

Bethany Medical Center and Janise Selbe. Case 17–
CA–17927

August 3, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND
LIEBMAN

On April 26, 1996, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified² and set forth in full below.

We agree with the judge that the catheterization laboratory employees were engaged in protected concerted activity when on March 9, 1995, they walked off their job for 2 hours in protest of certain terms and conditions of employment.³ Although they gave notice of their walkout only 15 minutes prior to the first catheterization procedure scheduled for the day, the judge correctly found that the special strike notice requirements of Section 8(g) of the Act apply only to labor organizations, not to groups of employees. *Walker Methodist Residence*, 227 NLRB 1630 (1977). The courts, as well as the Board, have read the clear unambiguous language of Section 8(g) to mean what it says: the notice requirements are applicable only if the strike is by a labor organization. *East Chicago Rehabilitation Center, Inc. v. NLRB*, 710 F.2d 397, 403 (7th Cir. 1983); *Montefiore Hospital & Medical Center v. NLRB*, 621 F.2d 510 (2d Cir. 1980), cert. denied 465 U.S. 1065 (1984). Since no labor organization was involved in the walkout,⁴ we find, in agreement with the judge, that the catheterization laboratory employees were not legally required to do anything more than they did to preserve their rights pursuant

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² We shall modify the judge's recommended order in accordance with or decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

³ The work stoppage at issue lasted from approximately 8 to 10 a.m.

⁴ We also reject the Respondent's contention that the notice requirements of Sec. 8(g) apply because the catheterization laboratory employees' "activities in meeting with supervisors to address various concerns made them the functional equivalent of a labor organization." If we were to find that any concerted activity by employees was the activity of a "labor organization," Sec. 8(g) would require advance notice of any walkout by two or more employees acting in concert—a result at odds with the clear language of both Secs. 8(g) and 2(5) (definition of "labor organization") of the statute.

to Section 7 of the Act when they walked off the job on March 9.

The Respondent argues that the catheterization laboratory employees forfeited their statutory protection when they refused to perform the scheduled catheterization procedures and refused to return to work to perform an emergency procedure on a patient who was experiencing chest pains. The Act protects the right of employees to engage in concerted activities, including the right to strike without prior notice. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *Montefiore Hospital*, supra. Both the Board and the courts, however, recognize that the right to strike is not absolute, and Section 7 has been interpreted not to protect concerted activity that is unlawful, violent, in breach of contract, or otherwise indefensible. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962). There is no claim that the walkout was violent or in breach of contract.

The sole issue is whether it was somehow "indefensible."⁵ The Board has held concerted activity indefensible where 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. *Marshall Car Wheel & Foundry Co.*, 107 NLRB 314 (1953), enf. denied 218 F.2d 409 (5th Cir. 1955). In cases involving health care employees, although the Board has recognized that risk of harm to patients caused by employees' concerted activity is a factor in deciding whether the activity was protected, it has applied the same standards of conduct to employees of health care institutions as it does to employees of other enterprises. *Phase Inc.*, 263 NLRB 1168, 1169 (1982). Accordingly, the test of whether the catheterization laboratory employees' work stoppage lost the protection of the Act is not whether their action resulted in actual injury but whether they failed to prevent such imminent damage as foreseeably would result from their sudden cessation of work.

The Respondent contends that the catheterization laboratory employees' refusal to perform the scheduled procedures and their refusal to return to perform an emergency procedure was indefensible conduct. Applying the test set forth above, we disagree. It is undisputed that, at the time of the walkout, there were no patients in the catheterization laboratory. Although five patients were scheduled for procedures that day, all of these cases were concededly routine. When the walkout occurred, the procedures were either delayed or the patients were transferred to one of the approximately 20 other hospitals capable of performing catheterization procedures in the near vicinity (including 3 within a 15-minute drive).⁶

⁵ The Respondent's only claim that the walkout was "unlawful" was based on Sec. 8(g) and we have rejected that claim.

⁶ The Respondent's radiology director, Sousley, testified that one of these patients had already been on the schedule for "one or two days for a procedure." Another patient, Mahany, who had been referred for an

Delays of routine procedures were common occurrences and had resulted in a set policy for “bumping.” The Respondent’s Director of Radiology testified that, under this policy, when a scheduled procedure could not be performed due to any number of reasons, including the cardiologist’s unavailability, the scheduled procedure would be bumped to another time on the schedule. In fact, one of the grievances presented by the catheterization laboratory employees involved their concern that cardiologists were often late for scheduled procedures and, as a result, the schedule for procedures had to be rearranged. There is no contention, nor is there any evidence, that, at the time of the walkout, there were any emergency patients requiring immediate treatment.

Further, even emergency cases were also subject to some delay. As found by the judge, while unscheduled emergency procedures take precedence over routine procedures, any procedure in progress must be completed before the emergency procedure is performed.⁷ In addition, the eight cardiologists who utilize the Respondent’s catheterization laboratory are independent practitioners who belong to multiple medical staffs. They are able to direct patients to several of the nearby acute care area hospitals with similar cardiac catheterization facilities. These facts support a conclusion that the catheterization laboratory employees did not foreseeably create such a risk of harm to patients so as to lose the statutory protection for their walkout.

We further find that the catheterization laboratory employees’ failure to provide the Respondent with more than 15 minutes notice of their work stoppage did not render the walkout indefensible. As noted above, both routine and emergency procedures were often rescheduled or delayed without endangering patients’ lives, and in fact the Respondent successfully rescheduled or transferred to other nearby hospitals all of the scheduled procedures and the one unscheduled emergency procedure that arose during the walkout.

We also find no support in the record for the Respondent’s claim that the catheterization laboratory employees’ refusal to terminate their work stoppage so endangered a patient’s life as to lose their statutory protection. First, the parties have not cited, nor are we aware of, any cases where the Board has required strikers to return

“elective” catheterization procedure approximately 6 days earlier, had the procedure performed the next day at another hospital. At the time of the work stoppage, his condition was not deemed an emergency by his doctor although the catheterization subsequently revealed significant blockage of the coronary arteries requiring immediate surgery.

⁷ Dr. Dulin, a staff cardiologist, testified that how quickly an unscheduled emergency procedure is performed depends on whether the catheterization laboratory is in use. According to Dr. Dulin, if “someone [is] performing a test already in the cardiac catheterization laboratory, you have to wait until they finish” and the wait depends on whether the procedure being performed is a long complicated procedure or a normal procedure. Dr. Dulin further testified that a complicated catheterization procedure could take “a couple of hours.”

once a strike is underway. See *Montefiore Hospital & Medical Center*, 243 NLRB 681 at 683(1979). (“Nothing in the Act requires pickets or those responsible for the picketing to act as an insurer, that is, to take steps to insure that customers, patients or others obtain the affected services or products elsewhere.”) Even assuming arguendo that there might be such an obligation in some circumstances, we find an insufficient basis for imposing such an obligation here. There were numerous other hospitals capable of performing catheterization procedures in the near vicinity of the Respondent’s health care facility and, in fact, the unscheduled emergency that arose during the walkout was treated at one of them by the same doctor who would have performed the catheterization procedure at Bethany.⁸

Under these circumstances, we find that the catheterization laboratory employees’ work stoppage and refusal to terminate their work stoppage to perform an emergency catheterization procedure did not foreseeably create such a risk of harm to patients as to justify depriving these employees of the Act’s protection.⁹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Bethany Medical Center, Kansas City, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engage in protected concerted activities.

(b) Requiring employees to waive their right to engage in protected concerted activities in order to be considered for rehire.

(c) Telling employees they are being discharged for engaging in protected concerted activities.

(d) Interrogating employees about their participation in protected concerted activities.

⁸ The unscheduled emergency involved a patient who had been admitted to the hospital prior to March 9 and began experiencing chest pains that morning. The Respondent arranged for her to be transferred via a 15-minute ambulance ride to the other hospital.

⁹ Chairman Truesdale agrees with his colleagues that the catheterization laboratory employees’ walkout and failure to return on request was protected. He finds that this case is more like *East Chicago Rehabilitation Center v. NLRB*, 710 F.2d 397 (7th Cir. 1983), where the court upheld the Board’s finding that a spontaneous 2-hour walkout by 17 nurses aides was protected, than *NLRB v. Federal Security*, 154 F.3d 751 (7th Cir. 1998), where the court agreed with Chairman Truesdale’s dissent and found a walkout by security guards at a public housing project unprotected. As the court noted in *Federal Security*, unlike the nurses aides in *East Chicago*, who were “provided cover” by doctors and nurses, the guards in *Federal Security* were “front line” and left behind unattended stations. 154 F.3d at 756. Here, there were other persons to “provide cover” for the employees by arranging for alternative care for the patients.

(e) Threatening employees with loss of accrued vacation benefits in reprisal for the employees having engaged in protected concerted activities.

(f) 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 Janise Selbe, Mary Zeller, Margaret Fergus, Jackie Hoelting, and Deborah Tanner, full reinstatement, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary employees hired for the catheterization laboratory after March 17, 1995, to make room for them.

(b) Make Janise Selbe, Mary Zeller, Margaret Fergus, Jackie Hoelting, and Deborah Tanner whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and, within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back-pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at the hospital in Kansas City, Kansas, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 17, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 22, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a re-

sponsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against our employees because they engage in protected concerted activities.

WE WILL NOT require that our employees waive their right to engage in protected concerted activities in order to be considered for rehire.

WE WILL NOT tell our employees they are being discharged for engaging in protected concerted activities.

WE WILL NOT interrogate our employees concerning their protected concerted activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer Janise Selbe, Mary Zeller, Margaret Fergus, Jackie Hoelting, and Deborah Tanner full reinstatement without prejudice to their seniority or any other rights or privileges previously enjoyed discharging, if necessary, employees hired for the catheterization laboratory since March 17, 1995, to make room for them.

WE WILL make Janise Selbe, Mary Zeller, Margaret Fergus, Jackie Hoelting, and Deborah Tanner whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Janise Selbe, Mary Zeller, Margaret Fergus, Jackie Hoelting, and Deborah Tanner, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

BETHANY MEDICAL CENTER

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted Pursuant to a Judgment 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."

David A. Nixon, Esq., for the General Counsel.
Henry F. Sondag Jr., Esq. and *Reid Holbrook, Esq. (Holbrook, Heaven & Fay)*, for the Respondent.
Wayne J. Kutz, Executive Vice President and Chief Operating Officer, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. I heard this case in trial in Overland Park, Kansas, on January 25 and 26, 1996. The case originates from a charge, filed by Janise Selbe, an individual (Selbe) on March 22 and amended on June 13, 1995,¹ against Bethany Medical Center (the Hospital). The prosecution of this case was formalized on June 16, when the Acting Regional Director for Region 17 of the National Labor Relations Board (the Board), acting in the name of the Board's General Counsel issued a complaint and notice of hearing (the complaint)² against the Hospital.

The complaint alleges the Hospital violated Section 8(a)(1) of the National Labor Relations Act (the Act) when in March certain specifically named supervisors and agents of the Hospital told employees the Hospital would not condone the employees concerted work stoppage and that employees who engaged in the concerted work stoppage would be disciplined by discharge, permanent probation, or license removal. It is also alleged specifically named supervisors and agents of the Hospital interrogated employees concerning their protected concerted activities, threatened employees with loss of accrued vacation benefits in reprisal for the employees having engaged in protected concerted activities, told employees orally and in writing the reason they were being discharged was because they engaged in concerted protected activities, and placed written restrictions on employees rehire to discourage its employees from engaging in protected concerted activities. It is further alleged the Hospital discharged Selbe, along with Mary Zeller (Zeller), Margaret Fergus (Fergus), Jackie Hoelting (Hoelting), and Deborah Tanner (Tanner) on March 17, because they on or about March 1 concurred complained to Hospital officials regarding wages, hours, and working conditions by making a written demand for change in patient scheduling, excessive work hours, and other terms and conditions of employment and by meeting with a Hospital official concerning their written demands.

The Hospital admits that the Board's jurisdiction is properly invoked³ and that Director of Radiology Dennis Sousley (Director of Radiology Sousley), Director of Patient Care Services Jim Hawkins (Director of Patient Care Services Hawkins), Vice President for Patient Care Services Sylvia Maher (Vice President for Patient Care Services Maher), Director of Personnel

Bob Feiger (Director of Personnel Feiger), and Senior Vice President and Chief Operating Officer Wayne Kutz (Chief Operating Officer Kutz) are supervisors and agents of the Hospital within the meaning of Section 2(11) and (13) of the Act.

The Hospital denies the discharged employees engaged in *protected* concerted activities or that its actions violated Section 8(a)(1) of the Act. The Hospital contends that when the employees in question walked away from their jobs on March 9 they directly, immediately, and unnecessarily jeopardized the health, well being, and very lives of patients entrusted to the care of the Hospital and that the employees actions were totally indefensible and of such an egregious nature that it was fully justified in discharging them. Additionally, the Hospital contends Tanner was a supervisor within the meaning of and outside the protection of the Act.

I have studied the whole record, the parties briefs, and the authorities they rely on. Based on more detailed findings and analyses below, I conclude and find the Hospital violated the Act substantially as alleged in the complaint, and I conclude and find Tanner was not at material times a supervisor within the meaning of the Act.

FINDINGS OF FACT⁴

I. OVERVIEW

The Hospital, established in 1892, is an acute care full service facility that has among other programs, an extensive Cardiac Care Program. The Cardiac Care Program consists mainly of a Cardiothoracic and Cardiovascular surgery unit, a Telemetry unit, and a Cardiac Catheterization Laboratory (Cath Lab).

The Cath Lab staff and procedures performed there gives rise to the instant case.

Director of Radiology Sousley described the Cath Lab functions as the fuel that powers the engine of the Cardiac Care Program. Various diagnostic and interventional procedures are performed by the Cath Lab staff on patients suspected or diagnosed with cardiac diseases or problems. At focus here are the diagnostic procedures of cardiac catheterization and the interventional procedure of angioplasty. A cardiac catheterization patient is placed on a highly technical in nature and sophisticated machine in the Cath Lab for the procedure.⁵ A cardiologist and a special procedures laboratory technologist, under sterile surgical conditions, will insert a needle-type tube into a patient's femoral artery. A tube, referred to as a catheter, is then advanced up through the abdominal aorta, the thoracic aorta, and into the various arteries around the heart that supply blood to the heart. A contrast media (dye) is injected through the catheter into the coronary arteries to visualize the blood supply to the heart so as to evaluate the arteries in order to ascertain if blood is flowing through the arteries at an acceptable level. If blockage is discovered in certain arteries of a patient the Cath Lab staff can perform an interventional procedure known as angioplasty. This procedure is performed by a cardiologist assisted by Cath Lab personnel. In an angioplasty a specialized catheter, commonly called a balloon catheter, is inserted into a

¹ All dates here after are 1995 unless otherwise indicated.

² The complaint was amended at trial.

³ The Hospital admits, and I find, it is a not-for-profit corporation with an office and place of business in Kansas City, Kansas, where it engages in business as a 426-bed acute care hospital. The Hospital further admits that during the 12-month period ending March 31, it, in conducting its business operations, derived gross revenues in excess of \$250,000 and purchased and received at its Kansas City, Kansas hospital products, goods, and materials valued in excess of \$5000 directly from points outside the State of Kansas. It is alleged in the complaint, the parties admit, the evidence establishes, and I find that at all times material the Hospital is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

⁴ The essential facts are not significantly disputed. Unless I note otherwise my findings are based on admitted or stipulated facts, documentary exhibits, or on undisputed and credible testimony.

⁵ For example, by electrodes on the patient information is transferred to a hemodynamic monitoring system, an EKG reading device, and a pulse oximetry. There are also visual monitors depicting conditions inside the arteries.

patient and advanced to the blocked portion of an artery. When the balloon catheter comes in contact with a blocked portion of an artery a technologist will, with the aid of visual monitors and at the direction of the cardiologist, inflate and deflate the balloon. The blocked portion of the artery is examined, and if necessary the procedure is repeated. If the procedure proves effective and the blockage is corrected a more adequate or more acceptable level of blood is supplied to the heart muscle.

The procedures performed by the Cath Lab staff are performed on a scheduled as well as an emergency basis.⁶ If an emergency occurs during a scheduled procedure, the emergency procedure takes precedence and is performed as soon as the procedure in progress is completed and the facility is prepared. Other regularly scheduled procedures must be bumped or rescheduled.

The Cath Lab staff (the alleged discriminatees here) at material times were responsible for providing coverage of the Cath Lab 24 hours a day, 7 days a week. The Cath Lab staff regularly works from 7 a.m. until 3:30 p.m. Monday through Friday and they are in on-call status, on a rotating basis, at all other times subject to reporting for duty at the Hospital within approximately 30 minutes following a call.

II. THE CATH LAB STAFF

At material times the Cath Lab staff members duties were as follows. Fergus, Hoelting, and Selbe were special procedures technologists. Zeller is a registered nurse and served the Cath Lab staff as a cardiovascular nurse specialist. Tanner is a special procedures technologist and served with the title Cath Lab supervisor.⁷

The cardiovascular nurse specialist (Zeller in this case) job summary, in part, reflects she is “[u]nder direct supervision of the Director of Cardiology” to “assist the Cardiologist” and “performs a variety of nursing procedures in the Cardiac Cath Lab including administration of medicines and monitoring of the patients status.” The cardiovascular nurse specialist “works in cooperation with the Supervisor of the Cath Lab to assure the communication of necessary information regarding patients schedules, procedures . . . etc.”

The job summary for the special procedures technologist (Cath Lab Tech) reflects such employees (Fergus, Hoelting, and Selbe in the instant case) are “under the supervision of the Assistant Chief of Cath Lab [and] performs a variety of tasks in the performance of Cardiac Catheterizations and Special Procedures.”

There are approximately eight cardiologists with staff privileges at the Hospital. The cardiologists, like all staff physicians at the Hospital, belong to multiple medical staffs and direct patients to hospitals in which they seem to have the greatest degree of confidence for each particular patient's medical problems or situations.

Director of Radiology Sousley described work in the Cath Lab as “exacting stressful work.” On an average day five or six scheduled procedures are performed whereas on a high volume day seven to nine are performed.

⁶ Chief Operating Officer Kutz stated 40 percent of all patients admitted to the Hospital come, without advance notice, through the emergency room.

⁷ Whether Tanner was at material times a supervisor within the meaning of the Act is contested and her status is addressed elsewhere in this decision.

III. CATH LAB STAFF'S JOB-RELATED CONCERNS AND ACTIVITIES

A. Early Expressions of Concern

Vice President for Patient Care Services Maher testified she became aware in the fall (September) of 1994 the Cath Lab staff (the alleged discriminatees here) had been expressing job-related concerns to Director of Radiology Sousley,⁸ Maher recalled at least three areas of concern raised by the Cath Lab staff, namely, that the Cath Lab technicians be provided nursing support for the removal of arterial lines,⁹ that ground rules be established regarding how patients are scheduled for the Cath Lab, and that additional staff be provided based on an increased volume of cases for the Cath Lab.

B. The March 1 Meeting

The Cath Lab staff continued pursuing what they perceived to be job-related concerns and, among other things, requested a meeting with Sousley for March 1. Sousley met with the five alleged discriminatees and student-trainee Jill Blake on that date. The meeting took place in the employee lounge area adjacent to the Cath Lab. Director of Radiology Sousley testified he and the employees sat around a table and “talked about the situations in the Cardiac Cath Lab.” Sousley testified:

The topics in the meeting . . . primarily centered around, again, scheduling procedures, cardiologists' availability . . . a bumping procedure . . . after-hours scheduling . . . [and] pulling of art[erial] lines . . .

Sousley explained:

scheduling . . . centered around . . . how much time should be allotted to perform a procedure? How many blocks of time should be allowed in the day to perform procedures? When should blocks of time be allowed for out-patients versus in-patients? What should be the procedure for scheduling if an angioplasty was added on after blocks of time were already filled?

According to Sousley, the Cath Lab staff very much wanted the Hospital to limit the number of cases that could be placed on the schedule for any given day.

Sousley also explained that the Cath Lab staff wanted a procedure whereby if a cardiologist did not show for a scheduled procedure within 15 to 20 minutes of the scheduled time the cardiologist would be “bumped” to the end of the schedule for that day.

Sousley further explained that the Cath Lab staff wanted the Hospital to “develop a system to allow scheduling of procedures after hours other than calling of the technologist on-call”

⁸ Maher testified Sousley told her he had discussed such matters with the Cath Lab staff.

⁹ When a procedure has been completed in the Cath Lab a catheter tube line is left in the patient's artery after, for example, an angioplasty has been completed. The line is sterile, coiled up, and may be hooked to a drip situation. The patient is moved from the Cath Lab to either the ICU (Intensive Care Unit) or the Telemetry Unit. Later the attending cardiologist will order the removal of the arterial line which must be unsecured and literally removed (pulled) from the patient's body. It is “a very careful procedure of holding pressure, placing pressure properly on the groin or the area where the catheter or arterial line is removed so that the patient does not develop conditions such as hematoma which can easily lead to infections.” The Cath Lab staff was seeking to have this procedure performed by staff nurses in ICU or the Telemetry Unit rather than by a member of the Cath Lab staff.

at home. The Cath Lab staff was seeking an in-hospital centralized scheduling system for all procedures.

C. The Hospital's Response to the March 1 Meeting

Several meetings of various Hospital management personnel took place starting on March 1, regarding the Cath Lab staffs' concerns as outlined above. Director of Radiology Sousley testified, for example, that he met on March 1 with Chief Operating Officer Kutz. Kutz told Sousley the Hospital needed to do something to organize the schedule so cardiologists did not schedule too many procedures in too short a time frame. Kutz noted he would "possibly be agreeable to adding staff," but needed to "review financials." Kutz told Sousley to work with Tanner on "an alternative manner of scheduling the after-hours schedule." Kutz directed that Sousley work with Vice President for Patient Care Services Maher regarding the removal of arterial lines.

On or about March 3, Director of Radiology Sousley and Tanner met with Chief Operating Officer Kutz. The three were joined by Cardiologist Dr. Hector Rodriguez. The concerns of the Cath Lab staff were again discussed. Kutz told them he was planning to authorize additional staff for the Cath Lab.¹⁰

D. The March 9 Walkout of the Cath Lab Staff and Related Matters

On March 9, the Cath Lab staff reported for work at the Hospital as scheduled. There were five scheduled procedures to be performed in the Cath Lab that day. The first scheduled procedure was Cardiologist Dr. Jose Dulin performing a heart catheterization on patient Carl Mahany¹¹ who had checked into the Hospital that morning. Dr. Dulin telephoned (from his car at 7:45 a.m.) to inform the Hospital Cath Lab staff he was on his way and would be at the Hospital in 15 minutes for the first procedure of the day. Dr. Dulin said he spoke with Tanner who told him "they [Cath Lab staff] were not happy with their . . . working conditions and that by the time I [Dr. Dulin] got there they may not be there."

The Cath Lab staff walked off the job shortly thereafter and went to a nearby restaurant.¹² Dr. Dulin arrived at the Hospital, proceeded to the Cath Lab, but found no one there. Dr. Dulin told Director of Radiology Sousley he was to perform a heart catheterization that morning but had been told by the Cath Lab staff they might not be there and the crew was not present. Dr. Dulin stated he then "waited to see what was going to happen." Dr. Dulin fully apprised his patient, Mahany, of the situation.¹³

¹⁰ Sousley testified he later told Tanner he "was happy . . . Mr. Kutz, was considering adding additional staff," and added they discussed how any new staff might be utilized.

¹¹ Mahany had been referred on March 3 to Dr. Dulin. Mahany had been experiencing progressive angina pectoris.

¹² It is undisputed that there was no patient in the Cath Lab at the time the staff walked off the job.

¹³ Dr. Dulin stated that after approximately 2 hours with no return of the Cath Lab staff he, after consulting with Mahany, arranged to perform Mahany's catheterization the next morning at 8 a.m. at Shawnee Mission Medical Center. Dr. Dulin testified that the next day "because of the severity of the disease [and] after consulting with a cardiovascular surgeon, [Mahany] went directly from the Cath Lab table to the operating room to have open heart surgery." Dr. Dulin was asked if the 24-hour delay in Mahany's catheterization placed Mahany at greater risk. Dr. Dulin responded, "retrospectively, because he had severe disease . . . there is a definite risk that something serious even death, may occur." Ms. Mahany testified she, at the time, had no difficulty in the 1-day delay for her husband to go to Shawnee Mission Medical

Director of Radiology Sousley testified that when he arrived at the Hospital on March 9 he was informed by Director of Patient Care Services Hawkins that the Cath Lab staff had been present at the Hospital but had left the building. Hawkins told Sousley there were patients scheduled to have procedures performed in the Cath Lab that day. Hawkins asked Sousley what he planned to do.

Sousley testified he obtained the Hospital provided pager (beeper) numbers for each of the Cath Lab staff members and paged all of them at approximately 8:15 a.m. A few minutes thereafter, Tanner telephoned Sousley. Sousley asked what was going on, and Tanner responded something to the effect the Cath Lab staff could not handle the pressures any longer and "they had walked out." Sousley asked, "[W]hat does this mean?" and Tanner replied, "[I]t means we're not working, we're not doing any procedures." Sousley asked if this meant the Cath Lab staff was not coming back to work, and Tanner stated they were not coming back. Sousley asked if the staff was looking for other jobs, and Tanner told him they were talking about "job options" and job openings that they could apply for. Sousley told Tanner, "[I]f you are quitting . . . please don't do it in this manner. Please come back, [and] submit your resignation." Sousley pointed out the staff had worked many years for the Hospital and again asked them to come back to work and give the Hospital a 2-weeks' notice and then quit. Sousley testified, "I also made the comment that they had accrued vacation benefits and many benefits . . . and I said they may be in jeopardy."¹⁴

The Cath Lab staff did not immediately return to the Hospital after the first telephone conversation between Sousley and Tanner.

Director of Radiology Sousley stated that shortly thereafter he was informed by Director for Patient Care Services Hawkins that a patient on the Telemetry Unit was "in serve chest pain" and "not responding to medication." Sousley concluded the patient needed immediate care so he again paged Tanner's beeper number and Tanner telephoned Sousley. Sousley told Tanner about the condition of the patient (Ms. Clendenin) and asked Tanner if the Cath Lab staff would come to the Hospital and perform this one emergency procedure. According to Sousley, Tanner responded they would not. Sousley told Tanner, "I cannot believe that you wouldn't take care of a patient. This patient could die."¹⁵ Sousley testified Tanner said, "[W]e've thought about patients in the past, but right now we have to think about ourselves."

Center for the procedure. Ms. Mahany testified the surgery on her husband was as far as she knew successful. Ms. Mahany said her husband had been referred to Dr. Dulin on Friday (March 3) of the preceding week.

¹⁴ Tanner describes her conversation with Sousley only slightly differently. Tanner stated Sousley asked that the Cath Lab staff come back to work and perform the procedures scheduled that day "and then we could have a meeting with administration about all our problems that we were so upset about." Tanner stated Sousley then said, "If you leave your job this way you're at the risk of losing your vacation and benefits." Tanner said she told Sousley, "Don't threaten us with our vacation." I find either version would require the same conclusion and results.

¹⁵ Tanner recalls Sousley stating in the conversation, "a patient [was] en route to the hospital and he needed to know if we were going to come back in and take care of the patient. And if we were not, then the patient would have to be rerouted."

Tanner testified she and the other members of the Cath Lab staff knew that if an emergency patient did not receive care the patient's life and/or health could be jeopardized. Tanner said that in deciding not to come back to the Hospital in response to Sousley's request they believed there was "a distinct possibility" Sousley would lie about the existence of an emergency. Tanner stated that whether or not an emergency existed the Cath Lab staff refused at that time to return to the Hospital. Tanner did not recall saying anything about the staff thinking about patients in the past, but only about themselves at the time.¹⁶

Although not a patient of his, Dr. Dulin responded to a "staff consult"¹⁷ involving Ms. Clendenin to assess her medical condition. Dr. Dulin testified Ms. Clendenin, who had been a patient in the Hospital before being transferred to the Telemetry Unit, was "having chest pains," "diaphoretic," and "short of breath." Dr. Dulin concluded Ms. Clendenin needed an emergency heart catheterization and, when he was informed the Cath Lab staff would not return to the Hospital for Ms. Clendenin, he arranged for her to be transferred via ambulance to Providence Hospital¹⁸ where he successfully performed a catheterization.¹⁹ The procedure at Providence Hospital took Dr. Dulin approximately 10 minutes to perform.

Director of Radiology Sousley testified he paged Tanner a third time and when she returned his call he had her speak with Chief Operating Officer Kutz who asked what was going on. At Kutz' request the Cath Lab staff (the alleged discriminatees here) returned to the Hospital around 10 a.m. and met with Chief Operating Officer Kutz and Sousley. They discussed scheduling, additional help, who at the Hospital would be responsible for pulling arterial lines, cardiologist scheduling, and events leading up to the walkout earlier that morning. Time lines were established for accomplishing certain changes and, according to Sousley, "Mr. Kutz stated there would be a meeting set up the very next day to meet with all the cardiologists and the Cath Lab Technologists and the Nurse to discuss the whole situation and a fact-finding meeting and to effect some resolution."

The Cath Lab staff then returned to the Cath Lab to perform procedures. "[A]ll the patients had already been transferred or allowed to eat or procedures were planned to be delayed; [however], so there weren't any procedures they could perform right at that time . . . [and] . . . they checked out and left approximately at noon."

The Cath Lab staff returned to work status March 10 through 16. Chief Operating Officer Kutz, Director of Radiology Sousley, and Vice President for Patient Care Services Maher had several meetings during this period concerning the Hospital's response to the Cath Lab staff's absence. For example, Hospital management met with the staff cardiologists and the Cath Lab

staff to discuss changes to be instituted regarding Cath Lab working conditions.

E. March 16 Meetings with Each Cath Lab Staff Member

On March 16, Vice President for Patient Care Services Maher and Director of Radiology Sousley met with each of the Cath Lab staff members individually. Maher asked each "what her individual thoughts were at the time of the walk out." Maher asked each about the "events leading up to" the walkout and "what . . . conversations . . . were going on between them" at the time. Each of the alleged discriminatees was asked by Maher what would happen if stress arose again in the Cath Lab, would the staff walk off the job again. Maher elicited a negative response from each.

IV. THE DISCHARGE OF THE CATH LAB STAFF

A. The Discharge Interviews

A decision was made by Chief Operating Officer Kutz, Vice President for Patient Care Services Maher, Director of Radiology Sousley, and Director of Personnel Feiger to discharge, effective March 17, all five of the Cath Lab staff members who participated in the March 9 walkout. Each of the five alleged discriminatees was advised individually of her termination. Each was told she was being terminated for "patient abandonment," "refusal to provide patient care," and "endangering the life of patients." Each was told she could be considered for reemployment if she submitted a job application and agreed to certain conditions.²⁰ Each of the Cath Lab staff was provided a written copy of her termination notice. Each termination notice in pertinent part reflects:

Intentional failure to perform work assignment, neglect of patients and conduct detrimental to patient care and medical center operations, demonstrated by your abandonment of patients and departure on Thursday morning, March 9, 1995.

B. Conditions for Consideration of Rehire

Each of the Cath Lab staff members was asked on March 17 to agree to the following "conditions for employment" if they wished to apply for rehire:

Dear Ms. Selbe:¹

You may apply for rehire based on the following conditions for employment:

1. Supportive of Bethany Medical Center and its administrative decisions.
2. Provides a work environment which is effective and conducive to employees/patients and physicians.
3. Performs job duties in accordance with the job description and direction of their supervisor.
4. Maintains the Professional Code of Ethics and performs job functions in accordance to Bethany Medical Center's Standard of Care.
5. Participates cooperatively and professionally with department problem solving and is supporting of decisions to make system improvements.

¹⁶ I find it unnecessary to resolve any of the apparent minor conflicts between Sousley's and Tanner's accounts of their conversations inasmuch as the outcome here would be the same relying on either version.

¹⁷ Dr. Dulin described a "staff consult" as "something like . . . you need to see right away because the patient seems to be in distress and threatening to have a heart attack."

¹⁸ Providence Hospital is within approximately 15 minutes via ambulance from the Hospital here.

¹⁹ Dr. Dulin said from the time he decided a catheterization procedure needed to be performed on Clendenin until he actually did so at Providence Hospital approximately 1-1/2 to 2 hours elapsed.

²⁰ Each of the Cath Lab staff applied for reemployment and two, Fergus and Hoelting, were rehired as new employees.

If you can comply with the above and desire to work at Bethany, your application may be submitted as soon as Monday, March 20, 1995. Your application will be considered with all other applications.

Sincerely,
/s/ Sylvia A. Maher
Sylvia A. Maher
Vice President for
Patient Care Services
/s/ Dennis Sousley
Dennis Sousley
Director of Radiology

¹ The letter to each of the other alleged discriminatees was identical to this one.

V. DISCUSSION, ANALYSIS, AND CONCLUSIONS

A. Legal Principles

The parties are in agreement that the key or central issue here is whether the walkout by the Cath Lab staff on March 9 was *protected* concerted activity. The Board in *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), noted that the concept of concerted action has its basis in Section 7 of the Act.²¹ The Board pointed out in *Meyers I* that although the legislative history of Section 7 of the Act does not specifically define concerted activity it does reveal that Congress considered the concept in terms of *individuals united in pursuit of a common goal*. The statute requires that the activities under consideration be “concerted” before they can be “protected.” As the Board observed in *Meyers I* “[i]f, indeed, Section 7 does not use the term ‘protected concerted activities’ but only ‘concerted activities.’ It goes without saying that the Act does not protect *all* concerted activity. With the above, as well as other considerations in mind, the Board in *Meyers I* set forth the following definition of concerted activity:²²

In general, to find an employee's activity to be “concerted,” we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.²² Once the activity is found to be concerted an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.²³

²² See *Ontario Knife Co. v. NLRB*, 637 F.2d 840, 845 (2d Cir. 1980); *Pacific Electric Co. v. NLRB*, 361 F.2d 310 (9th Cir. 1966).

²¹ Sec. 7 of the Act in pertinent parts states:

Employees shall have 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 [Emphasis added.]

²² In *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), the Board made it clear that under the proper circumstances a single employee could engage in concerted activity within the meaning of Sec. 7 of the Act.

²³ See *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, approved in *NLRB v. Transportation Management Corp.*, 103 S.Ct. 2496, 97 LC 10.164 (1983).

B. Concerted Activity

Applying the principles outlined in the *Meyers* cases to the instant facts, it is clear that the Cath Lab staff acted *concertedly* when they *jointly* met with Director of Radiology Sousley on March 1 to voice their *mutual complaints* regarding working conditions in the Cath Lab. They sought redress of job-related concerns which in part involved terms and conditions of employment such as scheduling, work tasks to be performed, and staffing levels for the Cath Lab. The Cath Lab staff continued to *act in concert* when they engaged in a work stoppage (strike) on March 9 in support of their work-related complaints.

The Hospital was fully aware of the concerted nature of the Cath Lab staff's activities concerning redress of their stated grievances.

C. No Advance Notice of Walkout

Before addressing the issue of whether the activities of the Cath Lab staff (walking off the job) on March 9 constituted *conduct* protected by Section 7 of the Act, I shall address an additional concern alluded to by the Hospital. The Hospital argues the Cath Lab staff gave management no advance notice of the walkout nor did the Cath Lab staff provide management with specific reasons for the walkout. First, employees do not necessarily lose their right to engage in concerted activity under Section 7 of the Act merely, because they do not present a specific demand on their employer to remedy a condition they find objectionable before they take action such as walking off the job. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 at 14 (1962). However, the Cath Lab staff had orally, as well as in writing, made their grievances known to the Hospital on March 1. The Cath Lab staff had in the fall of 1994 put the Hospital on notice of their job-related concerns. Therefore, when they walked off the job on March 9 they were not required to do anything more than they did to preserve their rights pursuant to Section 7 of the Act. Second, in *Walker Methodist Residence*, 227 NLRB 1630 (1977), the Board addressed the issue of whether Section 8(g),²³ added to the Act by the 1974 Health Care Amendments, applies to a work stoppage in which (as was the case here) no labor organization is involved. The Board concluded Section 8(g) was applicable only to strikes (or picketing) involving a labor organization. Thus, the Cath Lab staff was under no statutory obligation to give the Hospital notice of their intention to walk off the job before they did so on March 9. The Board in *Walker Methodist Residence* also addressed the modifications to Section 8(d) of the Act brought about by the addition of Section 8(g) to the Act. The Board concluded that the loss of employee status sanction of Section 8(d) applies only when the notice requirement of Section 8(g) of the Act is violated. As the 8(g) notice was not violated in the instant case the loss of employee status sanction of Section 8(d) of the Act does not apply here.

²³ Sec. 8(g) of the Act reads in pertinent part:

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

D. "Protected" Concerted Activity and the Related Indefensible Action Issue

I return to the critical issue regarding the discharge of the Cath Lab staff, namely, whether the walkout on March 9 was *protected* by the Act.²⁴ The U.S. Supreme Court in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 at 17 (1962), expressly recognized, "[I]t is of course true that Section 7 does not protect all concerted activities" it does not, for example, protect activities that are "unlawful, violent . . . in breach of contract" or "indefensible" (footnotes omitted). In the instant case there is no contention, and no evidence was presented, that the Cath Lab staff's conduct was unlawful, violent, or in breach of contract.

The Hospital does, however, contend the Cath Lab staff's conduct (walking off the job) was *indefensible*, because it directly, immediately, and unnecessarily jeopardized the health, well being, and very lives of patients entrusted to their care. In *NLRB v. Washington Aluminum Co.*, supra, the Court makes reference to its decision in *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), in which the Court denied certain concerted activities the protection afforded by Section 7 of the Act because the activities were "indefensible." The underlying facts in the Jefferson Standard Broadcasting case shows negotiations had reached an impasse on the issue of employment discharges being subject to arbitration. The employees in *Jefferson Standard Broadcasting* did not strike in support of their bargaining position but rather picketed the company during their off-duty hours and continued to draw full pay. After a period of time, and without warning, several of the technicians (*Jefferson Standard Broadcasting* operated a radio and TV station in Charlotte, North Carolina) launched a "vitriolic attack on the quality of the Company's television broadcast." Thousands of handbills were printed over the designation "WBT TECHNICIANS." The handbills were distributed on the picket line, at a public square blocks from the company premises, and at various other public places such as restaurants, barbershops, and local buses. The handbills made no reference to the union, to a labor controversy, or to collective bargaining. The company discharged the technicians and the Board upheld (with the exception of one technician who had not participated in the questionable handbills) their discharge. The Court in upholding the discharges in *Jefferson Standard Broadcasting* found the employees "deliberately undertook to alienate their employer's customers by impugning the technical quality of his product"; that the employees effectively separated the attack on the company from the labor controversy and treated it solely as one made by the company's technical experts on the quality of the company's product. The Court in *Jefferson Standard Broadcasting* noted (346 U.S. at 476):

Their attack related itself to no labor practice of the company. It made no reference to wages, hours or working conditions. The policies attacked were those of finance and public relations for which management, not technicians, must be responsible. The attack asked for no public sympathy or support. It was a continuing attack, initiated while off duty, upon the very interests which the attackers were being paid to conserve

²⁴ There is no dispute that the Cath Lab staff was discharged, because they walked off the job on March 9. Stated differently the adverse action taken against the Cath Lab staff was motivated by their concerted activity.

and develop. Nothing could be further from the purpose of the Act than to require an employer to finance such activities. Nothing would contribute less to the Act's declared purpose of promoting industrial peace and stability.¹²

¹² " . . . An employee can not work and strike at the same time. He cannot continue in his employment and openly or secretly refuse to do his work. He can not collect wages for his employment, and, at the same time, engage in activities to injure or destroy his employer's business." *Hoover Co. v. N.L.R.B.*, 191 F.2d 380, 289, and see *N.L.R.B. v. Montgomery Ward & Co.*, 157 F.2d 486, 496; *United Biscuit Co. v. N.L.R.B.*, 128 F.2d 771.

The Court went on to note that the "fortuity" of the coexistence of a labor dispute afforded the technicians no substantial defense. The Court noted the handbills diverted attention from the labor controversy, it attacked public policies of the company which had no discernible relationship to the labor controversy.

In the instance case, unlike in *Jefferson Standard Broadcasting*, the concerted activities of the Cath Lab staff were inextricably intertwined with their job-related concerns. The Cath Lab staff was, by its actions on March 9, attempting to press on the Hospital perceived grievances related to terms and conditions of employment. Stated differently the Cath Lab staff was by their actions on March 9 appealing directly to the Hospital for relief regarding working conditions. The Cath Lab staff's actions were not *indefensible* in purpose or sought after objectives.²⁵

E. Specific Patients and the Indefensible Conduct Contention

I now specifically address the Hospital's contention that patients scheduled for procedures on March 9 were after the walkout placed in such jeopardy as to constitute indefensible conduct on the part of the Cath Lab staff. Stated differently, did the Cath Lab staff's walking off the job constitute conduct so indefensible as to justify the Hospital's discharging them? A careful examination of the facts compels the conclusion the Hospital was not justified in discharging the Cath Lab staff. First, Cardiologist Dr. Dulin had scheduled a catheterization at 8 a.m. on March 9 for a patient, Mahany, who had been referred to Dr. Dulin some 6 days earlier because of progressive angina pectoris. Dr. Dulin knew as a result of a mobile telephone call that when he arrived at the Hospital the Cath Lab staff might not be there. Dr. Dulin learned, as soon as he arrived at the Hospital, the Cath Lab staff was not present yet he "waited to see what was going to happen." After approximately 2 hours, Dr. Dulin, after consultation with Mahany, arranged for Mahany's catheterization to be performed at another local hospital at 8 a.m. the very next day.²⁶ I am persuaded that if Dr. Dulin had deemed Mahany's situation to have been an emergency or life threatening he would have arranged for a

²⁵ In *Walker Methodist Residence*, supra at 1631, the Board made it clear that "[i]n enacting Section 8(g), Congress did not make a legislative finding of fact that all work stoppages against health care institutions are so harmful that they must be forbidden." The Board noted that nothing in the 1974 Health Care Amendments restricts concerted activities by nonorganized employees and also noted the legislative history does not indicate an attempt to alter the scope of Sec. 7 protection granted nonorganized employees in the health care industry. The Board in *Walker Methodist Residence* specifically restated the clearly established principle that a concerted work stoppage for the purpose of presenting job-related grievances is protected Sec. 7 activity.

²⁶ Mahany's wife testified she had no difficulty with the 24-hour delay for the catheterization procedure for her husband.

catheterization procedure for him on March 9 on an emergency basis at another of the many nearby area hospitals. The fact that Mahany's situation warranted surgery after the catheterization procedure was performed the next morning does not alter the situation as viewed by Dr. Dulin before the catheterization was performed. I am *not* persuaded that the Cath Lab staff's failure to be present to assist in performing a catheterization on Mahany on the morning of March 9 constituted conduct so indefensible as to remove the protection of the Act from the Cath Lab staff.²⁷

A second patient that was not afforded treatment in the Cath Lab on March 9 that the Hospital points to as indefensible conduct on the part of the Cath Lab staff involved a patient in the Telemetry Unit, a Ms. Clendenin. Ms. Clendenin, who had for a period of time been a patient in the Hospital, was on March 9 in an emergency-type situation. She was "in severe chest pain" and "not responding to medication." The Cath Lab staff declined a request²⁸ to return from a nearby restaurant to the Hospital to assist in performing a catheterization procedure on Clendenin. Dr. Dulin and the Hospital arranged for Clendenin to be transferred via a 15-minute ambulance ride to a nearby hospital where Dr. Dulin successfully performed a catheterization procedure on Clendenin within 1-1/2 to 2 hours of the time he first examined Clendenin and determined she needed a catheterization. If the Cath Lab at the Hospital here had been in use, as scheduled, it would have taken approximately 1 to 2 hours for the procedure in progress to have been completed and the Cath Lab prepared for Clendenin. Thus, Clendenin received treatment (a catheterization) approximately as timely as she would have had the Cath Lab staff returned to the Hospital to assist in performing a procedure on her. I am persuaded the Cath Lab staff's refusal to return to the Hospital for Clendenin does not constitute conduct so egregious as to be indefensible and remove the Cath Lab staff members from the protection afforded by the Act.

F. The Discharge of the Cath Lab Staff Violated the Act

In summary, I find the Cath Lab staff engaged in concerted activity on March 1 and 9 that was *protected* by Section 7 of the Act and that the Hospital violated Section 8(a)(3) and (1) of the Act by discharging the Cath Lab staff members for their participation in protected concerted activities.

G. The Supervisory Issue Related to Tanner

The Hospital contends Cath Lab Supervisor Tanner, at all times material, was a supervisor within the meaning of Section 2(11) of the Act. The Government contends she was an employee. The Hospital has the burden of proving Tanner's supervisory status by a preponderance of the evidence.

The Board, in *Providence Hospital*, 320 NLRB 717, 725 (1996), outlined the legal principles related to supervisory issues in the health care field and it is instructive to quote at length as follows from the Board's decision:

Section 2(3) of the Act excludes from the definition of "employee" "any individual employed as a supervisor." Section 2(11) defines supervisor as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be interpreted in the disjunctive and "the possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949).

In enacting Section 2(11) of the Act, Congress distinguished between true supervisors who are vested with "genuine management prerogatives," and "straw bosses, lead men, and set-up men 'who are protected by the Act even though they perform' minor supervisory duties." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974) (quoting S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947). Senate Rep. No. 105 also stated that the committee took "great care" that employees excluded from the coverage of the Act "be truly supervisory" and that the amendment exclude only "the supervisor vested with such management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such actions." NLRB, Legislative History of the Labor Management Relations Act of 1947, 410. "Responsibly to direct" was added to the Senate bill shortly before its enactment by Senator Flanders, who explained that it was added to include "essential managerial duties" not otherwise covered by the other indicia. Leg. Hist. at 1303.

There is no contention in the instant case that Tanner had the authority to hire, transfer, suspend, layoff, recall, promote, or discharge employees or to effectively recommend such actions.

The Hospital rather contends that Tanner responsibly directed and assigned employees and that she utilized independent judgment in the exercise of such authority. The Hospital also contends that Tanner was able to recommend disciplinary action and provided direct input into annual evaluations to the extent that such impacted on the employees' merit pay increases, thus, Tanner, the Hospital contends, had the authority to reward employees.

The Board in *Providence Hospital*, supra at 725, stated with respect to responsibly directing and assigning employees the following:

Applying the indicia of assignment and responsibly to direct to the facts of a specific case is often difficult. There are no hard and fast rules; instead, each case turns on its own particular facts. Clearly, not all assignments and directions given by an employee involve the exercise of supervisory authority. As succinctly stated by the Fifth Circuit in *NLRB v. Security Guard Service*, 384 F.2d 143, 151 (5th Cir. 1967):

If any authority over someone else, no matter how insignificant or infrequent, made an employee a supervisor, our industrial composite would be predominantly supervisory. Every order-giver is not a supervisor. Even the traffic director tells the president of a company where to park his car.

²⁷ The Cath Lab staff did not, for example, walkout in the middle of a procedure.

²⁸ I note the Cath Lab staff had reservations about the existence of an emergency-type situation at the Hospital that morning.

Consequently, the Board analyzes each case in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestion, and between the appearance of supervision and supervision in fact. *McCullough Environmental Services*, 306 NLRB 565 (1992), enf. denied 5 F.3d 923 (5th Cir. 1993). Where the supervisory issue involves . . . professional RNs, [technical hospital employees in the instant case] this analysis is compounded by the difficulty . . . of explaining the additional authority a charge nurse has without taking away from the professional responsibility of an RN [technical hospital employees in the instant case] for the quality of patient care. An additional compounding factor is that Section 2(11) requires that a supervisor use independent judgment in the exercise of any of the listed indicia and that Section 2(12) of the Act includes in the definition of professional employee “the consistent exercise of discretion and judgment.”¹⁶

¹⁶ The Board defines technical employees, such as licensed practical nurses (LPNs), as those who also use independent judgment. *Fisher Controls Co.*, 192 NLRB 514 (1971).

Do the facts establish Tanner was a supervisor within the meaning of the Act? According to the Hospital's provided job description, the Cath Lab supervisor reports to the director of cardiology. The duties of the Cath Lab supervisor are summarized in the job description as “supervises technologist in the day-to-day functions involving diagnostic procedures, scheduling, supply procurement, and etc.”

The Hospital contends Tanner made work assignments to the technologists in the Cath Lab. In this regard, the Hospital asserts Tanner made assignments to the “technologist responsible for monitoring a patient's EKG and pressures during various cardiac procedures,” and to the “technologist responsible for circulating in the room where the procedure is being conducted.” The Hospital's provided job description of the Cath Lab supervisor reflects she “[s]upervises technologists in their day-to-day functions” and “[w]orks in cooperation with the cardiac nurse of the Cath Lab²⁹ to assure the communication of necessary information regarding patients' schedule, procedures”

Tanner was, at all times material, a technologist and not a registered nurse. According to Director of Radiology Sousley, all the Cath Lab technologists are “highly trained and highly skilled personnel.” Sousley testified Tanner's job was to “run the Cath Lab day-to-day” and “make any decisions necessary as far as work assignments to the other technologists and nurse.” I a note there are only four technologist on the Cath Lab staff including Tanner. Each technologist had long-term experience with the Hospital. Thus, when Tanner assigned technologists to specific functions during a catheterization procedure, she was, in my opinion, merely performing a routine clerical task. I also note the Cath Lab nurse specialist did not report to, but only communicated with, Tanner. As the Board and courts have recognized, not every act of assignment of employees constitutes statutory supervisory authority. Assignments must be done with independent judgment before the assignments can be

²⁹ The Hospital-provided job description for the “cardiovascular nurse specialist” (Zeller in the instant case) reflects that position is under the “direct supervision of the Director of Cardiology” and not the Cath Lab supervisor.

considered supervisory under Section 2(11) of the Act. Routine assignments, such as those made by Tanner, are not supervisory in nature. Thus, Tanner's making work assignments for the Cath Lab staff does not establish an indicia of supervisory status on her part.

There is very limited, if any, evidence to indicate or even suggest that the skills of the technologists differed significantly. The Hospital-provided job description for all technologists in the Cath Lab is the same. The Hospital makes no contention that anyone of the technologists was more skilled than any other.

The Hospital contends Tanner's “managing the call schedule” constituted management of work such as to invest Tanner with statutory supervisory authority. Director of Radiology Sousley testified Tanner “was responsible for . . . developing the rotation” of the Cath Lab staff “to take call[s]” after hours and on weekends. As is set forth elsewhere in this decision, the Cath Lab staff all worked the same scheduled daytime 8-hour shift. Emergency situations, however, arose that required catheterizations to be performed after hours or on weekends. The Cath Lab staff members rotated being “on-call” to respond to emergency situations on the weekends and after hours. I am convinced Tanner's development and implementation of an on-call rotation system for after hours and weekends did not involve the independent judgment required of a supervisor.³⁰

The Hospital contends Tanner exercised supervisor authority when she interacted with cardiologists and made patient scheduling decisions based thereon. For Tanner to tell one Cath Lab staff member to perform a certain function and instruct another to perform a different function during a procedure where, as here, all staff members are equally qualified does not require the exercise of independent judgment. Tanner's actions in this regard are nothing more than an exercise of professional expert judgment, not independent judgment required of one having statutory supervisory authority.

The Hospital asserts Tanner, as Cath Lab supervisor, evaluated other Cath Lab staff members resulting in whether they received merit wage increases and/or the amount of such increases. The evidence fails to support the Hospital's contention on this point. Director of Radiology Sousley explained that he and Tanner were, during 1993 and 1994, involved in the evaluation process of the Cath Lab staff members for merit wage increases but that he, as the senior person, had the determining voice in the outcome of the merit pay evaluations. Director of Radiology Sousley explained that if he and Tanner disagreed over an evaluation, it was his opinion that prevailed. Director of Radiology Sousley testified Tanner sought to have one of the Cath Lab staff member's merit increase reduced from 4 percent to 2 percent. Even after Tanner consulted with Sousley, the increase for that particular Cath Lab staff member, as well as all other members (including Tanner), remained at 4 percent. The Board, in *Ten Broeck Commons*, 320 NLRB 806, 813 (1996), noted:

The Board has consistently found that LPNs are supervisors when they independently perform evaluations of other employees which lead directly to personnel actions affecting those employees, such as merit raises. By con-

³⁰ The Board in *Providence Hospital*, 320 NLRB 717 (1996), noted, for example, that charge nurses who ask nurses to work over using “rotational lists” do not exercise the independent judgment required of a supervisor.

trast, the Board has consistently declined to find supervisory status when charge nurses perform evaluations that do not, by themselves, affect other employees' job status. See *Northcrest Nursing Home*, supra at 498 fns. 36 & 37 (1993); *Bayou Manor Health Center*, 311 NLRB 955 (1993).

Where, as here, Tanner's input on Cath Lab staff members merit wage increase evaluations were reviewed with controlling authority does not constitute an exercise of statutory supervisory authority on Tanner's part.

Director of Radiology Sousley testified that in approximately January or February, he discussed with Tanner "any authority she might have to mete out disciplinary action." He said he did so because Tanner came to him complaining that a member of the Cath Lab staff was "belching in the Cath Lab" and "that it just drove her crazy." Director of Radiology Sousley testified he told Tanner:

as I recall in our conversation I brought up the topic that, you know, if it doesn't stop there's always the option of disciplinary action, I suppose, if it's done in front of a patient and considered unprofessional, and I suppose you would give them a . . . we have a very defined disciplinary action policy on the steps in those kinds of behaviors, and she could issue a counseling session if she chose to deal with that.

The Hospital failed to demonstrate that such disciplinary action was imposed or recommended by Tanner or, if such was imposed, that it would, could, or did, have an impact on the employees' job status or that future discipline might result against the employee. Accordingly, I conclude such does not constitute disciplining employees within the meaning of Section 2(11) of the Act.

In summary, I find the Hospital failed to demonstrate that Tanner was a supervisor within the meaning of Section 2(11) of the Act.

H. Accrued Vacation Benefits

It is alleged in the complaint that the Hospital, acting through Director of Radiology Sousley, by telephone, threatened employees with loss of accrued vacation benefits in reprisal for the employees having engaged in protected concerted activities.

As more fully set forth elsewhere in this decision, Director of Radiology Sousley spoke via telephone with Tanner on March 9 to ascertain if the Cath Lab staff members would return to work at the Hospital that day. After learning from Tanner that the Cath Lab staff probably would not return to work that day, Sousley reminded Tanner the Cath Lab staff members had worked for the Hospital for many years and told her "they had accrued vacation benefits and . . . they may be in jeopardy." Tanner told Sousley "[d]on't threaten us with our vacation."

I find Director of Radiology Sousley's comments constituted an unlawful threat of the loss of *accrued* vacation benefits in reprisal for the Cath Lab staff member's having engaged in protected concerted activities in violation of Section 8(a)(1) of the Act. It is quite clear that what Sousley was telling the Cath Lab staff was that if they persisted in their walkout they ran the real risk of losing their *accrued* vacation benefits.

I reject the Hospital's contention Director of Radiology Sousley was simply trying to ensure that the Cath Lab staff members received all accrued vacation benefits in the event they resigned their employment with the Hospital.

I. The March 16 Interviews

It is alleged in the complaint that on or about March 16, Director of Radiology Sousley and Vice President for Patient Care Services Maher interrogated employees concerning their protected concerted activities.

Maheer and Sousley interviewed each of the Cath Lab staff members individually on March 16 regarding their planning for, and participation in, the March 9 walkout at the Hospital. Each was asked by Maher what her individual thoughts were at the time of the walkout, what events lead up to the walkout, and what conversations were on going at the time. Considered in the totality of the circumstances, I am convinced Maher's questioning violated Section 8(a)(1) of the Act. First, the Cath Lab staff members had, prior to March 16, both orally and, in writing, informed the Hospital what their job-related concerns were. Thus, Maher had no valid reason to make the inquiries she did. Second, the Hospital, through Director of Radiology Sousley, had, as discussed elsewhere, threatened the Cath Lab staff with loss of *accrued* vacation benefits as a result of their participation in the protected concerted work stoppage on March 9. Thus, it appears the questioning was a continuation of the Hospital's efforts to intimidate and coerce the Cath Lab staff members for their participation in protected concerted activities. The lack of justification for the March 16 questioning is bolstered by the fact the Hospital thereafter unlawfully discharged the Cath Lab staff members and placed restrictions on their consideration for rehire.

J. Reasons for Discharge

It is alleged in the complaint that on or about March 17, the Hospital, by Director of Radiology Sousley and Vice President for Patient Care Services Maher orally and, in writing, told employees the reason they were being discharged was because they engaged in protected concerted activities.

At the time of their discharge on March 17, each of the Cath Lab staff members was told she was being terminated for "patient abandonment," "refusal to provide patient care," and "endangering the life of patients." It is undisputed that the reason the Cath Lab staff members refused to provide patient care is that they were on strike. The action of the Cath Lab staff in withholding their services was conduct protected by the Act. Thus, for the Hospital to tell the employees they were being discharged for engaging in conduct protected by the Act violates Section 8(a)(1) of the Act, and I so find.³¹

K. The Rehire Restrictions

It is alleged that the Hospital on March 17 placed written restrictions on employees' rehire to discourage its employees from engaging in protected concerted activity in violation of Section 8(a)(1) of the Act.

The text of the written restrictions is set forth elsewhere in this decision and need not be repeated in full here. The restrictions placed on the Cath Lab staff members demanded they be supportive of the Hospital in its administrative decisions. Implicit in such restrictions is that the Cath Lab staff members could not participate in a walkout in order to change established Hospital working conditions. Further, the restrictions on rehire demanded the Cath Lab staff members participate cooperatively

³¹ I also find the Hospital's written termination notice containing essentially the same message constitutes unlawful action in violation of Sec. 8(a)(1) of the Act.

and professionally with Hospital department problem solving and that anyone being rehired would have to support the decisions of the Hospital with respect to any improvements. Before being considered for rehire each Cath Lab staff member would have to agree to comply with all rehire restrictions. To require that employees who have participated in a protected concerted walkout waive their right to engage in any such conduct in the future in order to be considered for rehire violates Section 8(a)(1) of the Act, and I so find.

CONCLUSIONS OF LAW

1. Bethany Medical Center is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By on March 17, 1995, discharging and thereafter failing and refusing to validly reinstate its employees Janise Selbe, Mary Zeller, Margaret Fergus, Jackie Hoelting, and Deborah Tanner, because they engaged in protected concerted activities, the Hospital engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

3. By requiring its employees to waive their right to engage in protected concerted activities in order to be considered for rehire, by telling its employees they were being discharged for engaging in protected concerted activities, by interrogating its employees concerning their protected concerted activities, and by threatening its employees with loss of accrued vacation benefits in reprisal for their having engaged in protected concerted activities, the Hospital violated Section 8(a)(1) of the Act.

4. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

It having been found that the Hospital has engaged in certain unfair labor practices, it is recommended it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

It is recommended the Hospital be required to immediately offer³² Janise Selbe, Mary Zeller, Margaret Fergus, Jackie Hoelting, and Deborah Tanner employment in their former jobs or, if those jobs no longer exist to substantially equivalent positions without prejudice to their seniority, and other rights and privileges previously engaged, discharging if necessary, employees hired for the Cath Lab since March 17 to make room for them and make them whole for any loss of earnings they may have suffered due to the discrimination against them, less net interim earnings as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon computed in accordance with the formula approved in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I also recommend the Hospital be ordered to post an appropriate Notice to Employees copies of which are attached hereto as "Appendix," for a period of 60 days in order that employees may be apprised of their rights under the Act and the Hospital's obligation to remedy its unfair labor practices.

[Recommended Order omitted from publication.]

³² I leave to compliance whether, under the circumstances Tanner's resignation was valid, and what if any impact Fergus' and Hoelting's returning to work under the restrictions noted have on the remedy ordered here.