No. 07-5041-ag

UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 1000

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

CORRECTIONAL MEDICAL SERVICES, INC.

Intervenor

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court upon the petition of the Civil Service Employees Association, Local 1000 ("the Union") to review the Board's Decision

and Order, which issued on May 31, 2007, and is reported at 349 NLRB No. 111.[1] (JA 42-50.) The Order is final with respect to all parties. The Board had subject matter jurisdiction over the unfair labor practice proceedings under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). This Court has jurisdiction over this proceeding under Section 10(f) of the Act (29 U.S.C. § 160(f)) because the events surrounding this case occurred in Albany, New York. The Union timely filed its petition for review on November 14, 2007. The Act contains no limitation on the time to petition for review of a Board order. Correctional Medical Services, Inc., ("the Employer") has filed a motion to intervene that is still pending before the Court.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably found that the Employer, a health care institution, lawfully discharged five employees for picketing where the union failed to provide the 10-days advance notice a union owes to health care employers under Section 8(g) of the Act.

STATEMENT OF THE CASE

This case came before the Board on a complaint issued by the Board's General Counsel pursuant to charges filed against the Employer by the Union. The

[1] "JA" refers to the joint appendix. "Br." refers to the Union's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

complaint alleged that the Employer violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by threatening and interrogating three employees about their picketing with the Union. The complaint also alleged that the Employer discharged five picketing employees in violation of Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)). (JA 42; 4-7.)

The General Counsel and the Employer agreed to waive a hearing, the making of findings of fact and conclusions of law, and the issuance of a decision by an administrative law judge. (JA 42.) The parties then provided the Board with a stipulated record. The Board (Chairman Battista and Member Schaumber, Member Liebman dissenting) found that the employees' conduct constituted unlawful picketing, and that the Employer did not violate Section 8(a)(3) and (1) of the Act by discharging the employees. (JA 45-47.) This finding necessarily meant the Employer's response to the picketing -- the alleged interrogation and threatening statements -- was also lawful and did not violate Section 8(a)(1) of the Act. (JA 47.)

STATEMENT OF THE FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Employer Operates a Medical Clinic at the Albany Jail

The Employer operates an around-the-clock medical clinic at the Albany County Correctional Facility ("the Albany jail"), an 840-inmate facility in Albany, New York. The Employer, through a contract with Albany County, provides medical care to inmates and personnel at the jail, including a broad range of services such as diagnostic, preventative, chronic, and emergency care. The clinic contains an infirmary, a physician's office, a dental suite, and a pharmacy. (JA 42-43; 13-14.)

The Employer has 25 employees at the jail. While the number fluctuates, the Employer generally employees eight registered nurses (RNs), six licensed practical nurses (LPNs), one physician's assistant, one dental assistant, one physician, one office clerical, two supervisors, and one medical records clerk. (JA 42-43; 13-14.)

B. The Union Seeks Recognition, but the Employer Denies the Request

On August 15, 2002, the Union, which represents the correctional officers at the Albany jail, requested that the Employer recognize it as the collective-bargaining representative of all clinic employees, except the physician,

supervisors, and clerical workers. On August 19, the Employer rejected the Union's request for recognition. (JA 43; 15.)

C. The Union Pickets at the Jail's Main Entrance; Five Employees Participate in the Activity, which Involves Carrying Signs, Wearing Union Insignia, Walking Back and Forth, and the Intermittent Shouting of Union Slogans

On the afternoon of September 12, Hospital Administrator Gloria Cooper learned that the Union was picketing outside the jail.[2] From a vantage point inside the jail, Cooper observed about 20 individuals continually walking in a circle across the jail's main entrance and exit on Albany Shaker Road. The entrance and exit area is approximately two car-lanes wide. The jail uses this area for a variety of activities -- prisoner reception and discharge, employee, supplier, and visitor access, and daily delivery of pharmaceuticals and other medical supplies to the clinic. This area also serves as the point of exit for inmates receiving emergency medical care off-site. (JA 43; 15.)

While the participants in the conduct did not block the jail's main entrance, they did continuously patrol in front of it. Although the vehicles entering and exiting the jail during this time did so without impediment, the participants did speak to some of the drivers. (JA 43; 18.)

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[2] In its brief, the Union does not contest the Board's finding (JA 44-45) that the conduct outside the jail constitutes picketing. Therefore, the Union has waived its right to raise that issue. *See* discussion below, p 12.

The participants carried union-provided signs and placards containing various messages, such as "Capital District Area Labor Federation,"[3] "Fighting for Justice," and "C.S.E.A. Vote Yes." (JA 43; 16.) Participants also sporadically shouted, "[The Employer] is union busting." (JA 43; 16.) Many of the participants wore union T-shirts. In total, the conduct lasted approximately 40 minutes. (JA 43; 16.)

Five off-duty employees participated in the picketing.[4] (JA 43; 17.) All five had worked that day and wore their uniforms during the activity. Four employees had just completed their shifts prior to their participation. The fifth employee was participating during a pre-approved dinner time break. (JA 43; 17-18.)

D. The Employer Sends the Five Employees Who Participated in the Picketing a Letter Informing Them that the Picket Was Illegal Because the Union Failed To Provide the Employer with 10-Days Written Notice of Its Intent To Picket

On September 13, the day after the conduct, Administrator Cooper sent a letter to the five employees who had participated in the picket. (JA 43; 18, 23-27.) The letter informed the employees that the Union failed to provide the Employer

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[3] Capital District Area Labor Federation is another Albany area labor organization that also participated in the picket. (JA 16.)

[4] Those employees were physician's assistant Stephanie Spear, RN Darcy LaGoy, LPN Chesley Schager, RN Richard Kowalski, and records clerk Richard Jolly. (JA 17.)

with 10-days written notice of its intent to picket as required by the Act, and that employees who participate in an unlawful picket lose their statutory protection. (JA 19, 23-27.) The letter further stated that the Employer did not condone their conduct; that the Employer would be filing a charge with the Board "concerning the Union's illegal picket;" and that, after the Board had completed its investigation, the Employer would advise what action, if any, it would take against them. (JA 19, 23-27.) The letter concluded by advising the employees that the Employer "respects each employee's right to engage in conduct protected by the Act," and that it would "take no actions other than as legally authorized by the [Board]." (JA 19, 23-27.)

E. The Employer Files an Unfair Labor Practice Charge Against the Union

On September 16, the Employer filed a charge with the Board, alleging that the Union's conduct on September 12 violated Section 8(g) of the Act (29 U.S.C. § 158(g)) because the Union failed to provide the requisite 10-days notice to the Employer and to the Federal Mediation and Conciliation Service ("the FMCS"). (JA 43; 19.) Following an investigation of the charge, the General Counsel

determined that the charge was meritorious and issued an unfair labor practice complaint against the Union.[5] (JA 43; 19-20.)

F. The Employer Questions Employees Who Participated in the September 12 Activity and then Fires Those Employees; The Employer Posts a Notice Informing Employees That the Union Did Not Give the Required 10-Days Notice of Its Intent To Picket and that the Employer Had Filed an Unfair Labor Practice Charge Against the Union

On September 25, Robert Collins, the Employer's labor counsel, questioned three of the five employees who had engaged in the September 12 conduct. (JA 43; 20.) Collins specifically asked the employees to state whether they had engaged in the conduct and to identify who had solicited them to participate and other employees who had participated. (JA 43; 20.)

On September 30, the Employer fired all five employees who had participated in the conduct. (JA 43; 20, 28-31.) That same day, the Employer posted a notice to employees advising them of Section 8(g)'s notice requirement, and informing them that the Employer had filed a Board charge. (JA 43; 20.) The notice further stated that (emphasis in original):

> The NLRB Regional Director has announced his decision. **The NLRB HAS RULED LOCAL 1000'S PICKET WAS ILLEGAL.**
>
> * * *

[5] Ultimately, the Union and the Employer entered into an informal settlement agreement regarding the Employer's unfair labor practice charge. The parties' agreement contained a non-admissions clause. (JA 43; 20.)

> Employees who participate in an illegal picket are violating federal law and are not protected by the National Labor Relations Act. . . . When employees participate in an illegal strike, they lose their jobs.

(JA 32.) Ultimately, the Employer reinstated the employees 1 month after their discharge, but without backpay. (JA 21.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista and Member Schaumber, Member Liebman dissenting) found (JA 47) that the Employer's discharge of the employees was lawful. In doing so, the Board first determined (JA 44-45) that the Union's conduct outside the Employer's premises constituted picketing. Then the Board noted (JA 45) the undisputed fact that the Union failed to provide the Employer and the FMCS with the requisite 10-days advance notice of the picket. Because the Union did not provide the required notice, the Board determined (JA 45-46) that the picketing was not protected activity.

The Board next reasoned (JA 47) that the employees' participation in unprotected conduct left them "vulnerable to employer discipline." Therefore, the Employer's discharge of the employees who participated in the picketing did not violate Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)), and the Board dismissed those charges. (JA 47.) Given its finding that the discharge was lawful, the Board also dismissed the allegations that the Employer violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by threatening and interrogating

employees who participated in the illegal picketing. Consequently, the Board dismissed all charges against the Employer. (JA 47.)

SUMMARY OF ARGUMENT

This case presents only one issue for the Court -- whether an employer has the right to discipline employees who participate in a picket where the union has failed to provide the employer with the required 10-days advance notice. An employer's right to discipline employees for engaging in unprotected conduct is firmly settled by well-established Board and court precedent. Here, it is undisputed that the Union was required to give notice but failed to do so, and it is also undisputed that the employees engaged in picketing. Thus, because the picketing directly contravened the Act, the employees engaged in unlawful activity. Therefore, the Employer lawfully discharged the employees.

The Union tries to confuse the basic principle supporting the Board's decision by arguing that the Health Care Amendments, specifically Section 8(d), prohibit the discipline of picketing employees. This argument, however, ignores the significant difference between discipline based on loss of employee status and discipline for engaging in unprotected activity. Section 8(d) proscribes a specific punishment -- loss of employee status -- for the specific violation of striking without advance notice. Section 8(d) does not, however, eradicate the employer's

indisputable right to discipline employees who engage in otherwise unprotected activity.

Further, the Union's extensive quotation of legislative history behind the Health Care Amendments cannot support the absurd result that the Union's argument creates. Specifically, a recurrent theme in the legislative history was the need to ensure continuity of care and to encourage minimal disruption to services provided by a health care institution. However, the Union seeks to prevent an employer from disciplining employees who disruptively picket in violation of a statute meant to provide a tranquil atmosphere for patient care. Such an interpretation allows employs to violate the statute with impunity, and leaves health care institutions with no effective remedy against the disruptive effects of an unannounced picket.

ARGUMENT

I. INTRODUCTION AND STANDARD OF REVIEW

This case involves few, if any, factual issues. It is undisputed that the employees engaged in picketing under the Act on September 12. It is also undisputed that the Union violated Section 8(g) when it failed to give the Employer the requisite notice before initiating the picket.[6] Moreover, the Union does not dispute that the Employer discharged the employees because of their participation in the picket. Thus, this Court must address only one legal issue: What consequences must an employee face for participating in a picket at a health care institution when a labor organization has failed to provide the required advance notice?[7]

This Court affords the Board "'the greatest deference'" and "a degree of

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[6] The Union's failure to challenge these two findings in its brief -- that the employees' behavior constituted picketing and that the Union violated Section 8(g) -- waives its right to challenge these issues before this Court. *See NLRB v. Star Color Plate Serv., Div. of Einhorn Enter., Inc.*, 843 F.2d 1507, 1510 n.3 (2d Cir. 1988) (company's failure to present claim in its original brief before court "provides an independent ground under Fed. R. App. P. 28(a)(2) for court's refusal to hear . . . claim"). *See also Corson and Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (requiring petitioners to raise all arguments in opening brief to prevent "sandbagging" of respondents and to provide a chance to respond).

[7] The Union also has failed to challenge the Board's dismissal of the Section 8(a)(1) complaint and did not address the merits of either the alleged threatening statements or the interrogation. Therefore, for the reasons stated below (p.12 n.6), the Union has also waived its right to address that issue.

legal leeway when it interprets [the Act]." *Electrical Contractors, Inc. v. NLRB*, 245 F.3d 109, 116 (2d Cir. 2001) (quoting *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 89-90 (1995)). When reviewing the Board's legal conclusions, this Court's role is to ensure that they have a "reasonable basis in law." *NLRB v. Windsor Castle Health Care Facilities*, 13 F.3d 619, 622 (2d Cir. 1994). Thus, the Board's interpretation of the Act is "entitled to considerable deference" when it "represents a defensible construction of the statute." *NLRB v. Local Union No. 103, Int'l Assoc. of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 350 (1978). Finally, "even if the legislative history arguably pointed toward a contrary view, the Board's construction of the statute's policies would be entitled to considerable deference." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500 (1978).

II. CONGRESS AMENDED THE ACT TO GRANT HEALTH CARE WORKERS THE RIGHT TO STRIKE AND PICKET SO LONG AS THE UNION GIVES 10-DAYS NOTICE

A. Overview of the 1974 Health Care Amendments

In 1974, Congress amended the Act to cover nonprofit hospitals. In doing so, Congress brought workers employed by nonprofit hospitals within the coverage of the Act and granted them all the rights and protections provided by the Act, including the right to engage in collective-bargaining, striking, and picketing activity. Senate Comm. on Labor and Public Welfare, S. Rep. No. 93-766, at 1 (1974) ("*Senate Report*"), and H.R. Rep. No. 93-1051, at 1-2 (1974) ("*House*

Report"), *both reprinted in* 1974 U.S.C.C.A.N. 3946, *and in* Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, *Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974*, 8, 269-70 (Comm. Print 1974) ("*Legislative History*").

The newly bestowed right to strike and picket exposed health care providers and their patients to possible interruptions in the delivery of patient care. Recognizing that "disruption of patient care of even a few hours may cost lives," Congress created two provisions meant to assist health care institutions in maintaining stability of care in the event of labor unrest. *NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, 897 F.2d 1238, 1247 (2d Cir. 1990). Specifically, Congress added Section 8(g) (29 U.S.C. § 158(g)) to the Act and amended Section 8(d) (29 U.S.C. § 158(d)). Section 8(g) requires a labor organization to provide a health care institution with advance notice before engaging in certain types of concerted activity. Section 8(d), in turn, mandates that employees forfeit their status as "employees" under the Act if they participate in a strike where the union has failed to provide the Section 8(g) notice. Both amendments are discussed more fully below.

B. Section 8(g) Requires Labor Organizations To Provide Health Care Institutions with a 10-Day Advance Notice of Any Picketing

Section 8(g) provides in relevant part:

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

The purpose of Section 8(g) is to ensure the stability of patient care by mandating that health care institutions receive sufficient advance notice of a strike or work stoppage, allowing them to make timely arrangements to protect the continuity of service to their patients. *Legislative History* at 11-12 (*Senate Report*), 273-74 (*House Report*). *See also District 1199, Nat'l Union of Hospital and Healthcare Employees*, 232 NLRB 443, 444-45 (1977), *enforced*, 582 F.2d 1275 (3d Cir. 1978) (table); *Walter Methodist Residence and Health Care Center, Inc.*, 227 NLRB 1630, 1631 (1977).

Such notice allows the institution to assess the extent to which normal operations may be disrupted. *See Retail Clerks Union Local 727*, 244 NLRB 586, 587 (1979). The specific notice requirements of Section 8(g) "protect [ ] the interests of third parties for whom an unanticipated work stoppage may be a life-or-death matter." *NLRB v. Washington Heights-West Harlem-Inwood-Mental Health Council, Inc.*, 897 F.2d 1238, 1248 (2d Cir. 1990). A union's failure to provide Section 8(g) notice is an unfair labor practice. *See, for example, Local*

254, Service Employees International Union, AFL-CIO, 324 NLRB 743, 749 (1997).

C. Employees Who Strike Where the Union Has Failed To Give the Requisite Section 8(g) Notice Suffer Severe Consequences

Section 8(d) of the Act (29 U.S.C. § 158(d)) provides a "severe" consequence for employees who engage in a strike where the union has not provided the notice required by Section 8(g). *Boghosian Raisin Packing Co.*, 342 NLRB 383, 385 (2004). Section 8(d) states, in pertinent part:

> Any employee who engages in a strike within any notice period specified in this subsection . . . shall lose his status as an employee of the employer engaged in the particular labor dispute, for purposes of sections 8, 9, and 10 of this Act[.]

Thus, employees who engage in a strike without the requisite notice forfeit their status as employees as a matter of law. *Granite Construction Co.*, 330 NLRB 205, 222 (1999). Section 8(d) provides a "clear mandate" that the Board must enforce. *Boghosian Raisin Packing*, 342 NLRB at 385.

III. THE EMPLOYER LAWFULLY DISCHARGED THE PICKETING EMPLOYEES FOR ENGAGING IN UNPROTECTED ACTIVITY

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the right "to self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) protects

an employee's right to engage in concerted activities by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7." Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization . . . ."

The Union contends that the Employer violated Section 8(a)(3) and (1) by discharging the employees because of their union activity. However, Section 8(a)(3) and (1) only makes it unlawful for an employer to discharge employees for engaging in *protected* conduct. *See, e.g., NLRB v. G&T Terminal Packing Co.*, 246 F.3d 103, 115-16 (2d Cir. 2001). The Employer indisputably discharged the employees for their picketing activity, and the Union does not contend that the discharge was the result of anti-union animus. Therefore, as discussed below, because, as the Board found (JA 45-46), the employees who participated in the September 12 picket were not engaged in protected activity, the Employer lawfully discharged them.

A. Employers Have a Well-Established and Indisputable Right To Discharge Employees Who Engage in Unprotected Activities

The protection of Section 7 is not absolute and does not protect concerted activity that is unlawful, violent, in breach of contract, or otherwise indefensible.

Washington Aluminum v. NLRB, 370 U.S. 9, 17 (1962). Therefore, the Act allows employees "to engage in any concerted activity which they decide is appropriate for their mutual aid and protection, . . . unless . . . that activity is specifically banned by another part of the statute, or unless it falls within certain other well-established proscriptions." *Plastilite Corp.*, 153 NLRB 180, 183-84 (1965).

When employees act outside the protection of the Act -- that is, when they engage in conduct contrary to the Act's purposes -- the employer has "the normal rights of redress," including "in their most obvious scope . . . the right to discharge" employees for their unprotected conduct. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 254 (1939). In short, "unprotected conduct does leave employees vulnerable to discharge or discipline for engaging in such conduct." *Stamford Taxi, Inc.*, 332 NLRB 1372, 1404 (2000).

As the Board noted in its Decision (JA 45), its precedent is replete with examples of the employer's right to discipline employees whose conduct conflicts with the Act. *See, for example, Pratt Towers, Inc.*, 338 NLRB 61, 63-64 (2002) (upholding discharge of employees who participated in a picket that violated Section 8(b)(4)); *Rapid Armored Truck Corp.*, 281 NLRB 371, 371 (1986) (employer lawfully discharged employees who engaged in unlawful recognition picketing because such activity "seriously contravened the policies of the Act, and as such, employees . . . forfeited their right to [the Act's protections]"); *American*

Telephone & Telegraph Co., 231 NLRB 556, 561-62 (1977) (employer free to discharge employee who innocently honors a stranger picket line, if that picketing itself is a violation of the Act); *Mackay Radio & Telegraph Co.*, 96 NLRB 740, 742 (1951) (upholding discharge of employees who struck in violation of Section 8(b)(2), which forbids union from directing a strike to compel an employer to enter into a contract containing an unlawful union security clause). In each of these cases, the Board rejected the argument that the employer could not discharge or discipline the employees unless a specific provision in the Act provided the employer with the right to do so. Rather, the Board relied on the employer's general right to discharge employees who engage in unprotected conduct.

B. The Employees Who Picketed In Violation of Section 8(g) Engaged in Unprotected Conduct and Were Subject to Discipline

As the Board explained (JA 46), the instant case is "but one more example of [the] general principle" that an employer can discipline employees for unprotected activity. The Union does not dispute the reason for the employees' discharge -- their participation in picketing activity. The central question, therefore, is whether the employees who picketed in violation of Section 8(g) were engaged in unprotected activity, and, therefore, lost the Act's protection.

The Board has spoken with "unmistakable clarity" in finding that picketing "however conducted and for whatever reason is illegal unless accompanied by

proper notice under the provisions of Section 8(g)." *St. Joseph's Hosp. Corp.*, 260 NLRB 691, 699 (1982). When the employees here participated in a picket for which the Union provided no notice, "they took a position outside the protection of the statute and accepted the risk of termination of their employment[.]" *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 256-57 (1939). Thus, the picket was unprotected from its inception, and the Employer properly exercised its discretion in terminating the employees who participated in the unlawful picketing. *See St. Joseph's Hosp.*, 260 NLRB at 692-93 (employer lawfully discharged employee, who was also a union officer, for engaging in off-duty picketing in violation of 8(g)).

C. The Fact that Section 8(g) Addresses the Behavior of Labor Organizations Does Not Insulate Employees From Discipline

The Union argues (Br. 14-16, 24-25) that, because Section 8(g) is directed against conduct by labor organizations, the Employer may not rely on the Union's unlawful conduct to interfere with the employees' rights. Specifically, the Union contends that, because Section 8(g) imposes an obligation on unions, only the Union, and not the employees, can be penalized or disciplined for a violation. This argument, however, ignores the employees' role in the conduct underlying the unfair labor practice.

Employers may lawfully discipline employees who engage in conduct promoting a union's unfair labor practice. For example, in *Rapid Armored Truck Corp.*, 281 NLRB 371 (1986), the employees engaged in recognition picketing that violated Section 8(b)(7)(C) of the Act. Although, in that case, the union violated the Act by directing the picketing, the Board found that the employer's discharge of the employees was lawful because the employees' participation was unprotected conduct. *Id.* at 371 n.1. Specifically, the Board found that because the employees engaged in an activity that "seriously contravened the policies of the Act . . . [the] employees who participated in such picketing forfeited their right to invoke [the protections] of the Act." *Id.* at 382. *See also Teamsters Local 707 (Claremont Polychemical Corp.)*, 196 NLRB 613 (1972) (upholding discharge of employees who picketed in violation of Section 8(b)(7)(B) because participation in unlawful picket was unprotected conduct). Thus, while only a labor organization can violate Section 8(g), it does not follow that this insulates the employees from the consequences of their participation in unlawful activity.[8]

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[8] In its brief (Br. 16 n.7), the Union notes that the employees were not union members, and that the Union "merely" directed the demonstration. To the extent that this argument implies that a union must represent the employees engaging in the underlying conduct in order for its behavior to violate 8(g), that argument lacks merit. *See Service Employees International Union, Local 84*, 266 NLRB 335, 336 (1983) (fact that a labor organization does not represent employees does not negate union's failure to abide by Section 8(g)'s notice requirements).

The Union accuses (Br. 16 n.6) the Board of mischaracterizing the employees' activity as unlawful, arguing that the employees did not engage in any unlawful conduct because the legal requirement to give notice rests solely on labor organizations. The Union's accusation misses the mark. The Union failed to give notice of the picket. Therefore, the picket occurred in direct contravention of the Act's requirements and was unlawful from its inception. The fact that the employees were not responsible for providing the notice does not transform their participation in the picket into a lawful activity. The picket was an illegal act, and the employees' participation was unlawful conduct. *See Teamsters Local 707, (Claremont Polychemical Corp.)*, 196 NLRB 613, 615 (1972) (employees who participate in a picket that violates the Act are engaged in "illegal activities").

IV. SECTION 8(d) DID NOT PROHIBIT THE EMPLOYER FROM DISCHARGING THE EMPLOYEES FOR PARTICIPATING IN UNPROTECTED ACTIVITY

Section 8(d) metes out a "harsh" consequence to employees who participate in a strike that violates Section 8(g). *Boghosian Raisin Packing Co., Inc.*, 342 NLRB 383, 385 (2004). Specifically, employees who engage in a *strike* without the requisite notice forfeit their status as employees "of the employer engaged in the particular labor dispute" (28 U.S.C. § 158(d)). The Union argues (Br. 16-23) that the inclusion of "picketing" in Section 8(g) and simultaneous exclusion of "picketing" from Section 8(d)'s loss of employee status provision demonstrates

Congress' "clear intention" (Br. 5) that only employees who strike in violation of Section 8(g) may be subject to an employer's adverse actions. The Union further contends that the Board, by permitting discipline of picketers, has strayed from its precedent of strictly construing the Health Care Amendments and applying their literal language. As discussed below, both contentions lack merit and demonstrate a misunderstanding of the basis of the Board's decision.

A. The Employer Did Not Rely on Section 8(d)'s "Loss of Status" Provision To Discipline Its Employees

To the extent that the Union argues that employees who participate in an unprotected Section 8(g) picket do not lose their employee status, the Union makes an issue where none exists. The Board agrees with the Union that Section 8(d) does not include picketing within its clear mandate. In fact, the Board clearly stated (JA 46) that an employee who pickets in violation of Section 8(g) does not lose his status as an employee under the Act. Section 8(d), however, plays no role in determining whether an employer may discipline an employee who engages in an unprotected, and therefore unlawful, picket.

As the Board noted (JA 46), the Union's argument that Section 8(d) prevents the discharge of employees who picket in violation of Section 8(g) mistakenly equates two different concepts: the status of an *employee* and the protected or unprotected nature of an *activity*. The Union implies (Br. 37-38) that the Board's contrast between discharge for loss of status and discharge for unprotected activity

is a distinction without a difference, arguing that loss of status has the "same import" (Br. 5) as engaging in unprotected activity. But, as the Board explained (JA 46), the two concepts are not the same and yield significantly different consequences.

An employee who strikes in violation of Section 8(g) loses his status as an employee by virtue of the Section 8(d) statutory language, as a matter of law. *Granite Construction Co.*, 330 NLRB 205, 222 (1999). *See also Arundel Corp.*, 210 NLRB 525, 529 (1974) (Member Jenkins, dissenting). The effect of losing status as a matter of law is that the motivation for an employer's action in disciplining that employee is irrelevant. *Fort Smith Chair Co.*, 143 NLRB 514, 519-20 (1963), *enforced sub nom. United Furn. Workers of America, AFL-CIO, Local 270 v. NLRB*, 336 F.2d 738, 742 (D.C. Cir. 1964). In short, because the employee has lost his protected employee status, an employer can discharge that employee even for impermissible reasons, and fear no harm or legal consequences for its action. *Id.*

In contrast, employees can engage in unprotected conduct and still retain their employee status and the protection of the Act. In other words, employees who engage in unprotected activity do not *a fortiori* forfeit the Act's protections. Admittedly, employees who engage in unprotected activity are like employees who lose status in that they are both subject to discipline, including discharge. However,

when an employer discharges or disciplines employees for unprotected activity, the employer's motive remains relevant to determining whether the disciplinary action is lawful. Thus, the employer must have a legal basis for the discipline or discharge that it metes out (*for example*, the unprotected conduct), not a pretextual or discriminatory reason (*for example*, simply trying to rid itself of union members). *Granite Construction Co.*, 330 NLRB 205, 222 (1999).

A comparison of two cases provides an apt illustration of the practical difference between discharge for loss of employee status and for engaging in unprotected activity. For example, in *Fort Smith Chair Co.*, 143 NLRB 514 (1963), the employees engaged in a union-sponsored strike aimed at modifying its current contract with the employer. Section 8(d)(3) of the Act (29 U.S.C. § 158(d)(3)) requires the union to give advance notice of such a strike, which the union failed to provide. Because the union failed to provide the requisite notice, the employer, relying on Section 8(d), terminated the employees for participating in an unlawful strike. In arguing that the discharge was unlawful, the union contended that the evidence showed that the employer fired the employees not because of the strike but because of the employer's expressed desire to get rid of the union. *Id.* at 517.

The Board, in upholding the discharge, found the union's argument regarding the employer's discriminatory motive irrelevant because Section 8(d) required the employees who participated in the unlawful strike to "forfeit their rights to the

protection of the Act." *Id.* at 518. Thus, in simple terms, "the [employer's] motive in discharging the strikers is not a relevant consideration." *Id.* Notably, the circuit court agreed, stating that it saw "no need to pursue the question of the relevance of the [employer's] motivation." *United Furn. Workers of America, AFL-CIO, Local 270 v. NLRB*, 336 F.2d 738, 742 (D.C. Cir. 1964).

In contrast, the employer's motivation plays a determinative role in cases where an employer discharges an employee for unprotected activity. In *Sodexho Marriott Services, Inc.*, 335 NLRB 538 (2001), an employee who was a known and active union supporter shouted obscenities at his supervisor and kicked an office door, creating a disruption severe enough to warrant security officers' intervention. The employer terminated the employee, claiming that the outburst was unprotected activity that warranted discharge.

The Board rejected the employer's claims, instead finding the evidence sufficient to show that antiunion animus, not the unprotected activity, motivated the discharge. *Id.* at 539. Notably, the Board explained that "assuming arguendo that [the employee's] behavior . . . would have been a lawful reason for discharging him, the credited evidence shows that he was discharged [for his union activities]." *Id.* at 539-540. Thus, as *Fort Smith* and *Sodexho Marriott* illustrate, discipline based on Section 8(d)'s loss of status stands out in sharp contrast against discipline for engaging in unprotected activity. Specifically, under the former, an employee is

no longer an "employee" as defined by the Act and has lost all rights and protections that the Act affords, including the right to be free of a discriminatory discharge. However, an employer who disciplines an employee for engaging in unprotected activity remains subject to the Act's requirements that the discipline be lawful and free of any illegal motive.

B. The Board Adhered to Its Precedent in Upholding the Employer's Right To Discipline the Picketing Employees

According to the Union (Br. 30-33), the Board's decision is an unjustifiable departure from Board precedent. Specifically, the Union argues that by permitting an employer to discipline an employee who pickets in violation of Section 8(g), the Board has abandoned a strict interpretation of the Health Care Amendments.

This argument again shows the Union's misunderstanding of the Board's decision. The Board did not find the discharges lawful because the picketing employees lost their status pursuant to the strict terms set forth in Section 8(d). Rather, the Board simply applied the basic principle that employees who engage in unprotected activity are subject to discipline. In doing so, the Board did strictly construe and abide by the language of Section 8(d) by *not* upholding the termination on the basis of loss of employee status. In short, the Board did not unlawfully expand the provisions of the Act to include picketers within the language of Section 8(d). Thus, the Board continued to heed Congress' warning to "'use extreme caution not to read into this Act . . . something that is not contained

in the bill, its report, and the explanation thereof.'" *Walker Methodist Residence and Health Care Center, Inc.*, 227 NLRB 1630, 1631 (1977) (quoting remarks of Senator Harrison Williams, Chairman of the Committee on Labor and Public Welfare).[9]

V. CONGRESS DID NOT INTEND TO LEAVE EMPLOYERS WITHOUT A REMEDY

The Union also argues (Br. 26-27) that Congress' omission of the term "picket" from Section 8(d) not only preserves picketing employees' status, but also demonstrates Congress' intent to preclude an employer from taking any disciplinary action against employees who picket in contravention of Section 8(g). To support this argument, the Union relies heavily on legislative history, arguing that Congress knew the difference between a strike and a picket and chose only to remedy the former. This argument wrongly assumes that, because Congress limited the harsh penalty of loss of status to strikers, picketers have a free pass to picket without consequences.

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[9] The Union's authority (Br. 26-27) in support of its assertion that an employer may not discharge employees who picket in violation of Section 8(g) is unimpressive. As the Union admits, it consists only of unreviewed Board decisions, dicta, and a General Counsel's report, which is simply a press release of no authoritative value.

A. Congress Did not Intend to Immunize Picketers From Discipline

While picketers are exempt from the severe penalty of loss of status, Congress' omission of the term "picket" from Section 8(d) does not demonstrate an intent to immunize picketers from any discipline for their unprotected activity. "It is firmly entrenched that Congress is presumed to enact legislation with knowledge of the law." *United States v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995) (en banc). Applying that principle to the case at hand, Congress, when enacting the Health Care Amendments, understood the difference between discipline based on loss of employee status and discipline for engaging in unprotected activity. Indeed, as the Union notes (Br. 20-21), Congress knew that "loss of status" was a particularly harsh punishment, entailing "stripping employees of protection" and allowing them to be "summarily dismissed." Thus, through the specific language contained in Section 8(d), Congress exempted picketers only from what it recognized as the particularly severe punishment of loss of employee status.

Further, Congress was also aware of an employer's settled right to discipline employees engaged in unprotected activity. "Absent a clear manifestation of contrary intent, a newly enacted or revised statute is presumed to be harmonious with existing law and its judicial construction." *Id.* In short, if Congress meant to insulate picketers from all discipline, and thereby eliminate well-established precedent allowing for discipline based on unprotected activity, Congress would

necessarily have provided a "clearer expression of [such an] intent." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

B. The Ability to Discipline Employees Who Participate in a Picket that Violates Section 8(g) Is Necessary To Ensure Continuity of Care

The result advocated by the Union leads to the irrational result of allowing employees to engage in unprotected activity with impunity and fails to promote the policy behind Section 8(g). The "primary function of a hospital is patient care and . . . a tranquil atmosphere is essential to the carrying out of that function." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 500 (1978) (citations omitted). The purpose of Section 8(g)'s notice provision is to maintain that atmosphere and "to allow a health care institution to make arrangements for the continuity of patient care in the event of a strike *or picketing* by a labor organization." *Walker Methodist Residence and Health Care Center, Inc.*, 227 NLRB 1630, 1631 (1977) (emphasis added). *See also NLRB v. Stationary Engineers, Local 39*, 746 F.2d 530, 533 (9th Cir. 1984) ("Section 8(g) and its legislative history make clear that Congress was particularly concerned with the necessity that health care institutions be apprised sufficiently in advance of any planned *picketing* . . . .") (emphasis added).

While the Union tries to minimize picketing and its consequences (Br. 23), it cannot credibly assert that a picket will not affect patient care. As the Board previously explained, "any picketing may induce actions by others regardless of

the picketers' purpose, thereby creating the risk that the delivery of health services will be disrupted." *American Federation of Nurses, Local 535, SEIU*, 313 NLRB 1201, 1202 (1994). Therefore, contrary to the Union's assertions, picketing at a health care institution carries with it the "conceivable" and quite plausible result of disrupting patient care. *District 1199, National Union of Hosp. and Health Care Employees, Retail, Wholesale and Department Stores Union, AFL-CIO*, 256 NLRB 74, 75-76 (1981). Thus, the Union's interpretation produces the ill-advised result of leaving health care institutions with no effective remedy against the disruptive effects of an unannounced picket.

Moreover, courts have cautioned against "creat[ing] an entire category of employees who enjoy [the Act's] rights, but do not shoulder its responsibilities." *Internat'l Alliance of Theatrical and Stage Employees v. NLRB*, 334 F.3d 27, 34 (D.C. Cir. 2003). Yet, the Union's interpretation does just that by allowing an entire category of employees to engage in activity disruptive to patient care without regard for any consequences. Indeed, the result is counterintuitive: The Board cannot effectuate the Act's policies by essentially acquitting employees who engage in conduct contrary to the Act. *See Mackay Radio and Telegraph Co. Inc.*, 96 NLRB 740, 741 (1951).

In its brief (Br. 34), the Union describes an "inconsistent and inequitable" (and somewhat far-fetched) scenario supposedly produced by the Board's decision.

However, the position advocated by the Union results in the following unfair -- and more likely -- scenario: Labor organizations could easily exploit the statutory gap caused by the Union's interpretation by initiating a picket without providing the proper notice during a particularly demanding day at a health care institution, disrupting the hospital's administration and continuity of patient care -- all without fear of employee's losing their jobs. In short, rather than discouraging employee misconduct by denying employees the Act's protection, the Union's position advocates the incongruous result of encouraging conduct subversive to the Act's policies. Forbidding discipline of picketers places the Board in the absurd "position of encouraging, through its remedial processes, conduct subversive of the statute." *Mackay Radio and Telegraph Co. Inc.*, 96 NLRB 740, 741 (1951).

C. Health Care Employees Do Not Have a Preexisting Right To Engage in Unprotected Activity with Impunity

The Union argues (Br. 27-28) that the purpose of the Health Care Amendments was to accord employees of nonprofit hospitals the same rights and protections enjoyed by all other employees. Thus, the Union contends that punishing the employees for engaging in a picket is contrary to this expressed policy because it treats hospital employees differently from "regular" employees. However, the Union's argument again overlooks the well-established principle that an employer can discipline employees -- whether health care workers or otherwise -- for engaging in unprotected conduct. Contrary to the Union's assertion (Br. 13),

health care employees have no preexisting right to engage in unprotected activity without incurring consequences for that behavior. In that regard, the Board's decision does not treat health care employees any differently from other employees covered by the Act and does not improperly curtail health care employees' rights. Rather, all employees are subject to discipline, including discharge, for engaging in unprotected activity.

D. The Union's Heavy Reliance on Legislative History Is Unnecessary and Misplaced

The Union relies heavily on the legislative history behind the Health Care Amendments to support its argument that Congress did not intend to allow the discipline of health care workers who picket in violation of Section 8(g). However, the language contained in Section 8(g) and Section 8(d) is clear and unambiguous: Pickets and strikes require advance notice, and those who strike absent such notice are subject to the special penalty of loss of employee status. *See Montefiore Hosp. and Medical Center v. NLRB*, 621 F.2d 510, 514 (2d Cir. 1980) (Section 8(g)'s language is "crystal clear"); *Boghosian Raisin Packing Co., Inc.*, 342 NLRB 383, 385 (2004) (noting Section 8(d)'s "plain words" and "clear mandate"). When Congress has enacted clear and unambiguous legislation, there is no need to resort to legislative history as a reference. *Alexandria Clinic, P.A.*, 339 NLRB 1262, 1264 n.8 (2003), *enforced sub. nom Minnesota Licensed Practical Nurses Assoc. v. NLRB*, 406 F.3d 1020 (8th Cir. 2005). Rather, the

"proper understanding of the text is to be found in the plain language of the text itself." *Id.* Because the language of the Health Care Amendments is clear, the Union's reliance on legislative history is nothing but an "indiscriminate attempt to read legislative meaning into congressional tea leaves." *IBEW, Local 474 v. NLRB*, 814 F.2d 697, 715 (D.C. Cir. 1987) (Buckley J., concurring).

Moreover, this Court has expressed reservations about using legislative history of the 1974 Amendments as a reliable tool for construing those amendments. *See Montefiore Hosp. and Medical Center v. NLRB*, 621 F.2d 510, 515 (2d Cir. 1980) ("We cannot conclude that the legislative history requires us to ignore the unambiguous language of Section 8(g)."). In *Washington Heights*, this Court refused to create an exception to the Section 8(g) notice provision in the context of an unfair labor practice strike, even though a Senate Report seemingly endorsed doing so. In so holding, this Court stated that it was "somewhat hesitant to give this legislative history effect, because it not so much guides interpretation of ambiguous wording in the statute, but rather creates a significant exception." *NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, 897 F.2d 1238, 1247 (2d Cir. 1990). Similarly, in *Montefiore Hosp.*, 621 F.2d at 516, this Court refused to use legislative history to read Section 8(g) to require individual employees to give notice before participating in a strike, stating that to

do so, would "in effect be rewriting Section 8(g)."[10] *Id.* at 516. Likewise, in the instant case, absent Congressional action, this Court should exercise the same caution in using legislative history to erode an employer's well-established right to discipline employees for engaging in unlawful and unprotected activity.

[10] The Union (Br. 28-29) relies on *Montefiore Hospital* to support its position that Congress did not intend to punish all employees who picket in violation of Section 8(g). However, this reliance is misplaced as *Montefiore Hospital* is easily distinguishable from the instant case. In *Montefiore*, the Court found that two doctors who participated in a union-sponsored strike, without giving their employer (a health care institution) advance notice of their participation, did not violate Section 8(g) of the Act. 621 F.2d at 515. In that case, however, the union had provided the required Section 8(g) notice to the employer, and the strike was therefore lawful. 621 F.2d at 511, 515. In the case at hand, the Union did not provide the required Section 8(g) notice before initiating the picket. Thus, while the doctors in *Montefiore* participated in a lawful strike, the employees in the instant case participated in a picket that was unlawful from its inception.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Union's petition for review.

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April 2008

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FOR THE SECOND CIRCUIT

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Petitioner	*	
	*	No. 07-5041-ag
v.	*	
	*	Board Case No.
NATIONAL LABOR RELATIONS BOARD	*	03-CA-23855
Respondent	*	
and	*	
CORRECTIONAL MEDICAL SERVICES, INC.	*	
Intervenor	*	

COMBINED CERTIFICATES

As required under the Federal Rules of Appellate Procedure, combined with Local Rules 25, 28, and 32, Board counsel makes the following certifications:

COMPLIANCE WITH TYPE-VOLUME REQUIREMENTS

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32, the Board certifies that its final brief contains 7,902 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

COMPLIANCE WITH CONTENT AND VIRSUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the .pdf file containing a copy of the Board's brief that was sent by e-mail to the Court are identical to the hard copy of the Board's brief filed with the Court and served on petitioner, and were scanned for viruses using Symantec Antivirus Corporate Edition, program version 10.0.2.2000 (3/31/2008 rev. 19), and according to that program, are free of viruses.

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Dated at Washington, DC
this 2nd day of April, 2008

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address listed below:

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