

**Special Touch Home Care Services, Inc. and New York's Health and Human Service Union 1199/SEIU.** Case 29–CA–026661

June 30, 2011

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER  
AND HAYES

On September 29, 2007, the National Labor Relations Board issued its Decision and Order in this proceeding,<sup>1</sup> concluding, among other things, that the Respondent, Special Touch Home Care Services, a home health care provider, violated Section 8(a)(3) and (1) of the Act by failing to immediately reinstate economic strikers upon their unconditional offer to return to work. Subsequently, the General Counsel applied to the United States Court of Appeals for the Second Circuit for enforcement of the Board's Order. On May 12, 2009, the court issued a decision denying enforcement in relevant part.<sup>2</sup> The court remanded the case for the Board to address the relationship between what it characterized as the "plant rule doctrine" and Section 8(g) of the Act, which requires a union—but not individual employees—to give advance notice before a strike at a health care institution. On August 20, 2009, the Board notified the parties that it had accepted the remand and invited the parties to file statements of position. The General Counsel and the Respondent filed statements of position.<sup>3</sup>

The Board has delegated its authority in this proceeding to a three-member panel.<sup>4</sup> After reconsidering the matter in light of the court's decision and the parties' position statements, we affirm the prior conclusion that the Respondent's failure to immediately reinstate the strikers violated Section 8(a)(3) and (1).

I. BACKGROUND

The Respondent provides home health care services in New York City under contracts with nursing and health service providers. The Respondent employs approximately 2500 home health aides. At any given time, approximately 1400 are assigned to specific customers on an ongoing basis. The remainder form an "on-call" pool of employees who perform sporadic or temporary assignments.

<sup>1</sup> 351 NLRB 754 (2007).

<sup>2</sup> *NLRB v. Special Touch Home Care Services*, 566 F.3d 292 (2d Cir. 2009).

<sup>3</sup> The Respondent moves to strike portions of the General Counsel's position statement as misrepresenting the facts and the law. Having reviewed the parties' position statements and the record, we deny the motion.

<sup>4</sup> Member Pearce is recused and took no part in the consideration of this case.

The Respondent's customers have a wide range of physical and mental conditions ranging from depression to diabetes to poststroke partial paralysis. The Respondent's employees report to work at the customers' homes, where they provide services such as cleaning, shopping, bathing, reminding customers to take their medication, and observing customers for signs of immediate distress, such as dizziness or chest pains. The employees are prohibited from dispensing medication or providing medical services. Some customers receive care around the clock; others receive only a few hours of care per day.

The Respondent maintains a rule that employees who will not be reporting for a scheduled shift must call and notify the Respondent in advance. Vice President of Operations Linda Keehn testified that 2 hours' advance notice is the "minimum" and that the "responsible and preferred" practice is for employees to call the day before.<sup>5</sup> When the Respondent receives notice that an employee will not be reporting to work, it arranges to send a replacement aide.

On May 27, 2004, the Union, New York's Health and Human Service Union 1199/SEIU, which was attempting to organize the Respondent's employees, notified the Respondent, in writing, that the employees would engage in a 3-day strike starting Monday, June 7, and ending June 10. It is undisputed that the Union's notice to the Respondent satisfied the Union's obligations under Section 8(g) of the Act.<sup>6</sup>

Between 1400 and 1500 employees were scheduled to work on June 7. During the preceding week, as instructed by the state health department, the Respondent conducted a telephone poll of employees scheduled to work the following week. In most instances, the Respondent's agents did not refer to the strike in the poll, but simply asked the employees whether they would be taking any time off during the following week.<sup>7</sup> Seventy-five employees who later participated in the strike responded that they would not be working on June 7. Another 48 employees participated in the strike, but neither so in-

<sup>5</sup> While the evidence reveals that a small number of employees routinely fail to comply with this rule for reasons unrelated to activity protected by the Act, the General Counsel did not argue that the Respondent discriminated in its enforcement of the rule. Keehn testified that, on an average day, 1 or 2 employees who have not called in fail to show up for work. Approximately 5 to 10 additional employees call in to report their absences late enough that their assignments need to be filled "close to the start of their shift[s]."

<sup>6</sup> Sec. 8(g) requires that "[a] labor organization, before engaging in any strike . . . at any health care institution shall, not less than ten days prior to such action, notify the institution in writing. . . . The notice shall state the date and time that such action will commence."

<sup>7</sup> The General Counsel does not allege that the poll was unlawful.

formed the Respondent in response to the poll,<sup>8</sup> nor called in to inform the Respondent that they would not be working.<sup>9</sup> Of these 48 employees, 12 testified. Ten of the twelve explained that they did notify the families of their customers of their intent to strike (and the other 2 were not asked the question). At a union meeting before the strike took place, the Union told the employees that they did not need to notify the Respondent if they planned to participate in the strike because the Union had provided notice.

The 48 employees at issue all had regular assignments to specific customers. Keehn testified that because of the 48 employees' failure to call in, 5 clients received no services on June 7, and some others received delayed or partial services. There was no evidence that any of those individuals suffered any adverse consequences.

Upon the striking employees' June 10 unconditional offer to return to work, the Respondent immediately reinstated the 75 employees who had stated in advance that they would not be working. The remaining 48 were not immediately reinstated. On June 14, the Respondent informed the latter group that they had violated the call-in rule, but would not be discharged, because they had been told by the Union that they need not call in. At various times after June 14, all but 1<sup>10</sup> of the 48 employees who sought reinstatement were eventually reinstated, but not all to their prestrike customers or with the same number of hours, and not all to regular rather than on-call positions.

## II. PRIOR BOARD AND COURT PROCEEDINGS

The administrative law judge found that the failure to immediately reinstate the strikers violated Section 8(a)(3) and (1). He reasoned that employees engaged in a work stoppage protected by the Act cannot be disciplined for

<sup>8</sup> The Respondent does not contend that any other employees failed accurately to inform it concerning whether they would be working. In other words, excluding the 123 employees described above, the remainder of the 1400 to 1500 employees informed the employer that they would be reporting to work and did so.

<sup>9</sup> The evidence is in conflict as to whether the Respondent polled all 48 of those employees. Keehn testified that all employees scheduled to work during the strike were called, and that the 48 employees in question all said they would be working. Twelve of the forty-eight employees testified. Four of them denied receiving a telephone call. Of those who testified that they did receive a call, three said that they told the Respondent they would not be taking any time off, either because they were unaware of the strike at the time of the survey or had not yet decided to participate. One testified that he told the Respondent that he did not know if he would be taking any time off. We need not resolve this factual question because we hold that the Respondent acted unlawfully even if the employees did not disclose their intention to strike in response to the poll.

<sup>10</sup> Crecencia Miller was lawfully discharged for reasons unrelated to her failure to call in.

failure to comply with a company rule "requiring them to get permission or give notice before they absent themselves from work." 351 NLRB 754, 761 (2007). The judge relied on *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), in which the Supreme Court found that a walkout in protest of abnormally cold conditions in the plant was protected, despite the lack of advance notice and despite a plant rule prohibiting employees from leaving work without permission. The judge also observed that the advance notice requirement of Section 8(g) applies to unions, not individual employees.<sup>11</sup> He further reasoned that, even assuming a strike may be unprotected where there is "imminent danger" to customers or coworkers, the evidence failed to establish such danger here. *Id.* at 762. A unanimous Board adopted the judge's reasoning and affirmed the decision. *Id.* at 754 fn. 6, 757.

In its decision, the Second Circuit remanded the case to the Board to address the "intersection" of Section 8(g), which imposes a notice requirement only on unions, and the "plant rule doctrine," which the court defined as adopting the principle that an employer may "enforce neutral 'reasonable rules covering the conduct of employees on company time.'" 566 F.3d 292, 297 (2009) (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 fn. 10 (1945)).

On the one hand, the court observed, a plant rule that would require notice before striking "cannot be immediately reconciled" with the principle that the notice requirement of Section 8(g) applies only to unions. See, e.g., *Montefiore Hospital & Medical Center v. NLRB*, 621 F.2d 510, 516 (2d Cir. 1980) (holding that two unrepresented physicians did not lose the protection of the Act when they walked out, without notice, in sympathy with other employees who struck after their union had given proper 8(g) notice). On the other hand, the court reasoned, cases such as *Washington Aluminum*, *supra*, are distinguishable because they require that employees receive permission to leave work, whereas the rule at issue here required only that the employees provide no-

<sup>11</sup> Because the Union's notice undisputedly complied with Sec. 8(g), the Board and the judge found it unnecessary to decide whether the Respondent was a "health care institution" to which Sec. 8(g) applies. Before the court of appeals, the parties "assume[d]" that the Respondent was a health care institution. 566 F.3d at 295. In his position statement on remand, the General Counsel stated, without elaborating further, that he "does not concede" that issue, but considers it unnecessary to resolve. The General Counsel, however, alleged in the complaint that the Respondent was a health care institution, the Respondent admitted the allegation, and the case was litigated on that theory. In the absence of any argument to the contrary, we therefore assume that the Respondent is a health care institution and that the strike was subject to the requirements of Sec. 8(g).

tice. The court found that *Republic Aviation* and *Montefiore* “suggest[] that there is some weighing of the interests involved” in applying the relevant doctrines. *Id.* at 300. The court quoted dictum from *Montefiore* that a hospital receiving notice that certain employees intend to strike “would be well-advised to inquire of the rest of its employees whether they plan to stay out in sympathy.” *Id.* at 299 (quoting 621 F.2d at 515).

Accordingly, the court instructed the Board to determine whether the Respondent “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.” 566 F.3d at 300. The court outlined “several interests that must be balanced in resolving this issue,” including:

- (1) the employer’s attempt to maintain a properly regulated workforce, (2) the employees’ interest in striking (including their interest in not having to decide in advance that they wished to participate), and (3) the risk to the clients, including the nature of the care provided by the aides.

*Id.* In particular, the court instructed the Board to “explore, in light of *Montefiore Hospital*, how the limited scope of Section 8(g) should apply in a case where the relevant labor organization may have instructed employees that they need not inform the employer of their absence.” *Id.* at 301.

### III. PARTIES’ POSITIONS

The Respondent argues that the Board has found concerted activity unprotected when it violates facially neutral “absence notification” rules, such as the “call-in” rule at issue here. The Respondent further argues that Section 8(g) was intended to provide health care institutions with sufficient time to make arrangements for continuing patient care, and that the Union’s 8(g) notice is meaningless if the Respondent cannot rely on its call-in rule and prestrike poll. The Respondent argues that the employees’ right to strike was not infringed by the rule or the poll, because employees were free to change their minds after responding to the poll (as some did), so long as they called in 2 hours before their shifts began. Finally, the Respondent argues that its clients have serious medical conditions and that there are no other company employees at the clients’ homes to provide coverage if an employee does not show up; therefore, the risk of harm to the clients justifies enforcement of the call-in rule.<sup>12</sup>

<sup>12</sup> Because the Union did not yet represent the employees at the time of the strike, the Respondent contends that the 8(g) notice could not have been made “on behalf of” the aides. The Board has squarely rejected that argument in *Kapiolani Hospital*, 231 NLRB 34 (1977),

The General Counsel acknowledges that the Board must balance the competing interests when evaluating rules governing conduct in the workplace. But the General Counsel further asserts that Section 8(g)’s 10-day notice requirement, combined with the principle that a strike will be deemed unprotected if employees fail to take reasonable precautions to protect the employer’s plant, equipment, or products from foreseeable imminent danger, already strikes the proper balance. The General Counsel contends that, because proper notice was given pursuant to Section 8(g) and the strike, which was preceded by 10 days’ written notice, did not place clients in imminent danger, application of the call-in rule was not necessary to protect the Respondent’s legitimate interests.

### IV. DISCUSSION

For the reasons explained below, we hold that the Respondent was not entitled to deny immediate reinstatement to the strikers who did not disclose their intent to strike in response to the Respondent’s survey or otherwise comply with the Respondent’s call-in rule. A different result would be contrary to the balance struck by Congress in Section 8(g) of the Act, unnecessary to protect the Respondent’s legitimate interests under existing Board precedent, and unduly burdensome of the right to strike.

#### A. Statutory Provisions

It is beyond dispute that the right to strike is central to the Act, a core right protected by Section 7, and separately and expressly preserved in Section 13, which recites that “[n]othing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.” See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963). The Board and courts have consistently held that employees generally have the right to strike without providing advance notice, even at health care facilities (so long as there is compliance with the notice requirements of Section 8(g)).<sup>13</sup>

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enfd. 581 F.2d 230 (9th Cir. 1978), stating that an employee “was free to join the strike and could, without jeopardizing her rights under the Act, trade on, as it were, the 10-day notice of the Union, even though she was neither a member of nor represented by the Union, and had herself given no notice.” We adhere to that precedent.

<sup>13</sup> For example, in *Bethany Medical Center*, 328 NLRB 1094, 1094 (1999), the Board held that laboratory employees at a medical center who struck to protest working conditions without any union involvement had “the right to strike without prior notice.” See also *Washington Aluminum*, supra, 370 U.S. at 15–17; *Montefiore*, supra, 621 F.2d at 515; cf. *NLRB v. Pratt & Whitney Air Craft Division*, 789 F.2d 121, 131 (2d Cir. 1986) (employer violated Sec. 8(a)(1) by advising employ-

It is equally clear that health care institutions have a legitimate interest in ensuring that patients are adequately cared for during a strike. As originally enacted, the Act specifically exempted employees of nonprofit hospitals from its coverage. In 1974, however, Congress amended the Act to extend statutory protection—including the right to strike—to such employees. In enacting the 1974 amendments, Congress faced, and ultimately carefully balanced, two conflicting interests:

On the one hand, it was noted that it is unjust to deny to the employees of nonprofit hospitals the rights granted to employees in other industries to organize and bargain collectively. On the other hand, special protection seemed necessary when dealing with health care institutions in order to assure continuity of patient care.

*Walker Methodist Residence*, 227 NLRB 1630, 1630 (1977). To accommodate both of those competing concerns, Congress (1) amended the Act to cover employees of nonprofit hospitals; (2) added Section 8(g), requiring labor organizations to give 10 days' written notice before striking or picketing a health care institution; and (3) amended Section 8(d) to provide that "[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." That is, an employee who engages in a strike despite her union's failure to comply with Section 8(g) loses statutory protection.

The 10-day notice requirement in Section 8(g) "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." S. Rep. No. 93-766 at 4 (1974), reprinted in 1974 U.S.C.C.A.N. 3946, 3949. In other words, Congress adopted Section 8(g) and amended Section 8(d) precisely to address the concerns raised by the Respondent and the Second Circuit in this case. The statutory notice obligation, however, is imposed only on labor organizations, not on individual employees.<sup>14</sup>

Section 8(g) and the amendment to Section 8(d) represent Congress' finely tuned balance of competing interests.<sup>15</sup> Indeed, the legislative history of the 1974

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ees that they were required to call in each day of a strike and give a reason for their absence).

<sup>14</sup> See *Montefiore*, supra, 621 F.2d at 515-516; *Kapiolani Hospital*, supra, 231 NLRB at 42; *Walker Methodist Residence*, above at 1631.

<sup>15</sup> As Senator Javits (the ranking Republican on the Senate Committee that reported the bill) explained, "The provisions of the bill . . . have been carefully tailored to meet the particular problems posed by labor-management disputes involving health care institutions." Subcommittee on Labor, Senate Committee on Labor and Public Welfare, *Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974*, Committee Print, 93d Cong. 2d Sess. 98

amendments reflects Congress' specific intent that the Board not restrict the rights of healthcare employees in any manner other than that expressly set forth in the amendments.<sup>16</sup>

The courts have recognized this limitation on the Board's authority, observing that:

[T]he 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 8(g) notice was not required before a strike called by unions representing nonhealthcare employees involved in construction and renovation of hospital facilities, even though picketing would take place partially on hospital property). The Board has acted accordingly. See, e.g., *Kapiolani Hospital*, above at 42 ("[T]o impose a limitation [through adjudication] would be to embark upon the very amendatory process again which [the chief Senate sponsor of the amendments] cautioned.").

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(Nov. 1974) (Senate floor May 2, 1974). The legislative history makes clear that the provisions of the 1974 amendments represent a congressional compromise. As Senator Dominick explained in his individual views appended to the Senate Committee Report, the legislation "represents a compromise between those parties favoring simple repeal of the existing exemptions from Taft-Hartley coverage for nonprofit hospitals and some of those resisting such a repeal." S. Rep. No. 93-766 at 39 (reprinted in 1974 *Legislative History* at 46). Senator Cranston also affirmed on the Senate floor that the legislation "represents . . . a very carefully developed and finely tuned balance of competing considerations and philosophies to develop a procedure that will, at the same time, protect labor and management rights and promote good health care." 1974 *Legislative History* at 91 (Senate floor May 2, 1974). Having arrived at what it expressly considered a compromise, Congress did not intend for the Board to tip the balance in one direction or the other in order to better protect one set of the competing interests.

<sup>16</sup> As Senator Harrison Williams, Chairman of the Committee on Labor and Public Welfare and a chief sponsor of the legislation, stated during debate of the 1974 amendments:

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

120 Cong. Rec. 22575 (daily ed. July 10, 1974), reprinted in 1974 *Legislative History* at 361. Senator Williams concluded his observations concerning the legislation:

My overriding point is that in this carefully tailored legislation Congress decided to treat the health care industry uniquely in certain respects. It decided to go so far, and no more. I trust this bill will be treated by the NLRB and its General Counsel in the same spirit, and not as an excuse to . . . substitute its will for that of the Congress.

1974 *Legislative History* at 364 (Senate floor July 10, 1974) (120 Cong. Rec. 22576).

If the balance established by Congress in the 1974 amendments is imperfect, it is up to Congress, not the Board, to adjust it.

*B. The Board's "Imminent Danger" Doctrine*

Apart from the restrictions imposed on unions and employees under Section 8(g) and (d), "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." *East Chicago Rehabilitation Center*, 259 NLRB 996, 1000 (1982), enf. 710 F.2d 397 (7th Cir. 1983), cert. denied 465 U.S. 1065 (1984). Nevertheless, any strike, including a strike by employees of a health care institution, is unprotected if the employees "fail to take reasonable precautions to protect the employer's plant, equipment, or products from foreseeable imminent danger due to sudden cessation of work." *Bethany Medical Center*, supra, 328 NLRB at 1094–1095 (citing *Marshall Car Wheel & Foundry Co.*, 107 NLRB 314 (1953), enf. denied 218 F.2d 409 (5th Cir. 1955)); see also *Montefiore*, supra, 621 F.2d at 516.

To establish imminent danger, however, "more must be shown than that the [strike] caused inconvenience." *East Chicago Rehabilitation Center v. NLRB*, 710 F.2d 397, 404 (7th Cir. 1983), affg. *East Chicago*, supra. In *Bethany Medical Center*, supra, the Board held that a walkout by cardiac catheterization lab employees preceded by only 15 minutes' notice was protected, even though scheduled procedures were delayed and the strikers refused to return to perform an unscheduled, emergency procedure. *Id.* at 1094, 1094–1095. Similarly, in *East Chicago*, the Board found that a spontaneous 2-hour walkout by 17 nurses' aides was protected. Although some patient care schedules were "not completely adhered to," there was "no showing that the strike jeopardized any patient's safety or health." Above at 996 fn. 2. The reviewing court affirmed the Board's finding, despite evidence of delays in serving of patients' meals, administering medication, changing the bed sheets of incontinent patients, and removing the body of a patient who had died. 710 F.2d at 405. Finally, in *Montefiore*, supra, the Second Circuit affirmed the Board's conclusion that the strike was protected despite a drastic reduction in the number of workers on duty: the normal complement of workers at the struck clinic consisted of 10 to 12 physicians and 24 to 27 other personnel; during the strike, only 1 physician, 3 nurses, and a receptionist remained on duty. 621 F.2d at 512, 515.

Notably, in each of these cases, no 10-day notice was given relating to the employees at issue, because no union was involved in their strike. We are not aware of any case in which the Board has held that a strike was unprotected because it created an "imminent danger" despite

the fact that it had been preceded by written notice in compliance with Section 8(g).<sup>17</sup>

*C. The Respondent's Call-In Rule*

It is against the foregoing backdrop that we examine the Respondent's call-in rule. The Second Circuit instructed the Board to consider the intersection of Section 8(g) and what the court denominated the "plant rule doctrine." The Board has never articulated a categorical principle that an employer may always apply a pre-existing, neutral plant rule, even if it restricts employees' Section 7 rights. In fact, the Board and courts have long held that employers may not discipline or discharge strikers based on plant rules that forbid employees from leaving their jobs without permission.<sup>18</sup>

In the present case, however, the court correctly pointed out that such "permission" rules are different from the Respondent's "notification" rule. In so doing, the court cited two cases in which the Board upheld discipline of employees who engaged in otherwise protected, concerted activity, but who violated "notification" rules: *Terry Poultry Co.*, 109 NLRB 1097 (1954), and *General Chemical Corp.*, 290 NLRB 76, 83 (1988).

In *Terry Poultry*, two employees in a chicken processing plant left the production line to present a grievance to management. They did not give notice to anyone before doing so, despite a plant rule prohibiting employees from leaving the production line without first arranging with fellow employees or the foreman to perform their duties during their absence. As a result, chickens went through the line unprocessed and had to be reprocessed later. The employer discharged the two employees. A divided Board found the discharges lawful. The majority reasoned that the rule was not adopted for a discriminatory purpose and there was no indication that permission to leave the line would have been denied. Therefore, the Board concluded, the rule was "not an unreasonable impediment" to protected activity. 109 NLRB at 1097–1098.

<sup>17</sup> Nevertheless, under appropriate circumstances, we would entertain an argument that despite prior notice, a strike, or particular employees' participation in a strike, created an imminent danger.

<sup>18</sup> See, e.g., *Washington Aluminum*, supra; *Go-Lightly Footwear*, 251 NLRB 42, 44 (1980) (walkout was protected even though it violated rules that employees could not leave without permission or without punching out; activity does not lose protection because of violations of "those kinds of work rules"). See also *Wilshire at Lakewood*, 343 NLRB 141, 144 (2004), vacated on other grounds 345 NLRB 1050 (2005), rev. on other grounds 480 F.3d 1161 (D.C. Cir. 2007) (holding that the maintenance of a rule prohibiting nursing home employees from "walking off the shift" without permission was not unlawful, but stating that a different conclusion likely would have been reached if there had been any record evidence that the rule had been applied against Sec. 7 activity).

In *General Chemical*, the employer manufactured and processed hazardous chemicals. When employees struck unexpectedly, two were suspended for walking off their jobs without complying with a plant rule that required employees to be properly relieved before leaving their work stations.<sup>19</sup> No actual damage to the plant or equipment resulted. The employer contended that the two employees could have avoided discipline by either shutting down their equipment or notifying their supervisor before leaving. The judge, whose conclusion the Board adopted without comment, found the suspensions lawful. The judge reasoned that the employer's conduct was "consistent with" *Terry* as well as with cases holding that striking employees must take reasonable precautions to avoid imminent danger to the employer's plant. The judge further found that, "[w]hen balanced against the significant danger involved," the restriction on protected activity was minimal, and there was no evidence of unlawful motivation. *Id.* at 83–84.

*Terry* and *General Chemical* do not stand for the general proposition that enforcement of "notification" rules during a strike is always lawful. They are distinguishable from the present case on several grounds. First, and most importantly, there was no advance notice of the concerted activity in either of the prior cases. Here, through the Union's 8(g) notice, the Respondent knew about the strike 10 days in advance. As a result of that notice, the Respondent conducted a poll through which it learned that the strike would have a very limited scope.

Second, *Terry Poultry* and *General Chemical* involved employees leaving their workstations during work time. Similarly, in this case, the Second Circuit drew what it described as the "plant rule doctrine" from language in the Supreme Court's decision in *Republic Aviation*, supra, permitting "an employer to enforce neutral 'reasonable rules covering the conduct of employees on company time.'" 566 F.2d 289, 297 (1977) (quoting *Republic Aviation*, supra at 803 fn. 10). *Republic Aviation* did not involve a strike or a "notification" rule, but rather a rule prohibiting soliciting in the workplace. 324 U.S. at 795. Such a rule, the Supreme Court recognized, implicates the "right of employers to maintain discipline in their establishments." *Id.* at 798 (emphasis added).<sup>20</sup> *Terry Poultry* and *General Chemical* implicate that employer interest, but this case does not: there is no evidence that

<sup>19</sup> Three employees who struck after complying with the rule were not disciplined.

<sup>20</sup> In *Republic Aviation*, despite the fact that the rule against solicitation in the workplace was what the Second Circuit would describe as a neutral "plant rule," the Supreme Court upheld the Board's conclusion that the rule could not be categorically applied to limit otherwise protected activity.

any employee left a customer's home in order to join the strike.<sup>21</sup> We believe that this is a distinction of substance. It is highly unusual—and almost inevitably disruptive—for employees to walk off the job. In contrast, it is not unusual for some employees not to appear for work, even without prior notice; thus, employers typically have systems in place to insure coverage (as the Respondent did here). Indeed, in this case, as described above, the evidence showed that on any given day, one or two employees failed to appear for work without prior notice, and 5 to 10 gave notice so late that replacements had to be found at the last minute.

Third, the holding in *General Chemical* is not based solely on the existence of a plant rule; the Board also found that the walkout resulted in significant danger to the chemical plant. Above at 83. Here, the evidence fails to show such danger. As to the five customers who received no replacement aide on June 7, the Respondent presented no evidence regarding their disabilities or conditions that would enable the Board to determine whether they were endangered. Similarly, although some of the other 43 clients received delayed coverage, the Respondent presented no evidence regarding the length of or the potential consequences, if any, of the delay.<sup>22</sup> In the previous cases involving health care institutions described above, the Board found the potential dangers insufficient to deny employees the protection of the Act, even though the circumstances created by the strike in each case appeared to present a far greater potential risk to patients than that involved here. See *Bethany*, supra; *East Chicago*, supra; *Montefiore*, supra.

Furthermore, although "permission" rules are different from "notification" rules, a requirement of individual notice is nevertheless an impediment to Section 7 activity. In *Savage Gateway Supermarket*, 286 NLRB 180 (1987), enf. mem. 865 F.2d 1269 (6th Cir. 1989), the Board held that an absence notification rule is "a less formidable impediment to protected activity" than a permission rule, but "is a restrictive condition nonetheless."<sup>23</sup> The Act protects "concerted activity," such as a

<sup>21</sup> For this reason, the Second Circuit found the prior cases "slightly inapposite." 566 F.3d at 298.

<sup>22</sup> Moreover, Respondent official Keehn testified that on the morning of June 7, the Respondent was "accepting cancellations [from strikers] up to the start of the shift . . . even though technically it was really too late for them to call out." It also appears from Keehn's testimony that, on June 7, if an aide had not checked in 20 minutes after the start of her shift, the Respondent sought a replacement. The Respondent introduced no evidence indicating that, in these cases, initiating the search 20 minutes earlier would have made a difference in the Respondent's ability to obtain a replacement in time to meet the needs of the customer.

<sup>23</sup> The same is true in the present case. Although the burden of complying with the Respondent's call-in rule is not heavy, the rule might

strike, precisely because Congress believed that, individually, employees could not and would not effectively protect their legitimate interests. Yet a notice rule, applied to such concerted activity, requires that each individual inform the employer of her intention to engage in concerted activity in order for the activity to be protected. The premises of the Act, Congress' decision to impose a duty to give notice only on unions, and our experience with labor-management relations all suggest 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. Not only would individual employees be faced with the potentially intimidating prospect of telling their employer that they intend to take action that the employer might view unfavorably, 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.

Unlike either *Terry Poultry* or *General Chemical, Savage Gateway*, supra, involved an employee who did not report to work (because of the presence of a picket line). It is thus the most closely analogous Board precedent to the present case.<sup>24</sup> The *Savage Gateway* Board concluded that the employee's failure to comply with the notice rule did not justify her termination. Addressing the employer's interest in the enforcement of the notice rule, the Board recognized that "it best suits an employer's convenience to know in advance exactly who will and who will not support a strike," but reasoned that the law does not require that a strike be conducted in a manner most conducive to the continued operation of the employer. Above at 183. Nothing in the law, the Board concluded, "suggests that employers are free to restrict protected concerted activities through application of work rules simply on a showing that enforcement of such rules will help assure efficient operations during a strike." *Id.* at 183–184. The Board held:

[U]nless an employer shows that the business justification supporting a notice requirement is sufficiently compelling to outweigh unrestricted exercise of protected activity, it is not free to discharge an employee for failure to comply with that rule.

*Id.* at 183. The Board found no such justification in *Savage Gateway*.

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well deter employees from deciding fewer than 2 hours in advance whether to strike or might simply chill the exercise of the right to strike.

<sup>24</sup> On this point, our dissenting colleague appears to agree.

Any suggestion, as in the dissent, that, as a health care institution, the Respondent had a more compelling business justification for enforcing its notice rule than existed in *Savage Gateway*, despite its receiving 10 days' written notice of the strike and consequently conducting a pre-strike poll,<sup>25</sup> threatens the careful balance of interests established by Congress in Section 8(g). If health care institutions had been free to condition the protection of strikes on employees' provision of prior notice, there would have been no need for Congress to adopt either Section 8(g) or the amendment to Section 8(d). But Congress recognized that legislation was required, and it made a clear choice to impose a notice requirement only on unions and to specify that health care employees lose the protection of the Act only when they strike after their union has failed to give the required notice. The argument that healthcare employers should be able to require additional notice from employees must be directed to Congress, not the Board.<sup>26</sup>

Accordingly, we find that the failure of some of the strikers to comply with the call-in rule did not justify the Respondent's failure to reinstate those strikers upon their unconditional offer to return to work.

#### D. The Respondent's Prestrike Poll

In addition to citing its call-in rule, the Respondent also contends that the strikers' failure to give accurate responses to its telephone poll, conducted the week before the strike, justified its decision not to reinstate them. In making this argument, the Respondent relies on dictum contained in *Montefiore Hospital*, supra. There, the Se-

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<sup>25</sup> The 8(g) notice alone left the Respondent uncertain as to exactly which and how many of its 1400 workers would participate in the strike, and therefore uncertain as to how many replacement aides would be needed and for which clients. As we explain in the next section, however, the Respondent's poll substantially answered those questions and a poll fully complying with required safeguards might have been even more enlightening. Of the approximately 1400 employees polled, the evidence indicates that 97 percent accurately stated their intentions. Thus, the poll, despite its imperfections, provided the Respondent with very accurate information about the scope of the strike. It is not at all clear to us that adding a threat of discipline for inaccurate responses (which employees may well have assumed they were under in this case) would have produced even more accurate results.

<sup>26</sup> Nothing in the dissent would confine our colleague's position to the facts of this case. To the contrary, if adopted, it would permit every healthcare employer to show the type of "sufficiently compelling" business justification" the dissent finds here under *Savage Gateway*. That result would impermissibly readjust the balance struck by Congress. Our decision, contrary to the dissent's suggestion, grants no "special immunity" to healthcare employees. It merely holds that once their union has complied with the statutory notice requirement and they have been subject to a pre-strike poll that would be unlawful in other industries, their employer must show more than was shown here to demonstrate a "business justification supporting a[n additional] notice requirement that is sufficiently compelling to outweigh unrestricted exercise of protected activity." *Savage Gateway*, above at 183.

cond Circuit stated that when “a union has given notice of its intention to strike, the hospital would be well-advised to inquire of the rest of its employees whether they plan to stay out in sympathy. An employee who strikes after promising to show up may well forfeit protection under the Act.” 621 F.2d at 515.

The court’s dictum in *Montefiore* concerned employees *not* covered by a prior 10-day notice. As explained, the physicians who struck in *Montefiore* did so in sympathy with employees in a unit represented by a union that had given the required 8(g) notice. The court’s reference to “the rest” of the employees thus refers to those *not* covered by the 8(g) notice. In *Montefiore*, therefore, unlike here, the hospital had no notice whatsoever that the physicians might strike.

Moreover, the *Montefiore* court did not examine the Board’s extensive jurisprudence concerning employer interrogation and polling. Under most circumstances, it is unlawful for an employer to systematically question employees about their union activity. See generally *Johnnie’s Poultry Co.*, 146 NLRB 770, 775–776 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). In a limited exception to this general rule, the Board permits a health care employer that has received notice of a strike to poll employees about their intent to participate, provided the employer gives the employees express assurances against reprisal. In *Preterm, Inc.*, 240 NLRB 654, 656 (1979), the Board stated:

In enacting Section 8(g), Congress was concerned about insuring the continuity of patient health care. Accordingly . . . once an employer receives a 10-day notice and a strike therefore appears imminent he may properly attempt to determine the need for replacements by asking employees if they intend to strike.

See also *Continental Manor Nursing Home*, 233 NLRB 665, 676 (1977). In conducting such a poll, the employer has “an obligation [1] to explain fully the purpose of the questioning, [2] to assure the employees that no reprisals would be taken against them as a result of their response, and [3] to refrain from otherwise creating a coercive atmosphere.” *Preterm*, above at 656.

In this case, there is no record evidence demonstrating that the Respondent complied with either of the first two conditions of a lawful poll.<sup>27</sup> Importantly, it seems likely that an express assurance of nonretaliation would have

<sup>27</sup> Given that most of the Respondent’s telephone calls to employees did not mention the strike but simply asked if the employee would be taking time off, it seems unlikely that the Respondent met the requirement of “explain[ing] fully the purpose of the questioning [or] assur[ing] the employees that no reprisals would be taken against them as a result of their response.” *Preterm, Inc.*, above at 656.

led some number of the 48 employees who indicated that they would be working, but who later struck, to provide more forthcoming answers.<sup>28</sup>

The Board’s requirement that an employer “assure the employees that no reprisals would be taken against them as a result of their response” to a prestrike poll necessarily implies that the employer cannot engage in such reprisal.<sup>29</sup> The Respondent contends that the right to poll employees is useless if the employer cannot punish those who do not respond accurately. But we are aware of no Board or court decisions holding 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. It is one thing to permit a poll that would otherwise amount to unlawful interrogation. It is quite another to say that the poll may be backed up by the threat of discipline or discharge for engaging in protected concerted activity not disclosed in response to the interrogation. Such a result would effectively impose an individual notice obligation on health care employees, when Congress chose not to impose any such obligation.<sup>30</sup> For all of the reasons explained earlier, we decline to adopt such a rule.

#### V. CONCLUSION

Existing law protects the interests of healthcare employers like the Respondent, as well as the patients they care for, in three distinct ways. First, Congress required unions (but not employees) to provide 10-days’ written notice of a strike. Armed with that knowledge, the employer can, as the Respondent did here, make arrangement for coverage using supervisors, individual replace-

<sup>28</sup> Contrary to the suggestion in the dissent, there is no evidence of any concerted effort to mislead the Respondent in responding to the poll. Several employees testified that they were unaware of the strike at the time of the poll or had not yet decided to participate. One employee testified she informed the Respondent that she was not sure whether she would report when she had, in fact, decided to strike. In addition, the Union told employees, in accordance with current law, discussed infra, that they did not need to notify the Respondent of their intent to participate in the strike in light of the Union’s 10-day notice—a factor that the Second Circuit found warranted consideration. 566 F.3d 292, 301 (2009).

<sup>29</sup> Our dissenting colleague asserts that we “clearly dislike” the polling jurisprudence. But we neither like nor dislike the precedent. Unlike our colleague, however, we apply it, including its requirement of “no reprisals.” *Preterm*, above at 656.

<sup>30</sup> While asserting that his position is “a narrow one,” confined to a situation where a prestrike poll has been conducted and some employees respond that they will work, but later strike, our dissenting colleague does not acknowledge the full implications of adopting his position as it would permit any healthcare employer to adopt a call-in rule and enforce it as here. This would effectively render the required assurance of nonretaliation in relation to responses to the poll empty and require individual notice contrary to Congress’ clear intent.

ments, and temporary agencies. Second, the Board permits an employer which has received a 10-day notice to obtain additional information concerning the precise scope of the impending strike by polling employees, so long as the employer satisfies the conditions for insuring that the poll is not coercive. Such a poll here provided the Respondent with very significant information about the limited scope of the strike and might have yielded more had the required assurance of nonretaliation been given. With this information, the employer can refine its arrangements for coverage, knowing that it should arrange for some number of supplemental replacements to be available to work in the event that (as occurred here) additional employees choose to strike. An employer can also alert its customers to the possibility of a strike and ask that they notify it immediately if they learn in advance (as many customers here did) that a worker plans to strike or if a worker fails to appear. Finally, when the strike occurs, an employer operating in the healthcare field, like those outside of healthcare, can discipline particular employees who cease work without taking “reasonable precautions to protect” the employer’s plant, equipment, or patients “from foreseeable imminent danger due to sudden cessation of work.” *Bethany Medical Center*, supra, at 1094–1095.<sup>31</sup>

We do not believe that relevant provisions of the Act, Section 8(g) and (d), permit us to endorse any additional burden of health care employees’ exercise of the right to strike. Nor, in any case, does the balancing of interests in which the Second Circuit instructed us to engage in this case justify the Respondents’ actions here. Accordingly, we adhere to the Board’s original finding that the Respondent’s failure to immediately reinstate the strikers upon their unconditional offer to return to work violated Section 8(a)(3) and (1).

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Such affirmative action shall include offering the strikers reinstatement to their former assignments or, if those assignments are no longer available, to substantially equivalent assignments, and making them whole for any loss of earnings and other benefits. As described in our prior

<sup>31</sup> Given these existing legal protections of health care consumers, the dissent’s suggestion that our decision places health care employers in a worse position than other employers is unfounded. Our colleague would simply substitute his own judgment of what protections are necessary and appropriate for the carefully tailored and unambiguous statutory terms.

Decision and Order in this case,<sup>32</sup> as to strikers who were refused reinstatement and therefore suffered a cessation of employment, backpay shall be computed on a quarterly basis from the date of such refusal less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). As to strikers who were reinstated, just not to their former assignments, and who therefore did not suffer a cessation of employment, backpay shall be calculated pursuant to *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971).

Interest on backpay shall be computed in accordance with *New Horizons*, 283 NLRB 1173 (1987), and compounded daily as provided in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

#### ORDER

The National Labor Relations Board orders that the Respondent, Special Touch Home Care Services, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to immediately reinstate economic strikers who offered to return to work to their former positions of employment or to substantially equivalent positions of employment.

(b) Interrogating employees about their support or activities for New York’s Health & Human Service Union 1199/SEIU.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer to those strikers who have not yet 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 of employment or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole the striking employees who unconditionally offered to return to work on June 8, 2004, or at the end of the strike on June 10, 2004, and who were not reinstated immediately, for any and all losses incurred due to the denial of reinstatement to their normal assignments, with interest, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its records all reference to the unlawful actions tak-

<sup>32</sup> See 351 NLRB 754, 758, 765–766 (2007).

en against the 47 discriminatees, and within 3 days thereafter advise them in writing that this has been done and that these actions shall not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix," printed in English, Spanish, Russian, and Chinese.<sup>33</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.<sup>34</sup> Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The Respondent shall also duplicate and mail, at its own expense, a copy of the notice to all employees employed by the Respondent at any time since June 8, 2004.

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

MEMBER HAYES, dissenting.

Based on the particular facts of this case, I would find that the Respondent lawfully refused to immediately reinstate the 48 economic strikers who failed to notify it, pursuant to a preexisting and facially nondiscriminatory call-in rule, that they would not be working on June 7, 2004, after telling the Respondent, in response to a lawful prestrike poll, that they would be at work that day.

<sup>33</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>34</sup> See *J. Picini Flooring*, 356 NLRB 11 (2010).

Contrary to the majority, I would find that the Respondent has shown a sufficiently compelling business justification for enforcing its call-in rule and that justification outweighs the minimal burden imposed on employees' protected right to strike.

In my view, the issue on remand from the Second Circuit<sup>1</sup> is a narrow one. It does not concern whether the Respondent could have enforced the call-in rule if it had not conducted a lawful survey in response to the Union's 8(g) strike notice.<sup>2</sup> It does not concern whether the Respondent could have enforced a rule against someone who refused to reply to the survey. It does not concern the legality of a call-in rule that would require an employee to give a reason for being absent from work. It does not concern the kind of "permission" rule that has been found to be unenforceable. Simply stated, the call-in rule here comes into play only *after* the Respondent conducted the lawful survey, as instructed by the state health department, and only for those aides who answered that they would work on June 7, then failed to do so without giving notice.

In *Savage Gateway Supermarket*, 286 NLRB 180, 183 (1987), enfd. mem. 865 F.2d 1269 (6th Cir. 1989), cited by the majority, the Board stated that "[a]t least unless an employer shows that the business justification supporting a notice requirement is sufficiently compelling to outweigh unrestricted exercise of protected activity, it is not free to discharge an employee for failure to comply with that rule before engaging in such activity."<sup>3</sup> Unlike the employer in *Savage Gateway*, the Respondent here has clearly shown a "sufficiently compelling" business justification for requiring compliance with its call-in rule. As the Second Circuit pointed out, "If [the Respondent] could not rely on the survey or the neutral call-in rule, the [Respondent] (not to mention its clients, many with serious needs) could be in a state of limbo, with somewhere between zero and 1300 aides potentially going on strike."<sup>4</sup> Whether intentional or not, the survey answers

<sup>1</sup> *NLRB v. Special Touch Home Care Services*, 566 F.3d 292 (2d Cir. 2009).

<sup>2</sup> The majority suggests that there is no evidence that the Respondent provided the required nonretaliation assurances to employees for a lawful survey. Inasmuch as there was no allegation that the survey was unlawful, there was no reason to introduce such evidence.

<sup>3</sup> See also *Republic Aviation v. NLRB*, 324 U.S. 793, 803 fn. 10 (1945). The balancing of interests test represented by this precedent for employer plant rules is distinguishable from the well-established principle that, *even in the absence of a facially legitimate work rule*, a strike by employees is "indefensible" and unprotected if the employees fail to take reasonable precautions to prevent damage or injury from foreseeable imminent danger due to sudden cessation of work. *Marshall Car Wheel & Foundry Co.*, 107 NLRB 314 (1953), enfd. denied 218 F.2d 409 (5th Cir. 1955).

<sup>4</sup> 566 F.3d. at 299.

of the 48 aides mislead the Respondent in arranging for alternative home care coverage for its clients, who suffer from a wide range of physical and mental conditions ranging from depression to diabetes to post-stroke partial paralysis. Although the aides do not provide medical services for clients, they are often the only individuals available to remind clients of the need to take medication and to observe and report symptoms of immediate distress such as dizziness and chest pains.

Further, while the Respondent does have a pool of on-call aides to cover a client assignment in the event of a regularly assigned aide's absence, it is difficult for the Respondent to know of the need to provide such coverage at remote client sites if the assigned aide does not give advance notice in compliance with the call-in rule. Because of the 48 aides' failure to provide such notice after stating they would work on June 7, five clients received no coverage and some others received delayed or partial coverage.

The corresponding burden on employees' exercise of their statutory right to strike is minimal. The employees who originally responded that they would be at work could still engage in this activity by complying with the call-in rule, and they could do so without disclosing the reason for their absence. The majority's position that the Respondent may not enforce a nondiscriminatory call-in rule to the extent of requiring an employee to correct a misleading answer to a lawful poll effectively means that employees need not honestly answer the poll in the first place. Indeed, the majority position gives unions and their employee supporters the opportunity to increase the disruptive impact of a strike by deliberately giving false answers in response to a poll, thus eviscerating the poll as an effective aid in arranging for continuing patient care.

My colleagues clearly dislike the notion that health care employers should be able to conduct such a poll in the first place, but their approach puts these employers in worse position than in other industries. I agree with my colleagues that, in striking a careful balance between competing health care industry interests, Congress did not impose any special statutory notice requirements on employees (as opposed to the 8(g) and (d) notice requirements imposed on labor organizations). However, neither did Congress confer any special immunity on health care employees from employer notice requirements that would be enforceable, based on a sufficiently compelling business justification, in any other industry

subject to the Act. That is effectively what the majority opinion does today. Accordingly, I dissent.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to immediately reinstate economic strikers who offered to return to work to their former positions of employment or to substantially equivalent positions of employment.

WE WILL NOT interrogate employees about their support or activities for New York's Health & Human Service Union 1199, SEIU.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer to those strikers who have not yet 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 of employment or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole, with interest, the 47 strikers for any loss of earnings and other benefits suffered as a result of our refusal to reinstate them to their former jobs.

WE WILL, within 14 days from the date of the Board's Order, expunge from our records all reference to the unlawful actions taken against the 47 discriminatees, and WE WILL, within 3 days thereafter, advise them in writing that this has been done and that these actions shall not be used against them in any way.

SPECIAL TOUCH HOME CARE SERVICES, INC.