



United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

April 8, 2019

Patricia S. Dodszuweit, Esq.
Clerk, United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia PA 19106

Re: *NLRB v. Alaris Health at Harborview*
Board Case Nos. 22-CA-125023, 22-CA-125882 & 22-CA-140591

Dear Ms. Dodszuweit:

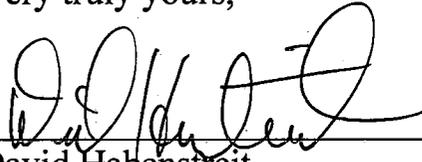
I am enclosing an original and five copies of the National Labor Relations Board's application for enforcement of its Order in this case. Within forty days of the Court's docketing of this application, I will file the agency record or the certified list of its contents.

Please serve a copy of this application on the Respondent, Alaris Health at Harborview, whose address appears on the service list. I have served a copy of the application on each party admitted to participate in the Board proceedings, and their names and addresses also appear on the service list.

I am counsel of record for the Board, and all correspondence should be addressed to me. I would appreciate your furnishing the Board's Regional Director, whose name and address also appear on the service list, with a copy of any correspondence the Court sends to counsel in this case.

The Board attorneys directly responsible for this case are Julie Brock Broido, (202) 273-2996 and Kellie Isbell, (202) 273-2482.

Very truly yours,



David Habenstreit

Assistant General Counsel

NATIONAL LABOR RELATIONS BOARD

1015 Half Street, SE

Washington, DC 20570

(202) 273-2960

Enclosures

SERVICE LIST

Alaris Health at Harborview
Board Case Nos. 22-CA-125023, 22-CA-125882 & 22-CA-140591

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Charging Party

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Regional Director

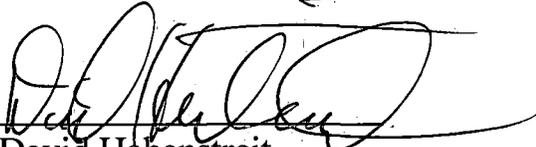
**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	Board Case Nos.
)	22-CA-125023, 22-CA-125882
v.)	and 22-CA-140591
)	
ALARIS HEALTH AT HARBORVIEW)	
)	
Respondent)	

**APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

The National Labor Relations Board hereby applies to the Court for enforcement of its Order issued against Alaris Health at Harborview on December 21, 2018, in Board Case Nos. 22-CA-125023, 22-CA-125882 and 22-CA-140591, reported at 367 NLRB No. 54. The Board seeks enforcement of its Order in full.

The Court has jurisdiction over this application pursuant to Section 10(e) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160(e)). Venue is proper in this Circuit because the unfair labor practices occurred in Jersey City, New Jersey.


David Habenstreit
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 8th day of April 2019.

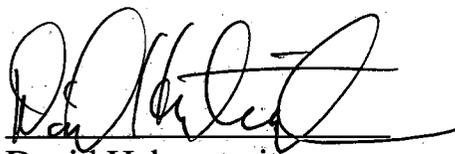
**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

NATIONAL LABOR RELATIONS BOARD)
)
Petitioner) Board Case Nos.
) 22-CA-125023, 22-CA-125882
v.) and 22-CA-140591
)
ALARIS HEALTH AT HARBORVIEW)
)
Respondent)

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2019, I filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Third Circuit via overnight mail. I further certify that the foregoing document will be served today via first-class mail on the following counsel:

John Bauer, Esquire
Littler Mendelson, P.C.
290 Broadhollow Road, Suite 305
Melville, NY 11747



David Habenstreit
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 8th day of April 2019

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Alaris Health at Harborview and 1199, SEIU United Healthcare Workers East. Cases 22–CA–125023, 22–CA–125882, and 22–CA–140591

December 21, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND KAPLAN

On February 11, 2016, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, the 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 National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.²

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 Castle Hill*, 367 NLRB No. 52 (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, while 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.

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) warning employees at a group meeting that they could lose their jobs if they went on strike, and (2) distributing leaflets to employees stating that the Respondent "will have replacement for all employees who choose to go out on strike and walk away from their jobs," and "[o]nce a strike is over, you may not be able to immediately return to your job."

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,³ and conclusions and to adopt the judge's recommended Order as modified and set forth in full below.⁴

In adopting the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to immediately reinstate unfair labor practice strikers Ingrid Williams and Kyria Miller following a 3-day strike in September 2014,⁵ we note that there is no exception to the judge's finding that the strike was an unfair labor practice strike. Because the strike was an unfair labor practice strike, we reject the Respondent's argument that its contracts with staffing agencies that supplied temporary replacements during the strike and its status as a health care facility justified its delay in reinstating Williams and Miller after their unconditional offer to return to work. See *Alaris Health at Castle Hill*, 367 NLRB No. 52 (2018) (holding that an employer's contractual obligation to retain temporary strike replacements for a minimum period

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 incorporated the decision by reference in a subsequent 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 As noted above, 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).

In accordance with the Board's 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 affected employees 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*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, we shall modify the judge's tax compensation and Social Security reporting remedies in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

We shall modify the judge's recommended Order to conform to this remedial change and to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

⁵ Williams and Miller were both ultimately returned to work, Williams on May 19, 2015, and Miller on October 17, 2014, not October 10 as the judge stated in his decision. (Miller resigned shortly thereafter.) Because both Williams and Miller were returned to work, albeit after an unlawful delay, we shall omit the judge's reinstatement remedy.

of time does not constitute a legitimate and substantial business justification for denying immediate reinstatement to unfair labor practice strikers). In addition, while employers generally have a 5-day administrative grace period to reinstate unfair labor practice strikers under *Drug Package Co.*, 228 NLRB 108, 113–114 & fn. 28 (1977), enf. denied in part on other grounds 570 F.2d 1340 (8th Cir. 1978), the Respondent disavowed any claim that its multiweek delay in reinstating the unfair labor practice strikers was justified by the grace period described in *Drug Package Co.*, and we find that the Respondent was not entitled to this grace period. See, e.g., *Teamsters Local 574*, 259 NLRB 344, 344 fn. 2 (1981) (citing *Interstate Paper Supply Co.*, 251 NLRB 1423 (1980)) (Where “an employer has rejected, attached an unlawful condition to, or ignored an unconditional offer to return to work, the 5-day grace period serves no useful purpose and backpay will commence as of the unconditional offer to return to work.”).

Even assuming arguendo 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 have failed to demonstrate that its agency contracts justified delaying the reinstatement of Williams and Miller. See *Alaris Health at Castle Hill*, above, slip op. at 5. Although the Respondent’s contract with Tristate Rehab Staffing required the Respondent to retain eight Tristate employees for 4 weeks, and the Respondent’s contract with Towne Nursing Staff required the Respondent to retain three Towne employees for 6 weeks, there is no credited evidence in the record regarding the parties’ negotiations that resulted in those contract terms. In addition, only one agency-supplied employee (from Tristate) actually worked at Harborview after the strike ended, and the Respondent has not provided any evidence that it had to compensate Tristate or Towne for replacements who were guaranteed employment after the strike but did not work. As a result, there is no basis upon which to find that the staffing agencies required the lengthy minimum terms as a condition of supplying the temporary strike replacements, that the Respondent was financially liable for any agency employees whom it did not use after the strike ended, or even that the one agency-supplied employee who worked at Harborview after the strike ended actually replaced either Williams or Miller during the period they were denied reinstatement. *Id.*

For all of the foregoing reasons, we adopt the judge’s finding that the Respondent violated Section 8(a)(3) and

(1) of the Act by failing to immediately reinstate Williams and Miller upon their unconditional offer to return to work.⁵

ORDER

The National Labor Relations Board orders that the Respondent, Alaris Health at Harborview, Jersey 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) Threatening employees with job loss if they go on strike.

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

(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 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, LPNs, and all other employees excluding professional employees, registered nurses, confidential [employees], office clerical employees, cooks, 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) Make Ingrid Williams and Kyria Miller 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 judge’s decision as amended in this decision, plus reasonable search-for-work and interim employment expenses.

⁵ 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 at 344.

(d) Compensate Ingrid Williams and Kyria Miller 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.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure to immediately reinstate Ingrid Williams and Kyria Miller 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.

(f) 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.

(g) Within 14 days after service by the Region, post at its facility in Jersey City, New Jersey, copies of the attached notice marked "Appendix"⁶ 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.

(h) 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
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 threaten you with job loss if you go on strike.

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.

⁶ 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

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

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, LPNs, and all other employees excluding professional employees, registered nurses, confidential [employees], office clerical employees, cooks, 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 make Ingrid Williams and Kyria Miller whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Ingrid Williams and Kyria Miller 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 Ingrid Williams and Kyria Miller 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 HARBORVIEW

The Board's decision can be found at <https://www.nlr.gov/case/22-CA-125023> 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.

¹ Unless otherwise indicated, all dates refer to 2014.

² 29 U.S.C. §§ 151-169.

³ The complaint was amended to modify pars. 23, 24, 25 and 31. (GC Exh. 101(w)). In addition, the General Counsel subsequently withdrew complaint pars. 28, 29 and 32, and modified par. 30 to remove reference



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 proceeding was one of four cases tried ad seriatim involving Alaris Health's New Jersey nursing homes and their unionized employees. Heard in Newark, New Jersey, on July 29 through 31, 2015, the case addressed complaint allegations that Alaris Health at Harborview (Harborview or Respondent), committed numerous unfair labor practices relating to 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 threats of job loss; and (3)

violated Section 8(a)(3) and (1) by refusing to reinstate two employee strikers after they unconditionally offered to return to work.³

Harborview 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" Harborview for unfair labor practice charges, which it denies, and then used those charges to mask an economic strike at Harborview 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 Harborview,⁴ I make the following

to par. 28 alleging that Harborview's unilateral discontinuation of the Union dues check-off.

⁴ Notwithstanding my instruction that counsel submit one "omnibus" brief addressing all four cases, the General Counsel submitted separate briefs for each case. All four Respondents moved to strike the General

FINDINGS OF FACT

I. JURISDICTION

Harborview, a corporation, operates a nursing home and rehabilitation center providing in-patient medical care at its facility in Jersey 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. Harborview 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*

At the relevant times in this complaint, Harborview's supervisors and agents included: Kevin Woodard, the administrator; Gerry Mijares, the director of nursing; Mariae Lapus, the assistant director of nursing; and Julian Duran, the food service director. David Jasinski, Esq., has served as Castle Hill's labor counsel and chief negotiator during collective bargaining, accompanied by Mendy Gold, an Alaris principal.⁵

Harborview and its predecessors have recognized the Union as the exclusive collective-bargaining representative of approximately 110 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, confidential [employees], office clerical employees, cooks, supervisors, watchmen and guards.⁶

The Union's leadership includes: Milly Silva, the executive vice president; Clauvice Saint Hilaire, the vice president; and Ron McCalla and Christina Ozual, union organizers. During collective bargaining, the Union's chief negotiator was William Massey, Esq., assisted by McCalla. Pursuant to the expiring agreement,⁷ the Union designated the following six Harborview employees as members of the bargaining committee: Denise Bowden, Gwyneth Russell, Cassandra Willis, Ella Moton, Romeo Rodriguez and Renee Jordan.⁸

Notwithstanding an employee strike in 2009 during negotiations over the 2010–2014 agreement, the parties enjoy a

relationship that both describe as respectful. The parties began meeting shortly before the 2010 contracts expired for Harborview, Alaris at Castle Hill, Alaris at Rochelle Park and Alaris at Boulevard East. However, controversy soon erupted over the composition of the Union's bargaining committee and information requested by the Union.

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 Harborview engage in bargaining and offered alternative dates in February. He also requested that Harborview 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;⁹ 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 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.¹⁰

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 January and February. The trial eventually started on February 9 and lasted until March 22. Rebecca Winklestein, Esq., Jasinski's co-counsel 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.¹¹ 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

Counsel's briefs. I decided against such an extreme measure but, in order to ensure that there was no prejudice to Respondents, I permitted them to submit supplemental briefs in each case. Harborview declined the option.

⁵ Harborview admitted only that Woodard was a Sec. 2(11) supervisor. However, the undisputed facts established that Mijares and Lapus were also statutory supervisors, while Jasinski acted as an agent within the meaning of Sec. 2(13).

⁶ GC Exh. 108.

⁷ Section 17 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 R. Exh. 104.

⁹ McCalla knew that none of the Alaris facilities maintained 401(k) plans 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. 155.)

¹⁰ GC Exh. 109.

¹¹ There is no dispute regarding Jasinski's assertion regarding his past practice of providing a response to the Union's information requests on the first day of negotiations. (Tr. 2152–2154.) 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 13th email demanding a response to the information request, it is clear that the Union never consented to delayed document production until March 27. (Tr. 1994–1995; GC Exh. 7; R. Exh. 104.) 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 written communications.

separately. He proposed bargaining dates of either March 27 or 31.¹²

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.¹³

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 recognizes its independence.

¹² Massey conceded that it was Jasinski's longstanding position to negotiate each contract separately, but noted that there were 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.)

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 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.¹⁴

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

¹³ 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 Harborview's bargaining committee. (GC Exh. 5; Tr. 869, 1426–1427.)

¹⁴ GC Exh. 6.

regards.¹⁵

2. The March 14th 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.¹⁶

3. The March 27 bargaining session

On March 27, Jasinski arrived at 11 a.m. for the first bargaining session at the Union's offices in Iselin, New Jersey. Massey, McCalla, Saint Hilaire, Silva and Ozual were present, accompanied by approximately 20-25 employee delegates from the four facilities. 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.

After waiting about an hour for Gold to arrive, 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 Harborview, Boulevard East and Rochelle Park. 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 bargaining team. At that point, Jasinski provided a packet of information relating to Castle Hill's December 27 information request and retreated to a caucusing room.¹⁷

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 the 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, please advise.¹⁸

Before Jasinski and Gold left, the Union did not submit a proposal.¹⁹ 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 Harborview, Boulevard East and Rochelle Park.

In a letter, dated April 1, Jasinski proposed dates for the resumption of bargaining for the Harborview contract:

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

¹⁵ 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, while corresponding during that time over the logistics and dates for bargaining, Jasinski simply ignored Massey's March 13th reminder to provide the information in advance of the March 27 bargaining session. (Tr. 926, 929-930, 1416-1418; GC Exh. 7.)

¹⁶ This request refined the previous request for monthly work schedules from one that sought daily work schedules. (GC Exh. 8.)

¹⁷ I credit Jasinski's undisputed testimony that some delegates at attendances made side remarks, sneered, and laughed, but not his conclusion 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.)

¹⁸ GC Exh. 110.

¹⁹ Harborview notes the discrepancy in testimony between Massey and Saint Hilaire as to whether the Union was prepared to issue its proposals if the bargaining sessions had gone forward. (Tr. 938, 1059.)

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.²⁰

In his reply later that day, McCalla documented the parties' March 27 meeting, disagreed with the four facilities' "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 Jasinski'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 Harborview 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:²¹

4. The Union's followup request

In a letter to Jasinski, dated April 9, Massey expressed concern over Harborview'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 15.²²

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.²³ 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.²⁴

5. The May 7 bargaining session

The parties subsequently agreed to resume the Harborview contract negotiations on May 7. Prior to that session, 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!²⁵

At the May 7 bargaining session, Jasinski and Gold met with Massey, McCalla, Silva, Saint Hilaire the six bargaining committee members from Harborview. This time, there was no controversy regarding the composition of the Union's bargaining team. Massey gave Jasinski the Union's written proposals, but reminded him 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.²⁶

6. The employee schedules

In a letter, dated May 14, Jasinski furnished Massey with the monthly staffing schedules at Harborview for each floor for all shifts from January 26 to May 17. 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

²⁰ GC Exh. 111.

²¹ GC Exh. 11.

²² GC Exh. 21.

²³ GC Exh. 112.

²⁴ GC Exh. 113.

²⁵ GC Exh. 44.

²⁶ The Union does not dispute that, notwithstanding Harborview's failure or refusal to provide necessary information requested on

December 27 and March 14, it was still able to submit a proposal. (GC Exh. 131; Tr. 2098–2099, 2107–2108, 2115–2116.)

²⁷ GC Exh. 114.

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

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 June 2. Massey again opened with a statement that the information provided in response to the Union's request was not satisfactory because it lacked requested health insurance information and consisted of projected monthly schedules instead of work schedules reflecting actual work performed by CNAs. Jasinski insisted that the monthly schedules were sufficient and Massey explained the relevance of the more accurate daily work schedules, which reflect the days and shifts actually worked.³⁰ After engaging in bargaining, Jasinski provided and explained Harborview's counterproposals.³¹

7. The July 9 bargaining session

At the July 9 bargaining session, McCalla served as the Union's chief spokesperson, as Massey was unable to attend. The session opened, as usual, with the Union's request for daily work schedules and health insurance information needed for bargaining. Once again, Jasinski disagreed, insisting the Union already had the information and did not need anything further. During the bargaining that ensued, Jasinski dismissed the Union's staffing proposals because Harborview was in compliance with State guidelines. McCalla took issue with that view, asserting that State guidelines took several factors into account.³² The parties then engaged in bargaining, with Jasinski providing Harborview's latest contract proposals.³³

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 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.³⁴

8. The August 25 bargaining session

The parties next met for bargaining on August 25. Massey reiterated the Union's need for the outstanding daily work schedules and health insurance information for bargaining. Jasinski did not respond to that inquiry and the parties engaged in bargaining.³⁵

C. Employees Prepare for a Possible Strike

Beginning in March, Ozual or Saint Hilaire met periodically with employees in the first-floor break room. 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 Harborview's refusal to meet with the Union's bargaining committee on March 27 and its refusal to provide requested information.³⁶

By May, the Union recommended that employees step up the pressure on the four Alaris facilities. In late May and June, several Harborview employees participated in informational picketing. Some signs contained messages which read "1199 Stop Unfair Labor Practices!" Other signs mentioned the need for affordable healthcare insurance, pension and wage increases and a fair contract.³⁷

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 the four Alaris facilities. 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.

²⁹ GC Exh. 115.

³⁰ GC Exh. 105-106.

³¹ GC Exh. 131.

³² It is undisputed that Harborview is subject to New Jersey State requirements for minimum staffing and resident ratios. (R. Exh. 13.)

³³ R. Exh. 105(b).

³⁴ GC Exh. 116.

³⁵ GC Exh. 131 at 22.

³⁶ It is undisputed that Ozual, accompanied occasionally by Saint Hilaire, followed a similar practice of updating employees, as well as receiving their complaints, at each of the four Alaris facilities. (Tr. 1158-1187, 1206-1207.)

³⁷ GC Exhs. 19.

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.³⁸

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. In prepared remarks that followed, Silva excoriated Alaris 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 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.³⁹

Jasinski knew about the Union's July 23 press conference and discussed that event with Alaris corporate officials.⁴⁰

D. 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 Harborview, Boulevard East and Rochelle Park. Another six employees from Castle Hill participated by telephone. Denise Bowden, Cassandra Willis and Rene Jordan were the delegates from Harborview.

The union officials met with the employees for about 1-1/2

³⁸ GC Exh. 48.

³⁹ GC Exh. 57.

⁴⁰ Jasinski conceded that Alaris officials were provided with the details. (Tr. 1536-1538.)

hours. 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 he expected to 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 deliver ten-day notices to engage in a 3-day strike. The group 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.⁴¹ The employees present signed the resolution and the six employees participating by telephone from Castle Hill voiced approval:

At a meeting of the Alaris Bargaining Committee of 1199 SEIU United Healthcare 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 bargaining position.⁴²

In a letter, dated August 29, Jasinski decried 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.⁴³

On September 5, the Union delivered to Woodard the contractually required ten-day notice of bargaining unit employees' intention to go out on strike for 3 days:

Notice is 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 Harborview located at 178-198 Ogden Ave., Jersey City, NJ 07 306. 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 6:00 AM on Tuesday September 16, 2014 and end at 6:59 AM on Friday September 19, 2014.⁴⁴

Such action had been submitted to the membership for a vote in past years, as required by the Union's constitution.⁴⁵ In this instance, unit members were informed of the scheduled strike and provided with reasons attributing the strike action to Harborview's bargaining posture and unfair labor practices.⁴⁶

⁴¹ 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. Art. VII, sec. 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.)

⁴² 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.)

⁴³ GC Exh. 117.

⁴⁴ GC Exh. 118.

⁴⁵ Harborview 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 Harborview 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.)

⁴⁶ There was no testimony by striking Harborview employees as to whether their participation was motivated by economic considerations or Harborview's alleged unfair labor practices. Kyria Miller did testify,

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."⁴⁷

E. Management/Supervisors Statements Prior To The Strike

By early September, the Union began mobilizing employees for the strike. Saint Hilaire and/or Ozual met with Harborview employees 2-3 times a week in the break room to rally support and participation in the strike. Ozual was especially forceful with employees who were reluctant or undecided about participating in the strike, insisting that the action was necessary in order to get raises and better benefits.⁴⁸

Around this time, employees were handed leaflets by Woodard and found them included with their paychecks. The leaflet was represented as the "truth" to refute "the Union's most recent lies." It posited the question of whether an employee could be replaced if he/she went out on strike. The answer stated that "Under Federal Law, we have the right to, and will, hire replacements to fill any vacancies in our staffing schedules. In fact, to meet our responsibilities to provide uninterrupted resident care, we have begun to take steps to ensure we will have replacement for all employees who choose to go out on strike and walk away from their jobs. We do this because of our commitment to our residents and our Facility. Once a strike is over, you may not be able to immediately return to your job. That is a fact."⁴⁹

Around the same time, Harborview CNAs were called into the break room for meetings with Mijares, the nursing director, and Lapus, the assistant nursing director. After distributing a document, Mijares told the CNAs that they would be neglecting Harborview's residents if they went on strike. She also warned that employees could lose their jobs if they went on strike. Miller voiced her disagreement, noting that Rene Jordan, a housekeeper, participated in the 2009 strike and was still employed. Lapus responded by reaffirming Mijares' warning.⁵⁰

F. Supervisors Observe Employees During Prayer Vigil

On September 10, employees from all four facilities also participated in a prayer vigil and rally with Silva and their local State

Assemblyman in front of Castle Hill.⁵¹ Flyers distributed to employees at the four facilities prior to the vigil referred to the upcoming strike relating to the facilities unfair labor practices and undermining of job standards.⁵² During the event, Castle Hill administrator Maurice Duran stood 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.⁵³ The Union photographed the rally/vigil and depicted it in a flyer distributed on September 15.⁵⁴

G. Alaris Prepares for the Strike

In anticipation of its staffing needs prior to the strike, Harborview entered into contracts with four temporary staffing companies. Addenda were attached to the form agreements with Tri-state Rehab Staffing and Towne Nursing requiring that Harborview retain their employees for minimum terms of four and six weeks, respectively. This was a peculiar development in light of the Union's prior notice of a 3-day strike. There was, however, no written agreement with Staff Blue, while the agreement with Medistar Personnel, Inc. made no mention of a contract term.⁵⁵

H. 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.⁵⁶

On September 16, approximately 25 Harborview employees/unit members ceased work and engaged in a strike. Over the next 3 days, the striking employees picketed outside the facility.⁵⁷ Their signs demanded Harborview engage in good-faith bargaining and protested unfair labor practices.

During the 3-day strike, Harborview covered the shifts of the striking CNAs with 22 temporary employees from the four staffing agencies.⁵⁸

I. 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 the facilities would

however, that she decided to strike after being instructed to do so by her mother. (Tr. 1843.) Williams did not testify as to her motivation for participating in the strike but confirmed her prior statement in a Board affidavit that Ozual informed employees that the strike was attributable to the employer's refusal to bargain in good faith for a new contract. (Tr.1831.)

⁴⁷ R. Exh. 8.

⁴⁸ Harborview called two witnesses who neither attended pre-strike meetings nor participated in the strike. Kisha Pearson, a recreational aide, vaguely testified that Ozual talked about "wages and stuff like that" (Tr. 2220.), while Verna Jeffries, a CNA, testified that Ozual told her she needed "to fight for the contract." (Tr. 2232.) I found their testimony vague, selective and ineffective in refuting evidence of the Union's standard message to unit members that the strike was caused by both economic considerations and the employer's unfair labor practices.

⁴⁹ GC Exh. 107.

⁵⁰ This finding is based on Miller's credible and undisputed testimony. (Tr. 1844-1848.)

⁵¹ GC Exh. 35.

⁵² GC Exh. 44(f).

⁵³ I base the finding regarding the observation of employees on Castle Hill CNA Leanne Crawford's credible and undisputed testimony. (Tr. 489-492.) Although his employment role was limited to Castle Hill, Duran conceded that he is engaged to Alaris official Ann Taylor. (Tr. 1584-1585.)

⁵⁴ GC Exh. 44(g).

⁵⁵ I did not credit Jasinski's vague testimony regarding alleged negotiations by unidentified persons which resulted in Harborview agreeing to four and 6-week terms. (Tr. 2168-2169; R. Exhs. 11, 107-108.) 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.)

⁵⁶ GC Exh. 28.

⁵⁷ GC Exh. 19.

⁵⁸ GC Exhs. 133-136.

make such a commitment if employees gave notice of a 3-day strike. Jasinski explained that the facilities 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 Harborview employees/unit members who engaged in the strike, made an unconditional offer to return to their former or substantially equivalent positions of employment.⁵⁹

On September 19, employees who participated in the strike reported to work at Harborview. Miller and other employees who arrived to work the morning shift were directed to the dining room. When they arrived, Woodard proceeded to read the names of employees who were not reinstated and needed to leave. He read the names of Miller and Williams. Miller left the facility and reported the development to Ozual and shop steward Romeo Rodriguez, who were standing outside. At Ozual's direction, Rodriguez entered the facility and asked Woodard why Miller and Williams were locked out. Woodard merely said that it was for the good of the facility.⁶⁰

Williams was not present at that time since she was scheduled to work until 3 p.m. However, upon learning she was locked out by a coworker, Williams went to Harborview and spoke with Woodard. He confirmed Williams had been replaced, but would let her know if a position opened up.⁶¹

Although locked out, Williams still participated in a rally in Union City on September 30 to protest the lock-out of employees at the four Alaris facilities. Williams played a prominent role in the rally, opening the event with a ten-minute prayer. The event was covered by local print and television media.⁶²

Jasinski sent a letter, dated October 10, informing Massey that Miller and Williams were reinstated as of October 15. Woodard, however, was not on the same page and turned them away when they reported to work on October 15. The snafu was partially ironed out and Miller was reinstated on October 10.⁶³ Williams, however, was not reinstated until May 19, 2015. Upon her return, she was reassigned from the fourth floor, where she had worked the previous 23 years.⁶⁴

LEGAL ANALYSIS

I. HARBORVIEW'S OBJECTION TO THE UNION'S BARGAINING COMMITTEE

The complaint alleges that Harborview violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union on March 27, 2014 because employee representatives from the other three facilities were present. Harborview contends that its insistence that the Union's bargaining committee be restricted solely to Harborview employees was consistent with past practice. Additionally, Harborview 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 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 at 177-178 (other locals); *General Electric Co. v. NLRB*, 412 F.2d at 517-520 (2d Cir. 1969) (other international unions); *Standard Oil Co. v. NLRB*, 322 F.2d 40, 44 (6th Cir. 1963) (other locals). Furthermore, a claim that a union's use of outsiders was an unlawful attempt to compel companywide or multiplant bargaining is also insufficient, unless the employer can demonstrate that the union actually attempted to bargain outside unit boundaries *NLRB v. Indiana & Michigan Electric Co.*, 599 F.2d at 191; *Minnesota Mining*, 415 F.2d at 178; *General Electric*, 412 F.2d at 519-520.

⁵⁹ GC Exh. 28.

⁶⁰ I found Rodriguez very credible. (Tr. 1877-1878.)

⁶¹ Williams' credible testimony was not disputed by Woodard. (Tr. 1804-1806.)

⁶² GC Exh. 102.

⁶³ Miller resigned 13 days later. (GC Exh. 106, 119(a)-(c); R. Exh. 103.)

⁶⁴ Harborview's hearsay testimony about letters purportedly sent to Williams prior to a March 16, 2015 certified letter offering her the opportunity to reapply for a CNA position was completely unreliable. (Tr. 2279-2283, 2291; R. 109.) It is undisputed that Jasinski worked out an arrangement whereby any reinstatement offers were to be communicated by him to Massey. (Tr. 1976-1979.) In Williams' case, that did not happen. (GC Exh. 119(e).)

In this case, there was no evidence that the Union sought to force Harborview into multiemployer bargaining through the presence of bargaining unit members from the other three facilities. The only hint of a Union strategy affecting all four facilities was its desire to have Silva and Massey make opening statements out the outset of bargaining. See *International Brotherhood of Electrical Workers, Local Union No. 46, AFL-CIO*, 302 NLRB 271, 273-274 (1991) (union not justified in refusing to negotiate with employer group's chosen committee of members and nonmembers 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 27 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 Union No. 46, AFL-CIO*, 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").

Jasinski's additional concern at hearing that the presence of employees from other facilities would violate the confidentiality of employees at the other facilities 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. No such concern was expressed on March 27.

Harborview 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. Harborview 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 the 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, Harborview 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, Harborview 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, (employer unlawfully refused to bargain with union negotiating committee because the union was coordinating the various bargaining efforts).

II. HARBORVIEW'S DELAY IN PROVIDING INFORMATION

The complaint alleges that Harborview also violated Section 8(a)(5) and (1) when it unreasonably delayed in providing the Union with information requested in order to prepare for bargaining. Harborview 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).

Harborview 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. The trial eventually took place between early February and the third week in March. Jasinski did propose, on several occasions, 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 Harborview, is inapplicable. 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, Harborview 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 five weeks responding to the

supplemental request was unreasonable. Harborview 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 conclusion of the March 27 session, just before he and Gold walked out. The tactic was clearly calculated to prolong bargaining by ensuring that the Union would have insufficient time to analyze the information provided and, thus, be unable to commence meaningful bargaining at the first session. The fact that Harborview 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 also contends that Harborview violated Section 8(a)(5) and (1) of the Act on May 21, when it refused to provide daily work schedule information, and July 30, when it refused to provide health insurance related information, both of which were relevant and necessary to the performance of its duties as the exclusive bargaining representative. Harborview refused to provide such further work schedule information, insisting that the Union should be satisfied with monthly master schedules. With respect to the health insurance information, Harborview claimed it was prohibited from releasing such information under the privacy provisions of the Health Insurance Portability and Accountability Act of 1996.⁶⁵

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*, 352 NLRB 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., 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, Harborview was obligated to furnish the requested health insurance information necessary for the Union to formulate its own proposal. *One Stop Kosher Supermarket, Inc.*, 355 NLRB 1237 (2010) (union was entitled to health insurance plan information). The Union was entitled to the requested information concerning the costs of health insurance to Harborview 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.

On May 21, Jasinski formally denied the union’s request for the daily work schedules. With respect to the health insurance information request, Jasinski initially insisted the Union already had the information. That 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. On July 30, Jasinski closed the door regarding any further health insurance related information. He based that objection on spurious confidentiality concerns that came more than 2 months after the information request. *Exxon Co. USA*, 321 NLRB 896, 898 (1996) (confidentiality objection must be timely raised). 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 the allegedly confidential information. See *Castle Hill Health Care Center*, 355 NLRB 1156, 1183–1184 (2010) (generalized confidentiality concern unavailing as an excuse to refuse information request);

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

IV. THREATS REGARDING STRIKE ACTIVITY

A. Threats to Employees of Job Loss or Other Reprisals

The complaint alleges that Harborview 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 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

⁶⁵ 45 CFR §§ 160 and 164.

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).

Harborview CNAs were called into the break room for meetings with Mijares, the nursing director, and Lopus, the assistant nursing director, and warned that employees could lose their jobs if they went on strike. Miller voiced her disagreement, noting that Rene Jordan, a housekeeper, participated in the 2009 strike and was still employed. Lopus responded by reaffirming Mijares’ warning.

The aforementioned supervisory statements sent clear messages that engaging in Section 7 activity was harmful to Harborview. 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). Under the circumstances, these implied threats of job loss by Mijares and Lopus violated Section 8(a)(1).

B. Memo to Employees About Job Loss or Other Reprisals

In early September, employees were handed leaflets by Woodard and found them included with their paychecks. The handouts posited the question of whether an employee could be replaced if he/she went out on strike. The answer stated that “Under Federal Law, we have the right to, and will, hire replacements to fill any vacancies in our staffing schedules. In fact, to meet our responsibilities to provide uninterrupted resident care, we have begun to take steps to ensure we will have replacement for all employees who choose to go out on strike and walk away from their jobs. We do this because of our commitment to our residents and our Facility. Once a strike is over, you may not be able to immediately return to your job. That is a fact.”

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. To the contrary, 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). Woodard 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, Woodard’s memo violated Section 8(a)(1) of the Act.

V. REFUSAL TO REINSTATE STRIKING EMPLOYEES

The complaint further alleges that the Harborview violated Section 8(a)(3) and (1) of the Act by refusing to reinstate Ingrid Williams and Kyria Miller when they returned to work the day after the strike ended. Harborview disagrees, insisting that Miller and Williams 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 ano. v. NLRB*, 805

F.3d 1131, 1136–1137 (D.C. Cir. 2015), citing *General Industries Employees Union, 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 (1972); *General Industries Employees Union*, 951 F.2d at 1311. In such instances, economic strikers are 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 (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; *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (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 such 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 Employees 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. Local 26, United Food and Commercial Workers Union*, 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; *General Industries Employees Union*, 951 F.2d at 1311.

In this case, there is a dearth of self-serving testimony by employees as to their reasons for participating in the strike. There is objective proof of motivation for the strike, however, in the statements by Union officials. Through public statements, media publications and its website, the Union conveyed the mixed message that it sought redress for Harborview’s unfair labor practices and economic reasons (e.g., better wages, health insurance coverage and pension plan). The Union followed up on these actions by filing unfair labor practice charges and informing employees that Board complaints would issue. 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”).

It is evident that meaningful collective bargaining was hamstrung at the outset by Harborview’s failure to provide responsive information prior to March 27 and then refusing to commence bargaining with Harborview’s chosen bargaining committee. While certainly not dispositive of the reasons for an

eventual strike nearly six months later, it set the tone for a ragged path of trickling information and resistance in providing relevant work schedule and health insurance related information.

Under Board law, the dual motivation of Harborview's employees to strike in order to improve their bargaining position and assail Harborview'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 Union 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; *General Industries Employees 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 Harborview a 10-day notice prior to the strike that employees would strike on September 16, 17, and 18. On September 18, the Union notified Harborview that the striking employees would return to work the next day. Under the circumstances, Harborview's refusal to reinstate the Ingrid Williams and Kyria Miller on September 19 violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. Harborview 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, Kevin Woodard, Gerry Mijares, Mariae Lapus and Julian Duran were supervisors of Harborview within the meaning of Section 2(11) the Act, and David Jasinski, Esq. was an agent within the meaning of Section 2(13) of the Act.

4. Harborview 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 daily work schedule information requested by the Union on May 21, 2014, and health insurance information requested on July 30, 2014, all of which was relevant and necessary to the Union's role as unit employees' representative.

5. Harborview violated Section 8(a)(1) of the Act in the following manner during early September:

(a) By distributing leaflets to employees warning that they could be replaced and lose their jobs if they went out on strike.

(b) By warning employees at a group meeting in early September that they would be neglecting Harborview's residents and

could lose their jobs if they went on strike.

6. By failing and refusing, on September 19, 2014, to immediately reinstate Ingrid Williams and Kyria Miller, two employees who engaged in an unfair labor practice strike and had made an unconditional offer to return to work, Harborview 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 Harborview 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, Harborview 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. Harborview shall also, within 14 days of the Board's Order, offer the two employees who engaged in an unfair labor practice strike in September 2014, and were not immediately reinstated on request, recalled 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. I shall also order Harborview to make whole the unfair labor practice strikers who were denied reinstatement 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 Harborview 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 Harborview to post a notice to all employees in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010).

Harborview shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Harborview 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 recommended⁶⁶

ORDER

The Respondent, Alaris Health at Harborview, Jersey 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 threatening any employee with job loss if they go on strike or engage in other union activities.

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

⁶⁶ 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.

(d) 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, confidential [employees], office clerical employees, cooks, 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 Ingrid Williams and Kyria Miller 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 Ingrid Williams and Kyria Miller 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 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 Jersey City, New Jersey, copies of the attached notice marked "Appendix"⁶⁷ 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 11, 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 threaten you with job loss if you go on strike or engage in any other union 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 Ingrid Williams and Kyria Miller 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.

WE WILL make Ingrid Williams and Kyria Miller whole for any loss of earnings and other benefits resulting from our refusal

⁶⁷ 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."

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 Ingrid Williams and Kyria Miller 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 HARBORVIEW

the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



The Administrative Law Judge's decision can be found at www.nlr.gov/case/22-CA-125023 or by using the QR code below. Alternatively, you can obtain a copy of the decision from