Alexandria Clinic, P.A. *and* Minnesota Licensed Practical Nurses Association. Case 18–CA–15371

August 21, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, WALSH, AND ACOSTA

This case raises an issue under Section 8(g) of the Act, which requires that labor organizations give health care institutions 10 days advance written notice of an intent to strike. More precisely, the question presented herein is whether the judge correctly found that the Respondent violated Section 8(a)(3) and (1) by discharging its nursing employees because there was a failure to comply with the literal requirements of Section 8(g), i.e., there was a delay in the start of the economic strike of 4 hours after the time set forth in the Union's 10-day notice to the Respondent.[1]

The National Labor Relations Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The Respondent operates a health clinic in Alexandria, Minnesota. The Charging Party Union, since winning a Board-conducted election in March 1998, has been the exclusive bargaining representative of the Respondent's licensed practical nurses and medical assistant employees (nurses).

Negotiations for an initial contract between the parties began soon after the Union's certification. After several meetings, the Respondent submitted a final contract offer to the Union, which the nurses considered at an August 25, 1999 meeting.[2] The nurses rejected the offer and voted to strike.

In accordance with 8(g)'s requirement of 10 days written notice by a union of the date and time of its intended strike,[3] the Union informed the Respondent by letter dated August 30, that it would strike the clinic on September 10, starting at 8 a.m. The Respondent, which received this letter no later than August 31, posted a notice to employees on that date announcing that the Union had served notice of its intent to strike, picket, and leaflet Respondent commencing at 8 a.m. on September 10.

After the Union served its 8(g) strike notice on Respondent, organizer Kleckner e-mailed employee organizing committee member Radil that:

> I faxed a 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 am on 9/10). This means that we can go at 8:00; or just have everyone go to lunch and not come back; or work as usual on 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.

Thereafter, on September 7, members of the Union's negotiating committee made a change to the commencement time of the strike from 8 a.m. to noon on September 10. The Union was aware of this change. It was also decided that neither the nurses nor the Respondent was to be notified of this change. Rather, employees were told that someone would come to get them when it was time to strike.

The nurses who were scheduled to start work at 8 a.m. on September 10 reported for work. Because they did so, the Respondent placed the contingent of temporary nurses (that it had hired to replace the striking nurses) in a lounge area in the clinic, rather than assign them work.

The unit nurses carried out their regular duties during the morning of September 10. Shortly before noon, they were individually notified that the strike was about to start and that they should gather outside the clinic to conduct picketing activity. The 13 working nurses (12 at the main clinic and 1 at a satellite facility) walked off the job. Eight other nurses, whose shifts began after noon, did not report for work. When the walkout commenced, the Respondent assigned to the replacement nurses, who were still in the clinic lounge, the unit nurses' work.

On September 13, the Respondent wrote the Union seeking an explanation as to "why the Union chose to delay the commencement of the strike and why the Union did not give the clinic advance notice of this change in plan." The Union replied by letter the next day, stating that "[u]nder statute, we gave the proper notice to

[1] On June 16, 2000, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel and Charging Party filed answering briefs. The Respondent then filed a reply brief.

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

[2] All dates are in 1999.

[3] Sec. 8(g) provides in pertinent part that:

> A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing 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.

strike and went out on strike within the allowable time." Asserting that this response was legally inadequate, the Respondent wrote the striking nurses that their walkout was "in violation of the notice provisions of Section 8(g)" and that their employment was, therefore, terminated.

The Judge's Decision

The judge found that the Respondent violated Section 8(a)(3) by terminating the striking employees. The judge determined that, despite the strike's delay of 4 hours beyond the specified hour of 8 a.m. set forth in its written notice to the Respondent, the Union's noon-time strike on September 10 did not violate Section 8(g). In reaching this result, the judge relied on *Greater New Orleans Artificial Kidney Center*[4] where the Board held that Section 8(g) was not to be "rigidly applied" in accordance with its statutory language which provides for extensions of strike time by "written agreement of both parties." In that case, the Board reviewed the legislative history of Section 8(g) and determined that Congress both contemplated and approved a union's unilateral extension of its 10-day notice of a strike's commencement, provided, however, that the delayed start did not exceed 72 hours and the union furnished 12 hours supplemental notice of the new start time.[5] Because the union in *Greater New Orleans* provided the employer with 12-hours supplemental notice that it was extending the time set forth in its initial 10-day notice for the commencement of the strike, and because the new strike time was within 72 hours of the originally noticed strike time, the Board found that the union was in "substantial compliance" with Section 8(g) and that the employer was, therefore, not privileged to discharge employees whom it contended had engaged in a strike in violation of Section 8(g).

Applying this rationale to the instant case, the judge found that, despite the Union's failure to provide 12-hour supplemental notice that the strike's commencement time had been extended—which 12-hour notice the Board had specifically relied upon in *Greater New Orleans* in finding "substantial compliance"—no supplemental notice was necessary because the "strike and picketing began within a reasonable time after the scheduled time [and] . . . the Union was in substantial compliance with Section 8(g)." Accordingly, the judge concluded that the Respondent violated Section 8(a)(3) by discharging the nurses for engaging in the strike and picketing. We disagree.

We find that the Union satisfied neither the "substantial compliance" requirements as interpreted by the Board in *Greater New Orleans* nor the literal 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*, 317 F.3d 316 (2003), Section 8(g) must be applied as it was written. Accordingly, we reverse the judge and dismiss the complaint.

Discussion

We view this case as covered by the clear language of Section 8(g). Section 8(g) requires that the union give 10 days notice of the date and time of the strike. The last sentence of Section 8(g) says that the 10-day "notice, once given, may be extended by the written agreement of both parties." Thus, a union cannot unilaterally extend the commencement time of its strike. To the extent that the Board's decision in *Greater New Orleans* holds to the contrary, we overrule it.[6]

Until 1974, health care employees employed by nonprofit hospitals were not entitled to collective-bargaining rights under the Act. Congress amended the Act that year by extending the Act's jurisdiction to cover all nonprofit health care institutions, thereby bestowing upon

[4] 240 NLRB 432 (1979).

[5] Specifically, the cited legislative history provided that "[S]ince the purpose of the [8(g)] notice is to give a health care institution advance notice of the actual commencement of a 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." S. Rep. at 4; H. Rep. at 5. As further stated, "[W]here the notice was mailed in timely fashion, and the union was not responsible for the delay, or where under such circumstances, the employer has been provided with more than 12 hours actual notice, then the failure to comply with the 12-hour notice seems excusable." Leg. Hist. at 409–410.

[6] We also correct two errors underlying the judge's legal analysis that are unrelated to the issue presented by the decision in *Greater New Orleans*. First, we do not agree with his finding that there are separate standards for evaluating the lawfulness of an 8(g) strike—one standard applicable where strikers have not been discharged, and a different standard when, as in the instant case, the strikers have been discharged. As the Respondent correctly observes, there is nothing in the legislative history or case law interpreting Sec. 8(g) that supports application of these different standards. In recognition of this fact, the General Counsel joins the Respondent in urging rejection of the judge's "two tiered system for evaluating alleged violations of Section 8(g)." See GC Answer Br. at 28–29.

Second, in direct contravention of the specific language of Sec. 8(g) and case precedent, the judge reasoned that because unrepresented health care employees are not covered by Sec. 8(g)—and, thus, are protected from discharge under Sec. 7 if they strike without notice to their employer—the same protection should not be denied the nurses here merely because they are represented by the Union. Congress, however, deliberately legislated this difference in treatment between represented and unrepresented health care employees with respect to the requirements of an 8(g) notice. *Bethany Medical Center*, 328 NLRB 1094 (1999). Accordingly, as the General Counsel again concedes on brief (Br. at 29–30), we must reject this finding by the judge.

those employed by such institutions the same collective-bargaining rights possessed by employees in other industries. But accompanying this extension of the Act's protections was a tradeoff: to address the concerns of health care business groups who feared that extending coverage to this new group of employees might lead to an increased disruption in health care services caused by labor disputes, Section 8(g) was added to the amendments in order to give the health care institutions sufficient advance notice of a strike or picketing to permit timely arrangements for continuity of patient care. *Hospital Employees District 1199, (United Hospitals of Newark),* 232 NLRB 443 (1977); *Walker Methodist Residence,* 227 NLRB 1630, 1631 (1977).

Since its enactment, the Board and courts have found that the text of Section 8(g) is clear and unambiguous and have therefore applied that text as written. For example, in one of its earliest decisions issued following passage of the health care amendments, the Board, in *Parkway Pavilion Healthcare,*[7] set out the following reasons for finding that Section 8(g) must be read literally:

> [T]he 8(g) notice requirement is clear and absolute. First, it is mandatory rather than discretionary—the statute provides that "a labor organization . . . *shall*" give written notice. Second, it applies regardless of the nature of the picketing involved – notice must be provided in advance of "any strike, picketing or other concerted refusal to work at any health care institution . . . ." Finally, Section 8(g) is devoid of any modifying language respecting the character of the picketing, its objectives, or the type of economic pressures generated. Id. at 212. [Emphasis in original.]

The issue in *Parkway Pavilion* was whether an 8(g) written notice requirements applied not only to primary picketing, but to sympathy picketing as well. Applying the above guidelines, and concluding that "Congress intended that the 10-day notice provision of Section 8(g) be interpreted according to its literal meaning" (222 NLRB at 213),[8] the Board found that 10-day notice was required in situations involving sympathy strikes or picketing.[9]

In *Walker Methodist Residence*, supra, the Board similarly held that 8(g) should be interpreted according to its literal language. In *Walker*, the employer argued that Section 8(g) applied to work stoppages in which no labor organization was involved. Although there was some legislative history indicating that the provision applied both to individuals and to labor organizations, the Board noted that "Section 8(g) appears on its face to apply only to striking or picketing by a labor organization." Citing, inter alia, *Parkway Pavillion*, discussed above, for the proposition that "the Board has examined the legislative history and found that the section should properly be interpreted according to its clear language," the Board found that Section 8(g) was applicable only to strikes or picketing involving a labor organization. Id. at 1631. The Second Circuit reached the same result in *Montefiore Hospital & Medical Center v. NLRB*, 621 F.2d 510, 514 (1980). In rejecting the employer's reliance on legislative history to support its argument that the 8(g) notice requirements should apply to strikes by unrepresented employees as well as unions, the court held that "we are here confronted with one whose language is crystal clear. We cannot disregard the 'ordinary meaning of plain language . . . .'" (Citation omitted.)

In *Retail Clerks Local 727 (Devon Gables Health Care Center),* 244 NLRB 586 (1979), the Board examined another provision of Section 8(g) and concluded that the literal terms of the section applied. At issue in *Retail Clerks Local 727 (Devon Gables Health Care Center)* was whether the union had supplied the requisite 10-day written notice when it *mailed* its notice to the employer 10 days before the planned strike. The Board determined that this notice, which was received 9 days before the scheduled picketing, did not satisfy Section 8(g). Rejecting the union's argument that 9 days notice constituted substantial compliance, the Board adopted the judge's conclusion that "in light of the literal construction of Section 8(g) decreed by the Board, the Respondent's picketing violated the Act as alleged."

Finally, in *Hospital Workers Local 250 (Affiliated Hospitals of San Francisco),* 255 NLRB 502 (1981), the Board adopted the judge's finding that 8(g) language must be read literally. In *Hospital Workers*, the union's initial written strike notice was deficient in that it omitted both the date and time of its planned strike. As stated by the judge, "Section 8(g) of the Act 'should properly be interpreted according to its clear language.'" Id. at 504

[7] 222 NLRB 212 (1976).

[8] Although the Board and some courts have employed the term "interpret" when setting out their reading of Sec. 8(g), we find that the use of this term can be misleading when, as here, Sec. 8(g) is clear and unambiguous on its face. The verb "interpret" means "to explain or tell the meaning of translate; elucidate." Webster's New Collegiate Dictionary 440 (13th ed. 1961). Obviously, when a text is clear and unambiguous, there is no need to "explain," "translate," or "elucidate" its meaning.

Similarly, there is no need to resort to legislative history as a reference to what Congress intended when it enacted clear and unambiguous legislation. When the words of the text are clear and unambiguous, the text need not be "interpreted" to understand its plain meaning. The proper understanding of the text is to be found in the plain language of the text itself.

[9] Although the union did not commence its strike at the precise time specified in their 8(g) notice, there is no evidence that this was alleged as violative of the 8(g) requirements.

quoting *Walker Methodist*, supra at 1631. The Board and judge likewise found deficient the union's second letter, sent 4 days later, announcing a strike set to commence 7 days after the second notice. In defending against the complaint allegation that it violated Section 8(g), the union argued that the combined effect of its two letters constituted "reasonable steps" to satisfy its statutory 10-day notice obligation. Id. at 504. The judge, affirmed by the Board, rejected this argument because:

> [i]ts acceptance would oblige the Board to delete the express commands of the second sentence of Section 8(g) of the Act by, in effect, subtracting from it the requirement that the date and time of commencement be recited in the notice. This it cannot do . . . . [T]he Board is not free to rewrite the second sentence of Section 8(g) of the Act to make its requirements discretionary, rather than mandatory. Id.

In stark contrast to the foregoing Board and court precedent, which applied the 8(g) provisions presented as written, in *Greater New Orleans*, the Board relied on certain language from the legislative history[10] to find that Section 8(g) was not to be "rigidly applied . . . ." 240 NLRB at 435. Applying that view to the third sentence of Section 8(g), the Board held that, notwithstanding that provision's allowance of extensions of 10-day strike notices "by the written agreement of both parties," extensions could also be accomplished "by unilateral notification to the employer . . . ." Id. We disagree. 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. Just as the Board in *Affiliated Hospitals* refused to do this with respect to the second sentence of Section 8(g), we refuse to do it with respect to the third sentence.

We need look no further than the language of the statute itself to conclude that unilateral extensions of strike notices are not permissible. In agreement with the D.C. Circuit, which recently addressed the precise issue presented here, we find that 8(g)'s third sentence clearly and unambiguously mandates that a written agreement of both parties is the "sole statutory exception" to the requirement that a strike commence at the time and date set forth in the 10-day notice. See *Beverly Health & Rehabilitation Services v. NLRB*, 317 F.3d at 321.

In *Beverly*, the union initially sent effective written notice to the respondent, more than 10 days in advance, of the date and time that it intended to go on strike against it. Thereafter, however, the union sent the respondent a second notice [2 days before the scheduled strike] purporting to postpone commencement of the strike by 71 hours. After the strike began as specified in the second notice, the respondent discharged the strikers for engaging in an unlawful strike. The court agreed with the respondent that the strike was unlawful under Section 8(g). Rejecting the Board's argument that the respondent's defense failed under *Greater New Orleans*, the court held that "[S]ection 8(g) manifests an "unambiguously expressed intent" that precludes the Board's interpretation." 317 F.3d at 320. As the D.C. Circuit explained:

> Section 8(g) expressly states that before commencing a strike at a health care institution a union "shall, not less than ten days prior to such action, notify the institution in writing" and that the "notice shall state the date and time that such action will commence." The meaning of this mandatory language could not be plainer or the Congress's intent in enacting it clearer. Id. at 321.

The court further concluded that the "plain meaning of the statute" cannot be overcome simply because the statute "does not expressly state that agreement of the parties is the *only* means to obtain an extension." Id. (Emphasis in original.) In so holding, the court rejected the express premise of the Board's finding in *Greater New Orleans* that "the cited language does not expressly provide that a written agreement of the parties is the exclusive manner of extending an initial strike date." 240 NLRB at 434. We reject it for the same reason that the *Beverly* court did:

> No such express provision is necessary. If the Congress had intended to allow either party to extend the notice unilaterally, it could easily have said so—but it did not. Instead the Congress carved out but a single express exception—when both parties consent in writing—an exception that would be unnecessary if either party could unilaterally extend the notice at will. Id.

Accord: *NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council*, 897 F.2d 1238, 1246 (2d Cir. 1990) (union's oral unilateral notice extending by 1 day its 10-day strike notice "not enough [because] . . . [S]ection 8(g) makes clear that notice, or any extension of notice, must be in written form").

Since the text of the statute is the law and that text is crystal clear and unambiguous, no further discussion is necessary. However, we hasten to point out that the policy considerations underlying Section 8(g) are effectuated by applying Section 8(g) as written. The purpose of Section 8(g) is to provide a mechanism to insure that a health care institution be apprised of any planned picket-

[10] See fn. 5 above and accompanying text.

ing or work stoppage sufficiently in advance of any such actions in order to take steps that it may deem necessary to protect the continuity of the health care services it renders to its patients. *Walker Methodist Residence*, supra at 1631. Matters such as "[p]atient needs, staffing requirements, and supplies must all be examined . . . [as well as] the ability of strike replacements to cross the picket lines, and the willingness of nonstriking personnel to work behind the picket line." *Parkway Pavilion*, supra at 213. In this respect, Congress chose to treat the health care industry uniquely because of its importance to human life, cognizant of the possibility that "disruption in patient care of even a few hours may cost lives." *Washington Heights*, supra at 1247. Consequently, determining the lawfulness of any work stoppage without adequate notice to a health care institution must take into account the high public interest in uninterrupted health services.

These important policy concerns would be ill-served by revising the text of Section 8(g) to permit unilateral extensions of strike notices which, by their inherent nature, carry the potential element of surprise, disruption, and jeopardized patient care. In fact, this potential element was fully realized in the instant case by the nurses' unilateral decision, made 3 days before the scheduled strike date, to delay the strike start time by 4 hours, and to deliberately withhold from the Respondent the vital information as to when, if at all, the strike would occur.[11] This result, which essentially forces health care institutions "to play a guessing game with respect to the welfare of its patients,"[12] is completely at odds with the statutory objective. In light of Congress' concern that "sudden, massive strikes could endanger the lives and health of patients in health care institutions,"[13] the burden cannot be placed on those institutions to anticipate when a work stoppage might occur. A wrong guess, with its potential adverse effect on patient care, is too critical a matter to be left to chance or to the health care institution's ability to intuit what a union likely will do when the 8(g) notice strike fails to commence at the scheduled time.

Finally, we find that strict adherence to the statutorily-mandated requirement of written bilateral consent will have the beneficial effect of eliminating, in the future, the kind of needless uncertainty and concomitant litigation generated in this and other Board and court cases due to the application of what we regard as the imprecise and ambiguous "substantial compliance" standard of *Greater New Orleans*. As discussed above, this *Greater New Orleans* standard of allowing unions leeway of up to 72 hours to postpone commencement of a strike beyond its originally noticed strike time, provided 12 hours supplemental notice is given of the new start time, has never been entirely clear. For example, when the postponement is between 12 and 72 hours, the standard would appear to require that 12 hours supplemental notice must always be given, and that it be given in advance of the original start time of the strike so that the health care institution is aware when the strike will begin. However, *Greater New Orleans* leaves open the issue of what notice, if any, is required if the strike is less than 12 hours after the scheduled time. As the Board said, a union's notice will be sufficient "*at least* in circumstances in which the postponement of the strike is between 12 and 72 hours of the time set forth in that initial notice and where there is at least 12 hours advance notice given to the employer of the postponement." (Supra at 435.) That was the situation in *Greater New Orleans*. However, in the instant case, the delay was less than 12 hours and the Union gave no notice of the delay. The Union apparently thought that this was permissible. Indeed, it appears that this interpretation is what the Union urges here in defense of its 4-hour strike delay. As discussed above, in response to the demand by the Respondent on September 13 for an explanation for its delayed strike without notice of its change in plans, the Union replied that it gave the proper notice, i.e., its 10-day notice alone was sufficient. Consistent with this position, the Union argued in this proceeding that "a 12-hour notice of actual commencement does not apply to delays of a strike of less than 12 hours." (Answer Br. at 12.)

All of this confusion and misunderstanding is avoided by adhering to the statutorily-mandated requirement of written bilateral consent of the parties. This requirement is unambiguous, easily understood, and less likely to spawn litigation regarding its application. Indeed, even were this requirement not statutorily mandated by Congress, it is clearly superior to the ephemeral "substantial compliance" standard of *Greater New Orleans*.

Our dissenting colleagues say that the statute is unclear. We disagree. Section 8(d) of the Act states that "an employee who engages in a strike within the appropriate period specified in subsection (g) of this section shall lose his status as an employee."[14] Our colleagues

[11] This was precisely what the Union counseled the nurses when it informed them that they could strike within 72 hours of the written 8(g) notice: "[W]e can go at 8:00; or just have everyone go to lunch and not come back; or work as usual on Friday, but not show up for Urgent Care Saturday—and have them wondering about Monday (when no one will come to work)!"

[12] *Nurses ANA (City of Hope)*, 315 NLRB 468 (1994) (new 10-day notice required after union resumes picketing after 3-week hiatus).

[13] *Walker Methodist Residence*, supra at 1631.

[14] The pertinent portion of Sec. 8(d) provides:

state that there is an ambiguity as to what "appropriate period" means. There is no such ambiguity. As made clear in Section 8(g), the "appropriate period" is the waiting period after a notice that gives the date and time for a strike. Obviously, if there is no notice, there can be no lawful strike. Concededly, in the instant case, there was a notice and the employees did not strike within the period set by the notice. However, the employees did strike thereafter, *and there was no notice with respect to that strike*. Under the statute, a union that wants to strike after the original notice period has two choices. It can give a new notice and wait a new 10 days, *or* it can obtain the written consent of the employer to strike in less than a new 10 days. The Union here did neither. In sum, the strike was without notice, and it was therefore unlawful.

Our colleagues also rely upon *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). In that case, the Supreme Court dealt with "an ambiguity" in certain language of Section 8(d), i.e., whether a strike to protest unfair labor practices was a strike "to terminate or modify" a contract because the strike was conducted within the 60-day waiting period after notice. The Court construed the language to answer the question in the negative. By contrast, the instant case involves different language, as to which there is no ambiguity.

Our colleagues also rely on legislative history, the alleged absence of harm to the patients, and their own notions of what is reasonable. Our obligation is to honor the statute as it is written. That is what we have done.[15]

Applying the statutorily mandated requirement here, we conclude that by extending the start time of its strike without the written agreement of the Respondent, the strike was unlawful under Section 8(g). We acknowledge that this conclusion results in the nurses losing their protected employee status under Section 8(d) for engaging in an unlawful strike, and subjects them to lawful discharge. See *Betances Health Unit*, 283 NLRB 369, 370 (1987). However, the statutory language is clear. Further, even *Greater New Orleans* did not teach that there could be no notice at all for a postponement of less than 12 hours. Indeed, the judge found that the "nurses were misled by the union regarding what is permissible under the notice requirements."[16] Pursuant to that misleading advice, the nurse leadership, knowing for a full 3 days that the strike was not going to commence at the time specified in their strike notice, purposely kept secret from the Respondent the strike's new start time.

Accordingly, for all the reasons discussed above, we find that by discharging the nurses for engaging in a strike without satisfying the notice requirements of Section 8(g), the Respondent did not violate Section 8(a)(3) and (1). Therefore, we shall dismiss the complaint in its entirety.[17]

ORDER

The National Labor Relations Board orders that the complaint be dismissed in its entirety.

MEMBER ACOSTA, concurring.

This case concerns an economic strike that began 4 hours after the time set forth by the Union in its 10-day notice provided pursuant to Section 8(g) of the Act. The Employer subsequently discharged its nursing employees for participating in the strike without giving the required 8(g) notice. For the reasons discussed below, I agree with my colleagues that Section 8(g) required the Union to begin the strike on the date, and at the time, stated in its notice, unless the parties agreed in writing to an extension. Because the Union did not obtain such an agreement, the strike was not protected and the Employer was entitled to discharge the striking employees.

In my view, the language of the statute is clear and mandates this result. Section 8(g) of the Act expressly states that a labor organization, before commencing a strike at a health care institution, "shall, not less than 10 days prior to such action, notify the institution in writing" and that the "notice shall state the date and time that such action will commence." The final sentence of the provision states: "The notice, once given, may be extended by the written agreement of both parties."

Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of Section 8, 9, and 10 of this Act.

[15] Our colleagues cite a selected portion from the Committee Reports on the 1974 amendments to the Act. The reports also state that the "*purpose of the notice is to give a health care institution advance notice of the actual commencement of a strike or picketing.*" S. Rep. 93-766, 93d Cong., 2d Sess. at 5, as reprinted in *Legislative History of the Coverage of Nonprofit Hospitals under the National Labor Relations Act, 1974*, at 11 and 273 (1974). (Emphasis added.) That is exactly what the majority finds here. However, we need not resort to the legislative history when, as here, the statute is clear and unambiguous on its face.

[16] See fn. 29 of the judge's decision.

[17] Our colleagues say that, under our view, a strike that begins 1 minute late would be unlawful. We do not agree. Although the statutory language is clear, we do not believe that Congress intended to vitiate the traditional legal principle of de minimis.

Similarly, if there were a postponement of a strike because of an unanticipated medical emergency, and the employer unreasonably declined to grant an extension, we are not wholly persuaded that the employer could nonetheless fire the strikers. Again, we do not necessarily believe that Congress intended to vitiate the traditional doctrine of equitable estoppel.

However, neither of the two situations discussed above is present here.

The plain meaning of this provision can only be that, if a union wishes to put off the date or time of the strike at a health care institution, the union and the employer must agree in writing to the new time or date. In my view, because the statutory language is unambiguous, we cannot depart from it.[1]

Notwithstanding the clear statutory language, the Board in *Greater New Orleans Artificial Kidney Center*,[2] found that the last sentence of Section 8(g) was consistent with a union's unilateral extension of the date or time of a strike. The Board reached this result by scrutinizing the legislative history and determining that the last sentence of Section 8(g) should not be "rigidly applied." I agree with my colleagues that the Board inappropriately relied on legislative history to turn the plain statutory language on its head. Therefore, I join them in overruling *Greater New Orleans*.[3]

This is precisely what the Court of Appeals for District of Columbia Circuit recently held in *Beverly Health & Rehabilitation Services v. NLRB*.[4] Indeed, the court specifically rejected the argument that the last sentence of Section 8(g) was ambiguous, and held that the statutory language precluded an interpretation that permitted unilateral notification. As the court explained, had the Congress "intended to allow either party to extend the notice unilaterally, it could have easily said so—but it did not." Id. at 321. Instead, it provided for one way—consent in writing by both parties—to extend time or date of the strike. Id.

As my colleagues note, the Board's approach in *Greater New Orleans* lent itself to uncertainty and increased litigation. Employers could not be sure that a strike would take place at the time provided in the 8(g) notice, but could not risk being unprepared. As a result, employers, like the Respondent here, were forced to expend time and resources preparing for a strike that could be rescheduled, late in the day, by a union seeking to gain a tactical advantage. In contrast, adhering to the clear statutory language protects employees' rights to engage in Section 7 activity, while ensuring that health care institutions receive sufficient advance notice of any picketing or work stoppage to enable them to take the necessary steps to provide for continuity of patient care.

Finally, although we reverse *Greater New Orleans* here, and our ultimate finding is that the striking employees were lawfully discharged, the application of our new policy to the facts of this case poses no due process problem. Cf. *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1102–1105 (D.C. Cir. 2001) (holding that the Board erred in retroactively applying the new rule enunciated in the case). Even were we to apply *Greater New Orleans* in this case, the result would be the same: that decision authorized a union's unilateral extension of a strike notice on 12 hours' advance written notice to the employer. Here the Union intentionally gave no notice, let alone timely written notice, to the Respondent.

For these reasons, I agree with my colleagues that the Employer did not violate Section 8(a)(3) and (1) of the Act by discharging the striking employees.

MEMBER LIEBMAN and MEMBER WALSH, dissenting.

The 22 discharged nurses in this case went on strike 4 hours after the time specified by their Union in the 10-day notice required by Section 8(g) of the Act. Alerted by the notice, their employer, a health clinic, had replacement nurses waiting, and patient care was unaffected. The majority acknowledges that Congress intended Section 8(g) "to give . . . health care institutions sufficient advance notice of a strike or picketing to permit timely arrangements for continuity of patient care."[1] Nevertheless, says that majority, the plain language of the Act dictates that the employer was privileged to fire the nurses: because the strike violated Section 8(g), the nurses lost their status as protected employees, under

[1] *NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council*, 897 F.2d 1238, 1246 (2d Cir. 1990) (holding that the Board is not "at liberty to depart from the straightforward unambiguous language of" Sec. 8(g)).

[2] 240 NLRB 432 (1979).

[3] The 1974 health care amendments have provided almost a textbook example of the misuse of legislative history. For years, the majority of the circuit courts held that "the admonition" against undue proliferation of health care bargaining units contained in the legislative history precluded the Board's application of traditional community-of-interest criteria in health care cases. See discussion in *Electrical Workers Local 474 v. NLRB*, 814 F.2d 697, 704–715 (D.C. Cir. 1987) (collecting cases), and see *Buckley, J.*, concurring at 715 ("This case is a classic example of the dangers that can flow from an indiscriminate attempt to read legislative meaning into congressional tea leaves."). Eventually, the Supreme Court held that the admonition could not be accorded such weight. See *American Hospital Assn. v. NLRB*, 499 U.S. 606, 616–618 (1991) (rejecting argument that the admonition rendered the Board's health care rulemaking invalid). Accord: *Electrical Workers Local 474*, supra at 712 (emphasizing that the legislative history's "admonition against undue proliferation is not part of the Act" and "cannot serve as an independent statutory source having the force of law"). (Emphasis omitted.) Likewise here, although the Board may look to legislative history to clarify nonspecific or ambiguous statutory language, neither the Board nor the courts are authorized to "enforce principles gleaned *solely* from legislative history that has no statutory reference point." Id. Accord: *Beverly Health & Rehabilitation Services*, supra at 321.

[4] 317 F.3d 316, 321 (D.C. Cir. 2003).

[1] Member Acosta's concurring opinion observes similarly that the purpose of Sec. 8(g) is to ensure that "health care institutions receive sufficient advance notice of any picketing or work stoppage to enable them to take the necessary steps to provide for continuity of patient care."

Section 8(d). Thus, the legislative history of these provisions—which instructs the Board to apply a "rule of reason" in connection with belated strikes, given the potentially harsh consequences for employees—is meaningless.

In fact, the relevant statutory language is ambiguous with respect to the situation presented here. Read together, Section 8(g) and (d) simply do not compel the result the majority reaches. Under the Supreme Court's *Chevron* decision,[2] then, the Board must interpret the Act, taking into account not merely the words of Section 8(g) and (d), but also the purpose of these provisions and of the Act as a whole, as illuminated quite clearly by the legislative history. Applying a rule of reason derived from these legitimate guides to Congressional intent—and not the majority's mechanical approach—demonstrates that the discharged nurses did not lose the protection of the Act and that their employer did indeed violate Section 8(a)(3) and (1) by discharging them. The contrary result reached today would surely appall the Congress that enacted Section 8(g), even if it does not trouble the majority.

I.

Section 8(g) provides that "a labor organization before engaging in any strike . . . at any health care institution shall, not less than ten days prior to such action, notify the institution in writing . . . of that intention." 29 U.S.C. § 158(g). Here, the Union's August 30, 1999 notice to the Alexandria Clinic set September 10, 1999, at 8 a.m. as the date and time for the strike.

The clinic accordingly prepared for a strike. As the judge found, it hired replacement nurses, held an orientation session for them, gave them a tour of the clinic, and gave the clinic's physicians an opportunity to meet with the replacement nurses on September 9. Moreover, the Respondent had the replacement nurses at the clinic on September 10 at 8 a.m., the time set forth in the Union's notice.

As it turned out, the nurses did not begin their strike precisely at 8 a.m. on September 10. On about September 7, Union Representative Scott Kleckner and nurses Joan Radil, Joyce Iverson, and Lynn Tvrdik (also members of the Union's bargaining committee) had decided to delay the actual start of the strike till about noon. One reason, as the judge found, was that they believed noontime was less busy than the morning at the clinic, and thus striking later would cause less disruption to the clinic. There is also evidence that Union Representative Kleckner may have had another reason, to gain an element of surprise. Kleckner shared this potential advantage with nurse Radil in an e-mail message, but it does not appear that nurses Iverson and Tvrdik were aware of this consideration. In any case, the Union did not advise the Respondent, or any nurses beyond Radil, Iverson, and Tvrdik, of the anticipated 4-hour delay.

If Kleckner intended to somehow disadvantage the clinic, the delay certainly did not have that effect. When the strike did not begin at 8 a.m., the clinic evidently assumed that the strike still was going to occur that day. There is no evidence that the clinic asked the Union or any nurse why the strike had not begun. Nor did it send the replacement nurses home. Rather, it directed the replacement nurses to stand by in a lounge at the clinic. The nurses actually began leaving the clinic to go on strike at approximately 11:45 a.m. At that point, the replacement nurses stepped in for the striking nurses. There was no disruption in patient care.

Three days later, the clinic finally sought an explanation from the Union for the strike delay and for the Union's failure to give the clinic advance notice of the delay. The Union responded that its actions were consistent with the Act. The clinic then wrote the striking nurses, asserting that the strike violated Section 8(g) of the Act and therefore firing them. There was no contention—nor could there be—that the nurses' actions jeopardized patient care.

II.

Under *Chevron*, supra, the Board must begin by asking "whether Congress has directly spoken to the precise question at issue." Supra at 842–843. If so, that is the end of the matter. If, in contrast, the Act "is silent or ambiguous with respect to the specific issue," then the Board must fill the gap based on its reasonable interpretation of the statute. Id. In that instance, the Board may appropriately look to relevant legislative history to guide its interpretation. This is such a case. Indeed, the Supreme Court has pointed out that "labor legislation is peculiarly the product of legislative compromise of strongly held views" and thus "legislative history may not be disregarded merely because it is arguable that a provision may unambiguously embrace conduct called in question." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 179 (1967).

The "precise question at issue" here is whether, under Section 8(d) of the Act, employees of a health care institution lose their protected status when they engage in a strike that occurs a very short time *after* the date and time specified in the notice required by Section 8(g). The majority insists that the statutory language clearly answers this question. It does not.

[2] *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The clinic was free to discharge the striking nurses only if they lost their status as employees protected by the Act. The analysis, then, must begin with Section 8(d), which provides in relevant part that:

> Any employee . . . who engages in any strike *within the appropriate period specified in subsection (g) of this section*, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of [S]ection 8, 9, and 10 of this Act . . . .

29 U.S.C. § 158(d). (Emphasis added.) What, in turn, is the "appropriate period specified in" Section 8(g)? Section 8(g) requires that the Union give notice "not less than ten days prior to" a strike. 29 U.S.C. § 158(g). It also provides that the "notice, once given, may be extended by the written agreement of both parties."

How do these provisions apply in a case like this one, where the strike occurs on the date, but after the time, specified in the Union's notice, so that the Union has provided *more* than 10 days' notice? More specifically, in these circumstances, is a striking employee "engage[d] in a strike" "within the appropriate period specified in" Section 8(g)? The better answer, for reasons that follow, is "no." But whatever the answer is, it is not supplied (as the majority contends) by simply looking at the statutory language.[3]

If the issue was the protected status of an employee who struck before the health care institution had had 10 days to prepare, then the answer would be clear. Section 8(g) requires 10 days' notice, and a strike during the 10-day period surely triggers Section 8(d). That result furthers the purpose of the provision. The employee's conduct—leaving the job before the employer expected a walkout—directly implicates the harm Congress sought to forestall. The health care institution may be caught unprepared and patient care may suffer.

This case is different. Striking *after* the institution has received a full 10 days' notice raises no concern, at least when the employer's strike preparations almost certainly remain in place. In interpreting the statutory phrase "the appropriate period specified in" Section 8(g), it would be irrational not to distinguish between a strike occurring before 10 days' notice had been given and a strike occurring after. Nothing in the language of the Act clearly requires this result.

The majority, relying on a recent decision of the United States Court of Appeals for the District of Columbia Circuit, points to the sentence in Section 8(g) which recites that a "notice, once given, may be extended by the written agreement of both parties." See *Beverly Health & Rehabilitation v. NLRB*, 317 F.3d 316, 321 (D.C. Cir. 2003). But the Supreme Court has instructed us, in connection with interpreting the loss-of-status provision in Section 8(d), that "we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956). Thus, the Court held that the loss-of-status provision does not apply to unfair labor practice strikes, although the language of the Act makes no such exception. The principles of statutory interpretation reflected in *Mastro Plastics* remain valid today.[4]

We certainly must take into account the notice-extension provision in Section 8(g). The question, however, is whether it plainly means that *the moment* the time specified in the strike notice has passed, a new notice, or a mutual extension of the original notice, is required by Section 8(g) and that for purposes of the loss-of-status provision in Section 8(d), any strike before a new 10-day period has passed necessarily occurs "within the appropriate period specified in" Section 8(g). On that view, applied to the facts of this case, the nurses would have lost the protection of the Act not only by striking at 11:45 a.m., but also by striking at 8:01 a.m. instead of at 8 a.m., as specified in the notice. That result can hardly be said to further the "object and policy" of the Act.

Indeed, the notice-extension provision of Section 8(g), considered in isolation, simply does not address whether every delay in the commencement of a previously-noticed strike, without regard to the length or the circumstances of the delay, requires the union to seek an extension of its notice and, if so, whether employees lose their protected status if they strike in the absence of an extension. Anyone familiar with labor relations surely recognizes that not every strike at a health care institution will commence at the precise moment identified in the union's 10-day notice. And it is absurd to think that Congress intended to put employees' jobs in peril simply because their union was not absolutely punctual. "Looking beyond the naked text [of a statute] for guidance is

[3] The majority cites several Board decisions to argue that, before *Greater New Orleans Artificial Kidney Center*, 240 NLRB 432 (1979)—a 24-year-old precedent, which is overruled today—the Board had found Sec. 8(g) to be clear and unambiguous. But none of the decisions cited involved the precise question posed here. Obviously, statutory language may clearly answer some questions and leave others open to reasonable argument.

[4] See, e.g., *Johnson v. U.S.*, 529 U.S. 694 710 fn. 10 (2000) ("One who believes that courts must not look beyond text might well find any invocation of policy unjustified (even willful), at least when the policy does not rise unbidden from the words of the statute, but we have never treated the text as such a jealous guide and have traditionally sought to construe a statute so as to reach results consistent with what Chief Justice Taney called 'its object and policy.'").

perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention . . . ." *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 455 (1989).

Even the majority, who repeatedly assure us that the language of Section 8(g) provides all we need to know about notice extensions, are unwilling to commit to a wholly literal reading. They disavow the notion that "it is a per se violation of Sec. 8(g) if a union fails to obtain the written consent of an employer before delaying the start time of its noticed strike." Instead, they carve out an exception for delays caused by "an unanticipated medical emergency." This is a wise exception, as far as it goes, but it has no literal basis in the Act's language. It illustrates, rather, that interpreting Section 8(g) and (d) calls for a rule of reason, under which certain minor delays simply do not trigger the notice-extension requirement. This rule of reason is just what Congress intended the Board to apply.

III.

Because the language of the Act does not answer the precise question posed here, the Board should turn to the legislative history. And the legislative history of the 1974 health care amendments to the Act could not be clearer. In identical language, the reports of the House Committee on Education and Labor and the Senate Committee on Labor and Public Welfare tell us why Congress adopted Section 8(g) and what principles should govern the interpretation of the provision:

> 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.

S. Rep. 93-766, 93d Cong., 2d Sess. at 4 and H.R. Rep. 93-1051, 93d Cong., 2d Sess. at 5, as reprinted in *Legislative History of the Coverage of Nonprofit Hospitals under the National Labor Relations Act, 1974*, at 11 & 273 (1974). See *Greater New Orleans Artificial Kidney Center*, supra at 434-435 (discussing legislative history).[5]

In other words, Congress envisioned a rule of reason: Did the union strike within a reasonable time after the time specified in its notice to the health care institution? If so, then the union was not required to secure the employer's extension of the original notice or to provide a new notice. Reasonableness, in turn, is defined by reference to the institution's opportunity to make—and then to maintain—arrangements for continuity of patient care.

The majority acknowledges the purpose of Section 8(g), which it necessarily gleans from the legislative history that it otherwise treats as off limits. But the majority never makes a credible attempt to explain how, in this case and cases like it, its rejection of a rule of reason serves any legitimate statutory purpose. Where a union's delay in striking is so short that an institution's arrangements for continuity of patient care are almost certainly still in place—for example, a strike that occurs on the same shift as the time specified in the notice—application of the loss-of-status provision is simply punitive.[6]

This case falls into that category. The clinic had the requisite "not less than ten days" advance notice of the Union's planned strike, and the clinic made the necessary arrangements. It had a contingent of replacement nurses at the facility on the morning of September 10 ready to step in to fill the nurses' positions. The Union's delay in the commencement of the strike from 8 a.m. to approximately 11:45 a.m.—during the same shift—could not have threatened these arrangements. The clinic readily recognized that the Union's delay was not an indication that there would be no strike on September 10 or that it was safe to abandon its preparations. The clinic, apparently without even seeing a need to check with the Union, remained prepared after 8 a.m. by having the replacement nurses stand by in a lounge area. When the nurses did walk out, their replacements stepped in. Under these circumstances, can there be any doubt here that punishing the nurses for supporting the Union, rather than vindicating the interests of patients, was the clinic's motive when it fired the strikers?

The precise contours of the rule of reason need not be resolved here. Certainly, a union is not free to give notice, let the specified strike time pass, and then either lull the institution into thinking that no strike will occur or require it to maintain contingency plans indefinitely.[7]

[5] The committee reports examined the same language that was ultimately adopted by Congress. Nothing in the legislative history suggests that the reports are an unreliable indicator of Congressional intent.

[6] The "unanticipated medical emergency" exception endorsed by the majority is clearly much too narrow. Would it serve the purposes of Sec. 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 timeclock and employees' watches?

[7] See, e.g., *District 1199-E, Hospital & Health Care Employees (Federal Hill)*, 243 NLRB 23 (1979) (holding that union violated Sec. 8(g) when it commenced picketing at health care institution 80-1/2

But neither of these concerns is implicated in this case. That the Union decided in advance to delay the strike, but did not disclose its intention to the clinic, is immaterial, given the short duration of the delay.[8]

Finally, following a rule of reason is not, as the majority argues, bad policy. Congress itself intended such a rule to be applied. It made the policy choice, and we must honor it. Given the strong deterrent against violating Section 8(g) created by the loss-of-status provision, unions are unlikely to test the outer limits of the rule. Health care workers, moreover, typically are just as committed to patient care as their employers are. In this case, of course, the Union believed that the Act permitted what it did—and that belief represented a reasonable reading of the Board's prior case law.

In short, the majority's approach cannot be squared with Congressional intent. It is not faithful to the language of the Act, which purposely left room for the Board to follow a case-by-case approach. Nor does it advance any purpose that Congress endorsed. For all of these reasons, we dissent.

Timothy B. Kohls, Esq., for the General Counsel.
James M. Dawson, Esq. and *Thomas R. Trachsel, Esq. (Felhaber, Larson, Fenlon & Vogt, P.A.)*, of Minneapolis, Minnesota, for the Respondent.
Gregg M. Corwin, Esq. and *Laura S. Ferster, Esq. (Gregg M. Corwin & Associates)*, of St. Louis Park, Minnesota, for the Charging Party.

hours after the time set forth in its 10-day notice without any explanation for the delay).

[8] Our colleagues assert that even if they were to apply *Greater New Orleans* they would reach the same result because the Union failed to provide 12 hours' advance written notice of the new start time for the strike. The Board in *Greater New Orleans* did not hold, however, that the 12-hour rule was inflexible, and not subject to the rule of reason. To the contrary, the legislative history that the Board relied on in *Greater New Orleans* makes clear that Congress intended the 12-hour rule to be governed by the rule of reason. The committee reports state merely that a union *should* give at least 12 hours' advance notice of the actual time for the rescheduled start of the strike (S. Rep. at 4; H. Rep. at 5). Furthermore, the joint remarks of Congressmen Ashbrook and Thompson with respect to the House committee report state that in setting forth the 12-hour rule the House committee "was aware of the practical application" of this rule, and "realized the need for application of the rule of reason." Joint remarks of Congressmen Ashbrook and Thompson, reprinted in *Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974*, at 409–410 (Nov. 1974). As explained above, applying the rule of reason to the circumstances presented here compels a finding that the Union's failure to provide at least 12 hours' advance notice of the new start time for the strike did not render the strike violative of Sec. 8(g), and cause the nurses to lose their status as protected employees under Sec. 8(d).

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. Upon a charge filed by the Minnesota Licensed Practical Nurses Association (the Union), on September 20, 1999,[1] against the Alexandria Clinic, P.A. (Respondent), a complaint was issued on December 16 alleging that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), by unlawfully discharging, by letter dated September 13, 22 named employees for engaging in a strike and picketing at the Respondent's Alexandria, Minnesota facility. In its original answer dated December 29, the Respondent denied violating the Act and alleged as affirmative defenses that (1) the terminated employees engaged in unprotected conduct, as the Charging Party commenced the strike in violation of Section 8(g) of the Act; (2) after the terminations were effected, the Respondent acquired evidence that the terminated employees engaged in conduct for which the Respondent would have lawfully discharged any employee; and (3) the terminated employees engaged in misconduct of such character as to render them unfit for further service. In an amendment to the answer, dated January 19, 2000, the Respondent adds a fourth affirmative defense, namely, inasmuch as one of the terminated employees, Angie Mertens, resigned her position with the Respondent on September 7, effective September 20, she is not entitled to reinstatement in any event. In its amended answer dated January 21, 2000, the Respondent points out that all of the terminations, except nurse Kay Ludwig's, were effective September 13, and nurse Ludwig's was effective September 14.

A hearing was held on January 24–27, 2000, in Alexandria, and on February 3, 2000, in Minneapolis, Minnesota. Upon the entire record[2] in this case, including my observation of the demeanor of the witnesses and consideration of the briefs filed on March 24, 2000, by the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, which is a Minnesota corporation, with an office and place of business in Alexandria and a satellite facility at Osakis, Minnesota, has been engaged in the operation of health care clinics. The complaint alleges, the Respondent admits, and I find that during the calendar year ending December 31, 1998, the Respondent, in conducting its business operations, purchased and received at its Alexandria facility materials and services valued in excess of $50,000 directly from points outside the State of Minnesota and received gross reve-

[1] Unless indicated otherwise, all dates are in 1999.

[2] The Respondent's motion to correct the transcript is unopposed. It is ordered that the motion be, and it is granted as modified below. On p. 521, that portion of LL. 8 and 9 which read "she did have retain products conception causing the bleeding" should read "she did not retain conception products causing the bleeding." On p. 535, the word "baling" on L. 24 should be replaced with the word "bailing." And on p. 588, the word "chanted" on L. 21 should be replaced with the word "changed."

nue from all sales or performance of services in excess of $1 million; that at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; and that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The Facts

The parties stipulated that the Respondent is a "health care institution" as that term is defined in Section 2(14) of the Act. (Jt. Exh. 1.)

The Respondent's administrator, Timothy Hunt, testified that the Respondent is a clinic which specializes in family practice, pediatrics, OB/GYN, general surgery, podiatry, urology, ENT (ear nose and throat), and internal medicine; that at the time involved herein (on or about September 10) there were 27 physicians, 170 total employees, and 38 bargaining unit members employed at the clinic; that additional physicians come into the clinic on an outreach basis; that some of the services the clinic provides includes mammography, echocardiography, stress testing, full lab, and X-ray; that the Respondent's satellite facility in Osakis is about 10 miles from Alexandria; that the Respondent serves approximately 85,000 people in a geographic area that is approximately a 40-mile radius out of Alexandria; and that it is the largest medical clinic in the area.

Doctor Kurt Hansberry, who is a physician and president of the board of the Respondent, testified that various patients with different conditions ranging from cancer to pregnancy are treated at the clinic; that many procedures are performed at the clinic,[3] that narcotics are given to the patients at the clinic; that medical emergencies can occur with patients who are undergoing stress tests or who have received an injection "to race their heart"; that at some unspecified time other than the one involved here one of his patients did not mention that he had chest pain, he walked over to the urgent care area of the clinic and was given oxygen and placed on a monitor; that there have been instances at some unspecified time other than the one involved here where patients have passed out in the hall and had to be taken to urgent care and then transported to the hospital by ambulance; that typically the involved nurses are assigned to an individual physician in the clinic, they will prepare the charts for the day, greet and room the patients, obtain vital signs,[4] record medications and allergies, ascertain why the patient wants to see the physician, either act as a chaperone or assist the physician with a procedure in the examination room if necessary, answer telephone calls and take messages from patients or other departments, gather up labs, schedule tests, give patients any instructions that they may need, and administer injections; that a physician wants to be able to rely on their nurse to "be your right hand person"; that Respondent's Exhibits 17 and 18 are the job descriptions for medical assistants (MAs) and LPNs, respectively; that obtaining telephone messages in a timely fashion can be very important in that a caller can be at grave risk and not fully appreciate their condition; and that one of his patients at some unspecified time other than the one involved here called indicating that her leg hurt and was swollen, and it was later determined that she had a blood clot. On cross-examination, Doctor Hansberry testified that at some unspecified point in time he approached LPN Joan Radil in an agitated state, accused her of bullying the other nurses into joining the Union, and told Radil that he "didn't appreciate being characterized as greedy, that I was there to take care of patients, and that for her to make those accusations were unsubstantiated and I certainly took offense to it."

In March 1998, the Union won a representation election held by the National Labor Relations Board (the Board), and became the bargaining representative of the Respondent's LPNs and MAs.[5]

The parties then began negotiations with respect to an initial collective-bargaining agreement. Nurse Radil, who is on the union bargaining committee, testified that binding arbitration and just cause held up the agreement. After several meetings the Respondent submitted its last offer in February 1999. It was stipulated that the last negotiation session was held on March 3.

In the spring of 1999, the Union filed two charges with the Board alleging that the Respondent was not bargaining in good faith. Scott Kleckner, a labor relations specialist with the Union, testified that a Regional Office of the Board dismissed the charges and the Union did not appeal; that the charges were filed because the Union believed that the clinic engaged in surface bargaining in that it was insisting on proposals which were predictably unacceptable to a union, namely, having discipline be at will without a just cause requirement, not allowing nurses to file a grievance and have it reviewed by a neutral arbitrator, and reducing the level of benefits by requiring employees to work more hours to maintain their current level of benefits; and that during negotiations counsel for the Respondent said (1) LPNs were not highly skilled and you could get people off the street to perform their functions, and (2) that it should not be a problem for nurses to have a lunch break because there were not life threatening things that happened at the clinic.

In July 1999, bargaining unit members met to discuss the Respondent's last offer. The offer was voted down by the membership.

In August 1999, the Respondent announced that it was going to implement its last best offer.

On August 25, members of the bargaining unit met and voted to strike. No union representative attended this meeting. LPN Joyce Iverson, who was on the negotiating committee and a union steward, testified that the unit members decided that they could not live with the Respondent's last best offer because people could be fired without reason or cause and they believed

[3] On cross-examination this witness testified that certain of the procedures he specified on direct are in fact handled by registered nurses and not licensed practical nurses (LPNs or nurses).

[4] These would normally include height, weight, temperature, blood pressure, and pulse.

[5] Hunt testified that there was a second election in March 1998 regarding the representation of all employees (excluding physicians and professional employees), at the clinic other than the LPNs and MAs, and the Union lost that election.

that if the Respondent implemented its last best offer they would all be gone. When called by the Respondent, nurse Iverson testified that at the last meeting she attended, which appears to have been held on August 25, the nurses joked about changing voice mail access codes.

By letter dated August 30, the Union informed the Respondent that the Union would commence a strike on September 10 at 8 a.m., Respondent's Exhibit 4 and attachment to Joint Exhibit 3. The parties stipulated that this letter was received by the Respondent no later than August 31. (Jt. Exh. 3.)

Hunt testified that he first became aware of the faxed notice from the Union, Respondent's Exhibit 4, on the morning of August 31; and that the notice indicates that it was faxed on August 30 at 5:16 p.m. and the office at the clinic generally closes at 5 p.m. Joyce Crowe, the Respondent's clinical director, who is a registered nurse and supervises nursing, X-ray and lab, testified that she first became aware of the strike notice from the Union on August 31.

Nurse Radil testified that she saw a memorandum posted by the Respondent on the bulletin board downstairs in the lunchroom which indicated that the nurses were going on strike on September 10 at 8 a.m.; and that she did not understand where the Respondent had gotten 8 a.m. from but she did not remember if she talked to Kleckner about it. Hunt sponsored Respondent's Exhibit 5 which is the notice posted by the Respondent in the employee lounge by the timeclock. It is dated August 31, it is addressed to the Respondent's employees and, as here pertinent, it reads as follows: "We received notice this AM, that the Minnesota Licensed Practical Nurses Association will engage in a strike, picketing and leafleting, commencing at 8:00 AM on Friday, September 10, 1999."[6] Crowe testified that she saw the posted memorandum with the strike date and time during the period from August 31 to September 10. Gloria Otte, who is the nursing supervisor at the Alexandria Clinic, testified that she saw the memorandum giving the date and time of the strike posted on the bulletin board by the downstairs timeclock. Nurse Joleen Elbert testified that she saw the memorandum by the timeclock but she did not know if that meant that 8 a.m. was the time they were going on strike. LPN Francis Aga testified that she saw the memorandum on or after September 7. LPN Janet Getz testified that she saw the clinic's memorandum about the date and time of the strike within a day or two of August 31.

Nurse Radil also testified that she, Kleckner and her coworkers nurses Iverson and Lynn Tvrdik planned how the strike would be initiated and that the strike should commence at noon because at 8 a.m. there are a lot of preparations at the clinic for the day and the LPNs and MAs start at different times; that she could not remember exactly when the decision to strike at noon was made but she, Kleckner, and nurses Iverson and Tvrdik talked about it after the 10-day notice was given; that they discussed the fact that mornings are very busy at the clinic and noon is a less busy time; that the only nurses who discussed the time the strike was to take place were her, and nurses Iverson and Tvrdik, and such discussions occurred after the notice; that she discussed with Kleckner that it was the intention of the nurses to strike at noon; that she, Kleckner, and nurses Iverson and Tvrdik decided to go on strike at noon; and that they thought that it would be far more disrupting to go out at 8 a.m. than at noon.

Nurse Tvrdik testified that she did not know who made the decision to strike at noon; that she did not recall ever communicating with the nurses what time they were going to strike; that she was in favor of striking at noon because it is a quieter part of the day, it is a down time, usually the patients are not scheduled between noon and 1 p.m.; and that at 8 a.m. it is very busy in that the phones are ringing, there are people waiting, and there are preparations which have to be made before the doctors arrive at the clinic.

Crowe testified that on September 7 LPN Mertens gave her resignation (R. Exh. 16), which indicates that nurse Mertens would be resigning effective September 20; and that she, with Otte present, told nurse Mertens that she accepted her resignation. On September 7, the bargaining unit members met and discussed the strike and how many nurses would participate. Verna Netjes, who was the executive director of the Union at the time, was present at this meeting. Nurse Radil testified that the involved employees needed to go out as a unit and they wanted to know if the majority was going to go; that the involved employees were told that they should go to work as usual and nurses Iverson and Tvrdik would go around and tell everyone when it was time to go "at noon or thereabouts"; that on September 7 the nurses knew what the plan was but they did not know the time of the strike; that she, and nurses Iverson and Tvrdik told the nurses not to leave patients in a procedure of any type and they would have to finish their duty before walking away from it; and that other than the people she discussed the time of the strike with, she did not tell anybody that the strike would begin at noon. Nurse Elbert testified that she attended this meeting (she missed a portion of the meeting); that she had "never been involved with a union before so I didn't know procedure as strikes or anything like that. I just took them at their word. We were very clearly told not to leave in the middle of a procedure . . . ."; and that it was her understanding that she was to go on strike even if she had patients waiting or in an examination room as long as she was not in the middle of a procedure. Nurse Aga testified that she did not remember any nurse questioning Netjes or the nurse leadership about what time the strike was going to start; that she heard all of the questions the nurses asked Netjes and the nurse leaders; that there was no discussion of what the nurses might do to make the job

[6] Hunt also sponsored R. Exh. 7, which—as here pertinent—is the same as the above-described posted notice and which was distributed to the Respondent's physicians, and R. Exh. 6, which was mailed to the Respondent's employees' homes and which gives the date and time of the strike, and indicates that the clinic intends to remain open. Nurse Dawn Juntunen, who went out on strike, testified that while she did not see the memorandum posted at the Alexandria clinic since she worked at Osakis, she received a letter from the clinic advising that it had received a strike notice, R. Exh. 6, prior to September 10; that the letter refers to a strike at 8 a.m.; that after she received this letter from the Respondent she questioned nurse leader, Tammy Porwoll, about the date and time of the strike that appeared in the letter, asking who indicated 8 a.m.; and that nurse Porwoll told her that she did not know who said 8 a.m.

of the replacement nurses potentially more difficult; that she did not recall whether any nurse at the September 7 meeting raised any concerns about the secretiveness with respect to when the strike was actually going to start on September 10; that such a concern was not raised at that meeting; that 8 to 10 people, including Netjes, attended this meeting; that she did not remember any nurse asking Netjes why she would not discuss the time of the strike; that nurse Radil said that it was important to go out together; and that neither Netjes nor the nurse leadership explained why they did not tell the nurses what time the strike was going to start. Nurse Juntunen testified that at this meeting the nurse leadership told the nurses that only the leadership would know what time the strike was going to occur; that being told the time was not a huge concern to any of the nurses but they were concerned whether they should strike or not; that she worked in Osakis and after the meeting nurse Porwoll told her in private when to walk out, namely noon; that nurse Porwoll asked her if she was okay about walking out of the Osakis clinic by herself, and nurse Porwoll told her that she would meet her on the street; that nurse Porwoll told her that she was not to tell anyone else about the time of the strike and they would be notified at Alexandria by nurse Iverson and Tvrdik; that since she was the only unit member in Osakis she was being notified at that time; that nurse Porwoll said that it was important for her not to tell the other nurses about the time because the nurse leadership "didn't want everyone being worried about a specific time. They didn't want them [to] keep looking at their watches and just being distracted by waiting for . . . a specific time to walk out" and this was discussed in general at the September 7 meeting; that one of the nurse leaders said something like this during the meeting with the unit members present; and that she did not remember that any of the nurse leaders at this or any other union meeting told the nurses that they were not being told the time of the strike because there was a leak. Nurse Getz testified that at the September 7 meeting Netjes said that the strike could actually commence anytime within a period of 72 hours after 8 a.m. on September 10; that at one of the meetings she attended someone was concerned about not discussing the time because of leaks but she was not sure who mentioned this; that she could not remember if it was Netjes or someone else who discussed that the strike could be 72 hours after September 10 at 8 a.m.; and that one of the stewards indicated that someone would come around and tell the unit members when it was time to strike. When called by the Respondent, nurse Vickie Jo Bevill, who had worked for the Respondent for 17 years, testified that at the September 7 meeting the nurse leadership said something to the effect of wanting everybody to be as relaxed as they could be so they would be able to do what they needed to do for their patients; and that there was a newspaper article informing the general public that there would be a strike at the Alexandria clinic sometime after 8 a.m. on Friday, September 10. In response to questions of counsel for the General Counsel, nurse Bevill testified that at the September 7 meeting the nurses were told that they should not leave any patients compromised in any way and if they were in the middle of a procedure they should finish it. When called by the Respondent, nurse Pamela Sherman, who did not join the strike, testified that the nurses were told at the September 7 union meeting by either nurse Radil or nurse Tvrdik that they were not going to be privy to the time of day the strike was actually going to occur, things were being leaked to administration and nurses Radil and Tvrdik wanted to be able to keep the time of the strike quiet; that other than potential leaks no other reason was given as to why the start time of the strike was not being revealed; that no statement was made to the effect that the starting time of the strike was not being revealed in order to prevent the strikers from looking at the clock on September 10; and that she came to this meeting late and she left the meeting early.[7] In response to questions of counsel for General Counsel, nurse Sherman testified that she did not report back to management about the meetings she attended; that she attributed certain of the above-described statements to nurses Radil or Tvrdik because they were sitting at the table to her left and that is where she thought the statements came from; that there were other people sitting at that table to her left and she did not know exactly who was speaking; that at times during this meeting little groups or pairs of people would be talking to one and another; that the nurses were instructed clearly not to disrupt a patient's care;[8] and that based on her knowledge of the individuals who went on strike, she did not believe that any of them would deliberately disrupt patient care or cause harm to a patient. In response to questions of the Charging Party, nurse Sherman testified that she told the clinic attorneys that she did not know of any plan or policy or procedure to disrupt clinic operations; that she told the clinic attorneys that she did not see any or notice any changing of the voice mail access codes or the removing of materials from the clinic; and that she did not have any information that any nurse interfered at all with the doctors' DEA numbers and she told the Clinic attorneys that she did not witness any such conduct on the part of any of the involved nurses.

Nurse Iverson testified that on the Wednesday before the strike she was advised by nurses Radil and Tvrdik that it was decided that the strike would occur at noon; that she agreed that this was a good time because it is a down time at the clinic in that while doctors start at different times, all of the doctors take lunch and do not have patients scheduled over noon, and everyone who was going on strike would be there;[9] that she, and nurses Radil and Tvrdik decided that if people did not know the time the strike was to commence they would not be watching their clocks; that it was decided that when it was noon on Sep-

[7] Nurse Sherman also testified that during the portion of the meeting that she attended there was some discussion of the fact that the nurses did not necessarily have to make it easy for the replacements to take over their jobs; that she did not recall who made the statement; and that it was mentioned that the nurses could replace DEA numbers or doctor licensure numbers. The Respondent has not alleged that any of the involved nurses replaced DEA numbers or doctor licensure numbers.

[8] Subsequently, in response to counsel for the Respondent's question, Nurse Sherman testified as follows:

> We were told that when the person or persons walk through to tell us it was time to join them outside, that we were not to leave patients unattended or to stop what we were doing. We were to finish our procedures, finish with out patients, and we could join them outside at any time.

[9] Subsequently, Nurse Iverson testified that most doctors take a noon lunchbreak and they do not start seeing patients again until 1 p.m.

tember 10 nurse Tvrdik would go to the upper floor, she would go to the lower floor and they would go past the nurses desks and tell them that it was time to go out on strike; and that she never told the other nurses what time the strike would begin.

Crowe testified that during the evening on September 9 she and her nursing supervisor, Gloria Otte, met with the replacement nurses at the Holiday Inn in Alexandria; that Otte reviewed a packet of the various forms, Respondent's Exhibit 13, used in the clinic with the replacement nurses; that such forms contain patient information and are a medical record which is placed in the patient's file and therefore speaks to the continuity of care; that the replacement nurses were told that the packet of forms would be available in the middle of the counter at the stations in the clinic on September 10; that the replacement nurses were then given a tour of the clinic and they met with some of the physicians that they were going to work with beginning on September 10; that at 9:30 p.m. on September 9 she and Otte distributed the packets to the stations in the clinic; that she left the packets she distributed on the counter top at stations 5, 6, and 7; and that Otte went to stations 2, 3, and 4. On cross-examination, Crowe testified that the forms in the packet can normally be found in different folders in cubicles on the station; and that prior to the strike she did not explain to the bargaining unit members that these packets would be on the station, and it would be unusual for unit LPNs and MAs to find such a packet left at the station.[10] Otte testified that she left the packets of forms, Respondent's Exhibit 13, in the middle of the counter top at stations 2, 3, and 4 at about 9:30 p.m. on September 9. On redirect Otte testified that while she did not give the "red manual" to the replacement nurses on September 9 she did tell the replacement nurses about what the "red manuals" contained generally and that they were located on each of the stations. (The "red manual," which is something other than the packet of forms, is described below.) Subsequently, Otte testified that the clinic has a cleaning staff which comes in at 7:30 p.m. and leaves around 9 or 9:30 p.m. but she was not absolutely certain. Otte also testified that the cleaning staff is not supposed to pick things up off the counter and throw them away; and that it is part of the responsibility of the rest of the staff to keep stations neat and clean.

At the beginning of the hearing the parties entered into the following stipulation, Joint Exhibit 2:

> On September 10, 1999, the Charging Party, by and through certain employees represented for purposes of collective bargaining by the Charging Party, commenced an economic strike against Respondent and began picketing Respondent's facility located at 610-30th Avenue West, Alexandria, Minnesota (the Alexandria facility).
>
> Thirteen of the bargaining unit employees who were working at Respondent's Alexandria facility and one of the bargaining unit employees who was working at Respondent's Osakis satellite facility on the morning of September 10, 1999 walked off the job, thereby commencing the strike. Immediately upon commencing the strike, the strikers began to picket Respondent's Alexandria facility. The fourteen employees who were working on September 10 and walked off the job are:[1]
>
> Fran Aga (7:31 a.m.–11:47 a.m.)
> Vickie Bevill (7:30 a.m.–1:47 a.m. [apparently 11:47])
> Joleen Elbert (7:53 a.m.–11:47 a.m.)
> Marcy Faris (7:46 a.m.–11:47 a.m.)
> Janet Getz (7:34 a.m.–11:48 a.m,)
> Carol Holten (9:29 a.m.–11:49 a.m.)
> Joyce Iverson (7:32 a.m.–11:48 a.m.)
> Shirley Jeppesen (9:47 a.m.–11:50 a.m.)
> Loretta Lundy (7:51 a.m.–11;48 a.m.)
> Angie Mertens (8:07 a.m.–11:47 a.m.)
> Louann Peterson (7:38 a.m.–11:46 a.m.)
> Lynn Tvrdik (7:51 a.m.–11:48 a.m.)
> Leah Watson (7:57 a.m.–11:47 a.m.)
> Dawn Junt . . . [u]nen[2] (9:46 a.m.–12:00 noon)
>
> The remaining eight terminated bargaining unit employees were not working when the strike and picketing commenced. However, after the strike began, each of these employees failed to report for work at the next time scheduled, instead joining and participating in the strike. (That is, each of the remaining terminated employees failed to report for work at her next scheduled date and time because she was on strike.) Two employees—Cindy Bradley and Renae Haugen—were scheduled to begin work at 1:00 p.m. on September 10 but did not show, instead joining and participating in the strike. Five employees were scheduled to work on Monday, September 13 but did not show, instead joining and participating in the strike:[3]
>
> Norma Lais (12:30 p.m.)
> Alison Olson (7:30 a.m.)
> Joan Radil (8:30 a.m.)
> Margaret Swanstrom (1 p.m.)
> Kathy Van Vickle (8 a.m.)
>
> One employee—Kay Ludwig—was not scheduled to work until Tuesday, September 14 (at 8 a.m.); she joined and participated in the strike rather than showing up for work that day.

[10] The packets were placed at the stations after the nurses left on September 9 and, according to the union notice, the nurses were not coming to work on September 10. In these circumstances it is not clear why there would have been any need to tell the unit members about the packets of forms. Otte was also asked if she told the unit members about the packet of forms. The same observation would apply. Technically, it might be argued that unit nurses do arrive at the facility a little before 8 a.m. and, therefore, they could have entered the facility and walked out at 8 a.m. In my opinion, the Respondent's apparent interpretation of the notice is a reasonable interpretation, namely, that the nurses were not going to be in the facility working on September 10.

[1] The times that the respective employees punched in and punched out on September 10 appear, respectively, in parentheses after her name.

[2] Ms. Junt . . . [u]nen is the employee who was working at the Osakis satellite facility when she walked off the job.

[3] The time that the respective employee was scheduled to begin work appears in parentheses after her name.

Nurse Radil testified that although she was not scheduled to work on September 10 since her doctor took the day off, if her doctor had a patient in the room in a procedure, she would not have left irregardless of what time of day it was; that it would have caused a disruption to patient service if someone who had no experience with her physician were to arrive on the scene at 8 a.m. and had to deal with the issues that she normally dealt with at 8 a.m.; that knowledge of how a particular doctor does things, the other available doctors in the clinic, and the other services available in the clinic is required; that life threatening situations occur in the clinic, and in her areas, OB/GYN, women have come in hemorrhaging; that it would have been a disruption of patient care at the clinic for the replacement workers to have started at 8 a.m. became there is a lot of preparation involving phone messages, charts for the day, making sure that the secretaries have the lab slips ready and they are correct, calling insurance companies to get precertification numbers for surgeries, and deciding what kind of lab work a patient needs so that she can discuss it with the doctor; that some people who should have gone to the hospital come to the clinic with emergency problems because they believe that it would be faster; that the decision to strike at noon was not an attempt to make it more difficult for the clinic to provide good service, to disrupt the clinic's business or to enhance the Union's bargaining position; and that "our patients have always come first. Always. We have missed many noon hours because of our patients. We have come in early and stayed late because of our patients."

Nurse Iverson testified that she arrived at work on September 10 at about 7:45 a.m.; that she went through her normal routine and there were a couple of patients for blood pressure or vitamin B12 shots, and she thought a man showed up to discuss some labs he felt were urgent; that when nurse Tvrdik was ready she told her that she would have to wait a couple of minutes because the doctor she was working with, Doctor Telste, had a patient for a dressing change and a patient for a blood pressure check; that she had done all of the vitals on the latter patient and this patient was just waiting for Doctor Telste to discuss her blood pressure; that she was waiting for Doctor Telste to tell her if he wanted her to put on a new dressing (she had already unwrapped the old dressing) or if he was going to put the new dressing on himself as he sometimes does; that when Doctor Telste came out of the examination room she asked him if he wanted her to change the dressing and Doctor Telste said, "[N]o I've got it, go ahead"; that she had done all of the work that she could have done up to that point; and that she then went to the lower floor and told the nurses that it was time to go out on strike.

Nurse Tvrdik testified that she arrived at the clinic at about 7:55 a.m. on September 10; that she punched in, went upstairs to her desk, prepared charts, took any messages off her voice mail, prepared her rooms, stocked them and cleaned them; that just prior to noon she and her doctor, Doctor Johnson, had seen their last patient and Doctor Johnson was standing by her, nurse Tvrdik's, desk reviewing her mail; that she told nurse Iverson that it was time to go and nurse Iverson said that she had to check with Doctor Telste; that she heard nurse Iverson ask Doctor Telste if she could leave and Doctor Telste said that it was fine; that she went down the hall to station 6 and told the nurses that it was time to go out on strike, she told nurse Aga and Medical Assistant Marcy Faris that it was time to leave and in answer to nurse Jeppesen's question, who was in the allergy room drawing up an allergy shot, she told nurse Jeppesen that she should finish giving the allergy shot before going out on strike; and that prior to telling nurse Iverson that it was time to go, she had finished all of her work for the morning.

Hunt testified that on September 10 he arrived at the clinic at approximately 7:15 a.m.; that the replacement nurses arrived at the clinic on September 10 between 7 and 8 a.m.; that he observed nurses that the Respondent had assumed would be striking starting to come into work that morning; that the 13 temporary nurses who were going to staff the clinic were put in the physicians' lounge to avoid any type of confrontation between the temporary nurses and the regular nurses; that he spent most of the morning trying to decide what to do with the temporary nurses since the regular nurses showed up; that it was decided to keep the temporary nurses in the lounge in case the strike would occur later; that no one from the Union ever contacted the Respondent to indicate that the involved employees were not going to be striking at 8 a.m. on September 10; that he first became aware that the nurses were walking out at about 11:50 a.m. on September 10 when Doctor Deborah Dittberner came into the administrative offices to indicate that her nurse had walked out; that he Crowe and Otte went to the units to determine where replacement nurses were needed; that 455 patients were seen at the clinic on September 10; that historically the clinic is busier in terms of the number of patients on Mondays and Fridays; that 11:30 a.m. to 12 noon is a busy time of the day and it is busier than it would be at 8 a.m.; that the busiest stations at the clinic are stations 5, 6, and 7 which are the family practice, pediatrics and OB/GYN stations, Respondent's Exhibit 3; that 11 of the 13 nurses who walked out that day were from stations 5, 6, and 7; that Respondent's Exhibit 8 are the time records for the 13 nurses who walked out on September 10 and they show that the 13 nurses punched out between 11:46 a.m. and 11:50 a.m.; that he was made aware of a problem regarding the access codes for the physician's voice mail between 1 p.m. and 2 p.m. on September 10, and the problem was corrected and a memorandum was disseminated to the nursing staff shortly after 2 p.m. on September 10 indicating "TO ACCESS VOICE MAIL FROM YOUR EXTENSION: Dial 278 to access voice mail. Enter your password. All passwords are 0000 for all nursing stations," Respondent's Exhibit 12; that he was advised during the afternoon of September 10 that certain of the materials which were distributed to the various nursing stations on September 9 to assist the temporary nurses in providing patient care, provide information regarding various forms that needed to be filled out for various procedures and to explain the appropriate procedure to refer patients were missing after the 13 nurses walked out on strike; that there are more patients being seen at the clinic at 11:45 a.m. than at 8 a.m. On cross- examination Hunt testified that 455 patients on September 10 is busier than normal; that in the affidavit he gave to the Board on October 15 he indicated that "455 patients . . . is an average day for the clinic"; that the afternoon is busier with respect to the number of patients seen at the clinic than the

morning; that LPNs have certain responsibilities in the morning prior to the physicians arriving at the clinic that are extra from just assisting the physician, including responding to voice mail, reviewing lab results from the prior day, and taking beginning of the day calls from patients who got sick during the night, and that is why the LPNs come in early; that the replacement nurses arrived in Alexandria on September 9; that General Counsel's Exhibit 4, which consists of two pages namely a page with instructions on how to change the voice mail message and how to retrieve a message and a page listing the voice mail codes, comes from the red manual which has been located at the various stations throughout the clinic well before September 10; that there are instructions available to employees in a different manual on how to change the voice mail access code; that no one witnessed any LPN change voice mail codes on September 10; that Tammy Kluver, the Respondent's data processing person told him about the problem with the voice mail codes between 1 and 2 p.m. on September 10; that by 1 p.m. the replacement employees were in place; that he did not know of any eye witness who saw the LPNs take or destroy manuals on September 10 but he concluded that they were responsible because the manuals were at the stations before the LPNs came in on September 10 and they were gone when the LPNs walked out on September 10; that he recalled that he was told that the red manuals and the replacement manuals, forms and procedures were missing on stations 5, 6, and 7 but he did not believe that these were the only stations referred to; that he was told that four voice mail access codes were changed and he told Tammy Kluver not to spend any additional time determining which codes had been changed but rather to override the system and change them all for accessibility; that the information on how to change the voice mail access code was contained in a book other than the red manual and that book was handed out years before the strike; and that the lunch hour did not automatically start for every nurse at noon every work day and the nurse's lunch time depended on where the doctor was with respect to seeing the patients scheduled.

Crowe testified that the "red book" is a combination of what each physician wanted to have used as they did a procedure, specifying such things as the size of glove they wear, whether they wanted a patient undressed for a physical, and giving details about various procedures or protocols; that on September 10 she and Otte let the replacement nurses in at the back door of the clinic beginning at 7:15 a.m.; that she took the first group of three replacement nurses to the different positions on the stations 7, 6, and 2 where they were expected to work; that when she saw nurses Aga and Bevill come to work at about 7:45 a.m. she "guess[ed] [that] they're not striking today"; that she then took the rest of the replacement nurses to the physician's lounge; that later she saw other unit members in the clinic and somewhere between 8 and 8:30 a.m. she observed that nurses who had been scheduled that day were all there; that shortly before noon she was in the administration offices and Doctor Deborah Dittberner came into the office and said that the nurses have gone out, her nurse—Faris—went with them and she still had patients in the examination rooms; that she took a replacement nurse to Doctor Dittberner; that she and Otte then assessed how many nurses left and she took the replacement nurses to the stations; that she prepared Respondent's Exhibit 15 which is a list of when certain unit members went on strike, their stations, and their assigned physicians; that with respect to nurses not scheduled to work on September 10 before the strike began, she saw nurses Radil, Lais, Olson, Bradley, Van Vickle, Swanstrom, and Ludwig on the nurses' picket line collectively on September 10, 13, and 14; that shortly after the replacement nurses were in place one of them, who was placed on station 6, told her between 1 and 1:30 p.m. that she could not get into the voice mail; that she telephoned Kluver, who works with the telephones, and asked her to check it out; that the delivery of patient care was disrupted by the strike because the Respondent did not have continuity of care, it did not know if phone messages were returned, each physician had to be assessed to see if they had patients left, and the Respondent did not know when the nurses walked off the job what had been done and what had not been done, what had been followed up on and what had not been followed up on; that in her opinion the disruption was more than what would have occurred had the strike occurred at 8 a.m. because as the day progresses more patients are added to the schedule, the schedules become busier, there is more of a possibility of the physician running behind, and there are more things going on closer to noon; that the switchboard typically closes at 5 p.m., there is a recording that if it is an emergency, the caller should dial 911 or call the hospital, and if a patient tries to call in after 5 p.m., they cannot leave a message for a physician on the nurses voice mail; that the switchboard opens at 7:30 a.m.; and that at the end of the day nurses can get their charts ready for the next day. On cross-examination, Crowe testified that she could not identify anyone who took any of the packet of forms off a station; that while some of the unit members were not scheduled to be working when the strike began and, therefore, they could not be held responsible for any disruption of care, they were nevertheless discharged also; that she did not know if any of the unit members who went out on strike did not have their charts prepared for the whole day; that General Counsel's Exhibit 5 is a schedule of appointments for September 10 for the various physicians; that she did not know whether any of the unit members asked their physicians if it was okay to leave; that the clinic's phone is answered until 7 p.m. at station 3, which is urgent care, and a caller can be transferred to a nurse's voice mail; that if a call involves an emergency it is triaged and does not go into voice mail; that she was aware that some of the nurses had been using their birth dates instead of the doctors' numbers for the access code to the voice mail; that the birth date was on the piece of paper with the codes; and that Hunt was mistaken when he testified that all of the voice mail access codes were the doctors' codes. Subsequently, Crowe testified that on the first day of the strike the nurses picketed in front of the clinic by the patient entrance and the fact that the strike was going to occur at the clinic was a major news item in the media prior to the strike; and that she did not have any personal knowledge of any patient submitting to the clinic a written complaint that service to them was disrupted on September 10.

Otte testified that shortly after 1 p.m. on September 10 one of the temporary nurses asked her about a form in that the temporary nurse could not find the packet of forms; that she went

to the involved station, station 7, and she could not find the packet of forms; that she then went to stations 6 and 5 and could not find the packets of forms there either; that she then went downstairs and could not find the packets of forms at stations 4 and 3 although she did find the packet on station 2 where no one went on strike; that on stations 3 though 7, where at least one of the nurses went on strike on each of these stations, she looked in the back counter area and in the cubicle space; that a temporary nurse from station 6 told her on September 10 that she could not access her voice mail; that she went to the phone, which was nurse Iverson's, and tried unsuccessfully to access any messages using three different numbers including 0390;[11] that she then notified Crowe; that generally the voice mail access code is the doctor's computer number with a 0 in front of it; that there are exceptions in that Doctor Bergstrand's nurse, Jeppesen, uses her birth date, which is posted on the access code sheet, ENT uses the nurse's phone extension because the physicians have different computer numbers, Doctor Connie Gratis did not have a nurse when the voice mail was put on the phone and the code subsequently assigned was thought to be easily remembered, Doctor Johnson's access code number specified on the sheet is an error, and Doctor Salo's number is different because his nurse moved to a different desk and that was the number of the extension at that desk; and that in the year or two before September 10 it was common for physicians to get backed up seeing patients in the morning. On cross-examination, Otte testified that she had no idea what time of the day the packets of forms disappeared and they could have disappeared at 12:45 p.m.; that she learned of the voice mail code problem after 1 p.m.; that she tried three different numbers in her attempt to access nurse Iverson's/Doctor Telste's voice mail messages because "[w]ell, I thought in case it would be—for instance this one I believe is 0405 [sic. It is noted that moments before this testimony she was shown the correct number by counsel for the Respondent while testifying on direct at the hearing herein] so I just gave it a try and thought, well let's try 405 or let's try the nurse's extension because I didn't have this piece of paper [the sheet of access code numbers which was given to her while she testified on direct herein] in front of me. So I tried where I thought [it] might possibly be";[12] that she did not know how many, if any, doctors were behind on their schedules on September 10; that she did not believe that Friday afternoons are historically less busy than Friday mornings; that according to General Counsel's Exhibit 5, on September 10 Doctor Elliott did not have a scheduled appointment from 1 p.m. until the end of the day at 5 p.m., except for a 20 minute appointment at 2 p.m. and a 10 minute appointment beginning at 3:30 p.m.;[13] that Doctor Kurt Hansberry did not begin seeing patients until 1 p.m. on September 10 and so his morning was not busier than his afternoon;[14] that she did not believe that, according to General Counsel's Exhibit 5, Nurse Practitioner Jennifer Janke had any scheduled appointments from 11:15 a.m. until the end of the day (5 p.m.), except for a 15-minute appointment at 1 p.m. and another 15-minute appointment at 1:15 p.m., and if she were scheduled to see patients she would not have either an MA or LPN;[15] that according to General Counsel's Exhibit 5 Doctor Odland did not even work the afternoon of September 10;[16] that according to General Counsel's Exhibit 5, Doctor Daniella Ouzounova had a flexible sigmoidoscopy procedure at 11:20 a.m. and she did not have an appointment in the afternoon until 2 p.m., and that is her usual schedule;[17] that according to General Counsel's Exhibit 5, Doctor Susan Paulson did not see patients the afternoon of September 10;[18] that she did not remember at exactly 1 p.m. on September 10 telling nurse Peggy Erickson, who did not join the strike and works on station 3, to go to a different station to answer the phones; that they started taking the replacement nurses to the stations shortly before noon; that she is not aware of any patient complaints about their care or service on the first day of the strike; and that September 10 was an average day in terms of the number of patients seen. On redirect Otte testified that Nurse Practitioner Connie Gratis did not have an afternoon schedule on September 10 because she works in urgent care on Friday afternoon; and that while she testified on cross-examination that you could change the voice mail access code by just listening to the prompts on the telephone, she did not know one way or the other how you would do that.

Nurse Erickson testified that she resigned from the Union before the strike for personal and health reasons; that she worked during the strike; that on September 10 she was on station 3 which is urgent care and is located on the main level; that you can change the access code for the voice mail by dialing 278 and following the prompts; that the walkout occurred about 11:45 to 11:50 a.m.; that around 1 p.m. Crowe came down the hall with a number of temporary people, Crowe told her to go to station 4 and Crowe filled her spot and the other nurse's spot on station 3 apparently with temporaries; that at about 1:30 p.m. when she went back to station 3 (to get her purse), she saw her message light flashing which indicates that there is voice mail; that when she tried to retrieve the voice mail message

[11] Nurse Iverson works for Doctor Telste whose physician computer number is 390, GC Exh. 4. The voice mail code number for Doctor Telste on GC Exh. 4 is "0390." Otte testified on direct that she tried "0390" only after looking at GC Exh. 4, which contains the voice mail codes, while testifying.

[12] Looking at the access code sheet Otte testified on direct at transcript page 237 that she tried "0390." On cross-examination at Tr. 244 Otte erroneously testified that the number was "0405." If Otte did not have the access code sheet when she allegedly tried the number, is it reasonable to conclude that the replacement nurse in question was using the access code sheet when she supposedly encountered the problem?

[13] Doctor Elliott's nurse, Jodie Dalton, did not join the strike, R. Exh. 15.

[14] According to R. Exh. 15, his nurse, Carol Holten, walked off the job at 11:49 a.m. on September 10.

[15] According to R. Exh. 15, Nurse Cindy Bradley was the employee assigned to Nurse Practitioner Janke and Nurse Bradley "[f]ailed to show for work on 9/10 as scheduled (1:00 p.m.) because on strike."

[16] According to R. Exh. 15, his nurse, Jeannie Zavadil, did not join the strike.

[17] According to R. Exh. 15, Doctor Ouzounova's nurse, Katie Bloedorn, never joined the strike.

[18] On redirect Otte testified that Doctor Susan Paulson had patients scheduled at 12, 12:10, and 12:20 p.m. According to R. Exh. 15, Doctor Susan Paulson's nurse, Mary Baker, never joined the strike.

with her access code it did not work; that she then telephoned Crowe who told her that the access codes were all changed to four zeroes; that she had no problem using the voice mail system between 8 a.m. and 1 p.m.; that she saw Respondent's Exhibit 13, which is the packet of forms, on the counter when she came to work on September 10; that she did not see the Respondent's Exhibit 13 on station 4; that on September 10 she did not receive any complaints from patients, patients were seen at the proper time, and she did not observe any disruptions in patient care; that she did not observe any difference in the operation of the clinic between the morning and the afternoon with respect to the stations she was working on; and that it was an average day for a Friday at the clinic. On cross-examination, nurse Erickson testified that she probably would have gone out on strike but for the fact that she needed health insurance because of her medical condition; that changing the access code for the voice mail is not something that can be done accidentally; that nurse Iverson was the one who came around and said that it was time to leave on September 10 and the other nurse on station 3, Carol Holten, walked out; that Crowe had 10 or 12 temporary nurses with her when she came down the hall at 1 p.m.; that she did not know for a fact that between 11:50 a.m. and 1 p.m. she sought to access voice mail messages on her phone; and that she went to lunch for about 15 minutes on September 10 and she did not check whether each patient was seen by the doctor at the time they were scheduled for. Subsequently nurse Erickson testified that she has worked at all of the stations in the clinic and historically the average delay on any day in a doctor seeing a patient beyond the scheduled time is 10 to 15 minutes, and sometimes longer depending on the doctor and what is happening with the doctor.

Nurse Mertens testified that on September 10 she was working on station 5; that she did not remember but she assumes that it was nurse Tvrdik who came around and said that it was time to leave and she did not recall the time; that her doctor, Doctor Lussenhop came out of the room and was standing by her desk when he said either "[i]ts time for lunch" or [y]ou can leave for the morning"; that she was then approached and told that it was time to go; that she handed Doctor Lussenhop a letter and told him that she was leaving; that the night before the strike she believed that she was the last employee to leave the clinic at about 8:10 p.m. and she did not see any packets on any nurses station;[19] that she came to work between 8 and 8:15 a.m. on September 10 and she did not see any packets and she did not remove any packets or any other material; that she did not even know how to attempt to change the voice mail codes or disable the voice mail system; and that the red book had not been at station 5 for at least 2 months before the strike began.

Nurse Elbert testified that when nurse Tvrdik came around on September 10 she, Elbert, did not tell her physician, Doctor Ross Anderson, that she was going on strike and she did not give him an update as to what had been happening that morning; that she did not change her voice mail access code and she did not take or destroy any clinic manuals or property on September 10; that between 8 and 9 a.m. on September 10 she prepared charts for the whole day, made sure that she had all of the charts that were needed for the day, got medical records, pulled lab sheets that were needed that day, answered calls, checked voice mail, stocked the rooms for the whole day, and things like that; that on September 10 she did not see Respondent's Exhibit 13 (the packet of forms) at her station, station 7, and she never saw it; that she had seen a red book at her station in the past but she did not look for it on September 10; that just before she went out Doctor Anderson had one patient in the waiting room and he was with a patient in the ultrasound room; that Doctor Anderson and she ("we") had finished the ultrasound, they left the room so the lady could get dressed and he went back in to visit with the patient as he often does after an ultrasound; that she was about to get her last scheduled morning patient when nurse Tvrdik told her it was time to go, and she left while Doctor Anderson was in the ultrasound room with a patient; that she did not inform Doctor Anderson that she was leaving because he was in the ultrasound room; that the patient in the waiting room was a 2-week postpartum check, Doctor Anderson generally just visits with those patients, and normally there is not a procedure or anything done with that particular type of appointment; that she was not aware that there was anything else for her to do at the time she went out on strike; that typically at that point she would go on her lunch break; that there are times when Doctor Anderson does an abdominal ultrasound and then decides that there is a reason to do a vaginal ultrasound; that Doctor Anderson always wants her present with him when he does a vaginal ultrasound; that they had just completed a vaginal ultrasound on the lady who was the next to last scheduled morning patient; and that she was positive that Doctor Anderson did a vaginal ultrasound and not an abdominal ultrasound. Subsequently, nurse Elbert testified that it would not be normal procedure to leave the room to allow the woman to get dressed if in fact Doctor Anderson had made up his mind that he was going to have another ultrasound.

Doctor Hansberry testified that he could not think of any patient complaints as a result of the strike that occurred on September 10; that his nurse went on strike on September 10; that he worked with a replacement nurse in the afternoon; and that his orientation of the replacement nurse was not made easier by the fact that he did not have the packet of forms, Respondent's Exhibit 13, on September 10 and the standard operating procedures (the red book) were not available.

Nurse Aga testified that on September 10 she worked on station 7 with Doctor Brian Carlsen; that although she did not know the exact time of the strike when she went to work on September 10, she was not concerned that the strike could occur at a time during the day that could potentially disrupt patient care because she "knew the union would not advise me of that" and she knew this "[b]ecause I trusted them" and the Union would not go on strike at a time that might hurt patient care; that at 11:50 a.m. nurse Tvrdik came by and told her that it was time to leave; that she did not talk to her physician and tell him that she was leaving because he was in a room with a patient; that the first time she heard that there was a problem with the voice mail access code was at the hearing herein; that she did not do anything to change her voice mail code on September 10 and if her code was changed, she did not have an explanation as

[19] As noted above, Crowe testified that the packets were distributed at 9:30 p.m.

to how that would have happened or why; that she arrived at work about 7:30 a.m. and she did not see any packet of materials, Respondent's Exhibit 13, on the counter top at station 7; that she did not hear any nurse or nurses talk about removing orientation materials from the station and she did not remove the packet; that the forms and information contained in Respondent's Exhibit 13, which she reviewed while on the witness stand, would have been used by the replacement nurses in providing patient care information; that her voice mail code was one of the few that did not have a zero in front of it because when they started the phone system she did not put a zero as the first number; that she did not know how to change the voice mail code; and that she had just finished giving vaccinations when nurse Tvrdik told her that it was time to go.

Nurse Juntunen testified that before she walked out on strike at Osakis she did not tell her physician that she was leaving because he was with a patient in an examination room and she told the other nurse who was working at Osakis that day "I have to leave"; that she left a note on the physician's phone which just indicated "Sorry"; that she was a roster nurse and she did not have a voice mail code;[20] that she was not concerned when she left that the other nurse would not be able to handle things because the other nurse had been doing the work for the past 13 or so years;[21] that she had been working at Osakis for the most part for 3 years; that before the strike she was working in Alexandria on station 6 for Doctor Susan Paulson and she, and nurses Tvrdik and Norma Woods could not find the red book; that she did not change voice mail codes, or remove clinic property from the clinic; and that she did not see Respondent's Exhibit 13 in Osakis.

Doctor Ross Anderson testified that he received a memorandum from the clinic indicating that the involved nurses were going out on strike on September 10; that at approximately 11:45 a.m. he left the ultra sound room, where he had been with a patient who had received an abdominal ultra sound, and discovered that the nurses, including his nurse—Elbert, went out on strike; that nurse Elbert did not give him a patient care update before she left to go on strike; that he had one remaining patient on his schedule that morning, an 11:40 a.m. appointment, and she was in the waiting room; that the 11:40 a.m. patient checked in at 11:25 a.m.; that the 11:40 a.m. patient was placed in an examination room at 12:10 p.m.; that the 11:40 a.m. patient was not there for a routine 2-week postpartum check but rather the patient was 4 weeks postpartum and came in for a nonscheduled examination because of bleeding; that he did not know this before he saw the patient; that he examined the patient on or shortly after 12:10 p.m.; that the 11:40 a.m. patient was not placed in an examination room until 12:10 p.m. because he did not have a nurse to room the patient; that it was common for his nurse to interrupt him in the examination room to ask to speak to him; and that prior to the noon break and prior to the end of the day it has been his practice to take care of anything that needs to be addressed before he leaves. On cross-examination, Doctor Anderson testified that nurse Elbert would have found out that the 11:40 a.m. patient was bleeding when Elbert took the patient to an examination room; that he did not know that the 11:40 a.m. patient ever told nurse Elbert that she was bleeding; that he did not give the 11:40 a.m. patient a blood transfusion, or perform an operative procedure on her or prescribe any medication;[22] that he examined the 11:40 a.m. patient, gave her an ultra sound and sent her home; that it is not unusual for a patient not to be placed in an examination room right at the scheduled appointment time; that the replacement nurse, who arrived shortly before 12:10 p.m., roomed the 11:40 a.m. patient; that he was available to see the patient at approximately 11:45 a.m. and he could have escorted the 11:40 a.m. patient into an examination room; that he could not say at the time that he was aware that there was a patient in the waiting room at 11:45 a.m. to 12:10 p.m. on September 10; that he did not make an attempt to place the patient in the examination room and it is not his practice to place patients in the examination room; that he does not have any problem with personally placing a patient in an examination room rather than having a nurse perform this task; that he has performed this task in the past; that he can take vital signs and a patient's history and he could find out what their condition is but filling out the necessary forms "would be very difficult for me"; that he did not know whether any forms were filled out for the 11:40 a.m. patient; that he would not perform a pelvic examination without either a nurse in the room or very close to the room; that he would not do a vaginal ultra sound, as was given to the 11:40 a.m. patient, without a nurse in the room; that at 11:45 a.m. when he realized that his nurse went on strike he did not telephone Crowe; and that he never telephoned Crowe to tell her that his nurse went on strike but rather he waited for about 15 minutes until Crowe came around with the replacement nurses.[23] When asked if nurse Elbert could not room the 11:40 a.m. patient because Elbert was in the ultra sound room with him, Doctor Anderson testified that that was not true and when asked if Elbert was with him in the ultra sound room when he did the abdominal ultra sound on the patient scheduled before the 11:40 a.m. patient, Doctor Anderson testified twice "[w]hen I came out of the ultra sound room, the nurse was not with me in the ultra sound room, the nurse was not present at that time." Doctor Anderson further testified that the next to last morning patient had an abdominal ultra sound; that he is sure that he talks to patients after the ultra sound; and that the 11:40 a.m. patient did not suffer any medical exacerbation of her condition as a result of the fact that she was not roomed on time. Subse-

[20] The witness explained that a roster nurse fills in with the various doctors when the regular nurses are on vacation or sick.

[21] When she was first sent to Osakis, Crowe and Otte explained to her that one of the doctors left that clinic and the remaining doctor was exceptionally busy so they were assigning a second nurse to the Osakis clinic to room patients so the more experienced nurse could handle the phone and do the paperwork.

[22] Doctor Anderson testified that it was not his practice to prescribe medication for postpartum bleeding.

[23] Doctor Anderson did not come to the clinic to meet with his replacement nurse the night before the strike because he "was naively hoping that . . . [his] nurse was not going out on strike." Also Doctor Anderson testified that he knew that the replacement nurses were going to be at the clinic on the morning of September 10 and he made no attempt to come in early and meet with the replacement nurse to explain how he practiced and how he wanted things done in his particular area.

quently it was determined, after a review of Doctor Anderson's schedule by the parties, that the 11:40 a.m. patient's condition was not described in any fashion on the schedule because she was added to the schedule at approximately 10:11 a.m. on September 10, and consequently there was nothing on the schedule that Doctor Anderson would have seen that would have indicated what the patient's condition was. Nurse Getz testified that on September 10 when nurse Iverson came around to tell her that it was time to go out on strike she filled out a lab slip for Doctor Pederson, who just came out of a room, had him sign it, gathered up her things, brought the lab culture or specimen to the lab and left; that she and Doctor Pederson had just come out of the examination room together and she assumed that her work was done in that room; that Doctor Pederson never said to her that she was finished for the morning; that she did not discuss the status of any patients or any messages with Doctor Pederson because she did not have any messages for him and they had just come out of the same room together; that she just remembers saying hello to Tonya Covel and speaking with her on the morning of September 10 when Covel came to the station to get the charge tickets for the previous day; that she did not remember seeing any orientation manuals at her station that morning; that she changed her voice mail code on the morning of September 10 and she was not sure why she did it; that she did not tell anyone that she had changed her voice mail access code; that she did not remember having a conversation with any nurse about changing voice mail access codes; that she did not see Respondent's Exhibit 13, the orientation packet, on the counter top at her station; that Doctor Pederson has a procedural manual that had been prepared by one of his former nurses and on September 10 she removed papers which were hers from the manual; that the documents which she removed from the manual had been prepared on her own time at home; that she had taken certain pages of the manual that the previous nurse had left her and she rewrote them; that when she took her pages out of the manual she did not put back in the manual the pages of the former nurse which she had previously removed because she had thrown the former pages away; that she did think that the more disruption that occurred at the clinic, the sooner the strike might be over;[24] that the instruments that Doctor Pederson uses are in see through sterile packets each of which is labeled; that about one week before the strike she made manila folder dividers at home with the name of the instruments for the see through, labeled packets of instruments; that on September 10 she removed the dividers she had made because she was in the process of making sturdier dividers and the dividers were hers; that on the morning of September 10 Doctor Pederson asked her where the dividers were and she told him that that morning she was cleaning the area where they were located and a couple of them had gotten wet; that as a roster nurse she worked in several areas of the clinic and, based on her experience, noon is not a disruptive time to the clinic to start a strike because there are not many physicians who schedule patients at noon, which is the lunch hour; that with respect to the last patient that she was with before she went out on strike, Doctor Pederson had removed antibiotic beads from the patients foot, cleaned the wound and took a wound culture, she labeled the culture and the lab sheets and had Doctor Pederson sign it and she took it down to the lab; that in her experience after Doctor Pederson tells her to fill out a lab slip, there is usually no more work for her to do with that patient; that with this particular patient she had not been instructed to do any more work for him and it was her understanding that her duties were done for this patient; that she did not believe that 8 a.m. is more or less disruptive than 12 noon or 11:45 a.m.; that she changed her voice mail password to "0000" which is the default code but she did not know that; that to her knowledge she was the only nurse who changed the password and took materials home with her; that she choose "0000" for the access code "out of the blue"; and that in her affidavit to the Board she indicated that she reset the password to four zeros because that was the password when she started.

Doctor Terrance Pederson testified that when he arrived at the clinic on September 10 around 7 a.m. nurse Getz was at her station; that about 10 days before September 10 he had received a memorandum from the clinic, Respondent's Exhibit 7, which notified him that the nurses were going to strike; that at approximately 11:45 a.m. on September 10 he was treating a diabetic patient who had been in the hospital for three weeks and had a foot wound; that he took cultures of the patients foot to see how the wound was progressing and to make sure there were no other infections; that nurse Getz was in the examination room when he took the cultures and she left the examination room before he was finished with the patient; that "[f]rom that point until she walked out the door . . . Ms. Getz [did not] identify to . . . [me] that she had in fact taken the culture and sent it down to the lab"; that he did not remember when he signed the form for the culture but he did fill out the medical part of the form when the culture was taken, what the area was and what he was looking for; that he did sign the form but he did not know when he signed the form; that he signs such a form before the nurse does anything with respect to getting it to the lab; that he then left the examination room and went to his office to get something he needed "[s]omething connected with patient care, phone number for referral or some material that wasn't in the [examination room] . . . ."; that he was by his office door when nurse Iverson came up and said "Janet let's go," and nurse Getz just walked away; that nurse Getz did not say anything to him and she did not "[g]ive [him] any status on any patient care issues that . . . [he] needed to be aware of"; and that with respect to what nurse Getz still needed to do,

> Well we still had to attend to the patient, make sure the referrals were done, make sure the patient was okay to leave on his own, make sure the cultures were done, and check with me to see what else had to be done for that day, if there was any other business that we had to attend to and none of that was done.

Doctor Pederson also testified that the aforementioned diabetic patient was given a referral for continuing treatment and "second opinions"; that the information that needs to be provided to

[24] Nurse Getz testified that she did not remember that this was discussed at one or more of the meetings she attended but it was something that could have happened and she just did not recall when she testified herein.

the patient in connection with a referral can be done by either the physician or the nurse; that he was going to have nurse Getz be responsible for providing the patient with the information in connection with the referral because he still had not dressed or packed the wound; that he has a practice of meeting with his nurse at the end of the morning to make sure that everything is done so that they can go and eat; that he saw the orientation packet of forms, Respondent's Exhibit 13, on the station 4 counter top on the evening of September 9 but when he came to work on September 10 he did not see the packet; that he first realized the that packet was not at the station after the replacement nurse started working; that he also discovered that a computer chart which was posted right above the computer was missing after the strike commenced on September 10; that a manual with instructions on how to run the office was there on September 9 but he discovered that it was missing after the strike commenced on September 10; that he did not recall ever seeing any of nurse Getz' notes in the manual; that his instruments are packaged in a sterile pack which is see through on one side and paper on the other side; that each package has the name of the instrument on it; that the dividers with the names of the instruments on them facilitated providing expedient patient care; that sometime between 8 and 10 a.m. on September 10 he noticed that the dividers were missing and he asked nurse Getz where they were; that nurse Getz told him that the dividers got wet; that on September 10 after the strike began he discovered that the voice mail code and been changed when his replacement nurse tried to retrieve a telephone message; that the replacement nurse had the sheet that had the codes on it; that he got the replacement nurse on September 10 sometime after 12 noon but he did not know whether it was closer to 1 p.m.; and that nurse Getz left in the midst of providing patient care. On cross-examination, Doctor Pederson testified that it would not be usual for nurse Getz, after she took a specimen down to the lab, to come back and tell him that she took the specimen to the lab; that in this instance nurse Getz did take the specimen to the lab and he did not tell nurse Getz that he wanted her to do the referral; that the fact that he did the referral instead of nurse Getz did not have any effect on the patient's health; that he did not see nurse Getz or anyone else take the orientation packet of forms or the computer chart or the procedure manual; that it is possible that he missed seeing something in nurse Getz' handwriting in the procedure manual; that he did not remember why he left the examination room when he was with the diabetic patient; that he did not say anything to nurse Getz when she was leaving; that patient care was not adversely affected in any way because the station did not have dividers before nurse Getz installed them; that it is his decision on whether to make a referral; that a lot of people could be in the clinic before 8 a.m.; that as a result of nurse Getz going on strike at about 11:45 a.m. on September 10 he took care of the treatment of the patient he was treating and there were no problems, the patient did not suffer any adverse result or medical problem; and that on September 10, after he had finished with the diabetic patient he went down to the lab to verify that the cultures had been delivered on the diabetic patient.

Tonya Covel testified that as a coding specialist she takes copies of the physician's reports she receives from the hospital up to the nurses' desks to be reviewed, signed and returned to medical records to be filed in the patient's chart; that she had seen the above-described memorandum regarding the nurses' strike, Respondent's Exhibit 5, and when she saw nurse Getz at station 4 at about 8:30 a.m. on September 10 she asked nurse Getz why she and the other nurses were still there working; that nurse Getz said that the clinic had replacement nurses and, as long as they continued to work, the clinic would have to pay both groups; that nurse Getz told her that the nurses would go out on strike when they received a call from the union representative; that nurse Getz asked her if she knew how to change the voice mail access code because she and some of the other nurses were trying to figure out how to do it; that nurse Getz did not say why they wanted to do that; that nurse Getz did say that if they were to change the code, the replacement workers would have no knowledge of what code they changed them to; that nurse Getz, while laughing, said that the handbook which was on her station was gone; and that she then went back to her office and told Kluver, who is in charge of the phone system, that it was possible that the voice mail access codes might be changed. Kluver testified that she is a computer system operator and she is responsible for the technical part of the clinic's phone system; that when a patient calls the clinic and wants to contact a physician the switchboard routes the call to the appropriate nurse for that physician, and if the nurse did not pick up the telephone, the call would go to the nurses' voice mail; that the nurses are supposed to change the message they leave on their voice mail daily to reflect the proper date and whether they are in or not;[25] that she had seen General Counsel's Exhibit 4, which are the voice mail access codes that were in effect on the morning of September 10; that the codes are public information within the clinic; that there would be no reason for a nurse to change the voice mail access code, there are eight steps or prompts for changing the voice mail access code, and you could not accidentally change a voice mail access code; that on August 31 she saw the clinic's memorandum, Respondent's Exhibit 5, which indicated that the nurses were going to strike at 8 a.m. on September 10; that she was aware that the clinic was going to use temporary nurses; that in "midmorning," at about 9 a.m. on September 10 Covel told her that nurse Getz said that "the nurses were going to change their voice mail messages so they—the replacements would not be able to access the messages . . . they were going to change the passwords so they couldn't access the messages"; that she did not think they would do it so she did not report this to management; that at approximately 1 p.m. Crowe called her and told her that Doctor Brian Carlsen's replacement nurse could not retrieve the messages and Crowe asked her to come to the station and help; that Doctor Carlsen's regular nurse was nurse Aga; that she went to Doctor Carlsen's station 7, where Crowe and the replacement nurse were and when she pressed numbers "0465" password invalid was indicated; that looking at the voice mail access code sheet, General Counsel's Exhibit 4, which she was shown by counsel for the Respondent at this point in her direct testimony, "0465" is the number that is pub-

[25] All of the nurses' messages are supposed to inform the caller (patient) to press zero if they need any immediate assistance.

lished on that document;[26] that as indicated by General Counsel's Exhibit 4 the correct access code for the involved phone was "465" and, therefore, she used the wrong number in her attempt to access the voice mail message; that she then went to the first nurse's phone on station 7, nurse Radil who is the nurse for Doctor Engebretson, and pressed "0010" and that also indicated "invalid password"; that as indicated on the voice mail access code sheet the correct voice mail code for Doctor Engebretson's phone was "010"; that when she was checking the voice mail codes she was not using the voice mail code access sheet, General Counsel's Exhibit 4; that in looking at the voice mail access code sheet again she "guess[ed]" that for the second time she dialed the wrong access code; that she then checked Doctor Dittberner's extension, whose nurse is Faris, on station 7 and by pressing "0310" and it was indicated that was invalid; that "0310" is voice mail access code on the sheet that she was looking at while she testified; that she then went around the corner to station 6 and checked the very first one there which would have been Doctor Johnson's (this was the extension of nurse Tvrdik);[27] that she pressed "0220 which is Dr. Johnson's number"; that the correct number, as indicated on the voice mail access sheet was "0020" (as noted above, Otte testified that this number on the access sheet is not correct); that "again it's different, which I was unaware of"; that she thought all the voice mail access codes were the involved doctor's number with a "0" in front of it;[28] that of the four voice mail access codes she tried she used incorrect access numbers with respect to three of the four; that Pam Miller, the Respondent's operations manager was there and she said that because of the time element they should default all of the numbers to "0000"; that she took 45 minutes to change the near 40 access code numbers; that she did not see the voice mail access code sheet at Doctor Carlsen's nurse's phone; that she did not know what number the replacement nurse was punching in; that at 6:30 a.m. on the morning of September 10 she taped a printout of the menus from the computers above the computers at each station (stations 2 through 7); that the menus (a "cheat sheet") would have made it easy for the replacement nurses to access a doctor's schedules and patient information on the computer; that about 8:30 a.m. on September 10 she walked back through the stations and she observed that all of the cheat sheets, except those on station 2, were not where she had placed them; and that she did not think that anyone on station 2 went on strike. On cross-examination, Kluver testified that she did not see anyone take the "cheat sheets" down.

When called by the Respondent, nurse Iverson, who worked for the Respondent for 8 years, was on the negotiating committee and was a Union steward, testified that the strike was delayed from 8 to 11:45 a.m. because it would be less disruptive on patient care; that when the nurses left it was a down time of the day; that when she went out on strike on September 10 her physician, Doctor Telste, was working with a patient who needed a dressing, she asked Doctor Telste if he wanted her to do the dressing and Doctor Telste said, "[N]o, I've got it, you go ahead"; that at the time there was another patient in an examination room who just needed to talk to the doctor about her blood pressure medication; that Doctor Telste knew that nurse Tvrdik was waiting for her in the hall and Doctor Telste said, "[Y]ou go ahead"; that with respect to the last patient she roomed, she indicated on the patient's chart the relevant information she obtained as she roomed the patient; that she did not orally discuss the last patient with Doctor Telste before she left; that she did not change her voice mail access code; that she did not believe that she saw Respondent's Exhibit 13, the orientation materials, at station 6 on September 10; that she was not aware of anyone removing the orientation materials from station 6; that if another patient came into the waiting room before 11:30 or 11:35 a.m. she believes that she would have been aware of that because usually the station clerk would tell her; and that if there is an open room it is the practice to take the patient from the waiting room to the examination room as soon as possible. In response to questions of counsel for the Charging Party, nurse Iverson testified that normally the busiest time of the day at the clinic is "[u]sually right away in the morning is your hustle and bustle time"; that generally most physicians do not schedule patients over the lunch hour; that on the day of the strike she did not leave any of her patients in a compromised position; that on occasion patients call at the last minute for an appointment and they do not show up on her sheet of patients for the day because they do not go into the computer until "the last minute"; and that the purpose of not telling all of the nurses the time of the strike was so that the nurses would not be distracted by the clock. When called by the Respondent, nurse Radil, who worked for the Respondent for 6 years, was on the

[26] This testimony was admittedly not accurate.

[27] At this point in her testimony Kluver was directed not to look at the voice mail access list she had in her possession while she was testifying.

[28] Counsel for the Respondent gave Kluver the voice mail access code sheet on the witness stand after she testified "0465" the number to access Doctor Carlsen's messages. As here pertinent the voice mail access code sheet, GC Exh. 4, has a "Physician's Computer Number" column with the physician's computer numbers. The sheet also has "Voice Mail Code" column. Doctor Carlsen's computer number on the sheet is listed as 465. That is why Kluver testified that the sheet indicates "0465" when in fact in the voice mail column the sheet indicates "465." As she testified, she believed that the code number was the doctor's computer number with a "0" in front of it. In looking down the "Physician Computer Number" column which she had in front of her when she testified about Doctor Dittberner's access code she would have seen "310." And adding a "0" to this would give her the correct access code number, namely "0310." But if she continued looking down the sheet which she had in front of her while she testified, she would have seen "010" for Doctor Engebretson in the "Physician Computer Number" column. Kluver testified that she pressed "0010." As noted above, the correct number was "010" as set forth in the "Voice Mail Code" column of the voice mail access code sheet. Kluver then testified that she then checked Doctor Johnson's code. She was then directed to not look at the list as she testified. If she had a chance to look at the list before she was given this directive, she would have seen "220" in the "Physician's Computer Number column. Following her understanding, she would have concluded that the access code was "0220." This is exactly what she testified that she pressed on September 10. In other words, in looking only at the "Physician Computer Number" column on the voice mail access sheet the only number, taking the approach she did—adding a "0" to the "Physician Computer Number"—she could get correct was "0310" for that was the only number of the four she gave which did have a "0" in front of the "Physician Computer Number" column entry of "310."

negotiating committee and was a Union steward, testified that she believed that Nures Jeppesen was leaking information to management and the reason she did not tell the nurses the time the strike was to commence was because she did not want it to be leaked; that if she had known that the nurses were supposed to give the clinic notice that they were going to strike at 11:45 a.m. instead of 8 a.m. on September 10, they would have given the clinic notice; that it was decided that there would be more nurses in the clinic later in the morning than earlier in the morning on September 10; that a decision was reached before the union meeting on the night of September 7 that the strike would commence at noon on September 10, Union Representative Kleckner knew the time before the September 7 meeting and Union Representative Netjes learned of the time at the September 7 meeting; that Kleckner had informed the nurses that they had the right to strike at any time within 72 hours after 8 a.m. on September 10;[29] and that in her September 30 affidavit to the Board she indicated "[n]ot all of the nurses started at 8:00 A.M. so waiting until later in the day would allow the entire group to be at work and to walk out as a unit." In response to questions of counsel for the General Counsel, nurse Radil testified that she made the above-described statement to the Board as part of the following statement:

> On about September 6th, 1999, I discussed the starting time of the strike with Scott Kleckner, he said that we could start within 72 hours of the time specified in the notice, not all of the nurses started at 8:00 A.M. so waiting until later in the day would allow the entire group to be at work and to walk out as a unit. I told him that it was important for the nurses to walk out as a group to show unity and strength, I also said, that they should show up for work as usual to help get the clinic prepared for the day so the patients could be taken care of.
>
> To my knowledge all of the nurses who were scheduled to work showed up on the morning of September 10th, 1999. Most nurses get a noon break and we talked about not wanting to leave patients so noon was decided as a time to begin the strike. Most nurses would be on break at that time and not taking care of patients. I had this conversation with Lynn Tvrdik and Joyce Iverson also and we all agreed that noon would be that starting time.

Nurse Radil also testified that noon was not chosen as the starting time to lull the clinic into a false sense of security or to in any way disrupt the operation of the clinic. In response to questions of counsel for the Charging Party, nurse Radil testified that she would not have done anything which would have jeopardized her right to continue to work at the clinic; that her decision to strike was a very difficult decision for her and she no longer has a home, she can not pay rent and she stays with friends as a result of going on strike; and that in deciding to strike she worried about her doctor because he relied on her a lot, she did a lot for him and she considered him not just a working partner but a friend.

When called by the Respondent, nurse Tvrdik, who worked for the Respondent for 19 years and became a steward and a member of the negotiating committee on September 3, testified that she did not remember being involved in the planning of the strike but she was involved in the implementation of the strike; that she had no involvement in the setting of the date or the time of the strike; that she did not recall being involved with nurses Radil and Iverson in deciding to strike at about noon instead of 8 a.m.; that in her September 30 affidavit to the Board she indicated "[a]bout one week prior to the strike date, Iverson, Radil and I decided that noon would be the best time to start"; that the nurses were not told in advance the time they would be going out on strike because if the nurses were told, they would be just thinking about the strike that morning and it would interfere with how they were going to do their job; that she did not recall the nurses being told this by the leadership at either the August 25 or the September 7 meetings; that 8 a.m. is a very busy time at the clinic, and it is busier than later in the morning; that it is common at the Clinic for patients to get backed up later in the morning and that can make things hectic; that in her September 30 affidavit to the Board she indicated "Radil, Iverson and I made plans for how to initiate the strike"; that she did not remember at the August 25 or September 7 meetings, along with the nurse leadership, telling nurses that when she and nurse Iverson came around each nurse was to check with their doctor to see if they were needed before they would leave their work station; that in her September 30 affidavit to the Board she indicated "[w]e also instructed the nurses that when we came around they were to check with their doctor to see if they were needed, punch out, and meet on the street"; that she was present on September 10 when nurse Iverson said words to the effect of "Doctor Telste I'm leaving is there anything else you need for me to do before I leave for the morning"; that at the meetings of August 25 and September 7 nurse Radil indicated to the nurses that it was important that they get as many nurses to go out at the same time to show unity; and that there are more nurses in the clinic to accomplish this later in the morning than there are at 8 a.m.. In response to questions of Counsel for General Counsel, nurse Tvrdik testified that 8 a.m. at the clinic is busier than noon because

> phones are ringing, you're trying to get your messages made, patients are—they're stopping in for blood pressure checks, in my case a lot of times I had mothers stopping with babies for

[29] R. Exh. 26 is an e-mail, dated August 30, that Kleckner sent to Nurse Radil. As here pertinent, it reads as follows:

> I faxed a 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 am on 9/10). This means that we can go at 8:00; or just have everyone go to lunch and not come back; or work as usual on 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.

In the e-mail Kleckner also indicated "let's keep them [the Respondent] guessing." However, this did not deal with the timing of the strike. Rather, it dealt with whether individual nurses had to tell the Respondent, if asked, whether they were going to participate in the strike. This portion of the e- mail reads as follows: "The Clinic has the right to ask each employee if they will cross the picket line, or if they plan to strike. The best answer is 'I don't know,' let's keep them guessing."

> just immunizations on their way to daycare, you're trying to prepare your rooms, your charts. There's a lot to do in the morning.
>
> . . . .
>
> Usually at noon you are finished with your patients, your morning work, you have a break, there is supposed to be a scheduled break time between 12 and 1 for you to take a lunch break and that's—it's less busy.

In response to questions of counsel for the Charging Party, nurse Tvrdik testified that on September 10 she made an effort to set things up for the entire day; and that because of her efforts it would have been easier for a replacement nurse to take over for her after noon.

When she was called by the Respondent, Medical Assistant Faris testified that she worked for Doctor Dittberner on station 7; that she did not change her voice mail access code on September 10, she would not even know how to do it; that she did not know anything about the alleged change of her voice mail access code; that on several occasions she had trouble getting into that voice mail herself; that when she left the clinic on September 10 she gave her physician a letter and she spoke with her before she left; and that in the letter she accused the clinic of lying to her but she was not angry when she went out on strike. In response to questions of counsel for the General Counsel, Medical Assistant Faris testified that she started working for Doctor Dittberner approximately three weeks before September 10; and that on more than one occasion she could not get into the voice mail, she had to have a coworker assist her, they used the correct number and it would work some times and at other times it would not work. Medical Assistant Faris testified that at one time nurse Dalton helped her and at one time nurse Aga helped her; and that they just kept pushing the correct numbers and eventually if would connect. In response to questions of counsel for the Charging Party, Medical Assistant Faris testified that she was promised a raise by Crowe from $8.45 an hour to $10.95 an hour but days before the strike she was told by Crowe or Doctor Dittberner, she could not remember which one told her, that she would not get the raise because it would look like she was being paid to stay and work and not join the Union and walk out on strike, and if the clinic did that, the Union would have a hay day with it. In response to further questions of counsel for the Respondent, Medical Assistant Faris testified that she recalled that she had a problem with the voice mail access code her first day working for Doctor Dittberner but she could not recall the specific dates of the other occasions when she had problems with the voice mail access code; and that she did not report the problem to a supervisor or Kluver or Doctor Dittberner because it was much faster to get coworkers to help her, and by continuously pressing the access code she eventually she was able to access the voice mail messages. Subsequently Medical Assistant Faris testified that nurses Aga and Dalton helped her on her first day and they were able to get into the system before they had to contact the nurse who previously worked at that station.

When called by the Respondent, nurse Bevill testified that nurse Leah Watson came and told her that it was time to leave and she did not tell her physician that she was leaving. In response to questions of counsel for the General Counsel, nurse Bevill testified that when she walked out on strike the last patient was in an examination room and she said to Doctor Wymore before he went into the examination room "[w]ell, the last one's in"; that the last patient, a man in his 30s or 40s, had an upper respiratory infection, and he was in the company of her physician when she left; that there were no other patients in the other examination rooms; that she had done all of her nursing responsibilities for the last patient in that she weighed him, checked his blood pressure, pulse rate, temperature, went through his medication and allergy lists, and wrote a one liner about his reason for being there that day. In response to questions of the Charging Party, nurse Bevill testified that she did not change her access code for her voice mail, she did not remove any material from the clinic, and she had no knowledge of any other nurse engaging in such conduct.

When called by the Respondent, Kleckner testified that it is his understanding that unions are required to give health care facilities a 10-day strike notice before they engage in a strike; that, as a lay person, it is his understanding that the Union had a 72-hour period that it could strike within any point of that 72 hours after the original date and time of the strike notice, and it was not necessary to give any additional notice to the employer in that 72-hour window; that it is his understanding that if the Union struck outside the 72-hour window period the strike would be unlawful unless there was a mutual written agreement that would extend the time;[30] that he only recalls discussing with nurse Radil striking at a time other that 8 a.m. on September 10; and that such discussions occurred after he faxed the notice to the Respondent.

Doctor Robert Telste testified that on September 10 he was seeing patients on station 6 and nurse Iverson was his nurse; that at approximately 11:40 a.m. on September 10 he was in an examination room with a patient for a dressing change and there were two more patients to be seen; that it is common as the morning goes on to fall behind the scheduled times for seeing patients and it is common for a nurse to interrupt him while he is seeing a patient if it involves an important matter; that on September 10 nurse Iverson did not speak to him about being able to leave work and he did not tell her that she could leave work; that he was with the patient with the dressing change when nurse Iverson walked off the job on September 10; that he discovered that nurse Iverson was gone when he walked out of the examination room looking for some materials for doing the dressing change; that nurse Iverson would normally assist him in getting these materials; that the other patient in an examination room had an eye infection; that he roomed the last patient, who had an ear infection; that he would not have told nurse Iverson that she was free to leave work at about 11:40 a.m. on September 10; and that nurse Iverson did not give him a status report about patient care activity when she walked out on September 10. On cross-examination, Doctor Telste testified that

[30] Documents turned over to the Respondent by the Union pursuant to a subpoena, namely a document titled "PRESS RELEASE" and a union newsletter, were received as R. Exhs. 27 and 28, respectively. Both refer to the involved strike and the Union's position regarding the involved notice requirement.

from 8:15 to 11:45 a.m. he saw patients every 15 minutes, except for 8:30 to 8:45 a.m. and 10 to 10:15 a.m.. In response to questions of the Charging Party, Doctor Telste testified that "[t]here was no harm done" to the patient who needed a dressing and the other two patients who were waiting to see him when nurse Iverson went out on strike; that he finished at 12:20 p.m., had lunch and then started up again; that he did not call anyone to get someone to help; that he was aware that after the strike began there were nurses in the building and that there were replacement nurses in the building; that he got his replacement nurse at 1 p.m.; that the dressing change patient was scheduled for 11 a.m., the eye infection patient for 11:30 a.m., and the ear infection patient for 11:45 a.m.; that he did not recall whether nurse Iverson asked him if he needed her to change the dressing on the patient he was with at 11:40 a.m.; that usually he looks at the wound and changes the dressing and if he needs something he will come out and get it; that he did not recall nurse Iverson asking if he needed her to change the dressing and him responding by saying, "[n]o, go ahead"; and that he would have wanted to do the dressing or at least look at it before it is changed. On redirect Doctor Telste testified that nurse Iverson's work was not finished at the time he walked in to attend to the patient with the dressing. Subsequently, Doctor Telste testified that after he finished with the last morning patient he left the station to get lunch and when he returned to the station he did some dictation; that he did not specifically remember seeing Crowe and Otte coming through the station trying to determine who had gone out on strike; that when he went to get a basin for the patient for whom he was changing the dressing, he saw a nurse but he did not ask her for assistance; and that the nurse he saw while getting the basin was assigned to another doctor.

Doctor Dittberner testified that she had received a notice from the clinic, Respondent's Exhibit 7, which indicated that the Union had sent notice that it was going to strike on September 10; that she thought her medical assistant, Faris, was going to work during the strike because Medical Assistant Faris had resigned from the Union on September 1, and Medical Assistant Faris had submitted a carbon copy of the resignation to the clinic, Respondent's Exhibit 29; that her practice on station 7 is busier later in the morning after 11:30 then 8 to 8:30 a.m.; that she typically begins seeing patients at 8:30 a.m. and her first scheduled patient on September 10 was at 8:30 a.m.; that she normally finished seeing patients between 12 noon and 12:30 p.m., and it is her practice to schedule her last morning patient at 11:45 a.m.; that at approximately 11:50 a.m. on September 10 she had three patients in examination rooms and she was coming out from a physical exam on one of the three; that as she left the examination room she met with Medical Assistant Faris and nurse Tvrdik, who was standing in the hallway; that Medical Assistant Faris handed her a letter and indicated that the letter, Respondent's Exhibit 30, would explain why she was going out on strike;[31] that she did not give Medical Assistant Faris any indication that she would no longer be needed that morning or that she was free to leave that morning; that she then went to administration and told them that her nurse left and she still had two patients to see; that Respondent's Exhibit 17 is the job description for a medical assistant; that she had a practice of always making sure with her nurse that all loose end were taken care of at the end of the morning; that Medical Assistant Faris did not advise her of the status of patients or patient care issues before she went out on strike; that this was a problem for her because she had no idea what phone calls had come in, and what things had been triaged where; that one of the medical assistant's duties was keeping the exam rooms stocked with supplies; that her 4 p.m. patient was scheduled for a procedure including a pap smear; that at this point in the day she had a replacement nurse; that with the 4 p.m. patient she took the pap smear and then she reached for a pap smear jar to discover that there was none in that examination room; that she discovered that there were no jars in two of her three examination rooms; that she found a jar and she put the sample in the jar; that the jar contains alcohol which protects the specimen; that subsequently she was advised that the sample was not a

[31] The letter reads as follows:

September 10, 1999

Dr. Dittberner,

I had to let you know how I feel, so here it is . . . .

I have been made promises by the administration that they have no intention of keeping. I have been looked in the eye and lied to, that is not acceptable to me. I have now experienced for myself what my co-workers have de[a]lt with for years, broken promises and words just to keep stringing you along. I want to make sure you know some facts. I have 16 years clinical experience with outstanding recommendations. I take pride in my medical career and the recognition it has given me. I am ashamed to be a part of the Alex. Clinic, as my standards and reputation are being compromised, and I will not allow that. Do you realize that I make $8.45 per hour, do the math, x 36 hours per week, now take out medical insurance @$396.00 per month, take taxes out, and see what I have to try to survive on, buy groceries, etc. This is the lowest wage and the worst benefits I have encountered over my entire career. I have never heard of such a high insurance premium, I question what we are really paying? Do you realize that most of the nurses working at the clinic qualify for Minnesota Care, and do you realize that this wage puts most of us at poverty level or below according to the State on Minnesota guidelines. Doesn't it send a red flag up for you by the extreme amount of people that have left the clinic, including doctors, nurses, and support staff, don't you question that? Do you know that cleaning people can start at @$8.50 per hour, what is going on here, we are in the health care business, why doesn't anyone care? The clinic and all it's decision makers should be embarrassed and ashamed. I am appalled, and find it difficult to believe that you aren't. The paper stated last night that the clinic is offering a 4-11% raise for all nurses, then why are we all only getting 4%, with pennies added on for experience, I get .9%, yes that is point nine percent! Either the statement was not true, or the clinic needs to reevaluate where they have set everyone's pay.

I am truly sorry that this had to be pushed to this extreme, we work very well together, and can accomplish a lot together along with excellent patient care, I respect you, and I like you, I pray this can be settled promptly as I want and need to get back to work, and I do hope that [it] is with you, you will never find a more loyal, hard working, well seasoned assistant, I just need to be appropriately compensated for that.

Sincerely,

Marcy

viable specimen and the patient had to come back for another pap smear; that normally there are three to five jars in each examination room and she knows this "[b]ecause I open the drawers [where the jars are kept] a lot"; that on September 10 she also conducted a pap smear on the 8:30 a.m. patient, on the 9:45 a.m. patient, and on the 3 p.m. patient; that on September 10 between 1:15 and 1:45 p.m. she saw Kluver sitting at her nurse's desk using the telephone and she asked Kluver what she was doing; that Kluver said, "[i]t appears the passwords have been changed"; that patients have called in emergency situations; that Mondays and Fridays are her busiest days; that in her opinion "the health and safety of . . . [her] patients was jeopardized by . . . [her] nurse striking without notice at approximately 11:50 a.m." on September 10; that in her opinion the risk would have been reduced if the strike had occurred at 8 a.m. as scheduled; and that Medical Assistant Faris had never indicated to her that there were any problems getting into her voice mail prior to September 10. On cross-examination, Doctor Dittberner testified that at 11:50 a.m. on September 10 she had completed her work with the patient to whom she gave a physical and she had not given Medical Assistant Faris any instructions to do anything further for this patient; that with respect to the two remaining morning patients Medical Assistant Faris had put them in examination rooms, took their vitals, and did a brief history; that she did not give Medical Assistant Faris any other instructions to do anything else with these two patients; that she had not seen these patients yet when Medical Assistant Faris went out on strike; that no emergencies occurred with either of the two remaining patients; that she did not know for a fact that the voice mail code was changed; that she never saw Medical Assistant Faris change her voice mail code and she did not know whether it was even changed; that keeping rooms supplied is an ongoing process throughout the day and if the nurse realized that some time during the middle of the day that she needed another pap smear jar it would be an ongoing process to keep the room supplied; that Medical Assistant Faris puts all of her calls and messages in an orange folder that goes directly to her, Doctor Dittberner, in the middle of the day and at the end of the day; that at the time Medical Assistant Faris left she, Doctor Dittberner, did not check that orange folder to see if she had any calls or messages; that she did not have any patients complain that there September 10 phone calls were not returned "but the potential is there"; that she did not meet with her replacement nurse the night before because she did not expect to have a replacement nurse; that she got her replacement nurse at 12:45 to 12:50 p.m.; that she was aware that the replacement nurses were in the physician's lounge; that she did not get a replacement nurse for the last two morning patients; that she never had Medical Assistant Faris in the examination room with her; that she had no problems in administering care to the two remaining morning patients after Medical Assistant Faris left; that the lab supplies pap smear jars but she did not know if there are not always enough pap smear jars at the lab; that she was not aware that nurses had trouble keeping pap smear jars in stock; that she was not aware that Medical Assistant Faris would go down to the lab many times during the day to see if they had jars available for her to place in the rooms; that "if I would have had somebody orientated to my station I would have had one [pap smear jar] out and available or I wouldn't have started the physical. I was assuming that the rooms were stocked or that she [Medical Assistant Faris] would have left a note that the rooms were not stocked"; that she did not have her replacement nurse check the examination rooms by 4 p.m.; that she did not tell her replacement nurse that one of her jobs was to keep the rooms stocked; that she did not tell her replacement nurse where to find pap smear jars; that she did not tell her replacement nurse to check the rooms to see if all of the pap smear jars had been used up; that she did not know whether there were more pap smear jars available from the lab;[32] that she was in the clinic over the noon hour she did not know if the phone was ringing, and she did not hear the phone ringing; that even though she was there, she did not know whether the last two morning patients were placed in jeopardy by Medical Assistant Faris leaving; that there were three registered nurses in the clinic and she could have received their assistance in a short amount of time; that there was one other nurse at station 7 after Medical Assistant Faris went on strike but she was working with her doctor; that she was not aware that medical assistant Faris' busiest time was her preparation time from 8 to 8:30 a.m.; that she did not know what her nurse did between 8 and 8:30 a.m. on September 10; and that she had "not yet heard" that any patient had complained that on September 10 they did not have their prescription called in. On redirect Doctor Dittberner testified that to her knowledge she had never before had a pap smear specimen returned dry. On recross Doctor Dittberner testified that she "looked at it [the involved specimen] before I put it in the jar *hoping* that it was not *totally* dry and stuck it in the jar" (emphasis added); and that she could have taken another specimen at that time "but it appeared like it was going to be okay and I didn't want to put the patient through it again." Subsequently Doctor Dittberner testified that to the best of her knowledge Medical Assistant Faris' September 10 letter, which is set forth above, does not contain any factual misstatements; that on September 8, Medical Assistant Faris handed her "a letter that showed her wage increase and she stated to me that she had been promised a larger wage increase and that she could not work for this"; that she talked with Crowe and arranged for Medical Assistant Faris to talk with her; that Medical Assistant Faris told her that she had been promised a raise to $10.95 per hour and was upset; and that she did not know if Medical Assistant Faris was upset enough to

[32] Doctor Dittberner then gave the following testimony:

JUDGE WEST: For the record you did three pap smears that day [before the involved one]. Were the jars in each and every of those three instances out or did you have to go into the drawer and get the jar yourself?

THE WITNESS: The—the ones [Pap smears]—the one [actually, according to her earlier testimony there were two pap smears in the morning] I had done in the morning the jar was out. The one I did at 3 o'clock the Pap smear bottle was in the drawer."

JUDGE WEST: So you looked in the drawer?

THE WITNESS: Yes.

JUDGE WEST: How many other bottles were in the drawer at the time?

THE WITNESS: I don't remember. I grabbed that one and finished with the Pap smear.

leave her job. On further cross-examination Doctor Dittberner testified that Medical Assistant Faris spoke with her after Medical Assistant Faris spoke with Crowe and Medical Assistant Faris told her that Crowe said that she would not get the $10.95 raise that Medical Assistant Faris said she was promised; that this occurred just days before the strike; and that it was her understanding that Crowe told Medical Assistant Faris that the raise in the circumstances would be viewed as trying to win her favor.

On rebuttal Medical Assistant Faris testified that she normally arrived at the clinic at about 7:45 a.m.; that her morning preparation is her busiest time of the day; that she kept rooms stocked every morning but the pap smear containers were a concern, they are hard to come by, she had to constantly go searching for them, the lab was unable to keep them in stock, and she would fill those throughout the day as pap smears were occurring because they generally were not there in the morning to retrieve; that when she was told that the strike was starting on September 10 she was coming out of an examination room after taking vitals, an explanation of why the patient was there, and the patient's medications and any allergies; that she told Doctor Dittberner that she was leaving and she handed Doctor Dittberner a letter; that after she rooms a patient rarely does she have other duties to attend to for the patient; that her duties were 100 percent fulfilled when she went out on strike; that she had prepared her charts for the entire day; that messages were returned as current as possible; that Doctor Dittberner did all of her own lab and X-ray requests; that she had completed all of her duties that she knew of for that morning; that the orange folder with calls, messages and prescription requests was current when she went out on strike; that Doctor Dittberner had asked her why she was upset and she showed Doctor Dittberner Crowe's letter and told Doctor Dittberner Crowe had promised her a pay increase of $10.95; that with Doctor Dittberner's intervention she spoke to Crowe who told her that she would not give her the pay raise because it would look like she was playing favorites and paying her not to strike; and that at the clinic where she worked immediately preceding the Respondent she received $13 per hour. On cross-examination, Medical Assistant Faris testified that she did not change the access code to her voice mail, and she would not even know how to do it; that whatever Pap smear jars were available when she stocked on the morning of September 10 were in the drawers; and that she received the $13 per hour at a facility in Minneapolis, Minnesota.

The parties stipulated that employees Covel and Kluver are not supervisory employees as that term is defined in Section 2(11) of the Act.

Respondent's Exhibit 9 was received pursuant to a stipulation. It is a letter dated September 13 from the Respondent's counsel, James Dawson, to Kleckner and reads as follows:

> On August 31, 1999, the Alexandria Clinic (Clinic) received notice of the Union's intent to strike the Clinic at 8:00 a.m. on September 10, 1999. A copy of that notice is attached. As you know, the Union did not strike at 8:00 a.m. Instead, employees reported to work and then walked off their jobs at Noon on September 10.
>
> Please immediately advise me as to why the Union chose to delay the commencement of the strike and why the Union did not give the Clinic advance notice of this change in plan.
>
> I expect a response to this letter by Noon on Tuesday, September 14, 1999.

Hunt testified that on September 13 a decision was made after the September 13 letter was sent to the Union to terminate the striking nurses for participating in an illegal strike but the decision was dependent on whether the Union provided some extraordinary excuse as to why the strike occurred at noon instead of 8 a.m.; that during the week following the strike he became aware that there was a problem with rooms not being restocked properly the morning of September 10; and that he would terminate a nurse for changing the voice mail code or for removing the manuals placed at the stations for the temporary nurses or for engaging in a concerted effort to withhold restocking patient rooms to disrupt the operation of the clinic. On cross-examination, Hunt testified that he believed that he became aware of the manuals disappearance sometime on Monday September 13; that he did not know whether the red manuals which were missing from stations 5, 6, and 7 were missing even before the nurses went out on strike; that with the average length of experience of the nurses in the unit they would not have occasion to use the red manuals and he did not know if the red manuals had been missing for months or years before the strike; and that he had knowledge of the voice mail codes being changed and the missing manuals before the Respondent sent out the discharge letters. Doctor Hansberry testified that on September 13 he heard about problems with the nurses' voice mail system and orientation materials; that the orientation materials would have assisted the temporary nurses in providing patient care on September 10; and that the termination letters were not sent out on September 13 because the Respondent wanted to give the Union an opportunity to indicate whether there were extenuating circumstances as to why the Union did not strike at 8 a.m. on September 10.

Kluver testified that on September 13 Crowe telephoned her and asked her to change the message on extension 1203, which is nurse Jeppesen's extension; that nurse Jeppesen's physician was Doctor Bergstrand; that she did not go to that phone but rather "I accessed it from my own, because the codes were still 0000, and I listened to it and I then went upstairs to Caroll [Pollard, who is the administrative secretary] and she listened to it and she said Tim [Hunt, who as indicated above is the administrator] should listen to this"; that the message, a tape recording of which was received herein as Respondent's Exhibit 21, was "gibberish," and it was nurse Jeppesen's voice; that Pollard put the message in the speaker phone and they tape recorded it; that the prompts on the tape recording were part of the message that was on extension 1203 on September 13; that the prompts which can be heard on the tape recording are on the voice mail messaging which are the prompts used to change the nurse's voice mail each morning; that at the beginning of the message there is a reference to Doctor Bergstrand; and that she has known Jeppesen for 11-1/2 years. On cross-examination, Kluver testified that the voice mail system is controlled by a

computer at the clinic; that it is not possible that a malfunction in the computer system caused the message to get so garbled because if something went wrong with the system, it would have been wrong with all the messages, not just one; that the "gibberish" message was discovered "[s]ometime in the morning, towards noon maybe"; that for Jeppesen to have recorded this "gibberish" message to the patients who call her voice mail number, she would have to done it prior to noon on September 10; and that she was not aware that nurse Sherman's phone or any other phone had problems in the past. On redirect, Kluver testified that at the request of Crowe she checked the messages of each individual nurse, some were fine, some still gave the date of September 8, and some had been deleted completely; and that she did not notice any problems which would suggest that there was a mechanical malfunction.

On rebuttal nurse Jeppesen testified that she worked for the Respondent for 11 years and she worked for Doctor Bergstrand; that on September 14 some patients, on their way out of the clinic, told her that they heard her voice mail message prior to them going into the clinic and it was a weird message; that the message was all garbled; and that she never changed her outgoing message on her voice mail. On cross-examination, after listening to Respondent's Exhibit 21, nurse Jeppesen testified that it was not her voice; and that she did not know how that message got on her voice mail machine. Subsequently, Jeppesen testified that she knows Kluver, conversed with her on a frequent basis 4 or 5 years ago, did a lot together, but over the years it just kind of diminished to saying "hi" and "stuff" in the hallway; that when she testified that the voice on the recording, Respondent's Exhibit 21, was not hers she meant that the voice sounds like hers but it is nothing that she did.

Respondent's Exhibit 10 was received pursuant to a stipulation. It is a letter dated September 14 from the executive director of the Union, Netjes, to Dawson and it reads as follows:

> As Mr. Kleckner is on vacation, I am responding to your letter received September 13, 1999 regarding the Alexandria Clinic strike.
>
> The Alexandria Clinic nurses acted under the advice of our legal counsel. Under statute, we gave the proper notice to strike and went out on strike within the allowable time.
>
> If you have any further questions, you may contact our attorney, Gregg Corwin at . . . .

Hunt testified that after receiving the Union's letter, the Respondent mailed termination letters on the afternoon of September 14; and that on September 14 the Alexandria Clinic, P.A. filed a charge with the Board against the Union alleging that it engaged in an unlawful strike in violation of Section 8(g) of the Act since the Union did not provide the required advance notice of its intent to strike, Respondent's Exhibit 11.

Doctor Hansberry testified that after receiving the letter from the Union it was decided that there were no extenuating circumstances as to why the Union could not have went out on strike at 8 a.m. and the termination letters were sent out.

The 22 involved bargaining unit members were informed of their discharge with the following letter from the Respondent, General Counsel's Exhibit 2(a)–(v) which are dated September 13,:[33]

> Beginning on September 10, 1999, and continuing to date, the Minnesota Licensed Practical Nurses Association (Union) has picketed the Alexandria Clinic, P.A. in violation of the notice provisions of Section 8(g) of the National Labor Relations Act. Accordingly, this picketing is unlawful.
>
> The Clinic views your participation in this unlawful picketing as a serious violation of the law and unnecessarily disrupted the Clinic's ability to care for its patients. Accordingly, your employment with the Alexandria Clinic, P.A. is terminated effective September 13, 1999. Your final paycheck, which will include any earned but unused vacation [,] will be sent to you in the near future. You will receive a separate letter covering issues relating to the continuation of medical and life insurance.

Nurses Radil and Tvrdik testified that other than this letter the Respondent never provided them with any other reason for their discharges.

Analysis

In my opinion the Respondent violated the Act as alleged in the above-described complaint.

In *Walker Methodist Residence*, 227 NLRB 1630, 1630–1632 (1977), the Board concluded as follows:

> The initial issue presented is whether Section 8(g), added to the Act by the 1974 Health Care Amendments,[1] applies to a work stoppage in which no labor organization is involved. We agree with the Administrative Law Judge that it does not.
>
> In enacting the 1974 Health Care Amendments, Congress was faced with two conflicting interests. On the one hand, it was noted that it is unjust to deny to the employees of nonprofit hospitals the rights granted to employees in other industries to organize and bargain collectively. On the other hand, special protection seemed necessary when dealing with health care institutions in order to assure the continuity of patient care. As a result of a balancing of these concerns, the Act was amended by extending coverage to employees of nonprofit hospitals and adding a new Section 8(g) requiring a labor organization to give 10 days written notice before striking or picketing at a health care institution.[2] Additionally, Section 8(d) was modified to extend the loss of status sanction to employees who engage in a strike proscribed by Section 8(g).[3]
>
> Section 8(g) appears on its face to apply only to striking or picketing by a labor organization. The Respondent, however, points to the legislative history to support its assertion that the 8(g) notice requirement applies to all strikes at a health care institution. Although there is language in the floor debates to support the Respondent's position,[4] a reading of the legislative history as a whole leads to the opposite result. Congress was concerned that sud-

[33] The letter to Nurse Ludwig was dated September 14. GC Exh. 2(m).

den, massive strikes could endanger the lives and health of patients in health care institutions. In voicing this concern and in considering the solution being proposed by Section 8(g), the legislators again and again spoke of placing a duty on labor organizations to give notice before striking. A brief work stoppage by a few unorganized employees simply was not the type of disruption with which Congress was concerned.

In construing Section 8(g), the Board has examined the legislative history and found that the section should properly be interpreted according to its clear language. [Footnote omitted.] For example, in a decision holding that a labor organization violated Section 8(g) by picketing a subcontractor at a reserved gate of a building project involving a hospital, the Board quoted the remarks of Senator Harrison Williams, chairman of the Committee on Labor and Public Welfare, that:

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

[1] Public Law 93-360, 93 Cong., 2d Sess., S.3203.

[2] Section 8(g) reads in pertinent part: '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 [FMCS] of that intention . . . .' [Section 8(g) also specifies '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.']

[3] Sec. 8(d) provides: 'Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer . . . .'

[4] See the statement of Senator Taft during the floor debates at p.115 of the Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974.

> . . . .
>
> Moreover, an examination of policy considerations reinforces a literal interpretation of Section 8(g) in this situation. The legislative history stresses that the purpose of the notice provision is 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. Placing the duty of advance warning on labor organizations is warranted because a strike involving a labor organization is likely to last longer and involve a greater number of employees than a work stoppage by unorganized employees. Further, a strike by a labor organization is of a greater concern because the presence of a picket line has the potential for interfering with respect . . . [to] supplies and making both replacements and nonstriking employees unwilling to work. Thus the legislative history, policy considerations, and Board precedents all point toward an interpretation of Section 8(g) as applicable only to strikes or picketing involving a labor organization.
>
> The second issue presented is whether the loss of status sanction of Section 8(d) applies in the absence of an 8(g) violation. We hold that it does not . . . . In an earlier case involving the loss of status clause of Section 8(d), the Supreme Court held that the clause must be read in the context of the entire Act.[8] . . . .
>
> . . . the final question presented is whether the work stoppage was protected concerted activity. We answer in the affirmative. In enacting Section 8(g), Congress did not make a legislative finding of fact that all work stoppages against health care institutions are so harmful that they must be forbidden. Rather, it found that strikes or picketing by labor organizations against health care institutions are so potentially disruptive as to require that advance notice be given. Nothing in the 1974 Health Care Amendments restricts concerted activity by nonorganized employees, and the legislative history does not indicate an intent to alter the scope of protection granted them under Section 7. In fact, the purpose of the 1974 amendments was to extend the protection of the Act to employees of nonprofit health care institutions who were excluded from coverage by the 1947 Taft-Hartley Amendment.[10] The amendments should therefore not be read to reduce the preexisting rights of health care employees unless explicit language mandates that result.
>
> . . . .
>
> In cases decided to date, the Board has not held work stoppages against health care institutions to be outside the protection of Section 7. Rather, it has determined that it will apply the same standards of conduct to health care institutions as to other enterprises. [Footnote omitted.]

[8] Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).

. . . .

[10] See the remarks of Senator Williams in the forward to the Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974.

The Board, in *Bethany Medical Center*, 328 NLRB 1094 (1999) concluded as follows:

> Although they gave notice of their walkout only 15 minutes prior to the first catheterization procedure scheduled for the day, the judge correctly found that the special strike notice requirements of Section 8(g) of the Act apply only to labor organizations, not to groups of employees. *Walker Methodist Residence*, 227 NLRB 1630 (1977). The courts, as well as the Board, have read the clear unambiguous language of Section 8(g) to mean what it says: the notice requirements are applicable only if the strike is by a labor organization. [Citations omitted.] Since no labor organization was involved in the walkout, [Footnote omitted] we find, in agreement with the judge, that the catherization laboratory employees were not legally required to do anything more than they did to preserve their rights pursuant to Section 7 of the Act when they walked off the job on March 9.

> . . . . The Act protects the right of employees to engage in concerted activities, including the right to strike without prior notice. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); *Montefiore Hospital [& Medical Center v. NLRB*, 621 F.2d 510 (2d Cir. 1980)] . . . . Both the Board and the courts, however, recognize that the right to strike is not absolute, and Section 7 has been interpreted not to protect concerted activity that is unlawful, violent, in breach of contract, or otherwise indefensible.
>
> . . . . In cases involving health care employees, although the Board has recognized that risk of harm to patients caused by employees' concerted activity is a factor in deciding whether the activity was protected, it has applied the same standards of conduct to employees of health care institutions as it does to employees of other enterprises. *Phase, Inc.*, 263 NLRB 1168, 1169 (1982). Accordingly, the test of whether the catheterization laboratory employees' work stoppage lost the protection of the Act is not whether their action resulted in actual injury but whether they failed to prevent such imminent damage as foreseeable would result from their sudden cessation of work.
>
> . . . . Delays of routine procedures were common occurrences and had resulted in a set policy for 'bumping.' . . . .
>
> . . . . They are able to direct patients to several of the nearby acute care hospitals with similar cardiac catheterization facilities. These facts support a conclusion that the catheterization laboratory employees did not foreseeable create such a risk of harm to patients so as to lose the statutory protection of their walkout.
>
> We further find that the catheterization laboratory employees' failure to provide the Respondent with more than 15 minutes notice of their work stoppage did not render the walkout indefensible. As noted above, both routine and emergency procedures were often rescheduled or delayed without endangering patients' lives, and in fact the Respondent successfully rescheduled or transferred to other nearby hospitals all of the scheduled procedures and the one unscheduled emergency procedure that arose during the walkout.
>
> . . . .
>
> Under these circumstances, we find that the catheterization laboratory employees' work stoppage and refusal to terminate their work stoppage to perform an emergency catheterization procedure did not foreseeable create such a risk of harm to patients as to justify depriving these employees of the Act's protection. [Footnote omitted.]

The Board's decisions in *Walker Methodist Residence*, supra, and *Bethany Medical Center*, supra, are quoted extensively herein to show how the Board approaches strikes by employees at health care institutions where no labor organization is involved in the walkout.

In this case if there was no union involved, the 22 nurses could not have been lawfully discharged for any alleged failure to give the Respondent the 8(g) notice, which is only required when a union is involved in the strike.

As noted above in *Walker Methodist Residence*, supra, the Board indicated "[i]n an earlier case involving the loss of status clause of Section 8(d), the Supreme Court held that the clause must be read in the context of the entire Act." Section 7 of the Act reads as follows:

> RIGHTS OF EMPLOYEES
>
> Sec. 7 Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . . .

With respect to whether impact on patient care should be considered herein, should the work stoppage or strike of the 22 nurses involved herein be analyzed in this regard differently than the situation of the health care employees in *Bethany Medical Center* solely because the employees in the instant case are represented by a union (and the above-described possible consequences of being represented by a union) in the strike involved herein and no union was involved in the walkout in Bethany Medical Center? In effect, are the employees in the instant case being treated differently, at least to some extent, because they engaged in union activity (striking while being represented by a union) vis-a-vis engaging in concerted protected activity (striking while not being represented by a union)?

The Board in *Greater New Orleans Artificial Kidney Center*, 240 NLRB 432, 433–436 (1979), concluded as follows:

> It cannot be disputed that the Union did not comply with the literal terms of Section 8(g) of the Act in that Respondent did not receive written notice of the Union's intent to strike Respondent's facility until September 2, a month after the commencement of the strike. Contrary to the Administrative Law Judge, however, we conclude that the Union, in fact, took reasonable steps to insure compliance with the 8(g) requirements . . . . Thus we find that it would be inequitable to hold the Union responsible for the untimely service of the notice when no reason for the delay can be attributed to it. This is particularly true since the Union struck without knowledge that Respondent had not received its initial written 10-day notice and since Respondent made no mention of its not having received such notice at the July 29 negotiation meeting which it knew was held because of the Union's notice of intent to strike. [Footnote omitted.]
>
> In any event, it is clear from the record that Respondent had 10 days' actual notice of the Union's intent to strike on August 2, inasmuch as it was so informed by the FMCS by telephone on July 23. [Footnote omitted.] Having been informed of the Union's intent to strike, Respondent made contingency plans, i.e., contracted with a security service to provide security during the strike, met with both the employees and patients to advise them of its intent to continue operations and to provide adequate security during the strike, contracted for and received an early shipment of dialysis concentrate, circulated a notice to patients indicating that the strike was to begin on August 2, and had security guards in its premises on August 2. Thus,

with these preparations having been completed when the strike began on August 3, Respondent was able to continue patient care without interruption and without jeopardy to the patients' health. In passing the health care amendments to the Act Congress was greatly concerned with the need for "sufficient notice of any strike or picketing to allow for appropriate arrangements to be made for the continuance of patient care in the event of a work stoppage.["][8] Here it is clear that such congressional concern was satisfied in that Respondent received 10 days' notice, albeit oral rather than written, and was able to provide for the continuity of patient care deemed essential by Congress.

Further we do not agree with the Administrative Law Judge's conclusion that the Union, in extending the date for the commencement of the strike, evidenced a lack of concern for Section 8(g) by failing to comply with the last sentence of that section which reads, The notice, once given, may be extended by the written agreement of both parties. The Administrative Law Judge construed such language as requiring a written agreement before an initial strike date may be extended. We cannot agree with such a restrictive interpretation of that portion of Section 8(g). Thus, the cited language does not expressly provide that a written agreement of the parties is the exclusive manner of extending an initial strike date. Furthermore, such a restrictive interpretation is clearly contrary to the expressed intent of Congress as revealed in the legislative history of Section 8(g).[9] In this regard, Congress, through the committee reports of its two bodies, specifically addressed the manner of extending the time of the strike set forth in the 10-day notice as follows:

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 commencement of a 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.[10] [Emphasis supplied.]

And the joint remarks of Congressmen Ashbrook and Thompson with respect to the House committee report further reveals the intent of Congress concerning the manner in which the initial strike may he extended:

[T]he Committee Report states that at least 12 hours notice must be given if an 8(g) notice has been filed and the strike has not occurred immediately after the 10 days. However, the Committee was aware of the practical application of this new legislation, and realized the need for application of the rule of reason.

Thus, e.g., where the notice was mailed in a timely fashion, and the union was not responsible for the delay, *or where under such circumstances, the employer has been provided with more than twelve hours actual notice, then the failure to strictly comply with the twelve hour notice seems excuseable* [sic].[11] [Emphasis added.]

It is thus clear that Congress, as revealed through its committee reports and the remarks of two of the leading proponents of the health care amendments, not only contemplated, but specifically approved, a labor organization's extension of the time set forth in the initial 10-day notice for the commencement of a strike by unilateral notification to the employer, at least in the circumstances in which the postponement of the strike is between 12 and 72 hours of the time set forth in the initial notice and where there is at least 12 hours advance notice given to the employer of the postponement. The record establishes that in this case the Union sent Respondent a telegram which was received sometime during the afternoon of August 2 and which informed the latter that the strike would commence at 7 a.m. on August 3. The Union here extended the time set forth in its initial 10-day notice for the commencement of its strike within the 12- to 72-hour period, and, in fact, gave Respondent at least 12 hours' advance notice before the strike actually began. Accordingly, we find that the manner in which the Union postponed the commencement of its strike was in accord weigh Section 8(g).

Finally, in concluding that the conduct of the Union here, both with respect to the initial 10-day notice and to the postponement of the commencement of the strike, was not in derogation of Section 8(g), we are mindful of the congressional admonishment to the Board to apply "the rule of reason," as cited above in the remarks of Congressmen Ashbrook and Thompson. While made in the context of a union's notice of postponement of the initial time set for a strike, in our view the following remarks of these two proponents of the amendments apply to the provisions of Section 8(g) generally:

> *The Board, in considering extenuating circumstances, is expected to act in a reasonable manner consistent with the Committee's intent as stated in its Report*. Furthermore, the status of strikers as "employees" would also be determined by the decision of the Board. Section 8(d) of the Act, which has been amended by this bill, clearly states "employees" will lose their status as such if they participate in a strike outside of the notice periods. Should the labor organization be in violation of Section 8(g), the employees would then, according to statute, lose their status as "employees." *Consequently, the reasonableness of the Board in applying the intent of the Committee to the facts is of major importance*.[12] [Emphasis added.]

Therefore, 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 serious consequences flowing from noncompliance with its provisions, i.e., the strikers' loss of employee status under the Act. We believe that out decision herein satisfies both of these expressed concerns of Congress.

In reaching the result herein, however, we wish to make it clear that we by no means are condoning a union's disregard for the provisions of Section 8(g). Thus, we stress that in the instant case the Union made reasonable efforts to give the Employer a 10-day written notice of its intent to strike, the Employer had the actual 10-days' notice of such intent, the Employer had the opportunity to and did make arrangements to insure continuity of patient care during the strike, and the Union extended the time for the commencement of the strike set forth in the 10-day notice within the 12- to 72-hour period and gave the Employer at least 12 hours' advance notice of the extension. In these particular circumstances, we conclude that the Union was in substantial compliance with Section 8(g) and that 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.

[8] S. Rep. 93-766, 93d Cong., 2d Sess. 4 (hereafter cited as S. Rep.); H. Rep. 93-1051, 93d Cong. 2d Sess. 3 (hereafter cited as H. Rep.); see also Id. at 4; Legislative History of the Nonprofit Hospitals under the National Labor Relations Act, 1974 at 92 (remarks of Senator Cranston); Id. at 97 (remarks of Senator Williams), (hereafter cited Leg. Hist.) Id. at 327 (remarks of Representative Young); Id. 374 (remarks of Senator Taft).

[9] We note that, as the Supreme stated in *N.L.R.B. v. Fruit and Vegetable Packers & Warehousemen, Local 760, et al. [Tree Fruits Labor*

Relations Committee, Inc.], 377 U.S. 58, 72 (1964), "[I]t is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers . . . ."

[10] S. Rep. at 4; H Rep. at 5.

[11] Leg. Hist., at 409–410.

[12] Leg. Hist.[,] at 410.

As noted in the above-quoted portion of *Greater New Orleans Artificial Kidney Center*, supra, the Board did consider impact on patients when the Board concluded "Respondent was able to continue patient care without interruption and without jeopardy to the patients' health" and "Respondent . . . was able to provide for the continuity of patient care deemed essential by Congress." And as noted above, regarding the 12-hour notice, the Board indicated as follows:

> It is thus clear that Congress, as revealed through its committee reports and the remarks of two of the leading proponents of the health care amendments, not only contemplated, but specifically approved, a labor organization's extension of the time set forth in the initial 10-day notice for the commencement of a strike by unilateral notification to the employer, *at least in the circumstances in which the postponement of the strike is between 12 and 72 hours of the time set forth in the initial notice and where there is at least 12 hours advance notice* given to the employer of the postponement.[34] [Emphasis added.]

After citing the Board's language quoted in the next preceding paragraph, namely "at least in the circumstances in which the postponement of the strike is between 12 and 72 hours of the time set forth in the initial notice and where there is at least 12 hours advance notice given to the employer of the postponement," the Charging Party, at pages 10 and 11 of its brief, contends that "a 12-hour notice of actual commencement does not apply to delays of a strike of less than 12 hours," and "the Union was . . . not required to give notice of the less than four-hour delay in the commencement of the strike," and "[g]iven the current state of the law, the Union's and the nurses' understanding of Section 8(g) is not patently incorrect." At page 17 of its brief the Charging Party contends that "the Union substantially complied with the notice requirements of 8(g) in that the only deviation from the 10-day notice was a delay of less than four hours in the strike time."

The Respondent, on brief, argues that any reliance upon the facts of *Greater New Orleans*, supra, to argue that the Union should be excused from complying with the 12-hour rule is seriously misplaced because that case is distinguishable in that here the Union did not notify the Respondent that the strike would be delayed to noon, the lack of notice of the delay was entirely the Union's fault, and the Union knew that the Respondent did not receive notice of the delay.

At page 15 of its brief the Charging Party contends as follows:

> The instant case is closer on the facts to *Hospital & Services Employees Union Local 399* (1976) Case No. 21–CG–4, 1976-77 CCH NLRB para. 20001 . . . . In *Hospital & Services Employee* the NLRB division of advice concluded that an unfair labor practice charge should be dismissed when the actual picketing began around 10:45 a.m. in a case where the notice had specified 7:00 a.m. as the time for picketing to commence. 43 A.L.R. Fed 449, . . . [subsection] 10 (Supp. 1998). *In that case, the NLRB based its decision on the fact that the employer suffered no adverse effects because of the delay in picketing*. Likewise, the Employer in the instant case did not suffer adverse effects because of the brief delay. The Employer should not be allowed to take advantage of the brief

[34] As noted above the Board reached this conclusion after indicating as follows:

> Further we do not agree with the Administrative Law Judge's conclusion that the Union, in extending the date for the commencement of the strike, evidenced a lack of concern for Section 8(g) by failing to comply with the last sentence of that section which reads, "The notice, once given, may be extended by the written agreement of both parties." The Administrative Law Judge construed such language as requiring a written agreement before an initial strike date may be extended. We cannot agree with such a restrictive interpretation of that portion of Section 8(g). Thus, the cited language does not expressly provide that a written agreement of the parties is the exclusive manner of extending an initial strike date. Furthermore, such a restrictive interpretation is clearly contrary to the expressed intent of Congress as revealed in the legislative history of Section 8(g). [Footnote omitted.]

and inconsequential delay in the commencement of the strike to rid itself of the Union's presence. [Emphasis added.]

The cited section in 43 ALR 449 reads as follows:

> In the following cases the NLRB division of advice recommended dismissal of unfair labor practice charges brought under 29 USCS . . . [subsection] 158 (g), as it found compliance with the statutory notice provisions by the labor organizations so charged.
>
> The NLRB division of advice concluded that an unfair labor practice charge concerning a union's violation of 29 USCS . . . [subsection] 158(g) should be dismissed as the union apparently began the strike on time and did begin picketing within a reasonable time from that specified in the notice filed with the health care institution and the FMCS, in *Hospital Service Employees Union Local 399* (1976) Cas No. 21–CG–4, 1976–77 CCH NLRB . . . [paragraph] 20001. The Union had written the employer of its intent to engage in a strike, picketing, and other concerted activities at or near the employer's facility at 7 a.m. on a given day. As at that time one employee scheduled to start work at that time failed to appear, and actual picketing commenced around 10:45 a.m., the division of advice determined that the strike had begun on time and the picketing was considered to have begun within a reasonable period after the scheduled time. It was also noted that the employer suffered no adverse effects because of the delayed picketing and the delay was apparently not attributable to any intention to mislead the employer by lulling him into a false sense of security, and the division recommended dismissal of the charge.

The case, as described in CCH, reads as follows:

> *HOSPITAL AND SERVICE EMPLOYEES UNION LOCAL 399 (Broadway Convalescent Hospital).*
>
> Case No. 21–CG August 12 1976
>
> From Harold J. Datz, Associate General Counsel, Division of Advice.
>
> Strikes-Notice of Strike-Delayed Picketing
>
> A union did not act unlawfully when it did not begin picketing until nearly four hours after the time scheduled in its 10-day strike notice. In view of the fact that an employee's failure to report to work coincided with the strike commencement time, and he later joined the picketing the strike began on schedule and the picketing began within a reasonable time. After receiving notice of the strike, the employer hired additional nurses and notified the families of patients and its suppliers. However, at strike time one employee scheduled for work did not report and there was no picketing. Section 8(g).
>
> From Text of Memorandum
>
> The Union was certified on February 6, 1976 and thereafter bargained with the Employer to impasse. On June 18, the Union wrote the Employer of its intent to 'engage in a strike, picketing and/or other concerted activities' at or near the Employer's facility on June 30, at 7 a.m. As a result, the Employer hired eight additional nurses and also notified its vendors and the relatives of patients of the pending strike and/or other activity.
>
> On June 30 at 7 a.m. one employee scheduled to start work at that time failed to appear. Actual picketing did not commence until 10:45 a.m.[1] The picketing has not disrupted patient care or interrupted deliveries and all nonunit employees apparently are crossing the picket line.
>
> ACTION
>
> It was concluded that the charge should be dismissed since the Union apparently began the strike on time and did begin picketing within a reasonable time from that specified in the 8(g) notice.[2]
>
> Since one employee who was scheduled for work did not report and later joined the picketing, he was apparently withholding his services as a striking employee.[3] And since his failure to report coincided with the strike commencement time set forth in the 8(g) notice, the strike began on schedule. With respect to the picketing, Union began picketing only three hours and forty minutes late. *In view of the fact that the strike began on time, the picketing was considered to be within a reasonable period after the scheduled time*. It was also noted that the Employer has suffered no adverse affects because of the delayed picketing and the delay was apparently not attributable to any intention to mislead the Employer by lulling him into a false sense of security. [Emphasis added.]

[1] The employee who failed to report at 7 a.m. subsequently joined the picket line.

[2] See *Lutheran Welfare Service of Illinois-Augustana Nursery*, Case 13–CG–4, Advice Memorandum dated December 31, 1975; S. Rep. No. 93-766, 93d Cong., 2d Sess. 4 (1971); H. Rep. No. 93-1051, 93d Cong., 2d Sess. 5 (1974)).

[3] Cf., *Bechtel Corp.*, 200 NLRB 503.

The Respondent, on brief, argues that certain of the nurses who were in the clinic exhibited great neglect in the manner in which they walked off the job in that they, collectively, did not either tell their physicians they were leaving, or ask their physicians if they were needed for anything, or discuss outstanding patient care issues before leaving;[35] that a minimum of three voice mail access codes were changed, namely those of nurses Iverson and Getz and Medical Assistant Faris; that information packets were removed and the evidence supports an inference that the striking nurses caused the disappearance of these and the computer cheat sheets since the documents were not removed from station 2 where the Union demonstrably enjoyed the least support; and that Jeppesen's unintelligible outgoing voice mail message was not the product of some sort of malfunction.

Counsel for General Counsel, on brief, contends that the delay did not cause an adverse impact on patient care and the continuity of patient care was protected; that the Respondent

[35] Nurses Elbert, Iverson, Getz, Aga, Juntunen, and Bevill, and Medical Assistant Faris.

consistently confused disruption to patient care with mere inconvenience to the physicians; that the Respondent was unable to present any evidence that the care provided to any patient was harmed; that the striking employees delayed the commencement of the strike to lessen its disruption to the Respondent's operation; that, other than nurse Getz, there is no evidence that the nurses changed their voice mail access codes; that the Respondent failed to prove that nurse Jeppesen changed her outgoing voice mail message; that the record does not substantiate the Respondent's claim that the striking nurses removed material from their nursing stations; that the record does not show that Medical Assistant Faris failed to keep her exam rooms stocked with supplies; that the Respondent's allegation that the nurses joined the strike while in the middle of performing patient care is not only false, but it also insults the character and integrity of the nurses;[36] that rather than proving the Respondent's misguided allegation that certain nurses walked out during patient care, the evidence shows that they conscientiously completed their work prior to joining the strike; that although the Respondent asserts that nurses Elbert, Iverson, Faris, and Getz joined the strike while in the middle of patient care, the testimony the Respondent elicited is limited to the conclusory statements from physicians which are not supported by the facts, and the facts show that these three nurses had completed their duties and were not engaged in patient care at the time they joined the strike; that according to Doctor Dittberner's own testimony, Medical Assistant Faris had completed her duties for the morning; that nurse Iverson was not in the midst of providing patient care at the time she joined the strike and there is no evidence that she was even aware that there was a patient in the waiting room; that rather then demonstrating that nurse Elbert was engaged in patient care at the time she joined the strike, the evidence shows that she was at her desk and she had completed her other work for the morning; that there is an enormous difference between walking out on a patient, and joining a strike while patients are in the building; and that given the Respondent's failure to adduce any evidence that the nurses joined the strike while they were engaged in patient care, the Respondent's assertion clearly lacks merit.

To the extent that it might be argued that employees engaged in a concerted effort to disrupt patient care, in my opinion it has not demonstrated that such was the case.[37] The most serious allegation is that a minimum of three nurses (Iverson, Faris, and Getz) changed their voice mail access codes. Nurse Getz admitted that she changed her voice mail. That matter will be dealt with below. Regarding the allegation that nurse Iverson changed her voice mail access code, it is noted that the only witness to make this allegation was Otte. Her testimony is not credited. Nurse Iverson testified that she did not change her voice mail access code. Iverson's testimony is credited. Otte testified that she did not look at the voice mail access code sheet when she allegedly tried to access messages. Otte testified, after looking at the sheet while testifying on direct, that she tried the correct number. But then just seven pages later in the transcript Otte erroneously testified on cross-examination that the number was other than the one she testified to on direct. Additionally, Otte testified that she told Crowe about the problem. Crowe did not specifically corroborate this.[38] And when Crowe allegedly telephoned Kluver to meet her to look into the problem Kluver did not go to station 6, which is Iverson's station. Crowe testified that she telephoned Kluver about station 6. Rather, according to her testimony, Kluver went to station 7 to nurse Aga's (Doctor Carlsen's nurse) extension at Crowe's behest, did not look at the access code sheet, and they were unable to access messages. Kluver admitted that she did not have the sheet with the access codes on it on September 10 when she tried to access the messages. And Kluver admitted that she was using the wrong codes for three of the four extensions she tried. Did Kluver then go to nurse Iverson's extension? No. Kluver then allegedly tried two other extensions on station 7. One of the extensions allegedly tried was that of nurse Radil, One of the extensions allegedly tried was Medical Assistant Faris' extension. Doctor Dittberner testified that she saw Kluver on Medical Assistant Faris' extension. While Kluver cited the correct number for Medical Assistant Faris' extension as she was looking at the access code sheet while testifying on direct, as noted above, taking the approach Kluver did with the access code numbers this was the only number she would have had correct while looking at the sheet. According to her testimony, Kluver then goes to station 6. Does she try nurse Iverson's extension at station 6? No. Kluver testified that she tries nurse Tvrdik's extension on station 6. Kluver never testified that she tried nurse Iverson's extension on station 6. And Otte did not testify that Crowe told her that she was aware of the problem when Otte allegedly telephoned Crowe to tell her about the problem.[39] Hunt testifies that he told Kluver not to spend any additional time determining which codes had been changed but rather to override the system and change all of them for accessibility. Kluver testifies that operations manager

[36] Counsel for General Counsel points out that 8 of the 22 striking nurses were not even working when the strike commenced; the Respondent presented no evidence regarding the activities of five nurses who were working at the time the strike commenced (Nurses Lundy, Mertens, Peterson, Holten, and Watson); two nurses had completed seeing patients; Nurse Jeppesen was not working with a physician; and Nurses Bevill, Aga, and Juntunen testified, without contradiction, that although their physician was seeing a patient at the time they joined the strike, their duties were complete and the Respondent failed to prove that any of these three was engaged in patient care at the time they joined the strike.

[37] To the extent that it might be argued that the nurses alleged misconduct warranted termination, it is noted that while the Respondent's management assertedly was aware of the alleged misconduct before the letters of termination were forwarded, no reason other that the delay in the commencement of the strike was cited in the termination letters. To the extent any misconduct should be considered in the context of reinstatement rights, such matter will be treated below.

[38] Otte testified that she notified Crowe of the problem on station 6. Crowe testified that the replacement nurse on station 6 told her of the problem with retrieving messages and she telephoned Kluver and asked her to check it out.

[39] When Nurse Erickson telephoned Crowe about the voice mail code, Crowe told Nurse Erickson that the code had been changed to "0000." Otte did not testify that Crowe told her that the code had been changed to "0000" so one must assume that Otte allegedly telephoned Crowe before the code was changed.

Miller said that because of the time element they should default all of the numbers to "0000." With respect to the extensions which allegedly had problems, does a pattern emerge? Nurses Radil, Tvrdik, and Iverson were the nurse leaders. And Medical Assistant Faris, as noted above, just a little over an hour before gave Doctor Dittberner a letter in which she indicated that she was being paid less than a janitor and was lied to by the Respondent's management. So with the testimony of Otte, Crowe, and Kluver, corroborated in part by Doctor Deborah Dittberner, the Respondent makes a very serious accusation against the three nurse leaders and the author of a letter which alleges a member of the management of the Respondent is less than honest.[40] Some backpedaling was necessary with respect to nurses Radil and Tvrdik when Kluver had to admit that she could not have been using the correct access code numbers. The testimony which the Respondent cites to support its allegation that more than one nurse changed the voice mail access code is not reliable. The testimony of Medical Assistant Faris that she did not change her voice mail access code is credited. The reliable evidence of record demonstrates that the only nurse or medical assistant who changed her voice mail access code was nurse Getz.

As noted above, Respondent requests an inference that the striking nurses caused the disappearance of the form packets and the computer cheat sheets. Counsel for the General Counsel, on brief, points out that the Respondent admits that it has no witness who could testify to what happened to the computer menus or form packets, and anyone in the clinic could have removed them, including the replacement nurses. Counsel for the General Counsel contends that the Respondent has the burden of proving that the nurses took the items, and the evidence of record only supports a conclusion that they were reported missing; and that rather than proving the nurses engaged in misconduct, the Respondent has only proven its desire to blame the nurses for everything regardless of the evidence. The Respondent has not given any basis warranting the inference it requests. Its request is denied.[41]

With respect to nurse Jeppesen's outgoing message, it is noted that the recording received in evidence could not be a recording of the changed outgoing message alone. The recording received has the verbal prompts for changing the outgoing message. Obviously it is not normal for the outgoing message which a caller hears to have the verbal prompts regarding changing the outgoing message. It appears that someone recorded the prompts and the outgoing message and later played a recording into the telephone instead of placing the normal updated outgoing message on the voice mail. The message is unintelligible but it is not clear if it is a result of changing the speed of the original message or something else. As indicated above, nurse Jeppesen testified that the voice sounds like hers but she did not record this message. Also, as noted above, Kluver testified that when Crowe told her about the message on September 13 she did not go to nurse Jeppesen's phone but rather she accessed nurse Jeppesen's outgoing message from her own phone using the default code ("0000") which was still in effect. What this means is that anyone could do the same thing. Anyone could have accessed nurse Jeppesen's message from any telephone (they did not have to go to nurse Jeppesen's extension), if they knew the default code. The default code was public knowledge in the clinic on September 10. While the Respondent might argue that it was necessary to go to the default code to retrieve messages as quickly as possible, there is no reasonable explanation on the record as to why the codes were not then immediately changed to individual numbers.[42] In my opinion, none of the access codes Kluver allegedly checked had been changed.[43] That Kluver allegedly checked them without using the voice mail access code sheet would not be a reasonable approach.[44] The fact that Kluver left the default code in effect for 3 days, notwithstanding the fact that she wanted to leave early at noon on September 10 because it was her birthday, is difficult to understand. And since the default code was still in effect midday Monday, September 13, obviously Kluver did not change the access codes back to individual numbers the first thing Monday morning. As indicated above, anyone could have accessed and recorded nurse Jeppesen's outgoing message from any telephone, altered it, and then played the changed message back into the system. In view of this, no weight will be given to the recording introduced herein by the Respondent in support of its allegation that nurse Jeppesen engaged in misconduct. Nurse Jeppesen's testimony that she did not record the message received herein as Respondent's Exhibit 21 is credited.

With respect to the Respondent's allegation that nurses Elbert, Iverson, Getz, Aga, Juntunen, and Bevill, and Medical Assistant Faris exhibited great neglect in the manner in which they walked off the job in that they, collectively, did not either tell their physicians they were leaving, or ask their physicians if they were needed for anything, or discuss outstanding patient care issues before leaving, it was not demonstrated that any of these things actually resulted in a disruption in the continuity of patient care or that the inconveniences that some of the physicians testified they experienced were part of any concerted

[40] Why was nurse Aga included? Perhaps because her name would appear first in an alphabetical list of those nurses who went on strike. More likely, nurse Aga was included because it was believed that it would have been too obvious to go first to the extension of Nurse Leader Radil or medical assistant and letter writer Faris. Nurse Aga's only fault was that she was also on station 7. As noted above, Covel testified that after she spoke with Nurse Getz, she told Kluver about Nurse Getz and the voice mail access codes. In my opinion, Nurse Getz' code was the only one that was changed. It would have taken a couple of minutes to change this one code to be able to retrieve any messages in that voice mail. Yet Kluver never testified that she even checked Nurse Getz' code.

[41] The reliable evidence of record indicates that some of the red manuals, other compilations which some of the Respondent's witnesses accused the striking nurses of taking, had been missing for some time before the strike.

[42] The procedure described by Kluver for changing an individual access code would apparently not have taken more than a couple of minutes for each of the extensions of the 13 nurses who walked out at Alexandria if the Respondent found that it was necessary to change them. But there was no need to change any access code other than Nurse Getz'.

[43] Kluver never checked the one code which was changed, Getz'.

[44] The same conclusion would apply to Otte who allegedly checked Iverson's access code without looking at the access code sheet.

effort to disrupt the continuity of patient care. It was not shown that there were any patient complaints relating to a disruption in the continuity of patient care on September 10 at the Alexandria clinic or the Osakis facility.

It has not been demonstrated that the striking nurses engaged in any concerted effort to disrupt the continuity of patient care or that the continuity of patient care was actually disrupted.[45] Regarding any delay in seeing a patient after the nurses went out on strike, as nurse Erickson testified herein, she has worked at all of the stations in the Alexandria clinic and historically the average delay on any day in a doctor seeing a patient beyond the scheduled time is 10 to 15 minutes, and sometimes longer depending on the doctor and what is happening with the doctor.

The Respondent cites a number of cases. In my opinion those cases dealing strictly with Section 8(g) which do not involve the question of job losses are not on point. In such cases there are no conflicting rights. Unlike the "RIGHTS OF EMPLOYEES," under Section 7 of the Act, there are no pertinent rights of unions in the Act. As noted above the Supreme Court has held that Section 8(d) must be read in the context of the entire Act, which obviously would include Section 7 of the Act. Since there is no conflict in the interests of the unions and the patients, there is no need to balance these interests. When only Section 8(g) is involved, compliance with Section 8(g) is the only real issue; there is no need to consider the impact on the continuity of patient care.

Those cases in which the 10-day notice was not even given are not on point.

And finally, cases where the strike was delayed to a date other than that specified in the 10-day notice are not the same situation as that at hand herein.

One of the cases cited by the Respondent contains dicta which the Respondent argues is on point. In *NLRB v. Washington Heights-Mental Health Council*, 897 F.2d 1238 (2d Cir. 1990), the employees went on strike one day later than the date specified in the 10-day notice and while there was some question whether the union there gave the employer verbal notice of the delay, at least with respect to the date, the court concluded that any extension of notice must be in written form. The court then concluded that there was no need to get into the legislative history because the union there did not provide twelve-hour supplementary notice of the time of day that the strike would begin. Then the court went on to conclude as follows:

> Given that the Center might well have figured out that the strike was to begin on the morning of September 29, we might appear unduly parsimonious about compliance with the notice requirement. We are not, however, at liberty to depart from the straightforward unambiguous language of the statute requiring the Union to specify in writing the date and time it would strike. Furthermore, we are convinced that the notice requirement is appropriately read strictly. At a health care institution, disruption in patient care of even a few hours may cost lives. "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 . . . .'" *NLRB v. Stationary Eng'rs, Local 39*, 746 F.2d 530, 533 (9th Cir. 1984) (citation omitted).

The Board had agreed with the administrative law judge that the September 29, 1982 strike was an unfair labor practice strike under the doctrine of *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956), and, therefore, the Union was excused from the notice requirement of Section 8(g) of the Act. The Court, however, indicated that it was somewhat hesitant to give that portion of the legislative history of Section 8(g) referring to *Mastro Plastics Corp. v. NLRB*, supra, effect because it not so much guides interpretation of ambiguous wording in the statute, but rather creates a significant exception. As can be seen, while the language cited by the Respondent, namely "[a]t a health care institution, disruption in patient care of even a few hours may cost lives" apparently refers to the potential for disruption, in the instant case there was no disruption in patient care. This language is dicta. The language does not refer to a few hours delay in the commencement of a strike but rather refers to "disruption in patient care of even a few hours."

On the one hand, the Respondent takes the position that the delay in the instant case requires notice in addition to the original 10-day notice. On the other hand, both the General Counsel and the Charging Party take the position that there was no need for notice in addition to the 10-day notice which was given.

Here the Respondent received the 10-day notice and it made the necessary preparations and informed those who had to be informed. The replacement nurses were given orientation, toured the clinic, and had an opportunity to meet with the physicians on September 9. The 13 replacement nurses were in the clinic when the strike began and they took the place of the 13 nurses who went on strike.

Here one of the reasons for the delay was so that the nurses could complete the necessary preparations for the entire day. While some of the doctors testified about which part of the day was busier, they did so in terms of the scheduling of patients. Doctor Dittberner, who apparently is representative, did not know that her nurse's busiest time is between 8 a.m. and 8:30 a.m., and Doctor Dittberner did not know what her nurse did between 8 and 8:30 a.m. And with respect to scheduling, counsel for the General Counsel, at page 26 of his brief, correctly indicates: "General Counsel's Exhibit 5, the doctors' schedules, demonstrates that with the exception of Dr. Susan Paulson, whose nurse did not strike, no physician was scheduled to see patients at noon . . . . Accordingly, the period between noon and 1 p.m. was in fact a slow time at the clinic." The nurses are busier the first thing in the morning and most of the nurses and doctors have a lunchbreak at noon. As correctly pointed out by counsel for the General Counsel on brief, one of the reasons the nurses delayed the commencement of the strike was to lessen its disruption to the Respondent's operation.

[45] Nurse Getz, who acted in her own, will be covered below. Since there is no allegation that anyone other than Medical Assistant Faris failed to stock properly before going out on strike, obviously there is no allegation that there was a concerted effort on the part of the nurses to disrupt the continuity of patient care by not stocking properly. In my opinion, Medical Assistant Faris was not at fault regarding the above-described specimen jar incident. That matter will be treated below.

Here it was not shown that the delay was used in an attempt to lull the Respondent into a false sense of security so that it would not be prepared for the strike.

Here the nurses were misled by the Union regarding what is permissible under the notice requirements. There is no reason to believe that if they were accurately informed of the requirements, they would not have made sure that there was strict compliance with the requirements. Although there is no requirement of such a showing, I do not believe that the involved nurses knowingly and intentionally failed or refused to strictly comply with the notice requirements. In the circumstances of this case I do not believe that any additional notice was required.

Here, as noted above, contrary to the Respondent's assertions, it was not shown that the nurses, except for Nurse Getz, engaged in misconduct or in any way disrupted the continuity of patient care when they went on strike.

Here one must consider the Supreme Court's holding in *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956) that the loss of status clause must be read in the context of the entire Act. Obviously this includes Section 7 of the Act. The loss of status clause alters the scope of protection granted employees under Section 7 of the Act in that the Act protects the right of employees, including nonorganized employees who work for health care institutions, to engage in concerted activities, including the right to strike without prior notice. The loss of status clause involved here alters the scope of protection granted the involved employees under Section 7 because the involved employees are represented by a union and they engage in concerted protected union activity. In these circumstances I believe that there should be a balancing; a balancing of the concern for the continuity of patient care and the concern that the involved employees are being deprived of certain rights because they are represented by a union and they engage in concerted protected union activity. Here there was no disruption of the continuity of patient care. Here there was no written complaint from any patient that his or her patient care was disrupted by the fact that the strike commenced at noon instead of at 8 a.m. Doctor Hansberry, the president of the board of the Respondent could not think of any patient complaints as a result of the September 10 strike. As the Respondent concedes on brief, there were no real patient problems (a disruption of the continuity of patient care) caused by the fact that the strike commenced at approximately noon instead of at 8 a.m. In my opinion, the strike and picketing began within a reasonable time after the scheduled time. In the particular circumstances extant here, I believe that the Union was in substantial compliance with Section 8(g). Here the Union did not have to give notice in addition to that which it did give. To conclude that Section 8(g) requires that the strike commence exactly at the time specified (assuming that it does commence on the date specified) in the circumstances existing here "so as to deprive strikers of their status of employees would constitute an unwarrantedly harsh result not intended by Congress." *Greater New Orleans Kidney Center*, supra.

On brief the Respondent argues that assuming arguendo that it violated Section 8(a)(1) and (3) by terminating the nurses who commenced the strike, four nurses are not entitled to reinstatement. More specifically, the Respondent argues that the following nurses for the following misconduct are not entitled to reinstatement: (1) Iverson, and (2) Faris for changing their voice mail access code, (3) Getz for changing her voice mail code, removing the dividers that separated instruments, removing Doctor Pederson's procedure manual, and removing a computer chart adjacent to the computer, and (4) Jeppesen for changing the outgoing message on her voice mail to incomprehensible gibberish. As found above, in my opinion the record does not support the Respondent's allegations regarding nurses Iverson, Faris and Jeppesen.[46] With respect to nurse Getz, the Respondent on brief argues that even where an employer unlawfully terminates an employee, if the discriminatee engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date that the employer first acquired knowledge of the misconduct; that Hunt testified that a nurse would be terminated for changing the voice mail access code under the circumstances present in this case; that by changing the code nurse Getz placed the clinic's patients at

[46] While the Respondent does not raise the pap smear specimen jar incident in support of its argument on brief that Medical Assistant Faris should not be reinstated, that matter should treated. The pap smear jars were difficult to obtain from the lab and stocking them was an ongoing process throughout the day. On brief, counsel for the General Counsel contends that Medical Assistant Faris should not be held accountable for her replacement's failure to do the job. And the Charging Party, on brief, argues that the evidence does not show that Faris intentionally failed to stock the examination room with supplies. The normal procedure is for the jar to be out when Doctor Dittberner goes into the examination room to take a pap smear. That was the case for the two pap smears which were taken during the morning of September 10 while Faris was working. As noted above, Faris went on strike at approximately noon on September 10. A pap smear jar was not out when Doctor Dittberner took a pap smear at 3 p.m. She had to go into a drawer to get a jar. When asked how many jars were in the drawer at the time, Doctor Dittberner responded: "I don't remember. I grabbed that one and finished with the Pap smear." In view of the fact that normal procedure was not followed with the 3 p.m. patient in that the jar was not out and available before the specimen was taken, and in view of the fact that Doctor Dittberner had to go into the drawer to retrieve a jar, one would think that it would have been reasonable to make note of how many jars were in the drawer. If there were none left, and if the 4 p.m. pap smear was done in this same examination room, it would be expected that when she opened the drawer again Doctor Dittberner would not find a jar unless she, the replacement nurse or someone else had put some jars in the drawer in the interim. If there was at least one other jar, Doctor Dittberner would have known where to get a jar for the 4 p.m. patient. But in view of her normal operating procedure, one must wonder why she began taking the pap smear of the 4 p.m. patient without having the specimen jar out and available. At one point Doctor Dittberner testified that she would have a jar out and available or she would not have started a physical. But she did not have a jar out and available for the 3 p.m. pap smear. Nonetheless, she allegedly commenced the 4 p.m. pap smear without having the jar out and available. Additionally Doctor Dittberner did not tell her replacement nurse (a) to check the examination rooms by 4 p.m., (b) that it was her job to keep the rooms stocked, (c) where to find the jars, or (d) to check to see if all the jars had been used up, and Doctor Dittberner did not know whether there were more jars available from the lab. It was not shown that Faris engaged in any misconduct with respect to the pap smear jar.

risk; and that actions creating the potential for harm to persons is the type of conduct that warrants depriving employees of their reinstatement rights. Counsel for General Counsel, on brief, contends that while nurse Getz admitted that she changed the access code to her voice mail on September 10, the Respondent must substantiate its assertion that it actually would have discharged nurse Getz for the stated reasons; that Hunt's testimony is not enough; that the Respondent failed to present any testimony regarding the standard of conduct to which it holds its nurses or how it has reacted to acts of misconduct in the past; that at the most, the record merely demonstrates the existence of what may be a legitimate reason to discharge nurse Getz; that, however, the Respondent has failed to demonstrate that it actually would have discharged an employee for such "trivial conduct";[47] that the Respondent failed to produce any testimony that nurse Getz acted with an intent to disrupt the clinic; and that the conduct to which nurse Getz admitted is not sufficient to deny nurse Getz reinstatement. The Charging Party, on brief, points out that "[t]he actions of one misguided individual [, nurse Getz,] cannot be used to convict the whole group."[48]

Contrary to the contention of counsel for the General Counsel, what nurse Getz admittedly did, changed the voice mail access code, was not "trivial conduct." Nurse Getz did a tremendous disservice to the patients, she did a tremendous disservice to her fellow nurses, and she did a tremendous disservice to herself. While Crowe testified that if a call involves an emergency it is triaged and does not go into voice mail, Doctor Hansberry testified and gave an example of a caller who could be at grave risk and not fully appreciate their risk. In such a case the caller might tell the receptionist to give her or him the extension of Doctor Pederson and end up leaving a voice mail message. To deliberately create a situation where such a person would needlessly be placed at further risk until the Respondent is able to retrieve the message is not acceptable conduct. There was no showing that any patient suffered because of nurse Getz' misconduct and there was no testimony regarding any complaints about messages in nurse Getz' voice mail. Nonetheless, when someone engages in such serious misconduct she or he loses the protection of the Act. In my opinion, nurse Getz' act of changing the voice mail access code, which was a deliberate act, was serious in its nature, it had the potential for serious harm, and it renders her unfit for future service with the clinic. Nurse Getz created an immediate and potentially dangerous situation. The Respondent will not be ordered to reinstate her and her backpay is terminated on the date that the Respondent first acquired knowledge of the misconduct. *Marshall Durbin Poultry Co.*, 310 NLRB 68 (1993).[49] In my opinion nurse Getz did a tremendous disservice to her fellow nurses because the Respondent used the information she gave to Covel to make very serious, unfounded accusations against the three nurse leaders, namely Iverson, Radil, and Tvrdik, and against Medical Assistant Faris and nurse Aga. The Respondent also generally painted all of the remaining striking nurses with its unfounded accusation. It would have been so easy for Kluver to check nurse Getz's access code and take the couple of minutes to correct the situation. Instead, the Respondent chose to use the situation and engage in unfounded accusations. With respect to whether nurse Getz' conduct reflects on the other nurses, as the Charging Party so aptly indicated on brief, "[t]he actions of one misguided individual [, nurse Getz,] cannot be used to convict the whole group."

On the basis of the foregoing findings of fact and on the entire record in this proceeding, I make the following

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging nurses Fran Aga, Vickie Bevill, Cindy Bradley, Joleen Elbert, Marcy Faris, Janet Getz, Renae Haugen, Carol Holten, Joyce Iverson, Shirley Jeppesen, Dawn Juntunen, Norma Lais, Kay Ludwig, Loretta Lundy, Angie Mertens, Alison Olson, Louann Peterson, Joan Radil, Margaret Swanstrom, Lynn Tvrdik, Kathy Van Vickle, and Leah Watson on or about September 13, 1999, in retaliation for engaging in a strike and picketing at its facilities and to discourage employees from engaging in these activities the Respondent committed unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in and is engaging in certain unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

The Respondent having unlawfully discharged nurses Fran Aga, Vickie Bevill, Cindy Bradley, Joleen Elbert, Marcy Faris, Janet Getz, Renae Haugen, Carol Holten, Joyce Iverson, Shirley Jeppesen, Dawn Juntunen, Norma Lais, Kay Ludwig, Loretta Lundy, Angie Mertens, Alison Olson, Louann Peterson, Joan Radil, Margaret Swanstrom, Lynn Tvrdik, Kathy Van Vickle, and Leah Watson, it must offer them reinstatement (except nurses Janet Getz and Angie Mertens) to their former positions and make them whole for any loss of earnings and benefits they may have suffered as a result of the Respondent's unlawful conduct, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net

[47] Br. of counsel for General Coounsel, p. 49.

[48] Br. of the Charging Party, p. 21.

[49] This finding obviates the need to go into the other allegations of misconduct on the part of Nurse Getz.

interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[50]

[Recommended Order omitted from publication.]

[50] Nurse Mertens' backpay period will commence on September 13 and end on September 20. Nurse Getz' will not receive any backpay.