No. 24-

IN THE

Supreme Court of the United States

ALARIS HEALTH AT BOULEVARD EAST,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether clauses in an expired collective bargaining agreement form part of the status quo that must be maintained after the expiration of the contract when such clauses give management discretion to act without having to bargain with the union. If such clauses are not part of the status quo that must be maintained post-contract, do the parties have to begin bargaining for a successor agreement as if the terms no longer exist.

2. Can employer be excused from bargaining over terms and conditions of employment when there are exigent circumstances which preclude normal bargaining over such terms.

3. Whether National Labor Relations Board ("NLRB") has the authority to make terms offered by the employer to employees as a temporary bonus program during COVID-19 into a term of employment that it was required to continue until the employer ceased operation.

4. Does an appellate court reviewing a decision of the NLRB have to defer to the NLRB's proposed remedies.

5. What due process is the employer entitled to in the proceedings before the NLRB.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, 1199 SEIU United Healthcare Workers East ("1199"), was a party before the NLRB.

CORPORATE DISCLOSURE STATEMENT

Alaris Health at Boulevard East("Alaris") has no parent corporation, and no publicly held company owns more than 10% of its stock.

RELATED PROCEEDINGS

Third Circuit Court of Appeals: *Alaris Health at Boulevard East v. National Labor Relations Board*, 23-1946/23-1976, judgment entered December 9, 2024.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(ii).

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JURISDICTION

The judgment of the court of appeals was entered on December 9, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the appendix. (29 U.S.C. 160(e)-(f). Pet. App. 114-116a.

STATEMENT

This case presents an important issue regarding what terms of the collective bargaining agreement remain in effect after the expiration of the collective bargaining agreement as part of the status quo, which this Court has said must be maintained by the parties by operation of law post-contract expiration. This issue has great consequences on how the employer can operate it business post-contract and how the employer and the union must bargain a successor collective bargaining agreement. Specifically, this case involves whether terms in a collective bargaining agreement that provide the employer with discretion to act without bargaining with the union remain in effect post-expiration of the contract.

Collective bargaining agreements universally vest in employers the right to make changes in their discretion, including the employers exercising their discretion in the determination of lay-offs and recalls, the determination of when to grant vacation, and the determination of overtime. In this case, there was a provision under the wage article (Article 10(B)) in the expired collective bargaining agreement ("CBA") between 1199 and Alaris that gave the employer the right to give merit increases, bonuses or other similar types of remuneration upon notice to 1199. This clause had been bargained as part of the wages that were to be provided to employees.

The Third Circuit in this case held that this provision was a management rights clause that did not survive the expiration of the CBA. This case did not involve the management rights clause, which was another provision in the CBA. Regardless of whether the Third Circuit mischaracterized this clause as a management rights clause or meant that all clauses which give management discretion are management rights provisions, the Third Circuit's holding creates confusion as to what terms must be maintained post-expiration of the collective bargaining agreement. While the Supreme Court held in *NLRB v. Katz*, 369 U.S. 736 (1962) that most terms in the expired contract continue to exist post-expiration by operation, the Supreme Court has never resolved this issue on whether clauses that give management discretion (including the amount and type of discretion) survive post-expiration as part of the status quo that must be maintained post-contract.

The Third Circuit's approach on whether the terms must be maintained focused on using ordinary contract principles to determine whether the provision in the wage provision survived. The Court held that, since the

clause was silent on whether it continued, this suggested that the clause did not survive the expiration of the CBA. *Alaris Health at Boulevard East*, 123 F.4th at 125. Pet. App.28a. The Court enforced the NLRB's order finding that Alaris violated the Section 8(a)(1) and (5) of the National Labor Relations Act ("Act"), 29 U.S.C. 158(a)(1) and (5), by not bargaining with the union when it rescinded and reduced bonuses that were provided to employees during COVID-19 even though the expired contract had a provision which allowed Alaris to provide these bonuses without bargaining with 1199.

This method of using ordinary contract principles to determine if a provision continues post-contract is not followed by the NLRB. In *Tecnocap, LLC*, 372 NLRB No. 136 (2023), the NLRB held that a past practice pursuant to a management rights clause did not survive the expiration of the collective bargaining agreement. The NLRB also held that provisions in the expired contract that allowed a large degree of discretion to the employer would not survive the expired contract. The NLRB further found that an "employer's unilateral change violates the duty to bargain under the Act, even where the change is consistent with a past practice of similar changes, if the change involves significant employer discretion." *Id.* The NLRB never defined what it means by a large degree of discretion. In addition, *Tecnocap* highlights the NLRB's continuing changing rationales and holdings on what changes an employer can make post-contract. That case overruled a prior NLRB decision, *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), which had found that an employer could lawfully exercise discretion where it had done so in the past as a prior practice.

By not having any bright-line test on what provisions survive post-expiration, particularly those that give management discretion, the union and the employer are literally left with not knowing what terms remain in effect and what terms have to be re-negotiated as if they do not exist. In the case at bar, the parties had negotiated provision allowing for bonuses as part of the wage package. If the wage provision regarding the bonus was not in effect, does this mean that such a clause was wiped out of the existing terms and had to be negotiated again from scratch? That certainly would not foster collective bargaining but would create chaos in trying to ascertain what terms remain by operation of law. Under the Third Circuit's decision, the real and practical effect is that no employer or union could know what remains in the contract after the expiration where the provision gives management some discretion.

Another significant question presented by this case is how does the NLRB and the Court reconcile the Act's requirement that an employer bargain with a union before making a change when there is a pandemic requiring the employer to act without following the normal procedure of bargaining with a union. The Sixth Circuit's held in *NLRB v. Metro Man IV, LLC*, 113 F.4th, 692, 695, 699-700 (6th Cir. 2024) that an employer's failure to bargain over hazard pay was excused by the exigent circumstances created by COVID-19. Rather than focus on the overall exigent circumstances, including the chaotic circumstances caused by the pandemic, the Third Circuit focused on the economic exigencies caused by the pandemic. The Third Circuit held that there was no substantial evidence that there were "exigent economic circumstances" that excused Alaris from bargaining over the bonus policies instituted

by Alaris. *Alaris Health at Boulevard East*, 123 F.4th at 124. Pet. App. 23a. The Supreme Court must resolve the conflict between the Sixth Circuit's holding that exigent circumstances may excuse bargaining with the Third Circuit's more narrow holding that exigent *economic* circumstances may excuse an employer's obligation to bargain with a union. The Court also can take judicial notice that in New Jersey, where Alaris was located, was an epicenter for the pandemic.

Still another significant question presented by this case is the NLRB's holding, which was enforced by the Third Circuit, that Alaris had to pay the bonuses that it implemented in April 2020 throughout the time that it remained operating through November 2020 even though the April bonuses by their terms were supposed to expire at the end of April 2020. The Court enforced the holding, in effect, creating a permanent term of employment even though each of the bonuses were only for a finite period and even though 1199 and Alaris had never bargained to make these terms permanent. Since the bonuses were meant to be temporary and finite, the NLRB created a new term of employment by requiring Alaris to pay the bonuses. Alaris asserts that this remedy is beyond the scope of the NLRB's authority by creating and imposing terms not negotiated for by the parties. The Third Circuit also should not have been deferred to the NLRB's remedy without its own review of whether the remedy was in accordance with the Act.

The last significant question is whether Alaris received its due process. As part of issuing an amended complaint, the Regional Director issued a compliance specification indicating how much money was owed to

each employee. The apparent rationale for issuing the compliance specification was that Alaris had closed its facility and the numbers were allegedly fixed. (The Third Circuit mistakenly said that Alaris owned other facilities. That clearly is wrong.) Alaris filed a general denial to the compliance specification. General Counsel moved for summary judgment with respect to the compliance specification, arguing that Alaris had failed to answer the compliance specification and contest the amount allegedly owed. The ALJ recommended dismissing the complaint, finding that the monies provided to employees were a bonus and a type of gift that did not require Alaris to bargain with the union regarding the implementation, modification or discontinuance of the bonus. The NLRB's General Counsel appealed the ALJ's recommendation to dismiss the complaint and the denial of summary judgment to the NLRB. The NLRB overturned the ALJ's decision that the complaint should be dismissed. The NLRB also granted summary judgment to General Counsel regarding the amounts owed to employees as stated in the compliance specification. The NLRB held that Alaris did not avail itself of the opportunity to answer the compliance specification because its general denial in its answer did not provide alternate calculations.

Alaris, however, was denied its due process because it could not have provided alternate calculations because it did not know how the NLRB would treat the bonuses, including each of the changes to the amounts to the bonus made by Alaris. Thus, it could not respond and give alternate calculations in response to General Counsel's appeal of the denial of summary judgment because it did not have or know what alternative calculations to use because it did not know which of the bonuses or changes

may have been deemed to be unlawful. In addition, the ALJ had recommended dismissing the complaint, finding that the monies given were a gift and not hazard pay.

The NLRB's rationale for its decision finding that Alaris had to bargain about the modification regarding the bonus was even different than the Third Circuit. Unlike the NLRB, the Third Circuit cited guidance from the U.S. Department of Labor while the NLRB relied upon prior NLRB cases law. The Third Circuit held that Alaris was not denied due process to contest the amount owed to employees in the compliance specification because Alaris had the opportunity to file an answer to a compliance specification. The Third Circuit never explained how such an answer could have been filed when it was not clear which, if any change, was unlawful

FACTS AND PROCEDURAL HISTORY

Alaris was an in-patient nursing home facility. Alaris ceased operations on about November 15, 2020. Pet. App. 65a. At all material times, 1199 had been the exclusive collective bargaining representative of the following unit within the meaning of Section 9(b) of the Act:

> All CNAs, dietary, housekeeping, recreational aides, cooks, and all other employees excluding professional employees, registered nurses, LPNs, confidential employees, office clerical employees, supervisors, watchmen and guards. Pet. App. 65a.

Alaris and 1199's collective bargaining relationship was embodied in a collective bargaining agreement,

effective by its terms from April 1, 2010 through March 31, 2014 (the "CBA"). At the time of the agreement, Alaris was known as Palisades Healthcare Center. Later the facility was renamed as Alaris Health Boulevard East. Pet. App. 65a

Due to the national COVID-19 pandemic in early spring 2020, the State of New Jersey implemented a state-wide shelter-in-place mandate affecting most governmental activities and commercial businesses, including the nursing home industry. While most employees were permitted to work from alternate locations, the employees at Alaris had to work at the job site in order to provide care. Pet. App. 67a. This placed a great strain upon Alaris's ability to staff the facility and maintain its operations. Accordingly, in order to meet the demands placed on it by the pandemic, in early April 2020 Alaris instituted a temporary bonus program aimed at rewarding employees for their efforts during the pandemic (while incentivizing employees to continue to appear at work during a time of persistent staff shortages). Pet. App. 68-69a.

Article 10(B), *Wages*, of the parties expired CBA provides that ***"[n]othing herein shall prevent the employer from giving merit increases, bonuses, or other similar payments provided it gives prior notice to the Union before implementation."***[1] This right is set forth immediately following Article 10(A), which describes the general wage increases, and minimum wage rates applicable to the bargaining unit. Pet. App. 85a.

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1. Section 10(B), *Wages*, contains a footnote which reads as follows: "This provision does not apply to the extant agreement pertaining to the attendance bonus, set forth in the May 12, 2010 side letter."

A side letter to the expired CBA dated May 12, 2020, at paragraph 2 thereof, establishes an attendance bonus program. Unlike the attendance bonus described in the May 12, 2010 side letter, which expressly describes the circumstances wherein Alaris must consult with 1199 prior to altering, modifying, or terminating the attendance bonus, Article 10(B) places no restrictions on the terms of the bonus program established thereunder, including, but not limited to, the duration of such program.

On April 1, 2020, a memo from Avery Eisenreich ("Eisenreich") on behalf of Alaris informed all employees that Alaris wished to take steps to recognize the hard work of the healthcare workers who continue to work during the pandemic by providing them with what the memo referred to as an ***"special COVID 19 hourly rate bonus."*** The memo stated, in relevant part, that:

> Accordingly, effective April 2, ***and thru at least April 30*** we will be providing all our staff working in our centers a ***special COVID19 hourly rate bonus*** equal to 25% of their current hourly rate. The special hourly bonus will apply to all worked hours (excluding any paid-time-off pay) thru April 30 [emphasis added].

Pet. App. 65a.

The bonus program described by Alaris in the April 1st memorandum is plainly worded, clear, and concise. It states, in plain language, that the "special COVID 19 hourly bonus" was temporary, and that Alaris was only obligating itself to provide this bonus until April 30, 2020, after which date Alaris would no longer be obligated to provide the bonus.

1199's attorney, William Massey ("Massey") testified that on either April 1st or 2nd he received a copy of Eisenreich's April 1st memo, which was sent from a union delegate. After having reviewed the April 1st memo, Massey sent an email to Alaris's attorney, David Jasinski ("Jasinski") in which Massey, without qualification, reservation, or counterproposal, stated that the Union agreed to the increase**.** Pet. App. 39a and Pet. App. 69-70a.

On April 7, 2020, Eisenreich distributed a memo to all "nursing and respiratory staff" stating that in appreciation for their work, the nursing and respiratory staff will receive a COVID-19 hourly rate bonus equal to 100 percent of their currently hourly rate, **"effectively immediately through April 30."** Pet. App. 72a. Massey testified that he received a copy of April 7th memo and, on the same day, emailed Jasinski, informing him that 1199 agreed to the increase. Pet. App. 39a.

In a memo dated April 29th, Eisenreich referring to his April 7th memo, announced the discontinuance of the bonus programs which were announced on April 1st and 7th, 2020, respectively, and the implementation of a new bonus plan, effective May 1st, 2020. Under this new bonus program Nurses, CNA's (certified nursing assistants) and Respiratory Therapists would receive a 25% hourly bonus for hours worked through May 14th. Pet. App. 40a and Pet. App. 73-74a

On May 13, 2020, Eisenreich sent out a letter to employees announcing the discontinuance of the bonus program which was then in place, and the implementation of a new bonus program, as follows:

> Our April 29 memo indicated reevaluation of our bonus program on May 14. Starting May 17, the 25% bonus payment for hours worked will be limited to "Direct Nursing Providers" only. This includes all RNs, LPNs, CNAs, and QA CNAs. This 25% bonus for Direct Nursing Providers will continue until May 31, 2020, at which point we are optimistic that the peak of this pandemic will have passed. As of May 17, all other employees will return to their normal hourly rate. The prior bonus program will continue to be in effect until May 17.

Pet. App. 74a.

Eisenreich followed up his May 13th memo with a memo dated May 29th, announcing the discontinuance of the memo May 13th bonus program, and the implementation of a new bonus program, effective June 1, 2020 through June 15, 2020. Pet. App. 75a.

On July 20, 2020, Eisenreich issued another memo to the Alaris staff. The memo stated that Alaris had re-evaluated the COVID-19 related bonus given to the CNAs in the May 29th memo, and stated that the 25 percent (25%) bonus for hours worked reflected in the May 29th memo was discontinued, and that a new bonus program, whereby employees would receive a $1.50 extra per hour supplement to their hourly wage rate, would replace it, effective July 26, 2020. This new bonus program remained in effect from July 26, 2020 though Alaris's closure, on or about November 15, 2020. Pet. App. 77a

The union filed a charge at the NLRB alleging that Alaris had violated Section 8(a)(1) and 5 of the Act by changing the bonuses without bargaining with 1199. The Regional Director issued a complaint against Alaris that Alaris had violated these provisions of the Act. Pet. App. 63a.

The NLRB also issued a compliance specification alleging a monetary amount that employees were entitled to because Alaris had changed the bonus structure by reducing the amount being paid as a bonus. General Counsel claimed that the employees were owed the difference the highest amount of the bonus that they received and what was paid to employees subsequently. Pet. App. 64a. General Counsel moved for summary judgment, alleging that Alaris had failed to file an answer by only claiming a general denial to the amounts owed in the compliance specification rather than an answer with alternate calculations.

The ALJ's Decision

By decision dated January 26, 2022, Administrative Law Judge Kenneth Chu ("ALJ Chu") held that Alaris did not violate Section 8(a)(5) and (1) of the Act by unilaterally implementing and then reducing and eliminating the bonuses without bargaining with 1199. ALJ Chu's holding is predicated upon several factual and legal conclusions he reached based upon the evidence adduced at hearing, including testimonial evidence.

Employing the Board's analysis articulated in *Benchmark Industries*, 270 NLRB 22, 22 (1984), and refined in both *Dura-Line Corp.*, 366 NLRB No. 126, slip op at 4 (2018) and *Bob's Tire's Inc.*, 368 NLRB No.

33 slip op at 1 (2019), ALJ Chu found that the monetary increases announced on April 1st and 7th, 2020 constituted "gifts," over which an employer has absolute discretion to implement, modify, or discontinue, as gifts do not comprise a mandatory subject of bargaining between an employer and a union. Pet. App. 89a

A separate factual and legal predicate relied upon by ALJ Chu was that the expired CBA gave Alaris the right to implement a bonus. Pet. App. 95-96a

Since the ALJ held that Alaris did not violate Section 8(a)(5) and (1) of the Act, General Counsel's motion for partial summary judgment regarding the compliance specification portion was rendered moot.

The Board's Decision

By decision and order dated November 23, 2022, the Board reversed ALJ Chu, finding that the monetary increases provided by Alaris in April 2020 were not gifts, but, rather, were "a form of hazard pay" and thus comprised a mandatory subject of bargaining between Alaris and 1199. Pet. App. 43a. Employing the same standard utilized by ALJ Chu as reflected in *Benchmark Industries*, 270 NLRB 22, 22 (1984), the Board found that, because the bonuses were provided only with respect to hours worked by an employee, they were conditioned upon an employment-related factor, thus constituting a mandatory subject of bargaining. Id. Accordingly, the Board held that Alaris violated Section 8(a)(5) and (1) of the Act of the Act by "unilaterally rescinding, reducing, and discontinuing employee bonuses starting May 1, 2020." Pet. App. 52a.

The Board further reversed ALJ Chu by finding that Article 10(b), *Wages*, did not survive the expiration of the CBA, as "[t]he provision in question…does not specify, either implicitly or explicitly, that it would survive the agreement's expiration." Pet. App. 45a (footnote 10).

Further, despite having observed that Alaris's April 1st and 7th memos to employees, along with Massey's emails responses, reflected an agreement regarding the provision of the bonuses, *("[w]e recognize that the Union consented to the implementation of the [April] bonuses"*), the NLRB nonetheless found that such agreement did not include the right of Alaris to discontinue the bonus programs after April 30, 2020. Pet. App. 45a.

Having concluded that Alaris violated Section 8(a)(5) and (1) of the Act when it discontinued the bonus programs announced April 1st and April 7th, 2020, the NLRB ordered a make-whole remedy which required that Alaris maintain the April bonus programs in effect, in perpetuity until the facility closed.

Lastly, despite the fact that ALJ Chu's remedial order did not include backpay, thus rendering General Counsel's motion for partial summary judgment regarding the Compliance Specification portion of the Second Amended Complaint moot, the Board nonetheless granted General Counsel's motion, holding that "the allegations in paragraphs 16 through 87 (first and second) of the compliance specification are admitted as true, and the Respondent is precluded from introducing evidence challenging them." Pet. App. 51a.

Third Circuit's Decision

The Third Circuit denied Alaris's petition for review and granted the NLRB's cross-petition for review. In doing so, the Court did not follow the NLRB's reasoning. The Court found that the language in the wage provision allowing Alaris the right to grant bonuses did not survive the expiration of the CBA. The Court also did not follow the Sixth Circuit's holding in *Metro Man IV, LLC* that COVID 19 was an exigent circumstance that would excuse an employer's failure to bargain with the union before implementing a bonus. The Third Circuit further upheld the NLRB's granting of summary judgment for the NLRB on the amounts allegedly owed to the employees in the compliance specification.

In finding that the clause allowing Alaris to grant a bonus did not continue post-expiration as part of the status quo, the Third Circuit held that this clause was in a management rights clause. However, the provision allowing the granting of the bonus was actually not in a management rights clause but was part of the provision involving wages. It is unclear if the Court was mistaken in stating that this provision was part of the management rights clause or the Court was referring to provisions that provide an employer with discretion under a collective bargaining agreement are management rights clause.

With respect to Alaris's claim that the wage clause allowing bonuses remained as part of the status quo by operation of law, the Third Circuit held that contractual obligations will usually end at the expiration of the contract. *Litton Fin. Printing v. NLRB*, 501 U.S. 190, 207 (1991). While

the contractual obligations may cease, the Third Circuit held that the term and conditions in the contract may still remain in effect by "operation of law." *Id.* At 206.

The Third Circuit then stated that the determination of whether a provision in an expired contract is part of the post-expiration status quo should be based upon "ordinary principles of contract interpretation. [citation omitted]" *Alaris Health at Boulevard East*, 123 F.4th at 124. Pet. App. 25a. The Court found that the silence on whether the management rights clause survived post-contract "suggests" that the clause did not survive the expiration of the contract. *Id.* The Court further held that, since the management clause waived rights of employees, absent some language that the clause survived, the management rights clause does not survive the expiration. *Id.* At 125. Pet. App. 29a.The Court concluded that there was no clear waiver of these rights to bargain after the contract expired and that if the clause continues, "would likely slow rather than accelerate future labor negotiations." *Id.* Pet. App. 29a.

Regardless of whether the clause was part of the management rights clause or as a clause which gives management rights, the Third Circuit decision has significant implications on what clauses, which give management discretion, survive post-contract and are part of the status quo. There are many other provisions in a collective bargaining that perforce give management discretion, including things like granting vacation time, hiring employees, laying-off employees, and determining overtime. The clause allowing Alaris to give a bonus in this case was collectively bargained as part of a wage package. Why does this part of the wage package not remain post-contract while clearly other parts of the collectively bargained wage package remain such that an

employer cannot reduce or change wage rates post-contract? The Third Circuit's decision does not designate which of these clauses giving management discretion survive post-expiration. Moreover, do the union and the employer have to begin bargaining for a successor agreement as if the clauses that give management discretion do not exist? Unlike what the Third Circuit stated, the Third Circuit's holding will not foster collective bargaining and will extend, not shorten, the collective bargaining process.

The question of what rights management maintains after the expiration of the contract is an issue also that needs to be determined by this court because the Third Circuit's decision conflicts with how the NLRB decides what clauses remain following expiration that give management discretion. The NLRB in *Tecnocap, LLC* indicated that any clause that provides management discretion may not survive the expiration of the contract in terms of the post-expiration of status quo. The NLRB does not even look to whether the provision is based upon "ordinary principles of contract interpretation." *Alaris Health at Boulevard East*, 123 F.4th at 124. Pet. App. 28-29a.

The Third Circuit further stated that there was no "substantial evidence" that COVID 19 created exigent economic circumstances at Alaris to excuse Alaris's obligation to bargain with the 1199. *Alaris Health at Boulevard East*, 123 F.4th at 124. Pet. App. 23a. Clearly, New Jersey was one of the epicenters of the pandemic.

The Court also stated that, unlike the facts in *Metro Man IV, LLC*, Alaris did not have any limitations on the bonuses and that Alaris changed the bonuses without reference to the previous bonuses. However, the first bonus was given on

April 2nd and stated that it would end on April 30. That was amended in April to increase the amount of the bonus with another statementthat it would end on April 30th. On April 29th, Alaris changed the bonus amount, again indicating that it would end in May. All the bonuses, except the last bonus, had a fixed period in which the bonus would end.

As part of its decision, the Third Circuit held that Alaris had unilaterally changed the terms of the bonus program, resulting in it being liable for the damages from the time that the highest bonuses were provided to employees (which was an April bonus) to the time it ceased operating. The Third Circuit deferred to the NLRB's remedy. Pet. App. 35a. In effect, The Third Circuit allowed the NLRB to make terms, which were stated by Alaris to be in effect only for a temporary period, into permanent terms. This finding presents significant issues of whether the NLRB had the authority to make those terms permanent when they were implemented by Alaris only for a temporary, finite period. A related significant issue is whether the Third Circuit properly deferred to the NLRB's remedy rather than deciding itself what the remedy should under the Act. *Loper Bright Enterprises, Inc. v. Raimondo*, 603 U.S. 369 (2024)

Finally, this case also presents the issue of what due process an employee must receive from the NLRB. The Regional Director issued an amended complaint against Alaris and a compliance specification. Alaris filed an answer to the compliance specification generally denying the calculations. On the eve of trial before the ALJ, General Counsel filed a motion for summary judgment, alleging that Alaris had not sufficiently answered the compliance specification. The ALJ never ruled on the motion for summary judgment, including whether Alaris's

answer was sufficient in response to the compliance specification. The reason is that the ALJ recommended dismissing the complaint.

The Board overruled the ALJ and found that Alaris had violated the Act regarding the bonuses. The Board also granted General Counsel's motion for summary judgment regarding the compliance specification amount despite there never having been a finding by the ALJ on whether the bonuses were unlawfully implemented, rescinded or modified. Prior to the Board's reversal of the ALJ and NLRB' finding that the revocation of the bonuses was unlawful, Alaris never knew if any of the bonuses were unlawfully implemented, rescinded or modified.

The Third Circuit held that Alaris was provided with notice that its answer to the compliance specification was insufficient in the motion for summary before the ALJ and in General Counsel appeal of denial of summary judgment to the NLRB. The Court stated that a general denial of the amounts claimed owed to employees was insufficient, citing the NLRB's rules at 29 CFR §102.56(b). The Third Circuit said Alaris had four opportunities to correct its answer. *Alaris Health at Boulevard* East, 123 F. at 127-128. The Third Circuit found that any claim of lack of due process was "meritless." *Id.* at 128.

REASONS FOR GRANTING PETITION

I. THE SUPREME COURT MUST DETERMINE WHETHER TERMS THAT GIVE MANAGEMENT DISCRETION IN COLLECTIVE BARGAINING AGREEMENTS SURVIVE THE EXPIRATION OF THE COLLECTIVE BARGAINING AGREEMENT

The overarching purpose of the Act is to provide a framework for parties to engage in collective bargaining for the purpose of reaching agreement over the terms and conditions of employment. *Fort Halifax Packing Co, Inc. v. Coyne*, 482 U.S. 1, 21 (1987). "[T]he [Act] is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining." *Id.*

When the parties' collective bargaining agreement ends, the parties' contractual obligations end. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 207 (1991). However, the "terms and conditions continue in effect by operation of the [Act]. They are no longer agreed-upon terms, they are imposed by law, at least so far there is unilateral right to change them." *Id.* at 206. This Court has held that if the employer changes the terms and conditions by changing the status quo, the employer violates Sections 8(a)(5) and (1) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962); *See also Wilkes-Barre Hospital Company, LLC v. National Labor Relations Board*, 857 F.3d 364 (2017).

A significant issue presented in this case is what terms in the expired contract are part of the status quo. If the terms in the expired contract state that they terminate at the end of the contract, then clearly those terms would

not be part of the status quo. In that instance, the union and the employer negotiated that those terms would end. However, the courts and the NLRB have not drawn any brightline on what happens to terms in the expired collective bargaining agreement that give employers discretion in implementing terms without bargaining with the union and where the provisions are silent on whether they continue post-contract. In the case at bar, the parties bargained as part of the wages that Alaris would have the right to give bonuses upon notice to 1199. Courts and the NLRB have struggled to define what terms, which give management discretion, remain in effect by operation of law after the expiration of the contract.[2]

The Third Circuit's approach is that the parties look to ordinary contract principles to determine if the terms expire. The Court qualified this approach by holding "federal labor policy" may also be examined to determine if the clause expired. *Alaris Health at Boulevard East*, 123 F.4th at 125. Pet. App. 28a. Under this approach, the Third Circuit held that provisions, such as management rights clauses which waive the union's right to bargain over the employer's decision, do not survive the expiration of the contract. *Alaris Health at Boulevard East*, 123 F.4th at 124-125. Pet. App. 28a.

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2. The clause in the expired CBA is not in the management rights clause. A "management rights" clause is a provision of a collective bargaining agreement which reserves to the employer all rights not limited or otherwise made conditional by the parties collective bargaining agreement. *National Labor Relations Board v. American Nat. Ins. Co.,* 72 S.Ct. 824 (1952). The provision allowing Alaris to give bonuses was part of the wage provision. It was simply a term that was negotiated by 1199 and Alaris as part of the wage provision.

This approach by the Third Circuit does not "provide a framework for the parties to engage in collective bargaining." *Litton Fin. Printing Div.* 501 U.S. at 207. Rather, this method frustrates the process of collective bargaining by leaving uncertain what terms survive. Moreover, this approach eliminates terms that the parties had bargained for even though the parties have not through actual bargaining agreed to remove the clauses. The status quo, that is supposed to be maintained post-contract, has been modified to the detriment of the employers to tilt the bargaining process in favor of the union. If the employer exercises its discretion that it had bargained for and that was not changed in bargaining post-contract, the employer clearly is in jeopardy of violating the Act if it exercises such discretion.

Moreover, the NLRB's approach in *Tecnocap* does not follow the Third Circuit's method in deciding whether provisions survived. The NLRB's approach is that clauses that give the employer a large measure of discretion do not survive post-contract. The NLRB never defined what constitutes sufficient discretion for the clause not to survive the contract. Further, the NLRB held that even past practices developed or made pursuant to a management rights clause cannot be used as a defense to a claim that the employer violated the Act by taking unilateral action. In its decision in *Tecnocap*, the NLRB overruled a prior decision, *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), highlighting the NLRB's conflicting approaches in determining what clauses survive post-expiration and what actions an employer can unilaterally take without violating the Act.

Courts also have struggled to determine what terms survive post-contract and what unilateral actions an employer may take post-contract. In *E.I. du Pont de Nemours and Co. v. NLRB*, 682 F.3d 55 (D.C. Cir. 2012), the Court refused to enforce an NLRB decision that found that the employer had made unilateral changes to a health plan post-contract. "Because an employer may make unilateral changes insofar as doing so is but a continuation of its past practice, we see no reason it should matter whether that past practice first arose under a CBA that has since expired." *Id.* at 69. The Court held that the issue is not the existence of the management rights clause but whether there were prior practices under the management rights clause that allowed the employer to make the change as a prior practice. *Id.* In denying enforcement of the NLRB's order, the Court further held that the NLRB had failed to explain a prior NLRB decision where the NLRB had found that an employer can lawfully make changes on the basis of an established practice

The Supreme Court must resolve this issue of whether clauses giving management discretion survive post-contract. There currently is no clear test to determine what clauses survive by operation of law. There also is no clear line on what rights management has to take a unilateral action based upon the prior language in an expired contract that allows it to exercise such discretion (such as in overtime, in hiring, and in layoffs). Does the employer follow the Third Circuit's approach that a determination is made whether the clause survives expiration by using ordinary contract principles? Is it the NLRB's approach that clauses which give the employer a large degree of discretion (with no definition of how much

discretion) that the employer must follow? Is it the D.C. Court of Appeals' approach that the employer should not examine whether a management rights clause survives but whether the employer had a past practice of making these changes?

This open issue of what provisions survive as part of the status quo has a direct and material impact on the negotiation of a successor collective bargaining agreement. Do these clauses giving management discretion totally disappear when it comes to negotiating a successor agreement? Do the parties have to bargain these clauses from scratch or do they start bargaining based upon this language being part of the status quo? These are questions being faced by employers.

Alaris asserts that the Court must decide that these provisions, which give employers discretion, are part of the status quo that exists by operation of law. Allowing these provisions to exist is not a waiver of the rights of the union and the employee's post-contract, as suggested by the Third Circuit. *Alaris Health at Boulevard East*, 123 F.4th at 124-125. Pet. App. 28a. Rather, it is a continuation of the terms that have already been collectively bargained by the union and the employer. These terms should be changed through collective bargaining and not when the contract expires.

This is a very important matter which warrants review by the Supreme Court.

II. THE SUPREME COURT MUST DETERMINE WHETHER AN OBLIGATION TO BARGAIN MAY BE EXCUSED FOR EXIGENT CIRCUMSTANCE

In *Metro Man IV, LLC*, the Sixth Circuit held that the employer had the right to implement and pay employees additional COVID-19 pay without bargaining with the union. The Sixth Circuit held that "exigent circumstances" such as a mass shortage of personnel or an outbreak because of COVID-19 could excuse an employer from its obligations to bargain with the union. *Id.* at 695, 699-700. Given the exigent circumstances during the pandemic, the Sixth Circuit held that the employer was excused from bargaining about its decision to implement the temporary wage increase *Id*. at 699. The Court held that the "exigent circumstances" of COVID-19 excused the employer from having to bargain about its decision. *Id.* The Sixth Circuit further held that the decision to implement and then to set the limitation when the payment would end was one decision and not two separate actions. *Id.*

The Third Circuit attempts to distinguish *Metro Man IV* by stating that there was no "substantial evidence" that the pandemic caused "exigent economic circumstances" to Alaris. *Alaris Health at Boulevard* East, 123 F. at 122. It is unclear what the Court is referring to with respect to its statement that there was not "substantial evidence" that there were exigent economic circumstances at Alaris that resulted in the bonus being provided. It is undisputed that New Jersey was an epicenter of the pandemic and that the bonus was given as a reward for coming to work. The Court cited the former Vice President of Alaris's testimony that it was "chaotic" and 'frightening" at the start of the pandemic. *Id.* at122. Pet.

App 22a. Moreover, while the Court's decision *Metro Man IV* focused on exigent circumstances, the Third Circuit's holding was based upon the economics, finding that there was no substantial evidence of "exigent **economic** circumstances." *Id.* [emphasis added].

The Third Circuit also held that, unlike the employer in *Metro Man IV*, Alaris changed and altered the bonus without reference to any past announcements in the terms provided in the bonus announcements. The Court said that there were no limitations set on the bonuses. However, as indicated above, the bonuses (except for the last announcement) did have limitations on when the bonus would expire. Further, Alaris acted before the expiration of the time periods mentioned in the bonus statements to make announcements regarding the modification or continuation of the bonus.

The Supreme Court must set forth the parameters of an employer's obligation to bargain under the Act when there are exigent circumstances, whether economic or non-economic, and hold these circumstances must excuse the employer's obligation to bargain with a union. An employer must be able to act in a pandemic or another emergency event without being required to bargain in a normal fashion with a union. Moreover, the Third Circuit refers to an economic exigency which may excuse an obligation. The Supreme Court must reject the Third Circuit's holding that an economic exigency will only excuse a failure to bargain. There are other exigencies, besides economic, which must also excuse the failure to bargain. The fear of coming to work in a facility, like a nursing home like Alaris, creates a very powerful exigent circumstance to excuse bargaining.

This is a very important matter which warrants review by the Supreme Court. The parameters of these exigent circumstances, including the obligation to bargain based upon the exigent circumstances under the Act, can be fleshed out later through the NLRB and the courts. However, an employer must be allowed to act in a "chaotic" and 'frightening" situation to handle the myriad of issues that arise during a pandemic or other emergency situations and not based just upon economic exigent circumstances. *Id.* at122. Pet. App 22a.The Court must find that an employer, like Alaris, must be excused from bargaining based upon the terrible circumstances of the pandemic.

An ancillary issue is that Supreme Court must decide whether the payment was a gift or whether it was hazard pay. If the payment was a gift, it is not a mandatory subject of bargaining. The ALJ, relying on several NLRB cases, said the payment was a gift for coming to work. The NLRB, however, said the payments were hazard pay, and that hazard pay was a mandatory subject that had to be bargained with 1119 before changing the amounts. The Third Circuit said it is an "open question" after *Loper Bright Enterprises* whether it had to defer to the NLRB determination that it was hazard pay and mandatory subject of bargaining with 1199. *Id.* at122. Pet. App 19-20a. Third Circuit said it did not have decide whether to defer to the NLRB. *Id.* at122. Pet. App 22a. The Third Circuit determined it was hazard pay, relying, in part, upon a definition of hazard pay used by the United States Department of Labor. *Id.* at122. Pet. App 22a.

The Supreme Court must resolve whether the Third Circuit must defer to the NLRB on questions such as

whether the bonuses were hazard pay or gifts under the Act and whether the implementation of these monies is a subject of mandatory bargaining. The ALJ, the NLRB and the Third Circuit relied on different factors to determine whether the bonus was a gift or hazard pay. Moreover, if the Appellate Court does not have to defer to the NLRB, what role does the credibility determination made by an ALJ have on the Appellate Court's decision in determining questions involving interpretations of the Act? Thus, the Court must clarify if the Appellate Courts must defer to the NLRB's interpretation of the Act and what the impact of credibility determinations at an administrative proceeding will have on the Appellate Court's interpretation of the Act?

III. SUPREME COURT MUST DECIDE WHETHER THE NLRB EXCEEDED ITS AUTHORITY IN MAKING A TEMPORARY BONUS INTO A PERMANENT TERM

In *H.K. Porter Company, Inc. v. NLRB*, 397 U.S. 99 (1970), the Court held that, while the Board has authority to fashion a remedy for a violation of the Act, the object of the Act was not to allow governmental regulation of terms and conditions of employment. The Supreme Court in *H.K. Porter* warned against the NLRB imposing upon the parties a substantive term of employment done under the guise of a remedial order. Moreover, "[t]he Board's discretion to select and fashion remedies for violations of the NLRA, though generally broad… but is not unlimited. *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137, 142-143 (2002).

Having found that Alaris violated Sections 8(a)(5) and (1) of the Act when, effective May 1, 2020, it discontinued

the bonus programs it announced on April 1 and 7, 2020, the NLRB fashioned a remedy which exceeds the parameters of its authority by setting terms of employment which were never contemplated or agreed to by the parties. The NLRB stated that employees should be made whole by receiving back pay as if the April bonus had been a permanent wage increase. It is beyond peradventure that Alaris stated in letters on April 1st and April 7th that the April bonuses were to be in effect through April 30th. Neither Alaris nor 1199 ever bargained for, agreed, or even contemplated, that, what Alaris had termed a *"special COVID 19 hourly rate bonus,"* would be essentially converted by the Board into a permanent wage increase, leading to a windfall to employees of a bonus equal to 100% of their earnings in perpetuity.

Can the NLRB impose economic terms upon the parties which were never negotiated by the parties? Can the NLRB ignore the "traditional remedies" of ordering the employer to cease and desist with instituting these policies to provide notice to employees of their rights and the employer's violation and instead impose a back pay remedy by creating terms that were never bargained for and meant only to be temporary? *Hoffman Plastics Compounds, Inc.*, 535 U.S. at 152.

Stated differently, the remedy must be a traditional remedy to cease and desist. The NLRB has no authority to order terms, that were by definition temporary terms, into a permanent terms and conditions of employment.

In the case at bar, the NLRB has done exactly what the Court in *H.K. Porter Company, Inc.*, said it could not do: impose a substantive term that the union and the employer never negotiated. The Supreme Court must

review and set a limit upon the NLRB imposing terms that were not bargained by the parties. The NLRB cannot place its thumb upon scales of the collective bargaining process to create terms that were not agreed upon.

IV. WHETHER THE COURT'S DECISION IN *BRIGHT LOOPER ENTERPRISES, INC.* REQUIRES THE APPELLATE COURTS TO DEFER TO THE NLRB'S PROPOSED REMEDIES

Another important issue is whether an Appellate Court must defer to the NLRB's proposed remedies for a violation of the Act. Alaris asserts that, after the decision in *Loper Bright Enterprises, Inc.,* the Appellate Court can no longer give *Chevron* deference to the Board's remedies.

In *Fireboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1978) , the Court that held that the Act in 29 U.S.C. §160 gives the Board the authority to impose remedies to effectuate the purposes of the Act. The Court in *Fireboard Paper Prods. Corp.* further held that the NLRB's authority to remedy violations is broad and discretionary and subject to limited judicial review. *Id.*

In *Bright Looper Enterprises, Inc.,* this Court held that agency interpretations of statutes are not entitled to deference by the reviewing court. *Bright Looper Enterprises, Inc.,* 603 U.S. at 392. "Courts must exercise their judgment whether an agency has acted within its statutory authority…" *Id.* at 412.

Alaris believes that the Court's decision in *Bright Looper Enterprises, Inc.* is inconsistent with the Court's prior decision in *Fireboard Paper Prods. Corp.* The

Court must clarify whether the reviewing court should defer to the NLRB's remedies under the Act or whether the Court must interpret the Act to determine whether the remedies are appropriate and within the NLRB's authority. Alaris believes under *Loper Bright Enterprises, Inc.*, a court reviewing the NLRB's remedies cannot defer to the NLRB's choice of remedies. Rather, the court should determine, based its interpretation of the Act, what remedies are appropriate under the Act to cure the violation.

The Supreme Court should remand the case to the Third Circuit to determine if the NLRB's remedies are consistent with the Act. Alaris asserts that the Third Circuit improperly enforced the NLRB's order by deferring to the NLRB's order, which imposed economic terms which were clearly never meant to be permanent and never bargained for to be permanent. The bonuses were specifically meant to be temporary. In addition, Alaris asserts that the Third Circuit improperly deferred to the NLRB's remedies. *Alaris Health at Boulevard* East, 123 F. at 128. Pet. App. 36a.

V. THE SUPREME COURT MUST GRANT REVIEW TO DETERMINE WHAT DUE PROCESS AN EMPLOYER MUST HAVE BEFORE AN ADMINISTRATIVE AGENCY

This Court has held that, under the Fifth Amendment, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) [quotation marks and citation omitted]. What procedures are required to satisfy due process is context

dependent. *Mathews*, 424 U.S. at 334. The ultimate issue is whether the procedure utilized satisfies due process. *Id.* The case at bar presents important and significant issues regarding the process that must be afforded to an employer at the NLRB.

In *Mathews*, the Court identified the following three factors to be used in determining whether an agency has afforded due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

In the case at bar, prior to the Board's reversal of the ALJ and its finding that the amendment of the bonuses at the end of April, 2020 were bonuses unlawfully implemented, rescinded or modified, Alaris never had notice of what bonuses, if any, may have been unlawfully modified or terminated. This made it impossible to respond to any claim for backpay that were allegedly owed to the employees resulting from the modification of the bonuses. Alaris clearly could not have filed opposition to General Counsel's exceptions to the ALJ's denial of summary judgment because Alaris could not have known whether

some or all of the bonuses would be found to be unlawful by the NLRB. Further, the ALJ had already found the bonuses to be gifts, requiring no bargaining with the Union in implementing, modifying or discontinuing the bonuses.

As indicated above, the Court in *Metro Man IV* also found that the employer did not have an obligation to bargain during the pandemic when it implemented a temporary wage increase because of the exigent circumstances. Thus, other than generally denying the compliance specifications, Alaris had no way of determining what could be owed to employees and how to respond to General Counsel's claim that monies were owed to certain employees. Moreover, the bonuses were implemented only to be temporary for certain periods.

The Third Circuit held that Alaris was provided with notice that its answer of a general denial was insufficient, in accordance with the NLRB's rules, 29 C.F.R. § 102.56(b), before the ALJ and in General Counsel's appeal of the denial of summary judgment to the NLRB. The Third Circuit said Alaris had four opportunities to correct its answer. *Alaris Health at Boulevard* East, 123 F. at 127-128. Pet. App. 35a. The Third Circuit found that any claim of lack of due process was "meritless." *Id.* at 128. Pet. App. 35a.

The Third Circuit failed to explain how Alaris could have put in an answer specifically stating the basis for the disagreement with the numbers stated by General Counsel when Alaris did not know which bonus or which changes to the bonus would be deemed unlawful. Moreover, 1199 also consented to both bonuses in April, which clearly stated that they were for a temporary period in April 2020.

The Supreme Court must not allow the NLRB or any agency to deprive an employer of the right to contest the amount owed for alleged violations without an opportunity to defend against the claim. The NLRB granted General Counsel's motion for summary judgment on the amount claimed in a compliance specification even though it was unclear, particularly given the pandemic, what, if any bonuses, would be found to have been unlawfully given or modified.

The Supreme Court must hold that a party should receive due process by being provided by an agency with the opportunity to defend itself so that it can have the opportunity to contest the monies allegedly owed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED DECEMBER 9, 2024

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 23-1946 and 23-1976

ALARIS HEALTH AT BOULEVARD EAST

v.

NATIONAL LABOR RELATIONS BOARD

Alaris Health at Boulevard East,
Petitioner in No. 23-1946

NLRB,
Petitioner in No. 23-1976

on Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board
(NLRB Docket No. 22-CA-268083)

Argued: **April 10, 2024**

Before: CHAGARES, *Chief Judge*, PORTER, and SCIRICA, *Circuit Judges*.

(Filed: December 9, 2024)

Appendix A

OPINION OF THE COURT

SCIRICA, *Circuit Judge*

In April 2020, petitioner/cross-respondent Alaris Health at Boulevard East (the "Company"), a nursing home, decided to pay its employees bonuses in recognition of their efforts at the beginning of the COVID-19 pandemic. The bonuses took the form of temporary salary increases. Over the next few months, the Company gradually reduced those raises until salaries returned to almost original levels. As well-intended as this gesture may have been, the Company did not give the union representing its employees notice or an opportunity to bargain prior to initiating and scaling back the bonus raises.

The National Labor Relations Board (the "Board")[1] determined the COVID-19 bonuses were wages subject to mandatory bargaining under the Act, and that a management rights clause in the parties' collective bargaining agreement purporting to authorize the Company's actions did not survive the agreement's expiration. Because the Board's factual findings were supported by substantial evidence, and because the Board reached the right answer as to the parties' collective bargaining agreement, we will deny the Company's petition for review. Moreover, because the Company

1. We refer to the body whose decision we are reviewing as the "Board," and the party appearing before us on the Board's behalf (i.e., respondent/cross-petitioner) as the "General Counsel." In addition, we refer to the National Labor Relations Act, 29 U.S.C. §§ 151 et seq., as the "Act."

repeatedly failed to address the remedy charged by the General Counsel and ultimately adopted by the Board, we will grant the General Counsel's cross-petition for summary enforcement.

I.

A.

The Company owned and operated six nursing homes/rehabilitation centers providing inpatient medical services. The facility at issue in this case was in Guttenberg, New Jersey, and closed on November 15, 2020. Prior to its closure, 1199 SEIU United Healthcare Workers East (the "Union") was the collective-bargaining representative for a unit of the facility's employees, including "[a]ll CNAs, dietary, housekeeping, recreational aides, [and] cooks." App. 9.[2] The Company and the Union's relationship was governed by a collective bargaining agreement (the "CBA"), effective by its terms from April 1, 2010, through March 31, 2014, and "automatically renewed for an additional period of four (4) years unless either party notifies the other in writing." App. 467. As relevant here, the CBA contains a management rights clause[3] providing

2. While the Union represented "CNAs" or certified nursing assistants, it did not represent "registered nurses" (RNs) or licensed practical nurses ("LPNs") working at the facility. App. 435.

3. A management rights clause is a "contractual provision that authorizes an employer to act unilaterally, in its discretion, with respect to a mandatory subject of bargaining." *E.I. Dupont*

that "[n]othing herein contained shall prevent the [Company] from giving merit increases, bonuses, or other similar payments provided it gives prior notice to the Union before implementation." App. 446.

In early 2020, the Company began experiencing extreme operational difficulties at the onset of the COVID-19 pandemic. As the Company's former Vice President testified,

> [O]nce COVID hit a facility, or a particular neighborhood, it hit and it hit rapidly. . . . [I]t was a very chaotic time period. It was a frightening time period. Facilities and . . . staff in facilities were really struggling for a number of reasons. Whether it be keeping up with all of the new regulations and guidance, that was coming by rapid fire from various agencies. In addition to staff fears, staff animus[,] . . . . there was a lot of information, and a lot of emotions, and also our patients at the other end of that, that needed to be taken care of, with dwindling staff resources.

De Nemours, Louisville Works, 355 N.L.R.B. 1084, 1085 (2010), *enforcement denied on other grounds*, 682 F.3d 65, 401 U.S. App. D.C. 172 (D.C. Cir. 2012); *see also Chi. Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992) ("The union had a statutory right to bargain over the terms of employment, . . . but it gave up that right, so far as the subjects comprehended by the management-rights clause were concerned, by agreeing to the clause.").

App. 183-84. The pandemic created operational difficulties for the Union as well. Most notably, New Jersey's shelter-in-place mandate prevented the Union's representatives from accessing the facility as required by the CBA. In response, the Union sent a letter to the Company on March 30, 2020, reminding the Company that "federal labor law prohibits the Facility from changing wages, hours, benefits, or any other term or condition of employment without giving the Union prior notice and an opportunity to bargain." App. 474.

Despite this warning, on April 1, 2020, the Company issued a memo to its employees announcing that "to [e]nsure the safety and recognize the commitment and hard work of our dedicated healthcare workers on the front lines fighting this pandemic," the Company would issue "a special COVID19 hourly rate bonus" to all staff. App. 475. Per the memo, the bonuses would be "equal to 25% of [each employee's] current hourly rate," "effective Thursday, April 2nd and thru at least April 30th," and would apply "to all worked hours (excluding any paid-time-off pay)." *Id.* On April 7, the Company published a second memo increasing the bonuses for all nursing staff to "100% of their current hourly rate." App. 479. Once again, the bonuses were to recognize "the challenge of navigating the ongoing COVID19 Pandemic" and would "apply to all worked hours (excluding sick or benefit time)" "effective immediately through April 30th." *Id.*

The Company did not directly communicate these bonus announcements to the Union. Instead, after learning of the first bonus announcement from an

employee, the Union emailed the Company on April 1 stating it "agree[d]" with the "proposed . . . 25% wage increase." App. 476. The Company responded on April 2, asserting that "[t]he temporary increase for our employees is well within our management rights" and "solely to recognize the outstanding efforts of our dedicated staff." App. 477. The Company also noted that it "will not be distracted because there is too much at risk" given that "[a]dministration and its staff are dealing with and making critical real-life decisions every minute of every day." *Id.* The Union responded the following day reiterating that it "promptly accepted, without any fuss, the proposed wage increase," but reminding the Company that "[t]he Union is entitled to notice and an opportunity to bargain before any changes (including modifications to the already implemented and agreed to increases) are implemented." App. 478. Upon learning of the second bonus memo, the Union sent additional emails on April 7 and April 8, again agreeing to the increase but reiterating that it was "entitled to notice and an opportunity to bargain before any future changes (including modifications to the agreed to increases) are implemented." App. 480; *see also* App. 481. The Company did not respond.

Beginning April 29, the Company published a series of memos scaling back the previously announced bonuses. Specifically, on April 29, the Company announced that effective May 1 and through May 14, the 100% hourly bonus for nursing staff would be reduced to 25% for all hours worked. On May 13, the Company announced that effective May 17 through May 31, the 25% hourly bonus would be limited to "Direct Nursing Providers" (including

RNs, LPNs, and CNAs), whereas "all other employees will return to their normal hourly rate." App. 483. On May 29, the Company announced that effective May 31 through June 15, the 25% hourly bonus for RNs and LPNs would be reduced to 10%, and that after June 15 RNs and LPNs would return to their "traditional [hourly] rate." App. 485. And finally, on July 20, the Company announced that effective July 26, the 25% bonus payments for all CNAs would be reduced to $1.50 extra per hour for all hours worked.[4] With each new memo, the Union emailed the Company objecting to the reduction and reminding the Company that it was required to provide the Union with advanced notice and an opportunity to bargain. The Company never responded.

Separately, on September 4, 2020, the Union filed a class action grievance on behalf of its members "for unpaid medical invoices and the cancellation of their health insurance benefits" after "unit members had accumulated hospital bills that were not being covered by their health insurance." App. 11-12. The Union issued an "Information Request" to the Company on September 8 for "files that show names and date of member[s] covered as of March 1, 2020," "[t]he summary plan and description for health insurance," and "[t]he summary benefit description for health insurance." App. 12. The Union never received the requested information.

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4. This $1.50 increase remained in effect until the Company's closure in November 2020.

Appendix A

B.

On August 30, 2021, the General Counsel issued a complaint, compliance specification, and notice of hearing alleging violations of sections 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), bypassing the Union and rescinding, reducing, and discontinuing wage increases without first notifying the Union or providing the Union with an opportunity to bargain; and refusing to provide the Union with requested information relevant to its representation of bargaining-unit employees. The General Counsel sought make-whole relief for the employees. App. 294. The compliance specification contained allegations of specific amounts owed to each bargaining-unit employee as well as compensation for any adverse tax consequences of receiving lump-sum backpay payments.

The complaint notified the Company that it was required to file an answer by September 20, 2021, and that such answer must "state any basis for any disagreement with any allegations that are within the [Company's] knowledge" and "furnish the appropriate supporting figures," and that "a general denial is not sufficient." App. 296-97. Despite this notice, the Company's answer to the compliance specification merely stated that "the allegations set forth were legal conclusions to which no response was required." App. 3. On October 20, 2021, the General Counsel notified the Company that its answer was deficient because it "contains general denials and conclusionary statements without setting forth the basis for such disagreement" and thus "does not comport with the specificity requirements of . . . the Board's Rules and

Regulations." App. 429. The General Counsel further warned that if the Company did not amend its answer by October 27, 2021, the General Counsel would move for summary judgment with respect to those allegations. The Company failed to respond.

The case was tried remotely over three days before an Administrative Law Judge ("ALJ") starting on November 1, 2021. The ALJ heard testimony from three witnesses—two Union employees and the Company's former vice president. At the start of the hearing, the General Counsel moved for partial summary judgment as to the remedy charged in its compliance specification, arguing the Company's general denials failed to comply with Board regulations. The ALJ invited the Company to file an opposition to the motion, but the Company failed to do so.

On January 26, 2022, the ALJ issued its decision finding in relevant part for the Company. The ALJ found "the bonuses were for a specific period of time and not conditioned upon employment-related factors" since such a wage increase "would have resulted in a significant and substantial windfall to the unit employees." App. 14. As such, "[i]t is difficult to believe," reasoned the ALJ, that "the Union seriously thought there was an increase of 100 percent in hourly wages and that the increase was not in fact a gift in the form of a bonus." *Id.* The ALJ further noted that "[n]one of the monetary increases were tied to performance, seniority, production, attendance or dependent on gross profits of the facility," but rather "[t]he bonuses were implemented to show appreciation to

the staff when the COVID-19 pandemic started in March 2020[,] and the bonuses were ended when the pandemic lessen[ed] in summer 2020." App. 15. Accordingly, the ALJ determined the COVID-19 bonuses were gifts rather than wage increases and thus not subject to mandatory bargaining under the Act.

The ALJ also found the bonuses were authorized by the management rights clause in the CBA. While noting the CBA expired in 2014, the ALJ reasoned "an employer has a statutory duty to maintain the status quo on mandatory subjects of bargaining" and the "substantive terms of the expired agreement generally determine the status quo." App. 13. Even though the "bonuses were unprecedented," the ALJ concluded the Company's "right under the [CBA] to give out bonuses upon notice to the Union without having to bargain," survived the CBA's expiration, and that the Union received sufficient notice of the bonuses. However, the ALJ found the Company violated the Act by failing to respond to the Union's information request and ordered compliance within twenty-one days. The ALJ did not address the General Counsel's partial summary judgment motion.

The General Counsel filed exceptions to the ALJ's decision. In doing so, the General Counsel specifically challenged the ALJ's failure to rule on its partial summary judgment motion. The Company once again failed to address the partial summary judgment motion in its answering brief. Nor did the Company object to the ALJ's decision concerning the information request.

On November 23, 2022, the Board reversed the ALJ's finding of no violation. The Board found the bonuses were sufficiently tied to "employment-related factors" because "attendance was a prerequisite," and "employees would not receive any hourly rate bonus for hours not worked because of vacation, sick leave, or any other reason." App. 2. Moreover, the bonuses "reflected the reality that working closely with residents in a nursing home during the early days and months of the pandemic meant exposure to risk of infection." *Id.*; *see also* App. 3 n.9 ("In finding that the bonuses were gifts, the judge appears to have been influenced in part by his view that they represented a 'significant and substantial windfall' to employees. We disagree with this characterization in light of the fact that employees earned the bonuses by providing care to residents of the Respondent's facility during a pandemic."). As such, the bonuses were "a form of hazard pay, which is a mandatory subject of bargaining." App. 2.

The Board also rejected the ALJ's finding that the management rights clause in the CBA permitted the Company to unilaterally rescind the bonuses because, according to the Board, the management rights clause did not survive the CBA's expiration. The Board reasoned that "provisions in an expired collective-bargaining agreement do not cover post-expiration unilateral changes unless the agreement contained language explicitly providing that the relevant provision would survive contract expiration." App. 3 n.10 (citation omitted). And the parties' management rights clause "does not specify, either implicitly or explicitly, that it would survive after the agreement's expiration." *Id.*

Lastly, the Board granted General Counsel's partial summary judgment motion and ordered the make-whole remedy charged in the compliance specification. The Board reasoned,

> It is well settled that a general denial of backpay calculations is insufficient to comply with [the Board's regulations] where the answer fails to specify the basis for the disagreement with the backpay computations contained in the specification, fails to offer any alternative formula for computing backpay, fails to provide appropriate supporting figures for amounts owed, or fails to adequately explain any failure to do so. Moreover, the gross backpay owed to employees in this case is clearly within the [Company]'s knowledge because its payroll department modified staff bonuses from April to November 2020.

App. 4. The Board also affirmed the ALJ's decision with respect to the Company's failure to respond to the Information Request.

After unsuccessfully moving for reconsideration, the Company petitioned this Court for review of the Board's decision. The General Counsel cross-petitioned for enforcement.

II.

The Board had jurisdiction over this matter pursuant to 29 U.S.C § 160(a). *See New Concepts for Living, Inc.*

v. NLRB, 94 F.4th 272, 279 (3d Cir. 2024). We have jurisdiction to consider the Company's petition and the General Counsel's cross-petition under 29 U.S.C. § 160(e) and (f). *Id.* at 279-80.

We review the Board's factual findings for substantial evidence. *See, e.g., NLRB v. ImageFIRST Uniform Rental Serv., Inc.*, 910 F.3d 725, 732 (3d Cir. 2018). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *1621 Route 22 W. Operating Co., LLC v. NLRB*, 825 F.3d 128, 144 (3d Cir. 2016) (citation omitted). We thus uphold the Board's conclusions of fact "even if we would have made a contrary determination had the matter been before us *de novo*." *Citizens Publ'g & Printing Co. v. NLRB*, 263 F.3d 224, 232 (3d Cir. 2001). Where, as here, the Board adopts in part the factual findings of an ALJ, we review the determinations of both the Board and the ALJ. *Trafford Distrib. Ctr. v. NLRB*, 478 F.3d 172, 179 (3d Cir. 2007). "But we owe the Board no deference on matters of contractual interpretation, even when undertaken in connection with unfair labor practice proceedings." *PG Publ'g Co. v. NLRB*, 83 F.4th 200, 211 n.16 (3d Cir. 2023).

III.

We begin with the Company's petition for review. The Company argues the COVID-19 bonuses were gifts rather than wage increases and thus not subject to mandatory bargaining under the Act. But even if the bonuses were wage increases, the Company posits, they would still be

authorized by the management rights clause in the CBA which survived the CBA's expiration. We will address each argument in turn.

A.

Employees have the right under the Act "to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157. An employer thus violates subsections 8(a)(5) and (1) of the Act by "refus[ing] to bargain collectively with the representatives of his employees," *id.* § 158(a)(5); *accord N.J. Bell Tel. Co. v. NLRB*, 720 F.2d 789, 791 n.2 (3d Cir. 1983), as well as by enacting "unilateral change[s] in conditions of employment" because "it is a circumvention of the duty to negotiate which frustrates the objectives of [the Act] much as does a flat refusal," *NLRB v. Katz*, 369 U.S. 736, 743, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962). *See also Leeds & Northrup Co. v. NLRB*, 391 F.2d 874, 877 (3d Cir. 1968) ("The principle at the heart of [the Act] is that basic terms which are vital to the employees' economic interest, such as wages, may not be altered unilaterally by the employer without bargaining with [union representatives]."). The mandatory duty to bargain is limited to "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). "[A]s to all other matters, each party is free to bargain or not to bargain." *N. Am. Pipe Corp.*, 347 N.L.R.B. 836, 837 (2006), *enforced sub nom. Unite Here v. NLRB*, 546 F.3d 239 (2d Cir. 2008). In particular, "gifts per se—payments which do not constitute compensation for services—are not terms and conditions of employment, and an employer can make or decline to make such payments as he pleases." *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210, 213 (8th Cir. 1965).

In distinguishing between wages and gifts, we ask whether the award is "so tied to the remuneration which employees received for their work that it was in fact part of it." *Unite Here*, 546 F.3d at 243 (quotation marks and brackets omitted). A sufficient relationship to remuneration may exist if the payment is tied to various "employment-related factors." *Benchmark Indus.*, 270 N.L.R.B. 22, 22 (1984), *enforced sub nom. Amalgamated Clothing v. NLRB*, 760 F.2d 267 (5th Cir. 1985). Those factors include "work performance, wages, hours worked, seniority, and production." *Unite Here*, 546 F.3d at 243; *see also Radio Television Tech. Sch., Inc. v. NLRB*, 488 F.2d 457, 460 (3d Cir. 1973) (considering "(1) the consistency or regularity of the payments; (2) the uniformity in the amount of the payments; (3) the relationship between the amount of the bonus and the remuneration of the recipient; (4) the taxability of the payment as income; and (5) the financial condition and ability of the employer" as relevant factors to the gift or wage determination). "An award that is sufficiently tied to these work-related factors is considered part of the overall compensation that an employee receives and is therefore mandatorily bargainable." *Unite Here*, 546 F.3d at 243.

In this case, the Board's determination that the COVID-19 bonuses were so tied to remuneration that they were in fact part of it was supported by substantial evidence. *See id.* at 244 (reviewing for substantial evidence the question of "whether the stock award is so tied to remuneration that it is in fact a part of it"). The bonuses were tied to relevant "employment-related factors." *Benchmark Indus.*, 270 N.L.R.B. at 22. For example, the

Board determined that "attendance was a prerequisite to receiving any hourly rate bonus" based on the Company's memos on April 1 and April 7 announcing the bonuses. App. 2; *see, e.g., Sykel Enters., Inc.*, 324 N.L.R.B. 1123, 1124 (1997) (finding Christmas bonuses were wages because the company "looked at the attendance and performance of the . . . employees in determining how much of a Christmas bonus to give each employee"); *Woonsocket Spinning Co.*, 252 N.L.R.B. 1170, 1172 (1980) (finding holiday bonuses that were calculated by multiplying the number of hours worked by years of employment could not be unilaterally rescinded). Those memos explicitly limited the bonuses to "all hours worked," and made clear that employees would not "receive any hourly rate bonus for hours not worked because of vacation, sick leave, or any other reason." App. 1, 2, 126; *see* App. 475 (April 1 memo "excluding [from the bonuses] any paid time-off pay"); 479 (April 7 memo "excluding sick or benefit time").

In addition, the bonuses were not paid equally to each employee, but instead were calculated based on job type and current hourly rate. While the April 1 memo announced an equal 25% salary bump for all employees, the April 7 memo increased the bonuses to 100% just for nursing staff, while the remaining employees remained at 25%. Then, after reducing the nurses' bonuses back to 25% on April 29, the Company limited the bonus to "Direct Nursing Providers only" on May 13 whereas all other employees returned to their normal hourly rate as of May 17. And finally, on May 29, the Company cut bonuses for RNs and LPNs from 25% to 10% until June 10, after which time they returned to normal salary levels, while

the CANs remained at 25% until July 26, after which they received a permanent increase of $1.50 per hour. Thus, the availability and amount of bonus each employee received depended on his or her position and hourly rate. *See, e.g., Radio Television Tech. Sch., Inc.*, 488 F.2d at 460 (Christmas bonuses considered gifts when they were "based upon the employees' length of service and the nature and scope of their employment responsibilities").

And finally, while the memos claimed that each salary change was temporary and subject to reevaluation, the Board acknowledged this factor, but concluded that it was outweighed by other considerations. *See* App. 2 n.7 ("The judge correctly observed that the Board also considers the regularity of a bonus in determining whether it is a term and condition of employment, but this factor is neither necessary nor sufficient in the analysis."); *see also Unite Here*, 546 F.3d at 244 (finding substantial evidence to uphold the Board's decision when the Board "majority acknowledged that [an employment-related] factor might cut against treatment of the stock award as non-bargainable, but concluded that this factor was outweighed by other considerations"). And regardless, as the Board pointed out, the Company's final change—an increase in $1.50 per hour for all CNAs—remained in effect until the facility closed in November 2020. App. 1 & 2 n.7. As such, "[t]he permanence of that pay increase further supports the conclusion that the bonuses were a mandatory subject of bargaining." App. 2 n.7.

The Company's reliance on *Unite Here v. NLRB* is unpersuasive. In fact, *Unite Here* better supports the

General Counsel, not the Company. In that case, the Second Circuit denied a petition for review of the Board's decision holding that a one-time stock issuance to all employees was a gift rather than a wage increase because "[t]he stock award . . . was a one-time event, given to each employee, regardless of rank, in an equal amount." 546 F.3d at 244. In contrast, the COVID-19 bonuses were distributed over the course of several months and varied in amount based on the employee's hourly salary and job title. Accordingly, the Board's finding that the bonuses were tied to employment-related factors is supported by substantial evidence.

The Board also determined the bonuses were "a form of hazard pay, which is a mandatory subject of bargaining." App. 2. No decision of the Board to our knowledge has ever recognized "hazard pay" as part of the "terms and conditions of employment" under the Act.[5] "We recognize

5. The Board's citation to *Hospital Menonita De Guayama, Inc.*, 371 N.L.R.B. No. 108, 2022 WL 2355898 (June 28, 2022), *enforced*, 94 F.4th 1 (D.C. Cir. 2024), is unconvincing. While true the Board in that case adopted the ALJ's finding that a Company violated the Act by unilaterally giving $150 bonus checks to employees who worked during a hurricane, it failed to provide any reasoning except that "[g]ifts or bonuses tied to the remuneration that employees receive for their work constitute compensation for services and are in reality wages falling within the Statute." 2022 NLRB LEXIS 273, 2022 WL 2355898, at *16. Moreover, that case involved more obviously illegal conduct from the employer—most notably, the recission of benefits and unilateral modification of health care policies, 2022 NLRB LEXIS 273, [WL] at *9, and dealt primarily with a legal issue not presented here—the fate of the successor bar rule. 2022 NLRB LEXIS 273, [WL] at *8. Neither

that classification of bargaining subjects as terms and conditions of employment is a matter concerning which the Board has special expertise." *Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 182, 92 S. Ct. 383, 30 L. Ed. 2d 341 (1971) (quotation marks and parentheses omitted). Accordingly, we have traditionally deferred to the Board's interpretations of the Act so long as they are "reasonable." *See, e.g., MCPC, Inc. v. NLRB*, 813 F.3d 475, 482 (3d Cir. 2016); *see also Ford Motor Co. v. NLRB*, 441 U.S. 488, 497, 99 S. Ct. 1842, 60 L. Ed. 2d 420 (1979) (holding the Board's interpretation of the Act should be enforced so long as it is "reasonably defensible," and refusing to enforce the Board's interpretation only when it has "no reasonable basis in law," is "fundamentally inconsistent with the structure of the Act and an attempt to usurp major policy decisions properly made by Congress," or "mov[es] into a new area of regulation which Congress has not committed to it" (citations and quotation marks omitted)).

Whether this deference survives the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024), which overruled *Chevron* deference, is somewhat of an open question. It would appear to us, however, that judicial deference to the Board's classifications of the "terms and conditions of employment" under the Act is distinct from *Chevron* deference, as the Supreme Court's decisions developing that deference to the Board predate *Chevron U.S.A.*

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the ALJ nor the Board in their decisions nor our sister circuit in its enforcement order discussed the concept of or even used the words "hazard pay."

Inc. v. NRDC, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). *See, e.g., Ford Motor Co.*, 441 U.S. at 496-97 (collecting cases). In fact, the Court in *Loper Bright* distinguished *Chevron* deference from prior cases where it deferred to the Board's interpretation of the Act, reasoning "[t]he Act had, in the Court's judgment, assigned primarily to the Board the task of marking a definitive limitation around the [relevant statutory] term" and so "application of [the] statutory term was sufficiently intertwined with the agency's factfinding" that deference to the Board's interpretation was warranted. 144 S. Ct. at 2259-60 (citations and quotation marks omitted); *see also Ford Motor Co.*, 441 U.S. at 496 (noting "Congress made a conscious decision to continue its delegation to the Board of the primary responsibility of marking out the scope of the statutory language and the statutory duty to bargain"). *But see, e.g., Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167, 174-75 (3d Cir. 2002) (reciting our deferential standard to the Board's interpretations of the Act but noting "[o]ur standard is governed by the test articulated in *Chevron*"); *Stardyne, Inc. v. NLRB*, 41 F.3d 141, 147 (3d Cir. 1994) (Alito, J.) (similar).

Ultimately, we need not decide whether deference to the Board's designation of mandatory bargaining subjects under the Act survives the Supreme Court's rejection of *Chevron* deference in *Loper Bright*. Even on de novo review, we reach the same conclusion as the Board—that hazard pay is appropriately considered the "terms and conditions of employment" and thus subject to mandatory bargaining under the Act. The Department of Labor defines hazard pay as "additional

pay for performing hazardous duty or work involving physical hardship." Hazard Pay, U.S. Dep't of Labor (last visited Aug. 14, 2024), https://www.dol.gov/general/topic/wages/hazardpay. And in the federal employee context, Congress has authorized the Office of Personnel Management "to provide additional compensation at fixed rates (pay differentials) to salaried, General Schedule employees for duty involving unusual physical hardship or hazard," or "for duty involving unusually severe working conditions or unusually severe hazards." *Adams v. United States*, 59 F.4th 1349, 1351-52 (Fed. Cir. 2023) (en banc) (quotation marks omitted); *see* 5 U.S.C. §§ 5543(c)(4), 5545(d). The purpose of these programs is "to serve as a gap-filling measure to provide additional remuneration to an employee asked to take unusual risks not normally associated with their occupation and for which added compensation is not otherwise provided." *Adams*, 59 F.4th at 1352 (quotation marks omitted). Given that hazard pay is simply a subset of one's salary or "remuneration," it clearly falls under "wages" or "other terms and conditions of employment" as used in the Act and therefore subject to mandatory bargaining. Thus, the Board's conclusion that "hazard pay . . . is a mandatory subject of bargaining" was not erroneous. App. 2. *See also NLRB v. Metro Man IV, LLC*, 113 F.4th 692, 697-700 (6th Cir. 2024) (assuming without deciding that hazard pay is subject to mandatory bargaining under the Act).

In addition, the Board's factual finding that the COVID-19 bonuses were properly "considered a form of hazard pay" is supported by substantial evidence. *Id.* At the hearing, the Company's former Vice President

described the situation at the facility at the onset of the COVID-19 pandemic as "chaotic" and "frightening." App. 183. She said the facility was "struggling" to "keep[] up with all of the new regulations and guidance[] that w[ere] coming by rapid fire" and that there was "a lot of emotions" and "dwindling staff resources." *Id.* at 183-84. The Company further recognized the difficulty of this time in its communications regarding the bonuses. In the April 1 memo, the Company alluded to the "challenges surrounding the COVID19" and described the pandemic as a "medical crisis." App. 475. In its April 2 email to the Union, the Company referred to the pandemic as an unprecedented "global emergency." App. 477 (stating the facility "is in the epicenter of the Covid-19 pandemic—*the likes of which no one has ever experienced*" (emphasis added)). And on April 7, the Company again described the pandemic as "most challenging times." App. 479. Moreover, that nursing staff received larger bonuses and for longer periods of times is consistent with the Board's hazard pay finding because nurses would have had the most direct exposure to the risks surrounding COVID-19. Thus, substantial evidence supports the Board's factual finding that the bonuses were a form of hazard pay meant to compensate for the "reality that working closely with residents in a nursing home during the early days and months of the pandemic meant exposure to risk of infection." App. 2.

In sum, the Board's factual findings that the COVID-19 bonuses were tied to employment-related factors and represented a form of hazard pay such that they were properly considered wages or other terms and conditions

of employment were supported by substantial evidence. The bonuses were therefore subject to the mandatory duty to bargain under the Act.

Lastly, relying on the Sixth Circuit's recent decision in *Metro Man IV*, the Company argues it was excused from any duty to bargain under the Act even if the bonuses were hazard pay because of "exigent circumstances" created by the pandemic. Dkt. 44 (Sept. 9, 2024 Letter); 113 F.4th 692 (6th Cir. 2024). At no point did the Company raise the doctrine of economic exigency before the Board or ALJ. But even if this argument were properly before us, there is no substantial evidence that the pandemic created "exigent *economic* circumstances" for the Company such as mass staffing shortages or a mass outbreak of COVID-19 at the facility. *Cf. Metro Man IV*, 113 F.4th at 695, 699-700 (emphasis added) (holding "exigent economic circumstances" excused employer from its duty to bargain over hazard pay when "[a]pproximately 75% of . . . unionized staff, including nurses, stopped coming to work" after nursing home residents began contracting COVID). Furthermore, *Metro Man IV* does not cover, let alone declare lawful, the type of unilateral action that the Company took here—announcing, repeatedly altering, and ultimately terminating bonuses without any reference to previous announcements or "terms." Rather, the employer in *Metro Man IV* had expressly time-limited its temporary hazard pay policy *at the outset* by noting that it would only apply until the employer's facility had "treated its last COVID patient." *Id.* at 698. Here, the Company did not attach any limitations to the bonuses at the outset, nor in subsequent alterations. And whereas in

Metro Man IV, the termination of the hazard pay policy before the union even learned of it meant, effectively, that "nothing remained to bargain about," *id.* at 700, here, the union was aware of the Company's changes to the COVID-19 bonuses at every step. Accordingly, we conclude the Company was obligated to bargain at every step of the Company's implementation of and changes to the bonuses. In sum, the facts and issues presented in *Metro Man IV* are wholly distinct from those we consider here.

B.

We next consider whether the management rights clause in the parties' CBA authorizes unilateral payment of the COVID-19 bonuses notwithstanding the Act. "When a union and an employer enter into a collective bargaining agreement, each party may waive certain rights they otherwise would possess under the [Act] . . . ." *Verizon New England Inc. v. NLRB*, 826 F.3d 480, 482, 423 U.S. App. D.C. 316 (D.C. Cir. 2016) (Kavanaugh, J.); *see also, e.g., Engelhard Corp. v. NLRB*, 437 F.3d 374, 378 (3d Cir. 2006) (noting "the statutory right to strike may be waived in a collective bargaining agreement," and collecting cases).

The CBA in this case contains a management rights clause which states that "[n]othing herein contained shall prevent the Employer from giving merit increases, bonuses, or other similar payments provided it gives prior notice to the Union before implementation." App. 446. The parties do not dispute this clause provides the Company unilateral authority with respect to the bonuses, provided it gives the Union prior notice. But the Board

found the CBA expired in 2014, long before the Company implemented its COVID-19 bonus program in 2020. The critical question therefore is whether the management rights clause survives the CBA's expiration and forms part of the post-expiration status quo.[6]

In general, "contractual obligations will cease, in the ordinary course, upon termination of [a collective] bargaining agreement." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 207, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991). But "terms and conditions continue in effect by operation of the [Act]. They are no longer agreed-upon terms; they are terms imposed by law, at least so far as there is no unilateral right to change them." *Id.* at 206. In this way, subsections 8(a)(1) and (5) require "continuation of the status quo" during negotiations over a successor CBA. *Katz*, 369 U.S. at 746. And so "an employer commits an unfair labor practice . . . when, after the expiration of a CBA and during negotiations for a successor CBA, the employer alters the post-expiration status quo regarding the terms and conditions of employment without first negotiating with its employees to an overall impasse on the successor CBA." *PG Publ'g*, 83 F.4th at 205.

We recently discussed the framework for analyzing whether a CBA provision forms part of the post-expiration status quo in *PG Publishing*. There, a provision guaranteeing employees five work shifts per week did not form part of the post-expiration status quo. In so holding,

6. We review de novo the question of whether a provision in a collective bargaining agreement forms part of the post-expiration status quo. *See, e.g., PG Publ'g*, 83 F.4th at 211-12 & n.16.

we rejected the Board dissent's "sweeping proposition" that "terms in an expired CBA form part of the post-expiration status quo only where there is some explicit statement by the parties." *Id.* at 217. We also declined to adopt the Board majority's view that "any provision touching on subjects of mandatory bargaining is by law included in the post-expiration status quo." *Id.* at 214. Instead, the proper analysis examines "the language of the CBA in question" using "ordinary principles of contract interpretation":

> If the language of the CBA does not indicate that the term in question persists as part of the status quo, the inquiry ends. If, but only if, the contract indicates in some fashion that the term does form part of the post-expiration status quo—and therefore continues to govern the parties by operation of the [Act]—then the employer must meet the clear-and-unmistakable-waiver standard if it wishes to assert that its employees have waived their statutory right to the benefits of the contested term.

Id. at 212-13.

The Company urges that under the standard announced in *PG Publishing*,[7] the management rights

7. The Board's decision predates *PG Publishing*. As such, the Board did not have opportunity to apply our "ordinary principles of contract law" approach to the instant case. Rather, it looked to its own decision in *Nexstar Broadcasting, Inc.* for the proposition

clause survives the CBA's expiration because "[t]he facts found in the *PG Publishing* case mirror the facts in the instant case." Company's Br. 23. To the contrary, while both this case and *PG Publishing* involve the general question of whether a provision in an expired CBA survives contract expiration, their underlying facts are materially different. The provision in *PG Publishing* guaranteed five shifts per week, which the employees were not otherwise entitled to by default under the Act. In contrast, the provision here waives the employees' right to bargain over certain wage increases—a right guaranteed under the Act. Thus, while both provisions touch on subjects of mandatory bargaining, one creates a right whereas the other waives a right, and we did not suggest in *PG*

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that "provisions in an expired collective-bargaining agreement do not cover post-expiration unilateral changes unless the agreement contained language explicitly providing that the relevant provision would survive contract expiration." App. 3 n.10 (quoting *Nexstar Broad. Inc.*, 369 N.L.R.B. No. 61, 2020 WL 1986474, at *3 (Apr. 21, 2020), *enforced*, 4 F.4th 801 (9th Cir. 2021)). Our decision in *PG Publishing* of course rejected the "clear and unmistakable language" rule endorsed by the Board and our sister circuit in *Nexstar*. *See PG Publ'g*, 83 F.4th at 217; *accord Nexstar*, 4 F.4th at 809 (holding "contract rights only survive expiration if the CBA explicitly so provides"). Thus we ordinarily would grant the petition for review and remand for further consideration in light of *PG Publishing*. *See, e.g.*, *NLRB v. A. Duie Pyle, Inc.*, 730 F.2d 119, 128 (3d Cir. 1984) ("We have made it crystal clear that a Board's decision ignoring our precedents will not be enforced."). But because we review issues of contract interpretation de novo, and because, as explained *infra*, we reach the same decision as the Board under our ordinary principles of contract law approach, we will deny the petition for review.

Publishing that these two different types of provisions must be analyzed and treated the same way under the Act. Moreover, the contract provision in *PG Publishing* was "drafted with precision" and contained "clear and unambiguous" durational language. 83 F.4th at 217-18 (reading the participial phrase "ending March 31, 2017" to modify the five-shift guarantee and demonstrate the parties' unambiguous intent that the fiveshift guaranteed would expire with the CBA). In contrast, the management rights clause here is silent concerning its duration. Nor do we discern any durational clues from the other provisions in the CBA.

We did not provide any guidance in *PG Publishing* on how to address such silence, except to say "the inquiry ends." *Id.* at 213. Thus, per ordinary principles of contract law, the durational silence in the management rights clause suggests it did not survive the CBA's expiration to form part of the post-expiration status quo. *See Pittsburgh Mailers Union Loc. 22 v. PG Publ'g Co. Inc.*, 30 F.4th 184, 188 (3d Cir. 2022) ("According to [ordinary contract] principles, if a specific provision does not have its own durational clause, the general durational clause of the CBA applies." (citing *CNH Indus. N.V. v. Reese*, 583 U.S. 133, 140-41, 138 S. Ct. 761, 200 L. Ed. 2d 1 (2018) (per curiam))); *see also M&G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 441, 135 S. Ct. 926, 190 L. Ed. 2d 809 (2015) ("[C]ourts should not construe ambiguous writings [in contracts] to create lifetime promises." (citing 3A Corbin, Corbin on Contracts § 553, p. 216 (1960))). But we may also seek guidance from federal labor policy in interpreting ambiguous contract provisions, for federal labor policy illustrates the parties' understanding at the

time they formed the CBA. *Cf. PG Publ'g*, 83 F.4th at 216 ("[W]e interpret collective-bargaining agreements according to ordinary principles of contract law, *at least when those principles are not inconsistent with federal labor policy.*" (brackets and ellipses omitted) (emphasis added) (quoting *Finley Hosp. v. NLRB*, 827 F.3d 720, 725 (8th Cir. 2016))); *see also Tackett*, 574 U.S. at 435 (same). We have long espoused the Board's policy that "waivers of statutorily protected rights must be clearly and unmistakably articulated" and absent some clear statement to the contrary, a "management rights clause does not survive the expiration of the CBA." *Furniture Rentors of Am., Inc. v. NLRB*, 36 F.3d 1240, 1245 (3d Cir. 1994) (first citing *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 708, 103 S. Ct. 1467, 75 L. Ed. 2d 387 (1983), then citing *Control Servs., Inc.*, 303 N.L.R.B. 481, 484 (1991), *enforced*, 961 F.2d 1568 (3d Cir. 1992) (unpublished table decision)).[8] Indeed, requiring clear waivers in management rights clauses ensures fair footing for bargaining of the next CBA. *See Katz*, 369 U.S. at 746-47. And continued reservation of a carve-out to subjects of mandatory bargaining would likely slow rather than accelerate future labor negotiations.

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8. While we did not address it in *PG Publishing, Furniture Rentors* remains good law as it post-dates *Litton*, the case upon which we primarily relied in *PG Publishing* for the proposition that collective bargaining agreements should be interpreted pursuant to ordinary principles of contract law. *See PG Publ'g*, 83 F.4th at 212-13; *accord Garcia v. AG of the United States*, 553 F.3d 724, 727 (3d Cir. 2009) ("We are bound by precedential opinions of our Court unless they have been reversed by an en banc proceeding or have been adversely affected by an opinion of the Supreme Court.").

In sum, when analyzed using ordinary contract principles, we find the management rights clause does not survive the CBA's expiration. Moreover, this conclusion is consistent with federal labor policy. Because the Board reached the same conclusion (albeit for different reasons), we will deny the petition for review.

IV.

We now turn to the General Counsel's cross-petition for enforcement. In addition to finding a violation of the Act, the Board granted the General Counsel's partial summary judgment motion, given the Company's failure to properly respond to the allegations in the compliance specification. As a remedy for violating the Act, the Board ordered the Company to "make the affected employees whole by paying them the amounts set forth [in the compliance specification]" as well as "to compensate affected employees for any adverse tax consequences of receiving lump-sum backpay awards." App. 5. The Company argues this remedy is excessive and that it was denied due process when the Board granted the General Counsel's partial summary judgment motion without giving the Company an opportunity to contest the backpay calculations. The General Counsel disagrees, and also contends we lack jurisdiction to consider the Company's challenges to the remedy.

We begin, as we must, with our jurisdiction. Under section 10(e) of the Act, "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall

be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). Application of this section is mandatory and jurisdictional. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66, 102 S. Ct. 2071, 72 L. Ed. 2d 398 (1982); *see also New Concepts for Living, Inc.*, 94 F.4th at 280 ("Section 10(e) is a jurisdictional administrative exhaustion requirement designed to ensure that any issue raised on appeal was first presented to the Board."); *Oldwick Materials, Inc. v. NLRB*, 732 F.2d 339, 341 (3d Cir. 1984). The Board has also promulgated regulations to flesh out section 10(e)'s requirements. *See* 29 C.F.R. § 102.46. Any party may file "exceptions" to an ALJ's decision. *Id.* § 102.46(a). The opposing party may then file an answering brief to those exceptions and/or cross-exceptions to the ALJ's decision. *Id.* § 102.46(b), (c). "Matters not included in exceptions or cross-exceptions may not therefore be urged before the Board, or in any further proceeding." *Id.* § 102.46(f). Ultimately, "[t]he crucial question in a section 160(e) analysis is whether the Board received adequate notice of the basis for the objection." *NLRB v. FedEx Freight, Inc.*, 832 F.3d 432, 437 (3d Cir. 2016) (quotation marks omitted).

In this case, we conclude, without hesitation, that our jurisdiction to review the Company's challenges to the remedy is proper. The General Counsel raised the issue of the ALJ's "fail[ure] to rule on . . . the General Counsel's Motion for Partial Summary Judgment regarding the Compliance Specification" in its exceptions to the ALJ's decision. App. 515. The issue is therefore properly before us. Full stop. *See New Concepts for Living, Inc.*, 94 F.4th at 280 ("A matter which is 'included in *exceptions or*

cross-exceptions' is thereby preserved." (emphasis added) (quoting 29 C.F.R. § 102.46(f))). Neither the Act nor the Board's implementing regulation requires the party pursuing an issue on appeal to have been the one to raise it before the Board. What matters is whether "the Board was clearly on notice of the key issues in the case before us." *Id.* at 281. Here, not only did the General Counsel raise the issue of its partial summary judgment motion, but the Board actually addressed and ruled on it, thereby demonstrating its awareness of the issue. Accordingly, our jurisdiction is proper. *See also id.* at 289-90 (Krause, J., concurring) (admonishing the General Counsel for its repeated invocation of this jurisdictional argument which "exposes a troubling gap between Section 10(e) of the [Act], and the Board's regulation . . . that purports to interpret it").

That said, we agree with the General Counsel that the Board's remedy was an appropriate consequence of the Company's deficient answer to the compliance specification. When the General Counsel issues a compliance specification alleging specific amounts owed to various employees, 29 C.F.R. § 102.55, the respondent is required to file an answer, *id.* § 102.56(a). That answer must contain "highly specific information, going well beyond the requirements for answers in civil actions in federal courts." *NLRB v. Harding Glass Co.*, 500 F.3d 1, 3 (1st Cir. 2007). Specifically,

> The answer must specifically admit, deny, or explain each allegation of the specification, unless the Respondent is without knowledge, in

> which case the Respondent must so state, such statement operating as a denial. Denials must fairly meet the substance of the allegations of the specification at issue. When a Respondent intends to deny only a part of an allegation, the Respondent must specify so much of it as is true and deny only the remainder. As to all matters within the knowledge of the Respondent, including but not limited to the various factors entering into the computation of gross backpay, *a general denial will not suffice*. As to such matters, if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer must specifically state the basis for such disagreement, setting forth in detail the Respondent's position and furnishing the appropriate supporting figures.

29 C.F.R. § 102.56(b) (emphasis added). Moreover, "when a respondent fails to deny allegations with the required specificity, those allegations are 'deemed to be admitted true, and may be so found by the Board without the taking of evidence supporting such allegation[s], and the respondent shall be precluded from introducing any evidence controverting the allegation[s].'" *Harding Glass Co.*, 500 F.3d at 7 (alterations in original) (quoting 29 C.F.R. § 102.56(c)).

Here, the Company's answers to the paragraphs in the compliance specification were "general denials" within the meaning of the Board's regulation. For each paragraph,

the Company repeated that it "[d]enies the allegations set forth in Paragraph [] of the Complaint" without providing any additional detail. *See* App. 552-55 (repeating the same answer in response to paragraphs 16-86). These denials fail to "specifically state the basis for such disagreement, setting forth in detail the [Company's] position and furnishing the appropriate supporting figures." 29 C.F.R. § 102.56(b). Nor can the Company claim it lacks knowledge as to those allegations since, as the Board noted, "gross backpay owed to employees in this case is clearly within the Respondent's knowledge because its payroll department modified staff bonuses from April to November 2020." App. 4. Because the Company's denials were clearly deficient under the Board's regulations, "[t]he Board was justified in . . . awarding partial summary judgment based on the allegations that were deemed admitted to be true." *Harding Glass Co.*, 500 F.3d at 7.

The Company claims it was not given the opportunity to address the partial summary judgment motion prior to the Board ruling on it because the motion was mooted by the ALJ's finding of no liability. This is plainly inaccurate. *First*, the compliance specification itself clearly alerted the Company of its "answer requirement" that "a general denial is not sufficient" and that "if an answer fails to deny allegations . . . in the manner required under [the Board's regulations] . . . the Board may find those allegations in the Second Amended Complaint and Compliance Specification are true and preclude [the Company] from introducing any evidence controverting those allegations." App. 295-97; *see Harding Glass Co.*, 500 F.3d at 7 (enforcing the Board's grant of partial summary judgment because "Harding

had fair notice of the costs of its evasiveness"). *Second*, the General Counsel gave the Company the opportunity to correct its clearly deficient answer prior to filing its partial summary judgment motion, but the Company declined to do so. *Third*, the ALJ explicitly invited the Company to oppose the General Counsel's partial summary judgment motion and/or correct its deficient answer at the conclusion of the hearing, but the Company declined to do so. And *fourth*, the General Counsel explicitly renewed its partial summary judgment motion in its exceptions to the ALJ's decision, but once again, the Company declined to do so. The Company was therefore given four opportunities to address its deficient answer, yet it failed to do so. Any due process challenge is therefore meritless.[9]

But even if we were to reach the merits, we would not find the Board's remedy excessive. The Act gives the Board the power to "take such affirmative action . . . as will effectuate the policies of [the Act.]" 29 U.S.C. § 160©. And we accord broad deference to the Board to fashion make-whole remedies. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964) (the Board's authority to issue remedies is a "broad discretionary one, subject to limited judicial review"); *see also 1621 Route 22 W. Operating Co.*, 825 F.3d at 147 ("In reviewing the Board's [remedy] determination, . . . our

9. *See Harding Glass Co.*, 500 F.3d at 3 ("This case has cautionary lessons for counsel about the costs of minimalist responses to [the General Counsel's] allegations. Here, the company failed to comply with the Board's rules for answering compliance specifications. . . . We [therefore] reject the company's arguments and enforce the Board's order.").

'judicial role is narrow,' and an order of the Board 'must be enforced' if it is rationally 'consistent[t] with the Act' and 'supported by substantial evidence on the record as a whole.'" (alteration in original) (quoting *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501, 98 S. Ct. 2463, 57 L. Ed. 2d 370 (1978))).

Finally, we will enforce the Board's order with respect to the Company's failure to respond to the information request. The ALJ found the Company failed to provide the requested information, that the information was "presumptively relevant and may be necessary for the Union to advocate [for] its represented members at the pending grievance," App. 17, and that the Company therefore violated the Act by failing to provide the information. Neither party raised the issue of the information request before the Board. Nor does the Company address the issue in its petition for review or its reply to the General Counsel's cross-petition. The issue is therefore forfeited.

V.

For the reasons set forth above, we will deny the Company's petition for review and grant the General Counsel's cross-petition for enforcement.

APPENDIX B — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, FILED NOVEMBER 23, 2022

NATIONAL LABOR RELATIONS BOARD

Case 22-CA-268083
372 NLRB No. 6

ALARIS HEALTH AT BOULEVARD EAST[1]
AND 1199 SEIU UNITED HEALTHCARE
WORKERS EAST

Filed November 23, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND RING

On January 26, 2022, Administrative Law Judge Kenneth W. Chu issued the attached decision. The General Counsel and the Charging Party Union each filed exceptions and supporting briefs, and the Respondent filed a combined answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to

1. We have amended the case caption to conform to the General Counsel's complaint.

2. Member Wilcox did not participate in the consideration of this case.

affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision and Order.[4]

For the reasons set forth below, we find, contrary to the judge, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally rescinding, reducing, and discontinuing a set of "hourly rate bonuses," paid to unit employees for all hours worked, without providing the Union advance notice and an opportunity to bargain. Additionally, we shall grant the General Counsel's Motion for Partial Summary Judgment on paragraphs 16 through 87 of the compliance specification, which allege amounts of backpay owed to each affected employee, because the Respondent failed to deny those allegations with the specificity required by the Board's Rules and Regulations.

I. FACTUAL BACKGROUND

Respondent Alaris Health at Boulevard East operated a nursing home and rehabilitation facility located in Guttenberg, New Jersey, until it closed in November 2020.[5]

3. In the absence of exceptions, we adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to furnish relevant information requested by the Union on September 4, 2020.

4. We shall amend the judge's conclusions of law to conform to the violations found. We shall amend the remedy and modify the judge's recommended Order to conform to the violations found and to tailor the wording to the particular circumstances of this case. We shall also substitute a new notice to conform to the Order as modified.

5. Unless otherwise indicated, all subsequent dates are in 2020.

Appendix B

The chain of events concerning changes to employee compensation began in April, near the onset of the first wave of the COVID-19 pandemic. In a memo to staff dated April 1, the Respondent unilaterally granted all employees a 25-percent hourly rate bonus starting April 2 and continuing through "at least April 30." The Respondent characterized this as a "special COVID19 hourly rate bonus" and noted that the increase would "apply to all worked hours" but not to any accrued paid time-off taken by employees. There is no dispute that employees who were out sick, on vacation, or otherwise on paid leave were not eligible to receive these or any subsequent increases. After learning secondhand about the Respondent's change, the Union emailed the Respondent to express its consent to the implementation of the hourly rate bonuses. Later, in an April 2 email to the Respondent, the Union made clear that it was "entitled to notice and an opportunity to bargain before any changes (including modifications to the already implemented and agreed to increases) are implemented."

On April 7, the Respondent circulated another memo to staff, notifying them that "[i]n appreciation and support of th[eir] dedication, effective immediately through April 30th all of our nursing and respiratory therapy staff will receive a COVID19 hourly rate bonus equal to 100% of their current hourly rate. The hourly bonus will apply to all worked hours (excluding sick or benefit time)." As before, the Respondent announced and implemented this increase unilaterally, without giving the Union advance notice and an opportunity to bargain. After learning that a portion of the staff would be receiving this 100-percent hourly rate bonus, the Union expressed its consent to the

implementation of the increase but again emphasized to the Respondent that the Union was entitled to notice and an opportunity to bargain before any subsequent changes to compensation were carried out.

As found by the judge, between May 1 and July 26, the Respondent unilaterally reduced or eliminated the aforementioned increases. Specifically, effective May 1, the Respondent lowered the 100-percent bonus for nursing and respiratory staff to 25 percent. Starting May 17, the Respondent eliminated the 25-percent bonus for all staff except direct nursing providers, a category that includes certified nursing assistants (CNAs), who are in the bargaining unit. Starting July 26, the Respondent unilaterally reduced bonuses for CNAs from 25% to $1.50 per hour for all hours worked. This $1.50 per hour bonus for CNAs remained in effect permanently, until the Respondent closed its facility in November.

Upon learning of each round of decreases and eliminations, the Union registered its disagreement, reminding the Respondent that it had an obligation to provide the Union with advance notice and a meaningful opportunity to bargain prior to carrying out any changes to compensation.[6] The record shows that after April 2, the Respondent did not reply to any of the Union's correspondence in this matter.

6. The Union's counsel testified that he received a copy of the Respondent's letter memorializing the May 1 decrease months later, in the fall of 2020.

II. DISCUSSION

a. The Respondent violated Section 8(a)(5) by unilaterally rescinding, reducing, and discontinuing employee bonuses

The judge found that the Respondent's bonus payments were gifts because they were limited in duration and "not tied to any employment-related factors," like "performance, seniority, production, attendance or . . . the gross profits of the facility." The judge characterized the hourly rate bonuses as signs of "appreciation to the staff when the COVID-19 pandemic started." Accordingly, the judge concluded that the hourly rate bonuses were not terms and conditions of employment and that the Respondent had no obligation to negotiate with the Union before reducing or discontinuing them.

We disagree. While the judge cited to the appropriate legal standard, he failed to properly apply it to the facts of this case. It is well settled that wages, hours, and other terms and conditions of employment are mandatory subjects of bargaining over which an employer has an obligation to bargain with its employees' exclusive collective-bargaining representative. *NLRB v. Katz*, 369 U.S. 736, 742-743 (1962); *Harley-Davidson Motor Co.*, 366 NLRB No. 121, slip op. at 2 (2018). In determining whether a bonus constitutes a mandatory subject of bargaining, the Board considers whether the payment of the bonus was tied to work performance, earnings, seniority, production, or other employment-related factors. *Benchmark Industries*, 270 NLRB 22, 22 (1984), enfd. mem. sub nom.

Amalgamated Clothing v. NLRB, 760 F.2d 267 (5th Cir. 1985); *Bob's Tire Co., Inc.*, 368 NLRB No. 33, slip op. at 1 (2019).[7]

The judge erred in concluding that the bonuses were not tied to any employment-related factor by failing to

7. The judge correctly observed that the Board also considers the regularity of a bonus in determining whether it is a term and condition of employment, but this factor is neither necessary nor sufficient in the analysis. See, e.g., *Bob's Tire*, above, slip. op. at 1 (finding bonus to be a gift where it was given for over 7 years, but there was no specific evidence about its amount or evidence that the bonus was dependent on any employment-based criteria); *Hospital Menonita De Guyama, Inc.*, 371 NLRB No. 108, slip op. at 1, 8-9, 10 fn. 4, 27 (2022) (finding one-time bonus of $150 to be term and condition of employment where bonus was tied to employment-related hazard of working during a hurricane); *SMI/Division of DCX-CHOL Enterprises, Inc.*, 365 NLRB No. 152, slip op. at 1, 22-23 (2017) (finding newly issued bonus to be term and condition of employment where bonus was tied to employment-related achievement of performance and production goal); *Harvstone Manufacturing Corp.*, 272 NLRB 939, 939 fn. 1 (1984) (finding employer did not violate the Act by unilaterally discontinuing Christmas bonus given for 10 years, where the bonuses were in the nature of a gift rather than a term and condition of employment), enf. granted in part and denied in part on other grounds 785 F.2d 570 (7th Cir. 1986). Accordingly, even if all of the increases here were only paid for a duration of several months at the start of the pandemic, such that there was a lack of regularity, the absence of this one factor would not alter the outcome of our analysis. In any event, the final change that the Respondent made to its bonus scheme granted a permanent $1.50 per hour pay increase for all CNAs that lasted from its implementation until the Respondent's facility closed. The permanence of that pay increase further supports the conclusion that the bonuses were a mandatory subject of bargaining.

consider that the hourly rate bonus was only paid for hours that a unit employee actually worked. The Respondent's April 1 and April 7 memos underscored that attendance was a prerequisite to receiving any hourly rate bonus, and, as noted above, the parties do not dispute that employees would not receive any hourly rate bonus for hours not worked because of vacation, sick leave, or any other reason. That the hourly rate bonus was paid only for hours actually worked reflected the reality that working closely with residents in a nursing home during the early days and months of the pandemic meant exposure to the risk of infection. Given these unique challenges, the increased hourly rate compensation to the Respondent's nursing home staff could be considered a form of hazard pay, which is a mandatory subject of bargaining. See, e.g., *Hospital Menonita De Guyama, Inc.*, 371 NLRB No. 108, slip op. at 1, 8-9, 10 fn. 4, 27 (adopting the judge's finding that the employer violated Section 8(a)(5) by unilaterally issuing a $150 bonus to staff who worked overnight during Hurricane Maria).

The precedent cited by the judge, including *Dura-Line Corp.*, 366 NLRB No. 126, slip op. at 4 (2018), rev. denied 807 Fed.Appx. 1 (D.C. Cir. 2019), and *Bob's Tire*, above, slip op. at 1, is not to the contrary.[8] In *Dura-Line*, the

8. See also *SMI/Division of DCX-CHOL Enterprises, Inc.*, supra, slip op. at 1, 22-23 (finding employer violated Sec. 8(a)(5) by unilaterally doling out bonuses to employees for meeting certain production and efficiency targets); *Waxie Sanitary Supply*, 337 NLRB 303, 303-304 (2001) (finding employer violated Sec. 8(a)(5) by unilaterally discontinuing bonus program based in part on the company's gross profits and employee performance); *Sykel Enterprises, Inc.*, 324 NLRB 1123, 1123-1125 (1997) (finding

Board dismissed an allegation that the employer violated Section 8(a)(5) by failing to bargain over a $9 reduction in the value of Thanksgiving bonuses as these were "token items given to all employees on an equal basis" and were not based on any employment-related factors. And in *Bob's Tire*, the Board found that the employer did not violate the Act by unilaterally discontinuing a Christmas bonus of between $20 and $100 absent proof that the bonus was dependent on any employment-based criteria. The facts of *Dura-Line* and *Bob's Tire* are distinguishable from those presented here. Unlike those employers, which awarded their staffs the holiday bonuses without regard to any employment-related factor, the Respondent increased the hourly rate of pay for those hours during which employees actively worked on the front lines in a dangerous health care setting during the start of the pandemic.[9]

Accordingly, unlike the judge, we find that the hourly rate bonuses were a term and condition of employment that could not be changed unilaterally.

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employer violated Sec. 8(a)(5) by unilaterally discontinuing Christmas bonuses where bonus amounts were based in part on employee attendance and performance); *Cypress Lawn Cemetery Assn.*, 300 NLRB 609, 613 fn. 9 (1990) (finding employer violated Sec. 8(a)(5) by unilaterally handing out paid vacations to Hawaii because they were a reward for good work).

9. In finding that the bonuses were gifts, the judge appears to have been influenced in part by his view that they represented a "significant and substantial windfall" to employees. We disagree with this characterization in light of the fact that employees earned the bonuses by providing care to residents of the Respondent's facility during a pandemic.

We recognize that the Union consented to the implementation of the bonuses. However, the Union also made clear that it expected to be notified and given an opportunity to bargain over any future modifications of the bonuses. The Respondent's exclusion of the Union from any deliberations prior to modifying the bonuses, particularly after the Union repeatedly reminded the Respondent of its right to be consulted, was "antithetical to our statutory system of collective bargaining meant to promote industrial stability." *McClatchy Newspapers, Inc.*, 321 NLRB 1386, 1391 (1996).[10]

We therefore reverse the judge and find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally rescinding, reducing, and discontinuing employee bonuses starting May 1.[11]

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10. The judge also erred in finding that a provision in the parties' expired collective-bargaining agreement permitted the Respondent to unilaterally rescind, reduce, and eliminate the hourly rate bonuses. In *Nexstar Broadcasting, Inc. d/b/a KOIN-TV*, the Board held that "provisions in an expired collective-bargaining agreement do not cover post-expiration unilateral changes unless the agreement contained language explicitly providing that the relevant provision would survive contract expiration." 369 NLRB No. 61, slip op. at 2 (2020); see also *Buck Creek Coal*, 310 NLRB 1240, 1240 fn. 1 (1993) ("[W]e note that a waiver of bargaining rights contained in a contractual management-rights provision normally is limited to the time during which the contract that contains it is in effect."). The provision in question, Section 10(B) of the expired agreement, does not specify, either implicitly or explicitly, that it would survive after the agreement's expiration.

11. In light of our finding that the Respondent's hourly rate bonuses were mandatory subjects of bargaining under *Benchmark*

b. General Counsel's Motion for Partial Summary Judgment on the compliance specification

The General Counsel excepts to the judge's failure to grant her Motion for Partial Summary Judgment on paragraphs 16 through 87 of the "compliance specification" portion of the second amended complaint, compliance specification, and notice of hearing.[12] The General Counsel argues that the Respondent's general denials of those allegations were insufficient under the Board's Rules and Regulations. As explained below, we agree and grant the General Counsel's Motion for Partial Summary Judgment.

On August 30, 2021, the General Counsel issued the second amended complaint, compliance specification, and notice of hearing in this matter.

Industries, above, we decline the General Counsel's invitation to revisit that precedent.

12. The compliance specification contains *two* paragraphs numbered "87." The first par. 87 alleges that employees are entitled to be compensated for any adverse tax consequences of receiving a lump-sum award in a year other than the year in which the income would have been earned had the Act not been violated. This first par. 87 also refers to Attachment A, which identifies amounts allegedly owed to each employee but, in a footnote, the General Counsel specifically acknowledged that the amounts will "need to be updated to reflect the actual year of payment." The second par. 87 is a summary of all prior paragraphs; it sets forth the total amount owed for backpay and the total conditional amount of excess tax liability, and asserts that interest shall accrue until payment is made. We understand the General Counsel to move for summary judgment on both paragraphs identified as "87."

Appendix B

On September 20, 2021, the Respondent filed its answer. The answer offered general denials to paragraphs 16 through 86. In response to both paragraphs identified as "87," the Respondent answered that the allegations set forth were legal conclusions to which no response was required and that, to the extent that a response was required, the Respondent denied the allegations.

On October 20, 2021, the General Counsel notified the Respondent that its answer was deficient because of its lack of specificity, and advised the Respondent that she would move for summary judgment if a more detailed answer was not submitted by October 27, 2021.

On November 1, 2021, following the Respondent's failure to submit an amended answer, the General Counsel filed a Motion for Partial Summary Judgment. The filing of the General Counsel's motion coincided with the date of the hearing in this case.

The General Counsel excepts to the judge's failure to rule on the motion for partial summary judgment and simultaneously renews the motion before the Board in her brief.

The Respondent has not filed an amended answer or an opposition in response to the General Counsel's motion.[13]

13. The Respondent did not submit an amended answer or opposition to the General Counsel's motion prior to the issuance of the judge's decision on January 26, 2022. Moreover, the Respondent's May 26, 2022 answering brief on exceptions does

Appendix B

On the entire record, the Board makes the following

Ruling on Motion for Partial Summary Judgment

Section 102.56(b) and (c) of the Board's Rules and Regulations states:

> (b) *Form and contents of answer.* The answer to the specification must be in writing, signed and sworn to by the Respondent or by a duly authorized agent with appropriate power of attorney affixed, and contain the address of the Respondent. The answer must specifically admit, deny, or explain each allegation of the specification, unless the Respondent is without knowledge, in which case the Respondent must so state, such statement operating as a denial. Denials must fairly meet the substance of the allegations of the specification at issue. When a Respondent intends to deny only a part of an allegation, the Respondent must specify so much of it as is true and deny only the remainder. As to all matters within the knowledge of the Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial will not

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not respond to the General Counsel's assertion that the motion must be granted if the Board were to find that the Respondent violated Sec. 8(a)(5) by rescinding and eliminating the hourly rate bonuses. In sum, the Respondent has not contested the General Counsel's exception to the judge's failure to grant her motion for partial summary judgment.

> suffice. As to such matters, if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer must specifically state the basis for such disagreement, setting forth in detail the Respondent's position and furnishing the appropriate supporting figures.
>
> (c) *Failure to answer or to plead specifically and in detail to backpay allegations of specification.* If the Respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the Respondent, find the specification to be true and enter such order as may be appropriate. If the Respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to deny is not adequately explained, such allegation will be deemed to be admitted as true, and may be so found by the Board without the taking of evidence supporting such allegation, and the Respondent will be precluded from introducing any evidence controverting the allegation.

The General Counsel's compliance specification sets forth a methodology for calculating gross backpay and excess tax liability and delineates the computations for

each of the alleged discriminatees. The General Counsel contends that the Respondent's answer to the relevant paragraphs of the compliance specification was inadequate because the Respondent merely denied those allegations without providing an adequate explanation for the denials or an alternate calculation of backpay or adverse tax consequences. We agree.

It is well settled that a general denial of backpay calculations is insufficient to comply with the specificity requirements of Section 102.56(b) and (c) where the answer fails to specify the basis for the disagreement with the backpay computations contained in the specification, fails to offer any alternative formula for computing backpay, fails to provide appropriate supporting figures for amounts owed, or fails adequately to explain any failure to do so. E.g., *Flaum Appetizing Corp.*, 357 NLRB 2006, 2007 (2011); *Power Equipment Co.*, 341 NLRB 249, 249-250 (2004); *Paolicelli*, 335 NLRB 881, 883 (2001); *Baumgardner Co.*, 298 NLRB 26, 27 (1990), enfd. mem. 972 F.2d 1332 (3d Cir. 1992). Moreover, the gross backpay owed to employees in this case is clearly within the Respondent's knowledge because its payroll department modified staff bonuses from April to November 2020. See *Mining Specialists, Inc.*, 330 NLRB 99, 101 (1999). Hence, the Respondent's answers to the backpay allegations (in paragraphs 1-86 and the second paragraph "87" of the compliance specification) were inadequate under the Board's Rules and Regulations. Likewise, the Respondent's general denial of the General Counsel's allegations regarding adverse tax consequences (set forth in the first paragraph "87" of the compliance

specification) was inadequate.[14] Accordingly, we grant the General Counsel's motion and deem that the allegations in paragraphs 16 through 87 (first and second) of the compliance specification are admitted as true, and the Respondent is precluded from introducing evidence challenging them.[15]

AMENDED CONCLUSIONS OF LAW

1. Delete Conclusion of Law 6.

2. Insert the following as Conclusion of Law 4 and renumber the judge's Conclusion of Law 4 and subsequent paragraphs accordingly:

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14. See *1621 Route 22 West Operating Co., LLC d/b/a Somerset Valley Rehabilitation & Nursing Center*, 371 NLRB No. 101, slip op. at 6 (2022) (finding that employer's general denial of compliance specification's allegations regarding liability for adverse tax consequences was deficient under Section 102.56(b) of the Board's Rules and Regulations because the answer failed to provide an alternative formula or figures for computing excess tax liability).

15. Though its facility closed in November 2020, the Respondent has not argued that the closure makes it financially unable to comply with its remedial obligations. In any event, the issue in a backpay proceeding is the amount due, not a respondent's ability to pay. *Scotch & Sirloin Restaurant*, 287 NLRB 1318, 1320 (1988). Therefore, the Respondent's financial situation is not a basis for denying the General Counsel's Motion for Partial Summary Judgment. See *Judd Contracting, Inc.*, 338 NLRB 676, 676 fn. 3 (2002), enfd. 76 Fed.Appx. 651 (6th Cir. 2003).

"(4) The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally rescinding, reducing, and discontinuing employee bonuses starting May 1, 2020."

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, in addition to the remedies ordered by the judge we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally rescinding, reducing, and discontinuing employee bonuses starting May 1, 2020, we shall order the Respondent to make the affected employees whole by paying them the amounts set forth below, with interest accrued to the date of payment as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), minus tax withholdings required by Federal and State laws. In addition, we shall order the Respondent to compensate affected employees for any adverse tax consequences of receiving lump-sum backpay awards in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), and to file with the Regional Director for Region 22, within 21 days of the date the final amount of each affected employee's make-whole award is fixed, a report allocating the backpay awards to the appropriate calendar year. We shall also order the Respondent to file with the Regional Director for Region 22, within 21 days of the date the final amount of each affected employee's make-whole award is fixed by agreement or Board order or such additional time as the Regional Director may

allow for good cause shown, a copy of affected employees' corresponding W-2 form(s) reflecting the backpay awards.[16]

Finally, because the Respondent's facility was closed in November 2020, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former employees to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Alaris Health at Boulevard East, Guttenberg, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the terms and conditions of employment of its unit employees without first notifying 1199 SEIU United Healthcare Workers East (the Union) and giving it an opportunity to bargain.

(b) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested

16. We have modified the wording of the standard *AdvoServ of New Jersey* and *Cascades Containerboard* remedies to correspond to the particular circumstances of this case. See *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324, 1324 (2016); *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76, slip op. at 2-3 (2021), as modified in 371 NLRB No. 25 (2021).

information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(c) 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) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit at the Respondent's facility in Guttenberg, New Jersey:

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

(b) Make affected employees whole for loss of earnings suffered as a result of the unlawful unilateral changes in the amounts set forth below, plus interest.

(c) Compensate affected employees for the adverse tax consequences of receiving lump-sum backpay awards, and file with the Regional Director for Region 22, within 21 days of the date the final amount of each affected

employee's make-whole award is fixed, a report allocating the backpay awards to the appropriate calendar year for each employee.

(d) File with the Regional Director for Region 22, within 21 days of the date the final amount of each affected employee's make-whole award is fixed or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay awards.

(e) Furnish to the Union in a timely manner the information requested by the Union on or about September 4, 2020, pertaining to a grievance over the nonpayment of medical bills of unit employees.

(f) Within 14 days after service by the Region, duplicate and mail, at its own expense, copies of the attached notice marked "Appendix" to the Union and to all employees who were employed by the Respondent at any time since May 1, 2020. In addition to physical mailing of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicated with its employees by such means.

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

IT IS FURTHER ORDERED that the General Counsel's Motion for Partial Summary Judgment is granted as to paragraphs 16 through 87 (first and second) of the second amended complaint, compliance specification, and notice of hearing, and the Respondent IS ORDERED to make whole the employees named below by paying them the amounts following their names, with interest accrued to the date of payment as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), plus compensation for adverse tax consequences in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), minus tax withholdings required by Federal and State laws.

Employee Owed	Amount
CNAs	
Alzate, Aracelly	$2,601
Campbell, Mildred	24,076
Carranza, Fatima	10,605
Checo, Mayra	11,331
Chicas-Rodriguez	2,228
Cruz, Emelitza	1,209
David, Beatrix	8,963
Diaz, Norma	9,241
Duque, Elenita	86
Espinoza, Aurelia	6,660
Garcia, Claudia	4,317
Gomillion, Glynd	6,898
Gonzalez, Celilia	8,959

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James, Jamileht	11,807
Mendez, Vianny	7,620
Nieves, Virginia	22,511
Ordonez, Reina	15,826
Pagan, Dora	9,843
Paulino, Oneida	9,317
Perez, Luz Leticia	8,446
Rivas, Patricia	9,498
Santay, Paula	14,200
Solis, Audrey	227
Woods, Andrea	12,138
Zambrano, Candid	616
Bocio-Elias, Maril	9,868
Calderon, Maria	8,805
Castillo, Chary	17,278
Flores-Rivera, Ya	9,285
Hernandez, Liz	5,151
Hisa, Atsede	10,600
Marcial, Tasha	2,748
Mena, Yadria	15,029
Osorio, Sandra	7,141
Rodriguez, Ana Si	2,536
Tejera, Martha	2,833
Ruiz, Milady	180
RECREATION	
Collado, Yesenia	$1,369
Ljutich, Helen	281
Villegas, Ena	2,088

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Villegas, Teresa	2,743
Zambrano, Candid	792
DIETARY	
Argueta, Chrisian	$524
Carbonel, Enia	1,327
Gilbert, Maurice	2,875
Gutierrez, Jack	49
Ortiz, Gerardo	2,381
Paredes, Carlos	982
Paredes, Ruth	289
Plasencia, Margo	2,616
Rodriguez, Maria	1,452
Rodriguez, Palma	1,024
Sandoval, Francisco	1,162
Vasquez, Rocio	3,201
HOUSEKEEPING	
Arias, Rosa	$1,995
Bastista Garcia, Denny	3,144
Duran, Odalis	2,407
Garcia, Julio	1,879
Gayle, Roy	2,480
Gonzalez, Tatiana	2,676
Melendez, Myrna	1,438
Mora, Ruben	2,205
Salazar, Zoraida	2,549
Tabares, Yolanda	2,669
TOTAL	$369,273

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Dated, Washington, D.C. November 23, 2022

/s/
Lauren McFerran, Chairman

/s/
Marvin E. Kaplan, Member

/s/
John F. Ring, Member

Appendix B

APPENDIX

NOTICE TO EMPLOYEES

MAILED 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 mail 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 change your terms and conditions of employment without first notifying 1199 SEIU United Healthcare Workers East (the Union) and giving it an opportunity to bargain.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested

information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

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

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

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

WE WILL make affected employees whole for loss of earnings suffered as a result of our unlawful reductions and eliminations of employee bonuses in the amounts set forth in the Board's Order, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and we will file with the Regional Director for Region 22, within 21 days of the date the final amount of each affected employee's make-whole award is fixed, a report allocating the backpay awards to the appropriate calendar year for each employee.

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WE WILL file with the Regional Director for Region 22, within 21 days of the date the final amount of each affected employee's make-whole award is fixed or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

WE WILL furnish to the Union in a timely manner the information requested by the Union on or about September 4, 2020, pertaining to a grievance over the nonpayment of medical bills of unit employees.

ALARIS HEALTH AT BOULEVARD EAST

The Board's decision can be found at www.nlrb.gov/case/22-CA-268083 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Appendix B

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried remotely in a video hearing on November 1, 2021, pursuant to a consolidated complaint issued by Region 22 for the National Labor Relations Board (NLRB) on February 23, 2021.[1]

Six Respondents were named in the consolidated complaint.[2] The second amended complaint, dated August 30, 2021, named only Alaris Health at Boulevard East (GC Exh. 1 (d) and (m)).[3]

The second amended complaint alleges that the Respondent Alaris Health at Boulevard East (Respondent or Alaris) unilaterally rescinded, reduced and discontinued wage increases in April 2020 without first notifying the

1. All dates are in 2020 unless otherwise noted.

2. The named Respondents in the consolidated complaint were Alaris Health Boulevard East, Alaris Health at Castle Hill, Alaris Health at Hamilton Park, Alaris Health at Harborview, Alaris Health at Rochelle Park, and Alaris Health at the Atrium. The six nursing facilities were under the corporate umbrella name of Alaris Health.

3. The General Counsel's exhibits are identified as "GC Exh." There were no hearing exhibits for the Respondent. The posthearing brief of the General Counsel is identified as "GC Br." and the Respondent as "R. Br." The hearing transcript is referenced as "Tr."

Union or providing the Union with an opportunity to bargain. The General Counsel alleges that the monetary increases for the unit employees were wage increases while the Respondent maintained that the increases were one-time bonuses with specific start and end dates.[4]

The complaint also alleges that on about September 4, 2020, the Union made an information request necessary for the union's performance of its duties as the exclusive collective-bargaining representative of the unit employee and that the Respondent has failed and refused to furnish the Union with the information requested (GC Exh. 1(m) at pars. 8, 9, 11, 12, and 13). By the conduct described above, the amended complaint alleges that the Respondent violated Section 8(5) and (1) of the National Labor Relations Act (Act).

The second amended complaint addressed the amount of backpay owed by the Respondent to each unit employee when the monetary increases were granted and subsequently reduced and eliminated (GC Exh. 1(n) at 4). The General Counsel moved for partial summary judgment on November 1, 2021, after the Respondent failed to provide a basis for the general denials in its answer and failed to detail an alternative backpay calculation as required under Section 102.56(b) and (c) of the Board's Rules and Regulations (GC Exh. 21). At the hearing, the Respondent was provided with another opportunity to submit an opposition to the motion and to

4. In my findings of fact, I will portrait the monetary increases as either a "wage increase" or "bonus" as characterized by the parties.

respond to the compliance specification (Tr. 164). As of the date of this decision, no response to the partial summary judgment motion was filed by the Respondent.

On the entire record, including my assessment of the witnesses' credibility[5] and my observations of their demeanor at the hearing and corroborating the same with the adduced evidence of record, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND UNION STATUS

The Respondent Alaris Health at Boulevard East has been a domestic corporation, with an office and place of business located in Guttenberg, New Jersey, until about November 15, 2020, and has been a nursing home and rehabilitation center engaged in providing inpatient medical care. The Respondent derived gross revenues in excess of $100,000 in conducting its operations annually until about November 15, 2020, and has annually purchased and received goods valued in excess of $5000 from points outside the State of New Jersey until about November 15, 2020 (GC Exh. 1(n) par. 2(a-c)). In its answer, the Respondent admits to paragraph 2 of the second amended complaint (GC Exh. 1(p)). As such, I find, that the Respondent is an employer engaged in commerce

5. Witnesses testifying at the hearing included William S. Massey, Sherry McGhie, and Jennifer Puleo.

within the meaning of Section 2(2), (6), and (7) of the Act and has been a health care institution within the meaning of Section 2(14) of the Act.

The Union, 1199 SEIU United Healthcare Workers East, is and has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

During the relevant period of time, Respondent was an inpatient nursing home and medical care facility. The Respondent ceased operations on about November 15, 2020. At all material times, 1199 SEIU United Healthcare Workers East has been the exclusive collective-bargaining representative of the following unit within the meaning of Section 9(b) of the Act:

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

The Respondent and Union's collective-bargaining relationship was embodied in an agreement from April 1, 2010, through March 31, 2014. At the time of the agreement, the Respondent was known as Palisades Healthcare Center and had been renamed as Alaris Health Boulevard East (GC Exh. 2; Tr. 19, 20).

Due to the national COVID-19 pandemic in early spring 2020, the State of New Jersey implemented a statewide

shelter-in-place mandate affecting most governmental activities and commercial businesses, including the nursing home industry. While most employees were permitted to work from alternate locations, first responders and essential workers, continued to commute to their jobsites. To their credit, unit employees continued with their responsibilities in protecting the health and well-being of patients at the Alaris facility. On March 30, the Union sent a letter to Francine Sokolowski, the administrator of the Alaris Health at Boulevard East facility at the time. The letter encouraged a proactive relationship between the Union and the Respondent to address the unique problems caused by the pandemic. In the letter, the Union requested clear policies and guidelines on dealing with COVID-19 related issues at the facility, such as implementation of a COVID-19 outbreak response policy; quarantine guidelines of affected employees by the virus; providing the Union with a directory of unit employees with phone numbers, home addresses, and emails addresses; a relaxation of grievance and arbitration time periods due to the lack of union access to the facility; and finally, a reminder to the Respondent not to change wages, hours, benefits, and other terms of employment without prior notice to the Union and an opportunity to bargain over any changes. The letter was signed by Milly Silva, the Union's executive vice president (GC Exh. 3).

At the hearing, William S. Massey (Massey) testified that he is a labor lawyer and had represented the Union since 2004. He stated that the letter was prepared by his law firm to remind the Respondent that the Union was still active at the facility and to ensure that the Union

be informed and given an opportunity to bargain before any changes in terms and conditions of employment are made. Massey said the letter served to address the lack of access of the Union to the nursing home because of the statewide lockdown. He said that Sherry McGhie served as the union organizer or staff representative at the nursing home at the time (Tr. 22-25; 66-68).

A. The Respondent's April 1 Bonus Memo to all Alaris Staff

On April 1, a memo, from Avery Eisenreich on behalf of Alaris Health,[6] informed all employees in the Alaris Health care system that the Respondent was taking steps to ensure the safety of the workers and wanted to recognize the hard work of the healthcare workers on the front line of the pandemic (GC Exh. 4). The memo stated that:

> Accordingly, effective April 2, and thru at least April 30, we will be providing all our staff working in our centers a special COVID19 hourly rate bonus equal to 25% of their current hourly rate. The special hourly bonus will apply to all worked hours (excluding any paid-time-off pay) thru April 30.

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6. It was alleged in the second amended complaint that Avery Eisenreich was the Respondent's owner and supervisor within the meaning of Sec. 2 (11) of the Act (GC Exh. 1(n) par. 3). This was denied in the Respondent's answer to the complaint but subsequently stipulated by the Respondent as admitted, as noted below.

Massey testified that he was informed after an employee at another Alaris nursing home told a union representative about the memo. Massey thought he heard about the memo from the Union on April 1 " . . . and may have received the screenshot of the notice later that day. Maybe I received it the next day" (Tr. 72). Massey testified that he never received the memo from Eisenreich and none of union officials were provided with the memo directly from the Respondent (Tr. 27-29, 69, 70).

Sherry McGhie (McGhie) testified that she was and is the Union's administrative organizer and was the shop organizer at the Alaris Health at Boulevard East facility (Tr. 103, 104). She stated that a worker and union delegate, Gwen Russell, at the Alaris Harborview facility, sent a screenshot of the April 1 memo in a text on April 1 to her. McGhie denied that she received a copy of the April 1 memo from any Alaris manager or supervisor (Tr. 105, 106).

In response to the memo, Massey sent an email to David Jasinski (Jasinski), who was and is representing the Respondent in labor employment matters. The email was dated April 1 and stated that Massey was informed by the Union of the 25 percent wage increase effective tomorrow (April 2) at the six nursing homes and that the Union agreed with the increase. Although the April 1 memo categorized the increase as an hourly rate bonus, Massey called it a wage increase in his email to Jasinski. Massey asked that Jasinski confirm this understanding. Massey testified that he was not aware of the cutoff date of April 30 at the time he sent the email to Jasinski (GC Exh.

5; Tr. 76). By letter dated April 2 (GC Exh. 6), Jasinski wrote Massey the following:

> Dear Bill:
>
> As you are all too aware, each one of these facilities is in the epicenter of the Covid-19
>
> Pandemic—the likes of which no one has ever experienced.
>
> Administration and its staff are dealing with and making critical real-life decisions every minute of every day. They cannot, and will not be distracted because there is too much at risk.
>
> The Facilities' goals are single minded and everyone is focused on it—provide the best health care for our residents and continued safety for them and our staff. Let me be as clear as possible. We will not be deterred by anyone or anything. We will do what is necessary to maintain these goals. The temporary increase for our employees is well within our management rights. It was solely to recognize the outstanding efforts of our dedicated staff.

During this global emergency, this Administration should not have to use precious time to justify its well-meaning actions and should not be distracted from the day to day challenges this crisis has created.

We make absolutely no apologies for our actions, and will continue to do what we believe is right for our residents and our employees.

I will be happy to address your concerns. For now, please allow the Administration to do their critical work.

Massey testified that he disagreed with Jasinski's assertion in the letter that granting the monetary increase was a management right of the employer. Obviously, Massey did not disagree with the increase but did testify that " . . . the wage increases unilaterally is not law, and was not permitted by the expired CBA, or by the National Labor Relations Act" (Tr. 33). Massey acknowledged in testimony that Jasinski's letter stated that the increase was temporary (Tr. 78).

In response to letter, Massey emailed Jasinski on April 2 that he was taken aback by the tone of the letter and to clearly remind Jasinski that the Union is entitled to notice and an opportunity to bargain with the Respondent before any changes, which included any modifications to the already implemented and agreed upon increases (GC Exh. 7; Tr. 34, 35). Massey testified that Jasinski did not respond to his April 2 email (Tr. 37).

B. The Respondent's April 7 Bonus Memo to the Nursing and Respiratory Staff

On April 7, Eisenreich distributed a memo to all nursing and respiratory staff and stated that in appreciation for their work at the various nursing homes

(which included Alaris Health at Boulevard East), the nursing and respiratory staff will receive a COVID-19 hourly rate bonus equal to 100 percent of their currently hourly rate, effectively immediately and through April 30. The hourly bonus will apply to all worked hours (excluding sick or benefit time) (GC Exh. 8).

Massey testified he has seen the April 7 memo after receiving a copy from the Union. He noted that a bargaining unit employee from another nursing facility had received the memo at another Alaris nursing facility and forward a picture of the memo to the Union. Massey denied receiving the memo from Jasinski or that any union officials had received the memo directly from the Respondent (Tr. 37-39). McGhie denied receiving this memo (Tr. 106).

On the same day, Massey emailed Jasinski about the April 7 memo. He informed Jasinski that he was made aware of the 100 percent wage increase for all nursing employees at the Alaris at Hamilton Park. Massey again referenced the hourly rate bonus in the April 7 memo as a wage increase. Massey believed in his email that the 25 percent wage increase was on top of the already implemented 100 percent wage increase that was previously announced on April 2. Massey again reminded Jasinski of the Respondent's obligation to inform the Union and provide an opportunity to bargain over the changes, including any modifications to the already implemented agreed to increases (GC Exh. 9). Massey followed his April 7 email with another email to Jasinski on April 8, informing Jasinski that he was now informed

that the Respondent's April 7 memo had also applied to the remaining five nursing facilities, including Alaris Health at Boulevard East. Massey testified that the Union had consented to the increase. Massey subsequently understood that the 100 percent was a modification to replace the 25 percent and not a 100 percent increase on top of the initial 25 percent increase (GC Exh. 10; Tr. 40, 41, 80-82). There were no replies from Jasinski to Massey's April 7 or 8 emails.

C. The Respondent's April 29 Revaluation Memo of the Bonus Program

In a memo dated on April 29, Eisenreich addressed all the staff at the six nursing facilities. He thanked the dedication and commitment of the staff during the COVID19 crisis and the loss suffered by many staff members due to the virus (GC Exh. 11). Eisenreich stressed the need to balance the desire to reward the staff with the need to ensure uninterrupted full salaries and benefits to all. To maintain the financial viability of the nursing facilities, Eisenreich referred to his April 7 memo that stated there would be a revaluation of the bonus program by April 30. The April 29 memo made the following modifications:

> Effective May 1st, the 100% bonus for Nurses, CNA's and Respiratory Therapists will be reduced to a 25% hourly bonus for hours worked through May 14th, which is consistent with the bonus received by all staff at our Centers. During this period, we will continuously review

> our ability to meet all obligations and we will update our Team Members prior to May 14th.

Massey testified that he learned of the April 29 memo several months after it was sent out by Eisenreich and was fairly certain that the Union never received a copy. He stated that he received a copy from Jasinski in late 2020 (Tr. 44-46). McGhie testified she received the April 29 memo as a screenshot in a text sent by union delegate Russell at the Alaris Harborview facility. McGhie testified that the April 29 memo was not posted at Alaris Health at Boulevard East and she was never provided a copy directly from that facility's managers (Tr. 107-109).

D. The Respondent's May 13 Memo Revaluation of the Bonus Program

On May 13, Eisenreich sent out another memo that stated it was a follow-up to the April 29 memo. The May 13 stated the following:

> Our April 29 memo indicated reevaluation of our bonus program on May 14. Starting May 17, the 25% bonus payment for hours worked will be limited to "Direct Nursing Providers" only. This includes all RNs, LPNs, CNA's, and QA CNAs. This 25% bonus for Direct Nursing Providers will continue until May 31, 2020, at which point we are optimistic that the peak of this pandemic will have passed. As of May 17, all other employees will return to their normal hourly rate. The prior bonus program will continue to be in effect until May 17.

Massey did not recall when he received a copy of the May 13 memo and believed that the Union did not receive that memo (GC Exh. 12, Tr. 46). McGhie confirmed that the Union did not receive a copy of the April 29 memo or the follow up memo of May 13 from the facility's managers but testified that a union delegate at another facility screenshot the two memos to her (Tr. 110).

E. The Respondent's May 29 Memo Modifying the Bonuses to the Nursing Staff

Eisenreich followed-up his May 13 memo with another memo on May 29. He reminded all staff that the May 13 memo stated there would be further modifications of the bonus by May 31. As such, the May 29 memo stated that the 25-percent bonus to RNs and LPNs will be reduced to 10 percent effective on June 1 through 15. The May 29 memo also stated that the RNs and LPNs would return to their tradition pay rate after June 15 (GC Exh. 14). Massey sent an email to Jasinski on May 15 after the Union had received reports from unit employees that they had lost their 100-percent bonus. Massey testified that the unit employees " . . . at some six Alaris facilities, that they had lost the 100% wage increase" (GC Exh. 13; Tr. 47; 83). His email protested the rescission of the 100-percent wage increase and stated the following:

> The Union has learned from employees that on or about the beginning of this month, the above 6 Alaris facilities unilaterally rescinded the 100% wage increases for all nursing employees that were implemented, and subsequently

> consented to by the Union on April 7 and 8. As you know, there is a union at each of these facilities, and changes to terms and conditions of employment (such as wages) cannot be made unilaterally. Rather, they must be negotiated, after providing the Union with advance notice and a meaningful opportunity to bargain.
>
> If Alaris wishes to modify terms and conditions of employment, (including, but not limited to the aforementioned wage increases), it should direct any proposals to Union Vice President Leilani Montes and/or to myself. In the meantime, we expect and insist that Alaris restore the recently rescinded increases, make employees whole, and refrain from making any unilateral changes, particularly reductions to employees' pay. Thank you for your attention to this matter.

Massey testified that the Union did not received a copy of the memo; did not agreed to the reduction; and, at no time did the Respondent offered to bargain over the reduction or communicate any proposals on the wage reduction (Tr. 51 52; 85-87). McGhie believed she received the May 29 memo between June 10-12 in a phone screenshot from a union delegate at another Alaris facility. McGhie never received the May 29 memo directly from any management officials (Tr. 111, 112).

Massey sent a second email on June 2 that referenced the LPNs at the 6 Alaris facilities. His June 2 email to Jasinski noted the earlier rescission of the " . . . 25% wage

increases for all employees," but now complained about the LPNs' 25 percent wage increase that was reduced to 10 percent. Massey stated that the union was willing to bargain over the changes and demand that the employer refrain from making any additional unilateral changes (GC Exh. 15).

Massey testified he was mistaken that the May 29 memo (GC Exh. 14) called for the reduction of the CNAs' wages from 25 percent to 10 percent (similar to the LPN reduction). Instead, the May 29 memo did not reduce the CNAs monetary benefits and remained at 25 percent (Tr. 55). Massey did not receive a reply from Jasinski on his June 2 email. Massey testified that the Respondent never communicated any bargaining proposals over the changes in the wage increases to the unit employee (Tr. 55, 56).

F. The Respondent's July 20 Memo Reducing the CNAs' Monetary Increases

On July 20, Eisenreich issued another memo to the Alaris Health staff. He stated that Alaris had re-evaluated the COVID-19 related bonus given to the CNAs in the May 29 memo and stated that the 25 percent bonus for hours worked reflected in the May 29 memo will now be reduced to $1.50 extra per hour for all hours worked, effective on July 26. The CNAs' prior 25 percent bonus was eliminated (GC Exh. 16).

Massey testified that he received a copy of the memo from the Union after an employee at a different facility sent a screenshot of the memo to the Union. He denied

receiving the notice from Jasinski or from the employer (Tr. 56, 57). McGhie testified that, again, a union delegate at a different Alaris nursing facility had screenshot the memo to her on about July 23. She denied received a copy from the administrator or another manager at Alaris Health at Boulevard East (Tr. 112, 113).

In response to this reduction, Massey emailed Jasinski on July 24 and summarized the Union's position that the monetary benefits given to the unit employees are in fact wage increases and he complained to Jasinski that the wage reductions were done unilaterally and without the approval by the Union. Massey stated in his email that the Union is willing to negotiate over the reductions, but the Respondent must maintain the wage increases as the status quo in the interim. Massey testified that Jasinski did not reply to his email (Tr. 58-60; GC Exh. 17).

On November 6, Jasinski wrote to Massey that it was in the best interest of all involved to provide bonuses to the Alaris staff during the pandemic and requested the Union to reconsider the filing of an unfair labor practice charge (presumptively after the bonuses were rescinded by the Respondent) (GC Exh. 20; Tr. 96, 97, 101).

G. The Union's Information Request

On about September 4, the Union filed a class action grievance on behalf of the unit employees at Alaris (previously known as Palisades) for unpaid medical invoices and the cancellation of their health insurance benefits. Sherry McGhie (McGhie) sent an email on

September 4 to Francine Sokolowski, the administrator for the nursing facility, regarding the grievance (GC Exh. 18). On September 8, McGhie sent a second email to Sokolowski, captioned ""Information Request," and attached a copy of a request for information dated September 4 and addressed to Sokolowski. Massey testified that he followed-up on the McGhie September 8 email with his own email to Jasinski on September 23. Massey stated that attached to his email to Jasinski was the information request of September 4 from McGhie to Sokolowski (Tr. 61-63; GC Exh. 19). The Union requested the following information on the pending grievance:

> 1. The files that show names and date of member covered as of March 1, 2020.
>
> 2. The summary plan and description for health insurance.
>
> 3. The summary benefit description for health insurance.

The Union requested that the information be provided by September 14. Massey testified that the Union did not receive a reply on the information request from Sokolowski and he did not receive a response from Jasinski (Tr. 63, 64).

McGhie testified that the Union filed the grievance because unit members had accumulated hospital bills that were not being covered by their health insurance. McGhie said she gave copies of the hospital invoices to Administrator Sokolowski but received no response

from her or any other management official. She stated that her next step was to file the grievance (Tr. 113, 114). Pursuant to the grievance, McGhie testified that she made an information request to Sokolowski to determine why the unit employees were not being reimbursed for their medical bills. The Alaris Health at Boulevard East facility closed operations in early November 2020. However, McGhie maintained that the grievance is still active, and that the Union never received the information requested (Tr. 100, 101, 117, 118).

H. The Testimony of Jennifer Puleo

Jennifer Puleo (Puleo) testified on behalf of the Respondent. She stated that at the time of this complaint, she was the regional vice president of operations for the Alaris Health system, which included the Alaris at Boulevard East facility. Puleo has been the regional vice president since May 2019 and is responsible for various topics arising with the facilities and provided guidance for the administrators and staff. Puleo described the chaotic situation at the Alaris nursing facilities during the COVID-19 pandemic in 2020. She testified that that the nursing facilities were faced with changing policies and mandates from the State of New Jersey on the operations of the nursing homes due to the unprecedent state of emergency caused by the pandemic. Puleo also described the suspension of visitations to the nursing homes and the care of nursing residents with dwindling staff resources (Tr. 131-133, 142, 143).

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With regard to the bonus memos issued by the Respondent, Puleo testified that she participated in the decision-making for giving out bonuses and also involved when the bonuses were reduced and eventually eliminated. Puleo recalled that another regional vice president, the executive vice president, and the owner, Eisenreich, were involved in deciding on giving and reducing the bonuses to the staff at Boulevard East and other Alaris facilities. Puleo testified that she made weekly visits to Boulevard East and recalled seeing the six bonus memos posted in various areas, specifically by the timeclock and break room nurses' station. She believed that the memos were disseminated to the employees at Alaris Boulevard East (Tr. 136, 137, 143). Puleo testified that the bonus memos were also disseminated to the union shop stewards at the Boulevard East facility but is not aware that the memos were discussed with them prior to the issuance of memos (Tr. 156, 157-160).

Puleo maintained that each bonus memo had a start and end date or stated that there would be a further modification of the bonuses. She testified that no employee complained to her when the bonuses were reduced and eliminated because they all knew when the bonuses would end (Tr. 139, 148-150, 160). Puleo stated that she is aware of grievances that may be filed at the Alaris nursing facilities but has not participated in a grievance. She is not aware of any grievances that were filed on the reduction of the bonuses (Tr. 139, 140, 147).

Appendix B

I. The Parties' Stipulation with Regard to Avery Eisenreich

In lieu of having Avery Eisenreich testify at the hearing, the parties agreed and stipulated to the following terms (Tr. 125-127):

> *1.* From about March 1, 2020, through the closing of Alaris Health at Boulevard East in about November of 2020, Avery Eisenreich was the part owner of Alaris Health at Boulevard East and is a supervisor within the meaning of Section 2(11) of the National Labor Relations Act.
>
> *2.* Avery Eisenreich did not provide a copy of GC Exhibits GC-4, GC-8, GC-11, GC-12, GC-14 or GC-16 to the Union, meaning 1199 SEIU, or to William Massey, Milly Silva, Leilani Montes and/or Sherry McGhie.
>
> *3.* The memos described in GC Exhibits, GC-4, GC-8, GC-11, GC-12, GC-14 and GC-16 were the same memos at Alaris Health at Boulevard East, as well as the five other Alaris facilities, in which 1199 represents employees in New Jersey (to wit): Alaris Heath at Castile Hill, Alaris Health at Harborview, Alaris Health at Rochelle Park, Alaris Health at the Atrium, and Alaris Health at Hamilton Park.
>
> 4. Avery Eisenreich was part of a team at Alaris Health, which included Jennifer Puleo,

Linda Dooley, and Chad Giampolo, that decided on the increases that were contained in GC Exhibits GC-4, GC-5, GC-8, GC-11 GC-12, GC-14, GC-16, as well as the decreases contained in those same memos.

Discussion and Analysis

The counsel for the General Counsel contends that the Respondent violated section 8(a)(5) and (1) of the Act by unilaterally reducing, modifying, and eventually rescinding the wage increases. The Respondent argues that the monetary increases were bonuses that the Respondent had the contractual right to give and rescind within its discretion. It is clear from the above factual findings that the Union consented to the unilateral monetary increases but always reminded Jasinski that further modifications required a notice and opportunity to bargain with the Union before changes were made. As a defense, the Respondent argued that during this unprecedented time with the COVID-19 pandemic, it made critical decisions on nursing home operations, including to give out bonuses to the staff in appreciation of their commitment and dedication in serving the vulnerable residents at the facilities that was permitted under the expired collective-bargaining agreement (Tr. 131-143).

a. The Respondent did not violate Section 8(a)(5) and (1) of the Act when it reduced, modified, and rescinded the bonuses

Section 8(a)(5) of the Act requires an employer to provide its employees' representative with notice and an

opportunity to bargain before instituting changes in any matter that constitutes a mandatory bargaining subject. *NLRB v. Katz*, 369 U.S. 736 (1962); *Toledo Blade Co.*, 343 NLRB 385 (2004). The duty to bargain in good faith includes a duty to abstain from unilaterally changing terms and conditions of employment without first bargaining to impasse with the designated representative regarding the changes. *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

The collective-bargaining agreement between the parties expired on March 31, 2014. After a collective-bargaining agreement expires, an employer has a statutory duty to maintain the status quo on mandatory subjects of bargaining until the parties reach a new agreement or a valid impasse in negotiations. See, *Triple A Fire Protection*, 315 NLRB 409, 414 (1994), enfd. 136 F.3d 727 (11th Cir. 1998), cert. denied 525 U.S. 1067 (1999); *Asociacion de Empleados del Estado Livre Asociado de Puerto Rico*, 370 NLRB No. 71 (2021). The substantive terms of the expired agreement generally determine the status quo. See, *PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette*, 368 NLRB No. 41, slip op. at 3 (2019); *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970). The Board may also consider any extracontractual past practices that are "regular and long-standing, rather than random or intermittent." *Sunoco, Inc.*, 349 NLRB 240, 244 (2007).

The Respondent (previously known as Palisades) and the Union enjoyed a collective bargaining agreement from April 1, 2010, to March 31, 2014 (GC Exh. 2). The "wage increase and minimum rate" section of the contract

set forth the hourly increases to the rates of pay of the unit employees and for the hourly increases. However, nothing in this section prevented the Respondent " . . . from giving merit increases, bonuses, or other similar payments provide it gives prior notice to the Union before implementation" (GC Exh. 2 at pp. 11, 12). Massey testified that he is not aware that the Respondent gave out merit increases, bonuses or other similar payments under this section during the life of the agreement or after the expiration of the contract in 2014 to the present time (Tr. 20, 21). Massey's testimony is not disputed that the bonuses were unprecedented, but that does not diminish the Respondent's right under the collective-bargaining agreement to give out bonuses upon notice to the Union without having to bargain.

I can well empathize with the chaotic situation in the nursing homes during the COVID-19 pandemic and the constant modifications of operational policies issued by the State of New Jersey on the nursing home industry. Nevertheless, an employer is obligated to provide notice and an opportunity to bargain with the Union on a unilateral change that affects terms and conditions of the unit employees. Changes to payment of wages are mandatory subjects of bargaining. *Strategic Resources, Inc.*, 364 NLRB 451, 457-458 (2016). Employers have a duty to bargain with the Union under Section 8(a)(5) of the Act about employees' wages, hours, and other terms and conditions of employment. These terms and conditions are "mandatory" subjects of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Bonuses, as payments to employees, are considered wages and

therefore a mandatory subject of bargaining. *Kirchhoff Van-Robb*, 365 NLRB No. 97, slip op. at 1 fn. 2 and 8 (2017). Thus, an employer violates its duty to bargain when it makes "a material, substantial, or significant change on a mandatory subject of bargaining without first giving the Union notice and a meaningful opportunity to bargain about the change to agreement or impasse, absent a valid defense." *NLRB v. Katz*, above. A bonus is a term and condition of employment over which an employer must bargain when the bonus was paid regularly and was tied to employment-related factors. *Bob's Tire Co.*, 368 NLRB No. 33, slip op. at 1 (2019).

As noted, it is well established that an employer and the representative of its employees have a mandatory duty to bargain with each other in good faith about wages, hours, and other terms and conditions of employment. *North American Pipe Corp.*, 347 NLRB 836, 837 (2006), petition for review denied 546 F.3d 239 (2d Cir. 2008). The Board has held, however, that employers do not have to bargain about gifts that they give to their employees. Id. As the Board has explained, items "given to all employees regardless of their work performance, earnings, seniority, production, or other employment-related factors" are properly characterized as gifts. *Benchmark Industries*, 270 NLRB 22, 22 (1984). Conversely, items that are "so tied to the remuneration which employees receive for their work that [the items] are in fact a part of the remuneration" are properly characterized as wages and are subject to the mandatory duty to bargain. *North American Pipe Corp.*, 347 NLRB at 837. Consequently, it is critical to this determination as to whether the monetary increases were

bonuses or wages. If the monetary increases were wage increases, the Respondent would be obligated to bargain with the Union. However, if the monetary increases were bonuses, then there is no obligation to bargain since the bonuses were permitted by the collective-bargaining agreement.

Massey testified to the following as to his interpretation that the monetary increases were a wage increase:

> [It's] pretty clear from the Union's point of view, that this was a wage increase. I guess the employer called it a bonus. We considered that to be self-serving. But what they did was there was a percentage wage increase. If somebody made $10, they were going to $20. If someone made $20, they were going to $40. That's a wage increase.
>
> A bonus, on the other hand, is like in the form of a ratification bonus. You will receive $500, or you will receive $100, or you will receive $250. That's a bonus. And a wage increase is, you know, that the wages were increased by either 100%, or 25%, or whatever the percent was. We viewed them as wage increases.
>
> Q. Okay. So-and we're going to use hypotheticals here. And I'll use round number. If an employee earned $10 an hour as a CNA, this bonus for the regular pay would be essentially their regular pay, $10 an hour, plus

> the same hours at an additional $10 an hour, correct?
>
> A Yes.
>
> Q. Okay. And if an employee worked overtime, so they were paid time and a half. And so they earned $15 an hour, when they worked overtime. You with me?
>
> A Uh-huh.
>
> Q. Okay. So they would receive—for their overtime hours worked, they would receive 100% bonus of the $15 an hour. Is that how this was applied?
>
> A. I believe that's how the overtime is applied (Tr. 49, 50).[7]

It is well established that a bonus or gift consistently bestowed for a period of time is considered a component of wages or a term or condition of employment. *Simpson Lee Paper Co.*, 186 NLRB 781, 783 (1970). In *Smi/*

7. Contrary to the position of the Union, a bonus does not necessarily need to be a specific dollar amount and a percentage of the hours worked may equally be considered a bonus and not a wage increase. Wage increases in collective-bargaining agreements can also be bargained for specific dollar amounts and not with percentages (see,e.g., *Wilkes-Barre Behavioral Hospital Co. LLC*, 583 NLRB 1, 19 (2019)(discussing wage increase proposals going up $1.77 per hour).

Divisio of DCX-CHOL Enterprises, Inc., 365 No. 152 (2017), the Board found that the $100 bonus was a form of compensation subject to a mandatory duty to bargain, and since the employer did not fulfill its duty to bargain with the Union before implementing the $100 bonus, the employer violated Section 8(a)(5) and (1) of the Act when it unilaterally implemented the bonus. In *Ohio Edison Co.*, 362 NLRB 777, (2015), the Board held that a bonus paid on the basis of an employee's performance on the job constitutes part of an employee's compensation, rather than a gift, requiring an obligation to bargain.

In determining whether a bonus constitutes a term and condition of employment over which an employer must bargain, the Board considers both the regularity of the bonus and whether payment of the bonus was tied to employment-related factors. See, e.g., *North American Pipe Corp.*, above; *Bob's Tire Co.*, 368 NLRB No. 33 (2019). The Board has held, however, that employers do not have to bargain about gifts that they give to their employees. Id. As the Board has explained, items "given to all employees regardless of their work performance, earnings, seniority, production, or other employment-related factors" are properly characterized as gifts.

In applying the Board's guidance, I find that the monetary increases were gifts and not wage increases. The bonuses were for a specific period of time and not conditioned upon employment-related factors. If indeed this was a wage increase as contended by the General Counsel and the Union, the so-called wage increases without benefit of robust negotiations between the parties,

would have resulted in a significant and substantial windfall to the unit employees. As Massey testified, an employee receiving a 100 percent increase in a $10-per hour situation will now receive $20 dollars per hour. It is difficult to believe the Union seriously thought there was an increase of 100 percent in hourly wages and that the increase was not in fact a gift in the form of a bonus. Here, taking the monetary formula used by the counsel for the General Counsel, a unit employee at Alaris who was earning $50,000 and applying the 100-percent increase, will now see an annual earned income of $100,000 for the duration of that worker's employment (except for the fact that the facility ceased operations).[8]

Upon my review of the memos, I find that each memo stated that the monetary increases were called "COVID-19 hourly rate bonus" and each reduction was prefaced as "bonus reductions." Each memo stated that the monetary increases were bonuses and given during the COVID-19 crisis and pandemic. Each bonus was specific as to the amount, eligibility, and the temporary nature of the bonus. The bonus was for 30 days or had a specific start date and end date. None of the monetary increases were tied to performance, seniority, production, attendance or dependent on the gross profits of the facility. Each bonus memo had a provision which stated the parties would revisit the bonus and respond based on the circumstances with the COVID-19 pandemic. Prior to the implementation and expiration of the bonus, the Respondent's facility

8. It is noted that the facility ceased operations about November 14, 2020, the date when the backpay period ended as contended by the General Counsel (GC Exh. 21).

distributed follow-up memos for the succeeding designated time (See, also, R. Br. at 6). A review of the series of memos issued by the Respondent substantiates the arguments of Respondent's counsel,

> The memo dated April 1 and effective April 2, specifically has an end date of at least April 30. None of the Respondent's staff was excluded: "All of Respondent's staff working in all Alaris centers, received a special COVID19 hourly rate bonus equal to 25% of their current hourly rate." The bonuses were tied to the COVID-19 pandemic situation and not employment factors. The hourly bonuses were not dependent on job performance and applied to all worked hours thru April 30 (GC Exh. 4).
>
> The memo dated April 7 gave all nursing and respiratory staff COVID19 hourly rate bonus equal to 100% of their currently hourly rate, effectively immediately and through April 30. Again, the bonuses had an end date and were not based upon performance or tied to any seniority, earnings or production of the workers. The hourly bonus applied to all worked hours (GC Exh. 8).
>
> The April 29 memo and made effective on May 1, gave a 100 percent bonus to the nurses, CNA's and respiratory therapists on April 7 and was reduced to a 25 percent hourly bonus for hours worked through May 14, making the reduction

consistent with the bonus received by all staff. Again, the bonus reduction was not based upon performance factors and applied equally to all job categories. The memo further provided there would be updates prior to May 14 for updates on the bonuses.

The May 13 memo was a follow-up to the April 29 memo and stated there would be a reevaluation of the bonus payments. The memo stated that starting on May 17, the 25 percent bonus payment for hours worked will be limited to "Direct Nursing Providers" only, which included all RNs, LPNs, CNA's, and QA CNAs. The 25 percent bonus for Direct Nursing Providers will continue until May 31, 2020. All other employees were informed that their normal hourly rate will resume as of May 17 (GC Exh. 12). Again, the May 13 memo provided specific start and end dates for the bonuses and applied equally to all job categories without regard to performance, seniority or production of the employee.

The May 29 memo referenced the May 13 memo and stated there would be further modifications of the bonus payment by May 31. As such, the May 29 memo stated that the 25 percent bonus to RNs and LPNs will be reduced to 10 percent effective on June 1 through June 15. The May 29 memo also stated that the RNs and LPNs would return to their tradition pay rate after

> June 15 (GC Exh. 14). This bonus to the RNs and LPNs had both a start date and an end date.
>
> Finally, the Respondent's July 20 memo informed the CNAs that the 25 percent bonus for hours worked reflected in the May 29 memo will now be reduced to $1.50 extra per hour for all hours worked, effective on July 26 (GC Exh. 16).

Here, the record shows that the Respondent paid its employees a cash bonus based on a percentage of their hour worked from April 1 to July 26. The memos were silent as to whether the bonus was tied in any way to employment-related factors. Indeed, the memos specifically mentioned that the bonuses were provided to all staff and given for their dedication and commitment during the COVID-19 pandemic. Upon the lessening of the crisis in the nursing facilities, the Respondent felt that the bonuses were no longer needed. In the absence of additional and more specific evidence that the bonuses were tied to any employment-related factors, there is no basis to find that these payments were anything more than gifts over which the Respondent was not required to bargain. See *Harvstone Mfg. Corp.*, 272 NLRB 939, 939 fn. 1 (1984) (employer did not violate the Act by discontinuing Christmas bonus given for 10 years, where bonuses were in the nature of gifts rather than terms and conditions of employment). In that case, the judge cited in support *Waxie Sanitary Supply*, 337 NLRB 303 (2001), and *Sykel Enterprises*, 324 NLRB 1123 (1997). The Board found that the judge's reliance on these cases is misplaced,

as both cases included evidence establishing that the holiday bonus at issue was clearly a term and condition of employment. In *Waxie Sanitary Supply*, the amount of each employee's bonus was a specified percentage of the employee's annual salary, and that percentage depended on the employer's gross profits for the year. 337 NLRB at 304. In *Sykel Enterprises*, the employer considered the employee's attendance and performance in determining the bonus amount. 324 NLRB at 1124. Here, as mentioned above, the only consideration for the bonuses was the COVID-19 pandemic on the staff and not tied to any employment-related factor.

In *Dura-Line Corp.*, 366 NLRB No. 126 (2018), the complaint alleged that the Respondent unilaterally reduced the card amount from $25 to $16 in violation of Section 8(a)(5) and (1) of the Act. The judge agreed, finding that the Respondent had established a past practice of providing $25 cards and was obligated to bargain over the change to the $16 cards. The Board disagree and found that the extra $9 value of the $25 gift cards constituted gifts not subject to mandatory bargaining. The Board held that items given to all employees on an equal basis without regard for individual work performance, earnings, seniority, production, or other such factors, as here, are gifts and are not mandatory bargaining subjects.

In *Bob's Tire Co.*, 368 NLRB No. 33 (2019), the Board reversed the judge and found that the employer did not violate the Act when it ended the annual Christmas bonus after several years without notifying the Union. The Board held that in determining whether a bonus

constitutes a term and condition of employment over which an employer must bargain, " . . . the Board considers both the regularity of the bonus and whether payment of the bonus was tied to employment—related factors." Here, the bonuses given by the Respondent was not tied to any employment-related factors. The bonuses did not account for the facility achieving stellar production or profits. They were not tied to job performance, attendance or seniority of the worker. The bonuses were implemented to show appreciation to the staff when the COVID-19 pandemic started in March 2020 and the bonuses were ended when the pandemic lessen in summer 2020.

As such, I find that the Respondent had no obligation to negotiate over the bonuses since they were not wage increases requiring a requirement to bargain with the Union.

b. The Respondent provided prior notice before the implementation and reduction/ recission of the bonuses

The remaining issue is whether the Respondent provided prior notice before the implementation and reduction/recission of the bonuses. As argued by the Respondent: "That subject (bonuses) was negotiated and the right was given to the Employer in Section 10 Paragraph B of the CBA. The CBA merely required notice—nothing more" (R. Br. at 6). The Respondent maintains that the Union delegates at the Alaris facilities were provided with copies of the memos as notice to the Union of the bonuses pursuant to the expired contract

(Tr. 156-160). As noted above, the expired collective-bargaining agreement states in section 10, para. (B) that,

> "wage increase and minimum rate" section of the contract set forth the hourly increases to the rates of pay of the unit employees and the hourly increases. However, nothing in this section prevented the Respondent " . . . from giving merit increases, bonuses, or other similar payments provide it gives prior notice to the Union before implementation" (GC Exh. 2 at pp. 11, 12).

Here, by the terms of the collective-bargaining agreement, the parties negotiated and agreed that the Respondent had the right to implement bonuses to the employees. The only obligation was to provide notice. I find that the Respondent was not required to provide written notice or to contact a designated and specific representative at the Union. I also find that this section of the agreement did not designate an address for service to the Union or the method of service of the notice. As such, so long as conveying the notice is reasonable, there is no requirement that the notice must be conveyed directly to McGhie, Montes, or Massey and that there is no requirement as to how the notice is to be conveyed to the Union.

McGhie testified that she was the administrator and organizer for the Union at the Alaris Boulevard East Hamilton Park, Harborview, Rochelle Park, and Castle Hill during the COVID-19 spring 2020. McGhie reported

directly to Leilani Montes, her supervisor and vice-president at the Union (Tr. 104).

I find the testimony of McGhie to be critical in determining whether notice was given to the Union. To be sure, it is not disputed that the Union through McGhie did not have access to the facility due to the state-wide "stay at home" policy in New Jersey and the prohibition of visitors at the State's nursing homes. As such, McGhie testified that she was dependent on the union delegates working at the Alaris Boulevard East facility and other Alaris-owned facilities for information (Tr. 118, 119). At the time, the union delegates at Alaris Boulevard East were Rosa Azias and Vicky Nieves.

On April 1, 2020, Alaris implemented a limited duration bonus for unit employees. McGhie testified that she received the April 1, 2020 memo (GC Exh. 4) on the same date from a unit employee, Gwen Russell, who worked at the Alaris Harborview and is a union delegate (Tr. 111). McGhie testified she received a picture of the memo on her cell phone sent by Russell.[8] McGhie forwarded the screenshot of the memo to her supervisor, Leilani Montes, who was the union vice-president at the time (Tr 105). McGhie testified that she did not receive the April 7 memo (GC Exh. 8). However, McGhie saw and received the April 29 memo (GC Exh. 11), which was the

8. It has not been disputed that the memos received from Russell and other delegates at the other Alaris facilities were different from the memos issued at the Boulevard East facility. Indeed, the parties stipulated that the memos were identical in all six Alaris facilities (Tr. 125-127).

follow-up to the April 7 memo. McGhie stated that she received a screenshot of the April 29 memo from Russell and again forward the memo to her supervisor Montes (Tr. 106, 107). McGhie further testified she received a copy of the May 13 memo from Russell, again via a screenshot on her phone and forwarded a text with a picture of the memo to Montes (Tr. 110). On about the same time, McGhie also received the May 29 memo from union delegate Mary Moise at the Rochelle Park facility and again forward the memo to Montes (Tr. 111). McGhie also received the final July 20 memo from Moise, approximately 2 or 3 days after the memo was issued (Tr. 112).

While McGhie was not sure, she did testify of having received at least one, possibly two, memos from Azias at the Alaris Boulevard East facility. The second delegate at Boulevard East, Nieves, was unavailable due to contracting COVID-19 for approximately 5 weeks (Tr. 109, 113). However, McGhie did receive the same memos from delegates at other facilities. McGhie admitted that she had received the April 1 notice from Russell and forwarded the memo immediately to Montes; that she received the April 29 memo from Russell on April 29 and forwarded the memo to Montes; that she received the May 13 memo and sent it over to Montes on the same day; and received the May 29 memo about June 10 and the July 20 memo from Moise and forwarded that memo to Montes within 3 days (Tr. 122-124, 112).

Upon review, of the 6 memos that were issued by the Respondent regarding the bonuses, McGhie received 5 of the memos from delegates Azias, Russell, or Moise.

Receipt of the memos by McGhie was immediate, almost always the same day or shortly thereafter the notice was posted. I find that Puleo credibly testified that the memos were posted at the facilities and that the Union delegates had received the memos (Tr. 156-160). I credit her testimony simply because it cannot be disputed that either the memos were posted by the Respondent at all the facilities, including Boulevard East, or that the memos were distributed to the union delegates since it would behoove me to question how else would the union delegates received the actual memos that they texted to McGhie?

The one memo that McGhie did not receive was the April 7 memo (GC Exh. 8). However, that deficiency was corrected when McGhie received the follow-up memo on April 29 that described in detail the April 7 memo (GC Exh. 11). I would also note as significant that the April 7 memo that McGhie said she did not receive only pertained to the nursing and respiratory therapy staff, two job categories that are not part of the represented unit employees (GC Exh. 11). McGhie and the Union would not routinely receive notice regarding this group of employees. As such, the Union, through the delegates and subsequently through McGhie and Montes, received notice of the bonuses and the subsequent modifications and recission consistent with section 10 (para. B) of the collective-bargaining agreement.

Accordingly, I find that the Respondent did not unilaterally rescinded, reduced, and discontinued the alleged wage increases in April 2020 in violation of Section (a)(5) and (1) of the Act.

c. The Respondent failed to provide the information requested in violation of Section 8(a)(5) and (1) of the Act

The General Counsel also alleges that since about September 4, 2020, the respondent has failed to provide certain information requested by the Union relating to a grievance it filed over the nonpayment of medical bills of its unit employees. The Respondent generally denied this allegation but offered no witness testimony or written evidence contrary to the charge alleged by the General Counsel.

An employer has a duty to furnish relevant information when requested by a union under Section 8(a)(5) and (1) of the Act, and this encompasses information necessary for the performance of its duties. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 156 (1956). An employer is obligated to provide a union with requested information that is "potentially relevant and would be of use to the union in fulfilling its responsibilities as the employees' bargaining representative." *E.I. Du Pont*, 366 NLRB No. 178, slip op. at 4 (citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967), and *Postal Service*, 332 NLRB 635, 635 (2000)). In evaluating relevance, the Board uses a ""liberal, discovery-type standard" that requires only that the requested information have "some bearing upon" the issue between the parties and be "of probable use to the labor organization in carrying out its statutory responsibilities." Id. (quoting *Public Service Co. of New Mexico*, 360 NLRB 573, 574 (2014), and *Postal Service*, 332 NLRB at 636).

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Information concerning terms and conditions of employment of employees represented by a union is generally presumed relevant to the Union in its role as a bargaining representative. Thus, information requested will be considered relevant when it would assist the Union in evaluating the merits of a grievance and the propriety of pursuing that grievance to arbitration. *Acme Industrial Co.*, 385 U.S. 432, 437-438 (1967) (employer's duty to furnish requested information constitutes obligation standing "in aid of the arbitral process," in that it permits union to evaluate grievances and sift out unmeritorious claims). The Board, in determining that information is producible, does not pass on the merits of a grievance underlying an information request. See Id. Where the information requested is not presumptively relevant, "it is the union's burden to demonstrate relevance." *Postal Service*, 332 NLRB 635 at 636 (2000). The Union's burden to demonstrate relevance is not heavy, but it does require "demonstrating a reasonable belief supported by objective evidence that the requested information is relevant, unless the relevance of the information should have been apparent to the Respondent under the circumstances." Id.; see also *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011).

As stated above, on about September 4, the Union filed a class action grievance on behalf of the unit employees at Alaris for unpaid medical invoices and the cancellation of their health insurance benefits. The email referring to the grievance was sent by McGhie, a union organizer, to Sokolowski, the administrator at the Alaris nursing facility (GC Exh. 18). The Union requested the following information on the pending grievance:

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1. The files that show names and date of member covered as of March 1, 2020.

2. The summary plan and description for health insurance.

3. The summary benefit description for health insurance.

Union counsel, Massey, followed up on McGhie's September 4 email with his own email to Jasinski on September 23. Attached to Massey's email to Jasinski was the information request from McGhie to Sokolowski (Tr. 61-63; GC Exh. 19). McGhie testified that the Union filed the grievance because unit members had been accumulating hospital bills that were not being paid by their health insurance. McGhie said she gave copies of the hospital invoices to administrator Sokolowski but received no response from her or any other management official (Tr. 113, 114). Pursuant to the grievance, McGhie testified that she made an information request to Sokolowski.

I find that the information requested pertaining to the unit employees' health insurance benefits as presumptively relevant and may be necessary for the Union to advocate its represented members at the pending grievance. See *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967). The requested information was presumptively relevant to the filing of the grievance so that the Union can determine how many unit employees were covered and to ascertain whether there were changes in the health insurance plan that now no longer allowed for coverage

and reimbursement for certain medical expenses.

To be sure, assuming the information requested is not presumptively relevant, this is not the situation where the Union failed in its burden to demonstrate the relevance of the requested information. The Board has long held that "generalized, conclusionary explanation is insufficient to trigger an obligation to supply information." *Island Creek Coal*, 292 NLRB 480 at 490 fn. 19; *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1099 (1st Cir. 1981); *FCA US LLC*, 371 NLRB No. 32 (2019). However, here, I credit McGhie's testimony that the information was needed by the Union to determine the reasons why the unit employees were not being reimbursed for their medical bills. This information would, of course, assist the Union in the preparation of the grievance proceeding. The Union requested that the Respondent provide the information by September 14. I find Massey credibly testified that the Union did not receive a reply on the information request from Sokolowski and he did not receive a response from Jasinski (Tr. 63, 64). Although Alaris Health at Boulevard East facility closed operations in early November 2020, it is undisputed from McGhie's testimony that the grievance is still active and that the Union never received the information requested (Tr. 117).

Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) of the Act when it failed and refused to provide the Union with the information requested by September 14, 2020.

Appendix B

CONCLUSIONS OF LAW

1. At all material times, the Respondent Alaris Heath at Boulevard East is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. 1199 SEIU United Healthcare Workers East (the Union) is a labor organization within the meaning of Section 2(5) of the Act

3. At all material times, the Union has been the designated exclusive collective-bargaining representative of Respondent's employees, in the following appropriate unit:

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

4. The Respondent violated Section 8(a)(5) and (1) of the Act when it failed and refused to provide the Union with the information requested by September 14, 2020.

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

6. The Respondent did not violate Section 8(a)(5) and (1) of the Act when it is alleged that the Respondent unilaterally implemented and subsequently reduced and

eliminated the alleged wage increases without notice and an opportunity to bargain with the Union.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I recommend that the Respondent having unlawfully failed and refused to provide the information to the Union that is relevant and necessary to the performance of its duties as the exclusive collective-bargaining representative and/or failed to inform the Union that certain information requested did not exist, shall be ordered to supply the requested information to the Union, or make such representation to the Union that the information requested does not exist. In addition, the Respondent shall post an appropriate informational notice, as described in the attached appendix. On these findings of facts and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Alaris Health Boulevard East, its officers, agents, successors, and assigns, shall

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9. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Appendix B

1. Cease and desist from

(a) Failing to provide information to the Union that is relevant and necessary to the performance of its duties as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

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

(b) 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) Furnish to the Union, in a timely and complete manner, the following information, or, to the extent such information does not exist, so inform the Union:

1. The files that show names and date of member covered as of March 1, 2020.

2. The summary plan and description for health insurance.

3. The summary benefit description for health insurance.

(b) 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.

(c) Within 14 days after service by the Region, post at the existing Alaris Health facility at Boulevard East located in Guttenberg, New Jersey, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent had 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 September 14, 2020.

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10. 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."

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

Dated, Washington, D.C. January 26, 2022

Appendix B

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 benefits and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail to provide information to the Union that is relevant and necessary to its performance of its duties as your exclusive collective-bargaining representative.

Appendix B

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 furnish to the Union, in a timely and complete manner, the following information:

1. The files that show names and date of member covered as of March 1, 2020.

2. The summary plan and description for health insurance.

3. The summary benefit description for health insurance.

To the extent such information does not exist, WE WILL timely inform the Union of that fact.

ALARIS HEALTH AT BOULEVARD EAST

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-268083 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX C — 29 U.S.C. § 160

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

(b) [Complaint and notice of hearing; six-month limitation; answer; court rules of evidence inapplicable] Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no

complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six- month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code [section 2072 of title 28].

(c) [Reduction of testimony to writing; findings and orders of Board] The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person

named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member,

or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

[The title "administrative law judge" was adopted in 5 U.S.C. § 3105.]

(d) [Modification of findings or orders prior to filing record in court] Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon

the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same

shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) [Institution of court proceedings as stay of Board's order] The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) [Jurisdiction of courts unaffected by limitations prescribed in chapter 6 of this title] When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101 to 115 of title 29, United States Code [chapter 6 of this title] [known as the "Norris-LaGuardia Act"].