Sutter Health Center d/b/a Sutter Roseville Medical Center *and* Health Care Workers' Union Local 250, Service Employees International Union.[1]
Case 20–CA–30946–1

September 29, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On April 20, 2004, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent filed exceptions, a supporting brief, an answering brief, and a reply brief and the General Counsel filed an answering brief, a brief in support of the administrative law judge's decision, and cross-exceptions and a supporting brief.

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

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order as modified and as set forth in full below.[3]

This case involves, in relevant part, the reinstatement of strikers following a 1-day economic strike at the Respondent's health care institution on November 14, 2002.[4] The Union notified the Respondent by letter on November 1 of the impending strike and its duration, and, in the same letter, made an unconditional offer to return to work on November 15 on behalf of the strikers. The Respondent determined that it would continue operating during the strike using temporary replacements. The Respondent decided that it would schedule all replacements for a 5-day period and that it would close its cafeteria, in which certain unit employees regularly worked, for 5 days in connection with the strike. On November 6, the Respondent informed unit employees by letter that if there were a strike "[r]eplacement staff will provide services for the full 5 days to provide continuity in patient care." The Respondent confirmed this decision in a November 8 memo to employees. The strike proceeded as planned on November 14. At the end of the 1-day strike, the Respondent refused to reinstate the strikers until the announced 5-day period had elapsed.

The parties stipulated that the Respondent's replacement work force was composed of two groups: (1) temporary employees hired pursuant to 5-day contracts between the Respondent and temporary employment agencies;[5] and (2) in-house managers, supervisors, and nonunit employees of the Respondent.

The judge found, and we agree, that the Respondent violated Section 8(a)(1) by notifying certain unit employees that their reinstatement would be delayed for 4 days, and Section 8(a)(3) and (1) by delaying the reinstatement of certain strikers[6] and by closing its cafeteria and thereby delaying reinstatement of the strikers employed there. We agree with the judge that the Respondent failed to establish substantial and legitimate business justifications for its actions.[7]

[1] We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL–CIO effective July 25, 2005.

[2] 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 they are incorrect. *Standard Drywall 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.

[3] We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), as modified in *Excel Container*, 325 NLRB 17 (1997). Accordingly, we change the date in par. 2(c) of the judge's recommended Order from November 14 to 6, 2002, the date of the Respondent's first unfair labor practice.

We shall also modify the judge's recommended Order in accordance with our decision in *Ferguson Electric Co., Inc.,* 335 NLRB 142 (2001), and the notice to conform to *Ishikawa Gasket America*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

[4] All subsequent dates are in 2002.

[5] The Respondent was only able to obtain these employees' services by committing to employ them for a 5-day period.

[6] The complaint did not allege that the Respondent violated the Act with respect to strikers who were replaced by the employees hired from the temporary employment agencies.

[7] The judge found that the Respondent violated Sec. 8(a)(3) with respect to those economic strikers replaced by Respondent's in-house supervisory and managerial employees, but inadvertently failed to find that the Respondent also violated Sec. 8(a)(3) by delaying the reinstatement of strikers replaced by the Respondent's in-house, nonunit employees. The General Counsel has excepted to this omission. We find merit in the General Counsel's exception, and find that the Respondent also violated Sec. 8(a)(3) with respect to the Respondent's in-house, nonunit employees. We note that the judge gave no reason for distinguishing between the Respondent's in-house striker replacements, and we have found none.

The judge also found that the Respondent violated Sec. 8(a)(5) and (1) by failing to provide the Union with an opportunity to bargain respecting the terms and conditions of employment of nonunit replacements after they ceased to be lawful striker replacements, or, in other words, during the 4 days between the end of the strike and the date the Respondent set for the strikers' return. Both the General Counsel and the Respondent have excepted to this finding. We find it unnecessary to pass on this matter, or on the issues raised by our colleague in the following paragraph, because finding these 8(a)(5) violations would not materially affect the remedy in light of the finding of an 8(a)(3) violation and the associated make-whole remedy. Moreover, the General Counsel has not sought a monetary remedy as to the replacements.

In addition to finding that the Respondent violated Sec. 8(a)(3), Member Liebman would also find that the Respondent violated Sec. 8(a)(5) by unilaterally assigning unit work to nonunit employees, and

Under the circumstances of this case, we reject the Respondent's argument that "there is no principled reason" for not extending to the economic strike situation here the 5-day grace period for reinstating unfair labor practice strikers. *Drug Package Co.,* 228 NLRB 108, 113–114 (1977). In *Drug Package*, the Board reaffirmed the longstanding rule that the backpay period for unfair labor practice strikers commences 5 days after the date of the unconditional offer to return to work. The Board found that the 5-day period represents a reasonable accommodation between the employees' interest in a prompt return to work and the employer's interest in dealing with administrative issues involved in reinstating the strikers and an orderly transition. Id. We see no need to apply that rule here.

In the usual unfair labor practice strike situation, it may be necessary to discharge replacement workers before strikers return to work. And the Board believes that 5 days is a reasonable amount of time to do the necessary administrative and personnel tasks to accomplish this. By contrast, in the instant case, the Respondent needed only to return the replacements to their prestrike regular positions. Indeed, the Respondent had ample time to effectuate this result. The Respondent received notice on November 1 that the strikers would strike for 1 day and return to work on November 15, 2 weeks before the strikers offered to return. Thus, this case is a particularly good example of a situation where 5 extra days is not needed. In addition, as the judge found, the Union had previously engaged in 1-day strikes, in which the unconditional offer to return to work accompanied the strike notice, and the strikers returned to work as announced. Thus, the prestrike period was available to the Respondent to make necessary arrangements for a smooth transition upon the strikers' return. Moreover, the history of such strikes between the parties lessened the possibility, advanced by the Respondent, that it would be faced with uncertainties as to the strikers' return to work. We find, then, that there is no showing of a need for a further period of time for such purposes.[8]

ORDER

The National Labor Relations Board orders that the Respondent, Sutter Health Care d/b/a Sutter Roseville Medical Center, Roseville, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in Health Care Workers' Union, Local 250, Service Employees International Union and discouraging employees' exercise of their right to engage in protected concerted activity by delaying the reinstatement of certain economic strikers after the strike had ended and the strikers had unconditionally offered to return to work.

(b) Notifying employees who were not to be replaced by temporary employees supplied by employment agencies with a minimum 5-day employment period before a strike that the strikers' reinstatement would be delayed for 4 days without legitimate and substantial business justification to do so.

(c) Closing or keeping closed portions of the facility which employed unit employees following a strike without legitimate and substantial business justification to do so, thereby denying reinstatement to economic strikers after the strike had ended and the strikers had unconditionally offered to return to work.

(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) Make whole the striking employees who unconditionally offered to return to work on November 15, 2002, at the end of the strike or thereafter, and whose delay in reinstatement was without legitimate and substantial business justification or who were not reinstated immediately after the strike because portions of the Respondent's facility were closed, for any and all losses incurred due to the denial of reinstatement to their normal shifts in the 4-day period November 15 through 18, 2002, with interest.

(b) 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.

unilaterally deciding to keep its cafeteria closed, during the period when the striking employees should have been reinstated.

[8] Member Schaumber would apply the *Drug Package* 5-day grace period in this case and in other cases involving economic strikes with temporary replacements. In his view, the reasons set out above for finding that the grace period is not applicable under the circumstances of this case are not determinative. As the Board noted in *Drug Package*, a primary purpose of setting a specific grace period is to avoid "compel[ling] the parties in each case to litigate, and the Board to decide, how long a reinstatement period would be appropriate. In our judgment the costs and uncertainties entailed in such litigation would far outweigh the benefit to be derived." 228 NLRB at 114. Member Schaumber sees no reason not to apply that principle here. In the absence of a Board majority to extend the *Drug Package* rule, however, he concurs with his colleagues in adopting the judge's finding of the 8(a)(3) violation.

(c) Within 14 days after service by the Region, post at its Roseville, California facility copies of the attached notice marked "Appendix".[9] Copies of the notice on forms provided by the Regional Director for Region 20, in English and other such languages as the Regional Director determines are necessary to fully communicate with employees, 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. 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 November 6, 2002.

(d) 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.

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 discourage membership in Health Care Workers' Union Local 250, Service Employees International Union and/or discourage employees' exercise of their right to engage in protected concerted activity by delaying the reinstatement of certain economic strikers for 4 days after the economic strike had ended and the strikers had unconditionally offered to return to work.

WE WILL NOT notify or inform unit employees who were not to be replaced during an economic strike by temporary employees supplied by employment agencies with a minimum 5-day employment period before an economic strike that strikers' reinstatement would be delayed for 4 days without legitimate and substantial business justification to do so.

WE WILL NOT close or keep closed portions of the facility which employ unit employees following an economic strike without legitimate and substantial business justification to do so, thereby denying reinstatement to economic strikers after the economic strike had ended and the strikers had unconditionally offered to return to work.

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 make whole the striking employees who unconditionally offered to return to work on November 15, 2002, at the end of the economic strike, and whose delay in reinstatement was without legitimate and substantial business justification or who were not immediately reinstated after the economic strike because portions of our facility were closed, for any and all losses incurred due to the denial of reinstatement of those employees to their normal shifts in the 4-day period November 15 through 18, 2002, with interest.

SUTTER HEALTH CENTERS, SUTTER ROSEVILLE MEDICAL CENTER

Jill H. Coffman, Esq., and *Micah Berul, Esq.,* for the General Counsel.

William Franklin Birchfield, Esq. (O'Melveny & Meyers, LLP), of San Francisco, California, for the Respondent.

William A. Sokol, Esq. and *Brooke Pierman, Esq. (Weinburg, Roger & Rosenfeld)*, of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge: I heard the above-captioned case in trial in Sacramento, California, on February 5 and 6, 2004, pursuant to a complaint and notice of hearing issued by the Regional Director for Region 20 of the National Labor Relations Board (the Board), on November 25, 2003. The complaint is based on a charge filed by Health Care Workers' Union Local 250, Service Employees International Union, AFL–CIO (the Charging Party or the Union) against Sutter Health Center d/b/a Sutter Roseville Medical Center (the Respondent) on November 19, 2002, and docketed as Case 20–CA–30946–1.

[9] 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."

The complaint, as amended at the hearing, alleges the Respondent, for the period November 15 through 18, 2002, failed and refused to reinstate economic strikers to their former positions of employment while continuing to operate its business using managers, supervisors, and nonunit employees to perform unit work and, further, discontinued certain services and closed certain areas of its facilities in which unit employees regularly performed unit work. The conduct described, the complaint alleges, was undertaken because the employees engaged in a strike and in order to discourage employees from engaging in protected concerted activities, thereby violating Section 8(a)(3) and (1) of the Act. The complaint further alleges that the Respondent wrongfully notified employees before the strike that reinstatement would be so delayed violating Section 8(a)(1) of the Act and finally alleges that the Respondent failed to provide the Union with an opportunity to bargain respecting the terms and conditions of employment of the individuals working in the unit in the days after the strike violating Section 8(a)(5) and (1) of the Act.

The Respondent essentially admits the conduct alleged, but denies that it took the actions described because of the employees' protected and or union activities, but rather did so under the press of business necessity. The Respondent further alleges additional defenses.

FINDINGS OF FACT

Upon the entire record herein, including helpful briefs from the Respondent and the General Counsel, I make the following findings of fact.[1]

I. JURISDICTION

The Respondent, a California corporation, operates various health care facilities. Its Sutter Sacramento/Sierra Region includes five acute care hospitals and ancillary facilities including an acute care hospital in Roseville, California (the Hospital). During the calendar year ending December 31, 2002, the Respondent in operating its health care facilities derived gross revenues in excess of $250,000 and purchased and received at the Hospital goods and materials valued in excess of $5000 from points located outside the State of California.

Based on the above, there is no dispute and I find the Respondent is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

II. LABOR ORGANIZATION

The record establishes, there is no dispute, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Hospital is one of an affiliated network of hospitals and is within the Respondent's Sacramento/Sierra Region. The Hospital is a major acute care institution with a substantial employee complement. The Union is a labor organization, which represents, inter alia, certain health care employees. The Respondent at all relevant times has recognized the Union as the exclusive representative of hospital employees in the following unit (the unit):[2]

> All Environmental Service Aides, Food Service Assistants, Laundry Helpers, Home Health Aides, Respiratory Assistants, Service Partners, Central Distribution Technicians, Grill Persons, Lead EVS Service Aides, Rehab Aides, Sterile Processing Technicians, Storekeepers, Nurse Assistant/CNAs, Radiology Assistants, Anesthesia Technicians, Cooks, ER Technicians, Monitor Technicians, OBF Technicians, Unit Secretaries, US/NAs, EEG Technicians, Surgical Technicians, LVNs, Echo Technicians, Radiology Technologists, Respiratory Care Practitioners, Mammo Technologists, Ultrasound Technologists, CV/Angio Technologists, Nuclear Medicine Technologists, CV/Radiology Technologists, Ultrasound Noninvasive Vascular Technologists, excluding all executive, administrative, professional and office clerical employees, employees represented by other collective bargaining representatives recognized by the Respondent and supervisors as defined the National Labor Relations Act.

The parties stipulated the unit is appropriate for purposes of collective bargaining within the meaning of Section 9(a) of the Act and I so find.

The unit was covered by a collective-bargaining agreement between the Hospital and the Union effective by its terms from July 12, 1999, through November 1, 2002. That agreement included, inter alia, the following language:

> Article 5. Work Stoppage
>
> There shall be no strike, slowdown, or other stoppage of work by Union employees and no lockout by the Employer during the life of this Agreement. In the event of a strike or picket line called by another Union, the Union recognizes its obligations to maintain adequate and customary service to the patients.

B. Events

1. Prestrike preparations

In the fall of 2002, the parties were in negotiations for a new collective-bargaining agreement for the unit. On November 1, 2002, the old contract expired, but the parties in bargaining agreed to extend it through November 13.[3] On November 1, the Union filed with the Federal Mediation and Conciliation Service (FMCS) with a copy to the Hospital a document titled

[1] As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

The General Counsel's motion to strike portions of the Respondent's brief, opposed by the Respondent, is denied.

[2] The parties stipulated that the bargaining unit described in the contract was appropriate and amended both the complaint and the answer to conform thereto.

[3] All dates hereinafter refer to 2002, unless otherwise specified.

"Notice of Intent to Strike," which provided official notice of the Union's intent to engage in a strike at the Hospital respecting the unit as required by Section 8(g) of the Act. The filing set November 14 at 6 a.m. as the time for the commencement of strike activity.

The Union also sent the Hospital a letter dated November 1, with copy to the FMCS, with the following body:

> All employees participating in the strike and withdrawal of labor at Sutter Roseville Medical Center scheduled to begin at 6:00 AM on Thursday, November 14, 2002, hereby unconditionally offer to return to work at or after 6:00 AM on Friday, November 15, 2002.
>
> This request is made by the Health Care Workers Union, Local 250 on behalf of all employees it represents as well as all employees who honor its picket lines at Sutter Roseville Medical Center on the above date.

In contemplation of the work stoppage, the Respondent determined to keep its facility open[4] and in operation during the strike by the use of temporary replacements. The Respondent ascertained how many unit employees would continue to work during the strike. To obtain temporary employees to fill strike vacancies it contacted employee agencies to contract for temporary unit employees to work during the announced strike. There is no dispute that the Respondent was able to obtain temporary unit replacements from these agencies only by committing to employ the temporary employees for a 5-day period, i.e., from November 14 through 18. Further, the temporary employees contracted for were not sufficient to fulfill the Respondent's strike staffing requirements. In order to satisfy this projected staffing shortfall, the Respondent also arranged for managers and supervisors from the Hospital and other affiliated hospitals to work at the Hospital as temporary unit employees. Finally it was determined to close the hospital cafeteria and limit food service to that necessary for patient needs.

The Hospital made a considered determination to schedule the temporary staffing of all temporary unit employees, including both the employment agency supplied temporary employees and the supervisory and managerial transferees, for a 5-day period commencing on November 14, at 6 a.m. and ending on November 19, at 6 a.m. On November 6, the Respondent notified its employees by memo of its position on the progress of bargaining and the upcoming strike and asserted, inter alia:

> In the unfortunate event that a union-sponsored strike occurs, you undoubtedly understand our need to ensure that our patients continue to receive high quality care. We have made arrangements for replacement staff for a 5-day period from 6 a.m., *Thursday, November 14, until 6 a.m. on Tuesday, November 19.* While we understand that the SEIU proposed to strike for just one day, unfortunately we had no reasonable alternative in securing reliable and sufficient replacement workers for such a limited timeframe. Replacement staff will provide services for the full 5 days to provide continuity in patient care. [Emphasis in original.]

The Hospital confirmed the quoted scheduling of the 5-day minimum employment of all unit replacement staff in a November 8 memo to unit employees.

2. Final prestrike negotiations

Negotiations took place on November 13 and into the morning hours of November 14 between the Respondent and the Union with the assistance of a Federal mediator from FMCS. The bargaining session evolved into shuttle bargaining in which the respondent and the union negotiating teams stayed apart and met separately with Mediator Rudy Medina, who went back and forth between the groups.

The session was lengthy and after a full day and well into the evening, with the parties well aware that the extended contract's expiration and the scheduled strike were but a few hours away, Mediator Rudy Medina met together with the Union's negotiator, John Borsos, and the Respondent's negotiators, Thomas Luevano and Tony Burg, then the assistant administrator of the Respondent's support services.

Burg testified that the first such meeting lasted perhaps an hour. During the session, he recalled, Tom Luevano asked the mediator to set additional dates for bargaining. The mediator did not have a date available until November 26 and 27. Burg testified as to what happened next:

> And then [Mediator Rudy Medina] said, was that okay with everyone, and John Borsos and Tom [Luevano] and myself said, Yes, that was fine. And then Tom said, well, is the contract extended then until that time? And everybody, including John Borsos and Rudy and myself said, Yes. Yes.
>
> Q. Did Mr. Borsos say anything else about extending the contract other than Yes?
>
> A. Well, just that he acknowledged that it was extended to that time.
>
> Q. Did he say anything about making any exceptions for the strike the next day?
>
> A. Not that I recall.

Luevano corroborated Burg:

> The discussion centered around some of the issues that John [Borsos] had proposed and the extension of the agreement based upon the availability of the federal mediator. And he was checking his calendar. And he had indicated that the earliest that he could meet was the 26th and the 27th.
>
> Our response to—our request of John was at the time was—at that time was, okay, well, we don't have anything in writing, but conceptually let's, you know, it doesn't seem like we're all that far off. Maybe we can do something. What about an extension to the contract to the 27th? And he said that would be fine.

Negotiations continued into the morning of November 14. No final agreement was reached and the parties ended the session. Luevano testified:

> So my recommendation at this point is that we just call it a night. We'll continue negotiating on the 26th and the 27th.

[4] The Respondent gave no consideration to closing the facility during the strike. I notice administratively that an acute care hospital with a normal patient census would be very unlikely to undertake the substantial task of transferring its patients to other institutions, if adequate patient care could be maintained at the facility.

> And Tony Burg agreed. And as we were leaving—we were with the federal mediator in his room—as we were leaving, I had said to John the conditions of the contract remain in place. And he said, Yes. And then I made references to several conditions such as the dues check-off. . . . And I gave examples of that to John, and one of them was the dues check-off. That we would not suspend the dues check-off during this period of time. And he said, Yes. We left.

Burg did not recall discussions of the contract extension beyond the initial discussion described above.

The Union's lead negotiator, John Borsos, denied vociferously that any agreement to extend the contract had been entered into during the November 13–14 negotiations and further testified that he had not heard the Respondent's expressed position that the contract had been extended in bargaining until learning, long after the strike, that it was part of the Respondent's defense to the instant unfair labor practice charge allegations.

The two respondent negotiators testified they rejoined their committees after the final meeting with the union negotiator and the mdiator and informed their colleagues that they believed the contract had been extended. They testified they were uncertain respecting whether or not the strike would go forward, but determined it was prudent to assume it would.

The union negotiation team member Senior Labor Relations Representative John Simmons testified that Borsos did not announce to the team that the contract had been extended either when he rejoined the union negotiating team after the negotiations ended for that day or at any other time. Simmons testified that at the end of the session the mediator came to the Union's caucus area, communicated a list of possible employer concessions and asked, if those concessions were made, would the Union call off its strike. Simmons added that the union team rejected the items on offer and that no agreement was ever reached.

The General Counsel also introduced a written agreement dated November 13, which contained broad principles rather than specific contract provisions and included a contract extension with a no-strike period extending to November 26. The document was signed by Thomas Luevano on behalf of the Respondent, but the signature line for the Union bears no signature.

There is no evidence that either side communicated to the nonnegotiating members of their colleagues preparing for the strike, the press, or the public generally, that the strike had been called off or that an agreement to call off the strike was in place.

3. The strike and its aftermath

At the appointed time the Union struck and approximately 400 of the approximately 450 unit employees withheld their services and established a picket line. The Hospital maintained its operations during the strike in accordance with its plans utilizing as unit employees: contract employees from temporary employment agencies; cross-over employees, managers, hospital supervisors, and other nonunit employees as well as managers and supervisors from other Sutter facilities. The Hospital also closed its cafeteria, but continued food service for its patients.

At the end of the 24-hour strike, striking employees attempted to return to work. They were not allowed entrance to the Hospital, but rather were told that arrangements to staff the institution without them had been made for a 5-day period and that, accordingly, they would not be allowed return to work until 4 days after the strike had passed. This process was repeated to a limited degree on the following days. The Hospital held to its announced plan, continuing to staff unit positions with the individuals who had worked during the 1-day strike for an additional 4 days. The striking unit employees were not allowed return to work until the 4-day period ended on the morning of November 19. At that time the employees returned to work in accordance with their normal shift schedules and the Hospital discontinued its substitute staffing arrangements.[5]

No contention was made to the Union, to striking employees, nor to the public by the Respondent's agents that the strike was in contravention of the no-strike provisions of an extended contract and was therefore illegal and the actions of the strikers unprotected. The Union filed the instant charge on November 19.

The parties met for additional negotiations on November 26. Luevano testified he privately raised with the mediator his view that the contract extension agreed upon on November 13 should have barred the November 14 strike. The mediator in Luevano's recollection advised him: "that it would serve no useful purpose to bring this up, given the contentious nature of the then-existing negotiations and the fact that we had really not made much progress [in negotiations]." In consequence, Luevano testified he did not raise the matter with the Union at any time. The Hospital and the Union thereafter reached a new agreement on a new collective-bargaining agreement, but remain in disagreement respecting the allegations involved herein.

C. Analysis and Conclusions

1. The Respondent's argument the strike was unprotected activity

The Respondent argues that the old contract was extended in bargaining and therefore the strike was in violation of the contract's no-strike provisions and the employees' actions were unprotected. The Board holds strikes in such circumstances unprotected and termination of employees for such unprotected conduct permissible. *Granite Construction Co.*, 330 NLRB 205 (1999).

The General Counsel and the Union contest the assertion that the contract was extended. Further, in response to questioning from the bench at the trials end, the General Counsel argues, even assuming the strike was unprotected, the Respondent condoned the strike activity and, under longstanding Board law, is now foreclosed to assert the employees activity was unprotected under the doctrine of condonation citing, inter alia, *General Clothing Corp*. 285 NLRB 596 (1987). The Respondent

[5] The parties stipulated that the Hospital employed as temporary unit replacements: 83 contract employees on November 14—the day of the strike; 90 contract employees on November 15; 62 contract employees on November 16; 66 contract employees on November 17; and 71 contract employees on November 18.

argues condonation is inapplicable to the facts of the instant case.

The condonation issue is appropriately considered initially for, if the Board's condonation doctrine is applicable to the conduct as issue, it will be unnecessary to further consider the protected or unprotected nature of the work stoppage.

A review of the cases is in order. The Board with court approval has established the principle that:

> [W]here employees engage in concerted activity which, although otherwise lawful and protected, is rendered unprotected by some improper aspect of the employees conduct, such as a breach of a no-strike clause, but the employer forgives or condones the strike, he will thereafter be estopped from asserting the unlawful nature of the strike as grounds for discharge. [*Jones & McKnight, Inc. v. NLRB*, 445 F.2d 97, 102 (7th Cir. 1971).]

In *Davis & Burton Contractors*, 261 NLRB 728 (1982), the Board held that, when an employer satisfied a picketing employee's demands so that the employee ceased picketing and returned to work without incident for a period of days or weeks until an economic layoff, the employer had condoned the picketing and it could not then assert the unprotected conduct as a basis for refusing to reemploy the employee.

The Board and the courts have differed from time to time respecting what constitutes condonation in given situations. The Board reviewed its condonation doctrine in *General Electric Co.*, 292 NLRB 843 (1989). In *White Oak Coal Co*., 295 NLRB 567 (1989), the Board in a scholarly analysis of the history and development of the cases held, in conformity with various circuit courts of appeals decisions, that where an employee's relationship with an employer has not been terminated by the employer at the time of condonation, the employers simple offer of reemployment may be sufficient to condone the conduct at issue.

The Respondent argues that the General Counsel bears the burden of proving condonation and failed to offer any evidence relating to the issue. The record is clear, however, that the Respondent treated the striking employees on their offer to return to work precisely as it had earlier planned and announced it would, i.e., reinstate them following a 5-day hiatus. And further, the actions of the Respondent on November 26, when Luevano agreed with the mediator not to raise the issue of the contract extension/no-strike clause with the Union and in fact did not raise the matter, establish that the Respondent had made a decision to condone the activity at least through that date.

Based on the above, I reject the Respondent's argument that the record does not show condonation and sustain the General Counsel's argument that the Respondent, after accepting the reinstatement offers of the employees, was estopped to assert that the strike was unprotected as a breach of the no-strike clause of the old contract, which had been extended by agreement of the parties in bargaining before the strike. I therefore find it unnecessary to determine if in fact the contract was extended in the bargaining of November 13–14.[6] The employees' 1-day strike shall therefore be considered protected conduct for purposes of the legal analysis herein.

2. The issue of the timing of striker reinstatement

The employees through the Union gave timely notice of a 24-hour or single day strike and accompanied it with a written unconditional offer to return to work at the end of the strike. In the event, employees were denied reinstatement for a 4-day period following the strike.

At the conclusion of this period, unreinstated strikers were offered reinstatement. The striking employees who were denied immediate reinstatement at the end of the strike fall into three categories, although all were offered reinstatement at the same time.[7]

One group of strikers comprises those who had been replaced by the employment agency supplied temporaries who were supplied under 5-day contracts. These employees were reinstated as the temporary agency employees concluded their employment contracts. A second group of employees was replaced by nonagency supplied staffing, which included managers and supervisors from the Hospital and other Sutter Hospitals. These employees were reinstated when the nonagency provided staff was released. A third group of employees was denied reinstatement because the employees worked as part of the cafeteria food service which was not utilized when the cafeteria was closed during the 5-day period at issue and who were offered reinstatement as that service resumed. The specifics and identification of particular employees within the groups as well as the specifics necessary to quantify a remedy for the individuals within the groups was reserved by the parties for the compliance stage of the proceedings, if necessary.

a. The arguments of the parties

The General Counsel's complaint alleges that the Respondent's closure of the cafeteria was improper and its denial of immediate reinstatement at the strike's end to the second and third groups of employees set forth above violated the Act. The General Counsel advances two theories of violation: (1) the closure and delayed reinstatement was inherently destructive of

[6] Were it necessary to determine if the contract had been extended by agreement of the negotiators in the November 13–14 bargaining, on this record I would find that mutual agreement to extend the no-strike provisions of the contract had not in fact been reached. While it seems clear that the parties discussed a conceptual agreement or agreement in principal that would have included extending the contract to the next negotiation session to be held on November 26, I find it never was consummated or, in the alternative, any agreement did not survive the continued negotiations of that session and there was not a mutual agreement at the conclusion of the negotiation session in the early hours of November 14. Such a finding would rest largely on the uncontested testimony respecting the events and the written agreement, unsigned by the Union, as described supra. The respondent agents' views, clearly tentative and doubtful respecting the implications for the strike, were, I find, at best based on a misapprehension that an agreement had occurred which extended the no-strike portion of the contract. To the extent the respondent agents recall an explicit adoption of contract extension including the no-strike provision by the Union at the sessions' conclusion, I would find they were mistaken.

[7] Since the respondent employees unit employees on a multishift basis, employees did not all physically return to work at the 6 a.m. hour of the end of the 5-day period. Rather employees from that time forward apparently resumed their normal schedules.

employee rights and (2) the Respondent's actions were illegally motivated to punish striking employees and to dissuade employees from striking in future. The General Counsel made it clear that the complaint did not allege and the General Counsel does not argue that the delay of reinstatement of the first group of employees, i.e., the employees replaced by the employee agency supplied employees, was improper.[8]

The Respondent makes several arguments. First, it argues that there was no Board cognizable harm done to strikers because the Board has long held that an employer has a 5–day grace period for reinstating strikers and that Board has "created a bright-line rule that reinstatement is "immediate" as long as it occurs within this administrative period." (R. Br. at 13.) Second, the Respondent argues both that it had no improper motivation in taking the action that it did and, rather, that it acted in response to substantial and legitimate business reasons for reinstating the strikes when it did and for closing the cafeteria during the period at issue.

b. Analysis and conclusions

The various arguments of the parties are best considered separately as follows.

(1) The administrative grace period argument

The Respondent quotes the following Board language in *Drug Package*, *Co.,* 228 NLRB 108 (1977), 113:

Traditionally, the Board has commenced backpay 5 days after the striker's offer to return. We believe that the 5-day period is justified as providing a reasonable period of time for employers to accomplish those administrative tasks necessary to the orderly reinstatement of the unfair labor practice strikers and to accord some consideration to the replacement employees who must be terminated.

The Board's Compliance Casehandling Manual states at Section 10527.4, Reinstatement Rights of Strikers:

> Employees engaged in strikes have certain reinstatement rights on their unconditional application to return to work.
>
> Unfair labor practice strikers are entitled to full reinstatement on unconditional application, even if the employer must dismiss other employees hired to replace them during the unfair labor practice strike. [footnote omitted.]
>
> Generally, the Board will order the respondent to reinstate unfair labor practice strikers on application and to make them whole for any loss of pay resulting from the failure to reinstate them within 5 days after their application. [12]

[8] The General Counsel concedes that the Respondent had a substantial and legitimate business justification, i.e. the minimum 5-day service time for employment agency supplied temporary unit employees, for delaying the reinstatement of those unit employees who had been replaced by the 5-day temporaries and who were reinstated at the end of those employees service.

[12] See, for example, *Drug Package Co*., 228 NLRB 108, 113–114 (1977), enfd. in part and remanded in part 570 F.2d 1340 (8th Cir. 1978).

The administrative law judge in *Beaird Industries*, 313 NLRB 735, 738 (1994), referred to the "Board's 5-day rule" in finding a 4-day delay in the reinstatement of unfair labor practice strikers reasonable. The Board sustained the judge.

The General Counsel argues that the 5-day period in the cases cited by the Respondent applies only to unfair labor practice strikers and not economic strikers both because the circumstances relevant to economic and unfair labor practice strikers are significantly different and because the Board cases simply do not apply the 5-day rule to economic strikers. The Respondent disputes this argument.

The Respondent seems to be correct that the Board has not made any black-letter pronouncement that the 5-day rule does not apply to economic strikers. There are no cases however applying the rule to such situations and the Board has made indirect statements regarding the rule's limited application. Thus, in *National Football League,* 309 NLRB 78, 83 fn. 27 (1992), Member Oviatt notes with some bewilderment the implicit holding of the panel majority that the 5-day rule does not apply to economic strikers. In *Le Corte ECM, Inc*., 322 NLRB 137, 137 fn. 2 (1996), the Board alludes to the distinction and the fact that the 5-day rule does not apply to economic strikers.

Administrative law Judges are bound to follow Board law. Board doctrine once ascertained is to be applied irrespective of the force or directness with which the doctrine is stated or described by the Board. This being so, I find the cases cited above bind me and I find that there is no 5-day rule for the reinstatement of economic strikers. Since the instant case involves the reinstatement rights of economic strikers, the 5-day rule of *Drug Package Co.,* supra, is inapplicable here.

(2) The illegal motivation argument

The General Counsel argues that the Respondent delayed reinstatement in a desire to and as part of a plan to punish employees. The Government argues the Respondent revealed its illegal motivation through its agent, Thomas Luevano, when he spoke to the Union's agent, John Borsos, by telephone on November 14. Borsos testified:

> Luevano represented that he was going to recommend a lock out not happen, but that he represented that in discussions with his side, there were people who wanted to make sure that people were not rewarded and were penalized for striking, the lock out was meant as a way to teach a lesson to employees.

Luevano denied that the conversation, or any other such conversation either in person or by telephone, ever occurred.

Even without resolving the conflict in testimony, it is clear that any statement made during the 1-day strike about the Respondent's deliberations respecting a future "lockout" could not be directed to or describe the Respondent's determination to

delay the reinstatement of the strikers until 5 days after the strike's commencement. Indeed, that decision had been made and announced by the Respondent to unit employees well before the strike started. I find the evidence offered by the Government simply does not support the argument advanced.

Considering the remaining record evidence on the question, it is clear the Respondent viewed earlier 1-day strikes at the Hospital and other of its affiliates by the Union as gravely inconvenient and, it may at least be argued, disturbingly effective in that the brief period of employment loss borne by the strikers was far outweighed by the disproportionate burdens and costs the Respondent experienced in having to deal with such a 1-day work stoppage. I do not find that fact, standing alone, or as here met by the denials of the Respondent's witness, is sufficient to sustain the General Counsel's illegal motivation argument. The Government bears the burden of proof on the illegal motivation allegation and has not sustained that burden. I shall therefore reject the Government's theory of a violation dependent upon it.

(3) The Respondent's claim of substantial and legitimate business justification

In *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375, 378 (1967), the Supreme Court held that if, after conclusion of a strike, the employer

> refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by [Sections] 7 and 13 of the Act. . . . Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to "legitimate and substantial business justifications," he is guilty of an unfair labor practice. The burden of proving justification is on the employer.

The Court in *Fleetwood* relied on its decision in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967), where it held that

> once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is on the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

In reevaluating the rights of economic strikers in light of *Fleetwood* and *Great Dane*, the Board in *Laidlaw Corp.*, 171 NLRB 1366, 1369 (1968), stated that:

> The underlying principle in both *Fleetwood* and *Great Dane*, supra, is that certain employer conduct, standing alone, is so inherently destructive of employee rights that evidence of specific antiunion motivation is not needed.

The Respondent emphasizes the context of the events under examination. First, the Respondent notes that the Hospital is a nonprofit acute care hospital. The Act contains special provisions narrowly applicable to health care institutions, such as, but not limited to, Section 8(g), which provide additional regulation of work stoppages in recognition of the special burdens and responsibilities of an employer in the health care setting to insure continuity of patient care.

The Respondent notes that its preparations to operate during the strike must be viewed in this context. More particularly Respondent argues initially that in making its preparations it could not be certain when the strike would end. The Respondent cites a General Counsel Advice Memo in *Sidney Square Convalescent Ctr.*, Case 6–CA–27897, 1996 WL 789042 at *2 (NLRB. GC) (Aug. 30, 1996), in which the General Counsel determined not to issue a complaint against an employer who permanently replaced employees who simultaneously with the strike notice offered unconditionally to return to work 24 hours after the strikes commencement. The General Counsel concluded a pre-strike return to work offer is not unconditional and does not bind the Union and therefore could not be relied on by the employer. The cited General Counsel memorandum was a change from an earlier memo: *Redstone Highlands Health Care Center, Inc*., 1995 WL 902238 at *2, (N.L.R.B. G.C.) (Nov. 7, 1995), which found a prestrike offer to be unconditional.

The views of the General Counsel are those of the prosecutor and do not bind the Board. Indeed, as the two cited memos indicate, the General Counsel may take changing positions respecting violations of the Act. While the legal analysis is an interesting one, I find that the question of the legally binding nature of the Union's pre-strike unconditional offer on behalf of the striking employees to return to work after 24 hours is largely irrelevant to the instant case. This is so because of the substantial history of 1-day strikes conducted by the Union against the Hospital or its affiliates. The record contains evidence of both the Hospital and its affiliated institutions history of 1-day strikes. A history well known to all the parties. In each previous 24-hour strike notice situation the Union and the striking employees had in fact limited their strike to the announced 1-day period.

Further, there is no evidence that the Respondent during the instant events in fact doubted or sought additional assurance from the Union that the announced 24-hour strike would be any different from earlier 1-day stoppages. Given the record as a whole, the history of stoppages and the conduct of the parties during the instant strike, I find the Respondent's argument in this proceeding that it needed to take prudent precautions in light of the nonbinding nature of the Union's statement that the strike would only be 1-day long and its time specific unconditional offer to return to work after only 1 day of striking is of little merit.

The General Counsel, as discussed supra, has conceded the Respondent had a legitimate business justification for retaining the employment agency-supplied temporary employees for the period for which they were contracted, i.e., the 5-day minimum. The Respondent cites a line of Board cases finding contractual commitments for replacement employees to be legitimate and substantial justification for delaying reinstatement of strikers. See, e.g., *AMI/HTI Tarzana Encino Joint Venture,* 332 NLRB 914 (2000); *Pacific Mutual Door*, 278 NLRB 854 (1986). Presumably, these are the cases which guided the government on the issue as well.

The Respondent, arguing from this line of cases, proposes that the entire replacement staff, including the Respondent's

supervisors and managers, should be treated as a unity and the Respondent therefore be found justified to end their service as a unity when the employment agency supplied temporary employees' terms of service ended. To do otherwise, argues the Respondent, would split the workforce into categories, an artificial bifurcation which would defeat the simplicity of the *AMI/HTI Tarzana–Pacific Mutual Door* doctrine.

I have considered the Respondent's argument for a unified or singular approach to an employer's temporary employee staffing and to striker reinstatement and do not find it persuasive. Without considering here the fact-based business considerations, which may be considered in such a setting, I simply do not find Board authority for the proposition asserted. The cited cases do not address the issue. I shall therefore reject the Respondent's assertion of a case established right to delay the replacement of any temporary workers until all could be replaced at once.

The Respondent, however, additionally argues that it had substantial business concerns respecting reinstating strikers ability to work with the employment agency-supplied temporary employees and the burdens of making changes in those employees context of work. In these regards the Respondent notes the statements of Administrative Law Judge Cracraft in *AMI/HTI Tarzana Encino Joint Venture,* supra, 332 NLRB at 918:

> Given the contours of the replacement situation, Respondent had substantial business reasons to require that nonstriking employees and contract employees work together during the entire 4-day period. The nonstriking employees were familiar with the operations and able to provide uniformity and stability in coordinating Staffing Agency care for the patients. Insertion of striking employees into the equation during the 4-day period would have created further learning curves for the replacement employees.

The Respondent argues further on brief at 19–20, quoting from the testimony of Thomas R. Luevano, chief labor employee relations officer:

> The General Counsel's argument ignores the real costs of keeping an acute-care hospital like [the Hospital] open in the midst of a strike. For example,
>
> > [t]o get [a] third party vendor to agree to staff the facility where they already have staff at other facilities and cancel these people out, and then bring them to yours is difficult enough. Then to arrange schedules for managers and supervisors to be back filled at other facilities is difficult enough. Then you have the on-sight administrative team who responsibility it is to insure that the services of this hospital remain in placed with little or no disruption is difficult enough. To do that and turn over an entire work force in one day is irresponsible, and it is impractical. [Tr. at 105–106.]

Respecting the latter argument that it would have been difficult and irresponsible to "turn over the entire work force in one day," I find the Respondent has not backed up its argument with persuasive record evidence. Rather there is evidence that the Hospital successfully reinstated bargaining unit strikers "in one day" after the earlier 1-day strike in the parties previous bargaining cycle. And in the events in controversy, the Respondent did not stage or spread the return of the strikers over a period of days. Rather the Respondent simply delayed reinstating all of the strikers for a period of days and then reinstated the "entire work force in one day." Thus, the reinstatement of employees was not done gradually or more gradually than would have occurred if they had been reinstated at the end of of the strike.[9]

Nor do I find persuasive the Respondent's arguments respecting the difficulty in arranging the schedules of both Hospital and affiliated institution supervisors and managers "to be back filled at other facilities." While any scheduling of staffing of other facility based employees will present complications, the complications involved are not obviously different in kind or degree when the Hospital schedules either a single day or 5 days of employment at the Hospital for such individuals.

Turning to the Respondent's position that it was justified in keeping the replacement crew together to preserve continuity, familiarity, uniformity, and stability of the temporary employment agency-supplied staff that were committed to work the 5-day period, there is an element of logic to the Respondent's argument. I find it somewhat undermined however by the fact that reinstating the regular employees immediately following the strike would also allow the out of facility supervisors and managers doing unit work during the strike to be replaced. That action itself would provide and restore continuity of care since the regular staff—after only a days absence during the 24-hour strike—would need confront no "learning curve" of patient care service provision, whereas the out-of-facility transferees from other affiliates surely would not have become completely familiar with the positions they had at that time filled for but a single day.[10]

The Respondent's arguments in these latter regards are not frivolous and are taken seriously. They must however be weighed and considered in the context of the specifics of the instant case which includes both the strike experience of the parties at the Hospital as well as their experiences at the other affiliated institutions—all of which Hospital decision makers

[9] Actually, if the strikers had been reinstated at the strike's end, the process would have been gradual. This is so because some strikers' reinstatements would have been delayed until the 5-day temporary employees finished their minimum terms of service.

[10] The Respondent also argues that it feared reinstating the strikers into the workforce alongside the temporary replacements, comprising employment agency-supplied temporaries, cross-over employees and supervisory/managerial fill-ins, would engender hostility which would adversely affect patient care and the smooth running of the Hospital. While these fears can be important and actions to deal with them prudent where they are reasonably anticipated, I reject the Respondent's claim here on the facts of the case. The record simply does not provide any basis for taking such actions given the history of the parties. As noted supra, the parties had a history of 1-day strikes at the Hospital and other affiliated institutions. The record shows no significant evidence of the type of animosity or difficulty that the Respondent argues informed its decision to delay reinstating some strikers. Further the decision could not have turned on any events occurring during the instant strike, because the decision to delay striker reinstatement was made and announced well before the strike commenced.

were well aware. Considering the Respondent's argued legitimate business justifications balanced against the protected employee right to engage in a concerted work stoppage on the facts of the instant case, I find that the Respondent's reasons are insufficient. As noted supra, I have rejected or heavily discounted many, although not all, of the Respondent's arguments. The Respondent's experience in the previous strike at the Hospital establishes that it was able to immediately reinstate employees without, on this record at least, suffering diminution of patient care or experiencing the types of difficulties advanced as horribles by the Respondent to be provided for by delaying strikers' reinstatement.

In hearing and reviewing the testimony and other evidence, I formed the impression that much of the dissatisfaction of the Respondent's decision makers came from the fact that the Union, by striking for a single day, inflicted on the Hospital a grave inconvenience entailing a very large amount of managerial time and effort to cope with the stoppage. And, from the Hospital's perspective, unfairly, the Union and the striking employees were able to cause this great disruption and inconvenience to the Hospital without incurring significant hardship or sacrifice themselves. This dissatisfaction[11] in my view is really directed to the legality of a 1-day work stoppage directed against a health care institution. That question has been decided by the Board and is not for an administrative law judge to question in all events.[12]

Given that a 1-day strike of the type involved herein is protected activity permitted under the Act, the Respondent's arguments supporting delayed reinstatement are simply insufficient on this record to allow a finding that they rise to the level of sufficient legitimate and substantial business justification to allow deferral of the reinstatement of economic strikes under *Fleetwood Trailer*. Accordingly, I find the delay in reinstatement of the employees who had been temporarily replaced by supervisors and managers was a violation of Section 8(a)(1) and (3) of the Act.

(4) The issue of the cafeteria closure and deferral of cafeteria strikers reinstatement

The Respondent closed the public portions of its cafeteria during the strike and thereafter until the strikers were reinstated. A certain number of strikers worked in association with the portions of the cafeteria that were closed. There were no strike replacements for these employees, but the delay in their reinstatement for the 4-day period is pled as part of the general striker reinstatement delay allegations. Additionally, the closure of the cafeteria or its failure to be reopened for the 4-day period at issue is also alleged as a violation of the Act.

Conceptually the analysis of these employee rights is similar to that which is set forth above save for several elements, which favor the Government. Given that there were no replacements involved, there were no scheduling requirement arguments advanced nor an argument that striking and nonstriking employees would be doing the same jobs. The Respondent did not provide special or unique reasons for shutting down the cafeteria during the period following the strike. Rather the Respondent advanced the same concerns and arguments discussed and rejected above.

For the same reasons I have found that the Respondent improperly delayed the reinstatement of the other strikers immediately above, I find the Respondent wrongfully denied the cafeteria strikers reinstatement immediately after the strike by the device of keeping the public portion of the cafeteria closed. As found supra the Respondent did not demonstrate sufficient legitimate and substantial business justification for the continued closure and concomitant failure to reinstate the striking cafeteria works at the strikes end.

(5) The Respondent's notification to employees that reinstatement would be delayed

The complaint alleges that the Respondent's prestrike communications to employees that strikers would not be reinstated at the strike's end but rather would only be reinstated 4 days later violated Section 8(a)(1) of the Act. The Government's theory is that threatening employees with an illegal denial of reinstatement following a strike impermissibly chills employee Section 7 rights. The allegation is entirely derivative of and dependent on the allegation that the delayed reinstatement was improper. Having found the delay described in the communication to employees violated the Act, it follows that the Respondent announcement to employees of that improper reinstatement policy also violates the Act. I so find and sustain this allegation of the complaint.

(6) The failure to bargain allegation

The complaint alleges that the Respondent's retention of temporaries—other than the employment agency-supplied temporaries discussed supra—in the 4 days after the strike was: (1) a mandatory subject of bargaining, (2) done without affording the Union an opportunity to bargain and, (3) in consequence, a violation of Section 8(a)(5) of the Act.

An employer need not bargain with a union respecting temporary strike replacement employees' terms and conditions of employment. The complaint does not allege a failure to bargain over the strike replacement employees during the strike. Consistent with the General Counsel's theory that the strike replacements, other than employment agency supplied 5-day contract employees, ceased being legitimate replacements at the strike's end, the complaint alleges the Respondent had a duty thereafter to bargain respecting all those who were doing unit work and that the Respondent failed to do so. This allegation is entirely derivative of and dependent on the allegation that the delayed striker reinstatement was improper. Having found the delay in offering reinstatement to the striking employees at the strikes end violated the Act, it follows that the Respondent's failure to provide an opportunity to the Union to bargain over the terms and conditions of individuals doing unit work during the period when strikers should have been reinstated also violates the Act. I so find and sustain this allegation of the complaint.

[11] A portion of the Respondent's brief is entitled: "One-Day Strikes Are Inherently Disruptive to Replacement Staffing."

[12] And, of course, an employer may in a variety of situations lock out employees as part of the bargaining process. No lock out was involved herein.

(7) Summary and conclusions

As set forth above, I have found that the employees work stoppage on November 14, 2003, was protected, concerted activity or, in the alternative, that the Respondent was estopped to deny that this was so because it had reinstated the employees and not raised the argument of unprotected activities at relevant times. I therefore found it unnecessary to determine if the parties collective-bargaining agreement was orally extended to cover the period of the 1-day strike on November 14, 2003. I also found that there is no 5-day grace period for the reinstatement of economic strikers by an employer under Board law.

Treating the employees' November 14, 2003, work stoppage as protected, I considered the Respondents argued legitimate and substantial business justifications for delaying reinstatement of the striking unit employees other then those replaced by temporary agency employees, from the strikes end to 4 days thereafter. Finding the Respondent's asserted justification insufficient, I found the delay in reinstatement a violation of Section 8(a)(1) and (3) of the Act as alleged. Making a similar analysis of the allegation of the wrongful closure of the cafeteria and the delay in cafeteria striker's reinstatement, I reached the same conclusions and found the closure and the delay in reinstatement also to violate Section 8(a)(1) and (3) of the Act.

In consequence of the above findings, I also found that the Respondent's prestrike announcement to employees that reinstatement of strikers would not occur at the strikes end violated Section 8(a)(1) of the Act and I further found that the Respondent's failure to provide the Union with an opportunity to bargain respecting the terms and conditions of employment of individuals engaged in union work, other than those individuals supplied by temporary agencies, in the 4 days following the strikes end violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent violated the Act as set forth above, I shall order that it cease-and-desist there from and postremedial Board notices.

I shall also direct that the Respondent make whole the striking employees[13] who unconditionally offered to return to work by the end of the strike, and whose delay in reinstatement was without legitimate and substantial business justification or who were not reinstated immediately after the strike because portions of the Respondent's facility were closed, for any and all losses incurred due to the denial of reinstatement to their normal shifts in the 4-day period November 15 through 18, 2002, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following

CONCLUSIONS OF LAW

1. The Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution with the meaning of Section 2(14) of the Act.

2. The Charging Party is, and has been at all relevant times, a labor organization within the meaning of Section 2(5) of the Act.

3. The Charging Party represents the Respondent's employees in the following unit, which is appropriate for bargaining within the meaning of Section 9 of the Act:

> All Environmental Service Aides, Food Service Assistants, Laundry Helpers, Home Health Aides, Respiratory Assistants, Service Partners, Central Distribution Technicians, Grill Persons, Lead EVS Service Aides, Rehab Aides, Sterile Processing Technicians, Storekeepers, Nurse Assistant/CNAs, Radiology Assistants, Anesthesia Technicians, Cooks, ER Technicians, Monitor Technicians, OBF Technicians, Unit Secretaries, US/NAs, EEG Technicians, Surgical Technicians, LVNs, Echo Technicians, Radiology Technologists, Respiratory Care Practitioners, Mammo Technologists, Ultrasound Technologists, CV/Angio Technologists, Nuclear Medicine Technologists, CV/Radiology Technologists, Ultrasound Noninvasive Vascular Technologists, excluding all executive, administrative, professional and office clerical employees, employees represented by other collective bargaining representatives recognized by the Respondent and supervisors as defined the National Labor Relations Act.

4. The Respondent violated Section 8(a)(1) of the Act by notifying potential striking employees who were not to be replaced by temporary employees supplied by employment agencies with a minimum 5-day employment period that strikers reinstatement would be delayed for a 4 day period after the strike without legitimate and substantial business justification to do so.

5. The Respondent violated Section 8(a)(3) and (1) of the Act by:

> (a) Delaying the reinstatement of certain economic strikers after the strike had ended and the strikers had unconditionally offered to return to work without substantial and legitimate business justification.
>
> (b) Closing or keeping closed portions of the facility which employed unit employees following a strike without legitimate and substantial business justification to do so and thereby denying reinstatement to economic strikers after the strike had ended and the strikers had unconditionally offered to return to work.

6. The Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with an opportunity to bargaining respecting terms and conditions of employment of employees doing unit work at a time the employees were no longer legitimate striker replacements.

7. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

[13] The parties agreed to identify individual strikers and the extent and quantification of losses to be made whole at the compliance stage of the proceedings, as necessary.