United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: December 9, 1999

TO : Ronald M. Sharp, Regional Director
Region 18

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Minnesota Licensed Practical Nurses Association
(Alexandria Clinic)
Case 18-CG-18
524-5073-3300

Alexandria Clinic, P.A.
Case 18-CA-15371
593-6050
593-6087

These cases were submitted for advice as to whether the Union violated Section 8(g) by beginning a strike against the Employer four hours past the time set forth on its Section 8(g) notice and, if not, whether the Employer unlawfully discharged 20 nurses because they engaged in the strike.

FACTS

The Employer, Alexandria Clinic, operates a health care institution in Alexandria, Minnesota. The Union, the Minnesota Licensed Practical Nurses Association, represents a unit of licensed practical nurses at the facility. In late August 1999,[1] after twelve months of bargaining, the Employer declared impasse and announced its intention to implement its last, best offer on October 4. On August 30, the Union sent the Employer a Section 8(g) notice of the employees' intention to strike at 8:00 a.m. on September 10. The Union's negotiating committee, however, did not tell members of the bargaining unit the exact time of the work stoppage. The committee allegedly wanted the nurses to concentrate on their work rather than watch the clock, and also was concerned about a run on the clinic's services if the general public became aware of the time of the strike.

The Employer hired replacement nurses through a temporary employment agency as preparation for the strike. The replacement nurses were directed to report to the

[1] All dates are in 1999 unless specified otherwise.

facility prior to 8:00 a.m. on September 10 for assignment at the beginning of the strike.

Without notice to the Employer, the Union's negotiating committee decided to delay the strike until noon, rather than begin at 8:00 a.m. as set forth in the Section 8(g) notice. The committee gave various reasons for the delay. It claimed that it wanted the nurses to work through the morning to better prepare the clinic for their later absence. The committee also believed that a strike beginning during the lunch hour, when patient levels normally decrease, would minimize disruption to the clinic and safeguard patient care. Furthermore, the committee reasoned that the delay would allow those nurses who did not start work until 10:00 a.m. the opportunity to join other employees in a mass walkout to show their unity and strength.

Thus, the bargaining unit reported for work on September 10 at 8:00 a.m. and worked throughout the morning. Although confused as to the nurses' intentions, the physicians and clinical administration provided patient care throughout the morning of September 10 as usual.[2] The Employer did not make any strike-related inquiries to the Union or unit nurses, but directed the replacement nurses who reported to work at 8:00 a.m. to wait in the doctors' lounge so as to remain available should they be needed.

The strike began about noon. At that time, the replacement nurses underwent a one and one-half hour orientation process, which the administration had planned all along to conduct upon the strike's commencement, and assumed their duties with minimal disruption.

On September 14, the Employer terminated all 20 striking nurses for engaging in an unprotected strike which diverged from the Union's strike notice. The Employer further filed this Section 8(g) charge against the Union. The Union, in turn, filed this Section 8(a)(1)

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[2] Although there is some evidence that some members of the nursing staff were less than thorough in performing their job duties on the morning of the strike, there is no evidence that patient care was jeopardized or that the employees' job performance that morning made the strike delay more difficult for the Employer. Moreover, the Employer does not contend that the employees' alleged misconduct was cause for discharge.

charge alleging that the Employer unlawfully terminated the striking employees.

ACTION

We conclude that in the circumstances herein, the Employer's discharge of its striking employees on the basis of a de minimis four-hour divergence from the strike time stated in the Union's Section 8(g) notice was unlawful. Therefore, a Section 8(a)(1) complaint is warranted, absent settlement. However, inasmuch as the Board has not yet spoken to the legality of such de minimis deviations from the requirements of Section 8(g), the Region should hold the Section 8(g) charge in abeyance pending the outcome of the charge against the Employer.

Section 8(g) requires a labor organization to give written notice to a health care institution at least ten days before engaging in any strike, picketing or other concerted refusal to work. The 10-day notice is intended to give health care institutions sufficient advance notice of a strike or picketing to permit them to make arrangements for the continuity of patient care.[3] The required notice must provide the date and time that the intended strike or picketing will commence. A union's failure to comply with the notice requirements of Section 8(g) deprives strikers of their status as "employees" under Section 8(d) of the Act. Therefore, an employer may lawfully discharge employees because they strike in violation of Section 8(g).[4]

However, Congress was wary of a rigid application of Section 8(g) in light of the serious consequences for striking employees whose union fails to tender proper 8(g) notice. Therefore, in enacting Section 8(g), Congress admonished the Board to apply a "rule of reason" to the construction of the statutory 10-day notice.[5] Congress

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[3] S. Rep. No. 93-766, 93d Cong., 2d Sess. 4 (herein, "S. Rep."); H. Rep. No. 93-1051, 93d Cong., 2d Sess. 5 (herein, "H. Rep."), contained in Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974 (herein "Leg. Hist."), at pp. 11 and 273, respectively.

[4] Leg. Hist. at 291 (comments of Representative Ashbrook).

[5] See, Greater New Orleans Artificial Kidney Center, 240 NLRB 432, 435 (1979), citing 120 Cong. Rec. E4,850 (remarks

meant to exempt labor organizations from sanctions for commencing a strike or picketing at other than the precise time specified in the Section 8(g) notice, so long as the job action commenced within a reasonable time thereafter.[6] To that end, a union may delay the beginning of a strike or picketing up to 72 hours after the time set forth in its 8(g) notice, so long as it gives the employer 12 hours notice.[7]

This "12-hour rule" is consistent with other portions of the legislative history of Section 8(g). In the Senate debate, Senator Harrison Williams, Jr., Chairman of the Committee on Labor and Public Welfare and sponsor of the health care amendments, forcefully rejected then-General Counsel Peter Nash's stated intention to litigate what Senator Williams referred to as the "many technical issues which [Nash] says are not clear in this bill."[8] Senator Williams cautioned the Board against treating Section 8(g) as "an excuse to search out and litigate all possible situations."[9] Referring to the 12-hour rule, he stated that,

> In this connection, I note [Nash's] statement that section [sic] 8(g) would be violated if less than 12 hours notice was given. Suppose, for example, that the union gave 11 hours notice. Clearly, the committee never intended that the General Counsel dissipate the efforts of his office and the Board by litigating such technical minutiae.[10]

In accordance with the "rule of reason," Representative John Ashbrook, a co-sponsor of the legislation, similarly directed the Board to consider

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of Rep. Ashbrook) (daily ed. July 18, 1974), reported at Leg. Hist. at 409.

[6] S. Rep. at 4; H. Rep. at 5, contained in Leg. Hist. at pp. 11 and 273, respectively.

[7] Ibid. (herein, the "12-hour rule").

[8] 120 Cong. Rec. 12,104 (daily ed. July 10, 1974), reported at Leg. Hist. at 363.

[9] Ibid.

[10] Ibid.

extenuating circumstances behind a labor organization's deviation from the 12-hour notice rule. Ashbrook noted that the necessity of subsequent notice would turn not on a mechanical implementation of Section 8(g), but rather on "the precise fact situation."[11] In discussing whether the 12-hour rule applies when unions resume discontinued strike activity, Ashbrook noted that the need for notice turns on whether the resumption adversely affects the hospital's ability to plan for continued operations.

> Thus, e.g., if the hospital has been lulled by the cessation of the strike and subsequent bargaining from a "siege" situation to a fully operative situation, it is apparent that a second notice would be required.[12]

The Board has recognized and applied Congress' 12-hour rule. Thus, in Greater New Orleans Artificial Kidney Center, the Board noted that Congress specifically acknowledged that a union which complies with the 12-hour rule can delay the commencement of a work action past the time set forth in its Section 8(g) notice.[13] In Federal Hill Nursing Center, Inc.,[14] the Board held that by delaying the commencement of a strike for 80½ hours after its noticed time and date, the union's conduct went beyond the 12-hour rule set forth by Congress and thus ran afoul of Section 8(g).

Thus, Congress and the Board have established rules covering notice delays of between 12 and 72 hours and delays of more than 72 hours. However, the Board has not had the occasion to develop specific rules concerning delays of less than 12 hours.

Mindful of Congressional instructions not to mechanically implement the new notice requirements, the General Counsel has declined to issue complaint based on de minimis Section 8(g) conduct, particularly where

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[11] Leg. Hist. at 410.

[12] Ibid.

[13] 240 NLRB at 434-45, citing S. Rep. at 4, H. Rep. at 5, reported at Leg. Hist. at 410.

[14] District 1199-E, National Union of Hospital and Health Care Employee (Federal Hill Nursing Center, Inc.), 243 NLRB 23, 24 (1979).

divergences from strike notices of less than 12 hours do not adversely affect an employer's ability to provide patient care or otherwise prepare for a job action. In Broadway Convalescent Hospital,[15] the union gave notice of its intent both to strike and to picket the employer's facility at 7:00 a.m. on a date more than 10 days in the future. Because picketing and striking have very different effects on an employer's operations, a union must specify the starting date and time for each form of conduct in order to afford the employer the opportunity to prepare for each.[16] In Broadway Convalescent Hospital, the union began the strike on time but delayed picketing for 3¾ hours. Nonetheless, the Region was directed to dismiss the allegation regarding the delayed picketing since it commenced within a "reasonable period" after the strike and since the employer did not suffer any adverse effects because of the delay.

In Monongahela Valley Association of Health Centers,[17] the union hand-delivered a notice to a hospital at 8:45 a.m. on November 4, 1977, stating that employees intended to strike at 6:00 a.m. ten days later. The strike, which commenced at the appointed time, thus began approximately 2 hours and 45 minutes prior to the end of a full ten day period. We concluded that this de minimis divergence was not unlawful since the employer was not taken by undue surprise and did not suffer a significant adverse impact

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[15] Hospital and Service Employees Union Local 399 (Broadway Convalescent Hospital), Case 21-CG-4, Advice Memorandum dated August 12, 1976.

[16] See Service Employees International Union Local 49 (MacKenzie Manor Nursing Home), Case 36-CG-15, Advice Memorandum dated November 23, 1988. See also G.C. Guideline Memorandum 74-49, "Guidelines for Handling Unfair Labor Practice Cases Arising Under the 1974 Nonprofit Hospital Amendments to the Act," dated August 20, 1974, Sec. III(B)(d) at p. 6 (herein, "GC Guideline"), attached hereto.

[17] Office and Professional Employees International Union, Local 33 (Monongahela Valley Association of Health Centers, Inc.), Case 6-CG-9, Advice Memorandum dated December 30, 1977.

from the premature commencement of the strike and picketing.[18]

In St. Francis Hospital,[19] employees did not commence a strike until nine hours after the time set forth in the Section 8(g) notice. The union waited seven hours until the beginning of a new shift, and then an additional two hours after that for unexplained reasons. We concluded that the seven hour delay was excused in conformance with the General Counsel's position that a union can delay a job action scheduled to begin in the middle of a shift until the beginning of the next shift without serving a 12-hour notice.[20] We further considered the subsequent unexplained two-hour delay to be de minimis since the employer did not suffer any adverse effects and the union stopped picketing after being informed of the potential Section 8(g) violation.

In Eden Park Nursing Home,[21] employees began a strike one hour prior to the time set forth in the union's Section 8(g) notice. Noting that the evidence failed to establish that the one-hour discrepancy adversely affected the employer's ability to provide patient cares and concerned about the serious consequences to employees

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[18] See also California Nurses Association (Warrack Medical Center Hospital, Inc.), Case 20-CG-5, Advice Memorandum dated August 4, 1975. There, the union commenced picketing at the time set forth in its notice, which was two hours shy of the full 10-day period. Although the Region issued a Section 8(g) complaint on other grounds, we concluded that the two-hour divergence was de minimis and, under the "rule of reason," did not constitute unlawful noncompliance with Section 8(g).

[19] Local 2653, AFSCME and Michigan Council No. 25, AFSCME (The Sisters of the Third Order of St. Francis, St. Francis Hospital, Escanaba, Michigan), Case 3-CG-11, et al., Advice Memorandum dated April 30, 1979.

[20] GC Guideline at 8. Interestingly, former General Counsel Nash noted that a union would violate Section 8(g) if it commenced a strike at a shift change occurring before the noticed time, "unless there is no significant adverse impact upon the institution." Ibid.

[21] Local 144, SEIU (Eden Park Nursing Home), Case 3-CG-13, et al., Advice Memorandum dated November 30, 1979.

flowing from noncompliance with Section 8(g) provisions,[22] we concluded that the premature strike was de minimis and not unlawful, and instructed the Region to dismiss the Section 8(g) charge.

Thus, applying a "rule of reason," we have recognized that a minimal divergence from the noticed commencement of a job action constitutes de minimis Section 8(g) conduct so long as the divergence has no adverse impact on an employer's preparations. Factors which both the General Counsel and Congress have evaluated in interpreting Section 8(g)'s notice requirements include:

- The extent of the divergence from the scheduled commencement of strike, picketing, or other concerted refusals; and,

- the adverse effect, if any, caused by the divergence on either the employer's ability to prepare for the concerted refusal to work or the quality of patient care throughout the job action.

In our view, these factors best address Congress' primary concern for patient care while avoiding unwarranted reliance on "technical minutiae."

We recognize that the Board is disinclined to dismiss a Section 8(g) complaint based solely on a strike's lack of adverse effect on patient care in cases where a union has given no Section 8(g) notice whatsoever.[23] Nonetheless, where a union has given a Section 8(g) notice, the Board has further acknowledged that lack of impact is a relevant concern when assessing a union's conduct that arguably results in a technical Section 8(g) violation. Thus in Greater New Orleans Kidney Center, the Board found it "inequitable" to hold a union responsible for the U.S. Post Office's failure to deliver a strike notice on time in circumstances where the employer, who was orally advised by

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[22] Id., citing Greater New Orleans Artificial Kidney Center, supra.

[23] See, e.g., Pipefitters Local 630 (Lein-Steenberg), 219 NLRB 837, 839 (1975) (picketing of subcontractor by its employees working at hospital construction site without Section 8(g) notice to hospital, unlawful, even though no adverse effect on patient care or intent to enmesh hospital employees). See also California Nurses Association (City of Hope National Medical Center), 315 NLRB 468 (1994).

the FMCS of the union's intent to strike, "made contingency preparations" which allowed it "to continue patient care without interruption and without jeopardy to the patients' health."[24] In so concluding, the Board was "mindful of the congressional admonishment to the Board to apply the 'rule of reason'," lest strikers and picketers lose their status as employees and, concomitantly, their jobs.[25] We share the Board's concern that Section 8(g) "not be rigidly applied in light of serious consequences flowing from noncompliance with its provisions."[26] Thus, in our view, the continuity of health care, a primary consideration behind the enactment of Section 8(g), is also a relevant factor in determining whether a de minimis divergence from Section 8(g)'s notice requirements is violative of the Act.

Based on the above test, we conclude that the Union's delay of four hours constituted de minimis Section 8(g) conduct which does not rise to the level of a statutory violation. There is no indication that the Employer was unable to prepare for the strike or that patient care was jeopardized by the delay. Rather, the Employer retained its replacement employees after the 8:00 a.m. strike deadline passed in order to remain prepared for the possibility of a delayed walkout, which in fact occurred four hours later. Thus, the Employer was able to implement its plans immediately upon the walkout. Moreover, the four-hour delay did not diminish the Employer's ability to provide patient care. Indeed, according to the Union, the strike committee wanted the nurses to continue to work through the morning to better prepare the clinic for their absence over the lunch hour when patient levels dropped and disruption to the clinic would be at a minimum.

Because the employees retained their protected right to engage in strike activity upon their noon walkout, the Employer violated Section 8(a)(1) by discharging them for striking. The Region should issue a Section 8(a)(1) complaint, absent settlement, consistent with the theory set forth above. Nonetheless, the Board has yet to address *any* type of de minimis conduct for deviations of less than 12 hours from the time specified in an 8(g) notice. Therefore, the Region should hold the CG charge

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[24] 240 NLRB at 434.

[25] Id. at 435, citing remarks of Representative Ashbrook, Leg. Hist. at 409-10.

[26] Ibid.

in abeyance pending the Board's resolution of the CA matter. Should the Board dismiss the General Counsel's Section 8(a)(1) complaint upon a finding that the strike was unprotected, the Region should issue a Section 8(g) complaint, absent settlement.[27]

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[27] This is the normal procedure when an employer and a union file mutually inconsistent charges against each other over a single fact pattern. See Bethlehem Steel Corp., 283 NLRB 254 (1987) (General Counsel held in abeyance and subsequently litigated Section 8(a)(5) charge against employer only after Board dismissed Section 8(b)(3) charge against union); Southern New Jersey Chapter of NECA, Case 4-CA-24599, et al., Advice Memorandum dated August 16, 1996 (General Counsel issued Section 8(b)(3) complaint and held cross-filed Section 8(a)(5) charge in abeyance). In Washington Heights-West Harlem-Inwood Mental Health Council, Inc., d/b/a The Council's Center for Problems of Living, et al., 289 NLRB 1122 (1988), enf. den. 897 F.2d 1238 (2d Cir. 1990), the Board and the court affirmed the General Counsel's authority to concurrently litigate a Section 8(a)(3) complaint against the employer and a Section 8(g) complaint against the union involving the same fact pattern (however, the court subsequently granted the employer's EAJA petition against the Board). Nonetheless, the litigation posture was cumbersome and the trials left the Regional Director involved in the matters dissatisfied with both the process and the result.