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Alaris Health at Castle Hill and 1199, SEIU United Healthcare Workers East. Cases 22–CA–125034, 22–CA–125866, and 22–CA–140619

December 21, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND KAPLAN

On February 3, 2016, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, the

¹ This case is one of four related cases involving unfair labor practice strikes at facilities affiliated with Alaris Health. See, in addition to this case, *Alaris Health at Harborview*, 367 NLRB No. 54 (2018); *Alaris Health at Boulevard East*, 367 NLRB No. 53 (2018); and *Alaris Health at Rochelle Park*, 367 NLRB No. 55 (2018). The judge heard these cases consecutively and issued four separate decisions. The Respondent and the Charging Party each submitted consolidated briefs addressing all four cases; the General Counsel submitted a separate brief in each case.

² Member Emanuel is recused and took no part in the consideration of this case. Additionally, former Member Hirozawa and Ellen Dichner, former Member Pearce’s chief counsel, took no part in the consideration of this case. Therefore, we deny as moot the Respondent’s motion to disqualify Board Member Kent Y. Hirozawa and Chief Counsel Ellen Dichner.

³ The Respondent has excepted to some of the judge’s credibility findings. The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge inadvertently set forth an incorrect description of the bargaining unit. The correct unit description, as set forth in the parties’ collective-bargaining agreement, is as follows:

[A]ll CNAs, dietary, housekeeping, recreational aides, and all other employees excluding professional employees, registered nurses, LPNs, cooks, confidential [employees], office clerical employees, supervisors, watchmen and guards.

In the absence of exceptions, we adopt the judge’s findings that the Respondent violated Sec. 8(a)(5) and (1) by (1) refusing to bargain in good faith with the Union’s chosen bargaining committee, (2) unreasonably delaying in providing the Union with requested information that was relevant and necessary for bargaining, and (3) refusing to provide the Union with requested information concerning health insurance and daily work schedules.

Also in the absence of exceptions, we adopt the judge’s findings that the Respondent violated Sec. 8(a)(1) by (1) soliciting employee Claudia Saldana to convince coworkers not to go on strike and to help in resolving employees’ grievances; (2) interrogating employee Devika Smith about whether she planned to go on strike; (3) threatening Smith by stating it would be a shame for Smith and her coworkers to go on strike and lose their jobs; (4) accusing Saldana of backstabbing Administrator Nelson Maurice Duran after Saldana testified before the Union City Board of Commissioners, thereby implying retaliation for her protected

General Counsel and the Charging Party each filed an answering brief, and the Respondent filed a combined reply brief to the answering briefs.¹ The General Counsel also filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.²

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge’s rulings, findings,³ and conclusions⁴ and to adopt the judge’s recommended Order as modified and set forth in full below.⁵

The judge found, and we agree, that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to immediately reinstate 15 unfair labor practice strikers

activity; (5) warning employee Diana Lewis to “be careful” because Duran was mad and wanted to know when employees would go on strike; (6) threatening Saldana that she and 17 other single mothers were going to lose their jobs for going on strike; (7) at group meetings, interrogating employees as to why they were going on strike, and threatening them with termination and changes in working conditions if they went on strike; and (8) engaging in surveillance of picketing employees.

Lastly, in the absence of exceptions, we adopt the judge’s finding that the Respondent violated Sec. 8(a)(3) and (1) by reducing the work hours of employees Brenda Mota-Lopes and Leanne Crawford. Although the Respondent filed an exception to the judge’s factual finding that Crawford “was locked out and, after being reinstated on October 27, also incurred reduced work hours,” the Respondent did not except to the judge’s finding that it unlawfully reduced Crawford’s work hours. In any event, the Respondent did not present any argument or evidence in support of this exception. Accordingly, we find, pursuant to Sec. 102.46(a)(1)(ii) of the Board’s Rules and Regulations, that this bare exception should be disregarded. See, e.g., *Charter Communications, LLC*, 366 NLRB No. 46, slip op. at 1 fn. 1 (2018) (citing *New Concept Solutions, LLC*, 349 NLRB 1136, 1136 fn. 2 (2007)).

In affirming the judge’s findings, we do not rely on his citation to *Alcan Rolled Products*, 358 NLRB 37 (2012), which was issued by a panel subsequently found invalid by the Supreme Court in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). Although *Wayneview Care Center*, 352 NLRB 1089 (2008), a two-member decision cited by the judge, was vacated by the United States Court of Appeals for the District of Columbia Circuit following issuance of the Supreme Court’s decision in *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010), we rely on it here because a three-member panel of the Board subsequently incorporated the decision by reference in a later decision, and that decision was enforced. See 2010 WL 5173270 (D.C. Cir. 2010) (order vacating and remanding to the Board), 356 NLRB 154 (2010), *enfd.* 664 F.3d 341 (D.C. Cir. 2011). We note that *Atlas Refinery, Inc.*, 354 NLRB 1056 (2010), another two-member decision cited by the judge, was also reaffirmed and incorporated by reference in a subsequent decision by a three-member panel. 357 NLRB 1798 (2011), *enfd.* 620 Fed.Appx. 99 (3d Cir. 2015).

⁴ We have amended the judge’s conclusions of law to conform to the violations found.

⁵ We have amended the judge’s recommended remedy. We have also modified the judge’s recommended Order consistent with the violations found, the amended remedy, and the Board’s standard remedial language. We shall substitute a new notice to conform to the Order as modified.

after their unconditional offer to return to work. As explained below, we reject the Respondent's argument, unaddressed by the judge that its delay in reinstating the strikers was justified by its contracts with staffing agencies that supplied temporary replacement employees during the strike.

I.

On September 5, 2014,⁶ the Union notified the Respondent that unit employees would go on strike from September 16 through September 18.⁷ In deciding to strike, the employees were motivated in part by the Respondent's unlawful refusal to negotiate with their union's chosen bargaining committee and the Respondent's unlawful refusals to furnish, and unreasonable delays in furnishing, certain information relevant to negotiations for a collective-bargaining agreement. The employees also sought to pressure the Respondent to accede to their bargaining demands.⁸

Prior to September, the Respondent had contracts with several staffing agencies, including MediStar Personnel, Tristate Rehab Staffing, and Towne Nursing Staff, under which the agencies would supply temporary employees on an as-needed basis. After the Respondent was notified of the strike, those contracts were amended to provide that the Respondent would employ replacements supplied by the agencies for a minimum of 4 to 6 weeks, depending on the agency. Specifically, as amended, the MediStar contract required the Respondent to retain MediStar-supplied replacements for a minimum of 30 days,⁹ the Tristate contract obligated the Respondent to retain Tristate-supplied replacements for 4 weeks, and the Towne contract required the Respondent to retain five Towne-supplied replacements for 6 weeks.

On September 16, approximately 40 of the Respondent's employees went out on strike. During the strike, the Respondent covered strikers' shifts with unit employees who did not participate in the strike, non-unit employees, employees from other Alaris Health facilities, and

temporary employees supplied by the staffing agencies. A total of 19 agency employees worked for the Respondent during the strike, 1 from MediStar, 12 from Tristate, and 6 from Towne.

On September 18, the Respondent's attorney, David Jasinski, informed the Union's attorney, William Massey, that some strikers would not be allowed to return to work on September 19 because of the Respondent's contractual commitments to the staffing agencies. Massey asked why the Respondent would make such a commitment when it knew the strike would last only 3 days. Jasinski replied that the Respondent needed to be prepared in case the strikers changed their minds and remained on strike for longer than 3 days. Later that day, the Union submitted an unconditional offer to return to work on behalf of all the strikers.

On September 19, the Respondent refused to reinstate 15 employees who had participated in the strike.¹⁰ After the strike ended, 13 agency-supplied employees continued working for the Respondent: one from MediStar, eight from Tristate, and four from Towne. Five of those employees—one from MediStar, three from Tristate, and one from Towne—did not work on September 19, the day after the strike ended. That day, two nonunit Quality Assurance CNAs and one CNA from another Alaris facility performed bargaining unit work at Castle Hill. The Respondent did not reinstate any of the 15 unfair labor practice strikers at issue until weeks after their unconditional offer to return to work.

II.

It is well settled that unfair labor practice strikers are entitled to immediate reinstatement after they have submitted their unconditional offer to return to work, even if their employer has hired replacements. *NLRB v. International Van Lines*, 409 U.S. 48, 50–51 (1972); *Mastro Plastics v. NLRB*, 350 U.S. 270, 278 (1956). Thus, an employer must immediately reinstate unfair labor practice strikers who make an unconditional offer to return to

⁶ All subsequent dates are in 2014.

⁷ There is no dispute that this notice complied with Sec. 8(g) of the Act, which requires unions to give 10 days' written notice before striking or picketing a health care institution.

⁸ "Under settled principles, a strike is an unfair labor practice strike where the employer's unfair labor practice conduct constitutes one of the causes of a strike." *Boydston Electric, Inc.*, 331 NLRB 1450, 1452 (2000) (citing *Trumbull Memorial Hospital*, 288 NLRB 1429, 1449 (1988)). There are no exceptions to the judge's finding that the strike was an unfair labor practice strike. Because we adopt this uncontested finding and the judge's finding that the Respondent unlawfully refused to reinstate 15 strikers, we find it unnecessary to pass on the General Counsel's cross-exceptions to the judge's failure to make certain findings regarding alleged permanent replacement of those strikers.

⁹ We find it unnecessary to pass on the General Counsel's renewed motion to strike Respondent's Exhibit 9 (the MediStar contract). See GC Answer Br. at 28–29. As explained in the text, even considering the MediStar contract, the Respondent has failed to establish a legitimate justification for denying immediate reinstatement to the unfair labor practice strikers.

¹⁰ Those 15 strikers are Devika Smith, Claudia Saldana, Lakeysa Smith, Cherlie Celestin Valfils, Natasha Santiago, Diana Lewis, Leanne Crawford, Angela Rodriguez, Angeline Murillo, Stephanie Garcia, Musuretu Abdulazeez, Jeanie Alexandre, Danielle Humphrey, Janis Martin, and Komi Anakpa. To the extent the Respondent's bare exception to the judge's finding that Leanne Crawford was "locked out" is intended as an exception to the judge's finding that Crawford was not immediately reinstated, we find that it should be disregarded. See fn. 3, *supra*.

work, discharging, if necessary, any replacements who have been working in their stead. See *Orit Corp.*, 294 NLRB 695, 698 (1989), enfd. mem. 918 F.2d 225 (D.C. Cir. 1990). An employer that fails or refuses to do so violates Section 8(a)(3) and (1) of the Act. *Id.* at 701.

In recognition of the administrative difficulties associated with reinstating striking employees on short notice, the Board ordinarily grants employers a reasonable period of time, up to 5 days, to reinstate unfair labor practice strikers. *Drug Package Co.*, 228 NLRB 108 (1977), enfd. denied in part on other grounds 570 F.2d 1340 (8th Cir. 1978).¹¹ In *Drug Package*, the Board reaffirmed its policy that the backpay period for unfair labor practice strikers does not commence until 5 days after the unconditional offer to return to work. *Id.* at 114. The Board explained that the 5-day period represents a reasonable accommodation between the interests of the employees in returning to work as quickly as possible and the employer's need to accomplish the administrative tasks involved in effectuating that return in an orderly manner, including, if necessary, discharging any replacement workers. *Id.* at 113–114.¹² However, where “an employer has rejected, attached an unlawful condition to, or ignored an unconditional offer to return to work, the 5-day period serves no useful purpose and backpay will commence as of the unconditional offer to return to work.” See *Teamsters Local 574*, 259 NLRB 344, 344 fn. 2 (1981) (citing *Interstate Paper Supply Co.*, 251 NLRB 1423 (1980)).

Here, the Respondent specifically disavowed any claim that its multiweek delay was justified by the 5-day administrative grace period for reinstating unfair labor practice strikers described in *Drug Package Co.* In any event, we find that a grace period is not warranted here. As the Board explained in *Drug Package Co.*, “[t]he 5-day period is not to enable the employer to delay reinstatement or to obtain 5 days during which he 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.” *Id.* 114. That is not the situation in this case. Even assuming that the Respondent remained uncertain as to the duration of the strike—notwithstanding that the Union's statutorily-required 8(g) notice stated that the strike would last from September 16 through 18—the Respondent did

not move to promptly reinstate the strikers following their unconditional offer to return to work on September 19. Rather, this was a situation where an employer rejects, unduly delays, or ignores an unconditional offer to return to work, such that the 5-day grace period serves no useful purpose and the employer's obligation commences with the unconditional offer to return. See, e.g., *Ideal Dyeing & Finishing Co.*, 300 NLRB 303, 321 (1990), enfd. 956 F.2d 1167 (9th Cir. 1992); *Newport News Shipbuilding*, 236 NLRB 1637, 1638 (1978), enfd. 602 F.2d 73 (4th Cir. 1979).

Nor do we find that the Respondent's asserted contractual obligations to retain agency-supplied replacement employees for 4 to 6 weeks excused its delay in reinstating 15 unfair labor practice strikers under *Pacific Mutual Door Co.*, 278 NLRB 854 (1986). In *Pacific Mutual Door*, the Board held that a 30-day notice-of-cancellation provision in a contract between the employer and an employee-leasing company that supplied temporary strike replacements constituted a legitimate and substantial business justification for a delay in reinstating *economic* strikers. *Id.* at 856. However, *Pacific Mutual Door* does not apply to unfair labor practice strikers, who are entitled to immediate reinstatement (subject to the 5-day administrative grace period).

The difference in our treatment of economic and unfair labor practice strikers is well established. The Board has explained this distinction as follows:

Unlike those who strike to secure economic objectives in an atmosphere untainted by employer unfair labor practices, unfair labor practice strikers are not required to assume the risk of being replaced during the strike, but instead are guaranteed a right to return to their former positions as soon as they unconditionally seek active reemployment. This guarantee, we believe, is essential in order to effectuate the purposes of the Act and the public policies underlying it. Any other construction of the statute would permit an employer, through the successful exercise of his economic power, to recruit replacements for strikers, to defeat, for all practical purposes, the interdictions of the Act against his commission of unfair labor practices and lightly to disregard the protests of his work force against his unlawful acts. It would permit employers to recruit a new group of

¹¹ See also *Beaird Industries, Inc.*, 313 NLRB 735, 735 fn. 2 (1994) (finding that employer did not violate the Act by reinstating unfair labor practice strikers 4 days after the effective date of an unconditional offer to return).

¹² The Board made clear, however, that administrative difficulties are not a basis for delay beyond the 5-day period: “As strikers cannot assert that an employer does not need the 5 days, neither can employers assert that a period longer than the 5-day period is required.” *Id.* at 113–114

fn. 28; see also *Dorsey Trailers, Inc.*, 327 NLRB 835, 856 (1999) (rejecting employer's argument that its contractual obligation to compensate temporary workers for at least a full 40-hour workweek justified its failure to immediately reinstate unfair labor practice strikers where the employer did not begin reinstating the strikers within 5 days after they unconditionally offered to return to work), enfd. in relevant part 233 F.3d 831 (4th Cir. 2000).

employees and to leave without employment some or all of those who had been adversely affected by his unlawful infringement of employee rights.

Colonial Press, Inc., 207 NLRB 673, 674 (1973), enf. denied in part on other grounds 509 F.2d 850 (8th Cir. 1975). The uncontroversial proposition relied upon by the Respondent—that economic strikers who have been temporarily replaced have the same right to reinstatement as unfair labor practice strikers—is not to the contrary. See *Harvey Mfg.*, 309 NLRB 465, 469–470 (1992) (quoting *Teledyne Still-Man*, 298 NLRB 982, 985 (1990), enf. 938 F.2d 627 (6th Cir. 1991)) (temporarily replaced economic strikers, like unfair labor practice strikers, “have a right to immediate reinstatement ‘because even economic strikers are entitled to reclaim their jobs . . . if the jobs are vacant or are occupied only by temporary replacements when they make their unconditional offer to return.’”). Unfair labor practice strikers do not stand in the shoes of economic strikers who have been temporarily replaced, as the Respondent asserts, and it does not follow that a legitimate and substantial business justification for a delay in reinstating economic strikers under *Pacific Mutual Door* also constitutes a legitimate and substantial business justification for a delay in reinstating unfair labor practice strikers.

We recognize that in order to continue operations during a strike, an employer may sometimes contractually commit to retaining temporary replacement workers for a period of time. Such a commitment may, in turn, generate an interest in delaying reinstatement of strikers in order to avoid paying both sets of workers. Where employees strike in support of economic objectives and the employer has not committed any unfair labor practices, this interest in avoiding double payment may constitute a legitimate and substantial business justification for an employer’s delay in reinstating such economic strikers. *Pacific Mutual Door*, above at 856.¹³ But where the employer’s own unlawful conduct contributed to employees’ decision to strike, its financial interest does not permit it to delay reinstating strikers; rather, “since the employer is at fault for interfering with protected rights of the employees, it must bear the consequences of having violated the Act.” *Orit Corp.*, 294 NLRB at 698, and cited cases.

Relatedly, we reject the Respondent’s claim that, as a health care facility, it must be allowed to delay reinstating

unfair labor practice strikers “pursuant to contractual commitments required by staffing agencies for temporary workers needed to ensure proper staffing levels and uninterrupted patient care during a strike.” While Board precedent requiring immediate reinstatement of unfair labor practice strikers does not prevent an employer from entering into such contractual commitments, the employer, not the unfair labor practice strikers, must bear the risk of having to pay for two groups of workers at the same time. Although ensuring adequate staffing and continuity of patient care are undeniably important, they do not justify shifting the financial burden of securing a replacement work force from the party that committed unfair labor practices to the employees who struck in protest of those practices.

Finally, creating an exception to permit health care employers to deny immediate reinstatement to unfair labor practice strikers based on staffing-agency contracts that ensure continuity of patient care but require minimum terms of employment would be contrary to the balance struck by Congress in Section 8(g) of the Act. Section 8(g) was added as part of the 1974 amendments to the Act, which were intended to remedy the exclusion of nonprofit hospital workers from the Act’s coverage while providing “special protection” to health care institutions “in order to assure continuity of patient care.” *Special Touch Home Care Services*, 357 NLRB 4, 7 (2011) (quoting *Walker Methodist Residence*, 227 NLRB 1630, 1630 (1977)), enf. denied on other grounds 708 F.3d 447 (2d Cir. 2013). Section 8(g)’s requirement that unions provide health care institutions with at least 10 days’ notice before striking was “intended as a sufficient safeguard to enable health care workers to strike.” *NLRB v. Special Touch Home Care Services*, 708 F.3d 447, 456 (2d Cir. 2013). Permitting health care employers to deny immediate reinstatement to unfair labor practice strikers would place an additional and significant burden on health care employees’ right to strike beyond that deemed appropriate by Congress. This, the Board is not free to do. See *Laborers Local 1057 v. NLRB*, 567 F.2d 1006, 1015 (D.C. Cir. 1977) (“[T]he Board is not free to draw the line elsewhere even in a well-intentioned belief that broader protection of the public interest in health care outweighs the resulting imposition on employees.”).¹⁴

¹³ See also *Randall, Burkart/Randall, Division of Textron*, 257 NLRB 1, 6–7 (1981) (finding legitimate and substantial business justification for delaying reinstatement of economic strikers where employer’s prestrike inventory buildup required by its customers made the immediate employment of a substantial number of the strikers unnecessary), enf. in part and denied in part on other grounds 687 F.2d 1240 (8th Cir. 1982); *NLRB v. Southern Florida Hotel & Motel Assn.*, 751 F.2d 1571, 1583 (11th Cir. 1985) (finding employer’s business decision to eliminate

a service justified denying reinstatement to economic strikers), denying enf. in relevant part to 245 NLRB 561 (1979).

¹⁴ Contrary to the Respondent’s assertion, neither *Sutter Roseville Medical Center*, 348 NLRB 637 (2006), nor *Roosevelt Memorial Medical Center*, 348 NLRB 1016 (2006), supports applying *Pacific Mutual Door* to an unfair labor practice strike at a health care facility. Although both *Sutter Roseville* and *Roosevelt Memorial* involved health care employers, neither case involved an unfair labor practice strike. *Sutter*

III.

In any event, we find that even assuming for the sake of argument that a delay beyond 5 days in reinstating unfair labor practice strikers could ever be justified by an employer's contractual obligation to retain temporary strike replacements for a minimum period of time, the Respondent would not have satisfied its burden of establishing that its staffing-agency contracts constituted a legitimate and substantial business justification for its delay. First, the Respondent has not demonstrated that the staffing agencies required the lengthy minimum terms as a condition of supplying the temporary replacements during the strike. Compare *Pacific Mutual Door*, 278 NLRB at 856 (finding 30-day cancellation provision gave the employer a legitimate and substantial business justification for delaying reinstating economic strikers where the provision represented a condition on the employer's ability to obtain temporary replacements and continue its operations), with *Harvey Mfg.*, 309 NLRB at 469 (finding employer's contract with temporary replacement agency did not justify delay in reinstating economic strikers because there was no basis to find that the contract provisions allegedly requiring the delay were necessary in order to induce the agency to provide replacements and because the provisions did not clearly require the delay). There is no credited record evidence regarding the parties' negotiations that resulted in the contract amendments or the reasons the Respondent agreed to the 4–6 week terms.¹⁵ In addition, Jasinski told Massey that the Respondent entered into the contracts in case the strike lasted longer than 3 days. There is no evidence Jasinski said that the staffing agencies demanded 4–6 week terms. Thus, the record does not support the Respondent's claim on brief that the staffing agencies insisted on the 4–6 week terms as a condition of providing temporary replacements.

Second, the Respondent has not established that it was financially liable for agency employees it did not use after the strike ended. Since 12 Tristate employees worked for the Respondent during the strike, the Tristate contract ostensibly required the Respondent to retain 12 Tristate employees for 4 weeks after the strike. However, only eight Tristate employees worked at Castle Hill after September

18. Additionally, the Towne contract stated that the Respondent agreed to employ five Towne employees for 6 weeks, but only four Towne employees worked at Castle Hill after the strike. The Respondent has not provided any evidence demonstrating that it had to compensate Tristate or Towne for replacements who were guaranteed employment after the strike but did not work. Indeed, the record does not support a finding that the Respondent would have had to pay for *any* agency employees that it did not use after the strike. Accordingly, the Respondent cannot establish that its contracts generated the kind of business interest in retaining temporary replacements that could warrant a delay in reinstating the strikers.

Third, the Respondent has failed to demonstrate that agency-supplied employees actually replaced the 15 strikers who were not immediately reinstated. While the Respondent refused to immediately reinstate 15 strikers on September 19, only eight agency-supplied employees worked at Castle Hill that day. In addition, three nonunit employees—two Quality Assurance CNAs and one CNA from another Alaris-affiliated facility—performed bargaining unit work at Castle Hill on September 19. Thus, even if the Respondent's contractual obligations could have justified denying immediate reinstatement to some strikers, the contracts could not justify the Respondent's refusal to immediately reinstate at least some of the 15 strikers at issue here. See *Sutter Roseville*, 348 NLRB at 637, 645–647 (temporary agency contracts did not justify delay in reinstating economic strikers replaced by in-house, non-unit employees). The Respondent has not provided any basis for determining which delays were attributable to its use of temporary replacements and which were not, but rather argues that the agency contracts justified its actions with respect to all 15 strikers. Accordingly, even assuming for argument's sake that a defense under *Pacific Mutual Door* were available to the Respondent as a matter of law, it would not have met its burden of establishing a legitimate and substantial business justification for delaying the reinstatement of the 15 strikers.

For these reasons, we affirm the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) by failing

Roseville involved an economic strike, and the complaint did not allege that the employer violated the Act by delaying the reinstatement of economic strikers replaced by temporary employees hired pursuant to 5-day contracts. 348 NLRB at 637 & fn. 6. In *Roosevelt Memorial*, a union gave notice of its intent to engage in an economic strike, but, 4 days before the strike was to commence, the union postponed the strike indefinitely. In the meantime, the hospital had scheduled agency-supplied temporary replacements and per diem employees to work during the strike. The Board found that the hospital's subsequent minimal reduction in the hours of the would-be *economic* strikers during the period in

which the strike was to have occurred was justified by the hospital's desire to avoid incurring the additional expense of unused labor and to maintain the goodwill of the per diem employees. 348 NLRB at 1020–1021. No such circumstances are present here.

¹⁵ Several of the Respondent's witnesses testified about their understanding of the staffing contracts, but those witnesses did not participate in the negotiations with the staffing agencies. The judge discredited their testimony as vague, noting that the Respondent failed to call to the stand Linda Dooley, the Alaris officer who signed the staffing agreements, or to otherwise explore the circumstances leading to the addenda.

to immediately reinstate 15 unfair labor strikers on their unconditional offer to return to work.¹⁶

AMENDED CONCLUSIONS OF LAW

1. Replace the judge's Conclusion of Law 5(a) with the following:

"(a) Duran solicited employee Claudia Saldana in July 2014 to convince other employees not to go on strike."

2. Insert the following as Conclusion of Law 5(b) and renumber the subsequent paragraphs accordingly:

"(b) Duran interrogated employee Devika Smith in September 2014 as to whether she planned to go on strike."

3. Replace the judge's Conclusion of Law 6 with the following:

"6. Castle Hill violated Section 8(a)(3) and (1) of the Act by:

"(a) Failing and refusing, on September 19, 2014, to immediately reinstate 15 employees who engaged in an unfair labor practice strike and had made an unconditional offer to return to work.

"(b) Reducing the work hours of Brenda Mota-Lopes and Leanne Crawford upon their reinstatement after the strike."

AMENDED REMEDY

We amend the judge's remedy as follows.¹⁷ First, the judge ordered the Respondent to recall the 15 strikers denied immediate reinstatement on September 19. However, the judge found, and no party disputes, that 14 of the strikers have been reinstated to their former jobs. We shall not order the Respondent to offer reinstatement to those strikers. The fifteenth striker, Leanne Crawford, was reinstated on October 27, but she was not granted *full* reinstatement to her former job because her hours were unlawfully reduced. We shall order the Respondent to offer Crawford full reinstatement to her former job, including her former hours.

Second, the judge ordered the Respondent to restore the previous work hours of the two strikers whose hours were reduced when they were reinstated. As stated above, we order the Respondent to offer Crawford full reinstatement to her former job, including her former hours. The other striker whose hours were reduced, Brenda Mota-Lopes,

quit her employment with the Respondent sometime after the strike ended, and the General Counsel does not seek her reinstatement. Accordingly, we do not order this remedy for her.

Third, the judge provided that both the 15 strikers who were denied immediate reinstatement and the 2 strikers whose hours were reduced be made whole as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). However, the make-whole award for the reduction in Crawford's and Mota-Lopes' hours is properly calculated in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). The *Ogle Protection* formula applies where, as here, the Board is remedying "a violation of the Act which does not involve cessation of employment status or interim earnings that would in the course of time reduce backpay." *Ogle Protection Service*, *supra* at 683; see also *Pepsi-America, Inc.*, 339 NLRB 986, 986 fn. 2 (2003). However, Crawford suffered both delayed reinstatement *and* reduced hours upon her return, requiring separate backpay calculations. Thus, backpay for Crawford shall be calculated pursuant to *F. W. Woolworth* from September 19 (the date of the strikers' unconditional offer to return) to October 27 (the date Crawford was reinstated, albeit with reduced hours and thus not fully), and pursuant to *Ogle Protection* after October 27.

Fourth, in accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), *enfd.* in pertinent part 859 F.3d 23 (D.C. Cir. 2017), we shall order the Respondent to compensate the 15 strikers denied immediate reinstatement for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, *supra*, compounded daily as prescribed in *Kentucky River Medical Center*, *supra*.

Finally, the Respondent shall be required to compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file

¹⁶ Backpay for this violation shall commence as of September 19, when the strikers, through their union, unconditionally offered to return to work. See *Teamsters Local 574*, 259 NLRB 344, 344 fn. 2 (1981) (citing *Interstate Paper Supply Co.*, 251 NLRB 1423 (1980) ("[I]f an employer has rejected, attached an unlawful condition to, or ignored an unconditional offer to return to work, the 5-day period serves no useful purpose and backpay will commence as of the unconditional offer to return to work.")).

¹⁷ As noted above, *supra* fn. 3, the Respondent has not excepted to the judge's finding that it unlawfully refused to bargain with the Union's chosen bargaining committee. Nor does it argue that the judge's recommended affirmative bargaining order is improper. We therefore find it unnecessary to provide a specific justification for the affirmative bargaining order. See *Lily Transportation Corp.*, 363 NLRB No. 15, slip op. at 3 fn. 5 (2015), *enfd.* 853 F.3d 31 (1st Cir. 2017); *Heritage Container, Inc.*, 334 NLRB 455, 455 fn. 4 (2001); see also *Scepter Inc. v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002).

with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. *Advo.Serv of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

ORDER

The National Labor Relations Board orders that the Respondent, Alaris Health at Castle Hill, Union City, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with 1199, SEIU United Healthcare Workers East (the Union) because of the composition of the Union's bargaining committee.

(b) Refusing to bargain collectively with the Union by refusing to provide and unreasonably delaying in providing it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees, including health insurance and daily work schedule information.

(c) Soliciting employees to convince other employees not to go on strike and soliciting employee grievances and impliedly promising to remedy them.

(d) Coercively interrogating employees about their union activities and/or support.

(e) Threatening employees with termination, job loss, or changes in working conditions if they go on strike.

(f) Threatening employees with unspecified reprisals for engaging in union or other protected concerted activity.

(g) Placing employees under surveillance while they engage in union or other protected concerted activities.

(h) Failing and refusing to immediately reinstate employees who engage in an unfair labor practice strike upon their unconditional offer to return to work.

(i) Reducing the work hours of employees because they have engaged in an unfair labor practice strike.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

[A]ll CNAs, dietary, housekeeping, recreational aides, and all other employees excluding professional

employees, registered nurses, LPNs, cooks, confidential [employees], office clerical employees, supervisors, watchmen and guards.

(b) Furnish to the Union in a timely manner the information it requested concerning health insurance and daily work schedules.

(c) Within 14 days from the date of this Order, offer Leanne Crawford full reinstatement to her former job, including her former hours, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Make Devika Smith, Claudia Saldana, Lakeysa Smith, Cherlie Celestin Valfils, Natasha Santiago, Diana Lewis, Leanne Crawford, Angela Rodriguez, Angeline Murillo, Stephanie Garcia, Musuretu Abdulazeez, Jeanie Alexandre, Danielle Humphrey, Janis Martin, and Komi Anakpa whole for any loss of earnings and other benefits suffered as a result of its unlawful failure to immediately reinstate them upon their unconditional offer to return to work in the manner set forth in the remedy section of the judge's decision as amended in this decision, plus reasonable search-for-work and interim employment expenses.

(e) Make Leanne Crawford and Brenda Mota-Lopes whole for any loss of earnings and other benefits suffered as a result of having their work hours unlawfully reduced in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(f) Compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure to immediately reinstate Devika Smith, Claudia Saldana, Lakeysa Smith, Cherlie Celestin Valfils, Natasha Santiago, Diana Lewis, Leanne Crawford, Angela Rodriguez, Angeline Murillo, Stephanie Garcia, Musuretu Abdulazeez, Jeanie Alexandre, Danielle Humphrey, Janis Martin, and Komi Anakpa upon their unconditional offer to return to work, and within 3 days thereafter notify them in writing that this has been done and that the failure to immediately reinstate them will not be used against them in any way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social

security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facility in Union City, New Jersey, copies of the attached notice marked "Appendix"¹⁸ in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 27, 2014.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated , Washington D.C. December 21, 2018

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

¹⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with 1199, SEIU United Healthcare Workers East (the Union) because of the composition of its bargaining committee.

WE WILL NOT refuse to bargain collectively with the Union by refusing to provide or unreasonably delaying in providing it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees, including health insurance and daily work schedule information.

WE WILL NOT solicit employees to convince other employees not to go on strike.

WE WILL NOT solicit employee grievances and impliedly promise to remedy them.

WE WILL NOT coercively interrogate you about your union activities and/or support.

WE WILL NOT threaten you with termination, job loss, or changes in working conditions if you go on strike.

WE WILL NOT threaten you with unspecified reprisals for engaging in union or other protected concerted activities.

WE WILL NOT place you under surveillance while you engage in union or other protected concerted activities.

WE WILL NOT fail and refuse to immediately reinstate employees who engage in an unfair labor practice strike upon their unconditional offer to return to work.

WE WILL NOT reduce the work hours of employees who engage in an unfair labor practice strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

[A]ll CNAs, dietary, housekeeping, recreational aides, and all other employees excluding professional employees, registered nurses, LPNs, cooks, confidential [employees], office clerical employees, supervisors, watchmen and guards.

WE WILL furnish to the Union in a timely manner the information it requested concerning health insurance and daily work schedules.

WE WILL, within 14 days from the date of the Board's Order, offer Leanne Crawford full reinstatement to her former job, including her former hours, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Devika Smith, Claudia Saldana, Lakeysa Smith, Cherlie Celestin Valfils, Natasha Santiago, Diana Lewis, Leanne Crawford, Angela Rodriguez, Angeline Murillo, Stephanie Garcia, Musuretu Abdulazeez, Jeanie Alexandre, Danielle Humphrey, Janis Martin, and Komi Anakpa whole for any loss of earnings and other benefits suffered as a result of our unlawful failure to immediately reinstate them upon their unconditional offer to return to work, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL make Leanne Crawford and Brenda Mota-Lopes whole for any loss of earnings and other benefits suffered as a result of having their work hours unlawfully reduced, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful failure to immediately reinstate Devika Smith, Claudia Saldana, Lakeysa Smith, Cherlie Celestin Valfils, Natasha Santiago, Diana Lewis, Leanne Crawford, Angela Rodriguez, Angeline Murillo, Stephanie Garcia, Musuretu

Abdulazeez, Jeanie Alexandre, Danielle Humphrey, Janis Martin, and Komi Anakpa upon their unconditional offer to return to work, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the failure to immediately reinstate them will not be used against them in any way.

ALARIS HEALTH AT CASTLE HILL

The Board's decision can be found at <https://www.nlr.gov/case/22-CA-125034> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Saulo Santiago, Michael P. Silverstein, and Eric B. Sposito, Esqs., for the General Counsel.
David F. Jasinski and Rebecca D. Winkelstein, Esqs. (Jasinski, P.C.), of Newark, New Jersey, for the Respondent.
William S. Massey and Patrick J. Walsh, Esqs. (Gladstein, Reif & Meginniss, LLP), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case involves the latest chapter in a long relationship between Alaris Health at Castle Hill (Castle Hill or Respondent), a New Jersey nursing home and its unionized employees. Tried in Newark, New Jersey, over 9 days between June and October 2015, the case addressed complaint allegations that Castle Hill committed numerous unfair labor practices during 2014¹ bargaining for a new contract: (1) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act)² by refusing to meet with the Union's chosen bargaining committee and then delaying and refusing to provide information requested by the Union which was relevant to bargaining; (2) violated Section 8(a)(1) by attempting to stifle employee participation in a likely strike through interrogation, threats and surveillance; and (3) violated Section 8(a)(3) and (1) by retaliating against 16 employee strikers by refusing to reinstate them and/or reducing their work hours.³

¹ Unless otherwise indicated, all dates refer to 2014.

² 29 U.S.C. §§ 151-169.

³ The complaint was amended to modify pars. 21 through 24 (GC Exh. 1(w)). In addition, the General Counsel subsequently withdrew complaint pars. 28-29 and modified par. 30 to remove reference to par.

Castle Hill contends that the Charging Party, Service Employees International Union 1199 (the Union), is bogged down on past history in negotiating for successor contracts and engaged in a series of acts designed to “set up” Castle Hill for unfair labor practice charges, which it denies, and then used those charges to mask an economic strike at Castle Hill and the other three Alaris facilities as an unfair labor practice strike.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and Castle Hill,⁴ I make the following

FINDINGS OF FACT

I. JURISDICTION

Castle Hill, a corporation, operates a nursing home and rehabilitation center providing in-patient medical care at its facility in Union City, New Jersey, where it annually derives gross revenues in excess of \$100,000 and purchases and receives goods valued in excess of \$5000 directly from points outside the State of New Jersey. Castle Hill admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, as well as a health care institution within the meaning of Section 2(14) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Parties*

Castle Hill is the successor-in-interest to Castle Hill Health Care Center. Although the company name has changed, the facility’s ownership has remained the same and the individuals involved in bargaining and the operational aspects mostly remain the same. At the relevant times in this complaint, Castle Hill’s supervisors included: Nelson Maurice Duran, the administrator; Regina Figueroa, Alaris’ vice president of operations for health care staffing; Alexandra Bracea, the director of nursing; Laura Vartolone, the assistant director of nursing; Fredline Altenor, the staffing coordinator; Lavonza Jaboiun, a nursing supervisor; Ann Taylor, a quality assurance nurse from health care staffing who serves as a Castle Hill consultant. David Jasinski, Esq., has served as Castle Hill’s labor counsel and chief negotiator during collective bargaining, accompanied by Mendy Gold, a principal in Castle Hill.⁵

Castle Hill and its predecessors have recognized the Union as the exclusive collective-bargaining representative of approximately 120 employees in successive collective-bargaining agreements, the most recent of which was effective from April 1,

2010, to March 31, 2014:

All CNAs, dietary, housekeeping, recreational aides, LPNs, and all other employees excluding professional employees, registered nurses, cooks, confidential [employees], office clerical employees, supervisors, watchmen and guards.⁶

The Union’s leadership includes: Milly Silva, the executive vice president; Clauvise Saint Hilaire, the vice president; and Ron McCalla and Chistina Ozual, union organizers. During collective bargaining, the Union’s chief negotiator was William Massey, Esq., assisted by McCalla. Castle Hill’s employees designated as members of the bargaining committee were Danielle Humphrey, Devika Smith, L. Stuckey, Ron Lesesne, Tosha Sangare and Marquis Francois.⁷

The parties enjoy a relationship that both describe as respectful. An outsider’s more accurate description is that Castle Hill and union representatives are professional labor negotiators who represent their clients with tactical, albeit scripted, fervor. The parties began meeting shortly before the 2010 contract expired, but controversy soon erupted over the method of meeting and information requested by the Union. This was not a surprise, given the previous disagreements during their 2007–2008 negotiations, which resulted in the Union going on strike, filing an unfair labor practice complaint, and Judge Mindy Landow issuing a decision finding unfair labor practices by Castle Hill in prematurely declaring impasse, unlawfully implementing its final contract offer, failing to furnish the Union with requested information, and unilaterally discontinuing pension fund contributions. The Board affirmed Judge Landow’s decision on September 28, 2010. *Castle Hill Health Care Center*, 355 NLRB 1156 (2010).

B. *The Union’s Information Requests*

1. The December 27, 2013 request

Saint Hilaire initiated the process for a new contract in a letter, dated December 27, 2013. He requested that Castle Hill engage in bargaining and offered alternative dates in February. He also requested that Castle Hill furnish the Union with the following information by January 24: detailed job descriptions and performance evaluations describing job duties for bargaining unit positions; summary plan descriptions and related costs of available fringe benefits such as health insurance, disability, pension, profit sharing and 401(k) plans;⁸ numbers of employees covered by health insurance and related costs; temporary staffing agencies used and related costs; work schedules for each nursing unit from January to October 2013; OSHA injury and illness records for 2011–2013; health and safety policies; overtime work

28 alleging that Castle Hill unilaterally discontinued its dues-checkoff agreement with the Union.

⁴ Notwithstanding my instruction that the parties submit one “omnibus” brief addressing this case, as well as the other three cases involving Alaris facilities, the General Counsel submitted separate briefs for each case. Castle Hill moved to strike the General Counsel’s exhibits. I decided against such an extreme measure but, in order to ensure that there was no prejudice to Castle Hill, I permitted it to submit supplemental briefs in each case. Castle Hill declined the option.

⁵ Castle Hill admitted only that Duran was a Sec. 2(11) supervisor. However, the undisputed facts established that Bracea, Jaboiun and

Vartolone were also statutory supervisors, while Jasinski, Altenor, Figueroa and Taylor acted as agents within the meaning of Sec. 2(13).

⁶ GC Exh. 3.

⁷ Section 17(c) of the agreement, entitled “Negotiations,” stated that the “Union negotiating committee, not to exceed six (6) Employees, shall be paid for up to three (3) negotiating sessions, by the Employer, at straight time rates, for all lost time from work.”

⁸ McCalla knew that Castle Hill did not maintain a 401(k) plan at the time of the previous negotiations but credibly explained that it was a standard request that was made in the event that one was created during the term of the expired agreement. (Tr. 153–154.)

policies, shift differentials, and premium pay; gross annual payroll information; cost reports submitted to Medicaid; and any other documents describing any terms and conditions of employment for unit members.⁹

Jasinski had several conversations with McCalla and Massey in January about dates to commence collective bargaining. He apprised them several times that he would be engaged in a lengthy trial in Atlantic City, New Jersey, during portions of February and March. The trial eventually started on February 9 and lasted until March 22. Rebecca Winklestein, Esq., Jasinski's cocounsel in this proceeding, served a similar role in that case.

At some point during those discussions, Jasinski suggested a brief contract extension, but did not request an extension of time to respond to the Union's December 27 information request.¹⁰ Neither Massey nor McCalla accepted that offer. McCalla did, however, express the Union's preference to bundle all four contracts together during collective bargaining, echoing the Union's position during the 2007 negotiations. Consistent with his response in 2007, Jasinski refused, insisting there was a separate contract for each facility and each should be negotiated separately. He proposed bargaining dates of either March 27 or 31.¹¹

In a letter, dated February 21, McCalla responded to Jasinski by agreeing to meet on either day and break out negotiations into separate bargaining sessions for each facility. However, he also proposed to have an initial session with the bargaining committees for all four facilities present in order for union officials to open with their remarks:

In our discussions concerning bargaining dates you said you have possible availability on March 27 and definite availability on March 31. We request that we use one of those dates to begin bargaining at Alaris Health at Boulevard East, Alaris Health at Castle Hill, Alaris Health at Harbor View, and Alaris Health at Rochelle Park. If we need to move the bargaining session for a different facility tentatively scheduled for the 31st, so be it. As you know the four Alaris contracts expire on the March 31, 2014 and we've yet to receive any response to information requests sent to the facilities on December 27, 2013. We believe it's important to start bargaining before the contracts expire as it's our desire to reach contract settlements in these facilities as quickly as possible.

While we understand the employer's position on separate bargaining tables for each facility and our agreement to hold four

separate meetings on the first day of bargaining we believe it would be advisable to add a fifth initial session with all facilities and bargaining committees present to give our union leader Milly Silva and counsel Bill Massey an opportunity to address the proceedings before we break into separate sessions. This would obviously be an opportunity for management representatives to speak directly with the employees and Union officials.

Please let us know which of these dates would be your preference.¹²

In a letter, dated February 26, Jasinski confirmed the proposed bargaining dates and agreed to the proposal to have Silva and Massey open with remarks, but insisted they make them at the beginning of each bargaining session for each of the facilities. He also renewed his request for a 90-day contract extension, but made no mention of the December 27 information request:

We are in receipt of your letter identifying a number of facilities whose contracts expire on March 31, 2014. A brief response is warranted.

Each identified facility is a separate and independent operation with its own collective bargaining agreement covering employees for that particular facility. They maintain separation operations, including all necessary staff. Each facility is unique and the bargaining history at each facility recognize its independence.

In light of these undisputed facts, we will adhere to our prior practice and not agree to joint bargaining. Of course, Milly Silva and Bill Massey may present the Union's respective positions for each facility at each bargaining session and, quite candidly, we welcome their attendance.

We are available and confirm the March 27 and 31 dates for each facility. Please notify me of the times to commence negotiations for each facility. In scheduling for these sessions, we request notification of the members of the bargaining committee who will be attending. We request these names at least two (2) weeks in advance to avoid any disruption in our staffing. Bargaining sessions, as in our prior negotiations, will take place at the Union's offices in Edison.

Finally, in a spirit of good faith and cooperation, as discussed, we will agree to the extension of each collective bargaining agreement for an additional ninety (90) days. This additional

⁹ Castle Hill did not dispute testimony by McCalla and Massey that employees complained about short staffing. (GC Exh. 4.)

¹⁰ There is no dispute regarding Jasinski's assertion regarding his past practice of providing Castle Hill's response to the Union's information requests on the first day of negotiations. (Tr. 2154.) Moreover, his testimony that he told McCalla in January and Massey in February that he would not have an opportunity to delve into the December 27 information request was also undisputed. However, in light of Massey's March 13 email demanding a response to the information request, it is clear that the Union never consented to delayed document production until March 27. (Tr. 1420-1424, 1986-1987; GC Exh. 7.) It is also likely that Jasinski, an experienced labor litigator who defended against the Union's unfair labor practice charges resulting from previous contract negotiations, would have mentioned such an agreement or understanding in subsequent communications.

¹¹ Massey conceded that it was Jasinski's longstanding position to negotiate each contract separately, but noted that there were previous occasions prior to 2014 when the employer agreed to bargain two to four facilities at different times on the same day. (Tr. 926-928.) Jasinski conceded that in 2010 all four contracts were essentially bargained at the same time in the final bargaining session based on an off-the-record meeting involving delegates from all four facilities. (Tr. 1509-1510.)

¹² Jasinski's testimony regarding assurances by McCalla about negotiating the contracts separately is consistent with McCalla's documented agreement to do that—subject to an opening statement by Silva at the beginning of negotiations. The assurances of separate bargaining, however, made no mention of the composition of Castle Hill's bargaining committee. (GC Exh. 5; Tr. 869, 1426-1427.)

time will afford all parties the opportunity to formulate its bargaining positions and engage in give-and-take at the bargaining table in an effort to reach an amicable agreement that balances the needs of all parties. Should the Union wish to jumpstart the negotiations and submit its initial proposals to us prior to the initial bargaining session, we will accept and review each proposal. Thank you.¹³

On March 13, McCalla emailed Jasinski to inform him that each of the four Alaris facilities would receive releases for bargaining committee members that day by fax and certified mail. Massey followed up with an email later that day regarding the commencement of bargaining and the outstanding information requests:

This is to follow up on Ron's correspondence below concerning the start of bargaining with the four Alaris facilities. As you are likely aware, on December 27, 2013, the Union, via Vice-President Clauvice St. Hilaire, served information requests on the four Alaris facilities, copies of which are attached hereto for your convenience. Clauvice requested that the sought after documents be produced to the Union by January 24, 2014. We are now in March, only a couple of weeks away from sitting down to start negotiations, and I understand that none of the four facilities has produced even a single document to the Union. Similarly, I am advised that the facilities have not requested an extension of time nor an explanation for the delay in producing these documents, which are relevant and necessary for bargaining. Please have the four facilities produce the requested information as soon as possible, but no later than March 18, 2014. Please advise your clients to supply information as it becomes available rather than waiting to assemble all the information requested. Thank you for your attention to this matter. Best regards.¹⁴

2. The March 14 information request

In a letter, dated March 14, Massey followed up on his email to Jasinski from the day before, insisting on a response to the December 27, 2013 information request by March 18. In addition, Massey made a supplemental request for the most current payroll roster, daily schedules from January to December 2013 (to the extent not already covered by the previous request), actuarial plan values, and specific health insurance plan documents. The health insurance documents sought included any relating to summary plan descriptions, costs, terms of coverage, census data reflecting plans selected by employees, actuarial and utilization plan values, and requests for proposals and financial impact related information.¹⁵

¹³ GC Exh. 6.

¹⁴ Jasinski's testimony established that he never had an agreement from the Union for an extension of time to respond to the December 27 information request. When asked on direct examination about that request, Jasinski simply lumped that issue in with his interest in a contract extension. (Tr. 1416–1418.) Massey had no recollection of any such conversation, but "could appreciate . . . that it would be difficult to do lots of other work while [Jasinski was] on trial." (Tr. 930–931.) Nevertheless, the other trial only extended into February and Jasinski simply ignored Massey's March 13th reminder to provide the information in advance of

3. The March 27, 2014 bargaining session

On March 27, Castle Hill and the Union met at 11 a.m. at the Union's offices in Iselin, New Jersey, for the first collective-bargaining session. Two days were set aside for bargaining. Bargaining was to start with the Castle Hill contract and be followed by negotiations over the Harborview, Boulevard East, and Rochelle Park contracts. Massey, McCalla, Saint Hilaire, Silva, Ozual, and approximately 20–25 employee delegates from Castle Hill, Rochelle Park, Harborview, and Boulevard East were present for the Union. Jasinski was present for the Employer, but Mendy Gold had not yet arrived.

After waiting about an hour for Gold, Jasinski agreed to start the Castle Hill negotiations. Milly Silva and Massey opened with brief opening remarks. After reviewing the sign-in sheet, Jasinski protested the presence of employee-members from the facilities. He proclaimed Castle Hill's readiness to commence Castle Hill negotiations, but noted each contract was different and the parties had not previously engaged in joint bargaining. Massey replied that the Union was entitled to bargain with a team of its choosing. Jasinski disagreed, accused the Union of playing games and was prepared to leave if employees from the other three facilities did not leave. Massey asked him to reconsider and reiterated that the Union was entitled to pick its own team. At that point, Jasinski placed a packet of information relating to Castle Hill's December 27 information request and retreated to a caucusing room.¹⁶

Shortly thereafter, Massey and McCalla went to speak with Jasinski. They asked him to relent, but neither side budged over the composition of the Union's bargaining committee. That conversation ended when Gold arrived and Jasinski asked to confer with his client. A few minutes later, Jasinski and Gold returned to the negotiation room. After confirming the Union's continued position regarding the composition of the bargaining committee, Jasinski said that they would leave. At no point during this meeting did Jasinski assert confidentiality concerns as a reason for excluding employees from other Alaris facilities during Castle Hill bargaining sessions.

The parties then discussed future dates for bargaining and Jasinski provided Massey with packets responsive to the December 27 information requests by Harborview, Boulevard East, and Rochelle Park. The cover letter in each packet conveyed Jasinski's view that the Union previously requested the information:

Enclosed please find a copy of the requested information. As you will see, much of the information was already in the position of the Union and available to the Union via its members. We are glad to provide you with another copy. Should you have any additional questions or require additional information,

the March 27 bargaining session. (Tr. 926, 929–930, 1416–1418; GC Exh. 7.)

¹⁵ This request refined the previous request for monthly work schedules from one that sought daily work schedules. (GC Exh. 8.)

¹⁶ I credit Jasinski's undisputed testimony that some delegates in attendances made side remarks, sneered, and laughed, but not his assertion that their conduct made it "not conducive to bargaining." If that were true, Jasinski, an experienced labor litigator, would have raised that as a concern. He made no mention of their conduct as he walked out. (Tr. 80–83, 870–872, 1432–1434.)

please advise.¹⁷

Before Jasinski and Gold left, the Union did not submit a proposal.¹⁸ Silva did, however, ask about rumors that Boulevard East would be demolished to make way for apartment building development. Jasinski replied that the Boulevard East question did not apply to the Castle Hill negotiation, while Gold said that there was nothing to report. Jasinski said he would get back to them about Boulevard East. Shortly thereafter, Jasinski and Gold left and did not return in order to commence bargaining over Boulevard East, Harborview, and Rochelle Park.

In a letter, dated April 1, Jasinski proposed dates for the resumption of bargaining at the four facilities:

After the abbreviated March 27th bargaining session, I want to reiterate that we are available to meet on April 1st, 2nd and 3rd to continue negotiations for the referenced facility. We understand that the Union did not believe it was prudent to meet on any of those dates since it needed additional time to review information. In light of the upcoming religious holidays, we confirmed that we are available on April 28th and 29th, and also offered April 30th and May 1st to meet on any one of those dates for this facility. We believe that it is best to dedicate one of these days for this facility only and not piggyback any other negotiations for the designated dates. The employees deserve our undivided attention. Unfortunately, despite our admitted availability, the Union has not confirmed any of those dates at this time.

If the Union is interested in meeting to continue negotiations at this facility, we ask that you confirm one of those dates for this facility. In addition, if you are interested in moving the negotiations forward, if we receive your written proposal prior to our next session, it will give us the ability to review it and prepare a response and to continue good faith bargaining.

Finally, we again express our willingness to extend the current collective bargaining agreement for an additional period of time to afford the parties the opportunity to continue negotiations in good faith, and seek to reach an amicable resolution that balances the needs of your members with the facility and the care for our residents. Thank you.¹⁹

In his reply later that day, McCalla documented the parties' March 27 meeting, disagreed with Castle Hill's "refusal to hold bargaining sessions for more than one facility per day" as "unreasonable and a poor use of the time and resources of all parties." Notwithstanding Castle Hill's position, McCalla proposed to commence separate bargaining dates for each facility as follows: Castle Hill on April 28; Boulevard East on April 29; Rochelle Park on May 1; and Harbor View on May 2.

As discussed on March 27, we reiterate that your clients' refusal to hold bargaining sessions for more than one facility per day is unreasonable and a poor use of the time and resources of all

parties. That said, assuming the Employers have not reconsidered on this issue, the Union confirms our agreement from last week to bargain on April 28 and April 29, we accept your offer to bargain, on May 1, and we offer May 2 for a fourth session. We propose the following sequence:²⁰

3. The Union's followup request

In a letter to Jasinski, dated April 9, Massey expressed concern over Castle Hill's failure to provide the Union with the information described in items 10, 11, and 12 of the December 27 request, and items 2, 3(b), (c), and (e) through (1) of the March 14 request. In addition, Massey noted that the responses to items 14 and 15 of the December 27 request and item 3(a) of the March 14 request were incomplete. He asked for the outstanding information to be provided by April 15.²¹

On April 21, Jasinski responded by reminding Massey that "each facility is separate and we provided separate information for each facility. In the future, we request that any inquiry be addressed for the individual facility." In response to items 10 and 11, Jasinski stated that there were no documents because the facility had not used agency personnel to perform bargaining unit work. Item 12 was noted to be voluminous and Jasinski proposed that the Union "accept a representative sample of work schedule[s] for a limited period of time." As to items 13 and 14, Jasinski referred Massey to the employee handbook.²² In a separate letter dated the same day, Jasinski responded to the Union's March 14 supplemental request by noting that items 1 and 3 were previously provided, while item 2 was burdensome and unnecessary. Jasinski requested the Union to refine it to one not as overbroad.²³

5. The April 28 bargaining session

Prior to meeting with Castle Hill on April 28, the Union undertook a propaganda blitz in a flier distributed to the employees at the four facilities:

At our first bargaining session on Thursday, March 27th, we came prepared to bargain with management at each of our four facilities. But management refused to sit face to face with our full bargaining team to discuss their proposals. They want to divide us and weaken us, but we won't let that happen! We won't wait years for a new contract! For more information, contact your organizer, Christina Ozual at [xxx-xxx-xxxx]. The next negotiations are scheduled for Monday, 4/28 and Tuesday, 4/29. Let's all be ready to stand strong and speak with one voice!²⁴

Jasinski and Gold met with the Union for bargaining over the Castle Hill contract on April 28. Massey, McCalla, Silva, Saint Hilaire, and Ozual were accompanied by eight bargaining unit employees. The employees present included Davika Smith and Danielle Humphrey from Castle Hill, Max Pedestin of Rochelle

¹⁷ GC Exh. 10; R. Exh. 2.

¹⁸ Castle Hill notes the discrepancy in testimony between Massey and Saint Hilaire as to whether the Union was prepared to give a proposal if the bargaining session had gone forward. (Tr. 938, 1059.)

¹⁹ GC Exh. 12.

²⁰ GC Exh. 11.

²¹ GC Exh. 21.

²² GC Exh. 22.

²³ GC Exh. 23.

²⁴ GC Exh. 44.

Park, and Denise Bowden of Harborview.²⁵ Jasinski expressed his continuing disapproval with the composition of the Union's bargaining team, but moved forward with the meeting. He provided the Union with Castle Hill's proposal to renew the contract and the Union provided a counterproposal, which included a comprehensive economic package.²⁶ Massey reminded Jasinski, however, that the Union was still waiting for the CNA work schedules and health insurance related information. In response to Jasinski's letter asserting the 12-month request was burdensome, Massey agreed to accept 3 months of daily work schedules. With respect to health insurance, Jasinski said he would get back to the Union.

6. The employee schedules

In a letter, dated May 14, Jasinski furnished Massey with the monthly staffing schedules at Castle Hill for each floor for all shifts from January 12 through end of June. The monthly schedules reflected projected CNAs' work schedules and floor assignments.²⁷ On May 21, Jasinski responded to Massey's additional information request:

In response to your additional information request, we have provided you with all relevant information. Most recently, we supplemented our initial response with schedules for this Facility. The additional information which you have requested is simply without merit. You are well aware of this fact, since similar information was requested when the SEIU responded that the information was not available, since it would be a violation of HIPAA.²⁸

It is disconcerting that the Union now requests information which it has previously been unable or refused to provide in negotiations. It was either an oversight or, worse, disingenuous, to make these requests.

We are prepared to continue to negotiate a collective bargaining agreement that balances the interests of our employees and your members with those of the Facility. Should you have any other questions, please advise.²⁹

The parties met again for bargaining on May 29. Massey again opened with a statement that the information provided in response to the Union's request was not satisfactory because it consisted of projected monthly schedules instead of daily reports reflecting actual work performed by CNAs. Massey also asked what Jasinski meant by HIPAA protected information. Jasinski insisted that the monthly schedules were sufficient, but did not identify the health related documents that were HIPAA protected. He then presented Castle Hill's counterproposal and Massey provided the Union's responses.³⁰ The meeting concluded, with Massey agreeing to get back to Jasinski with future bargaining dates.

²⁵ R. Exhs. 6, 104.

²⁶ The Union does not dispute that, notwithstanding Castle Hill's failure or refusal to provide necessary information requested on December 27 and March 14, it was still able to submit a proposal. (R. Exh. 1; Tr. 939.)

²⁷ GC Exh. 13.

²⁸ During the hearing, Jasinski sought to undermine the Union's need for health insurance information based on the lack of health or safety-

7. The July 8 bargaining session

The parties' July 8 bargaining session opened, as usual, with housekeeping issues, including the Union's request for daily schedules. Jasinski replied by insisting the Union owed him information regarding the Union's pension fund. Massey repeated the Union's position that the information provided on May 14 was insufficient for it to formulate staffing proposals. Massey insisted the Union needed the actual daily schedules as opposed to projected monthly schedules, due to the changes under the Affordable Care Act and needed to compare them to the levels of health care to be provided by the employer ("need to look to the ratios"). In addition, Massey told Jasinski that Castle Hill failed to provide the Union with information responsive to items 2, 3(b), (c), and (e) through (1) of the Union's request for information as described in the supplemental request.

Castle Hill's daily schedules, also referred to as attendance sheets, are generated by the staffing coordinator, Fredline Altendor, and posted on a board next to the time clock. Although printed a month in advance, these schedules are marked up by Altendor or supervisors to reflect the days and shifts actually worked.³¹ In contrast, the monthly schedules generated a month in advance do not reflect the days or shifts that are not actually worked due to sick or other leave.

On July 30, Jasinski replied to the Union's continuing request for health plan information and employees' daily schedules:

We want to be clear and avoid any misunderstanding regarding your multiple information requests. The Employer has been fully responsive. The latest request purportedly asked for supplemental information for the Employer's health plan which was nothing more than harassment, grounded in bad faith, and not intended to facilitate contract negotiations. It is intended to only stall negotiations. We are not about to allow that to happen. At the negotiations, we informed you that the Employer is not in possession of such information and/or the Union is requesting confidential information. We reiterated, at the bargaining table, it is irrelevant, unnecessary and not intended to facilitate contract negotiations.

In addition, the Union requested information concerning work schedules at this facility. We provided the Union with the master list which represents our work schedules. This is the only relevant information, and it was provided.

As stated across the bargaining table, the Employer will neither waive nor modify its rights as set forth in the Managements Rights clause of the collective bargaining agreement. Staffing has historically been a right reserved to this administration, and we will not give-up in this contract negotiation our unilateral right to determine staffing at this Facility. We will reject any Union proposal that modifies our rights concerning staffing

related grievances filed and focused on several CBA provisions: Sec. 8 (grievance and arbitration procedure); and Sec. 29(c) (Health and Safety Committee whose purpose "shall be to identify and recommend preventative measures where appropriate").

²⁹ GC Exh. 24.

³⁰ GC Exh. 9; R. Exh. 3.

³¹ GC Exh. 52.

levels on the units and the way we staff this Facility. That is our final position and we will not deviate from it.

Once again, we suggest the Union focus on the negotiation of a new collective bargaining agreement for our employees. We are puzzled with the Union's refusal to meet or provide, dates for parties to bargain in good faith. We reiterate our request for new dates to continue to negotiate.³²

C. Employees Prepare for a Possible Strike

Beginning in March, Ozual or Saint Hilaire began holding monthly meetings with employees in the first-floor breakroom. They provided employees with contract education, bargaining updates, and listened to complaints. The bargaining updates included the significant issues involving in bargaining such as health insurance coverage, pension plan funding, staffing, and the rumored demolition of Boulevard East. Ozual and Saint Hilaire also informed employees about Castle Hill's refusal to meet with the Union's chosen committee on March 27 and its refusal to provide requested information.

By May, the Union recommended that employees step up the pressure on Castle Hill by engaging in informational picketing. On June 10, several Castle Hill employees participated in informational picketing. The signs contained messages which read "1199 Stop Unfair Labor Practices!"³³ Employees who participated included Devika Smith, Diana Lewis, Lakeysa Smith, and Marquis Francois.

Thereafter, the Union gradually increased the public pressure. In July, the Union's New Jersey communications coordinator, Bryn Loyd-Bollard, created "Alarisk.com", a website devoted to the Union's bargaining campaign against Castle Hill. The website's home page included a news alert providing the economic motives behind a potential strike:

NEWS ALERT: HUNDREDS OF HEALTHCARE WORKERS STRIKE AFTER CONTRACT TALKS SOUR.

Don't put your health at alarisk.

Stand up for quality care and good jobs in nursing home.

Stand with nursing home residents, families and caregivers and tell the owners of Alaris Health (formerly Omni Health Systems) to settle a fair contract that protects patients and workers.

Despite making \$41 million in profit in 2012, many Alaris nursing homes suffer from substandard staffing levels while hardworking caregivers live in poverty. The overwhelming majority of Alaris nursing home employees earn less than \$25,000 a year, and some have to rely on public assistance just to make ends meet.

Our communities depend on skilled caregivers to provide for our loved ones in their times of need. They deserve better. We deserve better.³⁴

Loyd-Bollard also arranged for radio advertisements publicizing the Union's position and generated fliers and a press release publicizing a July 23 rally. The fliers protested Castle Hill's unfair labor practices and refusal to negotiate in good faith for a

reasonable contract.³⁵

On July 23, Silva convened a press conference in Jersey City near Alaris' corporate headquarters. There were elected officials and approximately 10 employees from Alaris facilities in attendance, including CNA Claudia Saldana, who proceeded to criticize Castle Hill's collective-bargaining stance. In prepared remarks that followed, Silva excoriated Castle Hill for a mélange of reasons as justification for a possible future strike, including unfair labor practices and regressive economic proposals.

We are here today because Alaris Health, the multimillion dollar for-profit nursing chain based here in Journal Square, is showing a callous disregard for the wellbeing of the communities in which they operate.

The owners of Alaris are violating the rights of its employees, they are raking in huge profits while maintaining substandard staffing levels, and they are planning to demolish one of their long-term care facilities without being forthright to the nursing home's residents or caregivers about their plans. We are here to demand that Alaris start acting responsibly.

The women and men standing beside me play a critical role as caregivers to some of the most vulnerable people in our communities. It is essential that their rights and dignity as workers be upheld, because there is a connection between the quality of life of caregivers and the quality of care for patients.

It is of grave concern to us that Alaris has committed numerous unfair labor practices and continues to act in the same disrespectful and illegal manner as they did five years back, when they operated under the name Omni Health Systems. We do not want a repeat of 2009, when hundreds of nursing home workers had no choice but to go on strike in order to protect standards for good jobs and quality patient care. Omni may have changed their name to Alaris, but it seems that they haven't changed their ways.

After nearly four months and 16 bargaining sessions, 450 caregivers at four Alaris Health nursing homes are still working under expired contracts. All they are asking for are the basics to make ends meet—something that must be insisted upon for every healthcare worker who, as a fundamental requirement of her job, needs to remain physically and mentally healthy.

Yet instead of moving forward, Alaris wants to further erode job standards in nursing homes. They're asking low-wage workers, who earn less than \$23,000 a year full-time, to pay even more for health insurance and to reduce critical benefits including sick leave. Many workers already have no choice but to enroll in public assistance just to get their children the healthcare they need, and the concessions that Alaris is seeking will only make the situation worse.

We will not let vital healthcare jobs suffer so that Alaris, which makes \$40 million in profit a year, can walk away with even more.

It is disgraceful that Avery Eisenreich, the principal owner of

³² GC Exh. 14.

³³ GC Exhs. 19(e)-(f).

³⁴ GC Exh. 48.

³⁵ GC Exhs. 44-45.

Alaris, which receives literally hundreds of millions of dollars in Medicaid and Medicare funding each year to provide care to the elderly and vulnerable, decides to pocket millions for himself before making sure that the caregivers who work directly with patients have what they need to get by.

Avery has also failed to address persistent staffing shortages at these four facilities, each of which have certified nursing assistant staffing levels below both state and national averages. Our union has proposed a framework for addressing staffing shortages, but management has for months failed to provide the union with requested information on staffing and has refused to negotiate over this critically important issue.

And in Guttenberg, where Avery Eisenreich owns a facility on Boulevard East that is home to 100 elderly and frail residents, he plans to demolish the nursing home in order to build luxury high-rise apartments. He is not being upfront about what his plans are, and the nursing home's residents, their family members, and workers have been left in the dark. This is incredibly disrespectful to everyone who depends on Boulevard East, either as a patient or as an employee.

In many ways, Alaris is acting in complete disregard for the community. We are here today to say that enough is enough. We do not want to strike. Our members would rather be doing the job they love and caring for their residents instead of walking the picket line. But they are ready to strike if they have to, to protect quality care and good jobs.

I'd like to introduce you to a few members of 1199, who work at Alaris nursing homes in Hudson and Bergen counties. They have been working very hard these past months to win a contract that respects their dignity as caregivers and as providers for their own families.³⁶

After the July rally, the Ozual and Saint Hilaire began laying the foundation for a strike. They met with employees in the breakrooms approximately two to three times a week. During the meetings, they told employees about planning for a strike because of Castle Hill's regressive economic proposals and unfair labor practices, including the refusal to provide requested daily schedules.³⁷

On August 19, several employees, including Saldana, spoke at a public meeting of the Union City Board of Commissioners. Saldana explained that Castle Hill employees were "trying to fight for a better contract," criticized Castle Hill's bargaining position, including its refusal to pay for dependent health insurance, and pleaded for political support. Their efforts yielded supportive resolutions from the Board of Commissioners and Hudson County, and Saldana posed for a photograph with Union City's

mayor while holding a copy of the resolution. That photograph appeared on the Union's "Facebook" page, a social media website, the next day.³⁸

D. Management Becomes Aware of Potential Strike in July

Duran was aware of the July 23 press conference at Journal Square and passed that information along to Figueroa. Thereafter, he began to approach certain union supporters.³⁹ In late July, Duran called Saldana into his office and implored her and coworkers not to strike. Saldana replied that she had no influence over coworkers and urged Castle Hill to reach an agreement with the Union.

In late August, about a week after Saldana spoke before the Board of Commissioners, Duran approached her in the sixth-floor dining room and said, "I can't believe you stabbed me in the back. I saw the picture with the mayor." He then proceeded to show Saldana a copy of the Union's Facebook publication showing Saldana holding the resolution as she stood with Union City Mayor Brian Stack. Saldana denied that she instigated anything and still considered Duran her friend. Duran, unconvinced, sighed, "hah!" Other employees were present.

Sometime around mid-August, Duran told Saldana that Angela Rodriguez, a coworker on the 7 a.m. to 3 p.m. shift, "was a big mouth and is instigating coworkers going on strike and going to lose her job." Saldana shared that conversation with Rodriguez.

Duran confronted Saldana one last time on the Friday before the strike. Duran approached her as she worked in the sixth-floor dining room. Speaking to her in Spanish and English, Duran asked Saldana to "talk to [her] friends and not to go on strike," adding that he was new and wanted to "fix the place." Saldana told Duran that she was only speaking for herself and suggested he urge the owner to negotiate a fair contract with the employees. Duran said it was a shame that Saldana, a good worker, as well as 17 single mothers, were going on strike and lose their jobs. Saldana rebuffed the threat, insisting she enjoyed a good work history, had never been disciplined, and would be good anywhere she ended up. Duran concurred with Saldana's assessment, but added that he felt "sorry for the single moms." Saldana replied that she earned only \$11.96 after working at Castle Hill for 13 years. Duran replied that "you're going to lose your job because of the union and they're not doing anything for you."⁴⁰

A few weeks before the strike, CNAs were instructed to attend a meeting with Duran and Bracea in the second-floor conference room.⁴¹ Once assembled, Duran asked why employees were going on strike if Castle Hill was giving them what they requested and faulted the Union for its lack of interest in negotiating. He warned that some employees would be locked out and upon

³⁶ GC Exh. 57.

³⁷ The undisputed record reveals mixed reasons given by Ozual and Saint Hilaire to employees as justification for a strike, including Castle Hill's economic proposals and unfair labor practices. (Tr. 352, 1101, 1232, 1238-1240.)

³⁸ GC Exhs. 31-33.

³⁹ Duran denied having one-on-one meetings with employees and insisted that he merely answered questions if employees asked him about going on strike. He also denied threatening an employee if they went on strike. However, Duran's terse denials, considered in conjunction with

his shifting and contradictory testimony regarding the reasons for reinstatements after the strike, made him less than credible and I credited employees' versions of these pre-strike encounters. (Tr. 1563.)

⁴⁰ Saldana appeared nervous throughout her testimony, but was very credible. (Tr. 281-284, 295-301.)

⁴¹ Bracea provided vague testimony about certain employees who came to her with questions and anxiety about the ramifications of a strike. However, she did not provide a reliable account of Duran's meeting with employees. (Tr. 1641-1643.)

returning their assignments would not be the same.⁴² Around the same time, Duran spoke individually with at least one CNA, Diana Lewis, and made the same point about Castle Hill's letter inserted with payroll checks asserting that the Union's requests had been met.⁴³

Duran and Bracea were not the only managers or supervisors who interacted with employees over a potential strike. Figueroa, Alaris' vice president of operations for healthcare staffing, met with Castle Hill employees in the conference room around the end of July and into August. Available employees were paged and asked to come to the meetings, which were optional. The discussion was in English and lasted approximately 20-30 minutes. Duran was also present and spoke. Some employees told Figueroa and Duran about their anxiety due to calls from the Union about bargaining and a potential strike. Others simply listened and/or asked questions. Figueroa followed with written talking points from a document that she distributed to supervisors.⁴⁴ Her talking points noted the need to care for the patients and families, and discussed employees' rights to choose whether or not to go on strike. After these meetings, Alaris sent out a memorandum to employees warning that Castle Hill would have to hire replacements if they went out on strike.⁴⁵

E. Unit Employees Decide to Strike

On August 27, Massey, Silva, McCall, Ozual, and Saint Hilaire met at the Union's office in Iselin, New Jersey, with ten employee delegates from Boulevard East, Rochelle Park, and Harborview. Another six employees from Castle Hill participated by telephone. The union officials met with the employees for about 1-1/2 hours.⁴⁶ The Castle Hill contingent included union delegate Marquis Francois. McCalla laid out a case for a strike based on the Union's inability to make significant headway in negotiations and the wide gap between proposals. Massey followed with a recitation of the unfair labor practice charges filed for the four facilities and the complaints that would be filed. He also provided an explanation of the difference between an economic strike and a strike premised on unfair labor practices.

Massey then proposed a resolution setting forth the reasons for going out on strike. At the conclusion, the employee delegates present voted to send ten-day notices to engage in a three-day strike. The group also discussed and decided who would deliver the notices along with McCalla. The delegates were also instructed to tell the membership that the strike was authorized and it was motivated by economic and unlawful practice reasons.⁴⁷ The employees present signed the resolution and the six participating by telephone from Castle Hill voiced approval:

At a meeting of the Alaris Bargaining Committee of 1199 SEIU United Healthcare

⁴² Lakeysa Smith did not possess a good recollection of the names of others present at the impromptu meeting, but her testimony was generally spontaneous and credible. (Tr. 384-388.)

⁴³ Lewis' credible testimony was not disputed by Duran. (Tr. 452-453.)
⁴⁴ R. Exh. 7.

⁴⁵ Duran and Jasinski provided inconsistent testimony as to which document was used as talking points at this time. However, the two documents were fairly similar in substance. (GC Exhs. 70-71.)

Workers East ("the Union"), held at the Unions office in Iselin, NJ on August 27, 2014, upon the recommendation of Executive Vice President Milly Silva, the following resolution was considered and adopted by the undersigned Committee members:

WHEREAS, 1199 SEIU United Healthcare Workers East is the collective bargaining representative of bargaining unit employees of Bristol Manor Health Care Center, Castle Hill Health Care Center, Harborview Healthcare Center and Palisades Nursing Center, all affiliates of Alaris Health (collectively, "the Employer"); and

WHEREAS the Union has bargained in good faith with the Employer to negotiate a collective bargaining agreement; and

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 unlawfully 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 make unreasonable bargaining demands of the Union and its members; 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

NOW, THEREFORE, BE IT RESOLVED THAT: the Union and its members hereby determine to serve the Employer with the legally required ten-day notice of intent to engage in a rally and vigil at Castle Hill Healthcare Center on or about September 10, 2014, in response to the Employer's ongoing Unfair Labor Practices and unreasonable bargaining position; and

BE IT FURTHER RESOLVED THAT: the Union and its members hereby determine to serve the Employer with a subsequent legally required ten-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

⁴⁶ CNA Devika Smith was one of the Castle Hill employees who participated by telephone.

⁴⁷ Art. IV, sec. 7 of the Union's Constitution gives delegates the "responsibility of involving their members in all affairs of the Union. Article V, Section 6(b) states the rights of members '[t]o vote on all strike calls and strike settlements directly affecting the members as employees. Article VII, Section 11(1)(f) states that the'" Regional Delegate Assembly shall have the power to call strikes in its region, subject to the approval of the members directly involved and the executive council. (R. 106.)

bargaining position.⁴⁸

In a letter, dated August 29, Jasinski sought to discount the Union's justification in moving towards a strike, noting that it had been approximately 2 months since the parties' last bargaining session. He referred to his request at the conclusion of their last session for future bargaining dates, but the Union never proposed any. At this point, Jasinski suggested the parties resume negotiations during the weeks of either September 8 or 15. He concluded by attributing the standoff to the Union's continuing request for 'irrelevant and unnecessary' information, and the Union's attempts to resurrect staffing proposals that were previously resolved.⁴⁹

On September 5, approximately ten employees, including Devika Smith and Marquis Francois, delivered to Duran the contractually required ten-day notice of bargaining unit employees' intention to go out on strike for three days:

Notice I hereby given, pursuant to section 8(g) of the National Labor Relations Act, that 1199 SEIU United Healthcare Workers East, New Jersey Region and the employees it represents intend to conduct a strike and picketing at Castle Hill located at 615 23rd Street, Union City, NJ 07087. The strike and informational picket are to protest the Employer's ongoing Unfair labor Practices and the Employer's unreasonable bargaining demands. The strike will commence at 530 AM on Tuesday September 16, 2014 and end at 653 AM on Friday September 19, 2014.⁵⁰

Such action had been submitted to the membership for a vote in past years, as required by the Union's constitution.⁵¹ In this instance, unit members were informed of the scheduled strike and provided with reasons attributing the strike action to Castle Hill's bargaining posture and unfair labor practices.⁵²

On the same day, Jasinski emailed Massey, questioning the Union's motives and cancelling proposed bargaining dates in September in order for his clients to dedicate its "time, effort and our resources to ensuring the strike contingency plan at each Facility that received a strike notice is in place and fully operational."⁵³

F. Supervisors Statements About Strike Activity

During the weeks prior to delivery of the Union's strike notice, Castle Hill managers and supervisors communicated their views to the CNAs. A few weeks before the strike, Duran

approached Devika Smith on the third floor and asked if she was striking. She told him yes. He replied that she had a lot of influence and added it would be a shame to have employees go out on strike and lose their jobs.⁵⁴

Bracea approached CNA Komi Anakpa and asked him if he was going to join the strike. In addition, Duran told Anakpa "I don't know if you can afford to go on strike."⁵⁵

Duran also approached Saldana in the sixth-floor dining room, told her that Angela Rodriguez had a big mouth, was instigating employees to go on strike, and would lose her job as a result. Saldana passed along the comment to Rodriguez.⁵⁶

About a week later, Smith's head nurse and supervisor, Jaboiun, asked Devika Smith if employees were going on strike and cautioned her to be careful because Duran was mad. About 2 weeks before the strike, Duran approached Smith again on the third floor and asked if she was going on strike. Smith did not respond. Duran tried again about a week before the strike as Smith spoke with a coworker outside the facility after her shift was over. After asking her if he was going on strike, he said yes. Duran laughed and left.⁵⁷

In late August or early September, Duran and Regina Figueroa convened meetings in the second-floor conference room to apprise employees of the consequences of their actions if they went out on strike. In these meetings, Duran told employees that he knew that employees were going out on strike and asked why they were choosing that course of action. He also spoke about wages and health insurance, including the fact that current employees would not have to contribute for single-coverage health insurance, and that the only ones who would pay would be new hires. The employees told him they wanted better benefits, higher wages, and most importantly, a contract. Duran warned that their jobs were "on the line" and criticized the Union's tactics, insisting a strike would be futile in their efforts to get a better contract. He added that some employees might not return to work if they went on strike since Castle Hill would need people to cover their shifts. In addition, upon returning, some employees would have different work assignments.⁵⁸

In one of those group meetings in the second-floor conference room, Angela Rodriguez replied to Duran's inquiry as to their reasons for striking by explaining that they would not strike if Castle Hill signed a contract. Duran responded that the Union was not interested in signing a contract. He added that if the employees wanted more money they should go to school.⁵⁹

⁴⁸ It is undisputed that the strike resolution was not disseminated to the entire union membership for a vote as required by the Union's constitution. (GC Exh. 15.)

⁴⁹ GC Exh. 25.

⁵⁰ GC Exh. 16.

⁵¹ Castle Hill correctly notes that a membership strike vote was not conducted in accordance with the Union's constitution. (Tr. 2221, 2229.) However, the vote of the delegates was subsequently ratified by the membership's actions in going on strike and Castle Hill failed to cite any CBA or other legal provision supporting the notion that the delegate's strike vote was null and void or that it even has standing to raise such a procedural objection. (R. Exh. 106 at 5-7.)

⁵² Castle Hill correctly notes that most employees who provided mostly scripted testimony as to their reasons for favoring a strike mentioned economic reasons, but half of those employees also cited Castle

Hill's alleged unfair labor practices regarding information requests and refusal to bargain in good faith.

⁵³ R. Exh. 8.

⁵⁴ Smith's provided detailed and credible testimony regarding statements by Duran and Jaboiun. (Tr. 226-233.)

⁵⁵ This finding is based on Anakpa's credible testimony. (Tr. 670.)

⁵⁶ Saldana and Rodriguez provided credible and consistent testimony regarding Duran's remarks. (Tr. 302-303, 695.)

⁵⁷ Jaboiun did not testify.

⁵⁸ This finding is based on the credible testimony of CNAs Lakeysha Smith (Tr. 383-387), Leanne Crawford (Tr. 485-489), and Angeline Murrilla (Tr. 737-739.)

⁵⁹ This finding is based on the credible testimony of Angela Rodriguez. (Tr. 683-687.)

In early September, Duran approached Diana Lewis on the third floor and warned that some employees could be terminated if they went on strike. He insisted that Castle Hill attempted to settle a contract with the Union, but blamed the standoff on the Union's intransigence. Lewis did not respond and Duran clarified his statement further by advising that she could be fired. He suggested she think about that.⁶⁰

Altenor, the staffing coordinator, was responsible for calling floaters and informing them of their shift assignments. A few days before the strike, she approached Brenda Mota-Lopes, a part-time floater, on the first floor and asked if she was going on strike. After Mota-Lopes said she intended to strike, Altenor warned that her hours could be cut. Mota-Lopes replied that she was not scared. Altenor said she was not threatening, but noted that management was going to let a lot of people go.⁶¹

G. Supervisors Observe Employees During Prayer Vigil

In early September, employees from all four facilities also participated in a prayer vigil with Silva and their local State Assemblyman in front of Castle Hill.⁶² The participants included Castle Hill employees Diana Lewis and Leanne Crawford. As they prayed, Duran and a female looked at them from about ten feet away. He could be heard saying that their action was a joke, there was nothing to worry about, it was just bad publicity, and it would not be a problem to do what he had to do next.⁶³

H. Alaris Prepares for the Strike

Castle Hill is subject to New Jersey State requirements for minimum staffing ratios at its nursing facilities.⁶⁴ It was no surprise therefore, that after receiving the ten-day notice on or around September 5, Jasinski drafted another memorandum for distribution to employees warning that they would be replaced if they went out on strike. The document acknowledged receipt of the ten-day strike notice, challenged the Union's rationale for the strike, outlined Castle Hill's proposed concessions, and the Union's refusal to return to the bargaining table. While acknowledging each employee's choice of whether or not to strike, he stated the facility had no choice but to implement a "contingency plan" and "hire qualified replacement workers in the event any employee abandons his or her job."⁶⁵

In anticipation of its staffing needs prior to the strike, Castle Hill hired eight part-time CNAs in early September.⁶⁶ Around the same time, Castle Hill entered into contracts with three

temporary staffing companies. Addenda were attached to each form agreement requiring that Castle Hill retain the temporary employees for minimum terms of four or six weeks. This was a peculiar development in light of the Union's prior notice of a 3-day strike.⁶⁷

I. The Strike

Massey did not speak with Jasinski about the strike beforehand, but sent him an email and voice mail the day before on September 15. On the same day, Jasinski called McCalla requesting he alert employees not to walk off early because it could leave the facilities understaffed and compromise their licenses.⁶⁸

As predicted, certain Castle Hill employees/unit members ceased work and engaged in a strike on September 16. Over the next 3 days, the striking employees picketed outside the facility.⁶⁹ Their signs demanded Castle Hill engage in good-faith bargaining and protested unfair labor practices. In addition, the Union coordinated a prayer vigil and rally outside Castle Hill on September 17, the second day of the strike. Accompanied by Silva and a local politician, several employees spoke during the vigil.⁷⁰

During the picketing on September 16, employees observed Bracea, the director of nursing, accompanied by Laura Vartolone, the assistant director of nursing, on the second-floor patio holding a cellular telephone in the direction of the striking employees in a clear indication that she was photographing them. Devika Smith made eye contact with her and Bracea lowered the telephone.⁷¹ On September 17, the second day of the strike, picketing employees observed Duran and Bracea taking photographs from the second-floor recreation room.⁷²

During the strike, Castle Hill covered the shifts of the striking CNAs with an assortment of nonstriking employees from Castle Hill and other Alaris facilities, supervisors and other nonunit quality assurance CNAs, newly hired employees, and temporary staffing agency employees. In all, three staffing companies provided approximately 18 temporary employees to work at Castle Hill during the strike.⁷³

J. Employees Attempt to Return to Work

On September 18, the last day of the strike, Jasinski informed Massey that some strikers would not be allowed to return to work the next day because of the contractual commitments with the staffing agencies. Massey questioned why Castle Hill would

⁶⁰ This finding is based on Lewis' credible and undisputed testimony. (Tr. 453–455.)

⁶¹ Brenda Mota-Lopes was very credible. (Tr. 793–794.)

⁶² GC Exh. 35.

⁶³ I base the finding regarding the observation of employees on Leanne Crawford's credible and undisputed testimony. (Tr. 489–492.)

⁶⁴ R. Exh. 13.

⁶⁵ GC Exh. 70.

⁶⁶ GC Exhs. 58–61, 76–78, 81.

⁶⁷ I did not credit the vague testimony of Jasinski, Figueroa and Taylor regarding alleged negotiations by unidentified persons which resulted in Castle Hill agreeing to the terms in the attached addenda. (R. Exhs. 9–11.) Linda Dooley, an Alaris officer who signed the agreements was available, but did not testify, and the circumstances by which the addenda were added were not explored. (Tr. 722, 2636.)

⁶⁸ GC Exh. 28.

⁶⁹ GC Exh. 19(f).

⁷⁰ GC Exh. 35.

⁷¹ Bracea confirmed credible testimony of Devika Smith, Marquis Francois, and Murilla. She attributed her actions in the midst of a strike to excitement over seeing local politicians present at the employee rally (Tr. 237–244, 359–360, 740–742, 1637; GC Exh. 18.)

⁷² I based this finding on Angela Rodriguez's credible and undisputed testimony. (Tr. 690–691.) Although credible in other respects, however, I do not credit Saldana's testimony regarding management surveillance since she failed to include such details in her otherwise detailed Board affidavit. (Tr. 327–329.)

⁷³ GC Exhs. 52, 73.

make such a commitment if employees gave notice of a three-day strike. Jasinski explained that Castle Hill needed to be cautious in case the employees changed their minds and remained on strike for a longer period of time. Massey disagreed, noting that the Union's history belied such a concern. In an email sent later that day, Massey, on behalf of all Castle Hill employees/unit members who engaged in the strike, made an unconditional offer to return to their former or substantially equivalent positions of employment.⁷⁴

On September 19, employees who participated in the strike reported to work at Castle Hill. At the beginning of each of the three shifts, employees were informed by managers or supervisors whether they were being permitted to return to work. Fifteen CNAs who participated in the strike and engaged in picketing were not reinstated to work on September 19: Devika Smith, Claudia Saldana, Lakeysa Smith, Cherlie Celestin Valvils, Natasha Santiago, Diana Lewis, Leanne Crawford, Angela Rodriguez, Anequina Murillo, Stephanie Garcia, Musuretu Abdulazeez, Jeanie Alexandre, Danielle Humphrey, Janis Martin, and Komi Anakpa.⁷⁵

Although Castle Hill refused to reinstate 15 CNAs on September 19, 3 nonunit employees, Angelo Daug, Doris Arco, and V. Brooks, were assigned and performed CNA-related bargaining unit work that day. Daug and Arco, Castle Hill's quality assurance CNAs, were replaced in their regular roles by three Alaris at Essex facility in order to facilitate that arrangement. Brooks was temporarily reassigned from another Alaris facility.⁷⁶

The employees eventually returned to work and, as positions opened up, Jasinski would call and inform Massey, who would notify the employee to return to work.⁷⁷

In addition to the 15 employees not reinstated, two employees suffered a reduction in work hours after returning to work.⁷⁸ Brenda Mota-Lopes participated in the strike and picketed outside Castle Hill and Harborview, but was not locked out.⁷⁹ However, after returning to work on September 20 and 21, Mota-Lopes worked 8-hour shifts, but was not assigned work the following weekdays. During the week of September 28 and October 4, she was assigned to work 24 hours each week. During the remainder of October, Mota-Lopes' work hours were reduced to an average of between 16 and 32 hours, and she received no overtime.⁸⁰

Leanne Crawford was locked out and, after being reinstated on October 27, also incurred reduced work hours. She was a floating CNA who participated in the strike, carried signs alleging unfair labor practices and calling for improved medical coverage.⁸¹ After being reinstated, her work schedule averaging 8-10 days per pay period before the strike was reduced to 6-7 days

per pay period. She complained about the reduction in hours to Altenor in November and her schedule was further reduced to an average of 6 days per pay period. Crawford complained again and her schedule was further reduced to an average of 5-6 days per pay period.⁸²

LEGAL ANALYSIS

I. CASTLE HILL'S OBJECTION TO THE UNION'S BARGAINING COMMITTEE

The complaint alleges that Castle Hill violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union on March 27 because employee representatives from the other three facilities were present. Castle Hill contends that its insistence that the Union's bargaining committee be restricted solely to Castle Hill employees was consistent with past practice. Additionally, Castle Hill contends that the parties' collective-bargaining agreement limited the Union's bargaining committee to six members.

Section 7 of the Act guarantees employees and employers the right to "to bargain collectively through representatives of their own choosing" and the Supreme Court has recognized this right as fundamental to the statutory scheme. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937). Generally, both parties have a right to choose whomever they wish to represent them in negotiations, and neither party can control the other party's selection of representatives. *General Electric Co.*, 173 NLRB 253, 255 (1968), enf'd. 412 F.2d 512, 516-517 (2d Cir. 1969); *Minnesota Mining & Mfg. Co. v. NLRB*, 415 F.2d 174, 177-178 (8th Cir. 1969) (affirming Board determination that "so long as it confines negotiations to terms and conditions of employment within the bargaining unit, it has free rein . . . in its choice of negotiators.")

The right to choose one's bargaining representatives, however, is not absolute. An exception to the general rule arises when the situation is so infected with ill-will, usually personal, or conflict of interest as to make good-faith bargaining impractical. See, e.g., *NLRB v. ILGWU*, 274 F.2d 376, 379 (3d Cir. 1960) (ex-union official added to employer committee to "put one over on the union"); *Bausch & Lomb Optical Co.*, 108 NLRB 1555 (1954) (union established company in direct competition with employer); *NLRB v. Kentucky Utilities Co.*, 182 F.2d 810 (6th Cir. 1950) (union negotiator expressed great personal animosity towards employer). But cf. *NLRB v. Signal Mfg. Co.*, 351 F.2d 471 (1st Cir. 1965) (per curiam), cert. denied 382 U.S. 985 (1966) (similar claim of animosity rejected). On the other hand, where the employer simply asserts that there was ill-will and a conflict of interest relative to the proposed union

was confronted with prior testimony that he did participate in the staffing decisions.

⁷⁴ GC Exh. 28.

⁷⁵ The findings omit reference to testimony and other evidence regarding subsequent reinstatements, offers of reinstatement, and shift assignments. Those are matters for compliance, if applicable. (GC Exhs. 13, 27, 52.)

⁷⁶ GC Exh. 52 at F3.

⁷⁷ Duran was also not credible regarding the reinstatement process. He initially testified that the Bracea and Taylor made the staffing decisions. However, after insisting he did not participate in those decisions, Duran

⁷⁸ The initial claim of reduced hours for Diana Lewis was not pursued.

⁷⁹ GC Exh. 19(p).

⁸⁰ The extent of Mota-Lopes' diminution in work hours and pay subsequent to the strike is a matter left to compliance, if applicable. (GC Exh. 55; Tr. 788-789, 803-807.)

⁸¹ GC Exh. 19(n).

⁸² I based this finding on Crawford's credible and undisputed testimony. (Tr. 497-500; GC Exh. 41.)

representatives, the Board is unlikely to grant an exception to the presumptive rule that both employers and employees have an unrestricted right to choose their own representative. *Atlas Refinery, Inc.*, 354 NLRB 1056, 1070 (2010) (employer "violated § 8(a)(5) and (1) of the Act by refusing to bargain with the Union as long as [the union's designated representative] was part of the bargaining committee").

Mere inclusion of persons outside the negotiating unit does not constitute exceptional circumstances. *NLRB v. Indiana & Michigan Electric Co.*, 599 F.2d 185 (7th Cir. 1979) (other units); *Minnesota Mining & Mfg. Co. v. NLRB*, 415 F.2d 174, supra at 177–178 (other locals); *General Electric Co. v. NLRB*, 412 F.2d 512, 517–520 (2d Cir. 1969) (other international unions); *Standard Oil Co. v. NLRB*, 322 F.2d 40, 44 (6th Cir. 1963) (other locals). Further, the employer's claim that the union's use of outsiders is an unlawful attempt to compel companywide or multiplant bargaining also is insufficient unless the employer can demonstrate that the union actually attempted to bargain outside unit boundaries. *Indiana & Michigan Electric*, 599 F.2d at 191; *Minnesota Mining*, 415 F.2d at 178; *General Electric*, 412 F.2d at 519–520.

In this case, there was no evidence that the Union sought to force Castle Hill into multiemployer bargaining through the presence of bargaining unit members from the other three facilities. *NLRB v. Indiana & Michigan Electric Co.*, supra, 599 F.2d 185 (employer asserting that union sought to force companywide negotiations must demonstrate that the coordinated bargaining in question was done in bad faith with that objective in mind). The only hint of Union strategy that affected all four facilities was its desire to have Silva and Massey make opening statements out the outset of bargaining. See *Electrical Workers Local 46*, 302 NLRB 271, 273–274 (1991) (union not justified in refusing to negotiate with employer group's chosen committee of members and non-members at the outset of separate bargaining sessions in accordance with a longstanding practice of including all both group members and nonmembers under a single collective-bargaining agreement).

Some delegates in attendances made side remarks, sneered and laughed in response to Jasinski's remarks on March 27. However, Jasinski never mentioned that as an issue on March and it was hardly an indication that the participation of employees from the other three facilities represented a "clear and present danger to the collective bargaining process" or would create ill will and make bargaining impossible. See *International Brotherhood of Electrical Workers Local 46*, 302 NLRB at 273–274 (union did not meet burden of showing that the employer group's chosen representatives were "so tainted with conflict or so patently obnoxious as to negate the possibility of good-faith bargaining").

Castle Hill's additional concern at hearing that the presence of employees from other facilities would violate the confidentiality of Castle Hill employees does not pass muster. See *Milwhite Co., Inc.*, 290 NLRB 1150, 1152 (1998) (mere fear that negotiations will result in compromising confidentiality is insufficient), citing *General Electric Co.*, 173 NLRB at 255.

Castle Hill cites *CBS, Inc.*, 226 NLRB 537, 539 (1976), as support for the proposition that the Union's bargaining

representatives presented "a clear and present danger to the bargaining process or would create such ill will as to make bargaining impossible or futile." That case, however, involved a conflict of interest regarding the composition of a bargaining committee because one committee member was part of a labor organization that did not represent CBS's members, but rather, two key competitors. That is hardly the scenario here. Castle Hill also cites *Fitzsimons Mfg. Co.*, 251 NLRB 375, 379–380 (1980), for a similar proposition. In *Fitzsimons*, however, an employer lawfully excluded a union representative who engaged in an unprovoked physical attack on company's personnel director. *Id.* That scenario was also inapplicable.

Given the absence of evidence of exceptional circumstances indicating bad faith on the part of the Union, Castle Hill was obligated to bargain with the Union's bargaining committee on March 27 even though employee-members from the other three facilities were present. *General Electric*, 412 F.2d at 520. By walking out of the negotiations under those circumstances, Castle Hill refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act. See *Standard Oil Co. v. NLRB*, 322 F.2d at 44 (employer unlawfully refused to negotiate with union bargaining committee, which added temporary representatives from affiliated bargaining units in order to improve communication between them); *NLRB v. Indiana & Michigan Electric Co.*, supra, 599 F.2d 185 (employer unlawfully refused to bargain with union negotiating committee because the union was coordinating the various bargaining efforts).

II. CASTLE HILL'S DELAY IN PROVIDING INFORMATION

The complaint alleges that Castle Hill violated Section 8(a)(5) and (1) of the Act when it unreasonably delayed in providing the Union with information requested in order to prepare for bargaining. Castle Hill contends that it responded in a manner reasonably consistent with past practice and that union officials sanctioned the delay because of counsel's other commitments.

The duty to timely furnish requested information cannot be defined in terms of a per se rule. *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). Rather, what is required is a reasonable good-faith effort to respond to the request "as promptly as circumstances allow." *Id.* See also *Woodland Clinic*, 331 NLRB 735, 737 (2000). In evaluating the promptness of an employer's response, the Board considers the complexity and extent of the information sought, its availability, and the difficulty in retrieving the information. *West Penn Power Co.*, 339 NLRB 585, 587 (2003), citing *Samaritan Medical Center*, 319 NLRB 392, 398 (1995), enfd. in relevant part 394 F.2d 233 (4th Cir. 2005). Since "information concerning terms and conditions of employment is presumably relevant," it must be "provided within a reasonable time, or, if not provided, accompanied by a timely explanation." In *Re W. Penn Power Co.*, supra at 597 (citing *FMC Corp.*, 290 NLRB 483, 489 (1988)). Even a relatively short delay of 2 or 3 weeks may be held unreasonable. See, e.g., *Capitol Steel & Iron Co.*, 317 NLRB 809, 813 (1995), enfd. 89 F.3d 692 (10th Cir. 1996) (2-week delay unreasonable under the circumstances because the information sought was simple, close at hand, and easily assembled); *Aeolian Corp.*, 247 NLRB 1231, 1244 (1980) (3-week delay unreasonable under the circumstances).

Castle Hill received the Union's initial information request on December 27 and a supplemental request on March 14. In early January, Jasinski informed Massey and McCalla that he would be busy with a State court proceeding in parts of January and February. In that regard, he proposed several times to extend the term of the expiring contract, but the Union never agreed. At no time, however, during his written and verbal communications with the Union did he request an extension of time to respond to the information requests. That is because Jasinski always intended to produce a response to the information requests on the first day of bargaining.

Dallas & Mavis Forwarding Co., 291 NLRB 980(1988), enfd, 909 F.2d 1484 (6th Cir. 1990), cited by Castle Hill, is inapplicable here. In that case, the Board found a delay in providing requested information justified to the extent that the employer's confidentiality interests outweighed a union's need for information. The employer feared that competitors might gain an advantage if they acquired information about tariff rates contained in certain business contracts. In this case, however, Castle Hill never asserted confidentiality concerns as an excuse for the delay at any time prior to March 27.

The passage of nearly 3 months in responding to the Union's initial information request and 5 weeks responding to the supplemental request was unreasonable. Castle Hill was entirely mum on the subject notwithstanding follow-up reminders by the Union to provide the information prior to the March 27 bargaining session. Instead, Jasinski simply delivered the information at the March 27 session, where union representatives had a relatively short period of time to review the information. The tactic was clearly calculated to prolong bargaining by ensuring that the Union would need more time to analyze the information provided and, thus, be unable to commence meaningful bargaining at the first session. The fact that Castle Hill previously delayed in producing requested information until the first bargaining session does not rescue it from a violation of Section 8(a)(5) and (1) of the Act.

III. REFUSAL TO PROVIDE DAILY SCHEDULES AND HEALTH INSURANCE INFORMATION

The General Counsel contends that Castle Hill violated Section 8(a)(5) and (1) of the Act on July 30 when Castle Hill refused to provide information requested by the Union which was relevant and necessary to the performance of its duties as the exclusive bargaining representative, specifically employees' daily work schedules and health insurance information. Castle Hill refused to provide such further work schedule information, insisting that the Union should be satisfied with the monthly master schedules provided. With respect to the health insurance information, Castle Hill claimed it was prohibited from releasing such information under the privacy provisions of the Health Insurance Portability and Accountability Act of 1996.⁸³

An employer has a duty to furnish relevant information necessary to union representatives for the proper performance of their duties as the exclusive bargaining representative. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956); *Detroit Edison v. NLRB*, 440 U.S. 301, 303 (1979); *W-L Molding Co.*, 272 NLRB

1239, 1240–1241 (1984); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011). Information requests regarding bargaining unit employees' terms and conditions of employment are "presumptively relevant" and must be provided. *Whitesell Corp.*, 352 NLRB 1196, 1197 (2008), adopted by a three-member Board, 355 NLRB 635 (2010), enfd. 638 F.3d 883 (8th Cir. 2011); *Southern California Gas Co.*, 344 NLRB 231, 235 (2005).

The standard for establishing relevancy is the liberal, "discovery-type standard." *Alcan Rolled Products*, 358 NLRB 37, 40 (2012), citing and quoting applicable authorities. The Union, in accord with its duty, sought copies of daily work schedules in order to formulate and present appropriate proposals on behalf of employee-members. See *Wayneview Care Center*, 352NLRB 1089, 1115 (2008) (work schedules relating to unit employees, are presumptively relevant, including information on current schedules for each department). Moreover, the Union was entitled to production of schedules of work actually performed by employees and was not relegated to the monthly work schedules. See *McGuire Steel Erection, Inc. & Steel Enterprises, Inc.*, 324 NLRB 221, 223–224 (1997) (employer unlawfully refused to provide additional payroll records on the grounds that it already provided the union with other types of payroll records); *National Grid USA Service Co., Inc.*, 348 NLRB 1235 (2006) (union was entitled to copies of invoices containing base line information, not just unverified summaries made by employer); *Merchant Fast Motor Line*, 324 NLRB 563 (1997) (union was not required to accept an employer's declaration as to profitability or summary financial information provided by the employer); *McQuire Steel Erection, Inc.*, 324 NLRB 221 (summaries of payroll records deemed not sufficient to meet a respondent's statutory obligation).

Similarly, Castle Hill was obligated to furnish the requested health insurance information necessary for the Union to formulate its own proposal. *One Stop Kosher Supermarket, Inc.*, 55 NLRB 1237 (2010). The Union was entitled to the requested information concerning the costs of health insurance to Castle Hill and covered employees in order to analyze them within the context of the Affordable Care Act. This was significant information, given the Union's bargaining objective to increase dependent health insurance coverage and its interest in exploring alternative proposals to offset the costs.

Jasinski initially insisted the Union already had the information, which was incorrect; the Union had only been provided with partial information relating to gross payroll benefits, monthly health plan costs, and a summary description of the plan. After the Union persisted, he agreed to inquire further and, on May 21, raised vague privacy objections under HIPAA. Such confidentiality concern came more than 2 months after the information request. Moreover, the documentary evidence and Jasinski's vague testimony failed to identify how any of the requested health insurance related documents involved the confidential medical information of any employees. Lastly, Jasinski refused Massey's offer to work out an accommodation for the release of

⁸³ 45 CFR §§ 160 and 164.

the allegedly confidential information. See *Castle Hill Health Care Center*, 355 NLRB at 1183–1184 (generalized confidentiality concern unavailing as an excuse to refuse information request); *Exxon Co. USA*, 321 NLRB 896, 898 (1996) (confidentiality objection must be timely raised).

Under the circumstances, Castle Hill's refusal to provide health insurance information on May 21 and daily work schedule information on July 30 as requested by the Union violated Section 8(a)(5) and (1) of the Act.

IV. INTERROGATION AND THREATS REGARDING STRIKE ACTIVITY

The complaint alleges that Castle Hill engaged in various violations of Section 8(a)(1) of the Act. The standard in determining whether employer conduct violates that section of the Act is based on whether statements made to employees reasonably tend to interfere with the free exercise of employee rights under the Act. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

In assessing the lawfulness of an interrogation, the Board applies the totality of circumstances test adopted in *Rossmore House*, 269 NLRB 1176 (1984), *enfd. sub nom. Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board has additionally determined that in employing the *Rossmore House* test, it is appropriate to consider the factors set forth in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964): whether there was a history of employer hostility or discrimination; the nature of the information sought (whether the interrogator was seeking information to base taking action against individual employees); the position of the questioner in the company hierarchy; the place and method of interrogation, and; the truthfulness of the reply. In applying the *Bourne* factors, the Board seeks to determine whether under all of the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it was directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Health Care Center*, 330 NLRB 935, 941 (2000).

A. Interrogation of Employees Regarding Strike Activity

In July, Duran, the highest ranking Castle Hill supervisor, approached Saldana while she worked, implored her to convince coworkers not to go on strike and asked for her help in resolving employees' concerns. Saldana rebuffed him and explained that employees would not go on strike if management negotiated a fair contract and then nobody would go on strike. Under the circumstances, Duran's remarks were coercive in nature and violated Section 8(a)(1). *Reno Hilton Resorts*, 320 NLRB 197, 207 (1995).

Although not specifically alleged in the complaint, the General Counsel moves to further amend it to conform to the proof that Duran also unlawfully interrogated Devika Smith regarding her participation in the strike. The motion is granted, as the statements, albeit not alleged, resulted from testimony which was received without objection and reasonably fell within the ambit of other coercive statements made by Duran to employees during individual and group encounters in August and September. See *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995) (conforming pleadings to proof allowed where complaint alleged similar coercive statements by same manager, had an opportunity to cross-examine the witness and present witnesses in opposition, and

addressed their legality in its post-hearing brief); *Meisner Electric, Inc.*, 316 NLRB 597 (1995) (same).

Duran twice interrogated Devika Smith on two occasions after she handed him the Union's 10-day strike notice. In the first incident, Duran approached Smith as she worked and asked whether she was going on strike, but Smith did not respond. A few days later, Duran approached Smith outside the facility entrance after work and asked if she was going out on strike. Smith said yes. In neither instance did Duran assure Smith that no reprisals would be taken against her as a result of her response. Such assurances were necessary given that Duran was crisscrossing the facility threatening employees, including Smith herself, with termination if they participated in the strike. In both instances, Duran unlawfully interrogated Smith in violation of Section 8(a)(1).

B. Threats to Employees of Job Loss or Other Reprisals

In determining whether a supervisor's statement is unlawfully coercive, the test is whether the employee would reasonably be coerced by it. See *Engelhard Corp.*, 342 NLRB 46, 60-61 (2004) (test for coercion under Sec. 8(a)(1) is "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act") (emphasis in original), *enfd.* 437 F.3d 374 (3d Cir. 2006). Under the circumstances, the aforementioned statements supervisors were clearly coercive in violation of Section 8(a)(1). See, e.g., *Hialeah Hospital*, 343 NLRB 391, 391 (2004) (manager's statements to employees that he felt "betrayed" and "stabbed in the back" implied employee disloyalty in supporting the union and constituted an implicit threat of unspecified reprisals).

In July, Duran approached Devika Smith, a union delegate, while she worked, and, noting her influence with coworkers, said that it would be a shame for Smith and her coworkers to go on strike and lose their jobs.

In August, Saldana testified before the Union City Board of Commissioners and succeeded in getting the political support of that body. The next day, her photograph holding a resolution standing alongside the mayor appeared on the Union's Facebook website. Shortly thereafter, Duran confronted Saldana at work. He accused her of backstabbing him and implied retaliation for her activity.

Similarly, about 3 weeks before the strike, Head Nurse Jabouin approached Devika Smith at work, told her that Duran was mad and he wanted to know when everybody was going on strike. After Smith refused to share any information with her, Jabouin warned Smith to "be careful" because Duran was mad and persisted in asking again when employees would go on strike.

About a week before the September 16 strike, Duran approached Diana Lewis as she was exiting a resident's room. Duran candidly told Lewis that he knew that "you all" were going on strike. When Lewis did not respond to Duran, he continued by saying that he did not know what she was going to do, but if you all go on strike, some of the strikers can be fired. When Lewis again refused to indulge Duran, he ratcheted up the rhetoric. Duran told her that if you all go on strike, you could be fired. Duran told her to think about it and he walked off of the floor.

On the Friday before the September 16 strike, Duran confronted Saldana again as she worked. Duran insisted that Saldana join him at a side table. When Saldana complied, Duran told her that it was a shame that she was going to lose her job because she was such a good worker. Duran then declared that 17 other single mothers were also going to lose their jobs for going on strike.

The aforementioned supervisory statements sent clear messages that engaging in Section 7 activity was harmful to Castle Hill. See *Hoffman Fuel Co.*, 309 NLRB 327, 327 (1992) (employer's questioning coupled with a veiled threat unlawful where there was no legitimate purpose for ascertaining the employee's prospective union activities). Duran's implied threats of termination violated Section 8(a)(1).

In addition, threatening employees that a strike will lead to job loss is unlawful because it incorrectly conveys to employees that their employment will be terminated as a result of a strike, whereas the law is clear that economic strikers retain certain reinstatement rights. *Baddour, Inc.*, 303 NLRB 275 (1991) (without explanation the employer stating "you could end up losing your job by being replaced with a new permanent worker" was unlawful); *Larson Tool & Stamping Co.*, 296 NLRB 895, 895-896(1989) (employees could lose their jobs to permanent replacements). By threatening employees with loss of their jobs if they participated in a strike, Duran violated Section 8(a)(1) of the Act.

C. Coercive Statements at Group Meetings

At group meetings held in late August or early September in the second-floor conference room, Duran interrogated employees as to why they were going on strike, threatened them with termination, and changes in working conditions.

In assessing the lawfulness of an interrogation, the Board applies the totality of circumstances test adopted in *Rossmore House*, supra. Circumstances considered in evaluating the tendency to interfere include the (1) background, (2) the nature of the information sought, (3) the identity of the questioner, and (4) the place and method of the interrogation. *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985); *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984). Conversations about union activity between employers and employees are considered lawful when they involve open union supporters, in a casual setting, and are unaccompanied by coercive statements. *Toma Metals, Inc.*, 342 NLRB 787 (2004) (lawful for a supervisor to ask an employee what is up with the rumor of the union where they had a friendly relationship); *Emery Worldwide* 309 NLRB 185, 186-187 (1992) (no violation where a low-level supervisor engaged in a casual, amicable conversation with an employee that did not involve coercive statements).

Applying the totality of the circumstances, Duran's statements were coercive in nature. First, it is clear that Castle Hill and, specifically, Duran have a history of hostility towards the Union. Second, it is evident that the questioners were merely trying to thwart a strike. Third, Castle Hill's highest ranking official and a high-ranking Alaris representative were questioning the employees. Fourth, the questioning was not done in a casual setting but took place at work in a conference room. These factors support the conclusion that Duran's questions were unlawfully

coercive.

Additionally, Duran's statements relating to termination and changes in working conditions at the aforementioned meetings were unlawfully coercive. Threatening employees that a strike will lead to adverse action, including job loss is unlawful because it incorrectly conveys to employees that their employment will be adversely affected as a result of a strike, whereas the law is clear that economic strikers retain certain reinstatement rights and other protections. *Baddour, Inc.*, supra, 303 NLRB 275 (without explanation the employer stating "you could end up losing your job by being replaced with a new permanent worker" was unlawful); *Larson Tool & Stamping Co.*, 296 NLRB at 895-896 (employees could lose their jobs to permanent replacements). Duran made no differentiation between economic and unfair labor practice strikes. As the Board has stated, "employers cannot tell employees without explanation that they would lose their jobs as a consequence of a strike or permanent replacement." *Baddour*, 303 NLRB at 275. Accordingly, Duran's statements violated Section 8(a)(1) of the Act.

V. SURVEILLANCE OF EMPLOYEES DURING STRIKE

Duran photographed the striking employees from a second-floor window in the facility as they picketed outside on September 16, the first day of the strike. Similarly, on September 16 and 17, Bracea took photographs of the striking employees from inside Castle Hill as they picketed in front of the facility. Bracea explained her actions on September 17 as those of a bewildered bystander interested in photographing politicians who joined the strikers on the second day of the strike. On that occasion, she was accompanied by Laura Vartolone, the assistant director of nursing.

It is not unreasonable to expect that the spectacle of a mass protest of employees carrying signs and chanting slogans would pique the interest of managers, supervisors, and employees working within the facility. The Board does, however, consider the photographing and videotaping of employees unlawful, "if the observation goes beyond casual and becomes unduly intrusive." *F. W. Woolworth Co.*, 310 NLRB 1197 (1993). See also *Local Joint Executive Board of Las Vegas v. NLRB.*, 515 F.3d 942, (9th Cir. 2008), quoting *Kenworth Truck Co.*, 327 NLRB 497 (1999).

Castle Hill failed to demonstrate any justification for the photographing of picketing employees outside Castle Hill. See *Food and Commercial Workers Local 204 v. NLRB*, 506 F.3d 1078, (D.C. Cir. 2007); *Timken Co.*, 331 NLRB 744, (2000); *National Steel & Shipbuilding Co. v. NLRB*, 156 F.3d 1268, 1271-1272 (D.C. Cir. 1998) (upholding the Board's finding that a company committed an unfair labor practice by videotaping union rallies without sufficient justification). There was no evidence of violence, unruly behavior, or past actions on the part of picketing employees indicating any possibility of a disruption to Castle Hill's operations which might otherwise have justified photographing their activity by the facility's manager and nursing director. Under the circumstances, Castle Hill violated Section 8(a)(1) of the Act by engaging in unlawful surveillance of picketing employees outside its facility on September 16 and 17.

VI. REFUSAL TO REINSTATE 15 EMPLOYEES

The complaint alleges that the Castle Hill violated Section 8(a)(3) and (1) of the Act by refusing to reinstate certain employees when they returned to work the day after the strike ended. Castle Hill argues that its striking employees were not entitled to reinstatement because they engaged in an economic rather than unfair labor practice strike.

Strikes may be categorized as either economic or unfair labor practice strikes. *Spurlino Materials, LLC, et al. v. NLRB*, 805 F.3d 1131, 1136–1137 (D.C. Cir. 2015), citing *General Industries Employees Local 42 v. NLRB*, 951 F.2d 1308, 1311 (D.C. Cir. 1991). That categorization carries significant consequences. Economic strikers run the risk of replacement if, during the strike, the employer takes on permanent new hires. *NLRB v. International Van Lines*, 409 U.S. 48, 50, 93 S.Ct. 74, 34 L.Ed.2d 201 (1972); *General Industries Employees Union*, 951 F.2d at 1311. Economic strikers are nevertheless, entitled, upon their unconditional offers to return to work, to reinstatement to their former or substantially equivalent positions, if no permanent replacements have been hired to replace them and the positions remain open. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378–379, 88 S.Ct. 543, 19 L.Ed.2d 614 (1967).

In the case of an unfair labor practice strike, employees are entitled to immediate reinstatement to their former positions upon their unconditional offers to return to work, even if the employer has hired replacements. See *International Van Lines*, 409 U.S. at 50–51, 93 S.Ct. 74; *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278, 76 S.Ct. 349, 100 L.Ed. 309 (1956); *General Industries Employees Union*, 951 F.2d at 1311; *Hajoca Corp. v. NLRB*, 872 F.2d 1169, 1177 (3d Cir.1989). Accordingly, an employer violates the Act if it fails to reinstate unfair labor practice strikers once they have made an unconditional offer to return to work. See *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 141–142 (D.C. Cir.1999).

In determining whether the General Counsel has met his burden of establishing that an employer's unfair labor practices caused the employee's decision to go on strike, the Board looks to the employees' motivations for striking, considering both objective and subjective evidence. See *General Industries Employee Union*, 951 F.2d at 1312; *Spurlino Materials*, 357 NLRB 1510, 1524–1525 (2011); *Executive Management Services*, 355 NLRB 185, 194–196 (2010); *Chicago Beef Co. v. Food and Commercial Workers Local 26*, 298 NLRB 1039 (1990). A strike wholly driven by the desire of employees to obtain favorable employment terms is an economic strike. When employees strike as a result of an employer's unfair labor practices, the strike is an unfair labor practice strike. See *International Van Lines*, 409 U.S. at 50–51, 93 S.Ct. 74; *General Industries Employees Union*, 951 F.2d at 1311.

In this case, there is undisputed evidence of statements by the Union and employee-members during the months leading up to the strike indicating that it was attributable to Castle Hill's unfair labor practices in refusing to bargain and provide the Union with requested information relevant to the bargaining process. They expressed these sentiments in public statements, which were followed up with the filing of unfair labor practice charges and confirmed during testimony that they acquiesced to the Union's

recommendation to strike because of unfair labor practices and for better wages, health insurance coverage and pension plan, i.e., economic reasons. See *Citizens Publishing & Printing Co.*, 263 F.3d 224, 235 (3d Cir. 2001) (facts supported finding that Board's decision to issue a complaint "galvanized bargaining unit members' belief that an unfair labor practice had been committed and served as the flashpoint for discussion about calling a strike").

Much of the testimony essentially reiterated what Ozual, Massey, and other union representatives told employees as the reason for their recommendations to strike. They were educated about the distinctions and ramifications between an economic strike and an unfair labor practice strike. Clearly, much of the testimony insisting that the strike was attributable to unfair labor practice charges was self-serving. In determining causation or motivation for a strike, however, "the Board will not 'calculate the degree of importance, or weight to be attached to the employer's unfair labor practices in characterizing the nature of a strike.'" *Executive Management Services*, 355 NLRB at 193 (citing *Cal Spas*, 322 NLRB 41, 60 (1996)). Additionally, although the strikers' characterization of their motives for the strike may be given substantial weight, the Board is supposed to examine the factual context of the strike and be wary of inconsistencies between the facts and any self-serving rhetoric by strikers. *Executive Management Services*, supra at 194. The factual context of the strike and ULPs needs to be examined regardless of the strikers' testimony. *Id.*

It is evident that meaningful collective bargaining was hamstrung at the outset by Castle Hill's failure to provide responsive information prior to March 27 and then refusing to commence bargaining with Castle Hill's chosen bargaining committee. While certainly not dispositive of the reasons for an eventual strike nearly 6 months later, it set the tone for a ragged path of trickling information and resistance in providing relevant work schedule information.

Under Board law, the motivation of Castle Hill employees to strike in order to improve their bargaining position and assail Castle Hill's unfair labor practices means that the strike must be characterized as an unfair labor practice strike. See *Executive Management Services*, supra at 193; *Domsey Trading Corp.*, 310 NLRB 777, 791 (1993); *General Drivers & Helpers Local 662 v. NLRB*, 302 F.2d 908, 911 (D.C.Cir.1962). "The employer's unfair labor practice need not be the sole or even the major cause or aggravating factor of the strike; it need only be a contributing factor." *Teamsters Local 515 v. NLRB*, 906 F.2d 719, 723 (D.C.Cir.1990); *Alwin Mfg. Co.*, 192 F.3d at 141; *Gen. Indus. Emps. Union*, 951 F.2d at 1311. See also *Struthers Wells Corp. v. NLRB*, 721 F.2d 465, 471 (3d Cir.1983); *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407 (3d Cir.1972).

The Union, on behalf of the striking workers, gave Castle Hill a 10-day notice prior to the strike that employees would strike on September 16, 17, and 18. On September 18, the Union notified Castle Hill that the striking employees would return to work the next day. Under the circumstances, Castle Hill's refusal to reinstate the following 15 employees on September 19 violated Section 8(a)(3) and (1) of the Act: Devika Smith, Claudia Saldana, Lakeysa Smith, Cherlie Celestin Valfils, Natasha Santiago,

Diana Lewis, Leanne Crawford, Angela Rodriguez, Angeline Murillo, Stephanie Garcia, Musuretu Abdulazeez, Jeanie Alexandre, Danielle Humphrey, Janis Martin, and Komi Anakpa

VII. REDUCTION IN WORK HOURS OF TWO EMPLOYEES

The complaint alleges that Castle Hill reduced Mota-Lopes and Crawford's hours because they engaged in a protected strike earlier that year. Castle Hill contends that neither employees' work hours were reduced after the strike and denies that any reduction is attributable to union animus.

In determining whether adverse employment action is attributable to unlawful discrimination, the Board applies the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The *Wright Line* framework requires proof that an employee's union or other protected activity was a motivating factor in the employer's action against the employee. 251 NLRB at 1089. The elements required to support such a showing are union or protected concerted activity, employer knowledge of that activity, and union animus on the part of the employer. *Amglo Kemlite Laboratories*, 360 NLRB 319, 325 (2014); *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428–1429 (11th Cir. 1985). Factors which may support an inference of antiunion motivation include employer hostility toward unionization, other unfair labor practices committed by the employer contemporaneous with the adverse action, the timing of the adverse action in relation to union activity, the employer's reliance on pretextual reasons to justify the adverse action, disparate treatment of employees based on union affiliation, and an employer's deviation from past practice. 764 F.2d at 1429.

Although Brenda Mota-Lopes was reinstated after returning to work after the strike, her work hours were significantly reduced after the strike from an average before the strike of 5–6 days per week, plus overtime. Similarly, upon her reinstatement on October 27, Leanne Crawford's work schedule was reduced from an average of 8–10 days per pay period to 5–6 days per pay period. Before the strike, Mota-Lopes worked 5–6 days each week and earned about 16–24 hours of overtime each pay period. After the strike, Mota-Lopes worked 24 hours per week for 3 weeks and worked between 16 and 32 hours for the rest of October with no overtime. Similarly, Crawford went from working 8–10 days per pay period before the strike to 5–6 days per pay period after the strike. As such, the revision to the schedules of Mota-Lopes and Crawford constituted adverse action.

The evidence clearly establishes that Mota-Lopes and Crawford engaged in a protected strike activity. Equally clear is the fact that Castle Hill had knowledge of both employees' protected strike activity. There is also sufficient evidence of animus to support a prima facie case in view of its 8(a)(1) violations found in this case. Furthermore, the timing of certain actions showed that union activity was a factor in the reduction of hours, where Mota-Lopes' staffing coordinator told her, prior to the strike, that if she went on strike, her hours could be cut.

The General Counsel having established a prima facie case,

the burden shifted to Castle Hill to prove that union activity was not a motivating factor in Mota-Lopes and Crawford's hour reductions. *Wright Line*, supra; approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). None of the explanations offered by Castle Hill meets this burden. Castle Hill did not provide a single witness to testify on the subject of Mota-Lopes or Crawford's hour reduction. Therefore, Mota-Lopes' testimony regarding her hour reduction was not reasonably disputed. Similarly, Crawford's hour reduction was not explained sufficient for Castle Hill to meet its burden under the *Wright Line* analysis.

Under the circumstances, Castle Hill violated Section 8(a)(3) and (1) by reducing the work hours of Mota-Lopes and Crawford upon their reinstatement after the strike. *Wright Line*, supra; *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

CONCLUSIONS OF LAW

1. Castle Hill was an employer engaged in commerce within the meaning of Section 2(2) of the Act.

2. The Union was a labor organization within the meaning of Section 2(5) of the Act.

3. At all relevant times, Nelson Duran, Alexandra Bracea, Lavonza Jaboiun, and Laura Vartolone were supervisors of Castle Hill within the meaning of the Act, and David Jasinski, Regina Figueroa, Ann Taylor, and Fredline Altenor were agents within the meaning of Section 2(13) of the Act.

4. Castle Hill violated Section 8(a)(5) and (1) of the Act by:

(a) Refusing on March 27, 2014, to bargain in good faith with the Union's chosen bargaining committee.

(b) Delaying for 3 months before producing information requested by the Union which was relevant and necessary to its role as unit employees' labor representative prior to the commencement of collective bargaining between the parties on March 27, 2014.

(c) Refusing to provide health insurance information on May 21, 2014, and daily work schedule information on July 30, 2014, as requested by the Union which was relevant and necessary to its role as unit employees' representative.

5. Castle Hill violated Section 8(a)(1) of the Act in the following manner:

(a) Duran's interrogated Duran in July and Devika Smith in September 2014 as to whether they planned to go on strike.

(b) Duran threatened Devika Smith in July 2014 by stating that it would be a shame for Smith and her coworkers to go on strike and lose their jobs.

(c) Duran threatened Saldana in August 2014 by accusing her of backstabbing him and implying retaliation after she appealed successfully for support for the Union City Board of Commissioners.

(d) Jaboiun warned Devika Smith in late August 2014 to be careful because Duran was mad and wanted to know when everybody was going on strike.

(e) Duran threatened Diana Lewis in September 2014 by warning that he knew employees were going on strike, warned that if they could be fired as a result and told her to think about it.

(f) Duran threatened Saldana on September 12, 2014, by stating that she and 17 other employees would lose their jobs if they

went out on strike.

(g) At group meetings held in late August or early September 2014 in the second-floor conference room, Duran interrogated employees as to why they were going on strike, threatened them with termination, and changes in working conditions.

(h) Duran and Bracea engaged in surveillance of employees as they participated in picketing outside Castle Hill on September 16 and 17, 2014.

6. By failing and refusing, on September 19, 2014, to immediately reinstate fifteen employees who engaged in an unfair labor practice strike and had made an unconditional offer to return to work, Castle Hill violated Section 8(a)(3) and (1) of the Act.

7. The aforementioned unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Castle Hill has engaged in certain unfair labor practices, I shall order it to take certain affirmative action designed to effectuate the policies of the Act. On request, Castle Hill shall bargain with the Union as the exclusive representative of the employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. Castle Hill shall also, within 14 days of the Board's Order, offer the 15 employees who engaged in an unfair labor practice strike in September 2014, and were not immediately reinstated on request, recall to their former positions, terminating, if necessary, any replacements who occupy those positions, or if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed. In addition, the two employees whose work hours were reduced after returning from the strike shall have their previous work hours restored. I shall also order Castle Hill to make whole the unfair labor practice strikers who were denied reinstatement or suffered loss of work hours for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, I shall order Castle Hill to expunge from its files any reference to the failure to reinstate the strikers, and to notify them in writing that this has been done. Finally, I shall order Castle Hill to post a notice to all employees in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010).

Castle Hill shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Castle Hill shall also compensate the discriminatee(s) for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.*, 359 NLRB 518 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸⁴

ORDER

The Respondent, Alaris Health at Castle Hill, Union City, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting 1199, SEIU United Healthcare Workers East or any other union.

(b) Coercively interrogating and threatening any employee about union support or union activities.

(c) Engaging in surveillance of employees participating in picketing.

(d) Refusing to provide or delaying in providing necessary and relevant information to the Union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All CNAs, dietary, housekeeping, recreational aides, LPNs, and all other employees excluding professional employees, registered nurses, cooks, confidential [employees], office clerical employees, supervisors, watchmen and guards.

(b) On request, furnish to the Union in a timely manner the information requested concerning daily work schedules and health insurance on May 21 and July 30, 2014.

(c) Within 14 days from the date of the Board's Order, offer Devika Smith, Claudia Saldana, Lakeysa Smith, Cherlie Celestin Valfils, Natasha Santiago, Diana Lewis, Leanne Crawford, Angela Rodriguez, Anequina Murillo, Stephanie Garcia, Musuretu Abdulazeez, Jeanie Alexandre, Danielle Humphrey, Janis Martin, Komi Anakpa, and Brenda Mota-Lopes full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Devika Smith, Claudia Saldana, Lakeysa Smith, Cherlie Celestin Valfils, Natasha Santiago, Diana Lewis, Leanne Crawford, Angela Rodriguez, Anequina Murillo, Stephanie Garcia, Musuretu Abdulazeez, Jeanie Alexandre, Danielle Humphrey, Janis Martin, Komi Anakpa and Brenda Mota-Lopes whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(e) Within 14 days from the date of the Board's Order, expunge from its files any reference to the failure to reinstate the strikers, and to notify them in writing that this has been done and that such adverse actions will not be used against them in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause

⁸⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Union City, New Jersey, copies of the attached notice marked "Appendix"⁸⁵ in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 27, 2014.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 3, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting 1199, SEIU United Healthcare Workers East, or any other union.

WE WILL NOT coercively question or threaten you concerning your union support or activities.

WE WILL NOT engage in surveillance of your union or other protected concerted activities.

WE WILL NOT refuse to timely provide the Union with necessary and relevant information.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All CNAs, dietary, housekeeping, recreational aides, LPNs, and all other employees excluding professional employees, registered nurses, cooks, confidential [employees], office clerical employees, supervisors, watchmen and guards.

WE WILL, on request, furnish to the Union in a timely manner the information requested concerning daily work schedules and health insurance on May 21 and July 30, 2014.

WE WILL, within 14 days from the date of this Order, offer Devika Smith, Claudia Saldana, Lakeysa Smith, Cherlie Celestin Valfils, Natasha Santiago, Diana Lewis, Leanne Crawford, Angela Rodriguez, Anequina Murillo, Stephanie Garcia, Musuretu Abdulazeez, Jeanie Alexandre, Danielle Humphrey, Janis Martin, Komi Anakpa, and Brenda Mota-Lopes full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Devika Smith, Claudia Saldana, Lakeysa Smith, Cherlie Celestin Valfils, Natasha Santiago, Diana Lewis, Leanne Crawford, Angela Rodriguez, Anequina Murillo, Stephanie Garcia, Musuretu Abdulazeez, Jeanie Alexandre, Danielle Humphrey, Janis Martin, Komi Anakpa, and Brenda Mota-Lopes whole for any loss of earnings and other benefits resulting our refusal to reinstate them or, upon their reinstatement, reducing their work hours, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Devika Smith, Claudia Saldana, Lakeysa Smith, Cherlie Celestin Valfils, Natasha Santiago, Diana Lewis, Leanne Crawford, Angela Rodriguez, Anequina Murillo, Stephanie Garcia, Musuretu Abdulazeez, Jeanie Alexandre, Danielle Humphrey, Janis Martin, Komi Anakpa, and Brenda Mota-Lopes for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

ALARIS HEALTH AT CASTLE HILL

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-125034 or by using the QR code

⁸⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the

United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

