

11-3147

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

SPECIAL TOUCH HOME CARE SERVICES, INC.

Respondent

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR
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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce a Board Decision and Order issued against Special Touch Home Care Services, Inc. (“the Company”) on June 30, 2011, and reported at 357 NLRB No. 2. (S.A. 1-12.)¹ 1199 SEIU United

¹ “S.A.” references are to the Special Appendix. “A.” references are to the Joint Appendix. Both appendices were filed on December 1, 2011. References

Healthcare Workers East (“the Union”), which was the charging party before the Board, has sought to intervene on behalf of the Board in a currently-pending motion.

The Board had jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Order is final with respect to all parties under Section 10(e) of the Act (29 U.S.C. § 160(e)). This Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)), because the unfair labor practices occurred in the state of New York.

The Board filed its application for enforcement on August 3, 2011. The filing was timely; the Act places no time limit on the institution of proceedings to enforce Board orders.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably found that 47 economic strikers retained the protection of the Act, notwithstanding the Company’s call-in rule or survey, because the statutory Section 8(g) notice requirement properly balanced the competing rights involved and, therefore, the Company violated Section 8(a)(3) and (1) of the Act by refusing to immediately reinstate the strikers.

preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

The Decision and Order under review results from the Board's reconsideration of this case following the Court's remand in *NLRB v. Special Touch Home Care Services, Inc.*, 566 F.3d 292 (2d Cir. 2009) ("*Special Touch*"). (S.A. 13-33.) In that opinion, the Court denied in part the Board's application for enforcement of an order that it issued against the Company on September 29, 2007, reported at 351 NLRB 754. (S.A. 34-46.) In its prior decision, the Board found that the Union gave the Company a 10-day advance notice of a strike as required by Section 8(g) of the Act (29 U.S.C. 158(g)) when a union plans a strike against a health-care employer. The Board rejected the Company's argument that it was justified to delay reinstating 47 home health aides after the strike because they did not, as required by a Company rule, call-in before being absent. Thus, the Board found, *inter alia*, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by failing and refusing to immediately reinstate the 47 economic strikers who unconditionally offered to return to work.² (S.A. 34.) The Court denied enforcement as to that finding and remanded the case for further

² The Board has identified 47 discriminatees among 48 home-health aides who went on strike and were not immediately reinstated upon their offers to return to work. The Board found that striker Crecencia Miller was lawfully discharged. (S.A. 34.)

proceedings.³ The Court stated that the Board “erred by not considering the intersection of the plant rule doctrine and Section 8(g)” of the Act. *Special Touch*, 566 F.3d at 294 (citing 29 U.S.C. § 158(g)). (S.A. 15.) Specifically, the Court described as “a question of first impression” the issue of “whether employees of a health care institution who violate a non-discriminatory call-in rule lose the protections of [the Act] even though the relevant union has given the notice required by Section 8(g) thereof.”⁴ *Id.* at 297. (S.A. 21.) The Court ordered the Board to consider and balance specific interests when resolving the issues.

Consistent with the Court’s instruction, the Board on remand examined the notice requirement of Section 8(g) of the Act and its intersection with cases involving various plant rules. The Board concluded (S.A. 4) that Congress already achieved the appropriate balance between the employees’ right to strike and the Company’s interest in planning for the strike when it enacted Section 8(g) and

³ In that decision, the Court enforced in part (with respect to the Board’s dismissal of the complaint as to one striker), modified in part and enforced as modified (with respect to the Company’s unlawful interrogations of two employees), and denied enforcement in part (with respect to the issue presented here). *Special Touch*, 566 F.3d at 303. (S.A. 33.)

⁴ The General Counsel alleged in his complaint that the Company is a health care institution, and the Company admitted the allegation. Therefore, the Board, in the absence of any argument to the contrary, “assume[d] that the [Company] is a health care institution and that the strike was subject to the requirements of Sec[ti]on 8(g).” (S.A. 2 n.11.)

required that only unions, and not individual employees, provide notice of a strike to a health care employer. The Board determined (S.A. 7-8) that the Company's absence notification rule and its surveying of employees prior to the strike did not alter this balance. Ultimately, the Board reaffirmed its prior finding that the Company violated Section 8(a)(3) and (1) of the Act by failing to immediately reinstate the 47 economic strikers upon their unconditional offer to return to work. (S.A. 1.) The facts relevant to the Board's finding are detailed below, followed by summaries of the Board's initial decision, the Court's opinion, and the Board's Supplemental Decision and Order on remand.

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company's Home Care Services; The Aides' Assignment Procedures, Duties, and Hours of Work

The Company provides home care services throughout New York City as a subcontractor for nursing and health services providers. (S.A. 1; A. 439.) In June 2004, the Company employed about 2500 aides, of whom about 1400 were assigned to specific clients at any given time. (S.A. 1; A. 447.) The remainder of the Company's workforce of aides formed an "on-call" pool of employees available for ad hoc assignments. (S.A. 40; A. 473, 508.)

The Company's clients are individuals who are elderly or sick; for example, a client may have a broken leg, be recovering from a stroke, or have Alzheimer's

or Parkinson's disease. (S.A. 1, 40; A. 82, 203, 214, 245, 379, 419.) Clients live in their own private homes, sometimes with family members. (S.A. 1, 40; A. 182, 346, 393, 439.) Clients receive home-health services anywhere from 2 hours per week to 4 hours a day/5 days per week, up to a 24/7 basis with multiple employees covering the time. (S.A. 1, 40; A. 495.) More than half of the Company's clients receive services for approximately 20 hours per week. (S.A. 40; A. 496-97.) The number of hours per day is related to the clients' needs and their insurance coverage. (S.A. 40; A. 498-99.)

Home-health aides report to coordinators, who assign clients and set schedules consistent with a plan of care. (S.A. 34, 40; A. 450.) Aides can be assigned to clients for various periods of time. (S.A. 40; A. 450-51.) Aides are assigned to clients primarily based on the ability to speak a common language. (S.A. 40; A. 448, 529.) The four major languages are English, Spanish, Chinese, and Russian. (S.A. 40; A. 448.)

Aides provide in-home services including cleaning, shopping, cooking, bathing, and reminding clients to take their medications. (S.A. 1, 40; A. 58, 114, 204, 206, 215, 297, 379-80.) Aides are not licensed and are prohibited from providing any kind of medical services. (S.A. 1, 40; A. 458, 460.) Pursuant to a doctor's order, a nurse from a contracting agency determines the amount of care

necessary and appropriate for each client and visits the home to make sure it is set up for the client. (S.A. 40; A. 440, 444-45.)

Aides report directly to clients' homes. (S.A. 1; A. 117, 721.) Attendance is checked either through a call by a coordinator confirming aides are at work or by an aide calling to punch-in over the phone. (S.A. 34; A. 117, 453, 721.) The Company maintains a rule that aides must call-in if they will not be at work. (S.A. 1, 41; A. 75, 505, 880.) When aides cannot report for a shift, the Company will send a replacement aide, if the client agrees. (S.A. 1, 40; A. 512.)

B. The Union Sends a 10-day Strike Notice; The Company Polls its Employees; The Aides Strike on June 7; The Aides Contact the Company and Attempt to Return to Work

On May 27, 2004, the Union sent, as required by Section 8(g), a 10-day notice to the Company stating that there would be a 3-day strike by the aides commencing on Monday, June 7, 2004 at 6 a.m. and ending on Thursday, June 10, 2004 at 6 a.m. (S.A. 1, 40; A. 521, 823.) The Union had planned a citywide strike of home-health aides for this time period. During the week prior to June 7, at the behest of the New York State Department of Health, the Company's supervisors and coordinators surveyed employees by phone and asked if they would be taking any time off the following week. (S.A. 1-2, 40; A. 70, 219, 246, 286, 345, 375, 522-24, 721-22.) Of those polled, 75 employees indicated that they would be off either from June 7-9 or some portion of that time. (S.A. 2; A. 525.) At a meeting

shortly before the strike, the Union informed employees that they did not need to notify the Company if they planned to participate in the strike because the Union had already provided notice. (S.A. 2; A. 71, 381, 401, 544.)

On June 7, 48 additional employees engaged in the strike, the majority of whom were Spanish speakers. (S.A. 2, 40; A. 528, 840-42.) Of this group, 46 went on strike for only 1 day and sought to return to their previous assignments the next day, June 8. (S.A. 35, 40; A. 60, 116, 185, 415.) All of the 46 employees who went on strike for 1 day either contacted the Company after the strike on June 7 to indicate they would return the next day, attempted to return to their clients on the afternoon of June 7, or reported for their shifts at their clients' homes on June 8. (S.A. 35, 43; A. 61, 116, 185, 215-16, 240, 347, 350, 376, 394, 414-15.) The Company informed these employees that they were not to report to work until further notice. (S.A. 41; A. 61, 116, 118-19, 188, 216, 241, 351, 376-77, 395, 416, 539.) The 48 employees were not put back to work until at least June 14. (S.A. 41; A. 63, 65, 191, 288-89, 354, 378, 397, 416-17, 545-46.) Of the 75 employees who had responded to the Company's inquiry that they were going on strike, 73 were immediately put back to work at their previous assignments. (S.A. 2, 41; A. 549.)

C. The Company's Letter to the Aides; The Aides' Reassignments

The Company's Director of Operations, Linda Keehn, sent letters to the 48 employees on June 14 stating that the employees had violated a company policy requiring that employees call in if they will not be reporting to their assignments. (S.A. 41; A. 545-46, 863-67.) The letter stated that a number of aides "were confused whether they needed to call in" because the Union told some aides that it was not necessary to do so. (S.A. 41; A. 863, 866.) In these circumstances, the letter continued, the Company explained that termination was not appropriate. (S.A. 41; A. 863, 867.)

The Company permitted some of the 48 strikers to return to their former assignments after June 14. (S.A. 2, 43; A. 62-63, 387, 560, 840-42.) However, it did not return other employees to their prestrike clients; instead, they had to wait to be reassigned to a new client and did not have the same schedule and/or number of hours per week. Specifically, Norma Lindao, who had been regularly assigned to the same two clients prior to June 7, was given temporary assignments until July 24, when she was given a new long-term assignment with fewer hours than she had before the strike. (S.A. 43; A. 412-13, 418.) Reina Santiago had the same full-time weekday client for 3 years prior to the strike; after the strike, she was given only brief temporary assignments until August 2004 when she was given another regular assignment. (S.A. 43; A. 392, 397-98.) Ramona Then had one weekday

client and one weekend client prior to June 7; two weeks after the strike, she was returned to her weekday client only. (S.A. 43; A. 373, 387-88.) Lidia Solano was regularly assigned to the same client on weekdays from 9 a.m. to 1 p.m. (S.A. 43; A. 285.) After June 14 until sometime in September 2004, Solano received only temporary assignments. (S.A. 43; A. 289-90.) Altagracia Matos had a 40-60 hour per week regular assignment. (S.A. 43; A. 263.) After the strike, beginning in late June, she was given short-term assignments, ranging from a half-day per week to 5 days per week. (S.A. 43; A. 267-68.) Lazarus Phillips had been working for the Company for 6 years and had a regular assignment prior to the strike. (S.A. 44; A. 213.) Afterward, he was willing and able to work but was not offered any reassignments. (S.A. 44; A. 216, 222.)

The Company did not reassign other strikers, and they obtained work elsewhere. Maria Nieves had been assigned to the same client for more than 3 years. (S.A. 44; A. 344.) Following the strike, the Company did not permit her to return to that client, only giving her offers for replacement assignments for 4-6 hour shifts. (S.A. 44; A. 354, 360.) Nieves left to work for a different agency. (S.A. 44; A. 354.) Zoila Niveló had one Monday to Friday 9 a.m. to 1 p.m. client and one weekend client before the strike. (S.A. 44; A. 114.) After being removed from her assignments, Niveló began working for another agency on June 15. (S.A. 44; A. 119.)

In two cases, the clients and their aides moved to other agencies when their aides were not returned to them after the strike. On June 8, when she reported to work, Melania Navarro was told that she was not to work with her assigned client and should leave the client's home. (S.A. 44; A. 242-43.) However, the client's son hired Navarro directly out of his own pocket, before having his father transferred to another agency for which Navarro went to work. (S.A. 44; A. 242-43, 904.) Likewise, Petra Ortiz transferred to another agency to keep working with her pre-strike client. (S.A. 44; A. 190-91, 591-92, 906.)

II. THE BOARD'S 2007 DECISION

Acting on a charge filed by the Union, the Board's General Counsel issued a complaint alleging, in relevant part, that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by failing and refusing to reinstate, or offer to reinstate, economic strikers. (S.A. 39; A. 812-22.) Following a hearing, a judge found that the Company violated the Act as alleged. The parties filed exceptions with the Board.⁵

The Board (Chairman Battista and Members Liebman and Kirsanow) found, in agreement with the judge, that the Company violated Section 8(a)(3) and (1) of

⁵ After the Company filed exceptions, the Board issued a Supplemental Order striking the Company's brief in support of exceptions for failing to conform to the Board's rules after the Company twice filed non-conforming documents. *See Special Touch Home Care Serv., Inc.*, 349 NLRB 759, 759-60 (2007). The Board accepted the Company's exceptions. *Id.*

the Act by failing and refusing to immediately reinstate 47 home health aides after they offered to return to work. *See Special Touch Home Care Serv., Inc.*, 351 NLRB 754 (2007). (S.A. 34.) The Board found that the aides were not reinstated, notwithstanding their offers and attempts to return to work, until at least 1 week after the strike, for which the Union undisputedly gave a valid Section 8(g) notice to the Company. *Id.* at 754-55. (S.A. 34-35.) Most were not reinstated to their prior clients. *Id.* at 755. (S.A. 35.)

The Board found unavailing various defenses raised by the Company including its reliance on a rule that aides were required to call-in and give notice when they would not be at work. Relying on the “fundamental right” of employees to strike for the purpose of organizing and improving their terms and conditions of employment, the Board found that an employer could not “legitimately contend that employees who engage in a primary strike can be fired or otherwise disciplined because they failed to comply with a company rule such as one requiring them to get permission or give notice before they absent themselves from work.” *Id.* at 761. (S.A. 41-42.) The Board concluded that, if the Company’s call-in rule could require individual notice from striking employees, “an employer could, by enactment of a private rule, nullify the public rights guaranteed by a statute of the United States.” *Id.* (citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962) (holding that a plant rule cannot require an employee to obtain

permission of a foreman before engaging in protected activity)). (S.A. 42.) The Board further rejected the Company's assertions that the aides' conduct justified the Company's treatment of them, that the Company permanently replaced them during the strike, or that it reinstated the aides within a "reasonable" period of time after the strike. *Id.* at 757, 763. (S.A. 37, 43.)

III. THE COURT'S OPINION

Acting on the Board's application for enforcement, the Court denied enforcement as to the failure and refusal to immediately reinstate the aides who went on strike after not affirmatively responding to the Company's survey asking if they would be taking time off during the week of June 7 and not calling in pursuant to the Company's absence notification rule. *Special Touch*, 566 F.3d at 300. (S.A. 26.) The Court remanded the case to the Board to determine "whether [the Company] may enforce its call-in rule and mandate compliance with its survey, reasonably relying on the results of both, in light of Section 8(g)'s requirement that only unions and not individual employees are required to give notice to health care employers." *Id.*

The Court recognized that a plant rule requiring individual notice from employees "cannot be immediately reconciled with the cases which have held that individual employees—including in the medical context—need not give notice before going on strike." *Id.* at 298 (citing *Montefiore Hosp. & Med. Ctr. v. NLRB*,

621 F.2d 510, 516 (2d Cir. 1980)). (S.A. 23-24.) However, the Court stated that a remand was necessary because “it appears both parties reasonably relied on separate doctrines—the Union relying on Section 8(g) and [the Company] on the plant rule doctrine—and these rules came into conflict with each other.” *Id.* at 299. (S.A. 25-26.)

The Court concluded that the Board should “decide the degree to which the plant rule doctrine is affected by Section 8(g) and whether . . . [the] employees are still entitled to labor law protection given their failure to comply with the call-in rule or honestly answer [the Company’s] survey.” *Id.* at 301. (S.A. 28.) The Court in particular instructed the Board to consider the application of Section 8(g) in a situation where the union may have told employees that they did not need to provide notice to the employer of their absence. *Id.* at 301. (S.A. 28.) The Court identified several interests for the Board to balance in answering its questions, including the Company’s “attempt to maintain a properly regulated workforce,” the aides’ interest in striking along with their interest in “not having to decide in advance that they wished to participate,” and any risk to the clients considering the type of care provided by the aides. *Id.* at 300. (S.A. 27.)

IV. THE BOARD’S DECISION AND ORDER ON REMAND

On remand, the Board invited the parties to file position statements. On June 30, 2011, after reviewing statements from the Company and the Board’s

General Counsel, the Board (Chairman Liebman and Member Becker, Member Hayes dissenting) issued its Decision and Order.⁶ The Board found that Congress adopted Section 8(g) of the Act with the “intent that the Board not restrict the rights of healthcare employees in any manner other than that expressly set forth in the amendments” to the Act. (S.A. 4.)

Addressing its case law involving plant rules requiring employee notification before participation in concerted activity—denominated by the Court as the “plant rule doctrine” the Board stated (S.A. 5) that it “has never articulated a categorical principle that an employer may always apply a preexisting, neutral plant rule, even if it restricts employees’ Section 7 rights.” The Board found prior cases involving such rules distinguishable on the facts, mostly because, contrary to a Section 8(g)

⁶ For the first time in this proceeding, the Company states (Br. 9) in a parenthetical that Member Becker should have disqualified himself from considering this case based on his prior employment with SEIU. The Company failed to request recusal, and the Court is precluded from considering such an argument here. 29 U.S.C. § 160(e). Moreover, in *Service Employees Local 121RN (Pomona Valley Hospital Medical Center)*, 355 NLRB No. 40, slip op. at 5 (2010), Member Becker explained the principles he would apply in evaluating recusal requests based on his prior representation of labor organizations that might appear before the Board. Not only was no such request for recusal made here, but applying the rationale of *Pomona Valley*, his involvement in this case is no different from cases that have been upheld in court. See, e.g., *Regency Grande Nursing & Rehabilitation Ctr.*, 355 NLRB No. 109 (2010), enforced, 441 F. App’x. 948 (3d Cir. 2011). Indeed, Member Becker’s representation of the Union (or its predecessors) in the Company’s two cited cases (Br. 9 n.1) occurred 9 years ago, well outside the 2-year ban that federal ethics law requires. *Pomona Valley*, 355 NLRB No. 40, slip op. at 6.

case, no prior notice of the work stoppage was given at all. Additionally, the Board found that “permitting an employer to compel employees to provide individual notice of participation in collective action would impose a significant burden on the right to strike, both as to individual employees and employees as a group.” (S.A. 7.)

As to the Company’s pre-strike survey of employees, the Board found no extant rule that “employees who change their minds or who choose for other reasons to participate in a strike, after having told the employer in response to a lawful poll that they do not plan to participate, lose the protection of the Act.” (S.A. 8.) The Board declined to adopt such a rule because it would “effectively impose an individual notice obligation on healthcare employees, when Congress chose not to impose any such obligation.” (S.A. 8.)

Concluding that the “balancing of interests” that it engaged in, as instructed by the Court, did not justify the Company’s actions, the Board reaffirmed its finding that the Company violated Section 8(a)(3) and (1) of the Act by failing to immediately reinstate the economic strikers upon their unconditional offer to return to work. (S.A. 9.)

The Board’s Order requires the Company to cease and desist from failing to immediately reinstate economic strikers who offered to return to work to their former positions of employment or substantially equivalent positions of

employment. (S.A. 9.) Affirmatively, the Order directs the Company to offer those strikers who have not yet been returned to their former jobs, or those who have had their hours or other terms and conditions of employment changed since the strike, immediate and full reinstatement to their former positions, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. (S.A. 9-10.) The Board also ordered the Company to make whole the striking employees who unconditionally offered to return to work, and who were not reinstated immediately, for any losses incurred due to denial of reinstatement to their normal assignments, with interest, and remove from its records all reference to unlawful action taken against the 47 discriminatees, informing them in writing that this has been done. (S.A. 10.) The Board's Order further requires the Company to post a remedial notice. (S.A. 10.)

SUMMARY OF ARGUMENT

In remanding this case, the Court asked the Board to resolve “whether [the Company] may enforce its call-in rule and mandate compliance with its survey . . . in light of Section 8(g)’s requirement that only unions and not individual employees are required to give notice to health care employers.” *Special Touch*, 566 F.3d at 300. (S.A. 26.) The Board answered in the negative, having

determined that Congress has already struck a balance against individual employee notice requirements in the health care industry.

When Congress amended the Act to grant all its rights and protections to health care employees, it carefully balanced the interests of employers, employees, and patients to achieve the protections necessary to insure continuity of patient care while not overly burdening health care employees' right to strike. Congress struck that balance with Section 8(g) of the Act, which requires that only unions, but not individual employees, provide health care institutions with a 10-day notice prior to striking. The Board concluded that it is bound to heed the compromise that Congress achieved and can not tip the scales in favor of one set of competing interests. Therefore, any argument that health care employers should be able to require individual notice from employees must be directed to Congress.

Thus, here, when the Union gave the Company an undisputedly lawful Section 8(g) notice of its intent to strike on June 7, no further burden adhered to the employees to give individual notice of their intent to strike by calling in to notify the employer that they would be absent. Cases involving the lawful application of plant rules to employees' concerted activity in different factual circumstances do not alter the balance here. As the Board found, those cases involved no prior notice of concerted activity or employees walking away from sometimes dangerous labors in progress. Furthermore, the Board reasonably concluded that

requiring additional individual notice in a strike situation in the health care setting, such as the Company's request for a particular form of individual notice each day of the strike, represents a significant burden on both the individual and group exercise of employee rights. The Board concluded that Congress balanced the relevant interests, chose not to place that burden on health care employees, and the Board cannot usurp that choice.

In sum, the home-health aides engaged in a lawful economic strike on June 7—a strike the Company had knowledge of 10 days in advance—following which the Company denied 47 aides the right to return to their jobs and provide services to their clients. None of these aides were put back to work until at least June 14 and many were never permitted to return to their regularly-scheduled clients. Instead, they had to wait weeks, and in some cases months, to be given regular assignments, often working fewer hours and making less money than their pre-strike assignments.

The Board rightfully rejected the Company's meritless claim that the aides lost the Act's protection because they left clients in "imminent danger." The evidence demonstrates that the aides, who perform no medical services, informed their clients and/or the clients' families that they would be on strike and no client's health and safety was jeopardized. Furthermore, the Company has failed to establish that the employees who replaced the aides during the strike were

permanent replacements. Lastly, the Company has presented no justification for its delay in reinstating the aides for at least 5 days, and sometimes much longer. The Company asserted to the Board only that it was privileged to delay reinstatement for 5 days, a rationale the Board rightfully rejected as erroneous and the Company no longer relies on.

ARGUMENT

THE BOARD REASONABLY FOUND THAT 47 ECONOMIC STRIKERS RETAINED THE PROTECTION OF THE ACT, NOTWITHSTANDING THE COMPANY'S CALL-IN RULE OR SURVEY, BECAUSE THE STATUTORY SECTION 8(g) NOTICE REQUIREMENT PROPERLY BALANCED THE COMPETING RIGHTS INVOLVED AND THEREFORE THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO IMMEDIATELY REINSTATE THE STRIKERS

A. Standard of Review

The Board bears “primary responsibility for developing and applying national labor policy.” *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). The Board’s interpretation of the Act is subject to the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). *See NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123-24 (1987); *Local 812, Int’l Bhd. of Teamsters v. NLRB*, 947 F.2d 1034, 1039-40 (2d Cir. 1991). Accordingly, where the plain terms of the Act do not specifically address the precise issue, the courts, under *Chevron*, must defer to the Board’s reasonable interpretation of the Act. *See Mathirampuzha v. Potter*,

548 F.3d 70, 82 (2d Cir. 2008) (“[W]e defer to agencies’ reasonable interpretations of ambiguous language in the statutes they administer, including the scope of those statutes and the types of claims they cover.”) (citing *Chevron*, 467 U.S. at 844).

Indeed, the Court must “respect the judgment of the agency empowered to apply the law ‘to varying fact patterns,’ even if the issue ‘with nearly equal reason [might] be resolved one way rather than another.’” *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996) (quoting *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 302, 304 (1977)). The Court will consider “both whether the [Board’s] interpretation is arguably consistent with the underlying statutory scheme in a substantive sense and whether ‘the [Board] considered the matter in a detailed and reasonable fashion.’” *ITT Indus. v. NLRB*, 251 F.3d 995, 1004 (D.C. Cir. 2001) (quoting *Chevron*, 467 U.S. at 865).

The Board’s findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e). A reviewing court may not “displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *Accord NLRB v. G&T Terminal Packaging Co.*, 246 F.3d 103, 114 (2d Cir. 2001). The Court will not reject factual findings unless “no rational trier of fact could reach the conclusion drawn by the Board.” *G&T Terminal*, 246 F.3d at 114. Therefore,

“the findings of the Board ‘cannot lightly be overturned.’” *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982) (quoting *NLRB v. Advanced Bus. Forms Corp.*, 474 F.2d 457, 464 (2d Cir. 1973)).

B. Employees Who Engage in an Economic Strike are Entitled to Immediate Reinstatement Upon Request When the Strike Ends, Absent Their Permanent Replacement

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the “right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” The employees’ right to engage in primary strike activity in support of economic demands is fundamental to the Act. Indeed, this right is expressly recognized in Section 13 of the Act (29 U.S.C. § 163): “Nothing in this Act . . . shall be construed . . . to interfere with or impede or diminish in any way the right to strike” *See also NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233-34 (1963) (“repeated solicitude [in the Act] for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system”).

Implementing Section 7’s guarantee, Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer “to interfere with,

restrain, or coerce employees in the exercise” of their Section 7 rights. Further, Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to discriminate “in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization.”

An employee whose work has ceased as a consequence of a labor dispute continues to be an “employee” under the Act if she has not obtained regular and substantially equivalent employment. *See* 29 U.S.C. § 152(3); *see also Waterbury Hosp. v. NLRB*, 950 F.2d 849, 854 (2d Cir. 1991). So long as the individual remains an employee under the Act, she has the right to be reinstated after the dispute is resolved. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Waterbury Hosp.*, 950 F.2d at 854. Under Supreme Court precedent, an employer that refuses to reinstate economic strikers violates Section 8(a)(3) of the Act unless it can demonstrate that it acted to advance a “legitimate and substantial business justification.” *See Fleetwood Trailer*, 389 U.S. at 378 (quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967)); *see also New England Health Care Emps. Union v. NLRB*, 448 F.3d 189, 191 (2d Cir. 2006).

When evaluating rules that govern employee conduct in the workplace, the Board must balance the employees’ Section 7 rights and the employer’s business interest in maintaining discipline in the workplace. *Republic Aviation Corp. v.*

NLRB, 324 U.S. 793, 797-98 (1945). Any limitation on Section 7 rights must be no more restrictive than necessary to protect the employer’s legitimate interests. See *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 495, 502-03 (1978); see also *NLRB v. Baptist Hosp.*, 442 U.S. 773, 773 (1979) (striking the appropriate balance in health care context includes consideration of the rights of employees, employers, and patients).

C. The Board Reasonably Found that Requiring Health Care Employees to Individually Notify Their Employer That They Were Planning to Strike Pursuant to an Employer Work Rule is Contrary to the Balance of Interests Congress Struck in Section 8(g) of the Act

On remand, the Board responded in the negative to the Court’s question “whether employees of a health care institution who violate a non-discriminatory call-in rule lose the protections of the [Act] even though the relevant union has given the notice required by Section 8(g) thereof.” *Special Touch*, 566 F.3d at 297. (S.A. 21.) The Board found that the aides did not lose the protections of the Act and that a determination otherwise would be “contrary to the balance struck by Congress in Section 8(g) of the Act, unnecessary to protect the [Company]’s legitimate interests under existing Board precedent, and unduly burdensome of the right to strike.” (S.A. 3.) Accordingly, the Board held (S.A. 3) that the Company was not entitled to deny immediate reinstatement to the aides and thus violated

Section 8(a)(3) and (1) of the Act by failing to reinstate them upon their offer to return the day after the strike.

1. Congress balanced the rights of health care industry employers, employees, and patients when enacting Section 8(g) of the Act requiring notice of strikes from unions

Section 8(g) of the Act (29 U.S.C. § 158(g)) requires a labor organization to give written notice to a health care institution at least 10 days before engaging in any strike, picketing, or other concerted refusal to work.⁷ Section 8(g) imposes no notice requirement on individual employees. *Bethany Medical Ctr.*, 328 NLRB 1094, 1094 (1999); *see also Montefiore Hosp. & Med. Ctr. v. NLRB*, 621 F.2d 510, 515-16 (2d Cir. 1980).

Congress enacted Section 8(g) when it amended the Act in 1974 to bring workers employed by nonprofit health care institutions within the Act's coverage and granted them all its rights and protections, including the right to strike. When considering the 1974 amendments, Congress "faced, and ultimately carefully balanced, two conflicting interests." (S.A. 4.) Congress considered that "it is

⁷ Section 8(g) states:

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, no less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

unjust to deny to employees of [health care institutions] the rights granted to employees in other industries to organize and bargain collectively.” *Walker Methodist Residence*, 227 NLRB 1630, 1630 (1977). However, Congress further recognized that “special protection seemed necessary when dealing with health care institutions in order to assure continuity of patient care.” *Id.*

As the Board noted (S.A. 4), Congress achieved a “finely tuned balance” of those interests by adding the 10-day union notice requirement in Section 8(g) and amending Section 8(d) to provide that, without such notice, “[a]ny employee . . . who engages in any strike within the appropriate period specified in [Section 8(g)], shall lose his status as an employee of the employer. . . .” 29 U.S.C. § 158(d). *Minnesota Licensed Practical Nurses Ass’n. v. NLRB*, 406 F.3d 1020, 1027 (8th Cir. 2005) (nurses lost protected status when union unilaterally delayed start time of strike beyond time set in Section 8(g) notice). As the Senate report on the health care amendments shows, the notice requirement in Section 8(g) was intended to give health care employers “sufficient advance notice of a strike or picketing to permit them to make arrangements for the continuity of patient care.” Senate Comm. on Labor and Public Welfare, S. Rep. No. 93-766, at 1 (1974) and H.R. Rep. No. 93-1051, at 1-2 (1974), both reprinted in 1974 U.S.C.C.A.N. 3946, and in Subcommittee on Labor of the Committee on Labor and Public Welfare, United

States Senate, *Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974*, 8, 269-70 (Comm. Print 1974).

Thus, while employees in the health care field have the same right to strike as other employees, the notice provision gives health care employers the time to arrange for uninterrupted client care. *See District 1199, National Union of Hosp. and Healthcare Emps.*, 232 NLRB 443, 445 (1977), *enforced*, 582 F.2d 1275 (3d Cir. 1978) (table); *Walker Methodist Residence*, 227 NLRB at 1631. Such notice allows the employer to assess the extent to which normal operations may be disrupted. *See Retail Clerks Union Local 727*, 244 NLRB 586, 587 (1979). In that manner, Congress balanced the right of health care workers to engage in a strike with a health care employer's need to maintain stability in its operations. *NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, 897 F.2d 1238, 1247 (2d Cir. 1990).

Strict adherence to the notice requirements fully satisfies the underlying policy consideration of Section 8(g). The interests of both the employees and the health care provider are satisfied. On one hand, the Board and courts "have consistently held that employees generally have the right to strike without providing advance notice, even at health care facilities" as long as the union complies with the notice requirements of Section 8(g). (S.A. 3-4 & n.13 (citing cases).) On the other hand, health care institutions have "a legitimate interest in

ensuring that patients are adequately cared for during a strike.” (S.A. 4.) Under Section 8(g)’s rubric, the union is given the opportunity to establish the date and time for a strike that is most advantageous; the health care employer is provided the degree of certainty in the date and duration of the strike necessary to plan for continuity of care.

Given this balancing of interests by Congress, the Board concluded (S.A. 4) that Congress “adopted Section 8(g) and amended Section 8(d) precisely to address the concerns raised” by the Court here. However, the Board further noted (S.A. 4) that the statutory notice obligation is imposed only on unions, and not on individual employees. *See, e.g., Montefiore Hosp.*, 621 F.2d at 515-16; *Walker Methodist*, 227 NLRB at 1631. Contrary to the Company’s characterization (Br. 10) and as shown here, the Board did consider the interests of employees, employers, and clients—by giving heed to the balance Congress already struck with regard to their interests. The Board recognized (S.A. 4) that Congress “[h]aving arrived at what it expressly considered a compromise . . . did not intend for the Board to tip the balance in one direction or the other in order to protect one set of the competing interests.”

Furthermore, Congress specifically intended that the Board “not restrict the rights of healthcare employees in any manner other than that expressly set forth” in the 1974 health care amendments to the Act. (S.A. 4 & n.16 (citing legislative

history).) Indeed, the Board is “not free to draw the line elsewhere even in a well-intentioned belief that broader protection of the public interest in health care outweighs the resulting imposition on employees.” *Laborers Local 1057 v. NLRB*, 567 F.2d 1006, 1015 (D.C. Cir. 1977) (holding that Section 8(g) notice not required from union representing nonhealthcare employees even though strike picketing would take place partially on hospital property).

The Board “considered the matter in a detailed and reasoned fashion” and its interpretation of Section 8(g) is a permissible construction of the Act and entitled to deference. *Chevron*, 467 U.S. at 843, 865. *Accord Mathirampuzha*, 548 F.3d at 82. Therefore, as the Board concluded (S.A. 5), if the balance established by Congress is “imperfect,” the Board has no authority to adjust it; such arguments are better directed to Congress.

2. The Board reasonably determined that allowing health care employers to maintain rules requiring individual notice from their employees before they strike would be contrary to the balance already struck by Congress

Having established that Congress intended only for unions, not employees, to give strike notice in the health care industry, the Board then answered this Court’s question asking “where the law stands in light of the intersection between Section 8(g) and the plant rule [doctrine],” *Special Touch*, 566 F.3d at 300 (S.A. 26.), which this Court defined as the principle that an employer may “enforce neutral ‘reasonable rules covering the conduct of employees on company time.’”

566 F.3d at 297 (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945)). (S.A. 21.) The Court observed that a plant rule requiring an employee to give notice before striking “cannot be immediately reconciled” with the well-established principle that Section 8(g) applies only to unions. 566 F.3d at 298. (S.A. 23.) Indeed, this Court’s own cases suggested a conflict: in *Montefiore Hospital*, the Court rejected the notion that Section 8(g) requires individual employees to give notice because such an interpretation would “disregard the ordinary meaning of plain language” in the statute and “would in effect be rewriting 8(g).” 621 F.2d at 514. However, in dicta, the *Montefiore* court noted that doctors who joined a strike and were not covered by a Section 8(g) notice “might” be in a different position (i.e., engaged in unprotected conduct) if they had affirmatively told the employer that they would not participate in the strike. 621 F.2d at 515. Thus, the Court found that *Montefiore* and *Republic Aviation* “signal[] that there is some weighing of the interests involved” in applying the doctrine of plant rules. *Special Touch*, 566 F.3d at 299-300. (S.A. 25, 27.)

In addressing this issue, as framed by the Court on remand, the Board stated (S.A. 5) that it “has never articulated a categorical principle that an employer may always apply a preexisting neutral plant rule, even if it restricts employees’ Section 7 rights.” The Board noted established Board and court precedent that employers may not discipline striking employees based on plant rules that forbid employees

from leaving their jobs without permission. *See, e.g., NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16-17 (1962) (walkout protected even though it violated work rule requiring employees to obtain permission from foreman before leaving their work); *Go-Lightly Footwear*, 251 NLRB 42, 44 (1980) (walkout protected even though it violated rules that employees could not leave without permission or without punching out). While cases such as *Washington Aluminum*, involving rules that require an employee to receive permission to leave work, are not identical to the Company's rule requiring notification, the Board held that the notification cases—all of which occurred outside the Section 8(g) context—were distinguishable. Thus, the Board noted (S.A. 6) that it found conduct unprotected where employees engaged in a sudden cessation of work on a production line in violation of a plant rule designed, in part, to safeguard the plant and its equipment. For example, employees who walked away from a moving production line of chickens to present a grievance to management engaged in unprotected conduct. *Terry Poultry Co.*, 109 NLRB 1097, 1097-98 (1954). Similarly, employees who walked away from an operating chemical production line to participate in a surprise strike engaged in unprotected conduct. *Gen. Chemical Corp.*, 290 NLRB 76, 83 (1988).

The Board, assessing its own case law (S.A. 6), found that *Terry Poultry* and *General Chemical* do not stand for “the general proposition that enforcement of

‘notification’ rules during a strike is always lawful.” The Board found several ways in which the home health aides’ situation differed from that of the employees in both cases. First, and most importantly, there was no advance notice of the concerted activity in either of the cases. In sharp contrast here, the Company had the Union’s Section 8(g) 10-day advance notice. This notice allowed the Company to engage in planning for the strike on multiple fronts, including conducting a poll that informed it of the “limited scope of the strike,” that would likely involve less than 10 percent of employees. (S.A. 9.)

Second, the aides did not leave their work areas during work time as the employees in the above-cited cases did. The Board noted (S.A. 6) that this Court drew what it denominated as the “plant rule doctrine” from language permitting an employer to enforce nondiscriminatory rules covering “the conduct of employees on company time.”” *Special Touch*, 566 F.3d at 297 (quoting *Republic Aviation*, 324 U.S. at 803 n.10). (S.A. 21.) Both *Terry Poultry* and *General Chemical* implicated the employer’s interest, set out in *Republic Aviation*, in maintaining discipline in their establishments. However, this case simply does not implicate the same employer interest in regulating employee behavior on work time because no aide left a client’s house to join the strike. The Board relied (S.A. 6) on this “distinction of substance” as it is “highly unusual—and almost inevitably disruptive—for employees to walk off the job.” In contrast, as the Board noted

(S.A. 6), it is not uncommon for some employees to fail to show up for work. Indeed, most employers, including the Company here, have systems in place to insure coverage for absent employees. For instance, record evidence shows that on any given day, one or two aides failed to come to work without prior notice, and five to ten gave notice so late that the Company had to find last-minute replacements for them. (S.A. 6; A. 534.)

Third, the Board's decision in *General Chemical* relies not only on an employer's plant rule but the "significant danger" that resulted from the walkout. 290 NLRB at 83. As more fully discussed below (pp. 44-50), here the "evidence fails to show such danger." (S.A. 6.) Despite the Company's contention (Br. 35), the Board did not demand proof of actual harm but rather assessed the risk of harm to the clients. Briefly, with respect to the five clients who received no replacement aide on June 7, the Company presented no evidence regarding their physical condition that would lead the Board to conclude that they were endangered. Similarly, for clients who received delayed coverage on the morning of the strike, the Company presented no evidence regarding the length or potential consequences, if any, of the delay. (S.A. 6.)

Finally, requiring individual notice is an impediment to employees' Section 7 activity. The Company's notice rule requires each aide to individually inform the Company of her plans. While an absence notification rule may be a "less

formidable” obstacle to concerted activity than a rule requiring permission, it is a “restrictive condition nonetheless.” *Savage Gateway Supermarket*, 286 NLRB 180, 183 (1987) (employer unlawfully fired employee who failed to report to work due to picket line and did not comply with notification rule), *enforced*, 865 F.2d 1269 (6th Cir. 1989) (table); *cf. Wilshire at Lakewood*, 343 NLRB 141, 144 (2004) (rule prohibiting nurses from abandoning their shifts without permission did not on its face violate Section 8(a)(1) because employees could not reasonably read the rule to prohibit them from engaging in strikes or similar concerted activity), *rev’d sub nom. on other grounds, Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007).

The notice rule here, applied to the concerted activity of the strike, requires each individual inform the Company of her intention to engage in the protected activity in order for the activity to be protected. The Company has, at base, asked for a two-step notification process. First, the Union must provide notice under Section 8(g). Then, each employee who intends to participate in the strike must provide a second, individual notice. In fact, according to the Company’s argument, under its call-in rule, each individual employee was required to provide notice each day from June 7 to June 10 that she chose to participate in the strike. However, this is antithetical to the purposes of the Act. As the Board stated, the Act protects concerted activity, such as the strike here, “precisely because

Congress believed that, individually, employees could not and would not effectively protect their legitimate interests.” (S.A. 7.)

The Board found (S.A. 7) the Company’s call-in rule to be a “significant burden” on the right to strike based on the “premises of the Act, Congress’ decision to impose a duty to give notice only on labor unions, and [the Board’s] experience with labor-management relations.” *See, e.g., NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (where the Board engages in the “‘difficult and delicate responsibility’ of reconciling conflicting interests of labor and management, the balance struck by the Board is ‘subject to limited judicial review’”) (quoting *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 96 (1957)). Not only would individual employees face the “potentially intimidating” prospect of telling their employer that they planned to go on strike, but “the ability of employees as a group to mount an effective strike would also depend on the willingness of individual employees to so notify the employer.” (S.A. 7.)

The concomitant burden on the employer if an absence notification rule is not complied with in a strike situation is smaller. In a case “most closely analogous” to this one, the Board found that an employee who failed to report to work because of the presence of a picket line was engaged in protected activity despite her failure to comply with the employer’s absence notification rule. *Savage Gateway*, 286 NLRB at 182. (S.A. 7.) The Board recognized that while “it

best suits an employer's convenience to know in advance exactly who will and who will not support a strike," *id.* at 183, the Act does not require that employees conduct a strike "in a manner most conducive to the continued operation of the employer." (S.A. 7.) Nothing in the Act gives employers the right to restrict protected activity by applying work rules "simply on a showing that enforcement of such rules will help assure efficient operations during a strike." *Id.* at 183-84. Rather, an employer must show that the business justification supporting an individual notice requirement is "sufficiently compelling" and "outweigh[s] unrestricted exercise of protected activity." *Id.* at 183.

Here, the Company has failed to provide any such compelling justification. The Board rejected (S.A. 7) the notion that simply being a health care institution is a compelling business justification, given the 10 days' written notice that such employers receive as part of the "careful balance of interests" Congress established in Section 8(g). *See East Chicago Rehab. Ctr.*, 259 NLRB 996, 1000 (1982) ("there is nothing in the Act which imposes greater restrictions on the activities of employees in the health care industry than employees of any other industry"), *enforced*, 710 F.2d 397 (7th Cir. 1983). The Company undisputedly received that notice here. Therefore, as the Board noted (S.A. 7), any argument that health care employers "should be able to require additional notice from employees must be directed to Congress, not the Board."

Thus, the Board thoroughly analyzed its own precedent and found the cases involving notification rules (denoted by the Court as the “plant rule doctrine”) inapplicable to the facts of this case in light of the balancing of interests already undertaken by Congress and the Union’s compliance with Section 8(g).⁸ This reasoned analysis represents a far cry from the Company’s charge (Br. 32) that the Board “disregarded” the Court’s questions on remand. Furthermore, contrary to the Company’s protest (Br. 33), the Board, on remand, expanded considerably upon the rationale of the judge by exploring the competing interests presented while giving due deference to Congress’ determinations as to the treatment of health care employers and employees, as well as their clients, under the Act. Accordingly, the Board reasonably found (S.A. 8) that non-compliance with the Company’s call-in rule by some strikers did not justify the Company’s failure to reinstate them upon their unconditional offer to return to work.

⁸ The Board referenced (S.A. 5) *Kapiolani Hosp.*, 231 NLRB 34, 42 (1977), *enforced*, 581 F.2d 930 (9th Cir. 1978), in response to the Court’s inquiry about the impact of a Section 8(g) notice on individual employee protections. The Company goes too far (Br. 33-34) in stating that a case alleging discriminatory enforcement of an employer work rule presents the same issue that the Board decided here. The Board had no reason in *Kapiolani* to address, let alone decide, the Section 8(g) notice issue that it has resolved here.

3. The Board found that a health care employer's interests can be further protected by its ability, while safeguarding employee rights, to poll employees individually after receipt of a Section 8(g) strike notice

The Board next considered (S.A. 8) the impact of the Company's poll in response to the Court's query on remand as to whether the Company may "mandate compliance with its survey" and "reasonably rely[]" on its results. *Special Touch*, 566 F.3d at 300. (S.A. 26.) The Board concluded (S.A. 8) that a poll can be a useful tool in protecting an employer's interests by probing an employee's intent to strike—provided that certain criteria are met to insure that the poll is not coercive and thus will yield honest answers from employees.

While it is unlawful in most circumstances for an employer to systematically question employees about their union activity, health care employers enjoy a limited exception to this rule. *See Preterm, Inc.*, 240 NLRB 654, 656 (1979). Specifically, upon receipt of a 10-day strike notice, an employer "may properly attempt to determine the need for replacements by asking employees if they intend to strike." *Id.* An employer's poll must meet certain criteria. The employer must fully explain the purpose of the questioning, assure employees that no reprisals will be taken against them based on their answers, and "refrain from otherwise creating a coercive atmosphere." *Id.*

Here, the Company achieved a 97 percent accurate response rate in its poll of approximately 1400 employees. (S.A. 7 n.25.) Still, the Board found (S.A. 8)

that the record lacks evidence showing that the Company complied with the first two conditions (although the poll was not alleged to be unlawful). Therefore, the Board observed that an express assurance of nonretaliation by the Company might have led some of the 48 employees who indicated they would not be taking time off to be more forthcoming. Thus, had the Company adhered to Board rules, it might have obtained an even more accurate picture of the strike and further minimized the disruption to its operations.

The Company erroneously asserts (Br. 37-38) that employees should be held to their pre-strike survey responses if they did not call the Company pursuant to the call-in rule. However, the law does not require the aides to make a decision as to whether to participate in the strike a week in advance. *See, e.g., Bethany Med Ctr.*, 328 NLRB 1094, 1094 (1999). Indeed, the record shows that some aides were not even aware of the strike when they were asked by the Company if they would be working on June 7. (S.A. 8 n.28; A. 59, 209, 345.) Aides had also been truthfully told by the Union that notice to the Company had already been provided. (S.A. 2, 8 n. 28; A. 71, 381, 401, 544.)

Furthermore, the Company, after holding a strike notice for ten days that covered 1400 individuals and surveying employees before some of them even knew about the strike, somehow realized “all of a sudden” (Br. 19, A. 530) that additional aides had joined the strike. The Company’s assertion (Br. 37) that

employees had an obligation to revise their answers to the poll if those answers changed at any time prior to the strike is unsupported. No Board or court decision holds that employees who change their minds or find out about a strike after answering a poll lose the protection of the Act. (S.A. 8.) There is no time limit placed on an employee's right to decide to participate in lawful concerted activity.

While health care employers are privileged to engage in what would otherwise be an unlawful interrogation by questioning employees about their plans to engage in union activity, that privilege does not extend to “back[ing] up” the poll with the “threat of discipline or discharge for engaging in protected concerted activity not disclosed in response to the interrogation.” (S.A. 8.) The Company protests (Br. 39) that no aides were “punished” for their participation in the strike. Irrespective of the terminology the Company wishes to apply to the consequences for the aides, they were not immediately reinstated to their prior clients. If employees face such consequences for failing to provide an accurate as well as unchanging, or unceasingly updated, response to an employer's survey, that would “effectively impose an individual notice obligation” on the employees, when Congress explicitly chose to do no such thing. (S.A. 8.)

The Company relies (Br. 30) on dicta in *Montefiore Hospital* stating that a hospital, after receiving a 10-day strike notice covering certain employees, would be “well-advised to inquire of the rest of its employees whether they plan to stay

out in sympathy” and, if an employee struck after promising to show up, the employees “may well forfeit protection under the Act.” 621 F.2d at 515. As the Board found (S.A. 8), the Court’s statement in *Montefiore* concerned employees *not* covered by the 10-day notice but individuals, like the doctors in that case, who might go on strike in sympathy with the unit covered by the union’s notice.

Congress chose not to tip the scales to give the Company a right to individual employee notice or the right to probe with guaranteed accuracy which employees would avail themselves of their right to strike. Instead, the Company had other types of notice—including the Union’s strike notice and its 97 percent accurate survey responses—to help it plan for protecting its interests.

4. The Board reasonably concluded that the Company violated Section 8(a)(3) and (1) of the Act by failing to reinstate the aides upon their unconditional offer to return to work

It is undisputed that the home-health aides engaged in a lawful economic strike and made an unconditional offer to return to work. Having reasonably determined that the aides were not required to give individual notice of their intent to strike, the Board found (S.A. 1), based on substantial evidence in the record, that the Company violated Section 8(a)(3) and (1) of the Act by failing to immediately reinstate the aides. Simply, the aides were employees when they went on strike the morning of June 7 and continued to be employees when they spoke to their coordinators about returning to work or attempted to report to their clients’ homes

only to have the Company send them home. As employees who made unconditional offers to return to work, the aides were entitled to reinstatement. *See NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Waterbury Hosp. v. NLRB*, 950 F.2d 849, 854 (2d Cir. 1991).

It is undisputed (Br. 59) that the Company did not permit those strikers to return to their clients notwithstanding their offers and attempts to do so, and 47 aides were not reinstated until at least June 14, one week after the strike. In fact, aides were told not to return to their jobs, and in some cases to leave their clients' homes where they reported for work—often against the express wishes of clients and their families. (S.A. 43-44; A. 186, 242, 352, 591-92.) Aides were denied reinstatement to positions with clients who felt comfortable with specific aides who had been coming to their homes for months and, in some cases, years. For example, both Reina Santiago and Maria Nieves had been with their clients for more than 3 years at the time of the strike, and were not reinstated to those clients. (S.A. 43-44; A. 344, 392.) Ms. Santiago was instead given only brief temporary assignments until she was reassigned to a different regular client 2 months later. (S.A. 43; A. 397.) Ms. Nieves was offered temporary replacement assignments for 4-6 hour shifts and weekends. (S.A. 44; A. 354-55, 360.) The situations of Ms. Santiago and Ms. Nieves are hardly unique. Other aides were not reinstated to their pre-strike clients and were given temporary assignments and/or fewer hours

for months after their 1-day, or in a few cases, 3-day strike. (S.A. 43-44; A. 267-68, 289-90, 417-18.) In two cases, long-term clients left the Company, and moved to another agency, to retain the services of their pre-strike aide because the Company would not permit the aide to return to work. (S.A. 44; A. 190-91, 242-43, 591-92, 904, 906.)

Given the Board's reasoned response to the questions on remand and the undisputed fact that the 47 aides were not immediately reinstated to their former positions, the Company clearly "unlawfully failed to reinstate the discriminatees to their former positions of employment or substantially equivalent positions." (S.A. 40 n.3.) By doing so, the Company violated Section 8(a)(3) and (1) of the Act.

D. The Company's Further Arguments that It was Not Required to Immediately Reinstatement the Aides Upon Their Unconditional Offer to Return to Work are Without Merit

The Company asserts, on three separate yet equally unavailing grounds, that it could lawfully deny the aides immediate reinstatement. First, the Company contends (Br. 45) that the aides' conduct in going on strike without calling in was indefensible because the aides' actions caused "imminent danger." Then, failing to show that the aides lost the protection of the Act, the Company contends (Br. 54) that the aides were permanently replaced. Lastly, the Company erroneously claims (Br. 55) that the Board failed to consider its claim that it was

justified in delaying reinstatement. As shown, these contentions were properly rejected by the Board as meritless.

1. The employees did not cause any “imminent danger”

The Company argues (Br. 45) that the aides should be denied the protection of the Act because, during the strike, their clients were left without services for part, or in a few cases, all of a shift. Such conduct, the Company argues, was indefensible as it created a reasonably foreseeable imminent danger for the clients. For a strike to be unprotected on the basis that concerted activity destroys property or endangers life or limb, as the Board recognized (S.A. 5), “more must be shown than that the activity caused inconvenience . . . [t]he whole purpose of a strike is to impose costs on the employer, in the hope of making him come to terms.” *East Chicago Rehab. Ctr. v. NLRB*, 710 F.2d 397, 404 (7th Cir. 1983) (citing *NLRB v. Marshall Car Wheel & Foundry Co.*, 218 F.2d 409, 413 (5th Cir. 1955)). The record evidence fails to show that any of the aides put their clients in jeopardy. To the contrary, the aides told their clients or their families that they would be absent for the day. Thus, the record demonstrates only that the strike caused the Company some inconvenience as it had to use its on-call list of 1000 employees more than it had anticipated in preparing for the strike.⁹

⁹ The Company misleadingly characterizes (Br. 43 n.3) the Board’s discussion, on remand, of the Company’s arguments about imminent danger as “gratuitous.” On the contrary, the Board, in addition to its original treatment of this argument,

The Company's characterization (Br. 46) of its clients as being in "foreseeable imminent danger" in the absence of an aide is unsupported by the record evidence. Home-health aides do not provide, are not licensed to provide, and are strictly forbidden from providing, any medical services. (S.A. 1, 40; A. 458, 460.) The Company's clients may live alone, and, if they do not, they spend time alone in their residences when family members are not present, or even when their aides go on errands for them during a shift. (A. 182, 393, 480-81.) The number of hours a client receives services from an aide may be as little as 2 hours per week, and can be capped based on the client's insurance coverage. (S.A. 1, 40; A. 495, 499.) Moreover, the Company sends a replacement aide to the home of a client whose aide has not reported for a shift only if the client "agrees to the replacement." (A. 512.) Thus, there may be times when a client does not receive services for a shift if she does not agree to see a replacement aide.

In *East Chicago Rehabilitation*, the court rejected the employer's argument—repeated by the Company here—that a walkout by nurse's aides, orderlies, and maintenance workers was unprotected because it endangered the health of nursing home patients. 710 F.2d at 404. The Board concluded that the 2-hour wildcat strike was protected "although some patient care schedules were not

responded to the Court's direction to address the "risk to clients, including the nature of the care provided by the aides." *Special Touch*, 566 F.3d at 300. (S.A. 27.)

completely adhered to,” because there was no showing that any patient’s safety or health was jeopardized. *Id.* The Company erroneously asserts (Br. 43 n.3) that the *East Chicago Rehabilitation* court found that “adverse effects on patients were caused by *management’s* failure to reinstate the workers” (emphasis in original). However, the court plainly stated that “no one was put in danger or subjected to acute distress, nor were such consequences likely from so short and incomplete a walkout of nonprofessional workers.” Some patients were late in getting their breakfast or medication or having their sheets changed, and there was also a delay in removing the body of a patient who died. *Id.* at 405. The court noted, as here, that the nurse’s aides were not professionals and did not have responsibility for critical care.¹⁰ *Id.*

The medical equivalent of conduct that could render a strike unprotected would be a nurse walking out of an operating room in the middle of surgery. *East Chicago Rehab.*, 710 F.2d at 405; *see also Montefiore Hosp.*, 621 F.2d at 517 (conduct of doctors who went on strike without giving notice was not “inherently

¹⁰ In contrast, in *NLRB v. Federal Security, Inc.*, 154 F.3d 751 (7th Cir. 1998), armed guards engaged in unprotected conduct when they walked off the job during a shift at a public housing project where they were “stationed at each passage at all hours,” specifically for the purpose of responding to life-threatening situations in an area of high crime. *Id.* at 756. The court in *Federal Security* distinguished *East Chicago* in part on grounds equally applicable here—that the “aides are not professionals and are not entrusted with critical care responsibilities.” *Id.* (quoting *East Chicago Rehab.*, 710 F.2d at 405).

destructive” unprotected conduct; such conduct would be where patients were “left lying on the operating table” or “people in need of immediate treatment were left to fend for themselves”). In contrast, the Company’s clients were able to be alone and the aides, when present, did not provide medical services of any kind. (S.A. 1, 40; A. 182, 393, 458, 460, 480-81.) The concerted activity by the aides was not “indefensible” because the health and safety of clients was not endangered. *See, e.g., Bethany Medical Ctr.*, 328 NLRB 1094, 1094 (1999) (employees in a catheterization lab gave 15-minute notice of their strike, and although five patient procedures scheduled for that morning were delayed and the strikers refused to perform an emergency procedure, the employees did not engage in “indefensible” conduct because the health and safety of patients was not endangered). As the judge found here, the evidence “does not establish that such a[n imminent] danger existed in this case.” (S.A. 42.)

Furthermore, and “[n]otably,” in *East Chicago Rehabilitation, Bethany Medical Center*, and *Montefiore Hospital*, the employers did not have the benefit of a 10-day notice “relating to the employees at issue, because no union was involved in their strike.” (S.A. 5.) The Company has not cited and the Board is not aware of (S.A. 5) “any case in which the Board has held that a strike was

unprotected because it created ‘imminent danger’” when the strike was preceded by written notice in compliance with Section 8(g).¹¹

The Company’s assertion (Br. 45) that aides “failed to take reasonable precautions” rings hollow in the face of evidence that the aides told either the client or a family member that they would miss one day of work. Having been told by the Union that Section 8(g) notice had been given and that they did not need to tell the Company that they would be participating in the strike (S.A. 2, 41; A. 71, 381, 401), the aides nonetheless notified the clients or the clients’ families in advance that they would not be at work on June 7, allowing for any necessary preparations to be made. (S.A. 42-43; A. 59, 76, 89, 116, 184-85, 238, 247, 345-46, 375, 393, 414.) Indeed, the Company can point to no instance where a striking aide failed to tell the client or a family member that the aide would be on strike on June 7. In the face of this evidence, the Company’s claim (Br. 22) that the aides “abandon[ed]” their clients is simply wrong.

Perhaps the “strongest evidence” that clients were not endangered by the aides’ absence, as the Seventh Circuit noted in *East Chicago Rehabilitation*, was that “when management learned that the workers were willing to resume work immediately it refused to take them back.” 710 F.2d at 405. That same evidence

¹¹ The Board noted (S.A. 5 n.17) that it was not precluding consideration, in future appropriate cases, of the argument that employees created imminent danger despite prior notice of strike.

supports the Board's finding here: the Company refused to take the aides back even when they reported for work at their clients' homes, ordering them to leave the clients' homes. (S.A. 40; A. 61, 119, 188, 215-16, 241-42, 351, 377, 395, 415-16.) For example, on June 9, aide Reina Santiago reported to work at her client's home and was told on the phone that she was not supposed to be there and was ordered to go home, despite the fact that no replacement aide was there with the client and none was sent by the Company that day. (S.A. 43; A. 395-96) As in *East Chicago Rehabilitation*, "unless the [Company] wanted to be prosecuted for criminal neglect it would not have done this if there were danger to its [clients]." *Id.*

The Company, which is seemingly so concerned about the well-being of its clients, nonetheless callously ordered the aides to leave the homes of their regular clients when they reported for duty the day after the strike. Further punishing not simply the aides, but also the clients they profess to care deeply about, the Company continued to refuse to reinstate the aides to their former regular clients, leading at least two clients to move to other agencies to retain the good services of these aides. In these circumstances, it can hardly be argued that it was the aides that failed to protect the clients.

Finally, the Company's claim (Br. 19, 51) that clients received only partial services on the first day of the strike does not constitute indefensible conduct on

the part of the aides sufficient to rob them of statutory protection. As indicated above (pp. 44-47), the Company presented no evidence that clients who received limited services on the morning of June 7 were in any “imminent danger.” (S.A. 6.) No evidence shows that the aides left any client in the midst of any care giving; indeed, unlike in the “imminent danger” cases cited by the Company, the aides did not leave during their work day.

The dates of the 3-day strike were fully broadcast to the Company 10 days ahead of schedule. While the Company claims (Br. 34) it had no “system” to insure coverage for the strikers who did not individually notify the Company of their intent to go on strike, the Company had, by its own account (Br. 15, A. 447, 507), at least 1000 aides on its active roster who did not have assignments in June 2004. The Company’s Vice President of Operations, Linda Keehn, explained, “there is always a core group of people who are available to work on a per diem basis, or an on-call basis . . . they can be sent on these replacement assignments.” (A. 508.) As the Company states (Br. 48), the “10-day notice period afforded [the Company] sufficient time to make appropriate arrangements” The onus was on the Company to prepare for the strike.

2. The Company did not meet its burden of showing that the aides were permanently replaced

The Company did not meet its burden of establishing that the employees who filled the strikers’ shifts beginning on June 7 were permanent rather than

temporary replacements. (S.A. 43.) *See Waterbury Hosp. v. NLRB*, 950 F.2d 849, 855 (2d Cir. 1991) (burden is on employer to demonstrate that replacements are permanent). To meet this burden, the Company had to show a mutual understanding between the Company and the replacements that they were permanently assigned to the strikers' clients. *Consolidated Delivery & Logistics*, 337 NLRB 524, 526 (2002), *enforced*, 63 F. App'x 520 (D.C. Cir. 2003); *Chicago Tribune Co.*, 304 NLRB 259, 261 (1991). In other words, the Company had to prove that the "replacements were hired in a manner that would show that the men [and women] who replaced the strikers were regarded by themselves and the [Company] as having received their jobs on a permanent basis." *Consolidated Delivery*, 337 NLRB at 526 (internal quotation omitted). Moreover, "[a]bsent evidence of a mutual understanding, the [Company's] own intent to employ the replacements permanently is insufficient." *Id.*

The Company argues only (Br. 55) that it "used its current, active employees as permanent replacements." The Company did not offer evidence of a mutual understanding between itself and the employees who covered the shifts on June 7 that they would be permanently assigned to the striking aides' clients. As the Board found (S.A. 37 n.15), the Company "failed to present any detailed evidence to clarify the status of the replacements drawn from the [Company's] established roster of employees." Relying solely on the Board's finding that the

employees were drawn from its established roster, the Company's apparent conflation (Br. 54-55 & n.5) of the terms "permanent employee" and "permanent replacement" is unavailing. The evidence fails to show that those employees who covered shifts on June 7, while in the Company's on-call pool of employees, had any understanding with the Company that they were permanently assigned to the strikers' clients.

3. The Company was not justified in delaying reinstatement

The Company's contention (Br. 55-57) that the Board should have considered its argument that it was justified in delaying reinstatement of the aides until June 14 fails on two grounds. First, the Board considered and rejected (S.A. 37) the Company's only articulated justification—an "erroneous assumption that it could wait for 5 days to reinstate the strikers," an argument that the Company has not continued to press before this Court. Any additional justification that the Company proffers here is not properly before this Court because the Company never made such an argument to the Board. 29 U.S.C. §160(e). *Accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982).

Secondly, as shown above (pp. 42-43), the aides were not universally reinstated to their former clients, to substantially equivalent positions, or to any positions as of June 14. (S.A. 43-44, A. 269-70, 292-93, 388-89, 398-99, 419.) While the Company contends (Br. 56) that it acted "expeditiously," its burden was

to act *immediately* in the absence of a “legitimate and substantial” business justification. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). The only such justification that it presented to the Board was rightfully rejected.

The Board addressed the questions posed on remand by this Court and reasonably concluded that the Company received all the notice it was due—a valid Section 8(g) strike notice from the Union. The Board based this conclusion on Congress’s balancing of employer, employee, and patient concerns when enacting Section 8(g), a balance that the Board is not free to revise but must instead apply as it has done in this case. The Board further considered and rejected the Company’s additional arguments as to why it was privileged to deny immediate reinstatement to its employees, finding no legitimate justification for the Company’s actions.

CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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March 2012

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD	*
	*
Petitioner	* No. 11-3147
	*
v.	*
	* Board Case No.
SPECIAL TOUCH HOME CARE SERVICES, INC.	* 29-CA-26661
	*
Respondent	*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,170 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 1st day of March, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. All participants are registered CM/ECF users and service will be accomplished by the CM/ECF system on the following counsel:

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