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The Road Less Traveled --Going Beyond the Family and Medical Leave Act to Create a Family-Friendly Legal Profession

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Paging Health-Care Workers: The NLRB Takes a Scalpel to Section 8(g) after *Beverly*

INTRODUCTION

From 1947 to 1974, workers at nonprofit hospitals lacked basic federal labor law protections.¹ Congress changed the law in 1974, bringing these workers under the National Labor Relations Act, which protects the rights of employees to organize and bargain collectively.² Congress, however, placed a significant limit on the ability of health-care workers to strike or picket, requiring them to provide ten days' notice before beginning either activity.³ The notice provision attempted to balance concerns about patient care with workers' collective-bargaining rights.⁴

In a 1978 decision, *Greater New Orleans Artificial Kidney Center*,⁵ the National Labor Relations Board gave a flexible interpretation to this notice provision, adopting a "substantial compliance" standard.⁶ This interpretation, which rested on the legislative history, helped protect workers from dismissals for short delays in the start of a strike or picketing.⁷ Since 1978, that precedent has generally governed cases arising under the NLRA's Section 8(g) notice provision.⁸

¹ See SENATE SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, 93D CONG., LEGISLATIVE HISTORY OF THE COVERAGE OF NONPROFIT HOSPITALS UNDER THE NATIONAL LABOR RELATIONS ACT, 1974 10 [hereinafter LEG. HIST.]. Most important, federal labor law protects workers from being fired for forming a union. See 29 U.S.C. §§ 151-169 (2000)

² Health Care Amendments of 1974, Pub. L. No. 93-360 (codified as amended at 29 U.S.C. §§ 151-169 (2000)).

³ 29 U.S.C. § 158(g) (2000).

⁴ LEG. HIST., *supra* note 1, at 10.

⁵ *Bio-Medical Applications of New Orleans, Inc., d/b/a Greater New Orleans Artificial Kidney Center*, 240 NLRB 432 (1979).

⁶ *Id.* at 435-36.

⁷ *Id.*

⁸ See, e.g., *infra* notes 41-48 and Part I.E.

Recently, two decisions have changed the law. In the first, *Beverly Health & Rehabilitation Services v. NLRB*,⁹ the D.C. Circuit Court of Appeals eliminated a union's ability to postpone a strike for seventy-two hours unless it gets the employer's consent.¹⁰ In a subsequent case, *Alexandria Clinic*, the NLRB quickly adopted the logic of *Beverly*, eliminating an initial twelve-hour grace period, as well as the Board's longstanding "substantial compliance" standard.¹¹ As now interpreted, a union apparently must strike at the time in the initial notice, receive employer consent to extend the deadline or provide a new ten-day notice.¹²

Together, the cases represent a sharp departure from the legislative history and case law. They also provide vivid illustrations of how employers may use the notice requirement to undermine unions, further weakening the bargaining power of health-care workers. The ten-day notice requirement already limited workers leverage at the bargaining table by hampering their ability to surprise employers.¹³ Now, health-care workers might be fired for short delays in picketing or striking, making Section 8(g) an especially powerful tool for employers looking to undermine unions.¹⁴ This prospect makes a strike even less probable than before for health-care workers, who have become an increasingly large part of the organized work force.¹⁵

In addition, the cases showcase the tactics of two aggressive anti-union employers, highlighting the contentiousness of labor relations in the growing health-care field. The cases

⁹ *Beverly Health & Rehab. Servs. v. NLRB*, 317 F.3d 316 (D.C. Cir. 2003).

¹⁰ *Id.* at 321.

¹¹ *Alexandria Clinic, P.A. & Minn. Licensed Practical Nurses Assoc.*, 339 NLRB No. 162, slip op. 1262 (2003), available at http://www.nlr.gov/nlr/shared_files/decisions/339/339-162.pdf (last visited Jan. 10, 2005). The decision has not yet been published in the NLRB's official bound volumes.

¹² *See id.*

¹³ Telephone Interview with Bill Sokol, partner, Van Bourg, Weinberg, Roger & Rosenfeld, Oakland, Calif. (Dec. 11, 2003).

¹⁴ *See Alexandria* at 1271, n.6 (Liebman, dissenting).

¹⁵ Telephone Interview with Harold Craig Becker, Chicago-based Associate General Counsel to the Service Employees International Union and staff counsel to the AFL-CIO (Oct. 22, 2003).

show how the notice requirement, originally designed to balance concerns about continuity of patient care with workers' rights to organize, can be converted into a weapon for employers. In *Beverly*, a large Arkansas-based nursing-home chain fought a seven-year battle against its workers and the government to pursue a stricter reading of the ten-day notice requirement.¹⁶ In *Alexandria*, a small-town physician-owned clinic relied on a similarly unprecedented interpretation of the notice requirement as it sought to impose an initial contract on a group of nurses and assistants who had voted for union representation.¹⁷

Part I of this comment reviews the legislative history of Section 8(g), the key case law and the General Counsel's interpretative memoranda. Part II examines *Beverly's* campaign to make Section 8(g) a more potent weapon for employers. Part III looks at *Alexandria Clinic's* concomitant effort to use Section 8(g), which resulted in the dismissal of twenty-two nurses and medical assistants. Finally, Part IV analyzes the significance of these two rulings on the relative bargaining strength of health-care workers and their employers and looks at the unresolved issues raised by the decisions. At least, the decisions strengthen the hand of health-care employers and send a strong political message about the Bush Board's¹⁸ relatively narrow approach toward ensuring collective-bargaining rights for unions.

I. CONGRESS EXPANDS THE NLRA TO HEALTH-CARE WORKERS AT NONPROFIT HOSPITALS

¹⁶ See 317 F.3d 316; *Beverly Health & Rehab. Servs., Inc.*, 335 NLRB No.54 (Aug. 27, 2001).

¹⁷ See *infra* Part III.

¹⁸ The Bush Board is a shorthand reference for the NLRB under President George W. Bush. The President's influence is limited to the appointment process. By custom, the five-member, bipartisan Board is made up of three members of one party and two of the other. See *generally infra* note 60 (discussing the NLRB's basic structure).

Congress adopted the ten-day notice requirement as part of the 1974 amendments to the National Labor Relations Act.¹⁹ The bill’s congressional committee reports said the notice requirement should be applied flexibly to avoid unwarranted firings.²⁰ The National Labor Relations Board’s General Counsel later used this legislative history in determining whether to prosecute cases under Section 8(g).²¹ The Board subsequently adopted this approach itself in a 1979 decision.²² That decision remained good law until August 2003.²³

A. Congress Brings Health-Care Workers Under the NLRA

Health-care workers have not always been covered by the National Labor Relations Act. Although health-care workers were included in the original 1935 legislation, a floor amendment to the 1947 Taft-Hartley Act exempted non-profit hospitals from the Act.²⁴ At that time, hospitals’ representatives argued their facilities were small, community-based institutions, operating outside the stream of interstate commerce, exempting them from the NLRB’s jurisdiction.²⁵ Industry supporters also contended that the exemption would help them to maintain low costs by limiting their labor expenses.²⁶

By the early 1970s, though, the exemption faced challenges on several fronts. In the 1960s, the Board itself began asserting jurisdiction over other health-care providers such as for-

¹⁹ See Health Care Amendments of 1974, *supra* note 2.

²⁰ See LEG. HIST., *supra* note 1, at v, 10.

²¹ General Counsel Memorandum 74-49, “Guidelines for Handling Unfair Labor Practice Cases Arising Under the 1974 Nonprofit Hospital Amendments to the Act,” Aug. 20, 1974 (*reprinted in* LABOR RELATIONS YEARBOOK – 1974, at 343-65 (1975)).

²² Greater New Orleans, 240 NLRB 432.

²³ See 339 NLRB No. 162.

²⁴ See LEG. HIST., *supra* note 1, at 10.

²⁵ Richard G. Vernon, *Labor Relations in the Health Care Field Under the 1974 Amendments to the National Labor Relations Act: An Overview and Analysis*, 70 NW. U. L. REV. 202, 203 (1975).

²⁶ *Id.*

profit hospitals, clinics and nursing homes.²⁷ This created an anomaly in the hospital industry, excluding some 56% percent of the nation's hospitals and about 1.43 million workers from the protections of the NLRA.²⁸ In addition, workers at some nonprofit hospitals had engaged in recognition strikes, attempting to use their economic clout to force their employers to recognize their right to organize.²⁹ Congress hoped the legislation would bring peace to the industry, limiting these recognition strikes.³⁰ Congress also became concerned that the exemption allowed hospitals to maintain low wages and poor working conditions, hurting employees and patients.³¹ Furthermore, these institutions had expanded considerably since 1947. As a result, many could no longer claim to be small community-based institutions, thus undercutting their jurisdictional-exemption claim under the Commerce Clause.³²

In 1974, Congress amended the National Labor Relations Act to include coverage of nonprofit hospitals.³³ Adopted after hearings and debate, the legislation was designed to increase the bargaining power of hospital workers, while giving their employers adequate time to ensure the continuity of patient care in the event of a strike.³⁴ The bill also applied the ten-day notice provision to health-care institutions such as nursing homes, clinics and health-maintenance organizations, which already had been covered by the NLRA.³⁵

²⁷ See John G. Kilgour, *The Health-Care Bargaining Unit Controversy: Community of Interest versus Disparity of Interest* 40 LABOR LAW JOURNAL 81, 82 (1989) (providing background about the circumstances that led to the passage of the 1974 amendments).

²⁸ LEG. HIST., *supra* note 1, at 10.

²⁹ *Id.*

³⁰ *Id.*

³¹ Vernon, *supra* note 25, at 203-04.

³² *See id.*

³³ Health Care Amendments of 1974, *supra* note 2. An earlier version of the bill passed the House in 1972, but the Senate did take up the legislation at that time. Vernon, *supra* note 25, at 204.

³⁴ LEG. HIST., *supra* note 1, at 10.

³⁵ *Id.* at 9-10.

By requiring ten days' notice before picketing or a strike, Section 8(g) sought to balance the demands of workers and employers.³⁶ Specifically, it requires a labor organization to send written notice of the time and date when it plans to begin striking or picketing.³⁷ A strike notice can be extended with the written consent of both parties.³⁸

B. The NLRB's General Counsel Provides Guidance

Despite the statute's apparently straightforward language, it left several important points unresolved, including how to apply to ten-day notice requirement. In 1974, the NLRB General Counsel issued a memo³⁹ attempting to clarify how the new law should be applied. The memo included an interpretation of the notice requirement: "Notwithstanding the wording of Section 8(g) itself, the Committee Reports indicate that that it should be applied with some flexibility, i.e., strick [sic] adherence to the notified strike or picketing time may not be necessary in order to avoid an 8(g) violation."⁴⁰ The memo then quotes the language of the House and Senate reports, which suggest the statute be applied flexibly.⁴¹

³⁶ *Id.* at v, 10.

³⁷ 29 U.S.C. § 158(g). Section 8(g) reads: "A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention.... The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties." *Id.*

³⁸ *Id.*

³⁹ General Counsel Memorandum 74-49, "Guidelines for Handling Unfair Labor Practice Cases Arising Under the 1974 Nonprofit Hospital Amendments to the Act," Aug. 20, 1974 (*reprinted in* LABOR RELATIONS YEARBOOK – 1974, at 343-65 (1975)).

⁴⁰ *Id.* at 6-7.

⁴¹ *Id.* at 7 (quoting LEG. HIST., *supra* note 1, at 11). Here is the full passage from the legislative history: "The 10-day notice is intended to give health care institutions sufficient advance notice of a strike or picketing to permit them to make arrangements for the continuity of patient care. It is not the intention of the Committee that a labor organization shall be required to commence a strike or picketing at the precise time specified in the notice; on the other hand, it would be inconsistent with the Committee's intent if a labor organization failed to act within a reasonable time after the time specified in the notice. Thus, it would be unreasonable, in the Committee's judgment, if a strike or picketing commenced more than 72 hours after the time specified in the notice. In addition, since the purpose of the notice is to give a health care institution advance notice of the actual strike or picketing, if a labor organization does not strike at the time specified in the notice, at least 12 hours notice should be given of the actual time for commencement of the action." *Id.*

The General Counsel interpreted the legislative reports to stress two points: the need for a commonsense interpretation of the Section 8(g) requirement and a benchmark for determining a reasonable time to start the strike or picketing.⁴² In adopting a standard, the General Counsel followed the committee report, allowing a labor organization to postpone a strike for up to seventy-two hours, provided the group gave twelve hours' notice.⁴³ The General Counsel required a new notice for strikes after the three-day window.⁴⁴

C. The Board Follows the Legislative History in Greater New Orleans

Five years later, the board followed this approach in *Greater New Orleans Artificial Kidney Center*.⁴⁵ In *Greater New Orleans*, the union gave more than twelve hours' notice of a one-day delay in the start of a strike.⁴⁶ Relying on the legislative reports and the comments of the legislation's sponsors, the Board concluded that "the rule of reason" should determine the statute's application.⁴⁷ In this case, the Board found the union's notice satisfied the reasonableness requirement.⁴⁸ "Therefore," the Board concluded, "the legislative history of the health care amendments demonstrates not only Congress' concern for the continuity of patient care, but also its concern that Section 8(g) not be rigidly applied in light of the serious consequences flowing from noncompliance with its provisions, i.e., the strikers' loss of

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* Later, the General Counsel opted not to prosecute less-than-twelve-hour delays. *See, e.g.*, Advice Memorandum, Hospital and Service Employees Union Local 399 (Broadway Convalescent Hospital), Case 21-CG-4, Aug. 21, 1976.

⁴⁵ *Greater New Orleans*, 240 NLRB 432. This case involved the discharge of ten hemodialysis technicians after a weeklong strike. *Id.* The union filed a charge for improper discharge after the employer refused its offer to return to work. *Id.* at 433. The employer defended the firings, arguing the strike violated Section 8(g) because the strike notice arrived late and the union extended the strike unilaterally. *Id.* The administrative law judge in the case agreed, and the General Counsel appealed to the Board, which reversed. *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 435.

⁴⁸ *Id.*

employee status under the Act. We believe that our decision herein satisfies both of these expressed concerns of Congress.”⁴⁹ The Board stated that in the circumstances of the case the union was in “substantial compliance with Section 8(g) and to apply Section 8(g) here in such a technical fashion so as to deprive the strikers of their status as employees would constitute an unwarrantedly harsh result not intended by Congress.”⁵⁰

D. Other Cases Show Board’s Commitment to ‘Rule of Reason’

The Board’s opinion in *Greater New Orleans* and the General Counsel’s decision not to prosecute less-than-twelve-hour delays meant relatively few 8(g) cases reached the Board. The cases that did reach the Board involved more obvious violations of the statute or collateral issues about its scope. For example, in *District 1199-E*, the Board found that an unexplained 80-1/2-hour delay violated the statute and required the union to cease and desist from future conduct.⁵¹ In the case, the Board stated its approach to 8(g) cases: “The test as to the unlawfulness of a strike or picketing commencing after the 10-day notice will be one of ‘reasonableness’; that is, the delay in the commencement of a strike or picketing beyond the stated time will be viewed in light of (1) the circumstances causing the union to delay its actions and (2) why the union could not give the health care facility notice of the new scheduled date and time that strike or picketing

⁴⁹ *Id.*

⁵⁰ *Id.* at 435-36. In reaching its decision, the Board also failed to hold the union responsible for failing to satisfy the ten-day written notice provision because the notice got delayed in the mail because of insufficient postage. The clinic did, however, have actual notice of the strike.

⁵¹ *District 1199-E, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO*, 243 NLRB 23 (1979).

would commencement.”⁵² In the case, the Board found no explanation for either the delay or the union’s failure to warn of the delay.⁵³

Other notice cases presented even more straightforward issues. In one case, the Board held that a six-day notice did not satisfy the statute.⁵⁴ In a sympathy-strike case, the Board found the notice needed to list the date and time, not simply reference the notice of another union.⁵⁵ And in *California Nurses Association*, a more recent case, the Board found the union violated 8(g) by resuming picketing after a three-week stop.⁵⁶ On the other hand, the Board found a threat to strike did not violate 8(g).⁵⁷

⁵² *Id.* at 24. In its 1979 annual report, the Board distinguished District 1199-E from Greater New Orleans, explaining that the former decision demonstrated that Congress did not intend for unilateral extension of the strike time to be “open ended, but, rather indicated that any unilateral extension beyond a period of 72 hours would be deemed unreasonable.” 44 NLRB ANN. REP. 172 (1979).

⁵³ 243 NLRB at 24-25. It’s also worth noting that the consequences of the union’s violation were not unduly severe. In its order, the Board required the union to conduct its picketing in compliance with Section 8(g) and post a related notice at its meeting halls. Apparently, no one lost a job. *Id.* at 25-26.

⁵⁴ Hospital and Institutional Workers’ Union, Local 250, SEIU, AFL-CIO and Affiliated Hospitals of San Francisco, 255 NLRB 502, 503-06 (1981). In this case, the union’s initial notice simply said it was a ten-day notice but did not specify the time and date of the strike. A few days later, the union gave the time and date. The Board found this later notice did not satisfy Section 8(g) because it was too late. The Board, however, declined to require the union to specify whether it planned to picket or strike, saying this would harm workers’ rights by imposing a more stringent requirement than the statute demanded.

⁵⁵ Stationary Engineers, Local 39, International Union of Operating Engineers, AFL-CIO (Kaiser Foundation Hospitals) 268 NLRB 115, 117-120 (1983). In this case, the union notified Kaiser that it planned to respect the strike of another union, but did not provide any information about the time and date of its own strike. Interestingly, a dissident union member, not the employer, filed the charge with the NLRB. In its decision, the Board ordered the union to repay several employees who had been fined for crossing the picket line.

⁵⁶ California Nurses Association, American Nurses’ Association (City of Hope National Medical Center), 315 NLRB 468 (1994). In this case, the union struck for nearly two weeks, then unconditionally offered to return to work. Three weeks after returning to work, however, the union resumed picketing without giving a new ten-day notice. The Board found this picketing resumption violated Section 8(g) and noted that the legislative history reflected concern that unions might abuse the notice provision by stopping a strike or picketing, then restarting without warning. The Board also noted the picketing started well outside the seventy-two-hour window covered by the initial ten-day notice.

⁵⁷ District 1199-E, National Union of Hospital & Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO 227 NLRB 132, 133-34 (1976). In this case, a union representative made a strike threat the day before a proposed strike, which did not occur. The Board affirmed the decision of the administrative law judge, who found that Section 8(g) does not forbid threats. This holding is consistent with the views of the legislation’s authors. *Id.* at 134; LEG. HIST., *supra* note 1, at 411 (remarks of Rep. John M. Ashbrook).

Before *Beverly*, at least one relevant notice case reached a federal appeals court.⁵⁸ In *NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, the court held that the union could not extend a strike deadline with an oral notice, finding “the notice requirement is appropriately read strictly.”⁵⁹ But no case from any court directly addressed the effect of a less-than-twelve-hour delay.

E. The General Counsel’s Approach Reinforces Twelve-hour Grace Period

Significantly, the General Counsel’s memoranda also reflect a commitment to a flexible standard, limiting the cases that would be litigated about what qualified as a “reasonable” delay.⁶⁰ Most recently, for example, the General Counsel advised against issuing in a complaint following an eleven-hour delay in the start of picketing, relying primarily on policy consideration.⁶¹

⁵⁸ *NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, 897 F.2d 1238 (2nd Cir. 1990). The U.S. Supreme Court has not decided an 8(g) case. The Court did, though, reference the statute in *Beth Israel Hospital v. NLRB*, one of its most important health-care-related labor cases. 437 U.S. 483, 496, n.12 (1978). In that case, the Court concluded that off-duty union supporters could solicit their colleagues in the hospital’s cafeteria during nonwork hours without disrupting patient care. *Id.* at 507. The Court noted Congress included Section 8(g)’s strike-notice as a safeguard for employers, but did not place any restrictions on solicitation in the 1974 health-care amendments. *Id.* at 496-97. The Court did, however, acknowledge the appropriateness special considerations for union activity in a health-care setting. *Id.* at 507-08.

⁵⁹ 897 F.2d at 1247. The court also quotes this language from another appeals court: “Strict adherence to notice requirements is essential in the area of health care institutions, in light of Congress’ concern ‘that sudden massive strikes could endanger the lives and health of patients....’” *Id.* at 1247 (quoting *NLRB v. Stationary Engineers, Local 39*, 746 F.2d 530, 533 (9th Cir. 1984)).

⁶⁰ The National Labor Relations Board serves both adjudicatory and prosecutorial functions, which are split between the agency’s five-member bipartisan Board and the agency’s General Counsel, respectively. Specifically, the five-member Board decides cases. The Board’s General Counsel prosecutes cases consistent with the Board’s decisions. The General Counsel’s decision not to prosecute is not subject to appeal. The roles, however, blur with Circuit and U.S. Supreme Court appeals. In these cases, the General Counsel serves as an advocate for the position of the five-member Board. By comparison, the General Counsel does not have special status when prosecuting cases before an administrative law judge or the Board itself.

⁶¹ *Operating Engineers Local No. 3 (Washoe Medical Center)*, Case 32-CG-47, Advice Memorandum, Feb. 5, 2001, at 3, available at <http://www.nlr.gov> or 2001 WL 310323.

In a memo, the General Counsel's office explained why the case should not be prosecuted. First, the union's activity involved picketing rather than striking.⁶² Second, neither party suffered any adverse consequences from the delay.⁶³ And, finally, the isolated nature of the three-hour picketing obviated the need for a complaint.⁶⁴ By comparison, in another case, the General Counsel advised issuing a complaint after an unexplained fifteen-hour delay.⁶⁵ In that memo, though, the General Counsel distinguished the case from shorter delays: "[U]nannounced delays of less than 12 hours after the specified time have been considered not to be unreasonable, and therefore not be violative of Section 8(g)."⁶⁶ For support, the memo cited an August 21, 1976, advice memo regarding an unannounced three-hour delay⁶⁷ and an April 30, 1979, memo regarding a nine-hour delay.⁶⁸

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Licensed Practical Nurse and Skilled Hospital Employees Professional and Economic Security Program (Allen Memorial Hospital), Cases 8-CB-4509 & 8-CG-6, Advice Memorandum, Sept. 30, 1981, at 2, *available at* 1981 WL 25911.

⁶⁶ *Id.*

⁶⁷ *Id.* at 2; *id.* at 2, n.5 (citing Advice Memorandum, Hospital and Service Employees Union Local 399 (Broadway Convalescent Hospital), Case 21-CG-4, Aug. 21, 1976). In the Broadway Convalescent memo, the General Counsel concluded that the strike itself began on time because one worker did not show up for his 7 a.m. shift. In addition, the General Counsel concluded that a three-hour-and-forty-five-minute delay in picketing did not violate Section 8(g) since the strike itself began on time and the picketing started within a "reasonable period." The General Counsel also noted that the employer did not suffer any adverse effects from the delay, and the delay apparently was not designed to lull the employer into a false sense of security. Advice Memorandum, Hospital and Service Employees Union Local 399 (Broadway Convalescent Hospital), Case 21-CG-4 (Aug. 21, 1976)(on file with author).

⁶⁸ *Id.* at 2; *id.* at 2, n.4 (citing Advice Memorandum, Local 2653, AFSCME (AFL-CIO) and Michigan Council No. 25, AFSCME (AFL-CIO) (The Sisters of the Third Order of St. Francis, St. Francis Hospital), Cases 30-CG-11 *et al.*, April 30, 1979). The St. Francis memo involved several 8(g) charges from the employer. In the first, the employer alleged that the union violated 8(g) when it began picketing at 9 a.m. March 1, 1979, instead of at 12:01 a.m., as specified in the notice. The employer also alleged the union violated 8(g) because it did not strike. In response, the General Counsel declined to prosecute either violation. The General Counsel concluded that since the delay occurred only two hours after a shift change it was "not unreasonable." The General Counsel, though, also borrowed a phrase from the Congressional Record, saying the office did not want to litigate "technical minutiae." And, in any event, the violations were deemed *de minimis*: "Even assuming *arguendo* that the requirements of Section 8(g) were not strictly met because of the delay in the commencement of the picketing and because the strike specified in the notice did not take place, the violation here would be de minimis since the Employer suffered no adverse effects." Advice Memorandum, Local 2653, AFSCME (AFL-CIO) and Michigan Council No. 25,

The Board's data about Section 8(g) cases also reflect the General Counsel's approach.⁶⁹ Since its inception in 1974, there has been relatively little litigation under 8(g) and few cases have reached the Board. The number of closed cases peaked in fiscal year 1977, accounting for 110 of the Board's 37,602 cases that year.⁷⁰ Since 1981, the number of cases has fluctuated between sixteen and forty-nine.⁷¹ For example, in 2002, the board closed thirty-seven cases, accounting for about one of every one thousand cases handled by the handled by the agency.⁷² Twenty-three were settled by agreement of the parties and thirteen were withdrawn or dismissed without a complaint.⁷³ The last case was closed through compliance with a Court of Appeals decree.⁷⁴

F. Section 8(g) and the Academy

AFSCME (AFL-CIO) (The Sisters of the Third Order of St. Francis, St. Francis Hospital), Cases 30-CG-11 *et al.*, April 30, 1979) (on file with author).

Separately, the General Counsel also declined to prosecute a seven-hour delay in the start of a subsequent strike. In this instance, the union gave the hospital written notice of the delay the day before the strike. The General Counsel stated that a union could delay a strike until the start of a new shift without sending a twelve-hour notice of the delay. *Id.*

⁶⁹ The NLRB lists the total number of cases by the type of unfair labor practice in Table 7 of its annual report. Section 8(g) cases are known as CG cases in Board parlance. To analyze this data, I looked through the Board's annual reports from 1975 through 2002. This is the best data on 8(g). Although labor organizations are required to send their notice to the Federal Mediation and Conciliation Service, FMCS apparently does not keep a record of the annual 8(g) notices it receives. As a result, there's no data on the aggregate number of 8(g) notices. The Board's data only reflects the number of 8(g) charges.

⁷⁰ 42 NLRB ANN. REP. 282 (1977).

⁷¹ The Board closed sixteen cases in 1991 and 2000 and forty-nine in 1999. 56 NLRB ANN. REP. 174 (1991); 65 NLRB ANN. REP. 150 (2000); 64 NLRB ANN. REP. 122 (1999).

⁷² 67 NLRB ANN. REP. 102 (2002). The Board closed 30,195 cases in fiscal year 2002. *Id.*

⁷³ *Id.* at 102-03.

⁷⁴ *Id.* at 102.

Incidentally, Section 8(g) has attracted the attention of a few academics and judges.⁷⁵ In a law review article, Judge Richard Posner analyzes the notice requirement as an economic issue for hospitals, rather than one related to patient care.⁷⁶ Specifically, he notes even a relatively small nurses' or doctors' strike could force an institution to close, creating a financial hardship.⁷⁷ But the strike notice, he says, benefits employers by allowing them to prepare for a strike and is “another example of how current law tempers the pro-union policy introduced by the Wagner Act.”⁷⁸

Outside the academy, of course, Section 8(g) is neither incidental nor obscure to labor lawyers representing health-care unions or facilities. While the notice requirement removes any element of surprise from a strike, placing health-care unions at a significant disadvantage from their non-health-care counterparts, the notice can still be an important bargaining tool by raising the possibility of a strike or picketing.⁷⁹ One union-side labor-law attorney estimates that the notice comes up in about 10% of contract negotiations.⁸⁰ Craig Becker, an attorney with the Service Employees International Union (SEIU), which is the country's largest health-care union,

⁷⁵ Section 8(g), however, has not been the subject of serious academic analysis in two decades. It did, however, receive more attention in the ten years after the law was passed. *See, e.g.*, Vernon, *supra* note 25, at 216-219 (calling 8(g) “perhaps the most significant of the new provisions”); Don Zimmerman, *Trends in NLRB Health Care Industry Decisions*, 32 LABOR LAW JOURNAL 3, 9-12 (1981) (identifying 8(g) as one of the subjects of “substantial controversy and conflict among the federal courts” since the amendments were passed); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769, 1801, n.123 (1983) (including 8(g) data in a calculation of unfair labor practice charges filed against unions in an important labor-law article).

⁷⁶ Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 1008 (1984).

⁷⁷ *Id.*

⁷⁸ *Id.* at 1008-09. *See also* Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1367, n.69 (1988) (citing 8(g) as an example of a restriction placed on a union's right to strike).

⁷⁹ Telephone interview with Bill Sokol, *supra* note 13 (Dec. 11, 2003).

⁸⁰ *Id.*

described the notice provision “as a constant issue at the SEIU.”⁸¹ He noted that it applies to both strikes and picketing and is the subject of frequent questions.⁸²

For management-side attorneys, there is also little doubt about Section 8(g)’s importance, as both *Beverly* and *Alexandria* demonstrate.⁸³ *Beverly* spent nearly seven years defending its unprecedented interpretation of Section 8(g), and *Alexandria* has spent almost as long.⁸⁴ The reason is clear. These are high-stakes cases. Failure to comply with Section 8(g) costs the union members’ their status as employees under the NLRA, leaving them vulnerable to termination.⁸⁵ And, as the cases show, even the threat of termination because of an alleged 8(g) violation has the potential to undermine a union.

Beverly’s short opinion belies the hostility generated by the case. The decision came after more than a dozen rulings from both federal courts and the Board. The large number of decisions reflects the behavior of an employer with a particularly strong union animus. In this context, Fort Smith, Arkansas-based *Beverly Health Care & Rehabilitation Services*’ challenge to 8(g) appears to be part of a companywide effort to undermine union activity at its roughly 500 nursing homes.⁸⁶

⁸¹ Telephone Interview with Harold Craig Becker, *supra* note 15 (Oct. 22, 2003).

⁸² *Id.* Becker also said: “Strikes in general are increasingly uncommon just because of the possibility of permanent replacement and difficulties of success.” *Id.* But, unlike some fields, there has been “a lot activity” in organizing health-care workers in the last five years. *Id.* At the same time, the industry has faced increasing pressure to cut costs, contributing to some contentious bargaining. *Id.*

⁸³ See, e.g., *Trends in Hospital Labor Relations*, 31 LABOR LAW JOURNAL 100, 102 (1980). The authors, two Wisconsin-based management-side attorneys, offer tips about how health-care employers can resist unionization. They note that the field is vulnerable, though: “No set of managers is *less qualified* to fight the union war and win than are those in health care: the experience of health care management does not stack well against the warriors on the union side...” (quoting Warren H. Chaney and Thomas R. Beech, *THE UNION EPIDEMIC: A PRESCRIPTION FOR SUPERVISORS VII* (1976) (emphasis added by Mulcahy and Rader).

⁸⁴ See 317 F.3d 316; 339 NLRB No. 162.

⁸⁵ See 29 U.S.C. § 158(d)(4).

⁸⁶ The number of nursing homes in *Beverly*’s stable has fluctuated widely during the last decade. As of January 2005, it owned 355 skilled nursing facilities, 18 assisted living centers and 45 hospice and home care centers. See

II. BEVERLY'S CAMPAIGN TO REWRITE 8(G)

A. *Anti-union Tactics Lead to Strike Vote*

Beverly's union hostility has been well-documented. Between 1987 and 1994, the company committed about 240 unfair labor practices at 54 facilities in 18 states.⁸⁷ The violations included coercive conduct, discrimination and bad-faith bargaining.⁸⁸ The immediate case, which was not directly related to the earlier violations, came after contracts had expired at twenty Pennsylvania nursing homes.⁸⁹ Following the expiration, Beverly engaged in a variety of unfair labor practices at some of the facilities, including removing union bulletin boards, denying union representatives established access to members, changing health care insurance, reducing work hours, changing employee policies without bargaining, withholding relevant information for contract negotiations and prohibiting the display of union insignia and union literature.⁹⁰ The union also alleged that Beverly had direct contact with employees to try to persuade them to discontinue their support for the union.⁹¹ In response, the employees at fifteen of the twenty nursing homes voted to authorize strikes.⁹²

http://www.beverlycorp.com/BeverlyCorp/Corporate+Overview/F_CompanyBackground_Landing.htm (last visited Jan. 10, 2005).

⁸⁷ Beverly Calif. Corp., 326 NLRB 232, 237 (1998).

⁸⁸ *Id.*

⁸⁹ Kobell v. Beverly Health & Rehab. Servs., 987 F. Supp. 409, 410.

⁹⁰ See Beverly Health & Rehab. Servs., 335 NLRB 635 (2001); see also 987 F. Supp. at 411 (listing the charges).

⁹¹ 335 NLRB at 658. The employer's language was quite blunt. John Ferrito, the top manager at Beverly's Meadville nursing home, called a meeting after some of his employees sent an unsigned letter to company executives and state regulators complaining about understaffing at the facility. At the meeting, Ferrito called the letter's authors "assholes" and "fucking idiots" and said workers who continued to support the union should "get Vaseline and bend over because you are going to get screwed." *Id.*

⁹² 987 F. Supp at 411.

The union originally sent the ten-day notice of its proposed unfair-labor-practice strike March 15, 1996.⁹³ The notice said the strike would begin at 7 a.m. March 29.⁹⁴ On March 27, the union notified Beverly that it planned a seventy-one-hour delay, starting the strike at 6 a.m. April 1.⁹⁵

B. Beverly Alleges Delay Violates Section 8(g)

Beverly's campaign to rewrite 8(g) began when it was told about the delay.⁹⁶ In response to the delay-notice, Beverly alerted the union that the notice was defective and that the union should send a new ten-day notice.⁹⁷ Despite this position, Beverly apparently was aware of its tenuous legal position.⁹⁸ In a meeting on March 15, Wayne Chapman, Beverly's senior regional director of associate relations, told nursing home administrators that the unions have "a courtesy period that runs for 12 hours – if nothing in the first 12 hours they have an opportunity to walk in 72 [hours]."⁹⁹

The warning, though, represented the start of Beverly's multi-front strategy to use Section 8(g) to undermine the union. On April 1, Beverly began its formal legal action. First, the company challenged the validity of the strike notice in district court.¹⁰⁰ The judge dismissed Beverly's complaint for lack of jurisdiction because the company had failed to exhaust its

⁹³ *Id.*

⁹⁴ 987 F. Supp at 411.

⁹⁵ *Id.*

⁹⁶ *See id.*

⁹⁷ *Id.*

⁹⁸ Brief for the National Labor Relations Board at 12, *Kobell v. Beverly Health & Rehab. Servs.*, 142 F.3d 428 (3rd Cir. 1998) (Nos. 97-3200 & 97-3357) (on file with author).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 16, citing *Beverly Enterprises v. District 1199, Service Employees Int'l Union*, Civ. No. 96-64J (W.D. Pa.) & Appeal Case No. 97-3094.

administrative remedies.¹⁰¹ Beverly appealed the dismissal to the Third Circuit, which affirmed the lower court's decision.¹⁰²

The strike itself ended after three days.¹⁰³ Despite Beverly's awareness of its risky legal position, the company treated the strikers as if they were unprotected and declined the union's April 4 unilateral offer to return to work.¹⁰⁴ The NLRB responded by seeking an injunction in district court, requiring reinstatement and backpay.¹⁰⁵ Beverly argued that the strike was unprotected, accepting some of the workers' requests to return, while denying others.¹⁰⁶ From April 1996 to January 1997, 290 workers returned to their former positions.¹⁰⁷ Another 237 were recalled to part-time positions or different shifts.¹⁰⁸ Meanwhile, 66 had not been reinstated, and 115 employees either had quit or been fired.¹⁰⁹

C. Workers Win Reinstatement

The district court granted the injunction, issuing an opinion highly critical of Beverly's behavior and finding the NLRB had shown reasonable cause that it would prevail.¹¹⁰ Applying the just-and-proper standard for granting an injunction, the court found that Board's ability to facilitate peaceful labor relations would be impaired without an injunction.¹¹¹ In the opinion, the court found Beverly's unfair labor practices had been "selectively geared" to destroy or impede

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ 987 F. Supp. at 411.

¹⁰⁴ *Id.* at 412. By law, ULP strikers are entitled to immediate reinstatement.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 411.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 413,416.

¹¹¹ *Id.* at 416.

communication among union members.¹¹² Beverly's actions, the court said, "have tended to demoralize the union ranks and impede whatever collective bargaining has occurred."¹¹³ The court noted that the filing of six decertification petitions showed that Beverly's actions had weakened the morale of the union members, contributing to the filing of the petitions.¹¹⁴ In other words, Beverly was already succeeding, regardless of the legality of actions. "If decertification proceeds, the Board's ability to remedy any unfair labor practices may be completely undermined simply due to the nonunion status of these former union strongholds."¹¹⁵

The injunction prompted a short item in the Pittsburgh *Post-Gazette*, bringing the dispute into public.¹¹⁶ "I don't know if they'll go to the Vatican next," joked Gerald Kobell, the regional director of the NLRB's Pittsburgh office.¹¹⁷ That article, in turn, sparked a letter from a Beverly executive.¹¹⁸ In the letter, the company accused Kobell of issuing specious complaints, refusing to settle cases, disregarding the rights of employers and making sarcastic comments to the newspaper.¹¹⁹ Kobell refuted the charges, criticizing Beverly's effort to hold a separate trial for each of the 20 nursing homes.¹²⁰ "We will continue to vigorously prosecute Beverly and other wrongdoers, employers and unions alike, and take courage from our success in proving our case

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* Following the injunction, Beverly reinstated the employees who wanted to return to work. As a result, the subsequent litigation related to whether the employees would receive backpay for the year they were out of work. Kobell estimated the backpay in the case at "well in excess" of \$1 million, although he said the agency did not complete firm calculations because the order was not enforced. Telephone interview with Gerald Kobell, Regional Director, National Labor Relations Board's Pittsburgh office (Feb. 18, 2004).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ William J. Meenan, Group Vice President, Beverly Health and Rehabilitation Service[s]/Western Pennsylvania, *NLRB Leader Lacks Respect*, POST-GAZETTE (Pittsburgh), June 1, 1997, at E-2.

¹¹⁹ *Id.*

¹²⁰ Gerald Kobell, *Beverly's Complaints about Labor Board Are Unjustified*, POST-GAZETTE (Pittsburgh), June 11, 1997, at A-18.

and securing relief from the board and the courts, which have repeatedly found Beverly's conduct to be unlawful."¹²¹ In earlier cases, Beverly also apparently had tried to apply political pressure on the regional office, sending letters to Kobell's Washington boss, NLRB General Counsel Fred Feinstein, and members of Congress.¹²²

D. Beverly Continues Legal Fight

Despite its losses in court, the protracted litigation benefited Beverly. After the administrative law judge found Beverly guilty of the alleged unfair labor practice charges in November 1997,¹²³ Beverly continued to fight over an appropriate remedy and whether the company and its Pennsylvania subsidiary qualified as a single employer.¹²⁴ In 1999, the judge found in favor of the General Counsel, holding that Beverly acted as a single employer and ordered a companywide remedy.¹²⁵

The administrative law judge explained his rationale with regard to the union's 8(g) notice. He determined that the *Greater New Orleans* (also known as *Bio-Medical*) precedent has been "uniformly followed by the Board since 1979. [citations omitted] In light of the clear and consistent precedent set by *Bio-Medical* and its progeny, any change in this area is a matter for Board determination; and Respondents' recourse is at that level. [citation omitted] Applying existing policy, I find that the extensions of the strike notices satisfied the requirements of Section 8(g)."¹²⁶

¹²¹ *Id.*

¹²² Jim McKay, *Middle Man; Regional NLRB Chief Weighs 1,200 Cases a year, Sometimes Taking Heat for Siding with Unions*, July 28, 1996, POST-GAZETTE (Pittsburgh), at C-5.

¹²³ 335 NLRB at 672.

¹²⁴ *Id.* Beverly also appealed the NLRB's injunction requiring it to reinstate the nursing-home workers. The Third Circuit affirmed the injunction, and the U.S. Supreme Court denied Beverly's petition for certiorari. 142 F.3d 428 (3rd Cir. 1998), *cert. denied*, 525 U.S. 1121 (1999).

¹²⁵ 335 NLRB at 674-76.

¹²⁶ *Id.* at 670-671.

Beverly appealed the judge’s decision to the Board. Two years later, the board affirmed.¹²⁷ The Board found the seventy-one-hour delay did not violate 8(g), following the decision of the administrative law judge.¹²⁸ Beverly’s position failed to win even a single vote from the three-member panel that heard that case. In a partial dissent, member Peter Hurtgen, a Republican Board appointee, revealed his misgivings about the strike notice, but still went along. “[T]he extensions of strike notices on the part of the Union satisfied the requirements of 8(g), but only because of well-established Board precedent, cited by the judge, which apparently has not been questioned in any court decision.”¹²⁹

The Board’s decision set up Beverly’s appeal to the D.C. Circuit Court of Appeals. In its brief, the General Counsel demonstrated his continued commitment to a flexible interpretation of 8(g), dismissing Beverly’s “restrictive reading” of the statute.¹³⁰ The General Counsel argued that the company “misinterprets the statutory text, ignores established principles of statutory construction, and disregards legislative history and policy considerations.”¹³¹ In its brief, the union also went through a detailed analysis of the statutory construction, before reaching the same point as the General Counsel.¹³²

E. D.C. Circuit Reverses the Board

¹²⁷ *Id.* at 635-36.

¹²⁸ *Id.* at 636.

¹²⁹ *Id.* at 648, n.4. Hurtgen’s statement here is significant. He considered the so-called twelve-hour rule to be a matter of “well-established Board precedent.” *Id.* Thus, prior to *Alexandria*, the Board never gave any indication that it was considering overturning *Greater New Orleans*, making *Alexandria* a surprise. And this surprise served as a disservice to both labor and management, as neither side was able to assess the risks of its conduct.

¹³⁰ Brief for the National Labor Relations Board at 19, *Beverly Health & Rehab. Servs. v. NLRB*, 317 F.3d 316 (D.C. Cir. 2003) (No. 01-1405) (on file with author).

¹³¹ *Id.* at 20.

¹³² Brief for the Service Employees International Union, *Beverly Health & Rehab. Servs. v. NLRB*, 317 F.3d 316 (D.C. Cir. 2003) (No. 01-1405) (on file with author).

The court, however, reversed the Board’s decision and faulted the Board’s reliance on *Greater New Orleans*, relying primarily on the principles outlined in Supreme Court’s opinion in *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*¹³³ In particular, the court argued that the Congress’ “unambiguously expressed intent” precluded the Board’s interpretation.¹³⁴

In its ruling, the court determined the statute’s ten-day notice requirement was clear on its face.¹³⁵ “The meaning of this mandatory language could not be plainer or the Congress’s intent in enacting it clearer. The notice must provide ten days notice of a strike specifying the date and time it is to occur.”¹³⁶ The court then concluded neither the original notice nor the “extension” complied with the statute.¹³⁷ Finally, the court found the notice did not fall under the statutory exception, which allows an extension with the written agreement of both parties.¹³⁸

The court also rejected the Board’s argument that the statute remained ambiguous because the statute did not expressly preclude a unilateral extension.¹³⁹ “If Congress had intended to allow either party to extend the notice unilaterally, it could easily have said so – but it did not.”¹⁴⁰

Following the decision, the union appealed the decision to the full court, emphasizing the panel’s departure from the legislative history.¹⁴¹ “It is hard to imagine a case in which the

¹³³ 317 F.3d at 321.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Brief II for the Service Employees International Union, *Beverly Health & Rehab. Servs. v. NLRB*, 317 F.3d 316 (D.C. Cir. 2003) (No. 01-1405) (on file with author). The NLRB’s General Counsel declined to join the appeal or file for certiorari. Traditionally, the Board has been conservative about appealing cases to the Supreme Court. The Board does not generally petition for certiorari without a circuit split or a strong dissent from an appeals court. As a result, in a typical year, it would be unusual for more than one or two cases to reach the Supreme Court.

legislative history provides clearer ‘countervailing indications’ to the construction adopted by the panel. If the panel’s reading of the text is allowed to stand, the clear and explicit answers to ‘the precise question at issue’ provided by the appropriate committees in both houses will be rejected contrary to the law of this Circuit.”¹⁴² The full panel declined to hear the case.¹⁴³

In addition to the appeal, the AFL-CIO and SEIU sent information about the effect of the decision to its members, alerting them not to rely on the unilateral strike postponement approved by the legislative history and *Greater New Orleans*.¹⁴⁴ Labor organizations also said the ruling made it unclear whether delays of less than twelve hours would violate 8(g).¹⁴⁵ The Board itself soon settled these disputes, taking on both issues in *Alexandria Clinic*.

III. ALEXANDRIA CLINIC: THE BUSH BOARD GETS ITS SHOT

The Alexandria Clinic strike also grew out of a contentious contract dispute.¹⁴⁶ In March 1998, the Minnesota Licensed Practical Nurses Association won an election to represent the 38 licensed practical nurses and medical assistants at Alexandria Clinic in Alexandria, Minnesota, and a satellite clinic ten miles away in Oskasis.¹⁴⁷ The clinic provided a wide range of outpatient services, employing 170 people, including 28 physicians.¹⁴⁸

A. *The Union Rejects Contract and Votes to Strike*

¹⁴² *Id.*

¹⁴³ 317 F.3d 316, *rehearing denied*, 2003 U.S. App. LEXIS 6288, *rehearing en banc denied*, 2003 U.S. App. LEXIS 6287.

¹⁴⁴ Telephone interview with Craig Becker, *supra* note 15 (Oct. 22, 2003).

¹⁴⁵ *Id.*

¹⁴⁶ 339 NLRB No. 162, slip op. 1262, 1273. The Board’s decision includes a copy of the administrative law judge’s decision, which starts on page 1272.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

After about a year of negotiating, the two sides had failed to reach an agreement on a contract.¹⁴⁹ The union then filed unfair labor practice charges with the National Labor Relations Board, alleging the clinic had made disparaging remarks about the employees' skills and had engaged in surface bargaining by insisting on unacceptable contract provisions, including no just-cause protection for discipline, no ability to file grievances with an arbitrator, and an increase in hours to keep the same level of benefits.¹⁵⁰ After the Board dismissed the charges, the two sides remained unable to reach an agreement on the contract.¹⁵¹ In July 1999, the union voted down the clinic's last offer.¹⁵²

In August 1999, the clinic announced it was going to implement the contract offer, helping prompt the union's August 25 strike vote.¹⁵³ The employees decided they could not accept the offer and feared they would all be fired because the agreement contained no just-cause protection.¹⁵⁴ In an August 30 letter, the union notified the clinic that it planned to strike at 8 a.m., Friday, September 10.¹⁵⁵

In the week before the strike both sides made strike preparations.¹⁵⁶ The union met to discuss details, and the clinic hired replacements and held an off-site orientation session.¹⁵⁷ During this week, the union decided to begin the strike at noon.¹⁵⁸ The union claimed it picked

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1273-74.

¹⁵⁵ *Id.* at 1274.

¹⁵⁶ *Id.* at 1274-76.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 1275-76.

noon because it would be less disruptive to the clinic's operations and would allow more workers to join the strike.¹⁵⁹

B. Alexandria Clinic Challenges Delay and Fires Nurses

On September 10, the strike began around 11:50 a.m., as the union leaders notified members to walk off the job.¹⁶⁰ Shortly after, the clinic enlisted the replacement nurses, who had been waiting in the clinic's lounge, and assigned them to different stations.¹⁶¹ Ultimately, 22 of the unit's 38 members joined the strike.¹⁶²

On Monday, September 13, an attorney for the clinic sent the union a letter asking if there was a reason for the delay.¹⁶³ When the union defended the strike, responding that it gave proper notice, the clinic sent out termination letters to the nurses the following day.¹⁶⁴ Both sides filed charges with the NLRB.¹⁶⁵ The union claimed that its members had been discharged for protected activity, while the employer alleged that the union members had lost their protected status for failing to comply with 8(g).¹⁶⁶

The NLRB's Minneapolis regional office sought advice from Washington about how to proceed. In a November 1999 memo, the General Counsel advised the region to issue a complaint for improper discharge.¹⁶⁷ This led to four days of hearings before an administrative law judge.¹⁶⁸ The clinic's principal defense was that the strike violated 8(g).¹⁶⁹

¹⁵⁹ *Id.* at 1277.

¹⁶⁰ *Id.* at 1262.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1262-63.

¹⁶⁵ *Id.* at 1263.

¹⁶⁶ *Id.*

¹⁶⁷ *See* Operating Engineers Local No. 3 (Washoe Medical Center), *supra* note 55, at 3, n.11. The General Counsel, however, held the 8(g) charges in abeyance, pending the outcome of the discharge complaint. The General Counsel

D. Administrative Law Judge Reinstates Workers

The administrative law judge disagreed. In a long opinion, the judge relied on *Greater New Orleans*, quoting much of the decision.¹⁷⁰ He decided the union had substantially complied with provisions of 8(g) and termination would be an unduly harsh result.¹⁷¹ He denied reinstatement to one nurse who changed her voice-mail access code before going on strike, however.¹⁷² The decision set up an appeal to the Board.

In its appeal, the clinic continued to pursue its risky legal argument.¹⁷³ It attempted to blur the legal question – whether the union’s unilateral delay violated 8(g) – with the reason for the delay, suggesting the union delayed the strike to improve participation, not out of concern for patient care,¹⁷⁴ as the administrative law judge had found.¹⁷⁵ It buttressed this argument with a provocative e-mail from a union official to a nurse that suggested the union could go on strike at any time within seventy-two hours of the notice, implying that the union believed it could use the law opportunistically.¹⁷⁶ The board later quoted this e-mail in its opinion.¹⁷⁷

also noted the Board had not yet ruled on de minimis deviations from 8(g). The General Counsel’s office denied a Freedom of Information Act request for the Alexandria memorandum, citing the statute’s exceptions for pending litigation and intra-agency casehandling instructions. Letter from Jacqueline A. Young to Joel Mandelman (January 8, 2004) (on file with author).

¹⁶⁸ 339 NLRB No. 162 at 1272.

¹⁶⁹ *Id.* at 1263.

¹⁷⁰ *Id.* at 1272-1301.

¹⁷¹ *Id.* at 1299.

¹⁷² *Id.* at 1300.

¹⁷³ Brief for Alexandria Clinic at 1-2, 339 NLRB No. 162 (on file with author).

¹⁷⁴ *Id.* at 5-9.

¹⁷⁵ 339 NLRB No. 162 at 1298.

¹⁷⁶ *Id.* at 1262. Union representative Scott Kleckner sent this e-mail to union steward Joan Radil: “I faxed the strike notice to the Clinic today. It is effective at 8:00 a.m. on Friday, September 10th. We have the ability to go out within 72 hours after we say we will (72 hours after 8:00 a.m. on 9/10). This means that we can go out at 8:00; or just have everyone go out to lunch and not come back; or work as usual Friday, but not show up for Urgent Care Saturday – and have them wondering about Monday (when no one will come to work)! Think about what makes the most sense, and then we can firm up some plans.” *Id.* at 1262.

¹⁷⁷ *Id.*

In his reply brief, the General Counsel used a six-factor balancing test to assess the reasonableness of the strike.¹⁷⁸ The calculus included the length of the delay, its impact on the employer's strike preparations, the actual impact on patient care, the reason for the delay, the reason for not providing notice of the delay, and any other extenuating circumstances for the unannounced delay.¹⁷⁹ This approach reflects the General Counsel's continued support for a nuanced reading of Section 8(g), balancing Congress' objectives of continuity of patient care against safeguarding employees from losing their protected status in unwarranted situations.¹⁸⁰ Applying the test, the General Counsel argued that the strike was protected.

E. The Board Reverses ALJ and Abandons Greater New Orleans

The Board disagreed, delivering its most significant 8(g) opinion since *Greater New Orleans*. In an expansive ruling, the Board not only found that the four-hour delay violated 8(g), but also decided that the union could not unilaterally extend its strike deadline for up to seventy-two hours, overruling *Greater New Orleans*.¹⁸¹ In its 3-2 opinion, the Board adopted the approach of the D.C. Circuit, reversing the administrative law judge.¹⁸² “We find that the Union satisfied neither the ‘substantial compliance’ requirements as interpreted by the Board in *Greater New Orleans* nor the literal Section 8(g) requirements. We further find, upon reconsideration of the relevant statutory language and decisional law, that consistent with the District of Columbia Court of Appeals decision in *Beverly Health & Rehabilitation Services v. NLRB* [citation

¹⁷⁸ Brief for the National Labor Relations Board at 30-31, 339 NLRB No. 162 (on file with author).

¹⁷⁹ *Id.* at 30-31.

¹⁸⁰ *Id.* at 31.

¹⁸¹ 339 NLRB No. 162 at 1263.

¹⁸² *Id.*

omitted] Section 8(g) must be applied as it was written.”¹⁸³ In other words, the Board abandoned its “substantial compliance” standard for Section 8(g) cases.

In its discussion, the Board determined a strike can only be extended by the written agreement of both parties.¹⁸⁴ More broadly, the Board reviewed the statute’s history and found the notice requirement was designed to give health-care institutions sufficient notice to ensure for continuity of care.¹⁸⁵ The severity of the result for the employees did not receive mention.

In reaching its decision, the Board also relied on four unrelated 8(g) decision to argue for a plain-language interpretation of the statute.¹⁸⁶ By comparison, the Board portrayed *Greater New Orleans* as a rogue precedent that incorrectly relied on the legislative history.¹⁸⁷ “In our view, by relying on the legislative history to find that unilateral extensions of strike notices were permissible, the Board in *Greater New Orleans* effectively rewrote the third sentence of Section 8(g) to make its requirements discretionary rather than mandatory. *Beverly* took the right approach” regarding the statute’s unambiguous intent.¹⁸⁸ Nonetheless, the Board carved out an exception for strike delays caused by “an unanticipated medical emergency, and the employer unreasonably declined to grant an extension.”¹⁸⁹ The exception accounts for “the high public interest in uninterrupted health services.”¹⁹⁰

F. The Board Splits along Partisan Lines

¹⁸³ *Id.* The Board is not obligated to follow the holding of a federal appeals court, and in many cases it does not. A decision from the Supreme Court, however, would be binding on the Board.

¹⁸⁴ *Id.* at 1265.

¹⁸⁵ *Id.* at 1265-66.

¹⁸⁶ *Id.* at 1263-66. The Board quotes language from 222 NLRB 212, 227 NLRB 1630, 244 NLRB 586 and 621 F.2d 510 (2nd Cir. 1980).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 1265.

¹⁸⁹ *Id.* at 1267, n.17.

¹⁹⁰ *Id.*

The decision split the Board along partisan lines, drawing a sharp dissent from the Board's two Democratic appointees.¹⁹¹ The dissent criticized the majority's "mechanical approach" and argued that *Chevron* requires consideration not only of the statute's language but also its purpose, which is reflected in the legislative history.¹⁹² "The contrary result reached today would surely appall the Congress that enacted Section 8(g), even if it does not trouble the majority."¹⁹³ Then, after looking at the facts in the case, the dissent found the delay did not have any actual impact on patient care.¹⁹⁴

The dissent also questioned the Board's use of the unrelated case law.¹⁹⁵ "[N]one of the decisions cited involved the precise question posed here," the dissent noted.¹⁹⁶ "Obviously, statutory language may clearly answer some questions and leave others open to reasonable argument."¹⁹⁷

In a footnote, the dissent also raised the broader question about the decision's effect on 8(g) strikes, reflecting concern about the decision's impact on workers' leverage at the bargaining table.¹⁹⁸ "The 'unanticipated medical emergency' exception endorsed by the board is clearly much too narrow. Would it leave the purposes of Section 8(g) by exposing employees to discharge for a 30-minute delay necessitated by employees remaining at work after the appointed strike time to clean up their work areas or to complete medical procedures? What about 15, 10 or 5 minutes late due to simple discrepancies between the institution's time clock and employees'

¹⁹¹ *Id.* at 1268-72 (Liebman and Walsh, dissenting).

¹⁹² *Id.* at 1269.

¹⁹³ 339 NLRB 162, 12.

¹⁹⁴ *Id.* at 1271.

¹⁹⁵ *Id.* at 1270, n.3.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 1271, n.6.

watches?”¹⁹⁹ The dissent added: “[I]t is absurd to think to think that Congress intended to put employees’ jobs in peril simply because their union was not absolutely punctual.”²⁰⁰

The decision also drew attention in the trade press.²⁰¹ At a labor-law forum, NLRB Chairman Robert Battista called the termination of the nurses “regrettable,” but defended the decision.²⁰² “[H]ealth care institutions should not be left to intuit what a union is likely to do when an 8(g) notice to strike fails to commence at a scheduled time.”²⁰³

Perhaps even more so than *Beverly*, which cost more for the employer to litigate, *Alexandria* was more dangerous for the client. A violation would have exposed the small operation to considerable damages. The clinic’s attorneys, though, defended their position. In a brief to the Board, they argued that the strike violated even the “substantial compliance” standard established of *Greater New Orleans*.

The case roiled the community and received regular coverage in the local newspaper.²⁰⁴ Six weeks after the strike started, U.S. Senate candidate David Lillehaug, a former U.S. attorney, visited during his unsuccessful primary campaign for the Democratic nomination, calling the clinic’s decision to fire the nurses a “great injustice.”²⁰⁵ In December 1999, U.S. Senator Paul

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1270.

²⁰¹ See Joyce Cutler, *NLRB’s Battista Defends Ruling to Uphold Firing of Nurses Who Struck Four Hours Late*, DAILY LABOR REPORT, Sept. 9, 2003, at A-2.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ See, e.g., *infra* notes 205-06.

²⁰⁵ U.S. Senate candidate visits clinic picket line, ECHO PRESS (Alexandria, Minn.), Oct. 22, 1999, available at http://www.echopress.com/back_issues/99/1099/102299/news/front/3lillehaug.cfm.

Wellstone visited and offered to try to settle the dispute.²⁰⁶ "I wish I could just snap my fingers and get you back to work, but at least I will make phone calls, and appeals."²⁰⁷

The newspaper ran a follow-up story in 2001, discussing the status of the workers, who remained on strike.²⁰⁸ Union steward Joan Radil told the paper she had taken a job outside the nursing field.²⁰⁹ Others had also been forced to do the same.²¹⁰ "They have to make a living," Radil said.²¹¹ At least one nurse had to give up her residence and move in with friends.²¹²

G. Union Appeals Decision to Eighth Circuit

The case is still not resolved. After the Board's decision, the union appealed to the Eighth Circuit.²¹³ In its brief, the union argued that the administrative law judge's fact-finding should be given "great deference," and that the case law and legislative history support the judge's decision to reinstate the twenty-two nurses.²¹⁴

The Board's decision placed the agency's General Counsel in the somewhat awkward position of arguing the opposite side of the case. Now, the Board argued: the statute is clear on

²⁰⁶ Hollan Lommen, *Wellstone visits striking nurses*, ECHO PRESS (Alexandria, Minn.), Dec. 9, 1999, available at http://www.echopress.com/back_issues/99/1299/121099/news/front/wellstonea.cfm.

²⁰⁷ *Id.*

²⁰⁸ Hollan Lommen, *Nursing strike still unresolved*, ECHO PRESS (Alexandria, Minn.), June 15, 2001, available at <http://www.echopress.com/article.cfm?articleID=363F791B-60E8-11D5-935A00B0D0207452>.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² 339 NLRB No. 162.

²¹³ The case is docketed in the Eighth Circuit as No. 03-3306. The court heard oral arguments Oct. 21, 2004. But the Eighth Circuit's review is unlikely to change the outcome because of the deferential standard of review for Board holdings.

²¹⁴ Brief for Minnesota Licensed Practical Nurses Association at 3, 7, *Minnesota Licensed Practical Nurses Association v. NLRB*, No. 03-3306 (on file with author) [hereinafter MLPNA Brief].

its face; the legislative history and policy support a rigid application of the strike notice; and that its interpretation will prevent needless litigation about “substantial compliance.”²¹⁵

At any rate, the General Counsel says, the existing precedent is “beside the point” because the Board overruled *Greater New Orleans*.²¹⁶ The Board also disputes that the notice provision was the subject of well-established precedent. “While the General Counsel may have refused to issue complaints in certain cases, the Board has not been presented with the issue until the instant case.”²¹⁷

Not incidentally, the Board’s decision also helped lead to the decertification of the union. The Board’s Minneapolis office had delayed a decertification vote while the case was pending. After the Board issued its decision, though, the election went ahead. The employees voted thirty-nine to zero to decertify the union, delivering the clinic’s physicians a victory and showing the lingering effect of the firings.²¹⁸ In this case, the clinic not only terminated the union’s strongest supporters, but also helped sow union discontent among the workers who crossed the picket line.

IV. ANALYSIS: DECISIONS RAISE NEW QUESTIONS

A. *What Is de Minimis Now?*

The decisions still leave open several questions about the application of Section 8(g). Most obviously, the Board has not provided clear guidance about what qualifies as a *de minimis* delay. The Board’s decision shows that a four-hour delay violates Section 8(g), but does not make it clear whether, for example, a shorter, one-hour delay would violate the statute.

²¹⁵ Brief for the National Labor Relations Board, *Minnesota Licensed Practical Nurses Association v. NLRB*, No. 03-3306 (on file with author).

²¹⁶ *Id.* at 34.

²¹⁷ *Id.*

²¹⁸ Certified Election Results, NLRB Minneapolis Regional Office (Dec. 2003) (on file with author).

B. How Will the Statute Be Applied in Hospitals?

The Board also has not made it clear how Section 8(g) might apply to strikes in larger, more complex medical settings. The *Beverly* strike took place at nursing homes, and *Alexandria*, at a clinic. A large, acute-care hospital, though, would present a different situation. In that situation, it is not clear what medical exigencies the Board would consider in evaluating a delay. The Board might be also confronted with how to treat workers who joined the strike after it began. Presumably, those workers would be covered by the union's notice, but the case law is not explicit.

C. Can Unions Ever Strike Without Notice?

Other questions also remain. One Board decision suggests strikes protesting flagrant unfair labor practices may be exempt from Section 8(g) notice.²¹⁹ In *NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, thirty-four health-care workers struck to protest the dismissal of eleven of their colleagues.²²⁰ The Board ordered reinstatement and backpay, concluding that the notice requirement did not apply to the strike under *Mastro Plastics Corp. v. NLRB*.²²¹ On appeal, however, the Second Circuit declined to enforce the Board's order, finding the strike notice failed to satisfy Section 8(g), and the strike did not qualify for the *Mastro Plastics* exception.²²² First, the court concluded that an oral notice of a one-day delay in the strike did not satisfy Section 8(g).²²³ Second, the court found the strike did not fall under *Mastro Plastics* because the union delayed its unfair-labor-practice strike so that its

²¹⁹ 897 F.2d at 1243.

²²⁰ *Id.* at 1242.

²²¹ *Id.* at 1243. *See also* *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956) (holding that the statutory 60-day strike notice requirement does not apply if the employer commits a flagrant unfair labor practice.)

²²² *Id.* at 1243-44.

²²³ *Id.* at 1246-47.

workers could collect their paychecks, not in protest of an unfair labor practice.²²⁴ In dicta, however, the court said it was skeptical that the statute’s legislative history could be used to exempt a strike protesting a flagrant unfair-labor-practice violation.²²⁵ “We are reluctant to conclude that the full Congress intended to sacrifice the safety of the sick or dying to help labor organizations at health care organizations avoid a ten-day delay in going on strike.”²²⁶

D. Can the Statute Be Interpreted Differently?

Separately, the union attorneys in *Alexandria* have raised a different interpretative issue on appeal. They suggest that Section 8(d) prohibits workers from striking before the notice takes effect, but does not prohibit short delays.²²⁷ The delays, the union argues, are protected by Section 8(d), which says employees acting under 8(g) lose their protected status when striking “within” the notice period.²²⁸

E. Will Employers Consent to Delays?

Then there are practical questions about an employer’s willingness to consent to a delay. In many industrial settings, an employer presumably would be eager to delay a strike. It’s not clear, however, whether this would be true in a health-care setting, since the ten-day notice effectively forces the employer to make at least some contingency plans for a strike. In *Alexandria*, for example, the clinic had replacement nurses waiting in the lounge. Similarly, in *Beverly*, the company had made plans to staff its facilities. In other situations, however, it may not be realistic for the employer to replace all of its employees or continue normal operations.

F. Do the Decisions Hurt Low-Wage Workers More?

²²⁴ *Id.* at 1248.

²²⁵ *Id.* at 1247-48.

²²⁶ *Id.* at 1248.

²²⁷ MLPNA Brief, *supra* note 214, at 6-7, 9-13.

²²⁸ *Id.*

The more stringent reading of Section 8(g) may also have a disproportionate impact among health-care workers, posing the greatest risk to lower-paid, less-skilled workers. *Beverly* involved nursing-homes aides; *Alexandria*, licensed practical nurses. Arguably, registered nurses and medical technicians would be more difficult to replace, making an employer more likely to extend a strike deadline for those workers and less likely to file a Section 8(g) charge. As a result, strict application of Section 8(g) may have a greater effect on workers who already have less leverage than their better-paid health-care counterparts.

G. Will Unions Act More Cautiously?

Finally, the decisions will force unions to be more cautious. Smart unions will almost certainly avoid close calls. Kobell, the NLRB's Pittsburgh Regional Director, suggests unions that do not receive consent to extend a strike deadline will start "by the stroke of the clock."²²⁹ As a result, he said, he does not expect the decisions to spark a rash of litigation.²³⁰ Instead, the two decisions have just recalibrated the law. "I think both these cases post the speed limit. That's what they do."²³¹ He added: "All right, the speed limit has been reduced. It's now a school zone: fifteen miles an hour."²³²

CONCLUSION: A BLOW TO HEALTH-CARE WORKERS

In two decisions, the D.C. Circuit and the NLRB have eliminated the substantial compliance standard that had governed Section 8(g) since its adoption in 1974. The decisions mark a break from the case law and the legislative history. In *Beverly*, the decision cost nursing-home aides more than \$1 million in backpay. In *Alexandria*, the ruling cost 22 nurses their jobs.

²²⁹ Telephone interview with Gerald Kobell, Regional Director, NLRB's Pittsburgh Office (February 18, 2004).

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

For health-care workers generally, *Beverly* and *Alexandria* have helped limit the value of a strike threat, one of the union's most powerful negotiating tools. Before *Alexandria*, unions had the ability to extend a strike deadline unilaterally during the final stages of contract negotiations. Now, unions can only extend that deadline with the employers' consent or issue a new ten-day notice, cutting their leverage during last-minute bargaining. As a result, *Beverly* and *Alexandria* weaken the bargaining power of health care workers, many of whom are already low paid. More broadly, it may strengthen the hand of employers using particularly aggressive anti-union tactics, as they try to undermine unions at their health-care facilities.

The *Alexandria* decision also has political significance. While Section 8(g) cases are not frequently litigated, the case gave the Board an opportunity to demonstrate its approach to protecting collective bargaining rights. Chairman Battista's public remarks only served to reinforce the message that the Bush Board will not be sympathetic to unions.²³³

As a legal matter, somewhat ironically, the rulings are likely to continue to spur litigation. *Alexandria*, for example, already has been appealed to Eighth Circuit. Furthermore, the abrupt change in law has created the uncertainty the Board's majority purports to avoid, as its interpretation represents a significant departure from the legislative history and past practice. The Board also has not determined what qualifies as a *de minimis* violation, leaving this issue open to litigation.

²³³ Oakland attorney Bill Sokol called the *Alexandria* decision "small potatoes in the great scheme of things, but as good an example as you could ask for of how the state acts as a willful accomplice even in the most picayune matters." He said unions often have to "wiggle a little on the 10 days [be]cause of weather, unexpected external news events, [and] conflicting schedules of speakers and leaders." E-mail from Bill Sokol, partner, Van Bourg, Weinberg, Roger & Rosenfeld, Oakland, Calif., to Joel Mandelman (Dec. 6, 2003, 15:22 CST) (on file with author).

Since the decision, he has advised unions about the importance of complying with the precise terms of the statute because the consequences are so serious. "It's about people's jobs," he said. "It's about their survival." In one fall 2003 case, he said, he advised the union to send a new ten-day notice because the earlier notice listed the incorrect address of the employer. Telephone interview with Bill Sokol, *supra* note 13 (Dec. 11, 2003).

Sokol and others also said they see the decision as a message to unions that a new sheriff has arrived at the NLRB. *Id.*; E-mail from Sokol.

