The Region submitted this case for advice as to whether the Union at any point violated Section 8(g) of the Act when, without any prior notice to the Employer, employees independently began concertedly calling in sick to protest safety conditions, and whether the discharge of those employees violated Section 8(a)(1) and (3). We conclude that the Union was not responsible for the employees’ actions and thus Section 8(g) was not violated. Accordingly, the Region should dismiss the CG charge, absent withdrawal, and issue complaint on the corresponding CA charges, absent settlement.

FACTS

The Employer operates a mental health facility in Tukwila, Washington. SEIU 1199NW (the Union) represents about 290 of the Employer’s nurses and nurse technician at the facility. The parties are currently bargaining a successor collective-bargaining agreement; the most recent CBA expired July 31, 2021.¹ One of the main disagreements at the bargaining table is over employee safety. Specifically, the Union asserts that a staffing shortage and a lack of security guards are creating dangerous working conditions. In July, the Tukwila police department announced that pursuant to its interpretation of a new state law banning the use of

¹ All dates hereinafter are in 2021.
force except pursuant to an arrest, it would no longer intervene at the mental health facility to help sedate or otherwise deal with unruly patients. Instead, it would only come when an assault or other crime had been committed. The Employer does not employ security guards so nurses had previously relied on the police to help with difficult patients. In response to the new policy, the Union requested the Employer hire security guards, but the Employer refused, claiming that industry standards discourage the use of security guards.²

On the evening of August 1, a physically intimidating patient became unruly and managed to acquire a secure keycard. The nurses called the police but did not indicate that any crime had occurred, so the police declined to respond. Afraid the situation might escalate, the nurses tackled the patient with a mattress. During the tackling and ensuing struggle several employees were injured, one so seriously they had to be taken to the emergency room. After the patient had been restrained and the injured employees tended to, the remaining nurses spent the evening talking to and messaging each other and off-duty employees about the incident. Many of the employees, including a shop steward, felt something had to be done to make the Employer take safety seriously, and decided to call out sick on their August 2-3 shifts. On August 2, more employees also called in sick as they heard about the incident and what other employees were doing. At this point the Employer emailed the Union informing it of the sickout, but the Union did not immediately respond, choosing instead to begin its own investigation of what was going on. On August 3, two employees who had been involved in the inciting incident, one of whom was a shop steward, coordinated an in-person meeting of about 40-60 employees at a park to discuss safety and understaffing. The employees decided to call out and begin picketing the Employer. At this point numerous employees called out sick or called out for “safety.” No Union staffers or non-employee Union representatives were involved in the meeting. There is no evidence that Union staff initiated, condoned, aided, or were even aware of the meeting or, aside from the Employer’s email, the call-offs.

The employees began picketing the Employer on August 3 with signs with slogans like “safety first.” None of the signs had Union insignia or colors, none of the employees wore Union shirts, and no Union staff members were present at the picket. The picketing continued like this until August 8, when the Union completed its investigation into the call-outs and the picketing and determined that the employees were engaged in a protected “safety strike” under Section 502 of the Act due to abnormally dangerous conditions. At that point the Union began offering support to the picketers, including food, water, SEIU signs and shirts, $200/week picket pay, organizing other SEIU members to join the picketing, and offering to

² The Employer did not provide evidence for this claim and the Union notes that many other facilities it represents use security guards.
negotiate with the Employer over the employees’ return to work. On August 9, the Union tweeted from its official Twitter account that “After an incident of workplace violence hospitalized one worker and injured others, and threatened the safety of many, as nurses and healthcare workers at Cascade we felt we had no choice but to go on a safety strike.”

The employees remain on strike, and the Employer has had to radically reduce operations in consequence. The Employer has discharged at least twenty employees due to their continued absence. The Employer filed a charge against the Union alleging a violation of Section 8(g), and the Union has filed over twenty charges alleging the discharges violated Section 8(a)(1) and (3).

**ACTION**

We conclude that the Union did not violate Section 8(g) by failing to give notice before the strike or picketing, since it is well established that Unions are not responsible when employees independently engage in such actions without notice to the Union. We further conclude that once the independent job action began the Union was not under any obligation to convince employees to stop the action or refuse employees its support. Accordingly, the employees at no point lost the protection of the Act and their discharges violated Section 8(a)(1) and (3).

Section 8(g) of the Act requires that a “labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing,” as well as the FMCS, continuing that the notice must “state the date and time that such action will commence.” Section 8(d) of the Act states that “[a]ny employee . . . who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.” The Board and courts have read Section 8(g)’s requirement literally, only applying the notice requirement to labor organizations and not to employees acting on their own. See *Walker Methodist Residence*, 227 NLRB 1630, 1630-31 (1977); *Kapiolani Hospital*, 231 NLRB 34, 41-42 (1977), enforced, 581 F.2d 230 (9th Cir. 1978). Even where employees are represented by a labor organization, the Board will not find a violation of 8(g) if employees commenced the job action independently from the union. *East Chicago Rehabilitation Center, Inc.*, 259 NLRB 996, 999 (1982), enforced, 710 F.2d 397 (7th Cir. 1983). As the ALJ in *East Chicago Rehabilitation Center* noted, since “it would not have been possible for the Union to have given the 8(g) notice contemplated by the Act since it had no prior notice of the walkout . . . the Union’s failure to provide such notice did not deprive the walkout of its protective character.” *Id.*
Furthermore, an employee shop steward’s participation in a spontaneous employee job action does not on its own render the labor organization responsible. In *East Chicago Rehabilitation Center*, one of the leaders of a walkout in response to the announcement of a new lunch policy was a shop steward, but the Board and 7th Circuit agreed that this did not prove the union had authorized the strike. See *East Chicago*, 710 F.2d at 404. Other direct evidence that the union was caught by surprise overbore any potential inference that might be made from the participation of the steward. *Id.* The Employer urges in part that we find a violation here based on the participation of stewards or delegates in the initial action. We are aware of no Section 8(g) cases finding liability as the Employer suggests. While it is true in other contexts that shop stewards or delegates may bind a union for other purposes, Board cases attaching ULP liability against unions in those situations based on an agency analysis are inapposite here. Such only underscores the difference between Section 8(g) violations and, for example, those of Section 8(b)(1)(A) or 8(b)(3), which contain no element of notification as part of the violation. Clearly notification cannot be accomplished by a party without its being aware of the planned action.

Initially, we conclude that the employees here were engaged in a concerted work stoppage for mutual aid and protection, namely to address workplace safety. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16-18 (1962). Thus, the main question presented is whether the Union violated Section 8(g), causing the strikers to lose the protection of the Act pursuant to Section 8(d). We find that since the strike was not called by the Union, the Union had no Section 8(g) duty before the strike commenced. While an employee shop steward was involved in instigating the call-outs, as in *East Chicago Rehabilitation Center*, there is no evidence the Union was aware of or authorized the strike. Indeed, the initial call-outs by the staff working the night of August 1 were an immediate and direct response to a traumatic incident of which the Union could not possibly have had prior notice. Like in *East Chicago*, since the Union here could not have given notice of the strike as it had no notice itself, the Union’s failure to provide the notice did not violate the Act. While the Union did not attempt to immediately stop the strike as the union in *East Chicago* did, the ample evidence that the strike was spontaneous is sufficient to show that the strike was not planned or authorized by the Union. See *East Chicago*, 710 F.2d at 404 (finding that the involvement of a steward in the walkout was “overborne by a mass of direct evidence that the union did not authorize the strike and tried to stop it as soon as it found out about it”).

We further find that, the strike having commenced lawfully, Section 8(g) did not require the Union to repudiate or attempt to quash it. First, the plain language of Section 8(g) only imposes pre-strike requirements, and does not mention any limits or duties on a labor organization after a strike has begun. Indeed, it would be impossible to do so, since most job actions’ end date is dependent on circumstance.
Second, the rationale behind Section 8(g) does not require the Board to create such a duty. The Board has interpreted Section 8(g), which was added as part of the 1974 healthcare amendments, as Congress's compromise between employees' right to strike and picket and the needs of patient care in health facilities. Walker Methodist, 227 NLRB at 1630. In the congressional debates over the 1974 amendments, which for the first time granted bargaining rights to workers in healthcare institutions, Congress was concerned about a sudden, well-organized, massive strike putting patients' lives in danger, and thus decided that labor organizations should have a duty to give notice before striking. Id. at 1631.3 Congress was apparently less concerned with independent or wildcat strikes, perhaps because such strikes are often not as massive, long-lived, or broad-based as strikes called by unions, and thus less likely to endanger patients if unannounced. See East Chicago, 710 F.2d at 403. The instant case is a good example of the soundness of this policy, since the scale of the call-outs only slowly increased as word of the incident spread over several days, differing from the typical front-loaded strike generally organized by unions. Nor has the Region found evidence that the strike here actually endangered any patients, as a sudden massive pre-organized strike might have. Accordingly, the Union's failure to try to quash the strike, and its eventual support for the picketing, did not place the Union in violation of Section 8(g). The Employer urges that the Union's failure to disavow is significant. We disagree. In addition to the reasons set forth above, it is important to note that those situations where union ULP liability is found in the Section 8(b)(1)(A) or 8(b)(4) context for failing to disavow unit employees' strikes, picketing or threats are distinguishable from Section 8(g). Indeed, the remedial similarity between those cases and Section 8(g) cases like the instant case is the employer's desire to get the objectionable conduct to stop. But focusing only on a remedy critical to the Employer ignores the elements of the ULP, which in a Section 8(g) case includes notice; notice that the union could not have given prior to the action, and thus no longer serves the legislative purpose of protecting patients from the disruption caused by the sudden onset of a pre-planned, union-organized job action, given that the job action here has already commenced, and was neither pre-planned nor union-organized.

3 While Section 8(g) also includes a requirement to notify the Federal Mediation and Conciliation Service, the Board and courts do not mention this requirement in their discussions of the policy purpose of Section 8(g), likely because such notice would have already been given in most cases under Section 8(d), and the fact that the 10-day window of Section 8(g) would not give the FMCS much time to prevent the job action. See Walker Methodist, 227 NRLB at 1630-31; East Chicago, 710 F.2d at 403. The limitation that Section 8(g) notice cannot be extended without the employer's consent, a limitation absent from Section 8(d), also demonstrates that the primary purpose of the section is to avoid union-organized, unannounced actions.
The Board and court’s decisions in *East Chicago* do not require a different result. While the union in that case did quash the independent strike soon after it started, the Board did not suggest doing so was a hidden requirement to avoid Section 8(g) liability. In the Board decision, the ALJ only noted the union’s attempts to end the strike and the employer’s refusal to accept the employees’ offer to return to work in his decision that the union could not be held responsible for endangering patients. 259 NLRB at 999. Judge Posner in the Seventh Circuit’s decision did not even discuss the union’s repudiation of the strike when finding that Section 8(g) only applied to labor organizations and not wildcat strikes. 710 F.2d at 403. Instead, the decision noted the union’s attempts to stop the strike as being evidence that the initial strike was not authorized or planned by the union. Id. at 404. Here, as discussed *supra*, while the Union did not quash the strike, the failure to do so does not outweigh the ample evidence the Union did not and could not have authorized the initial strike.

Finally, Judge Posner’s suggestion in *East Chicago* that the union there had to repudiate the strike, otherwise “it might have been held to have ratified it” also does not suggest a different result. 710 F.2d at 401. The part of the decision containing this phrase was not dealing with Section 8(g), but rather was handling an argument that the strike was unprotected because it was in derogation of the employees’ collective-bargaining representative under *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975). The employer in *East Chicago* argued that since the union tried to stop the strike, the strikers must have been attempting to bypass the union. Judge Posner’s decision that the union’s opposition to the strike did not render the strike unprotected was supported by ample precedent distinguishing protected wildcat and independent strike activity from unprotected attempts to bypass the bargaining agent. See 710 F.2d at 401-02. The court thus did not rely on the union’s stopping the strike to find the strike protected. Rather Judge Posner was explaining that the union’s quashing the strike was not because the strikers were bypassing the union, but because the union was concerned the strike might be unprotected by Section 8(g) at a time when Section 8(g) law was unsettled. Prior to *East Chicago*, the Board had never dealt with a situation like the one in *East Chicago* where represented employees in a healthcare setting had gone on strike independent from their union. It was entirely possible the Board might have held the Section 8(g) did apply to the union in such situations, or that a union might be held to ratify such strikes post-hoc. The court was not suggesting that the Board must find unions can unlawfully ratify strikes in such a way, just that it “might have.” Id. at 401. Had the court been suggesting otherwise, it might have cited something to support the asserted proposition, which it did not.
Based on the preceding analysis, the Region should dismiss the Section 8(g) charge, absent withdrawal, and issue complaint on the Section 8(a)(1) and (3)

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4The Employer also urges that we find that the Union organized the strike for the illegal purpose of including security guards in a mixed unit. First, we note the Employer only filed a Section 8(b) charge (Case 19-CB-284115) against the Union on October 6, and the Region has yet to complete its investigation of that allegation, rendering the Employer’s argument to us premature at best. Second, the Employer has not provided any evidence on this record linking the strike or picketing to the Union’s earlier bargaining proposal. Although the Union, when prompted by an inquiry from Employer’s counsel, indicated that earlier proposed security techs would be included in the bargaining unit, as explained above, the Union did not instigate the strike, and this relatively recent development cannot be said to manifest an unlawful objective of the strike or picketing initially undertaken without the Union’s knowledge. The Employer has failed to provide any evidence on this record actually linking the strike and picketing to this bargaining proposal, be it picket signs, fliers, or statements by the Union. Instead, the Employer points to the proposal itself and argues this renders the strike unlawful. We do not agree. Such a proposal, despite including the clarification Employer’s counsel induced more recently, is not by itself illegal even accepting the Employer’s argument that the individuals ultimately employed in the proposed job classification would be security guards under the Act. See Correction Corp. of America, 327 NLRB 577, 577 (1999) (noting that while the Board will not certify a mixed guard unit, it allows parties to voluntarily agree to such arrangements). Nor can the fact that safety concerns motivated the Union’s earlier proposal for security techs, and that the intervening event that caused the unauthorized strike perhaps bore out those concerns as valid, necessarily render the strike illegal or unprotected. Such legal bootstrapping would interfere with an otherwise lawful proposal on a permissive subject. (b) (5)
Cases 19-CG-280997, 19-CA-281345 et al.

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charges, absent settlement. This email closes this case in Advice. Please contact us with any questions. 5

/s/
R.A.B.

ADV.19-CG-280997.Response.1199 SEIU (Cascade Behavioral Health)

5The Region also requested advice on whether the employees’ job action was not technically a strike under Section 502 because of abnormally dangerous conditions at the facility. In view of the foregoing analysis, we do not reach whether this was an action under Section 502 or whether actions under Section 502 are immune from Section 8(g) liability (b) (5)