

**Correctional Medical Services, Inc. and Civil Service
Employees Association, Local 1000, AFSCME.**
Case 3–CA–23855

May 31, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

Upon a charge filed on October 1, 2002, by Civil Service Employees Association, Local 1000, AFSCME (the Union), the General Counsel of the National Labor Relations Board issued a complaint on January 6, 2003, against Correctional Medical Services, Inc. (the Respondent or CMS), alleging that it had engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the National Labor Relations Act. Copies of the charge and complaint were served on the Respondent. The Respondent filed a timely answer denying the commission of any unfair labor practices.

On March 24, 2003, the Union, the Respondent, and the General Counsel filed with the Board a joint motion to approve their stipulation of facts and to transfer this proceeding to the Board. They agreed that the charge, the complaint and notice of hearing, the answer, and the stipulation and accompanying exhibits constitute the entire record in this case, and that no oral testimony is necessary or desired by any of the parties. The parties waived a hearing, the making of findings of fact and conclusions of law, and the issuance of a decision by an administrative law judge. On June 9, 2003, the Executive Secretary, by direction of the Board, issued an order approving the stipulation, and transferring the proceeding to the Board. The Union, the Respondent, and the General Counsel thereafter each filed a brief. In addition, the Respondent filed an answering brief.

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

On the entire record in the case, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business located in Albany, New York, is engaged in the business of operating medical clinics at various correctional facilities throughout the United States, including its Albany, New York facility. The Respondent derives gross revenues in excess of \$250,000 at its Albany facility, and purchases and receives at that facility goods and materials valued in excess of \$5000 directly from points outside of New

York. The parties have stipulated, and we find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, that its Albany, New York facility is a health care institution within the meaning of Section 2(14) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The issues before the Board are whether the Respondent violated Section 8(a)(1) by interrogating employees about their participation in certain conduct, Section 8(a)(3) by terminating them for that conduct, and Section 8(a)(1) by subsequently threatening employees with discipline if they engaged in such conduct.¹ A principal subsidiary issue is whether the conduct amounted to picketing within the meaning of Section 8(g).

For the reasons set forth below, we find that the Respondent did not violate the Act.

A. Factual Background

On April 1, 2002,² the Respondent began operating the medical clinic at the Albany County Correctional Facility (Albany jail), an 840-inmate facility in Albany, New York, under a 3-year contract with the State of New York.³

The clinic operates around the clock, providing chronic care, emergency care, lab services, dental care, and minor surgical services. It sees over 100 inmate patients a day. Although the number of employees fluctuates, the clinic usually employs one physician, one physician's assistant, one dental assistant, eight registered nurses, six licensed practical nurses, one office clerical, one medical records clerk, and two other individuals whom the parties have stipulated are supervisors.

The Union represents the correctional officers at the jail, who are employed by the State of New York. The

¹ The parties, in their stipulation, stated the issues as follows:

1. Did Respondent, a health care institution, violate Section 8(a)(1) and (3) of the Act when it terminated employees who participated in off-duty "conduct" (footnote omitted) concerning their right to unionize that was conducted without advance notice to Respondent?

2. Did Respondent independently violate Section 8(a)(1) by threatening its employees with discipline, and interrogating them, concerning their participation in this off-duty "conduct?"

3. Did this off-duty "conduct" constitute picketing within the meaning of Section 8(g)?

4. Did the "conduct" require notice in accordance with Section 8(g) of the Act?

² All dates are in 2002 unless otherwise noted.

³ Although the record is not entirely clear, it appears that CMS was the first private contractor to operate the clinic.

Union is not the bargaining representative of the clinic employees, all of whom are employed by the Respondent.

On August 15, the Union requested that the Respondent recognize it as the collective-bargaining representative of all clinic employees except the physician, the supervisors, and the office clerical. On August 19, the Respondent rejected the request.

On September 12, under the direction of the Union and another Albany area labor organization, about 20 individuals, including 5 clinic employees, undertook action in support of the Union's demand for recognition. The five clinic employees engaged in this action during non-work time. Four of the employees had just completed their shifts and were off duty; the fifth took part during his dinner break and returned to work afterwards. All were in uniform. The labor organizations gave no advance notice to the Respondent or the Federal Mediation and Conciliation Service.

The September 12 labor action lasted about 40 minutes, during which the 20 individuals continually walked in a circle across the Albany jail's main entrance and exit on Albany Shaker Road. This main entrance and exit is approximately two car-lanes wide. The main entrance is used, among other things, for the daily delivery of pharmaceuticals and other medical supplies to the clinic, and it is the point of exit for inmates receiving emergency medical care off site.

The participants did not block the main entrance, but continuously patrolled in front of it. While they were patrolling, at least 10 vehicles entered or exited by that entrance, without impediment. The participants spoke to other drivers as they traveled past the entrance on Albany Shaker Road.

Many of the participants wore union T-shirts and carried placards with various messages, including "C.S.E.A. [the Union] Vote Yes." The participants sporadically shouted, "CMS [the Respondent] is union busting." A local newspaper article, included in the stipulated record, referred to the conduct as "a rally."

The day after the conduct, the Respondent issued a letter to the five employees who had taken part in the labor action. The letter stated that the employees had participated in union picketing of a health care facility without the Union's providing advance notice, and that employees who do so "lose the protection of the Act." The letter further stated that the Respondent did not condone their conduct; that the Respondent would be filing a charge with the Board "concerning the Union's illegal picket"; and that, after the Board had completed its investigation, the Respondent would advise the employees what action, if any, it would take against them.

Finally, the letter advised the employees that the Respondent "respects each employee's right to engage in conduct protected by the Act," and that it would "take no actions other than as legally authorized by the NLRB." A few days later, the Respondent filed a Board charge against the Union (Case 3-CG-41), alleging that the September 12 conduct violated Section 8(g).

On September 24, the Regional Office advised the parties of its view that the charge was meritorious. On September 26, the Regional Office issued a complaint alleging that the Union, by its conduct on September 12, violated Section 8(g) of the Act. Sometime after September 30, the Union entered into an informal settlement agreement of Case 3-CG-41 with a nonadmissions clause.

In the meantime, on September 25, the Respondent's counsel individually questioned three of the five employees involved in the conduct. The attorney asked them whether they had participated, who had solicited their participation, and to name the other employees who had participated.

On September 30, the Respondent terminated the five employees for engaging in an "illegal picket." That same day, the Respondent posted a notice to employees advising them of the notice requirement of Section 8(g), and that the Respondent had filed a Board charge. The notice further stated (emphasis in original):

The NLRB Regional Director has announced his decision. THE NLRB HAS RULED LOCAL 1000'S PICKET WAS ILLEGAL.

* * *

Employees who participate in an illegal picket are violating federal law and are not protected by the National Labor Relations Act

....

When employees participate in an illegal picket, they lose their jobs.

On October 1, the Union filed a charge alleging that the Respondent had violated the Act by, among other things, threatening, interrogating, and terminating the five employees. Following an investigation, the Regional Office issued the complaint in the instant case.

B. The Parties' Contentions

The General Counsel contends that the Union and the individuals who participated in the September 12 conduct were engaged in "picketing" within the meaning of Section 8(g), and therefore that the Union violated the Act by not giving the prior written notice required by

that section.⁴ Nevertheless, the General Counsel contends, the Respondent violated Section 8(a)(3) and (1) by discharging the participating employees.

The General Counsel observes that the 1974 Health Care Amendments simultaneously created Section 8(g) and amended Section 8(d). Although Section 8(g) makes it an unfair labor practice for a union to “engag[e] in any strike, picketing, or other concerted refusal to work at any health care institution” without first giving the requisite notice, Section 8(d), in relevant part, states that any employee “who engages in a strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee . . . for the purposes of sections 8, 9, and 10 of this Act.” (emphasis added). Thus, according to the General Counsel, the “plain meaning” of the statute, confirmed by the legislative history, is that the omission of “picketing” from 8(d) is intentional; there is a clear distinction between “picketing” and “striking,” i.e., the withholding of services; and, therefore, the employees did not lose their employee status when they engaged in off-duty picketing, at least on these facts.

The Respondent, like the General Counsel, contends that the Union and the individuals who participated in the conduct were engaged in picketing, and therefore that the Union violated Section 8(g) by failing to give the Respondent prior written notice. Parting company with the General Counsel, the Respondent further contends that, because the employees were engaged in “unprotected, unlawful picketing,” the Respondent was within its rights to discharge them. Both the General Counsel and the Respondent essentially acknowledge that the lawfulness of the alleged threats and interrogation stands or falls with the lawfulness of the discharges.

The Union contends that neither its conduct nor that of the employees amounted to “picketing.” Their conduct, the Union contends, did not call for any concerted action by any employees or suppliers. Rather, it was a “rally” or “demonstration” aimed at public officials; as such, it was protected by the First Amendment. Assuming *arguendo* that the conduct did constitute picketing, the Union asserts that the statute distinguishes between “picketing” and a “strike,” as the General Counsel contends.

⁴ Sec. 8(g), in pertinent part, makes it an unfair labor practice for a labor organization to “engag[e] in any strike, picketing, or other concerted refusal to work at any health care institution” without giving at least 10 days’ advance written notice to the institution and the Federal Mediation and Conciliation Service.

III. DISCUSSION

A. The Employees Were Engaged in Picketing, and the Union Therefore Violated Section 8(g)

Initially, we must determine whether the five employees whom the Respondent discharged were engaged in “picketing” on September 12. As stated above, they, along with about 15 other individuals, walked continuously in a circle in front of the main entrance to the Albany jail. They sporadically chanted union slogans, and some carried placards in support of the Union. No ingress or egress was blocked, but participants spoke to the drivers of some of the vehicles that passed by the entrance.

Our dissenting colleague does not quarrel with the proposition that the employees herein were engaged in picketing. The Union, however, does contend that the conduct in question was not “picketing” because it was a one-time, 40-minute incident, there was no element of confrontation, and no employees or suppliers were actually affected. The Board has, however, consistently rejected those arguments in the past. See, e.g., *West Lawrence Care Center*, 308 NLRB 1011, 1015 (1992) (picketing of health care institution for 45 minutes not *de minimis*); *Hospital Employees District 1199 (South Nassau Communities Hospital)*, 256 NLRB 74, 76 (1981). In any event, so far as the record discloses, the Union made no attempt to advise employees of the clinic or the jail, their suppliers, or anyone else that its conduct was not an appeal to them to refrain from crossing the picket line. As set forth below, it is clear that the employees were picketing.

Section 8(g) does not define “picketing,” nor is it defined elsewhere in the Act. The Board has had little difficulty in similar cases, however, in finding that the kind of conduct that occurred here amounted to picketing. See, e.g., *Hospital Employees District 1199 (United Hospitals of Newark)*, 232 NLRB 443, 443, 448 (1977), *enfd. mem.* 582 F.2d 1275 (3d Cir. 1978) (about 25 off-duty employees, some carrying placards with pronoun slogans, walked in a circle in front of the hospital’s main entrance; the entrance was not physically blocked and no one was asked to honor the picket line), cited in *St. Joseph Hospital Corp.*, 260 NLRB 691, 691–692, 699 (1982) (individuals, including off-duty employees, carried signs while walking in groups on the sidewalks surrounding the hospital; the Board found that the conduct was not simply a “demonstration” but amounted to “picketing”); see also *Service Employees Local 535 (Kaiser Foundation)*, 313 NLRB 1201, 1201–1202 and *fn.* 1 (1994) (the union conducted a press conference in front of the hospital’s main entrance, while about 15 individuals carrying pronoun

signs “mill[ed] around” near the entrance; the Board found that although the press conference itself was not “picketing,” the other individuals were engaged in “picketing,” despite the absence of “organized patrolling”).

Finding that the conduct here constituted picketing is also consonant with the legislative purpose behind Section 8(g). That section is designed “to assure continuity of patient care.” *Walker Methodist Residence & Health Care Center*, 227 NLRB 1630, 1630 (1977). To that end, it proscribes “any strike, picketing, or other concerted refusal to work at any health care institution” in the absence of the required advance notice. In the present case, the conduct of the participating employees and other individuals had the potential to influence other employees to withhold their labor, or to deter suppliers or their employees from attempting to enter the clinic. Those *potential* consequences are sufficient to bring the Union’s conduct within the ambit of Section 8(g). See, e.g., *United Hospitals of Newark*, supra at 443 (“while the Union may attempt to . . . prevent a work stoppage or disruption of services, it cannot control the actions or reactions that the mere presence of a picket line may induce in others.”).

The Union also asserts that its conduct was “aimed at” public officials, and is therefore entitled to First Amendment protection. Although the claim that the conduct was directed in part toward public officials finds some support in the record,⁵ the record surely supports a finding that the conduct was also aimed at the Respondent. Among other things, the Union stipulated that the purpose of the conduct was to support its demand for recognition, the conduct took place a few weeks after the Respondent rejected the Union’s bargaining demand, and it occurred in front of the jail, not the state legislature. The Union offers no case support for its claim of First Amendment protection in these circumstances, and we are aware of none.

Based on the foregoing considerations, we find that the conduct on September 12 constituted “picketing” within the meaning of Section 8(g). It is undisputed that the Union failed to comply with the notice requirements of that section. It therefore follows that the Union, under whose auspices the picketing was conducted, violated Section 8(g).⁶

⁵ The newspaper article included in the record quotes a union official as stating, “We want politicians to come to their [the clinic employees’] aid and put pressure on CMS [the Respondent] to do what is right.”

⁶ Our dissenting colleague assumes, but does not find, that the Union’s conduct violated Sec. 8(g).

B. The Respondent Did Not Violate the Act by Discharging the Employees Who Participated in the Unlawful Picketing

It has long been settled that the protections of Section 7 are not absolute. See, e.g., *Washington Aluminum v. NLRB*, 370 U.S. 9, 17 fns. 14–17 (1962), and cases cited. As we discuss below, employees who engage in conduct that is unlawful, either under the Act or for reasons extrinsic to it, or who pursue ends or employ means that are incompatible with the Act, are engaged in unprotected activity, and thus can be discharged therefor. An employer’s right to discharge employees who picket in violation of Section 8(g) is simply one more example of this basic principle.

It is well settled, for example, that an employer is free to discharge an employee who pickets in violation of Section 8(b)(7). See, e.g., *Rapid Armored Truck Corp.*, 281 NLRB 371, 371, 382 fn. 1 (1986) (Sec. 8(b)(7)(C)); *Teamsters Local 707 (Claremont Polychemical Corp.)*, 196 NLRB 613, 614 (1972) (Sec. 8(b)(7)(B)). The same result obtains when employees engage in conduct in violation of Section 8(b)(4) (see, e.g., *Pratt Towers, Inc.*, 338 NLRB 61, 63–64 (2002)), and when employees strike in violation of Section 8(b)(2). *Mackay Radio & Telegraph Co.*, 96 NLRB 740, 740–742 (1951). Notably, an employer is free to discharge an employee who innocently honors a stranger picket line, if that picketing is itself a violation of the Act. See, e.g., *American Telephone & Telegraph Co.*, 231 NLRB 556, 561–562 (1977), and cases cited. In each of those instances, as in cases arising under Section 8(g), only the labor organization commits the violation, but the employer is free to discharge an employee who engages in the conduct.

Similarly, employees who engage in a strike that is unlawful for reasons extrinsic to the Act may be subject to discipline including discharge. See, e.g., *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942) (mutiny); *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939) (seizure of employer’s property); see also *Laredo Coca Cola Bottling Co.*, 258 NLRB 491, 496–499 (1981) (aggravated violence).

Finally, employees who engage in concerted action in a manner or for an end deemed inconsistent with the Act may be subject to discipline including discharge. For example, employees who engage in a partial strike (*Valley City Furniture Co.*, 110 NLRB 1589 (1954), *enfd.* 230 F.2d 947 (5th Cir. 1956)), or an intermittent strike or slowdown (*Elk Lumber Co.*, 91 NLRB 333 (1950)), are subject to discharge. See also *Confectionery & Tobacco Drivers Local 805 v. NLRB*, 312 F.2d 108, 112 (2d Cir. 1963) (employees who engage in mi-

nority or wildcat strike are subject to discharge) (enfg. *M. Eskin & Son*, 135 NLRB 666 (1962)); *Emporium Capwell v. West Addition Community Org.*, 420 U.S. 50 (1975) (employees who demand separate minority bargaining rights are subject to discharge); *NLRB v. Sands Mfg. Co.*, 306 U.S. 332 (1939) (employees who engage in a strike in breach of no-strike clause are subject to discharge).

As stated above, we view the instant dispute as but one more example of this general principle. The Union violated Section 8(g) of the Act by conducting picketing of a health care institution without giving the required advance notice. The employees who engaged in that picketing were not protected by the Act, and, accordingly, the Respondent did not violate the Act by discharging them.

We agree with our dissenting colleague that an employee who *pickets* in violation of Section 8(g) does not lose his status as an employee under the Act. This is in contrast to an employee who *strikes* in violation of Section 8(g) or 8(d), where the striker does lose status as an employee under the Act. However, our point is that the employee who pickets in violation of Section 8(g) is engaged in unprotected conduct, and is thus vulnerable to employer discipline.

In short, the matter of “status” is not the same as the matter of protectedness. Obviously, there are instances where an employee engages in unprotected conduct and yet retains his “status” as an employee of the employer. An employee who physically assaults another because the latter will not sign a card remains an employee. However, he is subject to employer discipline for his unprotected conduct.

Our colleague has confused “status” with protectedness. She says that the employees here did not lose status inasmuch as they engaged in picketing rather than striking, and she then leaps to the conclusion that they cannot be disciplined, at all, for their picketing conduct. She fails to recognize that the 8(g) conduct is nonetheless unlawful and thus unprotected.

Our dissenting colleague says that the Act itself provides an “express limitation on the Board’s authority” to declare that picketing in violation of Section 8(g) is unprotected. In fact, there is no such expression in the Act. And, it is well within the Board’s discretion to hold that such picketing is unprotected.

It is one thing to say that Congress did not intend to impose a “loss of status” on those who engage in 8(g) picketing conduct. However, it is quite another (as well as an unreasonable stretch) to say that Congress intended to protect unlawful conduct. That proposition is

counterintuitive, and cannot rest on the mere absence of “loss of status.”

Our colleague contends that, by holding that a health-care employer may discharge picketers, as well as strikers, who participate in job actions made unlawful by Section 8(g), we are rendering “superfluous” the language of Section 8(d) that mandates loss of status for the striker. We disagree. Our colleague’s contention is ultimately a claim that Congress, by amending Section 8(d) to extend its loss-of-status sanction to cover one particular form of misconduct violative of Section 8(g), namely striking, intended Section 8(d) to be the sole response to 8(g) employee misconduct. We do not discern any such intent. Such an interpretation, moreover, would preclude a health care employer from taking *any* disciplinary action against employees who participate in non-strike violations of Section 8(g), including “other concerted refusal[s] to work,” which have as detrimental an impact on continuity of patient care as do strikes. We reject that reading of the statute, which would require us to ignore the overarching principle that employees who engage in unlawful activity are subject to discipline.⁷

Our dissenting colleague says that our position renders meaningless the distinction between striking and picketing. We disagree. A person who *strikes* in violation of Section 8(d) or (g) loses his status as an employee by *virtue of the language of the statute*. A person who *pickets* in violation of 8(g) does not lose such status. He is merely vulnerable to employer disciplinary action. That action can run the gamut from no discipline at all, to suspension, to the ultimate punishment of discharge.

Thus, an 8(d) striker loses status as an employee of the employer, irrespective of whether the employer takes the ultimate step of discharge. The 8(g) picketer is simply subject to employer discretionary discipline.

Neither is there merit to our colleague’s reliance on the fact that the employees are not represented by the Union. That assertion misses the mark. The critical fact is that the Union was responsible for the picketing, and the picketing therefore was in violation of the Act. Once the employees, albeit unrepresented, joined the Union-sponsored picketing, their conduct lost the protection of the Act.⁸

⁷ Our dissenting colleague states that the foregoing criticism of her position is “misleading,” because, in her view, Sec. 8(g) does not preclude a health care employer from taking disciplinary action against an employee who engages in conduct that is unprotected for reasons unrelated to Sec. 8(g). What is noteworthy here is that our colleague would treat conduct unprotected by virtue of Sec. 8(g) differently from all other unprotected employee conduct.

⁸ Thus, the employees here are unlike the employees in *Bethany Medical Center*, 328 NLRB 1094, 1101 (1999), and *Walker Methodist Residence*, supra, 227 NLRB at 1631, who, on their own initiative and

As noted above, we rely on 8(b)(4) and (7) cases to show that picketing is unlawful under these sections renders unprotected the conduct of the picketers. Like those cases, the picketing here unlawfully interfered with the employer's legitimate interests. Section 8(b)(4) is aimed at protecting the neutral employer, and Section 8(b)(7) is aimed, at least in part, at protecting an employer from "blackmail picketing." The picketing here unlawfully interfered with the legitimate interests of the employer, a health care institution. In sum, the conduct was unprotected, and the discharges were lawful.

Turning briefly to the 8(a)(1) allegations here, we note that the alleged threats and coercive interrogations occurred after the employees engaged in the unlawful and unprotected picketing. As the General Counsel appears to concede, if the employee conduct that was the subject of the threats and interrogations was itself unprotected, it was not unlawful for the Respondent to respond in that manner. We therefore find that the Respondent did not violate Section 8(a)(1) of the Act.

We shall therefore order that the complaint be dismissed in its entirety.

ORDER

The complaint is dismissed.

MEMBER LIEBMAN, dissenting.

My colleagues have said, with regard to Section 8(g) and (d) of the Act, that the Board's "obligation is to honor the statute as it is written."¹ A plain reading of these provisions shows that a worker who pickets—but does not strike—a health-care employer in the absence of an appropriate prior notice retains his status "as an employee of the employer." By preserving this employment status, Congress has chosen to preclude employers from taking action against picketing employees. The majority, however, mistakenly finds that five such picketers lost the Act's protection, and upholds their discharge.

I.

The stipulated facts are fully set forth in the majority opinion. In short, the Union in this case engaged in picketing of the Respondent, a health-care employer, for about 40 minutes, seeking recognition as the Respondent's employees' collective-bargaining representative. The Union did not satisfy the notice requirements of Sec-

without the involvement of a labor organization, engaged in a strike of a health care institution. In those cases, the Board concluded that the employee-initiated conduct did not violate Sec. 8(g). Here, by contrast, the employees joined union-sponsored conduct that did violate Sec. 8(g).

¹*Alexandria Clinic, P.A.*, 339 NLRB 1262, 1267 (2003), petition for review denied sub nom. *Minnesota Licensed Practical Nurses Assn. v. NLRB*, 406 F.3d 1020 (8th Cir. 2005).

tion 8(g).² Five employees of the Respondent joined in the picketing during their off-duty time.³ Neither they, nor any other employee, withheld their services from the Respondent. Later, the Respondent threatened its employees with discipline in connection with the picketing, interrogated three of the five picketers, and then discharged all five of them. The picketers were not represented by the Union at any relevant time.

II.

Peaceful picketing is both protected, concerted activity under Section 7 of the Act, as well as conduct shielded by the First Amendment. "Throughout the history of federal regulation of labor relations, Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends which experience has shown are undesirable." *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58, 62 (1964). This case involves one context in which Congress has restricted peaceful picketing.

Congress carefully balanced competing concerns in drafting Section 8(g) and the corresponding terms of Section 8(d).

In enacting the 1974 Health Care Amendments, Congress was faced with two conflicting interests. On the one hand, it was noted that it is unjust to deny to the employees of nonprofit hospitals the rights granted to employees in other industries to organize and bargain collectively. On the other hand, special protection seemed necessary when dealing with health care institutions in order to assure continuity of patient care. As a result of a balancing of these concerns, the Act was amended by extending coverage to employees of nonprofit hospitals and adding a new Section 8(g) requiring a labor organization to give 10 days' written notice before striking or picketing at a health care institution. Additionally, Section 8(d) was modified to extend the loss of status sanction to employees who engage in a strike proscribed by Section 8(g).

Walker Methodist Residence, 227 NLRB 1630 (1977) (footnote citations omitted).

The Board and the courts have interpreted the 1974 Health Care Amendments on several occasions. Where the related language of Sections 8(g) and 8(d) is unambiguous, it is to be given its plain meaning.⁴ Section 8(g)

² The majority finds that the Union's failure to provide appropriate notice violated Sec. 8(g), an unfair labor practice not alleged in this case. I will assume, without finding, that the Union's conduct was unlawful.

³ Their names are Stephanie Spear, Darcy LaGoy, Chesley Schager, Richard Kowalski, and Richard Jolly.

⁴ See *Alexandria Clinic*, supra at 1264–1267, and cases cited there.

requires a union to provide a 10-day notice before it may engage “in any strike, picketing, or other concerted refusal to work.”⁵ Section 8(d) states that where a union has failed to meet the notice requirement, an employee “who engages in any strike” within the notice period “shall lose his status as an employee of the employer engaged in the particular labor dispute.”⁶ Although Section 8(g) includes picketing as well as strikes in its regulation of union conduct, Section 8(d) mandates the loss of employee status *only* for striking.

The absence of “picketing” in Section 8(d) is not accidental.⁷ In a different context, the Supreme Court stated that if Congress had intended to include unfair labor practice strikers in the loss-of-status penalty of Section 8(d):

[I]t could readily have done so by specific provision. Congress cannot fairly be held to have made such an intrusion on employees’ rights . . . without some more explicit expression of its purpose to do so than appears here.⁸

The Board has echoed the Court in the context of the 1974 amendments, observing that the legislation should “not be read to reduce the preexisting rights of health care employees unless explicit language mandates that result.”⁹

It is evident, then, that Congress, in fashioning Sections 8(g) and (d), chose not to authorize employer reprisals against employees who merely picket, even if the

⁵ Sec. 8(g) provides in relevant part that:

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention.

⁶ The pertinent portion of Sec. 8(d) states:

Any employee . . . who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of Section 8, 9, and 10 of this Act.

⁷ The legislative history indicates that Congress was aware of the distinction it drew between picketing and strikes in the 1974 Health Care Amendments. See *Baptist Memorial Hospital System*, 288 NLRB 1160, 1171 fn. 18 (1988).

⁸ *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 289 (1956).

⁹ *Walker Methodist Residence*, supra at 1632. The Court’s and the Board’s view is consistent with the legislative history. In *Walker*, the Board quoted Senator Harrison Williams, chairman of the Senate Committee on Labor and Public Welfare:

This legislation is the product of compromise, and the National Labor Relations Board in administering the act should understand specifically that this committee understood the issues confronting it, and went as far as it decided to go and no further and the Labor Board should use extreme caution not to read into this act by implication—or general logical reasoning—something that is not contained in the bill, its report and the explanation thereof.

Id. at 1631 (footnote citation omitted).

union which sponsors the picketing is subject to unfair labor practice liability. Picketing obviously poses a lesser threat to continuity of patient care than a strike does. Because Congress has spoken clearly, the Board lacks discretion to apply rules fashioned in other contexts to this case. Cf. *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 481 (2001) (“[T]he agency’s interpretation goes beyond the limits of what is ambiguous and contradicts what in our view is quite clear”).

This caution against administrative overreaching is especially significant in the present case. On its face, Section 8(g) sanctions labor organizations, not employees, for untimely strikes and picketing. The five employees who engaged in picketing were not represented by the Union. The Board has found that the loss-of-status sanction of Section 8(d) does not apply to unrepresented employees even when they engage in a *strike* against a health-care employer.¹⁰ Because the Union is not the certified or recognized agent for the employees here, the Board is on particularly shaky ground in extending the consequences of the Union’s failure to provide a 8(g) notice to the employees.

III.

The majority contends that employees who have engaged in picketing unlawful under Section 8(g), like employees involved in unlawful 8(b)-type picketing, may be discharged because their conduct is unprotected. It adopts this view notwithstanding the limitations of the “loss of status” provision in Section 8(d), which the majority regards as irrelevant. It also finds that health-care employers should be able to freely punish their employees who engage in such picketing without interference from the Board. None of these views is consistent with the intent of Congress.

The majority identifies a “basic principle” in its rationale for upholding the discharge of the five picketers: employees who participate in union picketing that is either unlawful or incompatible with the Act are subject to discharge. Primarily, the majority analogizes unlawful union picketing under Section 8(g) with picketing unlawful under Section 8(b), and concludes that the situations are similar enough that the result in the Section 8(b) context—permitting discharge of picketers for unprotected conduct—should be the same under Section 8(g).¹¹

But, in fact, there is a fundamental distinction between the two situations. Nothing in the Act constrains the

¹⁰ See *Bethany Medical Center*, 328 NLRB 1094, 1101 (1999); *Walker Methodist Residence*, supra at 1631.

¹¹ The majority applies essentially the same analysis, and reaches the same conclusion, in comparing 8(g) picketing with picketing found unprotected because it violates other laws, or because it is inconsistent with the purposes of the Act.

Board's discretion to adopt a rule that an employee who engages in illegal 8(b) picketing may be lawfully discharged by his employer. Thus, as a matter of policy rather than statutory mandate, the Board determines that these employees have not engaged in conduct protected by Section 7, leaving their employer free to discipline or discharge them for that conduct.

Where picketing of health-care employers is concerned, however, Section 8(d), in conjunction with Section 8(g), provides an express limitation on the Board's authority, consistent with the congressional intent to balance employee rights with the interests of patient care. Congress itself chose not to treat employees' picketing, as opposed to striking, as lawful grounds for discharge, notwithstanding the unlawfulness of the Union's failure to provide proper notice of the picketing.

The majority argues that I have "confused 'status' with protectedness": even if a picketing employee retains his status as "an employee of the employer," his conduct remains unprotected and so he may be discharged for it. In the majority's view, although it may be reasonable to infer that Congress did not intend to impose a "loss of status," it is "an unreasonable stretch" to say that Congress intended to protect unlawful conduct. "That proposition is counterintuitive," says the majority.

The majority's view, however, overlooks a basic point. In enacting the Health Care Amendments, which added Section 8(g) and amended Section 8(d) to incorporate the 8(g) notice period, Congress decided both what conduct to proscribe and what sanctions would be applicable to which conduct. Unlike the Section 8(b) context, it did not leave the Board free to fashion its own rule with respect to sanctions. Rather, by restricting the loss-of-status provision in Section 8(d) to employees who strike in violation of Section 8(g)—and deliberately omitting picketing as a ground for loss of status—Congress clearly expressed its intention to preclude employers from taking action against individual picketing employees.¹² The majority offers no alterna-

¹² The majority asserts that my statutory interpretation

would preclude a health care employer from taking *any* disciplinary action against employees who participate in non-strike violations of Section 8(g), including "other concerted refusal[s] to work," [quoting Sec. 8(g)] which have as detrimental an impact on continuity of patient care as do strikes.

That assertion is misleading. Under my view, a health care employer is free to discipline employees for engaging in a strike in violation of Sec. 8(g) *and* for engaging in unprotected conduct that does not implicate the notice requirements of Sec. 8(g).

For example, a work slowdown has historically been recognized as unprotected conduct. See, e.g., *Elk Lumber Co.*, 91 NLRB 333, 336–338 (1950). There is no indication that, in enacting Sec. 8(g), Congress intended to preclude the Board from *continuing* to treat particular conduct as unprotected. Rather, as I have explained, Congress determined what sanctions would be applicable to the conduct that was newly

explained for the purpose served by either the loss-of-status provision or the distinction made in that provision between striking and picketing.

The majority clearly indicates that it is unnecessary to rely on Sec. 8(d) at all in this case. Without such reliance, however, there is no basis for upholding employer discipline that ultimately rests on a violation of Sec. 8(g). The Board made this point clear in *Alexandria Clinic*, *supra*, which held that the conclusion that a strike violates Sec. 8(g) "results in the [striking employees] losing their protected employee status under Section 8(d) . . . and subjects them to lawful discharge." 339 NLRB at 1267.¹³

At bottom, the majority's position wrongly makes Section 8(d)'s loss-of-status provision superfluous and the distinction between striking and picketing meaningless.¹⁴ Both strikers and picketers could be lawfully discharged without reference to Section 8(d) solely because Section 8(g) proscribes both kinds of conduct. It is this interpretation, not mine, that is counterintuitive.¹⁵

The majority justifies its position by finding that a health-care employer must have the capability to retaliate against employees who engage in unlawful activity. But, as I have explained, although the Union may have violated Section 8(g), this provides no basis for finding that the employers are free to engage in self help by disciplining or discharging picketing employees. A health-care employer's primary concern when faced with unlawful 8(g) picketing can be resolved by securing an injunction against the conduct.¹⁶

IV.

Congress provided a careful balancing of employee rights and patient care interests in the 1974 amendments to the Act. By striking a different balance in this case, the

addressed by Sec. 8(g). It chose to treat striking in violation of Sec. 8(g) differently from picketing. But a slowdown remains unprotected, whether or not the notice requirements of Sec. 8(g) were satisfied.

¹³ See also *Boghossian Raisin Packing Co.*, 342 NLRB 383 (2004) (employer lawfully invoked Sec. 8(d)'s "loss of status" provision in discharge of strikers supporting an illegal strike).

¹⁴ See generally *Oakwood Healthcare, Inc.*, 348 NLRB 686, 688 fn. 21 (2006) (citing statutory canon against construction that makes part of statute superfluous or redundant).

¹⁵ The majority insists that its statutory interpretation does *not* "render meaningless the distinction between striking and picketing," explaining that a striker "loses his status as an employee by virtue of the language of the statute," while a picketer "does not lose such status," but rather is "merely vulnerable to employer disciplinary action." But this is a distinction without a difference. As the Board's cases demonstrate, the significance of a loss of employee status is precisely that it permits the employer to discipline an employee without risk of statutory consequences. See *Alexandria Clinic*, *supra*.

¹⁶ See *District 1199-E, Hospital & Health Care Employees (Greater Pennsylvania Avenue Nursing Center)*, 227 NLRB 132, 134 (1976) (quoting legislative history providing for remedies under Sec. 10(j) for violations of Sec. 8(g)).

majority has reached well beyond the Board's statutory authority. The majority's decision today contradicts the holding in *Alexandria Clinic*, supra, which *relied* on the loss-of-status provision in Section 8(d) to validate the discharge of strikers in an 8(g) context. If Section 8(d) is relevant in enforcing the discharge of strikers, it is surely relevant in determining whether picketers may be discharged. Because the Act plainly forecloses the discharge of em-

ployees where the union has failed to provide an 8(g) notice of their picketing, I dissent.¹⁷

¹⁷ The complaint alleged that the Respondent also interrogated and threatened employees in connection with the picketing. Because I would find the picketing protected, I would find these additional violations as well.