UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SUTTER VALLEY HOSPITALS D/B/A SUTTER SOLANO MEDICAL CENTER	**Cases**	**20-CA-295261**
and		
SUTTER VALLEY HOSPITALS D/B/A SUTTER ROSEVILLE MEDICAL CENTER		**20-CA-295278**
and		
SUTTER BAY HOSPITALS D/B/A MILLS-PENINSULA MEDICAL CENTER		**20-CA-295287**
and		
SUTTER BAY HOSPITALS D/B/A SUTTER SANTA ROSA REGIONAL HOSPITAL		**20-CA-295288**
and		
SUTTER VALLEY HOSPITALS D/B/A SUTTER CENTER FOR PSYCHIATRY		**20-CA-295292**
and		
SUTTER BAY HOSPITALS D/B/A SUTTER LAKESIDE HOSPITAL		**20-CA-295295**
and		
SUTTER BAY HOSPITALS D/B/A NOVATO COMMUNITY HOSPITAL		**20-CA-295296**
and		
SUTTER BAY HOSPITALS D/B/A CALIFORNIA PACIFIC MEDICAL CENTER		**20-CA-295297**
and		
SUTTER COAST HOSPITAL		**20-CA-295298**
and		
SUTTER VALLEY HOSPITALS D/B/A SUTTER AUBURN FAITH HOSPITAL		**20-CA-295331**
and		
SUTTER BAY HOSPITALS D/B/A SUTTER DELTA MEDICAL CENTER		**20-CA-295496**

and	
SUTTER VALLEY HOSPITALS D/B/A SUTTER TRACY COMMUNITY HOSPITAL	**20-CA-295507**
and	
SUTTER BAY HOSPITALS D/B/A EDEN MEDICAL CENTER	**20-CA-295514**
and	
SUTTER BAY HOSPITALS D/B/A ALTA BATES SUMMIT MEDICAL CENTER	**32-CA-295420**
and	
CALIFORNIA NURSES ASSOCIATION	
and	
SUTTER BAY HOSPITALS D/B/A ALTA BATES SUMMIT MEDICAL CENTER	**32-CA-295430**
and	
CAREGIVERS AND HEALTHCARE EMPLOYEES UNION	

Tracy Clark, Esq.,
for the General Counsel,
Philip A. Miscimarra, Michael Lignowski, Geoffrey J. Rosenthal, G. Roger King, Esqs.,
for the Respondents,
David Willhoite and Amara Blades-Campa, Esqs.
for the Unions.

DECISION

STATEMENT OF THE CASE[1]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. These consolidated cases involve allegations that Sutter Valley Hospitals d/b/a Sutter Solano Medical Center (Solano Medical Center), Sutter Valley Hospitals d/b/a Sutter Roseville Medical Center (Roseville Medical Center), Sutter Bay Hospitals d/b/a Mills-Peninsula Medical Center (Mills-Peninsula Medical Center), Sutter Bay Hospitals d/b/a Sutter Santa Rosa Regional Hospital (Santa Rosa Hospital), Sutter Valley Hospitals d/b/a Sutter Center for Psychiatry (Center for Psychiatry), Sutter Bay Hospitals d/b/a Sutter Lakeside Hospital (Lakeside Hospital), Sutter Bay Hospitals d/b/a Novato Community Hospital (Novato

[1] Abbreviations used in this decision are: "Tr." for transcript; "Jt. Exh. __" for Joint Exhibit; "GC Exh. __" for the General Counsel's Exhibits; "R Exh __" for Respondents' exhibits. Although I have included several citations to the record to highlight specific testimony or exhibits, my findings and conclusions are not limited to those portions but rather based on my review and consideration of the entire record for these cases.

Hospital), Sutter Bay Hospitals d/b/a California Pacific Medical Center (CPMC), Sutter Coast Hospital, Sutter Valley Hospitals d/b/a Sutter Auburn Faith Hospital (Auburn Faith Hospital), Sutter Bay Hospitals d/b/a Sutter Delta Medical Center (Delta Medical Center), Sutter Valley Hospitals d/b/a Sutter Tracy Community Hospital (Tracy Hospital), Sutter Bay Hospitals d/b/a Eden Medical Center (Eden Medical Center), and Sutter Bay Hospitals d/b/a Alta Bates Summit Medical Center (Alta Bates Summit) (collectively Respondents) violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) surrounding their delayed reinstatements of approximately 7,000 nurses and technical employees who participated in a 24-hour economic strike on April 18-19, 2022.

The California Nurses Association (CNA) represents 14 bargaining units of nurses working for Respondents, and the Caregivers and Healthcare Employees Union (CHEU) represents one bargaining unit of technical employees working for Alta Bates Summit. The agreements the CNA and the CHEU (collectively the Unions) had with Respondents were set to expire in about July 2021. In the past, the Unions regularly conducted strikes during contract negotiations. To prepare for that possibility in 2021, Respondents contracted with staffing agencies to supply temporary replacements in the event of a coordinated strike(s). Consistent with the past, the staffing agencies required a five-day minimum guarantee, which obligated Respondents to pay the agency-supplied replacements for a minimum of five days (or 60 hours), regardless of how long the strike(s) lasted. These minimum guarantees have been held to be a legitimate and substantial business justification for delaying reinstatement of the returning strikers until the end of the guaranteed period.

On April 7, 2022, the Unions gave Respondents notice that their members intended to strike from 7:00 a.m. on April 18, 2022, to 6:59 a.m. on April 19, 2022. In those notices, the Unions, on behalf of their members, unconditionally offered to return to work at 7:00 a.m. on April 19, 2022. In the week prior to the strike, Respondents notified employees that there would be a five-day "replacement period," beginning at 7:00 a.m. on April 18, until 7:00 a.m. on April 23, 2022, stating the delay was due to Respondents' contractual obligations to the temporary replacements who would be staffing the affected hospitals during the strike. On Sunday, April 17, 2022, at 12:40 p.m., Respondents notified the Unions that if they called off the planned strike by 2 p.m. that day, the employees would be permitted to work their normally scheduled shifts the following day. If the strike was called off after 2 p.m., the employees would be permitted to return to work as soon as Respondents could "safely make the transition (likely within 24 to 48 hours)." By the time of this offer, Respondents were contractually obligated to pay most-if-not-all the amounts owed under the minimum guarantees.

The Unions did not call off the strike, and it occurred as scheduled on April 18-19, 2022. Despite the offers to unconditionally return to work on April 19, Respondents did not reinstate most of the strikers until the end of the five-day replacement/minimum guarantee period.

Between May 2022 and February 2024, the CNA filed the charges in Cases 20-CA-295261, 20-CA-295278, 20-CA-295287, 20-CA-295288, 20-CA-295292, 20-CA-295295, 20-CA-295296, 20-CA-295297, 20-CA-295298, 20-CA-295331, 20-CA-295496, 20-CA-295507, 20-CA-295514, and 32-CA-295420, and the CHEU filed the charges in Case 32-CA-295430. On February 27, 2024, the Acting Regional Director for Region 20, on behalf of the General Counsel, issued an Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing (the Consolidated Complaint). It alleges that: (1) in mid-April 2022, Respondents violated Section 8(a)(1) when it sent email messages and other written communications threatening employees that if they participated in the 24-hour strike, Respondents would delay their reinstatement by an additional four days, even though Respondents had no legitimate and substantial business justification for the delay; (2) from about 7:00 a.m. on April 19,

2022, until about 7:00 a.m. on April 23, 2022, Respondents violated Section 8(a)(3) and (1) when they failed and refused to reinstate the strikers to their former positions following their unconditional offers to return to work effective 7 a.m. on April 19, 2022; and (3) from about April 18, 2022, until about April 23, 2022, Respondents violated Section 8(a)(5) and (1) of the Act when they set terms and conditions of employment for the temporary replacements who filled positions performing bargaining unit work without affording the CNA or the CHEU with an opportunity to bargain over those decisions or their effects. On March 26, 2024, Respondents filed their Answer to the Consolidated Complaint (the Answer) denying these allegations and raising various affirmative defenses. The hearing was held on July 19, 29-31, and September 9-13, 16-17, 2024, in San Francisco, California.[2]

For the reasons stated below, I recommend dismissing the Consolidated Complaint.

FINDINGS OF FACT[3]

I. JURISDICTION

Sutter Health is a non-for-profit integrated healthcare network headquartered in Sacramento, California. It consists of 22 hospitals, 33 ambulatory surgery centers, 8 cardiac centers, 11 cancer centers, 4 trauma centers, and 4 mental health and addiction care centers. (R Exh. 18). It has over 50,000 employees, including over 15,000 nurses. (R. Exh. 18). Respondents are 14 acute care hospitals within the Sutter Health network. In the year ending December 31, 2023, Respondents each had gross revenues in excess of $250,000, and purchased and received goods valued in excess of $5,000. Respondents admit, and I find, that each is 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. Respondents further admit, and I find, that the CNA and the CHEU are labor organizations within the meaning of Section 2(5) of the Act. Based on the foregoing, I find these disputes affect commerce and that the Board has jurisdiction over these matters, pursuant to Section 10(a) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. *Collective Bargaining Relationships and Bargaining History*

Sutter Health affiliates employ more than 16,000 unionized employees. Among the 13 different unions representing employees are the CNA, the CHEU, the National Union of Healthcare Workers (NUHW), the Service Employees International Union (SEIU), and UNITE HERE. (R. Exh.

[2] The first day of hearing was held via video by the agreement of the parties to receive certain exhibits and to rule on certain prehearing motions.

[3] The Findings of Fact are a compilation of the stipulated facts, joint exhibits, and credible testimony, as well as the logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as in conflict with credited evidence or unworthy of belief. In assessing credibility, I relied upon several factors, including witness demeanor, the context of their testimony, the quality of their recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003).

20). For about a decade or more, the CNA has represented individual bargaining units of registered nurses at Solano Medical Center, Roseville Medical Center, Mills-Peninsula Medical Center, Santa Rosa Hospital, Novato Hospital, Lakeside Hospital, CPMC, Auburn Faith Hospital, Delta Medical Center, Tracy Hospital, Eden Medical Center, and Alta Bates Summit, and the CHEU has represented a unit of technical employees at Alta Bates Summit.

Prior to 2016, the collective-bargaining agreements covering these units had varying expiration dates, which meant negotiations occurred at different times. During the 2015 negotiations, the parties agreed that moving forward their agreements would have common expiration dates. They also agreed to address certain system-wide issues at a "common table" while retaining separate, individual bargaining for site-specific issues. The agreements eventually reached in 2016 were all set to expire on January 31, 2020. In September 2019, the parties agreed to 18-month extensions of these individual agreements, with certain modifications. Those extensions were set to expire on July 31, 2021.

In January 2021, the CNA was certified as the bargaining representative for units of nurses at the Center for Psychiatry and Sutter Coast Hospital. In about April 2021, the CNA began negotiations with Solano Medical Center, Roseville Medical Center, Mills-Peninsula Medical Center, Santa Rosa Hospital, Novato Hospital, Lakeside Hospital, CPMC, Auburn Faith Hospital, Delta Medical Center, Tracy Hospital, Eden Medical Center, and Alta Bates Summit over successor agreements, while it began negotiations with the Center for Psychiatry and Sutter Coast Health over initial agreements. When the existing agreements expired on July 31, 2021, the parties entered into month-to-month extensions of their agreements, which continued until February 28, 2022. At the same time Respondents and the Union were negotiating, several other Sutter Health affiliates were negotiating with the SEIU over agreements covering approximately 8 other bargaining units of nurses. Their existing agreements also were set to expire in around July 2021. (R. Exh. 21) (Tr. 610).

2. *Prior Strikes, Temporary Replacements and Minimum Guarantees*

Over the last 20 years, Respondents and other Sutter Health affiliates have experienced multiple strikes. For example, in November 2002, the SEIU conducted a one-day economic strike at Roseville Medical Center. (R Exh. 14). The union provided the hospital with notice of when the strike would occur and its duration, and, in the same letter, it made an unconditional offer, on behalf of the strikers, to return to work immediately following the conclusion of the strike. The hospital continued operating during the strike using replacements. The replacements consisted of two groups: (1) in-house, non-unit employees, and (2) temporary employees supplied by a staffing agency. The contract contained a five-day minimum guarantee for the agency-supplied temporary replacements. The hospital informed unit employees that in the event of a strike, replacement staff would provide services for the full five days to provide continuity of patient care. The strike occurred as planned. At the end of the strike, the hospital refused to reinstate the strikers until the five-day period had elapsed. The union later filed charges, and the General Counsel issued a complaint, alleging the hospital violated Section 8(a)(1) by notifying unit employees that their reinstatement would be delayed four days because of the strike; violated Section 8(a)(3) and (1) by delaying reinstatement of certain strikers who had been replaced by the in-house, non-unit employees; and violated Section 8(a)(5) and (1) by failing to provide the union with an opportunity to bargain over the terms and conditions of employment of the non-unit employees performing unit work following the end of the strike. Significantly, the General Counsel conceded the hospital had a legitimate and substantial business justification for delaying the reinstatement of those returning strikers who had been replaced by the temporary employees working under the five-day minimum guarantees. The judge found the hospital committed each of the alleged

violations. The Board affirmed all but the Section 8(a)(5) violation, holding that finding a refusal to bargain would not materially affect the remedy, particularly when the General Counsel did not seek a monetary remedy for the temporary employees. This is summarized in the Board's decision in *Sutter Roseville Medical Center*, 348 NLRB 637 (2006).

In December 2004, the CNA and the CHEU conducted a 24-hour sympathy strike at Alta Bates Summit and Solano Medical Center. (R. Exh. 15). In November 2004, the CNA and the CHEU provided each hospital with the requisite notice, including when the strike would occur (December 1) and its duration. In a letter following that notice, Alta Bates Summit informed unit employees that if they did not report for work on December 1, they would not be allowed to work for the four days following the strike, even if they were not scheduled to work the day of the strike. The hospitals later posted a flier stating that any employee who showed up to work during the strike, even without notice to the hospital, would be allowed to work during the four days following the end of the strike.

The two hospitals contracted with staffing agencies to supply temporary strike replacements. Those contracts contained five-day minimum guarantees. Certain of the unit employees who were not scheduled to and did not work on the day of the strike were not allowed to return to work until four days after the end of the strike, while others who were not scheduled to work on the day of the strike were allowed to return earlier. The hospitals made this exception when they had no other replacements available to cover the shifts. The unions filed charges over the delayed reinstatements. The hospitals defended that the guarantees served as a legitimate and substantial business justification for the delayed reinstatements.

The matter was submitted to the General Counsel's Division of Advice, which directed dismissal of the charges. It concluded there was no dispute about the contractual requirements, and there was no evidence or contention that any unit employee was denied reinstatement for any reason other than the five-day minimum guarantees. The only employees permitted to work earlier were those for whom the hospitals had no other replacements available. Finally, the Division of Advice held the fact that the hospitals may have attempted to entice employees not to strike by offering them continued employment did not detract from the conclusion that the minimum guarantees were lawful. Not only was it unclear that the hospitals would have employed employees who were not needed but, even if they had been willing to do so on a voluntary basis, they were not required to, given their legitimate and substantial business justification for not calling in unneeded employees during the five-day period.

In September 2011, the CNA and the CHEU conducted one-day economic strikes at eight Sutter Health affiliates, including Alta Bates Summit, Sutter Lakeside Hospital, and Sutter Solano Medical Center. (R Exh. 16). The affiliates contracted with staffing agencies to provide temporary replacements, and those contracts contained five-day minimum guarantees. After the strikes, the affiliates delayed reinstating the strikers until the five-day period expired. The CNA and the CHEU filed charges over the delayed reinstatements. The Regional Director dismissed the charges, concluding the affiliates' statements informed employees of the guaranteed period required by the staffing agencies, and that those guaranteed periods served as a legitimate and substantial business justification for delaying reinstatement. The CNA and the CHEU each appealed the dismissals, and the Acting General Counsel denied those appeals.

In December 2011, the CNA announced and later held a one-day strike at Eden Medical Center, Delta Medical Center, CMP, Solano Medical Center, and Alta Bates Summit, and the CHEU announced and later held a one-day strike at Alta Bates Summit. (R Exh. 17). Each affiliate contracted

with a staffing agency to provide it with temporary strike replacements, and those contracts contained minimum guarantees. The CNA and the CHEU filed charges over the delayed reinstatement. The Regional Directors dismissed the charges finding that the delays were justified by the contractual minimum guarantees.

In May, June, July, and November 2012, the CNA conducted one-day economic strikes at multiple Sutter Health hospitals. Consistent with the past, the hospitals contracted with staffing agencies to provide temporary replacements. Those contracts contained five-day minimum guarantees, and the hospitals delayed reinstatement of the returning strikers until the end of the guaranteed period. (Tr. 388-391). The record does not reflect whether charges were filed in any of these situations.

In 2015, there were strikes at Mills-Peninsula Medical Center, Auburn-Faith Hospital, Santa Rosa Hospital, Roseville Medical Center, and Tracy Hospital. (R Exh. 21). There was limited evidence introduced about those strikes. In 2015, Tracy Hospital contracted with a staffing agency to provide temporary replacements, and the contract contained a five-day minimum guarantee. The record, however, does not reflect the length of the strike, whether the hospital delayed reinstatement of the strikers, and, if so, whether charges were filed. (Tr. 483-484).

There were no instances in which a Sutter Health affiliate was held to have unlawfully delayed reinstatement of returning strikers when it was because of these contractual minimum guarantees.

B. Communications with Staffing Agencies and Contractual Arrangements

In early 2021, Sutter Health and its affiliates began preparing for negotiations over new or successor collective-bargaining agreements with multiple unions. There were over 20 agreements, most covering unit nurses, all set to expire in around July 2021. With the common expiration dates, there was the potential that the unions would conduct coordinated strike(s) involving the network's hospital nurses. As outlined, Sutter Health affiliates have experienced coordinated strikes in the past, but not of this potential size and scope. Complicating matters was the shortage of available replacement nurses. That shortage was worsened by the pandemic, which caused increased retirements and resignations, as well as fewer nursing school graduates. Reduced supply, in turn, led to increased demand and competition for both permanent and contract (or "travelling") nurses.

This potential for coordinated strike(s) at a time when there was a shortage of available nurse replacements, created an urgency surrounding Sutter Health's contingency planning. The goal was to have a replacement plan in place before the existing collective-bargaining agreements expired. Michael Goehring, Director of Sutter Health's Talent Acquisition and Workforce Development, formed a committee that began gathering information for selecting staffing agencies to provide temporary strike replacements. Goehring contacted agencies to ask whether they had the capability to recruit and supply the requisite number of skilled and licensed nurses to temporarily staff each of the locations at issue. (Tr. 940; R Ex. 57). The added challenge, of course, was that Sutter Health did not know whether, when, where, or how long a strike(s) would occur.

In February 2021, Goehring spoke over the telephone with U.S. Nursing representatives. (Tr. 276). They discussed recruitment and staffing capabilities, and whether U.S. Nursing could support a strike(s) that included both clinical and non-clinical employees. (Tr. 276-277). In this conversation, Goehring asked about guaranteed minimums, and what U.S. Nursing would require based on the potential size and scope of the strike(s). He was told there would need to be a five-day minimum

guarantee to attract the required number of skilled and specialized nurses to accept placement, particularly when the dates and locations of the strike(s) were unknown. (Tr. 274-276; 943-944). The U.S. Nursing representatives also mentioned the higher demand and competitiveness for staffing because of the continuing effects of the pandemic. Goehring did not propose or ask about a shorter minimum guarantee period. He asked only if there "flexibility" regarding the guarantee, and he was told there was not. (Tr. 276).

Sutter Health prepared a list of potential staffing agencies to supply the temporary replacements in the event of a strike(s). The final list of agencies that Sutter Health concluded could provide the necessary replacements included U.S. Nursing, Huffmaster, and Nurse Bridge. Georgette Kearsing, Sutter Health's Manager for Strategic Sourcing Contracts, began communicating with these agencies about their submissions. In March 2021, she sent the three staffing agencies the request for proposal (RFP) and a master service agreement template to complete. It included certain proposed terms but asked the agencies to propose their terms, including notice periods, deposits, and guaranteed staffing times. She later provided worksheets for the agencies to provide other information, including proposed hourly rates and minimum guarantees.

In late March 2021, U.S. Nursing responded with its proposal. (Jt. Exh. 71). Huffmaster did not submit its own proposal. It had agreed to subcontract with U.S. Nursing. The U.S. Nursing proposal required a minimum guarantee of five 12-hour shifts (60 hours) for each supplied temporary replacement. The proposal also included several other fees and costs. Nurse Bridge withdrew from consideration because it could not fulfill the requested staffing needs. It recommended that Sutter Health consider Ware Evans, Inc. as an alternative.

Sutter Health later met with Ware Evans in April 2021. Ware Evans stated it would not directly recruit or employ any of the strike replacements, but rather it would contract with several other healthcare staffing agencies, which, in turn, would collectively supply the replacements. Ware Evans also proposed minimum guarantees of 36 or 48 hours, which would be triggered if the supplied temporary replacement "begins to work her or his assignment at [the hospital]." (GC Exh. 9 (00345)). The proposal was unclear about whether the 36-hour or the 48-hour guarantee would apply and under what circumstances. Regardless, Sutter Health elected not to pursue Ware Evans as an option because it was an unknown entity and it would be acting as a broker rather than as a direct supplier, which is what Sutter Health wanted. Sutter Health did not want to deal with a middleman if issues arose; it wanted an entity that it could deal with directly. (Tr. 257-260).

In April 2021, Sutter Health selected U.S. Nursing as the vendor to supply the temporary strike replacements. Over the next several months, Sutter Health and U.S. Nursing negotiated over the terms of their contract. Sutter Health made inquiries about certain costs and fees triggered by the strike notice and deployment, and it submitted counterproposals regarding those and other terms.

On about May 3, 2021, Goehring and Kearsing met with representatives from U.S. Nursing to discuss certain outstanding issues. Goehring asked during this meeting whether there was any flexibility regarding the five-day minimum guarantees. Like they had in February 2021, the U.S. Nursing representatives indicated that the five-day minimum guarantees were necessary to successfully recruit and deploy the requisite number of qualified nurses needed in light of the various challenges,

including the pandemic and the nursing shortage. Goehring and Kearsing did not make any counterproposals or otherwise discuss reducing the five-day minimum guarantees.[4]

Sutter Health and U.S. Nursing continued their negotiations for the next two months. They eventually executed contracts on about July 21, 2021.[5] The contracts contains the five-day minimum guarantees that U.S. Nursing initially proposed and stated were necessary.

In March 2022, U.S. Nursing raised concerns with Sutter Health representatives about its ability to provide each of the hospitals the requested number of temporary strike replacements. Also, Sutter Tracy's CEO Dave Thompson expressed concerns internally about U.S. Nursing. He advised that during the 2015 strike U.S. Nursing was unable to supply the requisite number of replacements and failed to timely and adequately explain why. (Tr. 455-456). Based on this prior experience, as well as the significant challenges Sutter Tracy was having hiring nurses at the time, Thompson asked about pursuing another staffing agency. He specifically asked about Prolink Healthcare, which he had used in the past. (Tr. 458). In April 2022, Sutter Tracy agreed to a contract with Prolink to supply it with strike replacements. The contract contained a five-day minimum guarantee for the supplied replacements. (GC Exh. 47). Thompson testified that was the length Prolink set forth in the contract, and Sutter Tracy did not attempt to negotiate over it because, in part, it was the same length as what Sutter Tracy had agreed to in prior strikes. (Tr. 432; 460-461).

C. Strike Notices and Communications About Reinstatement

On April 7, 2022, the Unions issued Respondents strike notices pursuant to Section 8(g) of the Act. The notices stated the Unions intended to engage in a strike, picketing and other concerted activities commencing at 7:00 a.m. on Monday, April 18, 2022, and concluding at 6:59 a.m. on Tuesday, April 19, 2022. Below that was the heading "Unconditional Offer of Return to Work." It stated that the union, on behalf of all represented employees who engage in the strike described above, hereby unconditionally offers and requests immediate return of all unit employees who engage in strike activity to their positions, effective at 7:00 a.m. on Tuesday, April 19, 2022. (Jt. Exhs. 2-17).

D. Communications About Reinstatement and Eventual Reinstatement

In the week after the strike notices were received, Respondents distributed memorandums and information packets regarding the scheduled strike. Although there was some variation, Respondents notified the employees that there would be a five-day "replacement period," beginning at 7:00 a.m. on April 18, until 7:00 a.m. on April 23, 2022, based on Respondents' contractual obligations to the temporary replacements who would be staffing the affected hospitals during the strike. The notices advised employees that if they wished to work at any time during the replacement period, they must

[4] Goehring and Kearsing had inconsistent and, at times, contradictory recollections regarding this May 3 meeting. I credit Goehring over Kearsing when their testimony conflicts. Goehring had a more candid and straightforward demeanor, and his testimony was more plausible, logical and consistent. He attempted to provide a detailed recollection but acknowledged when he could not recall specific details about the meeting. The opposite is true of Kearsing. She offered testimony about conversations she had Goehring prior to the meeting, and statements she allegedly made during the meeting, which were largely uncorroborated or otherwise unsupported by other evidence. Much of her testimony regarding the discussion over minimum guarantees, which Goehring did not corroborate, struck me as largely manufactured, in an attempt to bolster Respondents' litigation position.

[5] There is no dispute that Respondents never notified or offered to bargain with the Unions, and the Unions never requested to bargain, over the terms and conditions of employment for the temporary strike replacements.

report for work on April 18. If they did not report and/or communicate with their manager prior to the strike, they would be considered as participating in the strike and not be permitted to work until their first shift after the end of the five-day replacement period, unless they were otherwise contacted by their manager during the replacement period. (Jt. Exhs. 31-44).

Over the weekend prior to the strike, Respondents and the Unions met for bargaining, but they did not reach an agreement. On (Easter) Sunday, April 17, 2022, at 12:40 p.m., Sutter Health's Vice President of Workforce & Labor Relations Michele Dewyea sent the Unions the following offer:

> We have asked repeatedly that the union call off this unnecessary and counterproductive strike and meet us at the bargaining table. At this point, our responsibility to care for our patients and community means we must solidify our staffing plans for Monday by no later than 2:00 p.m. today. If the union calls off the strike by 2:00 p.m. today, bargaining unit nurses will work they're normally scheduled shifts on Monday. But if the union refuses to call off the strike by that time, we will staff our hospitals on Monday with the contracted replacement workers. If the strike is later called off, bargaining unit nurses can return to work as soon as we can safely effectuate the transition (likely within 24 to 48 hours).
>
> Please let us know by 2:00 p.m. today if the union will call off this strike so our nurses can work their normal shifts on Monday and do what they do best-- care for our patients. We stand ready to continue bargaining today as long as negotiations are progressing effectively toward averting the strike.

(R. Exh. 37).

As of the date of this offer, Respondents had become contractually obligated to pay and began paying most-if-not-all the amounts owed to U.S. Nursing for the temporary replacements. (J. Exh. 68).

The Unions' representative, Johnathan Wietz, rejected this offer, calling it a "threat." He wrote that Respondents' decision to bring in replacement workers for more than one day is "totally unnecessary" and there were other employers who signed contracts with staffing agencies that allowed them to reinstate the returning strikers the following day. Dewyea responded, writing in relevant part:

> I appreciate that you may not have a full understanding of the complexity involved in planning and staffing for the kind of disruption a work stoppage can cause at 18 sites across multiple jurisdictions. Please be advised, the notice is not a threat, but simply the reality of the situation – we need some certainty in order for us to solidify our staffing plans and provide assurances and ongoing care for our patients and our community. If the strike is called off after 2:00 p.m., we will need time to effectuate the transition of the nurses back on the schedule. We believe it is best for all parties to understand the process in advance.

(R. Exh. 37).

The strike was not called off and occurred as scheduled on April 18-19, 2022. Respondents employed the agency-supplied replacements during the 24-hour strike, and the four days that followed.[6] Most of the returning strikers were not reinstated until April 23, 2022.

LEGAL ANALYSIS

I. THREATS TO DELAY AND DELAYED REINSTATEMENT OF STRIKERS

A. Overview

The General Counsel alleges that Respondents violated Section 8(a)(1) and (3) of the Act, respectively, when it threatened to delay and then delayed reinstatement of the returning strikers until April 23, 2022, despite their unconditional offer to return to work on April 19, 2022. Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act. Section 7 and 13 of the Act protect an employee's right to engage in a lawful economic strike. See *NLRB v. Allis-Chalmers Mfg. Co*., 388 U.S. 175, 181 (1967) ("The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms"). Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization. An employer's discouragement of employee participation in a lawful strike interferes with employees' Section 7 rights, in violation of Section 8(a)(1), and it constitutes discouragement of membership in a labor organization, in violation of Section 8(a)(3). *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 233-236 (1963); *Capehorn Industry, Inc*., 336 NLRB 364-365 (2001).

An employer violates Section 8(a)(3) and (1) when it fails to reinstate economic strikers upon their unconditional offer to return to work, unless it establishes a "legitimate and substantial business justification" for its failure to do so. *NLRB v. Fleetwood Trailer Co*., 389 U.S. 375, 378 (1967); *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967); *Laidlaw Corp*., 171 NLRB 1366, 1369 (1986), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). However, even if an employer presents sufficient evidence to demonstrate a legitimate and substantial business justification for the delayed reinstatement of the returning strikers, that is not the end of the inquiry. If the Board finds that an employer's conduct is "inherently destructive of employee rights," no proof of antiunion motive is needed, and the Board may find an unfair labor practice notwithstanding that the employer was motivated by business considerations. In contrast, if the adverse effect of the employer's conduct on employee rights is "comparatively slight," an antiunion motive must be proved to sustain an 8(a)(3) charge if the employer has presented evidence of a legitimate and substantial business justification. *Capehorn Industry*, 336 NLRB at 365 citing to *Great Dane Trailers*, 388 U.S. at 33-34.

B. Legitimate and Substantial Business Justification

An employer is permitted to take legitimate steps to maintain its operations during an economic strike, including using permanent or temporary replacements. See *Belknap, Inc. v. Hale*, 463 U.S. 491,

[6] Unlike in *Sutter Roseville*, there is no allegation that Respondents unlawfully continued to use in-house, non-unit employees to perform unit work following the end of the 24-hour strike.

504 n. 8 (1983); *Fairfield Tower Condominiums Assn.*, 343 NLRB 923, 924 (2004).[7] The Board has found that an employer's contractual obligations related to securing replacements may serve as a legitimate and substantial business justification for delaying the reinstatement of the strikers following their unconditional offer to return to work. The seminal case on this point is *Pacific Mutual Door Co*., 278 NLRB 854, 856 (1986). In that case, the employer contracted with a staffing agency to provide replacement employees during an economic strike, and the contract contained a 30-day notice-of-cancellation provision. After the strikers unconditionally offered to return to work, the employer delayed their reinstatement. The Board held the employer's obligations to reinstate the strikers arose on the date of the offered to return but did not mature until approximately 30 days later in accordance with the notice-of-cancellation provision. In concluding the provision served as a legitimate and substantial business justification for delaying reinstatement of the returning strikers, the Board held that it "appear[ed] that a condition of obtaining the temporary replacements and thereby continuing its operation was agreement to the 30-day cancellation provision" and "there was no indication an accommodation on the cancellation provision would have been made ..." Id. at 856, fn. 13. The Board, however, did not specify what evidence, if any, evidence must be presented to establish the provision at issue was necessary and/or that no change or "accommodation" would have been made.

Since *Pacific Mutual Door*, the Board has addressed the scope of its application. In *Harvey Manufacturing., Inc*., 309 NLRB 465, 469 (1992), the employer faced with an economic strike contracted with a staffing agency to provide replacements, and the contract required the employer to hire each replacement for at least 30 days and provide the staffing agency 10 days' notice prior to cancellation of the contract. When the strikers unconditionally offered to return to work, the employer refused and instead continued hiring employees from the staffing agency and claimed they were permanent replacements. Although the employer did not raise the contractual provisions as a justification for its actions, the judge found, sua sponte, that the 10-day notice-of-cancellation provision allowed the employer to delay reinstatement of the strikers and continue hiring "permanent" replacements. The Board reversed, holding that *Pacific Mutual Door* did not apply because the employer failed to establish, or even assert, that the contractual provisions were a legitimate justification for its actions. In reaching this conclusion, the Board found there was "scant evidence" offered as to the contracting parties' intentions with regards to the provision and "absolutely no evidence" that the provision was necessary to induce the staffing agency into providing the replacements. Id. at 468-469. The Board further found that private contracts between an employer and a staffing agency to supply temporary replacements are only valid for filling vacancies left by striking employees while they are on strike. "Once an appropriate offer to return is made, such contractual arrangements cease to have any legitimate purpose within the parameters of the Act, because there is no longer a need to hire replacements … and … the strikers have a fundamental right to immediate reinstatement." Id. at 470.

In *Encino-Tarzana Regional Medical Center*, 332 NLRB 914 (2000), the employer contracted with a staffing agency to supply temporary replacements during a one-day economic strike. The contract contained a 4-day minimum guarantee for the replacements. However, the General Counsel did not allege the employer was obligated to displace the temporary replacements upon the strikers'

[7] An employer may permanently replace economic strikers who have not made an unconditional offer to return to work, see *NLRB v. Mackay Radio & Telegraph Co*., 304 U.S. 333, 345 (1938), but it may not permanently replace unfair labor practice strikers. See *Mastro Plastics v. NLRB*, 350 U.S. 270, 278 (1956).

unconditional offer to return to work. Rather, the allegation was that the employer, during the 3-day period following the end of the strike, unlawfully suspended its "call off" procedure when scheduling employees for shifts, which would have resulted in the displacement of the employees who worked during the strike ("crossovers") by more senior returning strikers. The Board concluded that given the contractual requirement to retain the agency-supplied temporary replacements for the 4-day minimum-guarantee period, the employer did not violate the Act by suspending the call-off procedure, because there was insufficient work for the returning strikers as well as the crossovers and temporary replacements to perform. In reaching this conclusion, the Board relied upon *TWA v. Flight Attendants Union*, 489 U.S. 426, 438 (1989), in which the Supreme Court held the employer was not required to replace junior crossovers with the more senior returning strikers. The absence of immediate vacancies for the returning strikers was, in the Court's judgement, attributable solely to lawful actions of the employer. "We see no reason why those employees who chose not to strike should suffer the consequences when the gamble [of a strike] proves unsuccessful. Requiring junior crossovers, who cannot themselves displace the newly hired replacements … to be displaced by more senior full-term strikers is precisely to visit the consequences of the lost gamble on those who refused to take the risk." *Encino-Tarzana,* 332 NLRB at 914, citing to *TWA*, 489 U.S. at 438-439.

In *Roosevelt Memorial Medical Center*, 348 NLRB 1016 (2006), the employer faced with an impending economic strike drew up the work schedule for the dates when unit employees planned to strike. The schedule included per diem employees, volunteers from other departments, and temporary employees supplied by a staffing agency, all working as temporary strike replacements. The union called off the strike 4 days before it was set to begin. The employer kept and used the agency-supplied employees because it would have to pay for them regardless of whether they worked, and it reduced the hours of those employees who had intended to strike, because there was not enough work for all. The judge found the employer unlawfully reduced the hours of those who intended to strike in favor of the agency-supplied employees, which he concluded was "inherently destructive" and penalized the would-be strikers by distinguishing them from the others based on their planned protected strike activity. The Board reversed, holding the temporary schedule change had a comparatively slight effect on the unit employees' statutory rights. In reaching this conclusion, the Board held that because the strike announcement required the employer to commit itself to the replacement workers, the would-be strikers, not the temporary replacements or non-strikers, should absorb the short-lived consequences of the decision to strike. Id. at 1020. The Board also found the employer established a legitimate and substantial business justification for scheduling the agency-supplied employees because of the employer's desire "to avoid having to pay" for their unused services. It concluded this desire to avoid paying two sets of employees for the same timeframe (i.e., "double pay") was a sufficient justification for minimally reducing the scheduled hours of the few would-be strikers.

As discussed, in *Sutter Roseville Medical Center*, supra, the employer contracted with a staffing agency to supply temporary replacements after the union gave notice it would be conducting a one-day economic strike.[8] The contract contained a five-day minimum guarantee for the agency-

[8] In *Sutter Roseville,* the strike notice included an unconditional offer to return to work immediately upon the conclusion of the strike. The employer argued the offer was invalid because it was made when the employer could not be certain that the strike would end as scheduled. In rejecting these arguments and finding the offers to be valid, the judge held, and the Board adopted, that the unions had a substantial history of conducting these

supplied replacements. When the strikers unconditionally offered to return to work, the employer delayed their reinstatement until the end of the five-day period. Like *Encino-Tarzana*, the General Counsel did not allege the employer violated the Act by failing to displace the agency-supplied replacements during the five-day period. Rather, the General Counsel argued the employer violated the Act when it failed to immediately displace the in-house, non-unit employees working as replacement employees. The Board concluded that reinstating the returning strikers whose positions were temporarily held by the in-house, non-unit employees would not implicate any contractual obligations and each of the in-house replacements had an existing job they could immediately return to at the conclusion of the strike.[9]

24-hour strikes at Sutter Health hospitals, and there was no evidence the employer doubted or sought additional assurance from the union that the announced strike would occur or end any differently than those in the past.

Here, Respondents raise similar arguments. They contend the pre-strike offers were invalid because it was unclear whether the 24-hour strike(s) would occur and which employees would be participating, which deprived them of the right to plan and prepare, including possibly hiring permanent replacements. I reject these arguments. As outlined in *Sutter Roseville* and the cases since, the Unions have a long history of conducting these 24-hour strikes at Sutter Health hospitals, and there is no evidence that Respondents doubted or sought assurances from the Unions that the planned strike would be any different. Additionally, Respondents' communications with the Unions and the employees in the week prior to the strike, as well as the day before the strike(s), all confirm that Respondents planned for a 24-hour strike at each of the affected locations, and those plans, and the resulting contracts with the staffing agencies preparing for a system-wide strike(s), were finalized months *before* receiving the April 7 strike notice. Under these circumstances, and consistent with *Sutter Roseville*, I conclude the strikers, through the Unions, made valid, unconditional offers on April 7, 2022, to return to work at 7:00 a.m. on April 19, 2022.

[9] As stated, once unfair labor practice strikers make an unconditional offer to return to work, they must be reinstated promptly. *NLRB v. International Van Lines*, 409 U.S. 48, 50-51 (1972); *Mastro Plastics v. NLRB*, 350 U.S. 270, 278 (1956). In *Drug Package Co*., 228 NLRB 108, 113-114 (1977), enf. denied in part on other grounds 570 F.2d 1340 (8th Cir. 1978), the Board held employers have up to five days to reinstate the returning unfair labor practice strikers. It found this represents a reasonable accommodation between the interests of the employees in returning to work as quickly as possible and the employer's need to accomplish the administrative tasks involved in effectuating that return in an orderly manner, including, if necessary, discharging any replacement workers. In *Sutter Roseville*, supra, the Board declined to extend this five-day grace period to the reinstatement of economic strikers displaced by the in-house, non-unit employees. The Board explained:

> 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 five 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 one day and return to work on November 15, two weeks before the strikers offered to return. Thus, this case is a particularly good example of a situation where five extra days is not needed. In addition, as the judge found, the Union had previously engaged in one-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.

348 NLRB at 638 (footnotes omitted)

Respondents contend the five-day (60-hour) minimum guarantees in the contracts with U.S. Nursing and Prolink were a legitimate and substantial business justification for delaying reinstatement of the returning strikers until April 23, 2022. As outlined, Respondents faced the prospect of an unprecedented nursing strike, at a time when there was a shortage of available replacements. They needed to find a trusted supplier that could recruit and deploy the requisite number of qualified/specialized replacements, without knowing whether, when, where, or how long the strike(s) might occur. Respondents were informed that under the circumstances the five-day minimum guarantees were necessary to ensure the staffing agencies could attract the requisite number of replacements needed to allow Respondents to continue operating and caring for patients in the event of a strike(s). Finally, these five-day minimum guarantees were consistent with those that Sutter Health affiliates agreed to in the past. Each time those guarantees were challenged by the Unions, they were held to be a legitimate and substantial justification for delaying reinstatement until the end of the guaranteed period.

The General Counsel and Unions counter that Respondents failed to meet their burden of establishing these five-day minimum guarantees were "necessary" to induce U.S. Nursing and Prolink into agreeing to supply the strike replacements.[10] They argue that for a contractual provision delaying the reinstatement of returning strikers to be necessary the employer must make counterproposals and attempt to "push back" against the proposals to reduce the delay, which Respondents failed to sufficiently do. In support of their argument, the General Counsel and Unions rely upon *Pacific Mutual*

The Board, however, was not presented with the issue of whether the five-day grace period should apply to the reinstatement of economic strikers displaced by contractual temporary replacements. Given the greater protection historically afforded unfair labor practice strikers, Respondents argue there is no reason why employers faced with an economic strike should not, under the circumstances presented, be afforded the same five-day grace period to effectuate the orderly return of its striking employees. While I may agree with this argument, it is a matter of policy for the Board to decide. See *Waco, Inc.*, 273 NLRB 746 (1984).

[10] The General Counsel and Unions implicitly argue for the adoption of a standard upheld in *County of San Joaquin v. Public Employment Relations Bd.*, 82 Cal.App.5th 1053 (Cal. App. 3 Dist. 2022), which requires that a public health care employer "prove that: (1) it made a good faith effort in the marketplace to negotiate a strike replacement contract that would eliminate any minimum shift guarantee or shorten it to the greatest degree possible, but it ultimately needed to agree to the minimum shift guarantee in order to maintain critical health care services; (2) it barred employees from work only because such a contractual commitment temporarily reduced available work opportunities, and it filled all remaining opportunities without discriminating against employees based on whether they worked during the strike or engaged in any other actual or perceived protected activity; and (3) it provided the employees' union with timely notice regarding any decision to guarantee replacement workers a minimum work period or to modify the terms of such a guarantee, and if requested, bargained in good faith over the potential effects on bargaining unit employees." This requires far more than *Pacific Mutual Door*. As stated, changes in Board policy or precedent are matters for the Board to decide.

Along these same lines, the General Counsel also argues that Respondents did not "need" to select U.S. Nursing or Prolink, and they could have obtained striker replacements by using multiple smaller staffing firms, or at least they could have used that possibility as leverage to negotiate a reduction in the five-day/60-hour guarantee with U.S. Nursing or Prolink. The General Counsel and Unions cite to no Board authority suggesting that employers faced with an economic strike are required to select suppliers or negotiate terms based on the interests of the returning economic strikers. Here, Sutter Health wanted a trusted staffing agency that could directly recruit and deploy qualified replacements if there was a coordinated strike(s) among the network's hospital nursing staff. And, except for Tracy Hospital, each of Respondents concluded that U.S. Nursing was their best (and, in the end, only) option to do so. Despite the limited options, Respondents lawfully negotiated and reached agreement on terms of importance to them. In doing so, there is no evidence they proposed or agreed to terms to retaliate or discriminate against the strikers.

Door and *Harvey Mfg., Inc*. In *Pacific Mutual Door*, supra, the contract between the employer and staffing agency read that it continued in force and effect for 1 year, and thereafter until terminated by either party by providing 30 days written notice. In the margin of the contract, the employer's manager wrote "Does not apply" with an arrow pointing to the line beginning "effect for 1 year …" Following a discussion, the staffing agency agreed to relinquish the 1-year duration term but not the 30-day notice-of-cancellation provision. That is the provision the employer later relied upon -- and the Board held served -- as the legitimate justification for delaying reinstatement of the returning strikers. The employer's manager testified that the staffing agency would not eliminate the 30-day cancellation provision, and that the employer agreed to it. There is no evidence that the employer made a counterproposal or attempted to reduce the notice period, and I reject the General Counsel's claim that *Pacific Mutual Door* requires such evidence for the employer to meet its burden of proof.

As discussed, in *Harvey Mfg.*, supra, the employer never asserted, let alone established, the contractual provisions at issue justified delaying reinstatement, and there was "absolutely no evidence" that those provisions were necessary to induce the staffing agency to provide the needed replacements.

The General Counsel and Unions also cite to *Alaris Health at Castle Hill*, 367 NLRB No. 52 (2018), enfd. 811 Fed. Appx. 782 (3rd Cir. 2020) and *Alaris Health at Rochelle Park*, 367 NLRB No. 57 (2018), which both involved unfair labor practice strikes.[11] In those cases, *after* the unions provided notice of a planned 3-day strike, the employers contracted with staffing agencies to supply replacements. Those contracts contained minimum guarantees of 4 to 6 weeks. The Board held that minimum guarantees can never serve as a legitimate justification for delaying the reinstatement of unfair labor practice strikers. However, it went on to explain, in dicta, that assuming arguendo such obligations could qualify as a justification, the employers failed to demonstrate the minimum guarantees were necessary. Specifically, there was no credited evidence regarding the parties' negotiations, or the reasons why the employer agreed to the multi-week guarantees in the face of a three-day strike. There also was no evidence the staffing agencies demanded those guarantees as a condition of providing the replacements.

Here, unlike in *Harvey Mfg*. and *Alaris Health*, Respondents established that U.S. Nursing and Prolink required the five-day minimum guarantees as a condition of agreeing to supply the temporary strike replacements based on the circumstances that existed. As explained, Respondents were faced with the prospect of an unprecedented work stoppage among their hospital nurses, at a time when there was a shortage of available nurse replacements. Goehring spoke with U.S. Nursing representatives preliminarily in February 2021 regarding a potential contract to supply replacements in the event of such a strike, and they told him they would require a five-day minimum guarantee to ensure they could supply the requisite number of qualified individuals for a strike of that potential size and scope Then, in May 2021, Goehring and Kearsing spoke with the U.S. Nursing representatives and were again told the five-day minimum guarantee would be required for essentially the same reasons.

Additionally, Respondents presented credible evidence that they considered and concluded these five-day minimum guarantees -- which had been challenged and upheld in the past -- were reasonable and necessary under the circumstances. In the prior cases, Sutter Health was faced with coordinated strike(s) at eight or fewer of its hospitals: in 2021 and 2022, it was preparing for a coordinated strike at up to about 20 of its hospitals. The General Counsel and Unions argue the prior

[11] The Board issued multiple decisions about strikes at Alaris Health facilities on around this same timeframe.

cases in which the guarantees were upheld, which I credit were generally known and considered by Respondents' decisionmakers, have no bearing in the instant cases, because the outcomes in those prior cases were merely the positions of the General Counsels at the time. I disagree. Sutter Health affiliates, including several of the Respondents, were involved in these prior cases, and the CNA, the CHEU, and/or the SEIU challenged them as unlawful. In each case, the General Counsel considered the arguments and concluded under *Pacific Mutual Door* and *Encino-Tarzana* that the minimum guarantees were a legitimate and substantial business justification for delaying reinstatement of the strikers until the end of the guarantee period. While the General Counsel's conclusions in these prior cases are not dispositive here, they, and Respondents' knowledge of them, are certainly relevant to Respondents' evaluation of whether the minimum guarantees at issue in the agreements with U.S. Nursing and Prolink were reasonable.

In a separate but related matter, in these prior cases, the hospitals appear to have agreed to the five-day minimum guarantees *after* receiving strike notices indicating the strikes would last 24 hours. Here, in contrast, Respondents negotiated and executed the agreements with U.S. Nursing several months prior to receiving the strike notices, without knowing whether, when, where, or how long the strike(s) would occur. Thus, even if, as the General Counsel and Unions argue, Respondents should have anticipated the strike similarly would have lasted no more than 24 hours, the decision to agree to the five-day minimum guarantees was entirely consistent with their past practice in which they knew, or had reason to believe, the strike would last 24-hours.

Based on the foregoing, I conclude Respondents have established that under the circumstances the contractual five-day minimum guarantees required by U.S. Nursing and Prolink served as a legitimate and substantial business justification for delaying the reinstatement of the returning strikers until April 23, 2022.[12]

C. Alleged Evidence of Animus

The General Counsel and Unions next argue that even if Respondents could show the five-day minimum guarantees were necessary to induce U.S. Nursing and Prolink into providing the temporary replacements, those guarantees still do not serve as a legitimate and substantial business justification for delaying reinstatement of the strikers until April 23, 2022. They contend that contractual obligations, such as minimum guarantees, only serve as a legitimate justification if they are to avoid the employer paying double, i.e., paying for the temporary replacements and the returning strikers.

[12] Over the objections of the General Counsel, I allowed Respondents to present labor economist Dr. Erin Johnson to testify as an expert witness, stating I would evaluate her testimony and determine what, if any, weight to give it based on my review of the record and the parties' arguments. Under the Federal Rules of Evidence, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. (FRE) 702. Dr. Johnson, who qualified as an expert, offered her opinion on the ultimate issue of whether it was reasonable under the circumstances for Respondents to agree to the five-day minimum guarantees. She based her opinion on her knowledge, experience, and review of the evidence and other sources. With the benefit of reviewing the record and briefs, I conclude Dr. Johnson's testimony does not assist me with understanding or evaluating the facts, nor in addressing the issues in these cases. I therefore reject her testimony and find it properly excluded under FRE 702 and reclassify it as an offer of proof. See generally *Wal-Mart Stores, Inc.,* 368 NLRB No.146, slip op. at 69-71 (2019). I likewise reclassify the exhibits tendered in support of her testimony as rejected exhibits.

Here, the argument is that Respondents notified the Unions and employees on April 17 that they were, in effect, willing to double pay if the Unions called off the strike, but they were not willing to, and did not, immediately reinstate and pay both groups after the unit employees engaged in their lawful economic strike, in violation of Section 8(a)(3) and (1) of the Act.

The General Counsel and Unions argue that Respondents' April 17 conditional offer and subsequent refusal to immediately reinstate the returning strikers on April 19 was driven by animus for their protected strike. They raise several arguments to support this. First, the offer to double pay only if the unit employees did not exercise their right to strike, but not if they did, was plainly discriminatory. Second, Respondents' statement accompanying the offer that it "hope[d] the union will call off the strike to avoid disruption and keep our nurses working" is direct evidence that the offer was for the purpose of discouraging the strike. Finally, Respondents' claim that they did not immediately reinstate the strikers because of the five-day minimum guarantee does not withstand scrutiny. If avoiding double payment during the five-day guarantee period was the true goal, Respondents would not have offered to return their employees to work even if the Unions called off the strike. Moreover, if Respondents were willing to double pay for five days if the strike was cancelled, then their claim that they could not immediately reinstate the strikers because they could not double pay for 4 days was clearly pretextual. Because Respondents' purported reasons for delaying the strikers' reinstatement were false or not in fact relied upon, the General Counsel and Unions argue it must be inferred that Respondents' true motive was an unlawful one. I reject these arguments.

The General Counsel cites to *Roosevelt Memorial* and *Alaris Health* for support. In *Roosevelt Memorial*, the Board held the employer's desire to avoid *having to pay* for unused employee services was sufficient justification for minimally reducing the scheduled hours of a few would-be strikers." 348 NLRB at 1020-1021 (emphasis added). In the *Alaris Health* cases, which, again, involved unfair labor practice strikes, the Board cited to *Pacific Mutual Door* and generally held that "[w]here employees strike in support of economic objectives and the employer has not committed any unfair labor practice, this *interest in avoiding double payment* may constitute a legitimate and substantial business justification for an employer's delay in reinstating economic strikers." 367 NLRB at 4. While these and other Board decisions hold that an employer cannot be *required* to double pay, they do not prohibit an employer from *offering or agreeing* to do so *for the purpose of avoiding the strike altogether*. I credit that Respondents made the offer to avoid the disruption and uncertainty that a strike of this size and scope would cause. As outlined, Respondents informed the Unions prior to the strike that they would prefer to avoid a work stoppage and have the parties continue their negotiations toward reaching new and successor agreements. They acknowledged that a coordinated work stoppage at about 70 percent of their hospitals—even for a single day—required complex and costly preparation to ensure patient safety and care. This included the need for Respondents to orient, train, and support all the incoming temporary replacements. Additionally, there were concerns about Respondents' readiness to weather the strike because, shortly before the planned strike, U.S. Nursing advised that it may not be able to supply the requested number of replacements for each of the affected hospitals. This left Respondents concerned over whether they would have adequate staffing, and their preference was to have their own staff continue working. Hence, they made the offer.

Under Board law, an employer is prohibited from granting or denying a benefit, or imposing or withholding an adverse consequence, to induce employees not to participate in a protected strike. See generally, *Aelco Corp*., 326 NLRB 1262, 1265 (1998) (offering better wage rates to induce

employees to not participate in strike held unlawful); *Aero-Motive Mfg. Co.*, 195 NLRB 790, 791 (1972) (depriving strikers of benefits granted to non-strikers and making threats or promises of benefit to induce employees to abandon the strike held unlawful); *Schenk Packing Co.*, 301 NLRB 487, 489 (1991) (announcing before a lockout the condition that no union members would be employed as replacements and that locked-out union members might be reinstated only if they revoked their union membership; and by granting employees who resigned from the union and returned to work a bonus and vacation package one week into the five week lockout, held unlawful); *Boise Cascade Corp.*, 304 NLRB 94, 95-96 (1991) (granting free weekend gift certificates to non-striking employees but not to striking employees held unlawful); and *Smith's Complete Market*, 237 NLRB 1424 (1978) (offering employees individual contracts, more and different overtime, and agreeing to pay union fines if they did not strike held unlawful). Here, however, I find nothing unlawful about Respondents offer. Nothing was added or taken away from what otherwise would have lawfully occurred. If the Unions cancelled the strike prior to the 2 p.m. deadline, the unit employees would have been permitted to work without interruption. If the Unions went forward with the strike, the returning strikers would have been reinstated following the end of the five-day period.

This is analogous to a Section 8(a)(5) bargaining case in which an employer makes a favorable proposal to avoid an economic strike. If the union rejects the proposal and goes out on strike, the employer is not obligated to continue offering the same proposal after weathering the strike, and it may, in fact, offer regressive proposals. See *Hendrick Mfg. Co.*, 287 NLRB 310, 311 (1987); *Berry-Wehmiller Co.*, 271 NLRB 471, 472-473 (1984); *Hickinbotham Bros.*, 254 NLRB 96, 102 (1981). An economic strike is a double-edged sword; strikers may gain concessions or lose them, depending on how their actions impact the employer's operations. An employer that withstands the strike lawfully may use its new-found strength to secure more favorable contract terms. Id. Applying that same logic, an employer that offers to double pay solely to avoid an economic strike is not obligated -- nor is it acting with animosity if it refuses -- to continue with that offer after it has successfully weathered the strike. As the Supreme Court in *TWA* held, an economic strike is a gamble with risks for those who choose to participate. The Unions were aware of those risks and chose, as is their right, to move forward with their strike.

The General Counsel and Unions cite to no other evidence, direct or circumstantial, establishing that Respondents' delayed reinstatement of the returning strikers was motivated by animus for their protected activity. As explained, agreeing to the five-day minimum guarantees was justified under the circumstances, and they are entirely consistent with the past practice involving these coordinated 24-hour strikes requiring the use of contractual temporary replacements. The notable difference being that this was a far larger strike at more than double the number of locations.

Based on the evidence and applicable authority, I conclude Respondents did not violate Section 8(a)(1) and (3) by its statements or conduct regarding the delayed reinstatement of the returning economic strikers. I, therefore, recommend dismissing the allegation.

II. FAILURE TO BARGAIN WITH THE UNIONS BEFORE ESTABLISHING OR CHANGING EMPLOYMENT TERMS APPLICABLE TO TEMPORARY STRIKER REPLACEMENTS

The General Counsel alleges that from about April 18 until about April 23, 2022, Respondents violated Section 8(a)(5) and (1) of the Act when they set the terms and conditions of employment for

the temporary replacements who filled positions performing bargaining unit work without affording the CNA or the CHEU with an opportunity to bargain over those decisions or their effects.

A struck employer has the right to unilaterally set the terms and conditions of employment for its temporary strike replacements. *Detroit Newspaper Agency*, 327 NLRB 871, 871-872 (1999); *Service Electric Co*., 281 NLRB 633, 639 (1986). The reasons for this are that requiring an employer to bargain over those matters would effectively invalidate its right to hire replacements, and it would be illogical to expect that the union would negotiate in the best interests of strike replacements where it also represents strikers because of the direct conflict of interest. Id. However, in exercising its unilateral right, the employer may not act in a manner designed to accomplish an illegal objective, i.e., undermine the bargaining representative. *Service Electric Co*., supra at 639 fn. 11. The Board has held that where "the struck employer's employment terms for replacements have been formulated and implemented to accomplish illegal objectives, then it might properly be concluded that a bargaining obligation should be imposed." Id. at 640.

The General Counsel and Unions argue the April 17, 2022 offer demonstrates Respondents' illegal objective of agreeing to and utilizing the five-day minimum guarantee to obtain temporary replacements as a pretext for delaying the returning strikers' reinstatement for four additional days. For the reasons stated, I conclude Respondents did not act with animus or an illegal objective by presenting its offer to avert the strike, and then by moving forward with using the replacements for the contractual period after the Unions elected to move forward with their strike. As such, I conclude Respondents had no obligation to bargain with the Unions about the terms and conditions of employment for those replacements.

For these reasons, I conclude Respondent did not violate Section 8(a)(5) and (1). I, therefore, recommend dismissing the allegation.

CONCLUSIONS OF LAW

1. Respondents, Sutter Valley Hospitals d/b/a Sutter Solano Medical Center, Sutter Valley Hospitals d/b/a Sutter Roseville Medical Center, Sutter Bay Hospitals d/b/a Mills-Peninsula Medical Center, Sutter Bay Hospitals d/b/a Sutter Santa Rosa Regional Hospital, Sutter Valley Hospitals d/b/a Sutter Center for Psychiatry, Sutter Bay Hospitals d/b/a Sutter Lakeside Hospital, Sutter Bay Hospitals d/b/a Novato Community Hospital, Sutter Bay Hospitals d/b/a California Pacific Medical Center, Sutter Coast Hospital, Sutter Valley Hospitals d/b/a Sutter Auburn Faith Hospital, Sutter Bay Hospitals d/b/a Sutter Delta Medical Center, Sutter Valley Hospitals d/b/a Sutter Tracy Community Hospital, Sutter Bay Hospitals d/b/a Eden Medical Center, and Sutter Bay Hospitals d/b/a Alta Bates Summit Medical Center, are each 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.

2. Respondents did not violate the Act as alleged in the Consolidated Complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:[13]

ORDER

The Consolidated Complaint is dismissed.

Dated, Washington, D.C. February 28, 2025

Andrew S. Gollin
Administrative Law Judge

[13] 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."