STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA NURSES ASSOCIATION, Charging Party, v. COUNTY OF SAN JOAQUIN, Respondent.	Case No. SA-CE-1141-M PERB Decision No. 2761-M April 12, 2021

Appearances: Nicole J. Daro, Anthony J. Tucci, and Eric J. Wiesner, Attorneys, for California Nurses Association; Sloan Sakai Yeung & Wong by Jeff Sloan, Justin Otto Sceva, and Madeline Miller, Attorneys, for County of San Joaquin.

Before Banks, Chair; Shiners, Krantz, and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) for a decision based on the evidentiary record from a hearing before an administrative law judge (ALJ). California Nurses Association (CNA) filed the underlying unfair practice charge against the County of San Joaquin, alleging that the County violated the Meyers-Milias-Brown Act (MMBA) and PERB Regulations.[1]

The core facts of the case are not in dispute. Several months before CNA held a nurses' strike, the County signed a strike replacement contract guaranteeing

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise specified, all further statutory references are to the Government Code. PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

replacement nurses a minimum of five shifts.[2] After nurses struck for two days, the County barred most striking nurses from work for three additional days, prohibited them from using accrued leave during these three days, and filled out nurses' timecards with a payroll code that could potentially lead to adverse consequences. The operative complaint alleges that the County's conduct amounted to discrimination against and interference with protected conduct, as well as a unilateral change in employment terms without notice and an opportunity to meet and confer.

For the reasons set forth in detail *post*, we hold that a public health care employer that prohibits bargaining unit employees from work after a strike, due to a minimum shift guarantee for strike replacements, can typically establish an affirmative defense to an interference claim and avoid a finding of discrimination only if it can prove that: (1) it made a good faith effort in the marketplace to negotiate a strike replacement contract that would eliminate any minimum shift guarantee or shorten it to the greatest degree possible, but it ultimately needed to agree to the minimum shift guarantee in order to maintain critical health care services; (2) it barred employees from work only because such a contractual commitment temporarily reduced available work opportunities, and it filled all remaining opportunities without discriminating against employees based on whether they worked during the strike or engaged in any other actual or perceived protected activity; and (3) it provided the employees' union with timely notice regarding any decision to guarantee replacement workers a

[2] In this decision, we mainly refer to this type of contractual provision as a "minimum shift guarantee." We intend that term to have the same meaning as "minimum number of paid hours" or "minimum work period."

minimum work period or to modify the terms of such a guarantee, and, if requested, bargained in good faith over the potential effects on bargaining unit employees.

Applying this holding to the instant record, we find the County violated the MMBA and PERB Regulations by discriminating against and interfering with protected conduct. Finally, while we clarify an employer's notice and effects bargaining obligations when it guarantees strike replacements a minimum work period that has foreseeable impacts upon post-strike work opportunities for bargaining unit employees, we dismiss the unilateral change claim presented in the operative complaint.[3]

PROCEDURAL HISTORY

The County and CNA have been parties to successive Memoranda of Understanding (MOUs), the most recent of which was in effect from October 1, 2016, through December 31, 2018. The parties began negotiating for a new MOU in November 2018, reached an impasse in January 2020, and thereafter worked with a mediator. After mediation failed to break the impasse, CNA held a two-day strike on March 5-6, 2020.[4]

CNA filed the instant charge on March 10 and amended its charge on April 9. After the Board expedited the case at all levels and the County responded to the

[3] Both parties requested oral argument. The Board typically denies such requests when we have an adequate record, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear as to make oral argument unnecessary. (*County of Santa Clara* (2018) PERB Decision No. 2613-M, p. 6, fn. 3.) Because the instant case meets these criteria, we deny the parties' oral argument requests.

[4] Except where otherwise noted, all further dates refer to 2020.

amended charge, PERB's Office of the General Counsel issued a complaint against the County. The complaint alleges, first, that the County interfered with and discriminated against protected activity, thereby violating MMBA sections 3503, 3506, and 3506.5, subdivisions (a) and (b), as well as PERB Regulation 32603, subdivisions (a) and (b), by taking three actions: (1) notifying employees the day before the strike began that it had hired replacement employees for a five-shift minimum and, as a result, would not permit striking employees to return to work during the three days following the strike, unless management called them in earlier; (2) preventing most nurses who participated in the strike from returning to work until March 10 and forbidding them from using vacation time, compensatory time off, or holiday hours to cover the mandatory time off; and (3) noting "Leave Unauthorized" on nurses' timecards for strike days and for mandatory days off following the strike.[5]

The complaint further alleges that the County violated MMBA sections 3505 and 3506.5, subdivision (c), as well as PERB Regulation 32603, subdivision (c), by failing to provide notice and an opportunity to meet and confer before deviating from the status quo set forth in three contractual provisions: (1) MOU section 14.2.1(d)-(e), which required the County to refrain from involuntarily furloughing full-time nurses without first seeking volunteers and calling off any travelers, contract nurses, registry nurses, volunteers, nurses on overtime, per diem nurses, and part-time nurses;

[5] The complaint inadvertently alleges that the County *required* nurses to use accrued leave rather than *forbade* them from doing so. Pursuant to PERB Regulation 32645, we focus on the allegations the parties actually litigated and we disregard this wording error that did not materially impact either party's rights.

(2) MOU section 14.2.1(g), which stated as follows: "If an employee is notified that he or she is being furloughed and is then asked to report to work for the same shift, the employee will be guaranteed a full shift whether or not the employee works a full shift. Such an employee may not be ordered to return to work, and not required to be available if called"; and (3) MOU section 14.2.1(o), which allowed furloughed nurses to use up to 24 hours of vacation, compensatory time off, or holiday hours.

In its answer to the complaint, the County denied most of the material allegations and asserted several affirmative defenses. After unsuccessful efforts to settle the case, the parties stipulated to multiple essential facts and completed the evidentiary record during a five-day formal hearing. All parties, witnesses, counsel, and the ALJ participated in this hearing by video due to the COVID-19 pandemic. On the third day of the hearing, prior to resting its case-in-chief, CNA moved to amend the complaint. The County opposed this motion and the ALJ denied it, as discussed *post*.

After completing the hearing, the parties filed simultaneous opening briefs followed by simultaneous reply briefs. On October 14, the Board transferred the matter to the Board itself for decision pursuant to PERB Regulation 32215.

FACTUAL FINDINGS

The record reflects the following relevant facts, as well as certain additional factual findings that we incorporate into our analysis, *post* at pages 51-74.

The County is a public agency within the meaning of MMBA section 3501, subdivision (c) and PERB Regulation 32016, subdivision (a). The County operates San Joaquin General Hospital (SJGH), a general acute care hospital located in French Camp, California. The hospital includes an emergency department, a neonatal

intensive care unit, and the County's only trauma center. The County also operates outpatient clinics in French Camp and Stockton. SJGH serves more indigent patients than any other hospital in the County and provides inpatient care to incarcerated patients in a secure ward. In the first half of fiscal year 2019-2020, SJGH underperformed its projected net balance of income and expenses, losing substantially more money than expected.

CNA is an employee organization within the meaning of MMBA section 3501, subdivision (a) and the exclusive representative, as defined in PERB Regulation 32016, subdivision (b), of a bargaining unit comprising more than 700 registered nurses working at SJGH and other County locations.

I. Anticipating Possible Strikes, the County Contracted for Strike Replacements.

Beginning in June 2019—seven months before CNA and the County reached impasse and more than eight months before CNA gave notice of a strike—the County began to consider contracting for replacement services in the event of a strike. The County sought proposals from three strike replacement companies—including HealthSource Global Staffing (HSG)—between June and August 2019.

In October 2019, more than four months before CNA's eventual strike, the County executed a Contingency Staffing Agreement with HSG. The agreement called for HSG to provide replacement employees in the event of a strike by CNA and/or by the union representing technical workers and other employees at SJGH, Service Employees International Union Local 1021.

The County's contract with HSG included the following minimum shift guarantee:

> "Minimum Hours. Client will pay HealthSource a minimum of what amounts to five (5) twelve-hour shifts (60 hours) for each Replacement Staff that commences travel to the Destination City. . . . Client shall pay the applicable hourly rate for this minimum number of billable hours regardless of whether Replacement Staff is assigned to work the full number of hours. The calculation of the Guaranteed Hours includes regular and overtime hours but does not include any 'on-call' time. Orientation provided to the Replacement Staff will be billed at applicable Compensation Fee rates and will not count toward this minimum number of billable hours."

Before executing the HSG contract, the County did not seek to eliminate or reduce the minimum shift guarantee, although the County did successfully negotiate with HSG over several other contract terms. In prior dealings with other clients, HSG had negotiated over minimum shift guarantees and agreed to guarantees of fewer than five shifts. The two companies the County did not select also offered a minimum shift guarantee of fewer than five shifts.

II. After CNA Provided Strike Notice, the County Took More Preparatory Steps.

In January 2020, the parties reached an impasse in bargaining for a new MOU. When post-impasse mediation did not resolve the impasse, CNA provided ten days' written notice of a two-day economic strike. Specifically, CNA gave notice on February 24 that bargaining unit nurses would strike from 7:00 a.m. on March 5 through 6:59 a.m. on March 7. CNA further noted that all striking nurses would return to work unconditionally starting with shifts beginning at 7:00 a.m. on March 7.

On February 24, the County filed an unfair practice charge and request for injunctive relief, asking PERB to seek a court order enjoining more than 50 nurses from striking on the ground that their absence from work for the two days of the strike would allegedly pose an imminent and substantial threat to public health or safety. On

February 28, the parties settled that charge. Pursuant to this settlement, CNA exempted from the strike 38 nurses plus two alternates and one on-call nurse, and the County withdrew its charge and request for injunctive relief.[6]

In advance of the strike, the County canceled some elective surgeries and outpatient clinic visits, reduced its intake of trauma patients, and otherwise reduced its patient census. The County's decrease in patient census began before the strike, and as a result the County instituted voluntary and involuntary furloughs in the days before the strike.[7] Moreover, the County continued to maintain a lower patient census during the three days following the strike, March 7-9. During the five-day period comprising the strike and the three days thereafter, the County succeeded in reducing its inpatient census from approximately 150 patients to approximately 120 patients.[8]

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[6] PERB frequently takes administrative notice of its own records and files. (See, e.g., *Alliance Judy Ivie Burton Technology Academy High, et al.* (2020) PERB Decision No. 2719, p. 2, fn. 3; *Regents of the University of California* (2019) PERB Decision No. 2646-H, p. 3, fn. 4; *Children of Promise Preparatory Academy* (2018) PERB Decision No. 2558, p. 2, fn. 3.) In the instant case, we take administrative notice of multiple filings in other PERB cases, including at the request of both parties. For purposes of this paragraph, we take notice of records in PERB Case No. SA-CO-153-M, which the County brought against CNA for the purpose of asking PERB to seek injunctive relief barring allegedly essential employees from striking.

[7] When there are more nurses than needed based upon the census, management typically determines whether nurses can be floated to other departments needing help, secondarily asks nurses to volunteer for a furlough, and as a last resort, requires a mandatory furlough.

[8] Patient census fluctuates from day to day and within the course of any single day. Patient census during the five-day period fluctuated between approximately 112 and 135 patients.

The County also decided to make use of its contract with HSG. SJGH worked with the County's Health Care Services Agency, which uses nurses for public health, behavioral health, and correctional health, to determine how many replacement nurses the County would order from HSG. In determining how many replacement nurses it needed to maintain critical hospital functions, the County considered patient census, patient acuity, mandated nurse-to-patient ratios, and PERB precedent requiring a hospital to obtain replacements for essential positions, if possible, rather than seeking to enjoin employees from striking.

On March 3, SJGH Chief Executive Officer David Culberson asked the County Board of Supervisors to approve the contract with HSG retroactively and to approve up to $4 million for replacement workers during the period of March 2-10. The Board of Supervisors approved Culberson's requests.

On March 4, the day before the strike commenced, the County took several actions. First, it gathered HSG replacement nurses for a paid orientation day, which did not count toward the five-shift minimum hiring guarantee in the County's contract with HSG. Second, the County issued a memorandum to CNA entitled "Notice Regarding Return to Work Date for Striking CNA Unit Members." The memorandum stated in relevant part:

> "To ensure the continuity of necessary health services, the County has had no choice but to contract with an outside company for strike replacement workers. Such a contract was, however, only available for a minimum period of five (5) days. Given that fact, please be aware that we intend to immediately transmit the memorandum attached hereto as ATTACHMENT A to all potential strike participants, notifying them that employees who choose to participate in the strike will not be able to return to work immediately, after the strike

> period noticed by CNA, and will instead not be accepted to return to work until their first shift on or after Tuesday, March 10 at 7 a.m., unless called into work at an earlier time by SJGH management. The County also reserves its right to implement temporary furloughs pursuant to Section 14.2.1 of the County/CNA MOU, if it deems such furloughs appropriate in light of any decrease to patient census."

The memorandum's attachment was a memorandum from Culberson to all CNA bargaining unit nurses. This second memorandum, which the County posted in units and break rooms throughout the hospital on March 4, stated in relevant part:

> "To ensure our ability to provide necessary health services without interruption, including emergency services, the County has contracted with an outside company for replacement workers during the strike period. The company with which the County has contracted, however, will only agree to provide such replacement workers for a full five day period, and the County has therefore been forced to agree to pay a minimum of five full days for all such workers[.]
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> "Given this unavoidable commitment, please know that CNA unit members who participate in the strike will not be able to return to work at the end of the strike period as noticed by CNA. Instead, such **participating employees will not be accepted back at work until their first shift on or after Tuesday, March 10 at 7 a.m., unless called into work at an earlier time by SJGH management.**
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> "Please bear in mind that you may be notified not to return to work yet due to low census. Section 14.2.1 of the County/CNA MOU provides that the Hospital Director or designee may temporarily furlough any regular or contract employee for up to thirty-six (36) hours per fiscal year due to fluctuations in patient census. If the Hospital Director or designee determines that census has decreased such that furloughs are appropriate, given patient care needs, the skill level of personnel, and the kinds of staffing levels required for safe patient care, we will be abiding by the negotiated

In *Carlsbad*, the Board borrowed the phrases "inherently destructive" and "comparatively slight" from *NLRB v. Great Dane Trailers, Inc.* (1967) 388 U.S. 26 (*Great Dane*), which interpreted federal labor law governing private sector employers. However, as we explained in *Regents of the University of California (Berkeley)* (2018) PERB Decision No. 2610-H (*Regents*), the *Carlsbad* test diverges significantly from federal precedent by incorporating these phrases into the Board's interference standard rather than using them solely to assess an employer's alleged discriminatory motive, as under federal law. (*Id.* at pp. 57, 92.) Thus, the "'inherently destructive' / 'comparatively slight harm' framework used for evaluating employer defenses under *Carlsbad* has no analog in private-sector jurisprudence." (*Id.* at p. 57.) Under private sector labor law, proving that an employer engaged in inherently destructive conduct is one way to prove the employer's motive. PERB precedent, on the other hand, dispenses with this artificiality and considers interfering conduct and employer justifications on a continuum, holding that if conduct rises to the level of "inherently destructive," then the employer must justify it by demonstrating circumstances beyond its control, leaving it with no alternative course of action. (*Carlsbad*, *supra*, PERB Decision No. 89, pp. 10-11.)[12]

[12] Although California public sector labor relations precedent frequently protects employee and union rights to a greater degree than does federal precedent, where California statutory provisions are akin to those found in federal law, we consider federal precedent for its potential persuasive value. (*City of Santa Monica* (2020) PERB Decision No. 2635a-M, p. 47, fn. 16 [judicial appeal pending]; see also *Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382, 391 [when interpreting California public sector labor relations laws, federal precedent is a "useful starting point," but it does "not necessarily establish the limits of California public employees' representational rights"].)

PERB has applied the *Carlsbad* interference standard in hundreds of cases spanning 42 years—virtually the agency's entire existence. Our concurring colleague urges that the Board should instead follow federal law and consider inherently destructive conduct only as a means of proving discrimination, thereby expanding on a viewpoint he first articulated in dissent in *Contra Costa County Fire Protection District* (2019) PERB Decision No. 2632-M (*Contra Costa*).[13] The *Contra Costa* dissent would have partially overruled innumerable precedential Board decisions, but a Board majority respectfully disagreed and reaffirmed the Board's *Carlsbad* test. (See *Contra Costa*, *supra*, PERB Decision No. 2632-M, p. 36, fn. 18). Today's concurring opinion not only urges that the Board should begin considering inherently destructive conduct solely as a means of proving discrimination, it also proposes a second change in Board precedent: no longer requiring an employer to justify inherently destructive conduct by showing circumstances beyond its control. However, we respectfully disagree and once again adhere to *Carlsbad*.

First, we continue to believe that the concept of inherently destructive conduct fits most naturally within an interference framework, even though in some circumstances such conduct can also be relevant to assessing an employer's motive.

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[13] In *Contra Costa*, *supra*, PERB Decision No. 2632-M, the interference and discrimination claims were even more related than they are here, as the majority found that the employer repeatedly and explicitly admitted its goal was a hierarchy in which unrepresented managers were better compensated than represented managers because of their representational status. (*Id.* at p. 11 [union asked whether employer believed unrepresented managers should receive better benefits because they are unrepresented; employer responded affirmatively; employer repeated this position at a later bargaining session, noting that it was "looking for a differential between represented and unrepresented managers"].)

Second, the fundamental logic underlying *Carlsbad* remains sound: the most destructive category of interfering conduct should trigger the most stringent test for judging an employer's justification. (See, e.g., *Superior Court v. Public Employment Relations Bd.* (2019) 30 Cal.App.5th 158, 196 [*Carlsbad* test involves balancing employer justification against tendency to interfere, unless the tendency is so strong as to "demolish" a protected right].)[14]

As part of its argument, the concurrence relies on two appellate decisions—*Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*) and *Rivcom Corp. v. Agricultural Labor Relations Bd.* (1983) 34 Cal.3d 743—each of which cited to federal precedent in assessing a discrimination claim. The approach followed in these cases does not materially differ from one of PERB's governing discrimination tests. (See *post* at pp. 27-28.)

No California judicial precedent requires PERB to abandon its longstanding interference test. In fact, as noted above, in *Superior Court v. Public Employment Relations Bd.*, *supra*, the court cited *Carlsbad* and explained that it does not provide for simple balancing when employer conduct tends to egregiously interfere with protected rights. (30 Cal.App.5th at p. 196.)

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[14] Moreover, having reviewed extensive Board precedent consistently applying the *Carlsbad* standard, we do not view it as ill-defined or subject to manipulation. Nor do we view private sector labor law standards as better defined. The concurrence, by proposing to discontinue the longstanding standard that an employer must justify inherently destructive conduct by showing circumstances beyond its control, would provide less clarity than the current standard. While we mainly reaffirm *Carlsbad* based on our agreement with its underlying logic, preserving clarity is a secondary benefit.

In any event, the majority and concurrence agree the County's conduct here was inherently destructive. Thus, while interference jurisprudence is another example in which PERB standards protect union and employee rights more strongly than federal precedent governing private sector labor relations (see, e.g., *Contra Costa Community College District* (2019) PERB Decision No. 2652, p. 16 & p. 27, fn. 17), the instant case illustrates that the *Carlsbad* test does not necessarily lead to a different result as would a private sector labor law approach.

B. PERB's Discrimination Standards

PERB uses one of two tests in assessing discrimination cases. If an employer's conduct facially discriminates based on protected activity, that is "discrimination in its simplest form," and PERB may infer unlawful discrimination without further evidence of motive. (*Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 14 (*LA Superior Court*).) Common examples of facial discrimination include: (1) providing different pay, benefits, or other working conditions based explicitly on union membership or other protected activity; or (2) changing policies in response to protected activity where the operative comparison is not between two different groups of employees, but between an employer's policies before and after the exercise of protected rights. (*Contra Costa*, *supra*, PERB Decision No. 2632-M, p. 40; *City of Yuba City* (2018) PERB Decision No. 2603-M, pp. 10-11.) Thus, the conduct at issue may, but need not, involve disparate conduct toward different employee groups. (*Regents*, *supra*, PERB Decision No. 2610-H, p. 81; *LA Superior Court*, *supra*, PERB Decision No. 2566-C, p. 15.) Although inherently destructive conduct and facial discrimination do not always equate to one another, the same conduct can meet both

standards, and in such circumstances the employer's affirmative defense is the same under the two standards. (See, e.g., *Contra Costa*, *supra*, PERB Decision No. 2632-M, pp. 36 & 40.)

When the conduct at issue is not facially discriminatory, we apply the framework set forth in *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*) and its progeny. (*Regents*, *supra*, PERB Decision No. 2610-H, p. 76; *LA Superior Court*, *supra*, PERB Decision No. 2566-C, pp. 14-15.) To establish a prima facie case under the *Novato* framework, a charging party must prove four elements: (1) one or more employees engaged in activity protected by a labor relations statute that PERB enforces; (2) the respondent had knowledge of such protected activity; (3) the respondent took adverse action against one or more of the employees; and (4) the respondent took the adverse action "because of" the protected activity, which PERB interprets to mean that the protected activity was a substantial or motivating cause of the adverse action. (*San Diego*, *supra*, PERB Decision No. 2747-M, p. 26.) If the charging party has established a prima facie case but the evidence also reveals a non-discriminatory reason for the employer's decision, the respondent has the burden to prove that it would have taken the exact same action even absent protected activity. (*Ibid*.) In such "mixed motive" or "dual motive" cases, the question becomes whether the adverse action would not have occurred "but for" the protected activity. (*Ibid*.)

C. Applying PERB's Interference and Discrimination Standards

In applying these well-established interference and discrimination standards to the instant facts, we do not disturb the settled understanding that a California public sector employer may not impose a lockout. (*Fremont Unified School District* (1990)

PERB Order No. IR-54, pp. 10-11 (*Fremont*).) Rather, we consider whether there is a narrow circumstance in which an employer may prohibit employees from working for multiple days after a strike due to a necessary minimum shift guarantee for strike replacements.

We begin by distinguishing between several issues that require only brief analysis and several others that require substantial analysis. There is no doubt that CNA and the nurses it represents engaged in protected activity when they called for and carried out their March 2020 strike. (See generally *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, pp. 24-37.) Nor can there be serious dispute that the County's conduct tended to harm these protected rights at least to some degree. Denying work opportunities following a strike significantly coerces protected rights by discouraging employees from authorizing future strikes, and therefore gives rise to a robust duty to narrowly tailor. The same is true for preventing employees from using accrued paid leave for these days, as well as designating both strike days and mandatory days off with an LU payroll code that can be used for discipline. CNA has thus established a prima facie interference case, and the outcome of its claim will turn on whether the County meets the business necessity standard described above.

CNA's discrimination claim similarly raises several easy issues and a couple more difficult ones. There is no dispute, for instance, that CNA and represented nurses engaged in protected activity and the County knew of this protected activity. Moreover, only brief analysis is needed to conclude that four County actions were adverse to CNA and CNA-represented nurses: threatening to disallow strikers from

work for multiple days after the strike, implementing that action, refusing to allow nurses to use paid time off for the period following the strike in which they were barred from work, and designating employees' strike time and time following the strike as "LU." (See *San Diego*, *supra*, PERB Decision No. 2747-M, p. 27 [employer action is adverse if a reasonable employee would view it as having an adverse impact on his or her employment]; see also *id.* at p. 29 [a threat of action and carrying out the action are separate adverse acts].) The first three actions were clearly adverse since they blocked employees from remunerative work.

The LU designation requires closer analysis, but testimony from CNA's witnesses demonstrates that a reasonable employee would, objectively, perceive the LU designation as a negative mark to be avoided, as an employee can face discipline for multiple unexcused absences. Even the County's own witness, Culberson, confirmed this, though he said the County would not discipline nurses for any absences from March 5-9. On the third day of hearing, Culberson testified that an LU code "is used to identify that an employee was not present" when "requested or scheduled," that an LU code "can be used for disciplinary actions," and that it was reasonable for nurses who received LU designations to fear discipline, especially given that the County had never reassured nurses that the March 2020 LU designations would not be used for discipline. Continuing his testimony the next day, Culberson stated that overnight between the third and fourth hearing days, the County had decided to develop a new, non-disciplinary leave code "to be used for situations such as occurred for this matter." Culberson explained that the County would convert the LU designations to this new code, both for nurses who struck and for those who

were barred from work. The County later introduced into evidence an internal County memorandum regarding these decisions.[15] However, as of the last day of hearing, the County had not yet notified bargaining unit members that the County would amend their time records and would not discipline them.

Even assuming the County eventually notified nurses of these decisions, it would not qualify as a retraction under settled precedent. In both discrimination and interference contexts, an "honestly given retraction" can erase the effects of prior conduct if the retraction "completely nullified" all coercive effects. (*County of San Bernardino* (2018) PERB Decision No. 2556-M, p. 21; *Jurupa Unified School District* (2015) PERB Decision No. 2458, pp. 12-13.) To be effective, a retraction must be: "(1) timely; (2) unambiguous; (3) specific in nature to the coercive conduct; (4) free from other illegal conduct; (5) adequately publicized to the affected employees; (6) not followed by other illegal conduct; and (7) accompanied by assurances that the employer will not interfere with their protected rights in the future." (*County of San Bernardino*, *supra*, PERB Decision No. 2556-M, p. 21.) We need not consider the second through seventh requirements because the County's retraction was not timely,

[15] The County's delayed change did not, however, permit nurses to use paid leave for days in which they were barred from work. Moreover, the memorandum partially contradicted Culberson's testimony by stating that employees would still have the negative LU designations if they were called back to work between March 7 and 9 but did not report to work. The County maintained this position even though Culberson acknowledged he initially misspoke, leading nurses astray as to whether the furlough fell under MOU section 14.2.1, whether they could use accrued leave to cover furlough days, and whether they needed to remain within range to be called back.

coming five months after the County first made the LU designations and after the parties had substantially litigated the issue.

CNA has therefore established the first three elements of a *Novato* discrimination claim. As with the interference claim, remaining issues require deeper analysis, including whether the County can: (1) negate the fourth prima facie case element, nexus, or establish an alternative, non-discriminatory reason for its action under the *Novato* framework; and (2) establish that it did not engage in facial discrimination.

Turning to the remaining, unresolved interference and discrimination issues, we structure our analysis around four central questions:

(1) How have the National Labor Relations Board (NLRB) and federal appellate courts approached analogous issues under private sector labor law?

(2) Under California's public sector labor laws, when a hospital prohibits employees from work for multiple days following a strike, under what circumstances, if any, can the employer overcome a union's interference and discrimination claims?

(3) If it is possible to bar employees from work for multiple days following a strike in a manner that does not unlawfully interfere with or discriminate against protected rights, did the County do so?

(4) Did the County interfere with and/or discriminate against protected rights when it refused to allow nurses to use accrued paid leave for the period following the strike in which they were barred from work, or when it designated nurses' strike time and mandatory time off following the strike as "LU"?

We consider each question in turn.

1. How have the NLRB and federal appellate courts approached analogous issues under private sector labor law?

Federal decisions have repeatedly considered strike replacement contracts with minimum guarantee provisions and, in a parallel line of cases, partial lockouts featuring alleged discrimination against protected activity. These decisions lay out neither a consistent analytic framework nor an approach we find fully persuasive in interpreting the MMBA. However, NLRB and federal court pronouncements on these issues are nonetheless useful in illustrating some of the main issues in play and concerns in need of balancing.

a. Replacement contracts with minimum guarantee provisions

In *Pacific Mutual Door Co.* (1986) 278 NLRB 854 (*Pacific Door*), four truck drivers went on strike. Their employer negotiated a contract for temporary replacement workers, and this contract required the employer to provide 30 days' notice prior to cancellation. (*Ibid*.) At issue was whether the 30-day notice requirement justified the employer in not reinstating strikers until 30 days after the strike ended. The NLRB, summarizing applicable private sector labor law principles, explained that an employer may only delay reinstating strikers if it has a "legitimate and substantial" business justification. (*Id.* at p. 856, fn. 12, citing *NLRB v. Fleetwood Trailer Co.* (1967) 389 U.S. 375 (*Fleetwood*); *Great Dane*, *supra*, 388 U.S. 26; and *The Laidlaw Corp.* (1968) 171 NLRB 1366 (*Laidlaw*).) The NLRB concluded that the 30-day notice provision satisfied this standard. (*Pacific Door*, *supra*, 278 NLRB at p. 856.)

Four years later, the NLRB addressed whether an employer, when making staffing decisions following a strike, may favor employees who chose not to strike (also known as "non-participants," or sometimes as "crossovers," particularly for

employees who initially struck but later decided to cross the picket line and work during the strike). In *Waterbury Hospital* (1990) 300 NLRB 992, the NLRB found that longstanding principles generally prohibit such discrimination: "[T]he employer was obligated under the law of [*NLRB v. Mackay Radio & Telegraph Co.* (1938) 304 U.S. 333 (*Mackay*)], *Fleetwood Trailer*, and *Laidlaw Corp.* to reinstate the striking employees and the crossovers equally, either by seniority or on some other fair and nondiscriminatory basis, or by mutual agreement." (*Id.* at p. 1007.) Disfavoring strikers at the expense of non-participants or crossovers is either inherently destructive or, at least, unlawful in the absence of any legitimate and substantial justification. (See, e.g., *id.*, at p. 1006, fn. 80 & p. 1008; *Zapex Corp.* (1978) 235 NLRB 1237, 1238; *Laidlaw*, *supra*, 171 NLRB at p. 1368; but see *Roosevelt Memorial Medical Center* (2006) 348 NLRB 1016 [employer did not engage in inherently destructive or otherwise unlawful conduct by removing employees from schedule during strike because they intended to strike, particularly given that four of six potentially impacted employees ended up receiving their full work opportunities and other two employees ended up removing themselves from work opportunities].)

Waterbury Hospital noted that disfavoring strikers is permitted in the private sector if, during an economic strike, an employer permanently replaces strikers with new hires, non-participants, or crossovers. (*Waterbury Hospital*, *supra*, 300 NLRB at pp. 1005-1006.) However, the statutes we enforce do not allow permanent replacements. (*Fremont*, *supra*, PERB Order No. IR-54, pp. 10-11.)[16] Decisions

[16] There are many other critical differences between the private and public sectors. For instance, bargaining unit employees who work during a private sector strike may fairly be deemed "non-participants" or "crossovers," but those who worked

permitting preference for permanent replacements over strikers, such as *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants* (1989) 489 U.S. 426 (*TWA*), are therefore inapposite.[17]

The NLRB returned to the issue of replacement contracts with a minimum hiring period in *Harvey Mfg., Inc.* (1992) 309 NLRB 465 (*Harvey*). There, after the employer warned strikers that they would be permanently replaced if they did not return to work, it hired more than 200 permanent replacements through a direct recruitment process, recalled 100 previously laid off employees, and then contracted with a staffing agency (First Temp) to refer applicants for additional replacement positions. (*Ibid.*) The contract in question required the employer to hire each worker for at least 30 days and provide at least 10 days' notice prior to cancelling the contract. (*Id.* at p. 469.) While the employer was interviewing and hiring applicants First Temp referred, the union

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during a public sector strike are often essential employees who have no choice but to work pursuant to an injunction or agreement. (See, e.g., *County of San Mateo* (2019) PERB Order No. IR-61-M, pp. 3-5 (*San Mateo*).) That was the case here, though the record does not reflect what percentage of employees working during the strike fully supported it but worked pursuant to the agreement the parties reached to avoid threatened injunctive relief litigation.

[17] In any event, to the extent *TWA* has any relevance, the dissenting opinions come far closer than the majority in providing analysis useful to interpreting California's broadly protective labor relations laws. (See, e.g., *TWA*, *supra*, 489 U.S.at pp. 444 & 447 (dis. opn. of Brennan, J.) [explaining why employer favoring employees who cross a picket line over those who did not is inherently destructive to protected rights, citing *Mackay*, *supra*, 304 U.S. at p. 346 for the proposition that "in making poststrike reinstatements an employer may not discriminate among its employees on account of their union activity," and citing *NLRB v. Erie Resistor Corp.* (1963) 373 U.S. 221, 230-231 for the proposition that it is unlawful to offer individual benefits to strikers to induce them to abandon a strike].)

called off its strike and unconditionally offered to return to work. (*Ibid.*) The employer ultimately hired 265 replacements from First Temp, including those it hired before and after the strike ended. (*Ibid.*) The employer claimed the 265 recruits from First Temp were permanent replacements. (*Ibid.*) The union argued that they were temporary replacements and that the employer therefore violated the law both when it continued employing them in lieu of reinstating many strikers and again when it favored these 265 replacements over returned strikers during later layoffs and recalls from layoff. (*Id*. at p. 466.)

The NLRB agreed with the union that the First Temp replacements were temporary. (*Harvey*, *supra*, 309 NLRB at p. 466.) Therefore, the employer's decision to favor them over strikers was inherently destructive of protected rights. (*Ibid.*) The NLRB also rejected the ALJ's reliance on the 10-day notice and 30-day minimum timeframes in the First Temp contract. (*Id.* at p. 469.) The NLRB found the employer failed to raise such arguments and the record established neither that these contractual provisions were "necessary in order to induce First Temp to provide replacements," nor that they absolutely required 30 days' paid employment or 10 days' notice before ceasing to hire applicants from First Temp. (*Ibid.*) The NLRB concluded as follows:

> "The First Temp employees were temporary replacements and, given that status, the economic strikers' reinstatement rights are identical to those of unfair labor practice strikers under *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956). Specifically, they have a right to immediate reinstatement 'because even economic strikers are entitled to reclaim their jobs—not just be placed on a rehire list—if the jobs are vacant or are occupied only by temporary replacements when they make their unconditional offer to

> return.' *Teledyne Still-Man*, 298 NLRB 982, 985 (1990), enfd. mem. 938 F.2d 627 (6th Cir. 1991). Routinely, the economic strikers' entitlement to immediate reinstatement comprehends the discharge of temporary replacements occupying the strikers' prestrike or substantially similar jobs. See *Covington Furniture Mfg. Corp.*, 212 NLRB 214, 220 (1974), enfd. 514 F.2d 995 (6th Cir. 1975). See also *Hansen Bros., supra* [279 NLRB] at 741 ('where the striker replacements are only temporary, an offer to return to work which demands no more than the discharge of those replacements is perfectly appropriate').
>
> [¶ . . . ¶]
>
> "[A]ny delay in the reinstatement of the economic strikers in this case assertedly required by the terms of the private contract between the Respondent and First Temp, and any consequent limitation on the backpay owed to the discriminatees, would be an unsupportable restraint on the [ ] rights of the strikers. . . . Private contractual arrangements between an employer and temporary strike replacement employees, or, more specifically here, a contract with an employment agency for the supply of temporary strike replacements, are valid only for the purpose of filling vacancies left by striking employees while they are on strike. Once an appropriate offer to return is made, such contractual arrangements cease to have any legitimate purpose within the parameters of the Act, because there is no longer a need to hire replacements in view of the strikers' availability for work, and, more significantly, because the strikers have a fundamental right to immediate reinstatement."

(*Ibid*.)

Although *Pacific Door* and *Harvey* are somewhat in tension with one another, it is possible to discern a general set of principles applying to private sector employers: a contractual provision may constitute a legitimate reason for delayed reinstatement if the employer proves that the contractual provision absolutely requires a minimum shift

guarantee; the provision was needed to induce the staffing agency to provide replacements; and while using temporary replacements for the minimum period the employer fills other contemporaneous and later staffing needs without discriminating between strikers and non-participants or crossovers.

The NLRB did little to clarify its analytic framework in *Encino-Tarzana Regional Medical Center* (2000) 332 NLRB 914 (*Encino-Tarzana*), which involved a one-day hospital strike. The hospital contracted with a staffing agency for temporary replacement workers, and the agency insisted on a guarantee that each temporary worker would be paid for a minimum of four shifts. (*Ibid.*) The NLRB could have distinguished *Pacific Door* because *Encino-Tarzana* apparently involved discrimination between strikers and non-participants or crossovers. The NLRB could equally have distinguished *Harvey* if the record revealed that the four-shift minimum was necessary to induce the staffing agency to provide replacements. Instead, the NLRB largely sidestepped all such issues by "emphasiz[ing] that the [ ] complaint did not allege that the [employer] was obliged to reinstate the economic strikers immediately on their unconditional offer to return to work, notwithstanding its contractual obligation" to guarantee the temporary replacements a minimum of 4 days' pay. (*Ibid*.) Thus, just as the employer in *Harvey* waived much of its potential defense, the complaint in *Encino-Tarzana* waived significant parts of the union's potential claims.[18]

[18] In analyzing what remained of the union's claims, which included a unilateral change argument based on the parties' contract and a peculiar interference and discrimination argument shorn of any claimed right to immediate reinstatement under *Fleetwood*, *Laidlaw,* and *Harvey* (see *Encino-Tarzana*, *supra*, 332 NLRB at p. 914), the NLRB relied primarily on *TWA*, *supra*, 489 U.S. 426. Although *TWA* involved permanent replacements and *Encino-Tarzana* involved only temporary replacements,

Sutter Health Roseville Medical Center (2006) 348 NLRB 637 (*Sutter*) also involved a one-day hospital strike. The record revealed that the hospital was unable to obtain replacements without committing to employ replacements for a minimum work period. (*Id.* at p. 637, fn. 5.) Based on this contractual provision, the hospital notified employees that it would bar certain unit employees from work for several days following the strike. (*Id*. at p. 637.) The complaint challenged neither that decision nor discrimination between strikers and crossovers and instead challenged two different employer actions: (1) continuing to have supervisors, managers, and other non-unit employees fill in for unit employees even after the strike ended, thereby reducing work opportunities for unit employees; and (2) closing the hospital cafeteria and thereby delaying reinstatement of cafeteria workers following the strike, even though they were not replaced. (*Ibid*.) The NLRB found both actions were unlawful. (*Ibid*.)

While both CNA and the County have briefed their views on the extent to which we should find portions of the above cases persuasive, only CNA asks us to consider the NLRB's latest decision in this area, *Alaris Health at Castle Hill* (2018) 367 NLRB No. 52 (*Alaris*). A union called a three-day unfair practice strike at a nursing home and rehabilitation center providing inpatient care, but when the strike ended, the employer refused to immediately reinstate 15 strikers. (*Id.* at pp. 1-2.) The record revealed that, after the employer received notice of the strike, it had amended its staffing contracts to add a minimum hiring period of four to six weeks. (*Id.* at p. 2.) The NLRB found that

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the *TWA* framework arguably made sense given the complaint did not claim that the strikers had the right to immediate replacement under *Fleetwood*, *Laidlaw,* and *Harvey*. These peculiarities add to the reasons the case is unpersuasive.

the *Pacific Door* line of cases does not apply to unfair practice strikes, as "where the employer's own unlawful conduct contributed to employees' decision to strike, its financial interest does not permit it to delay reinstating strikers." (*Id.* at pp. 3-4.) Thus, "the employer, not the unfair practice strikers, must bear the risk of having to pay for two groups of workers at the same time." (*Id.* at p. 4.) In any event, even if *Pacific Door* principles had any application, the NLRB found that the employer had shown neither that the minimum hiring periods were necessary to recruit replacements, nor that it was liable for replacements not used after the strike ended. (*Id.* at p. 5.)[19]

b. Partial lockouts

A parallel line of federal decisions covers discrimination against protected activities as part of implementing a lockout. In *American Ship Bldg. Co. v. NLRB*

[19] Furthermore, the NLRB in *Alaris* declined to apply *Drug Package Co., Inc.* (1977) 228 NLRB 108 (*Drug Package*), wherein the Board found that the backpay period for unfair practice strikers need not commence until five days after a strike has ended, to provide "a reasonable period of time for employers to accomplish those administrative tasks necessary to the orderly reinstatement of [strikers] and to accord some consideration to the replacement employees who must be terminated." (*Id.* at p. 113.) The NLRB similarly did not apply *Drug Package* in *Sutter*, *supra*, 348 NLRB 637, noting that the employer had ample time for administrative tasks given that the union had provided over 10 days' notice of a one-day strike, and the employer need only return to its normal scheduling. (*Id.* at p. 638.) We find this reasoning to be more persuasive than that given in the *Drug Package* majority opinion. PERB has never adopted *Drug Package*, no party asks us to adopt it in this case, and we specifically reject it as an interpretation of the MMBA. As to the first rationale the *Drug Package* majority provided—affording the employer time to complete administrative tasks—we have substantial experience in modern public sector strikes in California and find that to be a nonfactor. Indeed, while the *Drug Package* dissent had the better argument even in the private sector in 1977, a fortiori, we find no cause to apply the anachronistic rule now in an era of instant communication. As to the second rationale given—consideration for replacement workers—there is no dispute that replacement workers' rights must give way to those of strikers.

(1965) 380 U.S. 300 (*American Shipbuilding*), the Supreme Court held that the employer's lockout was permissible, in part, because the employer implemented it across-the-board rather than distinguishing between employees based on protected activity. (*Id.* at p. 312.) Subsequent cases confirmed that a discriminatory lockout is impermissible. (See, e.g., *Schenk Packing Co.* (1991) 301 NLRB 487, 490 [relying on *American Shipbuilding* to find employer's lockout unlawful given that it treated employees disparately based on protected activity]; *Allen Storage & Moving Co.* (2004) 342 NLRB 501 [employer evidenced unlawful motive when it implemented lockout while exempting the only bargaining unit employee who had not struck].)

When the NLRB deviated from these principles in a pair of 2004 decisions, the Seventh Circuit and D.C. Circuit Courts of Appeals reversed. First, in *Local 15, Intern. Bhd. of Elec. Workers, AFL-CIO v. NLRB* (7th Cir. 2005) 429 F.3d 651 (*Midwest Generation*), a union representing approximately 1,150 employees called an indefinite economic strike without any offer to return to work. Eight employees declined to strike, and 53 employees who initially struck later crossed over. (*Id.* at p. 654.) The employer continued to operate during the strike, using the non-participants and crossovers, as well as supervisors and temporary replacements. (*Ibid*.) After striking for two months, the union ended its strike and unconditionally offered to return to work. (*Ibid*.) Rather than accepting this offer, the employer locked out all bargaining unit employees except for the non-participants and crossovers. (*Id.* at pp. 654-655.) The union filed an unfair labor practice charge, and the parties stipulated to a single issue in dispute which noted that the conduct at issue could equally be framed as a lockout or a refusal to reinstate certain employees:

> "Whether the Company [unlawfully interfered with or discriminated against protected activities] by locking out and/or refusing to reinstate those employees who were on strike at the time of the union's unconditional offer to return to work, while not locking out and/or reinstating those individuals employed by the Company who, prior to the union's unconditional offer to return to work, had ceased participating in the strike by making an offer to return to work, and had either returned to work or scheduled a return to work at the Company?"

(*Id.* at p. 655.) While the NLRB found no violation, the Seventh Circuit reversed. (*Id*. at p. 662.) The court found that it did not matter whether the employer's conduct was inherently destructive or had a comparatively slight impact on protected rights, because the employer had no legitimate and substantial business justification for granting preferential status to non-participants and crossovers, meaning it could not meet even the lower burden that applies when conduct is not inherently destructive. (*Id*. at pp. 656-657, 662.)

In reaching this conclusion, the court held than an operational need must be one that is critical to maintaining operations. (*Midwest Generation*, *supra*, 429 F.3d at p. 658.) The court also rejected the employer's argument that it lawfully favored non-participants and crossovers to pressure strikers, finding that a "discriminatory lockout on the basis of protected activity is unlawful even when it is supportive of an employer's bargaining position." (*Id*. at p. 660.) Indeed, the court found that if "employers were free to exercise economic penalties selectively against those employees whom they believe economic coercion would be most effective, an employer could take discriminatory actions that have traditionally been barred . . . This type of discrimination cannot be a legitimate and substantial business justification for a

partial lockout." (*Id*. at p. 660-661.) Lastly, the court noted that there is "an obvious disparate treatment of employees when an employer locks out only those employees who, by striking, had identified themselves as union adherents, while continuing to operate with those employees who had not joined the strike." (*Id*. at p. 661 [internal quotation marks and citation omitted].) The court found interference given that the employer undermined protected activity by demonstrating the advantages of refraining from such activity, and the court also found discrimination in that the disparate treatment demonstrated an unlawful motivation. (*Id.* at pp. 661-662.)[20]

Seven years after *Midwest Generation*, the NLRB returned to some of the same issues in *Dresser-Rand Company* (2012) 358 NLRB 854 (*Dresser-Rand I*), which remains a pivotal part of private sector labor law after the NLRB readopted its reasoning and incorporated it by reference in *Dresser-Rand Co.* (2015) 362 NLRB 1100 (*Dresser-Rand II*).[21] When the union in *Dresser-Rand II* ended a strike after several months, the employer responded by locking out the entire bargaining unit, including employees who had crossed the picket line and returned to work during the

[20] In a 2006 unpublished decision, the D.C. Circuit, like the Seventh Circuit in its published *Midwest Generation* decision a year earlier, disagreed with the NLRB's treatment of discriminatory lockouts and reversed the NLRB's decision in *Bunting Bearings Corp*. (2004) 343 NLRB 479.

[21] The NLRB reconsidered the case after the United States Supreme Court invalidated *Dresser-Rand I*, among other decisions, because a panel member's recess appointment was outside the bounds of the Constitution's Recess Appointment Clause. (*NLRB v. Noel Canning* (2014) 573 U.S. 513.) *Dresser-Rand II* explicitly incorporated *Dresser-Rand I* by reference and adopted the ALJ's proposed decision as part of the NLRB's decision, as supplemented and modified. (*Dresser-Rand II*, *supra*, 362 NLRB at p. 1100)

strike. (*Ibid*.) The employer then preferentially called back the crossovers and refused to bargain over such procedures. (*Ibid.*) The NLRB found both the preference and refusal to bargain unlawful, and further found them to evidence unlawful animus that, in combination with other conduct, showed the entire lockout to have been discriminatory. (*Id.* at p. 1101.) On appeal, the Fifth Circuit reversed these conclusions. (*Dresser-Rand Co. v. NLRB* (5th Cir. 2016) 838 F.3d 512.)

Thus, private sector labor law presents a somewhat chaotic tapestry.[22] However, the NLRB's reasoning in *Dresser-Rand I* and *Dresser-Rand II,* like the Seventh Circuit reasoning in *Midwest Generation*, protects against discriminatory partial lockouts. Such a rule is consistent with longstanding federal precedent such as *American Shipbuilding*, *Schenk Packing Co.*, and *Allen Storage & Moving Co.*[23]

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[22] For example, the employer averred that it had no choice but to lockout all bargaining unit employees, as it would be unlawful to exempt crossovers. (*Dresser-Rand I*, *supra*, 358 NLRB at p. 885.) The NLRB was somewhat more equivocal on this point, describing the law as unsettled following *Midwest Generation* while acknowledging that employers risk a violation if they treat employees differently based upon whether they struck or abandoned a strike. (*Dresser-Rand Co. v. NLRB*, *supra*, 838 F.3d at p. 515, fn. 1). Thus, both *Midwest Generation* and the *Dresser-Rand* cases show differences between various circuit courts and the NLRB. While the NLRB reserves the right to refrain from applying both published and unpublished court of appeal decisions in subsequent NLRB cases—irrespective of whether such a later matter arises in the same circuit or in a different circuit—the NLRB is permitted to follow appellate decisions that it finds persuasive, and refusal to acquiesce to the D.C. Circuit can be particularly difficult since all NLRB litigants have the right to seek review in that circuit. (*Enloe Medical Center v. NLRB* (D.C. Cir. 2005) 433 F.3d 834, 838.)

[23] The *Dresser-Rand* decisions feature an employer arguing that it uniformly locked out all bargaining unit employees on an initial basis and therefore was permitted to preferentially call back employees who had abandoned the strike and crossed-over. (*Dresser-Rand I*, *supra*, 358 NLRB at p. 887.) Such a loophole, manifestly, would constitute a classic exception that swallows the rule, allowing an employer to describe its actions as a non-discriminatory lockout of any length followed

California's public sector labor relations statutes limit both the right to strike and the right to lockout more so than does private sector labor law, while providing stronger interference protections. In the below analysis of California law, we therefore adapt federal principles, considering differences between federal private sector precedent and California public sector precedent.

2. Under California's public sector labor laws, when a hospital prohibits employees from work for multiple days following a strike, under what circumstances, if any, can the employer overcome a union's interference and discrimination claims?

Employers and unions under our jurisdiction each face stricter limits on their use of economic weapons than the restrictions governing their private sector counterparts. For instance, it is an unfair practice for a public sector union strike to cause an imminent and substantial threat to the public's health or safety, and a union may lawfully strike pre-impasse only based upon employer unfair practices. (*Regents of the University of California* (2019) PERB Order No. IR-62-H, pp. 8 & 10-11; *San Mateo*, *supra*, PERB Order No. IR-61-M, pp. 5-6.) Employers, for their part, cannot lock out employees or permanently replace strikers, among other restrictions. (*Fremont*, *supra*, PERB Order No. IR-54, pp. 10-11.) These principles not only make inapposite private sector caselaw allowing an employer to disfavor strikers if it has made permanent new arrangements during an economic strike, but also aid us in

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by allegedly lawful discrimination in ending the lockout. But the law should not be nearly so brittle, arbitrary, or inconsistent. As the NLRB found, "full-term strikers and the crossovers" were "equally entitled" to be recalled, and an employer normally evidences an unlawful motive if it fails to use a nondiscriminatory recall procedure. (*Id.* at pp. 887-888; *Dresser-Rand II*, *supra*, 362 NLRB at p. 1101 [rejecting employer's alleged non-discriminatory reasons for its disparate treatment].)

discerning the boundaries that apply to the County's conduct, which bears characteristics akin to a lockout.[24]

Furthermore, we take administrative notice of the fact that the County, in asking PERB to seek to enjoin nurses from striking, argued that replacement employees may not always serve the public at the same high level as regular employees. Other public health care employers have done the same, and thereby availed themselves of an essential employee injunction, an avenue not available to their private sector counterparts. (*San Mateo*, *supra*, PERB Order No. IR-61-M, p. 23.) We thus keep in mind that the public benefits when there are at most narrow circumstances in which an employer is permitted to effectively prolong a strike. Moreover, as noted above, because a public employer can ask PERB to seek an injunction against essential employees threatening a strike, the nature of non-participants and crossovers in the public sector is quite different than in the private sector. Employees who report to work during a public sector strike may be non-supporters, or may do so pursuant to an

[24] The County maintains that its conduct was not a lockout. At the hearing, the County's attorney asked Culberson why he did not believe the County had implemented a lockout. Culberson testified that, in his view, a lockout involves the entire bargaining unit. Culberson's answer may implicitly reference private sector law and its prohibition on discriminatory partial lockouts. The County also argues its action was not designed to exert bargaining pressure and that it does not matter whether its action was technically a lockout because a CNA strike manual acknowledged that a full lockout may be legal. Ultimately, the parties' labels or characterizations do not determine the contours of labor law. Our task is to determine whether the MMBA permits the County's conduct, however labeled. In the below analysis, we for the first time carve out a narrow set of circumstances that will typically permit a public hospital to bar represented employees from working for a short period following a strike. This analysis could be regarded as deeming such conduct not to constitute a lockout, or as permitting a small subset of lockouts; the difference is semantic and therefore immaterial.

injunction, a union exemption designed to benefit the public or to avoid litigation, or a mutual agreement between the parties toward such an end. Thus, while there are multiple reasons why an employer cannot discriminate against strike participants, this circumstance helps to illustrate the idiosyncratic impacts of such discrimination.

A public hospital also risks significant inconsistency if it distinguishes itself from private hospitals in seeking to enjoin strike activity only to later cite private sector labor law to defend its strike responses. Here, the County makes some such inconsistent arguments. Although the County concedes it should be afforded more limited economic weapons than a private hospital, it relies on its preferred interpretation of private sector precedent to argue that it can continue using replacements over bargaining unit employees for the length of any minimum shift guarantee that may remain after a strike concludes.

The foregoing considerations—including both the NLRB's somewhat tortured efforts to balance competing concerns, as well as recognizing the substantial differences between state and federal labor relations frameworks—inform us in applying our longstanding interference and discrimination standards to this new factual context. We hold as follows. A public health care employer that prohibits bargaining unit employees from work after a strike, due to a minimum shift guarantee for strike replacements, can typically establish an affirmative defense to an interference claim and avoid a finding of discrimination only if it can prove that: (1) it made a good faith effort in the marketplace to negotiate a strike replacement contract that would eliminate any minimum shift guarantee or shorten it to the greatest degree possible, but it ultimately needed to agree to the minimum shift guarantee in order to maintain

critical inpatient services; (2) it barred employees from work only because such a contractual commitment temporarily reduced available work opportunities, and it filled all remaining opportunities without discriminating against employees based on whether they worked during the strike or engaged in any other actual or perceived protected activity; and (3) it provided the employees' union with timely notice regarding any decision to guarantee replacement workers a minimum work period or to modify the terms of a prior guarantee, and, if requested, bargained in good faith over the potential effects on bargaining unit employees.[25] We proceed to explain why these three elements will generally be necessary to show the employer acted in a non-discriminatory manner and narrowly tailored its conduct to minimize the harm to protected rights.[26]

First, while the NLRB has not fully explained *why* an employer must prove that a contractual provision is "necessary" to induce a staffing agency to provide replacements (*Alaris*, *supra*, 367 NLRB No. 52, p. 5; *Harvey*, *supra*, 309 NLRB at p. 469), the reasons are evident: An employer that bars employees from work based

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[25] While the NLRB declines to apply *Pacific Door* and its progeny in unfair practice strikes, the adapted version of these principles that we adopt should apply equally in economic and unfair practice strikes. This conclusion makes sense in the California public sector given that, as discussed above, one of the primary differences between private sector economic and unfair practice strikes—the employer's right to hire permanent replacements in an economic strike but not in an unfair practice strike—does not apply under California public sector labor relations laws.

[26] Nothing in this decision rules out the possibility that a hospital marshalling sufficient proof as to each of these three elements could still be held liable for discrimination based on other evidence showing a discriminatory motive, including statements indicating it barred employees from work to discourage them from further strikes.

on a minimum shift guarantee it need not have signed imposes an adverse action based more on protected conduct than on any legitimate non-discriminatory reason, and it fails to narrowly tailor its conduct to minimize harm to protected rights. Indeed, if an employer can truthfully explain to employees that it explored all options with replacement companies and was left with no realistic choice, this will tend to lessen the decision's retaliatory and coercive nature. Thus, where strike replacement companies with which the employer negotiates propose such a term, the employer must make a good faith effort in the marketplace to negotiate a contract that would eliminate the minimum shift guarantee or shorten it to the greatest degree possible.

Second, if a hospital denies work opportunities to a greater degree for those who have engaged in protected activity, such conduct is facially discriminatory, and the significantly coercive impact rises to the level of inherently destructive. (*Contra Costa*, *supra*, PERB Decision No. 2632-M, pp. 34-35 & 39 [conditioning a benefit on whether employees exercise protected rights is inherently destructive of those rights]; *Santa Monica Community College District* (1979) PERB Decision No. 103, pp. 19-20 [same] (*Santa Monica CCD*), affd. *Santa Monica Community College Dist. v. Public Employment Relations Bd.* (1980) 112 Cal.App.3d 684.)

Third, a hospital discriminates against and interferes with protected rights in failing to provide notice and an opportunity to meet and confer regarding potential post-strike furloughs and other bargainable effects of a minimum shift guarantee. In reaching this conclusion, we note as an initial matter that an employer's conduct around notice and bargaining can evidence discrimination even in far less fraught circumstances, when the decision and effects at issue do not involve core protected

conduct such as a strike. (See, e.g., *San Francisco*, *supra*, PERB Decision No. 2712-M, p. 26 [allegation that employer refused to respond to bargaining request in a timely and adequate manner suggested discriminatory motive behind related employer conduct]; *County of Orange* (2018) PERB Decision No. 2611-M, p. 17 [unilateral change evidenced discriminatory animus].)[27] Context is critical in determining whether particular bargaining conduct is persuasive proof of discrimination or an independent interference allegation. In the present context, the bargaining conduct at issue is persuasive because it undercuts a union's ability to control the parameters of the economic sacrifice involved in striking, preventing negotiations over use of leave or other measures needed to keep that sacrifice from growing well beyond the usual, anticipated loss of pay for each strike day.

Such bargaining conduct is also not narrowly tailored to spare protected rights to the greatest degree possible. In addition to causing the aforementioned damage to protected rights, it further tends to harm such rights by preventing the union and represented employees from learning in advance if the employer plans to bar employees from working after the strike, thereby denying them information salient to their decision whether to strike (and for how long), as well as intensifying the coercive impact and perception of punishment associated with the employer's decision. The instant case illustrates how the County escalated the tendency to harm protected rights by keeping secret its minimum shift guarantee agreement and creating

[27] Where, as here, bargaining conduct evidences discrimination, we consider it irrespective of whether it was ever alleged or litigated in an unfair practice charge and irrespective of whether it falls within the statute of limitations. (*City of Oakland* (2014) PERB Decision No. 2387-M, pp. 35-36.)

widespread confusion among employees, the union, and even within management. Indeed, Culberson admitted that he misspoke when he and bargaining unit nurses discussed the post-strike mandatory days off, and he further admitted that the County failed to tell them to remain within range to report to work if called in after having been barred from work. Bargaining would have led to greater clarity on these issues, likely would have prompted management to avoid using the LU designation rather than waiting five months to replace such designations, and might well have led to an agreement regarding use of paid leave. Moreover, advance knowledge and consideration can reduce the perceived retaliatory nature of the employer's actions, especially when compared to a notification directly to employees on the eve of the strike, as occurred here.[28]

3. Did the County interfere with and discriminate against protected rights when it barred certain nurses from work following the strike?

Applying the above standards to the instant record, we conclude as follows.

a. The County did not establish that it made a good faith effort in the marketplace to negotiate a contract that would eliminate the minimum shift guarantee or shorten it to the greatest degree possible.

In June 2019, recognizing that the County's negotiations with CNA and SEIU could result in one or both unions striking, the County began to consider contracting

[28] As we discuss further *post*, executing a contract specifically for strike replacements is not a mandatory subject of bargaining, but the effects of that decision on bargaining unit employees are bargainable, because hours of employment, work opportunities, and mandatory furlough periods are within the scope of representation. The County's conduct thus frustrated the MMBA's central purpose of promoting full communication between public employers and their employees. (MMBA, § 3500.)

with a strike replacement company.[29] County Chief Nursing Officer Belva Snyder asked a manager, Roberta Schramek, to obtain three strike replacement bids. Each company that Schramek approached provided the County with an initial draft contract. HSG's draft contract contained a five-shift minimum hiring period, irrespective of the length of the strike. A second company, Autumn Enterprises, provided an initial draft containing a three-shift minimum for a one-day strike and a four-shift minimum for a strike lasting two or more days. The third company, Maxim Healthcare Services, similarly offered a four-shift minimum for a strike lasting two days.

The County e-mailed all three companies with requested contractual changes, and the companies readily agreed to such changes. However, none of these requested changes related to the minimum shift guarantee. In the case of HSG, the County asked to edit the contract to lower the contractual interest rate, and the County also sought clarification as to a contract term that appeared to prevent it from continuing to employ traveling nurses from other agencies. HSG approved the change in interest rate and reassured the County that the contract did not prevent it from continuing to employ travelers.

The County early on stopped seriously considering Maxim's bid because the County considered Maxim to provide primarily longer-term traveling nurses rather than strike replacements, and Maxim did not always fill the County's orders for travelers. That left HSG and Autumn as the only contenders. Snyder chose HSG over Autumn

[29] During a prior round of bargaining with CNA in 2016, the County briefly considered the need for strike replacement services. At that point, the County reached out to one company, HSG, but their discussion ended when the County concluded it would not need replacement services during that round of negotiations.

because HSG was experienced and well respected, HSG was confident that it could fulfill the County's needs, and HSG was considerably cheaper than Autumn. The County's slight familiarity with HSG from brief discussions three years earlier also played a role in this decision.

The County has not provided an adequate explanation for only approaching two companies that it believed focused on strike replacements. Nor, despite its burden to establish an affirmative defense, has the County provided any information about the number of potentially available companies or how its modest foray into the market showed that it gained contemporaneous knowledge as to whether a five-shift minimum was truly standard.[30] Snyder, when asked during her testimony why the County approached Maxim over other companies focused on providing strike replacements, testified that even though Culberson had made her responsible for choosing a strike replacement company, she provided no input into which companies the County should approach. Moreover, the County employees responsible for this decision—Schramek and one of her supervisors—did not testify. In any event, Snyder admitted that the County proceeded with initial negotiations with Maxim even while knowing that Maxim did not focus on strike replacements.

This testimony suggests that the County was, at least in part, going through the motions of a bid process without exercising due diligence as to how many companies

[30] We take administrative notice of a compendium of evidence submitted under penalty of perjury in PERB Case Numbers SF-CO-222-H and SF-CO-223-H, Volume D, pp. 9-10, listing approximately 20 companies in the hospital strike replacement business. We make no finding as to whether that evidence is accurate. Rather, we cite it to illustrate one category of evidence missing from the instant record.

it should approach, what terms it should prioritize and negotiate, or how to conduct the negotiation by comparing offers from multiple companies and using the competition to obtain better terms. Whether bureaucratic obstacles or another type of inefficiency was primarily responsible for the County's narrow focus on HSG and Autumn, the above process would not establish a good faith effort in the marketplace, even if we were to assume for the sake of argument that, while still negotiating the contract, the County had attempted to eliminate or reduce the minimum shift guarantee.[31]

Even more importantly, Snyder testified that the only time the County raised the minimum shift guarantee issue was well after the County had already executed its contract with HSG. Snyder testified to this fact twice. First, she testified that she discussed the minimum guarantee with HSG Regional Sales Manager Brian McInnes only after the County had already selected HSG. Snyder then testified that although she cannot recall the timing of when she asked HSG to reduce the minimum shift guarantee, it likely would have been shortly before CNA provided strike notice in February. McInnes did not testify.[32]

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[31] The County's narrow focus on just a few companies is particularly curious given that Culberson testified he was aware of PERB precedent requiring an employer seeking an essential employee injunction to contact all companies or other entities potentially able to provide replacement employees or services. (See *San Mateo*, *supra*, PERB Order No. IR-61-M, p. 8.)

[32] If Snyder had sought to change the minimum shift guarantee in a timely manner while still negotiating the contract, McInnes likely would have consulted with his superior, Tabi Ebahou, who served as HSG Vice President and General Manager from November 2018 until shortly after CNA's March 2020 strike. Ebahou executed the contract for HSG and testified that he and McInnes together spoke with the County about its needs several times. Ebahou recalled that the County asked to edit the contract to lower the contractual interest rate, and that he discussed the contract

The County likely knew, or should have known, that CNA and SEIU commonly hold strikes lasting fewer than five days at many California hospitals. This raises further questions regarding why the County failed to negotiate over the minimum shift guarantee before executing a replacement contract. In any event, the County never offered any reasonable explanation for not having raised the issue in a timely manner. This timing evidence, even alone, represents a further independent reason why the County cannot meet its burden.[33]

In assessing this evidence, we also consider that the County began seeking a strike replacement agency in June 2019 and concluded its effort in October 2019. Between June and October, the County had plenty of time to approach a reasonable number of companies in the marketplace, obtain comparator contracts they had signed in the past, and attempt to negotiate the best possible terms. The County failed to do so and instead signed with HSG without discussing the minimum shift guarantee, only to purportedly raise the issue shortly before the strike, long after the County had completed its selection process and executed the HSG contract. This did not reflect a good faith effort to eliminate or reduce the shift guarantee through negotiation.

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terms with McInnes, but he could not recall the County raising any issue over the minimum shift requirement.

[33] Furthermore, while our standard does not require that an employer necessarily document its negotiations on this topic in writing, we note the County made no written request to amend the contract. This was the case even though the County made written requests as to other matters and even though Snyder admitted that the minimum shift guarantee had a substantial, negative effect on the overall cost of the contract. When the County's attorney asked Snyder on redirect examination why she made no written request to change the minimum shift guarantee, she admitted she had no answer to that question.

Had the County negotiated in a timely manner to change the minimum shift guarantee as it sought to change other contract terms, it is more likely than not that HSG would have reduced the minimum period in order to secure the County's business. We base this inference on multiple evidentiary strands. First, while Ebahou initially testified that the five-shift hiring minimum is an "industry standard" needed to recruit enough replacements, and he initially stated that he could only recall lower minimums being used for one-day strikes, counsel for CNA then showed him other HSG contracts containing lower minimums for strikes of two or more days, at which point Ebahou stated he was not aware of those. But even Ebahou was able to recall that HSG had in the past negotiated with other employers seeking to reduce the minimum shift requirement.

Moreover, the available evidence does not show that a five-shift minimum is an industry standard, even for strikes lasting more than one day. In 2017, for instance, the University of California and HSG entered into a strike staffing agreement featuring different minimum shift guarantees depending on the duration of a strike. In the event of a one-day strike at a University medical center, the contract required a three-shift minimum hiring period, which would include employees' travel days on either end of such a single-day strike. In the event of a strike lasting two or more days, the contract required a four-shift minimum, which, again, could include employees' travel days on either end of the strike. As a result of these arrangements, when nurses struck for two days in 2018, the University did not bar any nurses from work following the strike.[34]

[34] The County suggests that the University of California had greater bargaining leverage with HSG because of the large number of nurses the University needed to hire. The record does not contain adequate support for this theory. Indeed, to the

In PERB proceedings involving the University's 2017 contract with HSG, the University submitted a declaration from Robin Epstein Ludewig, a Senior Director of Human Resources Planning and Talent Acquisition for the University of California Los Angeles Health System, claiming that the alternate three-shift or four-shift minimum, depending on the length of the strike, was "a common provision" for "strike replacement agreements." As noted above, PERB commonly takes administrative notice of its own records and files. In this instance, we take administrative notice of Ludewig's declaration (which is part of the record in PERB Case Numbers SF-CO-222-H, SF-CO-223-H, and SF-CO-224-H) and the contract referenced therein, both of which CNA and the County referenced at the hearing and in their briefs in this matter.

We also take administrative notice of two more contracts between medical centers and strike staffing agencies appearing in records of other PERB cases, both of which CNA and the County referenced at the hearing and in their briefs in the instant matter.[35] The first is a 2013 contract between HSG and the University, introduced into

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extent the record contains relevant facts, it suggests that the more nurses needed for the same period of days, the harder it is to recruit and the more need there may be for a minimum shift guarantee.

[35] Before the ALJ granted CNA's motion for administrative notice, the County raised two objections which the ALJ overruled and which we briefly address. First, the County claimed parts of the documents in question are not relevant. We disagree. The above-referenced documents, together with the offers the County received from other companies, rebut the County's claim that a five-shift minimum hiring provision is an industry standard. Second, the County asserted that the documents are hearsay and cannot be relied upon for the truth of the matter asserted. We do not find that the contracts with strike replacement companies introduced in prior PERB proceedings have more hearsay characteristics than those introduced as evidence in the instant matter, and indeed it is not clear that any are introduced for "the truth of the matter asserted" within the meaning of the County's argument. Moreover, the County itself

evidence in PERB Case Numbers SF-CE-1029-H, SF-CE-1030-H, SF-CO-186-H, and SF-CO-187-H. This contract provided for either a four-shift minimum hiring period or, in the event of a one-day strike, a one-shift minimum hiring period at a higher rate. The second is a 2010 contract between Salinas Valley Memorial Healthcare System, Huffmaster Crisis Response, LLC, and Alternative Workforce, Inc., introduced into evidence in PERB Case Numbers SF-CO-222-H, SF-CO-223-H, and SF-CO-224-H. This contract provided for a three-shift minimum hiring guarantee for a strike of any length.

Snyder testified that when she finally raised the minimum guarantee with McInnes, he responded: "this is our standard contract, basically, this is what we do." But her testimony on that point was hearsay, and the weight of the evidence does not indicate that a five-shift guarantee was the industry standard. Furthermore, Snyder had not done sufficient research to learn that HSG had agreed to lower minimum shift guarantees in other contracts, and she did not raise with McInnes the fact that other companies had offered lower minimums. Snyder testified that she had the information needed to bargain with HSG based on the other offers the County received, but she could not recall ever having done so. This testimony shows how the timing of Snyder's alleged conversation with McInnes—months after she had already selected HSG and just before the strike—interplays with her lack of good faith effort to negotiate a lower

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sought administrative notice of documents from filings in other PERB cases involving different parties, and, at least as much as CNA, has relied on those documents for the truth of various matters asserted. In any event, PERB Regulation 32176 allows us to consider hearsay evidence where, as here, there is also other evidence showing that a five-shift minimum is not the industry standard.

minimum shift guarantee. By raising the issue only when a strike was imminent and the County needed to order replacements, Snyder gave up any leverage to convince HSG it should reduce or eliminate the minimum shift guarantee.

Lastly, while the County did not come close to establishing a good faith effort to reduce or eliminate the minimum shift guarantee even if we were to credit all of Snyder's testimony, we also find Snyder was not a reliable witness when she testified, as noted above, that McInnes rebuffed her when she raised the minimum shift guarantee after CNA gave notice of a two-day strike.[36] On direct examination, Snyder gave vague testimony about her discussion with McInnes. On cross-examination, CNA's counsel tried to dig deeper, revealing Snyder had limited recall about her conversation with McInnes. For instance, Snyder could not recall who participated in the call. On redirect examination, after a break, Snyder provided the more definitive, hearsay testimony noted above, claiming that in her discussion with McInnes shortly before the strike, he indicated that the five-shift guarantee was standard. While this testimony is plausible, particularly given that the tardy inquiry gave Snyder no leverage, we are also aware that Snyder had an obvious incentive to cover herself by reframing a last-minute lament about the minimum shift guarantee as if she had actively sought to change the term. Indeed, Snyder's initially vague testimony,

[36] While Culberson similarly testified that Snyder had raised the topic with HSG, this testimony was hearsay and not based upon personal knowledge, as Culberson was not involved in selecting a strike replacement company.

followed by better recollection on redirect examination after a break in the proceedings, further undercuts her credibility.[37]

b. The County engaged in facial discrimination when it granted preference to non-strikers over strikers.

If the County had made a good faith effort to secure replacements while eliminating or shortening the minimum replacement period, then the first two sentences of Culberson's March 4 memorandum to CNA would have been accurate: "To ensure the continuity of necessary health services, the County has had no choice

[37] CNA also successfully impeached Snyder's credibility by showing how she had previously mischaracterized facts, despite declaring them under penalty of perjury, to obtain maximum legal leverage. In support of the County's request to enjoin certain nurses from striking on the ground that they were essential, Snyder signed a declaration dated February 25, 2020. She declared under penalty of perjury that the County needed an injunction for full minimum staffing in the operating room because—unlike other categories of nurses—there would be no replacement workers to cover operating room nurse shifts, due to insufficient supply and, in any event, because "it takes generally 3 months to train and onboard agency workers for this position. There is not enough time to train registry workers for this position." At the formal hearing in this matter, however, Snyder was eventually forced to admit, after significant attempts at evasion, that in fact it was not right to say that there would be no replacements available and the County did in fact receive such replacements. Snyder testified that what she meant was it was her "preference" to use the County's own nurses, and she would use HSG replacements only if she failed in having County operating room nurses deemed essential workers. Snyder's declaration manifests a significant deviation from the truth on a critical matter before PERB. On redirect, the County's counsel solicited Snyder to testify that when she signed the declaration on February 25, she did not yet know what percentage of the requested nurses HSG would fill, meaning she did not yet know whether HSG would provide operating room nurses. This admission makes matters no better, however, since Snyder's declaration stated that, unlike other categories of nurses, no operating room replacements would be available and further stated that, in any event, there was no time to provide enough training. Snyder also admitted, contrary to her declaration, that replacements could be used in the operating room with only a single day orientation, provided there was a regular nurse present as well.

but to contract with an outside company for strike replacement workers. Such a contract was, however, only available for a minimum period of five (5) days."

Even had that been the case, however, the memorandum's next sentence included the following facially discriminatory statement:

> "[P]lease be aware that we intend to immediately transmit the memorandum attached hereto as ATTACHMENT A to all potential strike participants, notifying them that *employees who choose to participate in the strike* will not be able to return to work immediately, after the strike period noticed by CNA, and will instead not be accepted to return to work until their first shift on or after Tuesday, March 10 at 7 a.m., unless called into work at an earlier time by SJGH management." (Emphasis supplied.)

Culberson attached to his March 4 memorandum to CNA a copy of his pre-strike memorandum to nurses, which reveals the same facial discrimination between strikers and nurses not striking: "CNA unit members who participate in the strike will <u>not</u> be able to return to work at the end of the strike period as noticed by CNA. Instead, such **participating employees will not be accepted back at work until their first shift on or after Tuesday, March 10 at 7 a.m., unless called into work at an earlier time by SJGH management.**" (Emphasis in original.)

In his testimony, Culberson confirmed that his memoranda accurately stated his intent, viz., to warn nurses that those who chose to participate in the strike would not be able to return for three days unless called to work. Moreover, while the County later called some strikers back to work between March 7-9, the record and post-hearing briefing from the County leave no doubt that it singled out strikers for different treatment from non-strikers. The parties stipulated that the County treated "strike participants who would have otherwise been regularly scheduled to work" differently than others,

generally looking first to non-participants when filling available slots. While this stipulation, the March 4 memoranda, and the briefing fully resolves the fact that the County did, in fact, discriminate against strikers, extensive record evidence also supports this finding. Indeed, the County argues that when it barred nurses from striking who had not actually been scheduled to work during the strike, that, too, was based on protected activity such as organizing the strike, urging others to strike, providing picket signs to others, leading a rally, or simply picketing during the strike, any of which was sufficient to make a nurse an "active striker" in the County's view.

Singling out employees who honored picket lines during the strike and reducing their post-strike work opportunities—while granting greater opportunities to employees who did not strike—constitutes facial discrimination under our discrimination standard and inherently destructive conduct under our interference standard. (*Campbell*, *supra*, 131 Cal.App.3d 416, 423 [noting that, under *Great Dane*, *supra*, 388 U.S. 26, favoring non-strikers over strikers constitutes "discrimination in its simplest form"]; *Contra Costa*, *supra*, PERB Decision No. 2632-M, pp. 34-35, 39 & 40-43; *Santa Monica CCD*, *supra*, PERB Decision No. 103, pp. 19-20.) As noted above, the County must therefore prove that it acted solely due to circumstances beyond its control and no alternative course of action was available. (*Contra Costa*, *supra*, PERB Decision No. 2632-M, pp. 36 & 40.)

Therefore, even if the County had shown it had no choice but to agree to a minimum shift guarantee for replacement employees, and as a result there were reduced work opportunities for bargaining unit employees, the County would have the further burden of showing an outside circumstance requiring it to rely on protected

activities to determine which bargaining unit employees would receive the limited remaining work opportunities. The County attempts to meet this burden by referencing HSG's alleged prohibition on replacement employees working alongside bargaining unit workers, a concern allegedly based on HSG's experience outside of California involving such groups working together. There are a series of problems with the County's defense.

First and foremost, the contractual provision at issue does not call for discrimination between strikers and non-strikers. Rather, it treats all members of the bargaining unit equally, providing that the County "shall not schedule [HSG] Replacement Staff to work alongside Client's Staff who are members of a collective bargaining unit with which Client had a labor dispute within the previous 30 days without prior written approval from [HSG's] Vice President."[38] Similarly, when Snyder and Culberson described HSG's concerns, they were clear that HSG's concerns applied to the entire bargaining unit, rather than particularly to strikers. For instance, during the shift change at the start of the strike, HSG asked that bargaining unit

[38] We draw no conclusion as to what circumstances, if any, would permit a public employer to execute a discriminatory contract. We need not resolve that question because the contract here did not require discrimination. We therefore leave open the question of whether, faced with a demand for a discriminatory contract, a hospital may narrowly tailor its conduct by showing it attempted to negotiate over the discriminatory provision in advance of executing the contract and ultimately had no choice but to accept such a contract. Here, the record does not reflect that the County negotiated over the side-by-side work provision.

workers and replacements not interact with one another, reinforcing that HSG did not ask for discrimination between strikers and non-strikers.[39]

The contract provision on which the County relies, in addition to not requiring discrimination, also allowed the County to ask HSG to waive the provision. And, in fact, HSG permitted such side-by-side work when asked. According to Snyder's testimony in her direct examination, HSG made an "exception for essential workers," meaning the nurses that CNA and the County agreed would work during the strike. Then, on cross-examination, Snyder admitted that the County went significantly further than that in allowing HSG replacements to work alongside bargaining unit workers—including both strikers and non-strikers—and that HSG in fact had no problem with any of the interactions the County wished to occur between HSG replacements and bargaining unit nurses. Nor did HSG have any problem with the fact that five bargaining unit nurses trained the HSG replacements on the day before the strike.

While the above factors are each, independently, sufficient to defeat the County's defense to CNA's discrimination claim, we also briefly consider the County's effort to introduce evidence of actual tension between strikers and replacements. We do not tarry long on this evidence as there is no clear basis for finding it relevant given that the County set out its discriminatory decision in pre-strike memos. Alleged tension during the strike simply cannot explain the County's pre-strike decision to discriminate based on protected activity. Similarly, in *Sutter*, *supra*, 348 NLRB 637, the NLRB rejected the hospital's argument that strikers and replacements working side-by-side

[39] While both Snyder and Culberson gave hearsay testimony about HSG's concerns, Culberson offered double hearsay that came from HSG to Snyder and then from Snyder to Culberson.

would engender hostility, as the record did not show a history of such conflict at the hospital in question, and the hospital's decision "could not have turned on any events occurring during the instant strike," because the decision was announced before the strike.

Furthermore, while Snyder pointed to a single incident on the picket line, her testimony was hearsay and lacking in personal knowledge. In any event, tempers commonly flare on a picket line and that would not necessarily lead us to extrapolate and assume that one or more nurses might act unprofessionally in the workplace, particularly given the record reveals that from March 7 through 9, HSG replacements successfully worked alongside bargaining unit employees, including some strikers. Similarly, a nurse testified using the word "scab" to describe replacements, and she acknowledged there could be tension between bargaining unit nurses and replacements, but she also testified that as it played out there were no such tense incidents while regular nurses and replacements worked together in the hospital.

Snyder, too, positively reviewed the actual side-by-side work, testifying that between March 7 and 9 the County brought back strikers to work alongside HSG replacements and there were no incidents of conflict. Culberson further supported the same conclusion, as he testified that he had no reason to think that bargaining unit nurses would act inappropriately or unprofessionally simply because they were working alongside HSG replacements.

For the foregoing reasons, the County engaged in facial discrimination when it explicitly threatened to withhold available work opportunities based upon whether employees had engaged in protected activities and then carried through on this threat.

(Cf. *Contra Costa*, *supra*, PERB Decision No. 2632-M, pp. 34-35, 39, & 40-43 [employer explicitly distinguished between represented and unrepresented employees].) In the alternative, as discussed below the same discriminatory conduct would, in any event, supply a sufficient showing of nexus to satisfy a prima facie case under the *Novato* framework.

Where, as here, there is direct evidence of discrimination, i.e., "the employer's words or conduct reveal that its adverse action was based on the employee's union activities or other protected acts," no further evidence of nexus is required. (*County of Riverside* (2018) PERB Decision No. 2591-M, adopting proposed decision at p. 63.) The direct evidence of discrimination in this case makes it unnecessary to review circumstantial evidence, but that evidence, too, supports our alternative finding. For instance, many avenues existed for the County to avoid such discrimination; there were numerous non-discriminatory bases for assigning work, including basing assignments on skills, seniority, or, most easily, pre-existing schedules if they were created without a discriminatory basis.[40] The County deviated sharply from such unbiased decision-making. It also deviated from norms when it declined to call in full-time nurses ahead of part-time, per diem, contract, registry or traveling nurses. And the County evidenced further animus by preventing nurses from being paid for days

[40] There is no evidence that the County relied on discriminatory criteria in deciding *how many* bargaining unit nurses to schedule on March 7-9 to supplement HSG replacements. For instance, the record reveals no reason to doubt that the County looked at remaining service needs after accounting for the number of replacements it had obligated itself to hire on those days. As discussed above, however, the County readily admits that it took protected activity into account when deciding *which* bargaining unit employees would fill the available slots.

following the strike on which management barred them from work, even though allowing use of accrued paid time off was standard for other types of furlough days.[41]

Finally, the County has not established that it would have taken the same action for a non-discriminatory reason. Indeed, while the County asserts HSG's requirement as its alternative, non-discriminatory basis for preferencing non-strikers over strikers, that argument fails for all the reasons discussed above, including that HSG's requirement related to *any* bargaining unit employee working alongside a replacement, and that HSG waived the requirement for strikers and non-strikers alike in those instances in which the County sought a waiver. The record therefore suggests it is more likely than not that HSG would have agreed to a non-discriminatory approach for assigning post-strike work availabilities to work alongside replacements.

c. The County failed to provide CNA with adequate notice of the HSG contract's minimum shift guarantee, thereby precluding negotiations over the foreseeable effects on bargaining unit employees' work opportunities.

Advance notice and bargaining are the primary means by which the MMBA promotes its central purpose—communication—and would lead to greater understanding and harmony going forward. Work opportunities, hours, and mandatory furlough periods are within the scope of representation. (See, e.g., *Modoc County Office of Education* (2019) PERB Decision No. 2684, p. 10; *City of Long Beach* (2012) PERB Decision No. 2296-M, p. 23; *County of Fresno* (2010) PERB Decision No.

[41] In Part III, we find that MOU section 14.2.1 did not cover the post-strike furlough and that, instead, the County had no prior policies or MOU provisions covering this type of furlough. Nonetheless, the County evidenced discriminatory intent by adopting a more punitive policy for a furlough following protected activity, as compared to furloughs arising from low census under section 14.2.1.

2125-M, adopting warning letter at p. 3; cf. *Dresser-Rand II*, *supra*, 362 NLRB at p. 1101 [noting employer's duty to bargain over how to recall employees after a strike and lockout].) In the present circumstances, the decision to contract with HSG had foreseeable effects on these mandatory subjects of bargaining. The County therefore was required to provide notice and a meaningful opportunity to bargain over the reasonably foreseeable effects of its decision before implementation. (*County of Santa Clara* (2019) PERB Decision No. 2680-M, p. 12.) While we find no independent effects bargaining violation, because the operative complaint included no such allegation and CNA has not pursued such an independent claim as an unalleged violation, the same conduct constitutes a third, independent reason why the County cannot establish that it narrowly tailored its actions to an important business need while limiting harm to protected rights to the extent possible.[42]

Snyder and Culberson admitted that when the County executed its contract with HSG in October 2019, the County had no idea what length strike, if any, CNA or SEIU might call. Since the County had just committed to a five-shift minimum hiring period, the County knew or should have known that it might try to avoid double-paying for nurses by furloughing bargaining unit employees or otherwise reducing their work opportunities for a few days following a strike. There was sufficient time for substantial negotiations before the strike, had the County provided notice of the minimum shift guarantee in October 2019.

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[42] While the parties did not litigate the County's failure to provide notice as part of an independent failure to bargain claim, CNA did submit that the County's lack of notice and deprivation of the opportunity to bargain was part of the County's discrimination against and interference with protected rights.

If the County had provided notice as required, several benefits to sound labor relations would have likely ensued. First, through the bargaining process, the parties might well have worked out a lawful, nondiscriminatory method for assigning limited work opportunities following any strike. Indeed, the focus and reflection associated with bargaining likely would have led the County to seek legal counsel and recognize its duty not to discriminate. The parties likely could have worked out a way for the County to avoid violating the MMBA by use of the LU code, and the County might also have acceded to requests to allow nurses to use paid leave to cover any days they were barred from work. Finally, the parties could have bargained over whether nurses furloughed after the strike were required to remain within range and appear for work if asked.[43]

Even had it proven difficult to reach agreement on some or all effects of the County's decision to bar nurses from work, discussion would have clarified matters on all sides. Indeed, when the County instead waited until the day before the strike to provide notice, a chaotic implementation ensued, in which the County's own managers were unclear on some of the above issues, and bargaining unit nurses even more so. This is not surprising given the short time frame, lack of discussion, and the County's

[43] Advance notice might have mooted all such issues if it led CNA to call a five-day strike to match the minimum shift guarantee. The County's unlawful decision not to provide CNA with advance notice of the HSG contract terms caused CNA to have no basis to make such a decision. Furthermore, the County's conduct led to an anomaly that does not promote sound labor relations: nurses, who provided 10 days' notice of their two-day strike, were barred from work thereafter. SEIU-represented employees, on the other hand, faced no such bar because they provided virtually no notice of their sympathy strike and thereby left the County insufficient time to hire HSG replacements.

eventual decision to treat the post-strike furlough differently from any prior furlough. Thus, for instance, while managers in some cases began marking “F” for furlough on timecards (implying that section 14.2.1 and all its conditions might apply), the County later changed these timecards to “LU,” before later abandoning the LU designation and changing all subject timecards yet again. As a result of the confusion even on management’s side, Culberson misspoke when he and bargaining unit nurses discussed the post-strike mandatory days off, thereby exacerbating confusion among nurses.[44] Culberson also admitted that the County failed to tell them to remain within range to report to work if called in after having been barred from work.

For the foregoing reasons, the County’s tardy notice on March 4, when there was no longer an adequate opportunity to bargain over negotiable effects, increased the tendency to harm protected rights rather than minimizing such tendency to the extent feasible, as PERB precedent required the County to do. Therefore, even had the County established that it had no choice but to accede to a five-shift hiring minimum and that it implemented its decision in a non-discriminatory manner, the County could still not meet its burden of defending its decision to bar certain nurses from work from March 7-9.

[44] Beyond sowing confusion, failure to provide advance notice and an opportunity to bargain also breeds mistrust. As Culberson noted, loss of pay for three days after the strike was significant for nurses. Nurses learning about this extra pay loss on the eve of the strike with no input from or opportunity to consult in advance through their union, combined with the County’s discriminatory focus on strike participants, heightened the extent to which nurses were likely to view the County’s action as retaliatory and undermined CNA’s status as their bargaining representative.

4. Did the County interfere with and/or discriminate against protected rights when it refused to allow nurses to use paid leave for the period following the strike in which they were barred from work, or when it designated nurses' strike time and mandatory time off following the strike as "LU"?

Our above analysis resolves the complaint's interference and retaliation allegations as to the threats contained in the County's March 4 memoranda as well as the County's post-strike implementation in which it barred most striking nurses from work for three days. We turn now to the County's two final adverse actions: refusing to allow nurses to use paid time off for the period following the strike in which they were barred from work; and designating nurses' strike time and mandatory time off following the strike as "LU."

The County allows nurses to use paid leave for furloughs that have no relationship to protected activity. Singling out the post-strike furloughs for differential treatment from all other furloughs is both facially discriminatory and inherently destructive of protected rights. As we proceed to explain, the County has not justified such conduct with a valid business necessity, much less one reflecting circumstances beyond its control leaving it with no other alternative. And even were we to instead apply the *Novato* framework, the County's disparate treatment of post-strike days meets the nexus element, while illustrating that the County would likely have permitted nurses to use paid leave, absent protected activity.

At the hearing in this matter, the County's attorney asked Culberson why the County did not permit nurses to use paid leave to cover days following the strike during which the County barred them from work. Culberson responded that the County does not allow paid leave "to substitute for strike hours." The County's attorney noted

that his question did not relate to the two strike days, and he therefore re-asked the question. Culberson said he did not know why. Similarly, Culberson did not explain why employees who attempted to use paid leave on their timecards were prohibited from doing so.

Snyder testified next, and she had an answer prepared, albeit an inadequate one. Snyder provided the following one-sentence explanation: “We'd be paying the nurses and paying the replacement workers and that was financially not what we could afford.” However, in the normal course of business the County hires per diem or registry nurses to replace nurses who are using their accrued leave, thereby paying out leave time while simultaneously paying a replacement. This is necessary because the County must eventually pay accrued leave, and employees generally have the right to take leave at their discretion. Indeed, on cross-examination Snyder acknowledged that because nurses are eventually paid for all accrued leave, the County would not lose money by having nurses use such leave during the post-strike period.[45] Most importantly, the County has not established that it treats employees comparably during similar furloughs unrelated to protected activity. Thus, Snyder’s testimony does not adequately support the County’s defenses to CNA’s interference and discrimination claims.

[45] Typical low census furloughs, in which nurses are free to use paid leave, illustrate the point. Absent such a furlough, nurses would work on the days in question and use their paid leave on other days, when they would likely need to be replaced by per diem or registry nurses. Thus, a furlough saves the County money because it forces employees to choose between using up accrued leave or not being paid. Snyder’s flawed reasoning, on the other hand, would imply that low census furloughs do not save the County money if the employees choose to use accrued leave.

We similarly find that the County's decision to use the LU code for employee absences—for strike days and for the mandatory days off thereafter—constitutes facial discrimination and also discrimination under the *Novato* framework, especially given that the County could have simply entered "F" for furlough on nurses' timecards. The County also has not established a legitimate business purpose that outweighs the tendency of the County's conduct to harm protected rights. We explain.

There is no dispute that the LU code can be a basis for discipline, nor any dispute that it is used to identify that an employee was not present when scheduled or requested. Here, the County used it for employees who were striking and therefore not subject to discipline, and then for employees whom the County itself had barred from working.[46] The County's primary defense for misusing the LU code was that it had no other code to use and, implicitly at least, did not realize the need for such an alternate code until the night between the third and fourth days of the hearing, five months after CNA's March 2020 strike. We do not find that this explanation outweighs the tendency to harm protected rights or shows an alternative, non-discriminatory basis for the decision; a fortiori, it does not meet the higher standard needed to excuse conduct that is facially discriminatory and/or inherently destructive. As already explained, the

[46] As above, there is no need to examine circumstantial evidence where the employer conduct at issue directly responds to protected activity. To the extent it is relevant, however, the timing evidence is particularly strong, since the County's adverse actions immediately followed protected activity, while the County's eventual fix came much later and only when called to account for its actions. We also infer improper motive from the County's inability to explain why it did not allow employees to use the non-punitive "F" (for furlough) on their timecards for the post-strike furloughs, at least until it created a new code for such situations.

County's tardy decision to create a new payroll code (and to convert all the LU designations) does not constitute an adequate defense; it does, however, lead us to narrow the scope of our remedy, as the County's creation of a new code largely eliminates the need to bar it from using the LU code in future strikes.

The County asserts an additional defense vis-à-vis one category of nurses: those who were scheduled to work on March 7, 8, or 9, were initially barred from working but then were called back, and at that point refused to report. For these nurses, the County claims that its use of the LU code is still warranted and there should be no back pay ordered. We disagree on both counts. While we find below that MOU section 14.2.1 did not cover the post-strike furlough, we also find that nurses were reasonably confused for the reasons already described. Indeed, Culberson's admission that he misspoke, and that the County did not tell nurses to remain within range to report to work if called in, confirms testimony from CNA's witnesses suggesting that they reasonably interpreted Culberson's statements to mean that the County was furloughing nurses under MOU section 14.2.1. Nor are we swayed to a contrary conclusion by the fact that these nurses were asserting their averred section 14.2.1 rights out of solidarity to one another. Because they reasonably believed not only that they had the right to do so but that they could use paid leave to cover the days, it would undercut the MMBA's purposes to deny them any remedy for the County's interference and discrimination.[47]

[47] A "properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice." (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68.) An appropriate remedy therefore should make whole all injured persons or organizations for the full amount of their losses and should withhold from the wrongdoer the fruits of its

III. Unilateral Change Analysis

A unilateral change to a matter within the scope of representation constitutes a per se violation of the duty to meet and negotiate. (*Stockton Unified School District* (1980) PERB Decision No. 143, p. 22.) To establish a prima facie case of an unlawful unilateral change, a charging party must prove that: (1) the employer took action to change policy; (2) the change concerns a matter within the scope of representation; (3) the change has a generalized effect or continuing impact on represented employees' terms or conditions of employment; and (4) the employer reached its decision without first providing advance notice of the proposed change to the employees' union and bargaining in good faith over the decision, at the union's request, until the parties reached an agreement or a lawful impasse. (*County of Merced* (2020) PERB Decision No. 2740-M, pp. 8-9.) Three primary types of policy changes are sufficient to prove the first element: (1) deviation from the status quo set forth in a written agreement or written policy; (2) a change in established past practice; and (3) a newly created policy or application or enforcement of existing policy in a new way. (*Id.* at p. 9.)

The complaint alleged only that the County deviated from the status quo as set forth in MOU section 14.2.1, entitled "Low Census Furlough." In Part III(A) below, we

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violation. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 13.) In addition to serving restorative and compensatory functions, a Board-ordered remedy should also deter future misconduct, so long as the order is not a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the labor relations laws the Board enforces. (*Sacramento City Unified School District* (2020) PERB Decision No. 2749, pp. 10-11; *City of Palo Alto* (2019) PERB Decision No. 2664-M, p. 3.)

find that the County did not unilaterally deviate from section 14.2.1, as that contractual provision does not apply to the County's post-strike furlough.[48]

On the third day of hearing, prior to resting its case-in-chief, CNA moved to amend the complaint to allege that the County deviated from the status quo as set forth in MOU section 14.2. For the reasons discussed in Part III(B) below, we find that the ALJ erroneously denied CNA's motion. However, we also explain that, at this stage, resolving the claim that CNA properly sought to add would require further proceedings, and we decline to order such further proceedings given that the added claim could not lead to a greater remedy.

Significantly, neither the complaint nor CNA's motion to amend the complaint alleged that the status quo was that the County had previously adopted no policies on assigning post-strike work opportunities, post-strike furloughs and use of paid leave, and appropriate payroll codes for use during strikes and post-strike furloughs. For all the reasons set forth above, these are bargainable effects on mandatory subjects of bargaining, and the County implemented new policies on all these topics without notice and an opportunity to bargain. But we do not find a violation because the complaint did not allege this unilateral change theory, and the parties did not litigate it sufficiently to satisfy the unalleged violation doctrine.

A. Alleged deviation from MOU section 14.2.1

The parties exhaustively litigated whether the County implemented a furlough within the meaning of MOU section 14.2.1. We find in favor of the County on this

[48] All pertinent MOU provisions are set out in full, *ante*, at pages 13-18.

issue, concluding that section 14.2.1 did not apply, and the County did not apply that section in a new way.

Our analysis begins with the language of section 14.2.1, which clearly applies only to furloughs resulting from low patient census. While the hospital's census was lower than normal during the March 7-9 furlough, the primary cause of the furlough was not low census but rather the County's use of replacement nurses to cover most of the bargaining unit work. Although some nurses read Culberson's March 4 memoranda to mean that strikers were barred from work following the strike under section 14.2.1, the better reading of the memo is the one Culberson explained in his testimony: the first paragraph to address the issue indicates that the County was furloughing strikers because it hired replacements for a minimum period, while the next paragraph warns that furloughs under section 14.2.1 could become necessary as well, presumably if patient census remained low when the replacement nurses finished their minimum shift guarantee.

As recounted above, Culberson led nurses astray, or at least compounded their confusion, when he misspoke. More generally, confusion among the County's own managers, combined with the County's lack of notice to CNA, contributed to nurses' misunderstanding as to whether section 14.2.1 applied. As described above, these facts form part of the circumstances leading us to remedy the County's interference and discrimination even as to nurses who, citing section 14.2.1, refused to work when the County called them back after initially barring them from their regular shifts. Such reasonable confusion does not, however, mean that section 14.2.1 in fact applied. We

therefore find that CNA has not established a unilateral deviation from that contract provision.

B. Alleged deviation from MOU section 14.2

PERB favors a liberal right to amend pleadings, so that parties are not deprived of the opportunity to have their issues heard on the merits due to legal technicalities. (*Eastern Municipal Water District* (2020) PERB Decision No. 2715-M, p. 8 (*EMWD*).) A party may amend a complaint during a hearing unless the amendment "would result in undue prejudice to other parties." (*Ibid.*; *Contra Costa Community College District* (2019) PERB Decision No. 2669, p. 8.) Notably, "prejudice typically means that a party has been prevented from preparing or presenting evidence or argument. It does not typically mean that an amendment improves one party's pleadings and thereby presents an additional obstacle to the opposing party; were that the case, nearly every proposed amendment would be prejudicial." (*EMWD*, *supra*, PERB Decision No. 2715-M, pp. 11-12.) Even if an amended pleading would prejudice the other party, it is appropriate to grant the requested amendment if the ALJ can order accommodations that sufficiently alleviate the prejudice, typically a continuance that allows additional time to prepare the case. (*Id.* at p. 8.)

This standard remains the same even if a charging party moves to amend its complaint after resting its case-in-chief. (*EMWD*, *supra*, PERB Decision No. 2715-M, p. 9, citing *Contra Costa Community College District*, *supra*, PERB Decision No. 2669, p. 8.) Thus, at any stage, the same core question must be answered: "Is there undue prejudice that cannot be sufficiently mitigated by scheduling additional hearing time after an appropriate continuance?" (*EMWD*, *supra*, PERB Decision No. 2715-M, p. 9.)

In some cases, moreover, a proposed amendment may cause so little prejudice that there is no need for a continuance. (*Ibid.*)

In its initial charge, CNA premised its unilateral change claim solely on an alleged change to the status quo as set forth in MOU section 14.2.1. CNA maintained that claim in its first amended charge, while adding that the County also changed the status quo as set forth in the immediately preceding provision, MOU section 14.2, entitled "Short-Term Staff Reductions – SJGH." In processing the charge, however, OGC neither dismissed this allegation nor included it in the complaint.

During cross-examination on the first day of hearing, Marilyn Scheid, a bargaining unit nurse, testified that MOU section 14.2 establishes a program allowing the hospital to reduce staff in the short term based on patient census and staffing considerations, but she has never seen it used. Scheid then testified that section 14.2.1, which the hospital uses regularly, allows furloughs when there is a low census within a particular department. Scheid also testified that, in past instances in which management has implemented a low census furlough, management has not determined the need for such a furlough three days in advance, as management did here with respect to the post-strike days.

On the third day of the formal hearing, prior to resting its case-in-chief, CNA orally moved to amend the complaint to allege that the County changed the status quo not only as set forth in MOU section 14.2.1, but also as set forth in section 14.2. CNA specifically proposed to amend the complaint to allege that the County, when it denied post-strike work opportunities based on nurses' strike participation and denied them the right to use accrued leave, deviated from provisions in section 14.2 requiring that:

(1) a short-term staffing reduction must affect part-time employees first, followed by regular employees in seniority order; (2) employees subject to such a short-term staffing reduction may use paid leave to cover the absence; and (3) employees subject to such a short-term staffing reduction are to be called back to work in reverse order of the reduction.

The County orally opposed CNA's motion. The County argued, in part, that "there must have been a reason" that OGC did not include MOU section 14.2 in the complaint. As a matter of law, however, if OGC does not address an allegation in a charge, we make no assumption that OGC rejected the allegation. (See, e.g., *Trustees of the California State University* (2017) PERB Decision No. 2522-H, pp. 6, 18-19 [remand to OGC for further investigation where Board determined that dismissal did not address alternate theory of violation]; *Trustees of the California State University* (2014) PERB Decision No. 2384-H, pp. 4-5 [remand to OGC for further investigation of any factual or legal issues that were not fully or properly considered]; PERB Reg. 32620, subd. (d).) Indeed, the fact that CNA had included section 14.2 in its charge strengthens rather than weakens its argument in favor of amending the complaint, since the County was on notice about the claim and CNA was not to blame for OGC's omission.

The County also argued that CNA had already rested its case-in-chief, but the ALJ correctly noted that was not true and that it would not, in any event, constitute a ground for barring CNA's motion. Furthermore, while the County claimed the first two

days of hearing had featured no testimony about practices under MOU section 14.2, that would not constitute a basis for barring CNA's motion.[49]

On the determinative question of prejudice, the County presented no substantial or persuasive reason why it could not defend against CNA's renewed claim regarding section 14.2. In lieu of demonstrating that it had "been prevented from preparing or presenting evidence or argument" (*EMWD*, *supra*, PERB Decision No. 2715-M, pp. 11-12), the County made the above-noted arguments and summarily asserted that "we've got a real prejudice problem." The County gave few specifics about such alleged prejudice; it appears that the alleged prejudice was having to defend against another claim. As noted above, that would not constitute prejudice unless the County could show that CNA, by delaying in bringing its motion, had prevented the County from being able to defend the claim even with a reasonable continuance.

Moreover, the record does not reflect any reason why a continuance would not have been sufficient to mitigate any material prejudice. The Board expedited this matter at CNA's request. If a continuance were needed to mitigate material prejudice, this would run counter to the need CNA saw to expedite the matter, but in such an instance the ALJ should provide the charging party with a choice of foregoing its amendment or seeing its case delayed.

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[49] The County's claim was also inaccurate. While cross-examining Scheid on the first day of hearing, the County's attorney posed two questions that specifically asked about that MOU provision. Although this examination strengthened CNA's motion, our analysis demonstrates that the motion would have been valid in any event.

At the outset of the parties' arguments on CNA's motion, the ALJ repeatedly noted that PERB liberally grants motions to amend. The ALJ also correctly identified that the "real issue is what prejudice will come to the County." However, he did not base his ruling on any analysis of alleged prejudice. Rather, in his eventual oral ruling on CNA's motion, the ALJ did not mention prejudice at all. The ALJ instead stated that he was denying CNA's motion because section 14.2 is a less good fit for what occurred when compared to section 14.2.1.

The ALJ's ruling was erroneous. First, the ALJ did not base his ruling on demonstrated prejudice to the County. Second, the ALJ ruled on the merits of the section 14.2 issue prior to the close of the hearing, which is only appropriate if the pleadings (together with any stipulations and any facts that may be administratively noticed) establish that there are sufficient undisputed facts to make a hearing on one or more issues unnecessary. (*EMWD*, *supra*, PERB Decision No. 2715-M, pp. 13 & 15.) Notably, the County had made no such contention.

While there can be occasions in which an ALJ may, on her or his own accord, raise potential summary judgment on a claim, the ALJ here did so without notice to the parties. The ALJ also did so without an adequate substantive basis. Whereas section 14.2.1 covers furloughs resulting solely from low patient census, section 14.2 covers short term staff reductions "based on patient census/staffing considerations." Section 14.2 therefore describes a broader set of circumstances than the low census program found in section 14.2.1, and, indeed, "patient census/staffing considerations" arguably captures both the primary grounds for the County's decision—the minimum shift guarantee for HSG replacements—as well as the more minor role that low patient

census played in reducing work opportunities from March 7-9. CNA therefore had a colorable claim that the County deviated from section 14.2, as well as a separate colorable claim that the County's actions amounted to applying section 14.2 in a new way. Because the ALJ sought to resolve a theory on the merits without hearing evidence on it, he should have applied "the standard governing the pre-complaint investigation of an unfair practice charge." (*Cal Fire Local 2881 (Tobin)* (2018) PERB Decision No. 2580-S, p. 2.) In those circumstances, a hearing is required if there were, as here, "contested, colorable legal theories." (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 13.)

Although the ALJ should have granted CNA's motion to amend, we decline to remand for the parties to litigate the additional unilateral change claim. This decision best effectuates the MMBA's purposes because remand would substantially delay the outcome of this matter without providing an opportunity for different make-whole relief. (*City of Glendale* (2020) PERB Decision No. 2694-M, pp. 58-59 [judicial appeal pending].)

ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the Public Employment Relations Board (PERB) finds that the County of San Joaquin (County) violated the Meyers-Milias-Brown Act (MMBA), codified at Government Code, section 3500 et seq. Specifically, the County violated MMBA sections 3503, 3506 and 3506.5, subdivisions (a) and (b), and PERB Regulation 32603, subdivisions (a) and (b), by interfering with and discriminating

against protected rights of the California Nurses Association (CNA) and nurses it represents. All other allegations in the complaint are dismissed.

Pursuant to MMBA section 3509, subdivision (b), it hereby is ORDERED that the County, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with or discriminating against employee rights protected by the MMBA.

2. Interfering with CNA's right to represent employees under the MMBA.

3. Barring nurses represented by CNA from work as a result of a minimum shift guarantee in a strike replacement contract, without: (a) seeking in good faith to shorten or eliminate the minimum shift guarantee before entering into the contract; (b) providing timely notice regarding any decision to guarantee replacement workers a minimum work period or to modify the terms of a prior guarantee, and, if requested, bargaining in good faith over the potential effects on bargaining unit employees; and (c) treating all nurses equally irrespective of whether they struck or engaged in any other actual or perceived protected activity.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Provide all lost compensation, including but not limited to wages, differentials, accruals, and other benefits, to those nurses who were scheduled to work on March 7, 8, or 9, 2020, but whom the County barred from work on such a scheduled day. This Order shall include nurses who were subsequently called back to

work but did not return during that period, irrespective of the reason they did not do so. This Order shall include interest at a rate of 7 percent per year.

2. Unless the parties agree otherwise, permit nurses to use paid leave time for furloughs occasioned by a minimum shift guarantee in a strike replacement contract to the same extent as is permitted for furloughs resulting from reduced patient census or other business reasons.

3. Remove all "Leave Unauthorized" codes from the payroll and timekeeping records of any nurses who struck on March 5-6, 2020, or who were barred from work on March 7-9, 2020, irrespective of whether such nurses were subsequently called back to work during that period.

4. Rescind any discipline issued to nurses based, in whole or in part, on absences from March 5-9, 2020, occasioned by the strike or the County's refusal to allow employees to return to work, and make any impacted nurses whole for all lost compensation and benefits plus interest at a rate of 7 percent per year.

5. Within 10 workdays after this decision is no longer subject to appeal, post at all work locations in the County where notices to CNA-represented employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the County, indicating that the County will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the County to communicate with its employees in the bargaining unit represented by CNA. Reasonable steps shall be

taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.[50]

6. Written notification of the actions taken to comply with the terms of this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The County shall provide reports, in writing, as directed by the General Counsel, or his designee. All reports regarding compliance with this Order shall be served concurrently on CNA.

Chair Banks and Member Paulson joined in this Decision.

Member Shiners' concurrence begins on p. 87.

[50] In light of the ongoing COVID-19 pandemic, Respondent shall notify PERB's Office of the General Counsel (OGC) in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If Respondent so notifies OGC, or if Charging Party requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all parties. OGC shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing Respondent to commence posting within 10 workdays after a majority of employees have resumed physically reporting on a regular basis; directing Respondent to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing Respondent to mail the Notice to those employees with whom it does not customarily communicate through electronic means.

SHINERS, Member, concurring: I agree with the dismissal of the unilateral change allegation for the reasons stated in the majority opinion. I also agree that the County of San Joaquin discriminated against registered nurses represented by the California Nurses Association (CNA) as alleged in the complaint. I disagree, however, with aspects of the legal framework the majority applies in its analysis. I therefore write separately to explain my reasoning for finding discrimination.

FACTUAL BACKGROUND[51]

This case arises from a strike by CNA-represented County nurses on March 5 and 6, 2020. In preparation for a potential strike, the County entered into a strike replacement staffing agreement with HealthSource Global Staffing (HSG) in October 2019. Under the agreement, the County had to pay each replacement nurse for five 12-hour shifts even if the nurse did not work a full 60 hours.

On February 24, 2020, CNA gave the County written notice that nurses would strike from 7:00 a.m. on March 5 through 6:59 a.m. on March 7. The notice said all striking nurses would return to work unconditionally starting with shifts beginning at 7:00 a.m. on March 7.

On March 4, 2020—the day before the strike began—San Joaquin General Hospital (SJGH) Chief Executive Officer David Culberson sent a memorandum to CNA-represented nurses. The memorandum informed them that the County had contracted with a staffing agency to provide replacement nurses during the strike—the first time CNA and the represented nurses learned of the HSG staffing agreement.

[51] I join in the majority's factual findings, and briefly summarize here the facts pertinent to my reasoning on the discrimination issue.

The memorandum said that, because of the contractual commitment to pay replacement nurses for five shifts, nurses who participated in the strike would not be allowed to return to work in the three days following the strike, i.e., not until March 10, unless they were called to work earlier by SJGH management.

Upon their return to work, several nurses—believing the County had furloughed them—attempted to use accrued vacation, compensatory time off, or holiday hours for shifts missed on the three days they were not allowed to work. Likewise, some managers marked "F" for furlough on employees' timecards for the three days following the strike. Ultimately, the County did not allow any nurses who participated in the strike to use accrued leave to receive pay for the shifts they were not allowed to work on March 7-9, 2020. The County also marked shifts nurses missed because of the strike and the ensuing three-day delay in allowing strikers to return to work as "Leave Unauthorized (LU)," a designation that could subject nurses to discipline for unexcused absences.

DISCUSSION

The complaint alleges that the County took the following adverse actions against CNA-represented nurses: (1) notifying nurses on March 4, 2020, that striking nurses would not be allowed to return to work until March 10 because of the County's contractual commitment to pay replacement nurses for five shifts; (2) preventing most nurses who participated in the strike from returning to work until March 10 and forbidding them from using vacation time, compensatory time off, or holiday hours to receive compensation for the mandatory time off; and (3) noting "Leave Unauthorized"

on nurses' timecards for strike days and for mandatory days off following the strike.[52] The complaint alleges the County violated MMBA sections 3506 and 3506.5, subdivision (a), and PERB Regulation 32603, subdivision (a), by taking these actions because of the nurses' participation in the strike.[53] The complaint also alleges this same conduct interfered with CNA's right to represent the nurses but does not allege that the adverse actions interfered with employee rights under the MMBA.[54]

I. Prima Facie Case

Under *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*), a charging party may establish "discrimination in its simplest form" via evidence of "employer conduct that is facially or inherently discriminatory, such that the employer's unlawful motive can be inferred without specific evidence." (*Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 14 (*LA Superior Court*).) "This type of discrimination may manifest where an employer provides pay or benefits or other working conditions based on union

[52] Although the County's answer denied these actions were adverse, it made no argument on that point in its briefing. The argument therefore has been waived. (*Colusa Unified School District* (1983) PERB Decision No. 296, p. 4.)

[53] The MMBA grants public employees a qualified right to strike. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 33.)

[54] While I agree with the majority that PERB's unalleged violation doctrine has been met with respect to an independent allegation of interference with employee rights, I see no reason to address such an allegation because finding an interference violation would be cumulative and would not affect the remedy. (*Fresno County In-Home Supportive Services Public Authority*, *supra*, PERB Decision No. 2418-M, p. 20.)

membership or other protected activity." (*Ibid.*; *City of Yuba City* (2018) PERB Decision No. 2603-M, p. 10.) Of particular relevance here, denying a benefit to strikers while giving the same benefit to non-strikers is facially discriminatory. (*NLRB v. Great Dane Trailers, Inc.* (1967) 388 U.S. 26, 32 (*Great Dane*).)[55]

All of the adverse actions here—threatening a three-day delay in strikers' return to work, actually barring strikers from working during the three days after the strike, denying the use of accrued leave to receive pay for missed shifts on those days, and designating missed shifts during the strike and the three days afterward as "LU"—were taken only against those nurses who participated in the strike. Nurses who did not strike, either under the parties' "line pass" agreement or of their own accord, were not subject to the three-day bar on working and thus did not suffer loss of pay or receive LU notations on their timecards for those days. This differential treatment based solely on strike participation is sufficient to establish a prima facie case of discrimination.

II. Appropriate Level of Scrutiny

"If the employer has engaged in [facially discriminatory] conduct, it bears the burden of justifying its conduct by coming forward with a legitimate business justification." (*City of Yuba City*, *supra*, PERB Decision No. 2603-M, p. 10, citing

[55] Federal judicial and administrative precedent is not binding on PERB, though we may find such precedent persuasive in construing California's public sector labor relations statutes. (*City of Sacramento* (2020) PERB Decision No. 2702-M, p. 9, fn. 13.) Federal precedent is particularly relevant here because "*Great Dane* provides the most direct authority for PERB's interpretation and application of *Campbell* and, inasmuch as *Campbell* is controlling authority for PERB, its explicit reliance on *Great Dane* makes that case . . . controlling precedent for PERB as well." (*Regents of the University of California* (2018) PERB Decision No. 2610-H, p. 79 (*Regents*).)

Campbell, *supra*, 131 Cal.App.3d at p. 424; *Great Dane*, *supra*, 388 U.S. at p. 34.) As discussed *post*, the County has offered business justifications for its discriminatory conduct. It therefore is necessary to determine what level of scrutiny applies to those justifications. (*Regents*, *supra*, PERB Decision No. 2610-H, p. 86.)

The appropriate level of scrutiny is determined by how much the employer's discriminatory conduct harms protected rights. If the employer's conduct is inherently destructive of protected rights, it bears a heavy burden to prove it acted because of a legitimate and substantial business reason that outweighed the harm to protected rights. (*International Paper Co. v. NLRB* (D.C. Cir. 1997) 115 F.3d 1045, 1048.) On the other hand, if the employer's conduct results in comparatively slight harm to protected rights, the employer need only prove that its "conduct was 'reasonably adapted' to achieve the legitimate business purposes asserted."[56] (*Regents*, *supra*, PERB Decision No. 2610-H, p. 90.) In such cases, "the charging party must produce evidence of unlawful motive to sustain the charge." (*Ibid.*, citing *Campbell*, *supra*, 131 Cal.App.3d at pp. 423–424.)

Inherently destructive "conduct carries with it unavoidable consequences which the employer not only foresaw but which he must have intended and thus bears its own indicia of intent." (*Regents*, *supra*, PERB Decision No. 2610-H, p. 80, quoting *Great Dane*, *supra*, 388 U.S. at p. 33, internal quotations and citation omitted.) Generally, inherently destructive conduct is "conduct that has far reaching effects

[56] "Comparatively slight" does not mean the harm actually is slight, just that it is less harmful than inherently destructive conduct. (*City of San Diego* (2020) PERB Decision No. 2747-M, pp. 36-37, fn. 19 (*San Diego*).)

which would hinder future bargaining and conduct that creates visible and continuing obstacles to the future exercise of employee rights." (*International Paper Co.* (1995) 319 NLRB 1253, 1269, internal quotations and citations omitted.) "The more severe the consequences reasonably perceived by employees to flow from their exercise of [protected] rights, the more likely [ ] that the future exercise of those rights will be chilled." (*Roosevelt Memorial Medical Center* (2006) 348 NLRB 1016, 1018-1019.) "The act of paying accrued benefits to one group of employees while announcing the extinction of the same benefits for another group of employees who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity." (*Campbell*, *supra*, 131 Cal.App.3d at p. 423, quoting *Great Dane*, *supra*, 388 U.S. at p. 32; *Santa Monica Community College District* (1979) PERB Decision No. 103, pp. 19-20.)

That is the case here, where threatening to deny strikers pay for up to three days after the strike ended, actually doing so, and then coding missed shifts during the strike and the three days afterward in a way which could subject nurses to discipline has the unavoidable consequence of strongly discouraging nurses from exercising their right to strike.[57] Because the County's adverse actions were inherently destructive of protected rights, its asserted business justifications are subject to heightened scrutiny.

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[57] As I noted in my dissent in *Contra Costa County Fire Protection District* (2019) PERB Decision No. 2632-M (*Contra Costa*), the inherently destructive conduct standard has been criticized as ill-defined and subject to manipulation to achieve a particular result. (*Id.* at pp. 84-87 & fn. 40 (dis. opn. of Shiners, M.).) Whatever the potential shortcomings of the standard, the County's conduct here falls squarely within the bounds of inherently destructive conduct under existing precedent.

In applying heightened scrutiny in cases like this one, I would not require the employer to prove that it acted solely due to circumstances beyond its control and that no alternative course of action was available. (*San Diego*, *supra*, PERB Decision No. 2747-M, p. 36.) In *Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*), the Board, interpreting the Educational Employment Relations Act (EERA, Gov. Code § 3540 et seq.), adopted the "inherently destructive"/"comparatively slight" framework from *Great Dane* but added the requirement that the employer prove "it acted solely due to circumstances beyond its control" to establish its defense when inherently destructive conduct is found. (*State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S, p. 11, overruled in part on other grounds in *LA Superior Court*, *supra*, PERB Decision No. 2566-C.) This requirement has no analog in federal precedent, and no other jurisdiction that applies the *Great Dane* framework—federal or state—has modified it to include such a requirement. (E.g., *NLRB v. Oregon Steel Mills, Inc.* (9th Cir. 1995) 47 F.3d 1536, 1538; *Town of Winchester v. Connecticut State Bd. of Labor Relations* (Conn. 1978) 402 A.2d 332, 342-343; *Pasco County School Bd. v. Florida Public Employees Relations Commission* (Fla.Dist.Ct.App. 1977) 353 So.2d 108, 117, fn. 4.) The California Supreme Court has applied *Great Dane* in discrimination cases under the Agricultural Labor Relations Act without requiring a "circumstances beyond its control" defense. (*Rivcom Corp. v. Agricultural Labor Relations Bd.* (1983) 34 Cal.3d 743, 757-758.) Most importantly, the *Campbell* court applied *Great Dane* without a "circumstances beyond its control" defense to find that the city employer discriminated against

employee organizations in violation of the MMBA. (*Campbell*, *supra*, 131 Cal.App.3d at pp. 423-424.)[58]

Although PERB need not interpret the statutes it administers consistently with the National Labor Relations Act (NLRA), our departure from federal precedent should be supported by dissimilar statutory language or a substantial policy reason to adopt a different rule for California's public sector. (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 306-308.) *Carlsbad* noted that, unlike the NLRA, EERA's prohibitions on discrimination and interference are in the same provision. (*Carlsbad*, *supra*, PERB Decision No. 89, pp. 6-9.) But nowhere in the decision did the Board explain why requiring an employer to prove its inherently destructive conduct was justified by "circumstances beyond its control" is warranted in California's public sector, especially when such a defense has not been imposed in any other jurisdiction.[59] Nor does the text of EERA or its legislative history reveal the

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[58] The majority suggests that in *Superior Court v. Public Employment Relations Bd.* (2018) 30 Cal.App.5th 158 (*Superior Court*), the court of appeal affirmed the entire *Carlsbad* test. The court, however, addressed only the balancing of interests for comparatively slight harm, not the employer's burden to justify inherently destructive conduct. (*Id.* at pp. 196-197.) *Superior Court* thus did not affirm the "circumstances beyond its control" defense. (See *County of Orange* (2019) PERB Decision No. 2657-M, p. 15 ["It is axiomatic that cases are not authority for propositions not considered"].)

[59] The *Carlsbad* Board notably did not justify its adoption of the "circumstances beyond its control" defense by claiming—as the majority does here—that the PERB-administered statutes provide greater protection against discrimination and interference than does the NLRA. Indeed, because EERA and the MMBA were patterned on the NLRA, there is a presumption that the Legislature intended for both statutes to incorporate the discrimination and interference standards from federal law. (*Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551, 557; see *Campbell*, *supra*, 131 Cal.App.3d at pp. 422-423 [applying the *Great Dane* framework

Legislature intended to impose such a high burden on employers to disprove a discrimination or interference claim.

Given the absence of any justification for departing from federal precedent, I would follow *Great Dane* and *Campbell* and not require an employer to prove its inherently destructive conduct was justified by "circumstances beyond its control." As I have previously noted, pairing the concept of inherently destructive conduct with a "circumstances beyond its control" defense allows PERB "to limit employer defenses in order to produce a preferred outcome" by simply deeming the employer's conduct to be inherently destructive. (*Contra Costa*, *supra*, PERB Decision No. 2632-M, p. 82 (dis. opn. of Shiners, M.); see *Regents*, *supra*, PERB Decision No. 2610-H, p. 58 [recognizing that "the level of scrutiny used to evaluate the employer's affirmative defense (under the 'inherently destructive'/'comparatively slight' framework) may even determine the outcome of the case"].) To lessen the likelihood that a finding of inherently destructive conduct could be used to achieve a particular outcome, I would not limit the employer's defense to proving it acted because of "circumstances beyond its control." Instead, I would follow the underlying essence of *Carlsbad*—that the "interests of the parties should be placed in balance and the matter resolved accordingly" (*Carlsbad*, *supra*, PERB Decision No. 89, p. 9)—by allowing the employer to assert as a defense any business justification, regardless of whether motivated by

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to a discrimination claim because MMBA section 3506 is "patterned closely upon analogous provisions of the" NLRA].)

internal or external circumstances, and balancing that justification against the harm to protected rights.[60]

III. The County's Asserted Business Justifications

The County defends its differential treatment of striking nurses by asserting that the staffing agreement with HSG required the County to pay replacement nurses for shifts on the three days following the strike, and that under National Labor Relations Board (NLRB) precedent such a contractual obligation constitutes a substantial and legitimate business justification for delaying strikers' return to work. Under NLRB precedent, economic strikers must be reinstated and temporary replacements released upon the strikers' unconditional offer to return to work. (*Harvey Mfg., Inc.* (1992) 309 NLRB 465, 466.) The NLRB also has recognized that a contractual minimum hours guarantee may provide a legitimate and substantial business justification for delaying reinstatement of strikers when agreeing to such a guarantee was necessary to obtain temporary replacements so the employer could continue its operations during the strike.[61] (*Pacific Mutual Door Co.* (1986) 278 NLRB 854, 856.)

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[60] This approach is not as radical as the majority suggests. Federal courts, applying a similar standard, have "described the employer's burden in justifying inherently destructive conduct as 'heavy . . . if not impossible.'" (*International Paper Co. v. NLRB*, *supra*, 115 F.3d at p. 1048.) Elimination of a "circumstances beyond its control" defense thus will not subject an employer to a lower standard of proof but will merely remove an arbitrary requirement that has no basis in statutory text or case law.

[61] Unlike my colleagues, I see no need to fashion a multi-part test to determine whether a public employer has a legitimate and substantial business justification for delaying strikers' return to work. While each of the three elements of the majority's test is relevant to whether the County discriminated against striking nurses in this case, their relevance may vary case by case and other factors not present here may also be relevant. I therefore would not cast these three elements in stone as the only way to mount a successful defense to a discrimination claim in this context. Because I would

Although the County relies heavily on *Pacific Mutual Door* and NLRB decisions following it, this line of cases is unavailing because the County did not prove that it had to enter into a staffing agreement with a five-shift guarantee in order to secure replacement nurses to continue critical inpatient services during the strike. The County contacted three staffing agencies about strike replacements. Two of them sent draft contracts with four-shift minimums for a strike of two days or more. The third agency, HSG, sent a draft contract with a five-shift minimum. In the evidentiary record are contracts between HSG and other public employers for strike replacement nurses that contain a four-shift minimum for a strike of two or more days. The record also includes a declaration from a human resources director of one of these public employers stating that a four-shift minimum for strikes of two days or more is "a common provision" for "strike replacement agreements."[62] And while the HSG official who executed the agreement with the County, Tabi Ebahou, testified that a five-shift minimum is industry standard, he also recalled that HSG had negotiated with employers seeking to reduce the minimum shift requirement. It cannot be concluded from this evidence that a five-shift minimum guarantee is required to obtain replacement nurses for a two-day strike.

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not impose the three-part test, I do not join that portion of the order requiring the County to satisfy the three-part test in order to delay the return of strikers in the future.

[62] Although the declaration is hearsay, it can be considered because it is corroborated by the non-hearsay contract between the declarant's public employer and HSG. (PERB Reg. 32176; see *County of Santa Clara* (2019) PERB Decision No. 2670-M, p. 21, fn. 23 [considering hearsay documents that were corroborated by non-hearsay evidence]; PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.)

Nor did the County prove that HSG insisted on the five-shift guarantee as a condition for providing replacement nurses for the March 5-6, 2020 strike. As Ebahou admitted, HSG previously had negotiated with employers over the minimum shift guarantee. In this case, the County asked to lower the contractual interest rate and HSG agreed. But the County executed the agreement without asking whether the minimum shift guarantee could be changed. Not until after CNA gave its notice of a two-day strike did County Chief Nursing Officer Belva Snyder call HSG about reducing the minimum shift guarantee. According to Snyder, the HSG representative, McInnes, responded, "this is our standard contract," and the County did not pursue the issue further.

This evidence fails to establish that HSG insisted on the five-shift minimum as a condition for providing replacement nurses on March 5-6, 2020. First, McInnes did not testify, and his statement to Snyder that a five-shift minimum was standard therefore is hearsay. Because there is no non-hearsay evidence in the record establishing that a five-shift minimum is industry standard for a two-day strike, we cannot consider McInnes's statement as evidence of that fact. (PERB Reg. 32176; see *Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 24 [hearsay evidence may be considered when it corroborates non-hearsay evidence].) Second, Ebahou testified that if the County had sought to change the minimum shift guarantee, McInnes likely would have consulted with him about the request. But McInnes did not do so, indicating the County never asked to change the minimum shift guarantee. Finally, Snyder's testimony about the call with McInnes was vague and she appeared to have limited recall of what transpired on the call. This, coupled with her incentive to

characterize the call as a request to reduce the minimum shift guarantee to help the County's litigation position, renders Snyder's testimony suspect.[63]

Further undermining the County's asserted justification is how the County treated nurses who were not scheduled to work during the strike. Because none of these nurses was on strike during a scheduled shift, the County did not need to hire replacement workers to fill their positions. Its stated basis for barring striking nurses from returning to work for three days—that under the HSG staffing agreement it had to pay a replacement nurse to fill their position—therefore does not apply to this group of nurses. But these nurses nevertheless suffered the same adverse actions as their counterparts who struck during their shifts. The County's failure or refusal to limit the adverse actions to those nurses who actually were replaced belies its stated reason for the three-day delay and supports an inference that the adverse actions were intended to discourage or punish participation in strike activity.

The County's justification also is weakened by the fact that the County waited until the day before the strike to inform CNA and the nurses it represents about the HSG agreement containing a five-shift minimum guarantee. The County has asserted no business reason for withholding this information from CNA and the nurses until the strike was imminent. Had CNA and the nurses known of the five-shift guarantee prior to deciding whether to strike, they could have weighed the potential loss of up to five days' pay (instead of two) as part of their decision making process. As it was, nurses

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[63] A witness's "capacity to . . . recollect" and "bias, interest or motive" are relevant in determining the credibility of testimony. (*State of California (Department of Corrections and Rehabilitation)* (2012) PERB Decision No. 2285-S, p. 10, fn. 15, citing Evid. Code, § 780.)

learned of the shift guarantee on the eve of the strike, requiring them to quickly decide whether to risk losing more than double the amount of pay they anticipated foregoing during the strike. Under these circumstances, the County's 11th hour reveal of the five-shift guarantee to CNA and the nurses suggests it did so to coerce nurses not to strike.[64]

In sum, the County failed to prove that it had to agree to a five-shift minimum guarantee to secure replacement nurses for the March 5-6, 2020 strike. The County thus has not established a legitimate and substantial business justification for barring strikers from returning to work until March 10.

Turning to the County's refusal to allow striking nurses to use accrued leave time on the three days it barred them from working after the strike ended, the County argues it was justified in doing so because the County could not afford to pay its nurses and replacement nurses for the same days. But, as Snyder admitted on cross-

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[64] I disagree with the majority's injection of a notice and meet and confer obligation into the discrimination analysis. It very well may be, as the majority finds, that a public employer has an obligation to provide notice to the union and meet and confer upon request over the effects of a decision to enter into a strike replacement contract with a minimum shift guarantee. But CNA did not allege such a violation in its charge, the complaint did not allege one, and the parties did not litigate one. We therefore have no basis to determine whether such an obligation existed here, much less whether the County breached it. (See *Tahoe-Truckee Unified School District* (1988) PERB Decision No. 668, p. 10 ["The province of the Board is to resolve, not to find, issues"].) The majority nonetheless finds such an obligation and bootstraps it into its new discrimination test, further breaking down the distinction between discrimination and bargaining violations. (See *Contra Costa*, *supra*, PERB Decision No. 2632-M, pp. 68-69 (dis. opn. of Shiners, M.) [observing that majority's finding that district's bargaining proposal constituted interference and discrimination allowed charging party to obtain a remedy it could not have received for a bargaining violation].)

examination, the County pays nurses for accrued leave whenever they take it. At times, the County must temporarily replace a nurse who is on paid leave with a per diem or registry nurse. Paying a nurse for accrued leave time at the same time it pays a replacement worker for that nurse thus is a routine practice. The County has offered no credible reason why it could not have followed that practice during the three days after the March 5-6, 2020 strike, and thus has failed to prove a legitimate and substantial business justification for denying striking nurses use of accrued leave time on March 7-9, 2020.

Finally, the County claims it designated shifts that striking nurses missed during the strike and the following three days as "LU" because it had no other code it could use to designate the missed time. Yet some managers initially coded the missed time as "F" for furlough. The County does not explain why it could not have allowed that non-punitive designation to remain until a new code was created. Given that the "LU" designation was, at best, a product of administrative convenience, the County has not established it had a legitimate and substantial business reason for using it over other possible, non-punitive designations. And, as the majority notes, the County's creation several months later of a new payroll code for the missed time does not absolve it of liability, but merely impacts the appropriate remedy.

CONCLUSION

The County's actions of threatening and then actually barring striking nurses from returning to work for three days after the strike ended, denying them use of accrued leave to receive compensation for that mandatory time off, and then designating shifts missed because of the strike and mandatory three-day delay as

“Leave Unauthorized” were inherently destructive of protected rights because they penalized nurses for exercising their right to strike in a way that strongly discouraged nurses from exercising that right in the future. The County has not met its heavy burden to establish a legitimate and substantial business justification for any of these actions. I accordingly join my colleagues in finding that the County discriminated against CNA-represented nurses in violation of MMBA sections 3506 and 3506.5, subdivision (a), and PERB Regulation 32603, subdivision (a), as alleged in the complaint.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SA-CE-1141-M, *California Nurses Association v. County of San Joaquin*, in which all parties had the right to participate, it has been found that the County of San Joaquin violated the Meyers-Milias-Brown Act (MMBA), Government Code sections 3503, 3506 and 3506.5, subdivisions (a) and (b), and Public Employment Relations Board Regulation 32603, subdivisions (a) and (b), by interfering with and discriminating against protected rights of the California Nurses Association (CNA) and nurses it represents.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Interfering with or discriminating against employee rights protected by the MMBA.

2. Interfering with CNA's right to represent employees under the MMBA.

3. Barring nurses represented by CNA from work as a result of a minimum shift guarantee in a strike replacement contract, without: (a) seeking in good faith to shorten or eliminate the minimum shift guarantee before entering into the contract; (b) providing timely notice regarding any decision to guarantee replacement workers a minimum work period or to modify the terms of a prior guarantee, and, if requested, bargaining in good faith over the potential effects on bargaining unit employees; and (c) treating all nurses equally irrespective of whether they struck or engaged in any other actual or perceived protected activity.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE MMBA:

1. Provide all lost compensation, including but not limited to wages, differentials, accruals, and other benefits, to those nurses who were scheduled to work on March 7, 8, or 9, 2020, but whom we barred from work on such a scheduled day. This Order shall include nurses who were subsequently called back to work but did not return, irrespective of the reason they did not do so. This Order shall include interest at a rate of 7 percent per year.

2. Unless the parties agree otherwise, permit nurses to use paid leave time for furloughs occasioned by a minimum shift guarantee in a strike replacement contract to the same extent as is permitted for furloughs resulting from reduced patient census or other business reasons.

3. Remove all “Leave Unauthorized” codes from the payroll and timekeeping records of any nurses who struck on March 5-6, 2020, or who were barred from work from March 7-9, 2020, irrespective of whether such nurses were subsequently called back to work.

4. Rescind any discipline issued to nurses based, in whole or in part, on absences from March 5-9, 2020, occasioned by the strike or our refusal to allow employees to return to work, and make any impacted nurses whole for all lost compensation and benefits plus interest at a rate of 7 percent per year.

Dated: _____ COUNTY OF SAN JOAQUIN

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED, OR COVERED WITH ANY OTHER MATERIAL.