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The Ten-Day Notice of Strike Requirement of Section 8(g) of the 1974 Health Care Amendments As Applied by the East Chicago Rehabilitation Center, Inc. v. NLRB Court

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THE TEN-DAY NOTICE OF STRIKE REQUIREMENT OF SECTION 8(g) OF THE 1974 HEALTH CARE AMENDMENTS AS APPLIED BY THE *EAST CHICAGO REHABILITATION CENTER, INC. v. NLRB* COURT

I. INTRODUCTION AND SCOPE

The 1974 Health Care Amendments added section 8(g) to the National Labor Relations Act. This section states in 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 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.[1]

Since August 25, 1974, the effective date of these amendments,[2] the National Labor Relations Board and the courts of appeals have applied and interpreted this section in various factual settings.

On June 27, 1983, the Seventh Circuit Court of Appeals decided *East Chicago Rehabilitation Center, Inc. v. NLRB*.[3] This Note will discuss the ten-day notice of strike requirement of section 8(g) as interpreted by that court.[4] Unrelated issues in the opinion will not be considered.[5] Part II of this Note will examine

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1. 29 U.S.C. § 158(g) (1976). This section is consistently referred to in the legislative history as the "10-day strike notice" provision. District 1199, Nat'l Union of Hosp. & Health Care Employees, 232 N.L.R.B. 443, 446 (1977)(citing the legislative history).

2. This date is 30 days after the Amendments were signed into law.

3. 710 F.2d 397 (7th Cir. 1983), *enforcing*, 259 N.L.R.B. 999 (1982), *cert. denied*, 104 S. Ct. 1414 (1984).

4. 710 F.2d at 403-04, 409-11 (Coffey, J., dissenting).

5. For example, the majority did not find that an *unlawful* wildcat strike had occurred, 710 F.2d at 403-04, which the dissent vigorously contested in its opinion, 710

the legislative history of the 1974 Health Care Amendments, with emphasis on section 8(g). In parts III, IV, and V, the tests for "labor organizations," the pre-*East Chicago* decisions, and considerations of patient harm will be discussed.

II. PERTINENT LEGISLATIVE HISTORY

As originally enacted in 1935, the National Labor Relations Act[6] allowed the Board to assert jurisdiction over charitable hospitals.[7] The 1947 Taft-Hartley Amendments withdrew this jurisdiction by altering section 2(2)'s definition of "employer" to specifically exclude charitable hospitals.[8] This exemption remained in effect until the enactment of the 1974 Health Care Amendments.[9]

The definition of "health care institution" contained in section 2(14) was also added in 1974.[10] This term is defined as including "any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person."[11] The broad sweep of this term was emphasized during the House consideration of the Amendments. Representative Thompson stated that when the term "health care institutions" was used, it meant "real patient care and health service delivery, whether inpatient or outpatient. In addition, we do not mean it just as to the sick or aged. We mean it also to apply to private institutions caring for the mentally retarded, and the like."[12]

F.2d at 411-15. See *infra* note 144 for a definition of a "wildcat strike."

6. 29 U.S.C. §§ 151-168 (1976).

7. Central Dispensary & Emergency Hosp., 44 N.L.R.B. 533, 540-42 (1942), *enforced*, 145 F.2d 852 (D.C. Cir. 1944), *cert. denied*, 327 U.S. 847 (1945). Despite alternate urgings that a charitable institution and a hospital were involved, the Board still asserted jurisdiction. 44 N.L.R.B. at 540-42.

8. Vernon, *Labor Relations in the Health Care Field Under the 1974 Amendments to the National Labor Relations Act: An Overview and Analysis*, 70 NW. U.L. REV. 202, 203 (1975). After the 1974 Amendments, section 2(2) exempted from coverage "any corporation or association operating a hospital, if no part of the net earnings [inures] to the benefit of any private shareholder or individual." 29 U.S.C. § 152(2) (1976).

9. Vernon, *supra* note 8, at 203. The 1974 Health Care Amendments excised from section 2(2) the phrase that is quoted in note 8, *supra*. *See* Pub. L. No. 93-360, § 1(a), 88 Stat. 395 § 1(a)(1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 444.

10. 29 U.S.C. § 152(14) (1976).

11. *Id.*

12. SUBCOMMITTEE ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE,

The Senate Report, however, clarified that this broad definition did not rescind the preexisting exemptions for governmental corporations involved in health care delivery.[13]

The bright line drawn by the legislative history on coverage of particular facilities centers on "real patient care and health service delivery," the phrase used by Rep. Thompson.[14] This standard has been viewed by one commentator as "perhaps illusory"[15] and as "an awkward concept."[16] Two further considerations regarding jurisdiction of a particular health care facility are whether the institution affects commerce and whether it meets the minimum monetary jurisdictional standards.[17]

In bringing all nongovernmental hospital employees under the protection of the Act,

> it was recognized that the needs of patients in health care institutions required special consideration in the Act including a provision [section 8(g)] requiring hospitals to have 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.[18]

It was established that the special ten-day notice of strike provision of section 8(g) should be extended to all health care

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LEGISLATIVE HISTORY OF THE COVERAGE OF NONPROFIT HOSPITALS UNDER THE NATIONAL LABOR RELATIONS ACT, 1974 at 305-06 (1974)(hereinafter cited as LEGISLATIVE HISTORY). Representative Ashbrook stated that Rep. Thompson's statement was "absolutely accurate." *Id.* at 306. Based on this reference to the care for the mentally retarded, the Board asserted jurisdiction over a nonprofit corporation that provided residential care and training exclusively for mentally retarded persons. Beverly Farm Found., Inc., 218 N.L.R.B. 1275 (1975); *accord*, Lutheran Ass'n for Retarded Children, 218 N.L.R.B. 1278 (1975)(decided the same day as *Beverly Farms*).

13. S. REP. No. 766, 93d Cong., 2d Sess. 4 (1974), *reprinted in* 120 CONG. REC. 11620, 11621 (daily ed. April 24, 1974); LEGISLATIVE HISTORY, *supra* note 12, at 88; 1974 U.S. CODE CONG. & AD. NEWS 3946, 3949. The intent "was to cover the entire nonpublic health care industry." 120 CONG. REC. 22,575 (1974)(remarks of Sen. Williams).

14. *See supra* note 12 and accompanying text.

15. Feheley, *Amendments to the National Labor Relations Act: Health Care Institutions*, 36 OHIO ST. L.J. 235, 244 (1975).

16. *Id.*

17. *See* East Oakland Community Health Alliance, Inc., 218 N.L.R.B. 1270 (1975). The Board's monetary jurisdictional standard applies to both representation and unfair labor practice cases in the health care setting. Feheley, *supra* note 15, at 245.

18. S. REP. No. 766, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 3946, 3948 (hereinafter cited as SENATE REPORT and page cited to this reprint).

institutions, as that term is broadly defined in section 2(14).[19] The Senate Report stated: "It is in the public interest to insure the continuity of health care to the community and the care and well being of patients by providing for [such] a statutory advance notice."[20] Section 8(g), "which generally prohibits a labor organization [as defined by section 2(5)] from striking . . . a health care institution without first giving 10 days' notice,"[21] was added for these reasons.[22]

While not expressed in the Amendments, the legislative history shows an intent to make a violation of 8(g) an unfair labor practice, with injunctive relief available under section 10(j).[23] More importantly, an employee participating in any strike violative of section 8(g) loses his status as an employee pursuant to section 8(d).[24]

Although the notice requirements are more stringent for the health care industry than for other industries,[25] a "hygenic regard for timing is not mandated."[26] The legislative history again expresses what the statute does not: for a strike notice to be reasonable, the strike must begin within seventy-two hours of the time specified.[27] If the strike is delayed past the time specified in the notice, yet is within the following seventy-two hours, an additional twelve hours notice must be given.[28] If the strike is not scheduled within the seventy-two hour period after the time specified in the notice, a new ten-day notice is required.[29] "Re-

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19. *Id.*

20. *Id.* at 3949.

21. *Id.*

22. *Id.* Another purpose was to give the Board the opportunity to determine the legality of the strike before harm occurred to the institution but after a section 8(g) notice was given and after an unfair labor practice charge was filed. *Id.*

23. *Id.* Section 10(j) allows the Board, after a complaint has issued charging an unfair labor practice, to grant "appropriate temporary relief or restraining order." 29 U.S.C. § 160(j) (1976). This section was not changed by the 1974 Amendments.

24. 29 U.S.C. § 158(d) (1976). This loss of status ends if the employer rehires the employee. *Id.* The other modifications to § 8(d) are discussed in detail in Vernon, *supra* note 8, at 209-16.

25. 1 THE DEVELOPING LABOR LAW 64-65 (C. Morris ed. 1983). Nothing comparable to § 8(g) applies to other industries, Vernon, *supra* note 8, at 216, with the exception of § 8(d). *Compare* 29 U.S.C. § 158(g) *with* 29 U.S.C. § 158(d) (1976).

26. Feheley, *supra* note 15, at 250 (citing the Senate and House reports).

27. SENATE REPORT, *supra* note 18, at 3949. It is uncertain why seventy-two hours was chosen.

28. *Id.*

29. Vernon, *supra* note 8, at 216.

peatedly serving such ten day notices upon the employer [will] be construed as constituting evidence of a refusal to bargain in good faith by the labor organization,"[30] and perhaps will be violative of section 8(b)(3).[31]

The legislative history reveals three instances when a section 8(g) ten-day notice is *not* required. First, threats to strike are not prohibited under section 8(g) unless a strike actually occurs without notice.[32] Second, if the employer has committed flagrant unfair labor practices such as those in *Mastro Plastics Corp. v. NLRB*,[33] notice will not be required.[34] Faced with such employer misconduct, the labor organization need not wait until the noticed day and time to begin striking if notice has already been given.[35] Third, if the employer takes extraordinary steps after notice has been given, such as bringing in large numbers of personnel for replacement purposes or heavily stocking up on ordinary supplies, the strike can begin immediately.[36]

III. SECTION 2(5) LABOR ORGANIZATIONS

A. Non-Health Care Setting

The words of section 8(g) limit the notice requirements to

30. SENATE REPORT, *supra* note 18, at 3949.

31. Vernon, *supra* note 8, at 216.

32. *See* District 1199-E, Nat'l Union of Hosp. and Health Care Employees, 227 N.L.R.B. 132, 134 (1976)(discussion of pertinent legislative history).

33. 350 U.S. 270 (1956). This case was designated as the standard in the legislative history. SENATE REPORT, *supra* note 18, at 3949. In *Mastro Plastics*, the employer instructed employees to sign cards for a particular union and threatened termination for noncompliance. 350 U.S. at 273. During the jurisdictional dispute, the employer fired one employee for his organizational activities in support of the current union. *Id.* The employer also organized an employee committee to seek members for one of the unions. 350 U.S. at 272. Exact repetition of these particular unfair labor practices is not required. The standard has become "serious or flagrant unfair labor practices" in the health care setting. *See* Local 144, Hotel, Hosp., Nursing Home, & Allied Serv. Employees Union, 232 N.L.R.B. 25, 29 (1977) (involving picketing and § 8(g)).

34. SENATE REPORT, *supra* note 18, at 3949.

35. *Id.*

36. *Id.* at 3950. The Senate Report states that such employer conduct would "not necessarily [be] a violation of the Act." *Id.* However, "the implication is that [such conduct] could be deemed a refusal to bargain or at least be considered as evidence in determining whether the employer has engaged in overall bad faith bargaining." Vernon, *supra* note 8, at 219.

"labor organizations."[37] This term is defined in section 2(5) of the Act as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."[38] The term was defined very broadly in the original version of the National Labor Relations Act of 1935 in order to extend to all organizations of employees dealing with employers[39] the maximum independence of their section 7 rights[40] as protected by section 8.[41] Because section 8(g) hinges on finding a "labor organization,"[42] a sampling of cases dealing with section 2(5) will be examined briefly at this point.

In *Bonnaz v. NLRB*,[43] the court held that one employee who was the Board-certified bargaining representative of a group of fellow employees was not a section 2(5) labor organization.[44] Finding that an individual is not a labor organization might be considered illogical in light of section 2(5)'s words.[45] The court in *Bonnaz* decided, however, that the plain meaning of the statute should not "produce an absurd result or one plainly at variance with the policy of the legislation as a whole"[46] when ap-

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37. "A *labor organization* before engaging in any strike . . . or other concerted refusal to work at any health care institution shall . . . notify the institution. . . ." 29 U.S.C. § 158(g) (1976)(emphasis added).

38. 29 U.S.C. § 152(5) (1976). This section was not changed by the 1974 Health Care Amendments.

39. NLRB v. Cabot Carbon Co., 360 U.S. 203, 211 n.7 (1959)(quoting legislative history).

40. 29 U.S.C. § 157 (1976) generally allows employees to organize, to bargain collectively, and to engage in concerted activities for mutual aid and protection. *Id.*

41. 29 U.S.C. § 158 (1976) circumscribes unfair labor practices by employees or by a labor organization or its agents. *Id.*

42. *See supra* note 37.

43. 230 F.2d 47 (D.C. Cir. 1956).

44. *Id.* at 48. The case involved Local 66's encouraging employees to strike with the purpose of requiring the employer to recognize or bargain with Local 66 instead of the Board-certified bargaining representative, Ann Sabino. Such conduct is violative of § 8(b)(4)(C) if "another labor organization" is the certified representative of the employees. 29 U.S.C. § 158(b)(4)(C) (1976). No violation was found, however, because the certified representative, Ms. Sabino, was not a "labor organization." 230 F.2d at 48.

45. *See supra* note 38 and accompanying text.

46. 230 F.2d at 48. The court thought the word "labor organization" could not "reasonably be interpreted to include Ann Sabino," the Board-certified bargaining representative. *Id.*

plied to the facts.

Four years later, the same court was again faced with the question whether one person could be a labor organization. In *Schultz v. NLRB*,[47] the court built upon its logic in *Bonnaz* and expanded its discussion of the meaning of "labor organization." The court in *Schultz* viewed a true section 2(5) labor organization as possessing permanency and continuity as contrasted with an individual, who is subject to illness, death, and disability.[48]

Pacemaker Corp. v. NLRB[49] found that the lack of formal organization, bylaws, officers, or dues is not material in determining whether an employee committee is a labor organization.[50] The court in *Pacemaker* held the plain language of section 2(5) to be controlling.[51] The same plain language approach was utilized by the United States Supreme Court in *NLRB v. Cabot Carbon Co.*[52] After finding no contrary legislative history, the Court held that the term "dealing with employers" in section 2(5) is not synonymous with, but is broader than, the concept of "bargaining with" employers.[53] Therefore, it is unnecessary to find that a group of employees is "bargaining with" the employer—in the usual concept of collective bargaining—in order to find a statutory labor organization.[54]

The broad language of section 2(5) was also relied upon in *NLRB v. Kennametal, Inc.*[55] The circuit court found it "perfectly clear . . . that the employees [in that case] who informally joined together to present their grievances . . . [fell] well within [section 2(5)'s] statutory definition."[56] Despite their spontaneous

47. 284 F.2d 254 (D.C. Cir. 1960).

48. *Id.* at 258.

49. 260 F.2d 880 (7th Cir. 1958).

50. *Id.* at 883. This finding was upheld by the Supreme Court. *See* NLRB v. Cabot Carbon Co., 360 U.S. 203, 212 n.14 (1959).

51. 260 F.2d at 883.

52. 360 U.S. 203 (1959).

53. *Id.* at 211-12.

54. *See id.* at 212-13. *Cf.* Oakwood Manor, Inc., 254 N.L.R.B. 907, 917 (1981)(court indicated that nurse's aides were not a labor organization because the employer did not recognize them as collective bargaining representatives).

55. 182 F.2d 817, 818 (3d Cir. 1950).

56. *Id.* In *Kennametal*, the employees "were not unionized or represented by any formal collective bargaining agency." *Id.* Seven or eight employees decided as a group to present "their grievances to the company's president after discussing their wages while gathered around a water fountain." *Id.* "As the men headed toward the executive offices, their number swelled to approximately 100." *Id.*

joining together, the employees were found to be a labor organization.[57]

B. Summary of Surveyed Industrial Cases

These industrial cases point out some of the considerations utilized in determining the presence *vel non* of a section 2(5) labor organization. Obviously, there cannot be an organization comprised of just one person.[58] Beyond this, a construction of section 2(5) cannot be either absurd or "at variance with the policy of the legislation as a whole."[59] Moreover, the plain language of section 2(5) controls[60] if no contrary legislative history is present.[61] In a section 2(5) determination, lack of formal organization, bylaws, officers, or dues is not material.[62] Furthermore, an organization need not "bargain with" the employer for the statutory definition to be met.[63] In appropriate circumstances, a spontaneously joined group of employees, presenting a grievance to their employer, can be held to be a labor organization.[64]

C. "Labor Organizations" in the Health Care Setting

The courts seem to have relied on the industrial cases in determining whether a labor organization is present in a health care institution. For example, in *NLRB v. Long Beach Youth Center, Inc.*,[65] the court relied mainly upon *NLRB v. Buzza-Cardozo*[66] in which no labor organization was found. The court in *Buzza-Cardozo*, however, held that the striking employees did not constitute a labor organization because they did not seek

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57. *Id.*

58. Bonnaz v. NLRB, 230 F.2d 47 (D.C. Cir. 1956); *see also supra* notes 47-48 and accompanying text.

59. 230 F.2d at 48.

60. Pacemaker Corp. v. NLRB, 260 F.2d 880, 883 (7th Cir. 1958).

61. NLRB v. Cabot Carbon Corp., 360 U.S. 203 (1959).

62. 260 F.2d at 883.

63. 360 U.S. at 211-13; *see also supra* notes 52-53 and accompanying text.

64. *See supra* notes 55-57 and accompanying text. *See also* Annot., 19 A.L.R.2d 566, 568-69 (1951)(dealing with spontaneous or informal activity of employees held to be a "labor organization").

65. 591 F.2d 1276 (9th Cir. 1979), *enforcing* 230 N.L.R.B. 648 (1977).

66. 205 F.2d 889 (9th Cir. 1953), *cert. denied*, 346 U.S. 923 (1954).

representation.[67] In *Long Beach Youth Center*, the court determined that the employees were not a labor organization, based on the Board's findings that "the employees all signed Union authorization cards contemporaneously with the 'organizational' meeting, . . . no committee was formally designated and . . . [the] meeting occurred after the work stoppage began."[68] The Board had denied the presence of a labor organization based on the following facts: the seventeen employees had not formed themselves into a group; they had met only once; no one of their number had been designated as a representative for the purpose of dealing with the employer; they were merely in the process of organizing; and they intended their union to be the only organization dealing with the employer.[69]

In *Oakwood Manor, Inc.*,[70] the Board reached a new level of confusion. No labor organization was found "within the meaning of the Act. [The employees] in no way existed as an employee 'representation committee or plan.' Clearly, the [employer] did not recognize the day-shift aides as collective-bargaining representatives."[71] The Board added that "there was absolutely no evidence that the aides acted as agents of the Union in the walkout."[72] Unless the Board was referring to the national union, this last factor is inapplicable in ascertaining whether a statutory labor organization is present.[73]

The Board continues to have difficulty in finding a test for a labor organization in the health care setting. In *Keyway, a Division of Phase, Inc.*,[74] the Board ruled that no labor organization existed. The Board stated:

> As far as this record discloses, the employees in question acted

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67. 205 F.2d at 891.

68. 591 F.2d at 1278.

69. Long Beach Youth Center, Inc., 230 N.L.R.B. 648, 650 (1977), *enforced*, 591 F.2d 1276 (9th Cir. 1979).

70. 254 N.L.R.B. 907 (1981).

71. *Id.* at 917. Whether the employer recognized a group as collective bargaining representatives had not formerly been a factor in determining the presence of a labor organization. *See, e.g.*, 360 U.S. at 211-13.

72. 254 N.L.R.B. at 917.

73. To be fair, it should be stated that the quotes in notes 71 and 72 *supra* are from the decision of the administrative law judge. However, these quotes were adopted by the Board. 254 N.L.R.B. at 907. The Board seemed to dismiss each potentiality for a labor organization, including the presence *vel non* of an "agency."

74. 263 N.L.R.B. 1168 (1982).

> without structure or organization, and simply were in the nature of a group of employees who shared a common, reasonably specific grievance. It does not appear that the combination of employees existed for the purpose of treating with [the health care employer] as to other matters, or beyond resolution of that which brought them together. . . .[75]

Thus, the Board indicated that dealing with an employer must include more than one purpose. This disregards the disjunctive "or" and the singular, rather than plural, use of "purpose" in section 2(5).[76]

There is obviously not a bright line test used by the courts or the Board in determining the presence *vel non* of a labor organization in the health care setting. The closest the courts have come to such a test was in *East Chicago Rehabilitation Center, Inc. v. NLRB*,[77] in which the court used the two main portions of section 2(5) as its test: "There is no requirement of formality—no requirement that the 'labor organization' be recognized as a union—but there must be an *organization*, such as the employee committee in *Pacemaker* . . . and one of its *purposes* must be bargaining with an employer."[78] Following the holding of *Cabot Carbon*, the court should have said that one of the purposes must be *dealing*, not *bargaining*, with the employer.[79] Thus, the two elements of the *East Chicago* test *should* be (1) an organization, (2) with a purpose of dealing with the employer on certain statutory matters.[80] This goes full circle back to the plain language of section 2(5).

Because the threshold question in the application of section 8(g) is whether a labor organization is present, a bright line test is needed. Since the patients of the health care industry require special consideration under the Act,[81] the definition of a "labor organization" also needs special consideration in a health care context. The policies and intent behind Congress' passage of the 1974 Health Care Amendments surely demand this.

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75. *Id.* at 1176 n.19.
76. *See supra* note 38 and accompanying text for the relevant text of section 2(5).
77. 710 F.2d 397 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1414 (1984).
78. 710 F.2d at 404 (emphasis added).
79. *See supra* notes 53-54 and accompanying text.
80. The dissent states the test this way. 710 F.2d at 410.
81. *See supra* note 18 and accompanying text.

IV. THE ROAD TO *East Chicago*

A. The Seminal Board Decision

The Board's decision in *Walker Methodist Residence and Health Care Center, Inc.*[82] is often cited and relied upon by the Board[83] and the courts of appeals.[84] In *Walker Methodist*, two nurse's aides, without providing notice, withheld their services for a half-hour to present a grievance to their nursing home employer.[85] No union represented any of the nursing home employees for the purposes of collective bargaining.[86]

The Board initially considered whether section 8(g) applied to a work stoppage when no labor organization was involved.[87] After examining the legislative history, the Board found that section 8(g) should be interpreted according to its clear language.[88] Thus, based on policy considerations, the Board held that a notice of strike should be given only when a labor organization was involved.[89]

The flaw in this analysis is that the Board did not consider whether the two discharged employees constituted a labor organization.[90] When counsel for the nursing home failed to raise this issue,[91] the Board, to effectuate the policies of Congress, should have considered it *sua sponte*.

The broader contention made by the nursing home was that section "8(g) notice requirements [applied] to *all* strikes at a

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82. 227 N.L.R.B. 1630 (1977).

83. *See, e.g.*, Keyway, a Div. of Phase Inc., 263 N.L.R.B. 1168, 1175-76 (1982); East Chicago Rehabilitation Center, Inc., 259 N.L.R.B. 996, 999 (1982).

84. *See, e.g.*, Kapiolani Hosp. v. NLRB, 581 F.2d 230, 233-34 (1978); Montefiore Hosp. & Medical Center v. NLRB, 621 F.2d 510, 514 (2d Cir. 1980)(partially relied upon in East Chicago Rehabilitation Center, Inc. v. NLRB, 710 F.2d 397, 403 (7th Cir. 1983)).

85. 227 N.L.R.B. at 1630.

86. *Id.* at 1633.

87. *Id.* at 1630.

88. *Id.* at 1631.

89. *Id.*

90. The appended decision of Administrative Law Judge James L. Rose, which the Board affirmed with some modifications, *id.* at 1630, also did not make any reference to, or analysis under, § 2(5).

91. In Long Beach Youth Center, Inc., 230 N.L.R.B. 648 (1977), *enforced*, 591 F.2d 1276 (9th Cir. 1979), the Board *did* reach the section 2(5) analysis, but it was the employer who contended the 17 employees comprised a labor organization. 230 N.L.R.B. at 650. See *supra* text accompanying note 69, for the factors used by the Board in its analysis.

health care institution."[92] The rationale for this argument apparently springs from the following words in the summary section of the Senate Report on the 1974 Health Care Amendments: "The bill . . . contains . . . special provisions designed . . . to provide advance notice of *any* strike . . . involving a health care institution."[93] The Senate Report summary then listed several provisions. One read, "The health care institution must be given a 10 day notice by a labor organization before any . . . strike (whether or not related to bargaining) can take place,"[94] an obvious reference to section 8(g).

Since Congress expressly designed the Health Care Amendments to provide notice of any strike and placed the duty to give this notice upon a labor organization, any analysis under section 8(g) should include a section 2(5) analysis. Relying on the analysis of *Walker Methodist*, the Board has erroneously continued to bypass consideration of whether a "labor organization" is present.[95] Furthermore, the Board has issued decisions indicating that a "labor organization" is to be equated with a "union," sometimes in apparent reliance on *Walker Methodist*.[96] This is an error either in analysis or in choice of words.

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92. 227 N.L.R.B. at 1630.

93. SENATE REPORT, *supra* note 18, at 3947 (emphasis added). *See also* Beth Israel Hosp. v. NLRB, 437 U.S. 483, 496 (1978) ("Congress enacted special provisions for strike notice . . . intended to avoid disruptions of patient care caused by strikes").

94. SENATE REPORT, *supra* note 18, at 3947.

95. See, e.g., Leisure Lodge Nursing Home, 250 N.L.R.B. 912, 917 (1980) (decision of Administrative Law Judge Harold A. Kennedy adopted by the Board), in which § 8(g) perfunctorily was not applied because a "labor organization" was not involved. *Id.* The decision, however, did not discuss whether the seven discharged employees constituted a labor organization under § 2(5). This case, as do others, seems to equate a "labor organization" with a certified union. It is obvious that this was not Congress' intent.

Of course, where just *one* employee engages in a work stoppage, as in Kapiolani Hosp., 231 N.L.R.B. 34 (1977), *enforced*, 581 F.2d 230 (9th Cir. 1978), the § 2(5) analysis should be summarily disposed of. *See* Schultz v. NLRB, 284 F.2d 254, 258 (D.C. Cir. 1955); *see also supra* notes 47-48 and accompanying text.

96. *See, e.g.*, East Chicago Rehabilitation Center, Inc., 259 N.L.R.B. 996, 999 (1982)("[t]he notice requirements of Section 8(g) run to the Unions, not employees. . .")(citing Walker Methodist Residence and Health Care Center, 227 N.L.R.B. 1630 (1977)), *enforced*, 710 F.2d 397 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1414 (1984); Henry C. Beck Co., 246 N.L.R.B. 970, 973 (1979)("[s]ection 8(g) requires a union to give notice. . .")(holding that nonhealth care employees are not required to give notice of concerted activity). *See also* Vernon, *supra* note 8, at 206 ("if . . . the union is determined to strike . . ., it is required to give ten days written notice of its intention. . .") (citing section 8(g) as authority).

B. *The Rationale of* Walker Methodist

Since *Walker Methodist* is often cited and relied upon,[97] a further critical examination of its rationale is in order. First, the Board in *Walker Methodist* recognized that Congress was faced with two conflicting interests when it enacted the 1974 Health Care Amendments:

> 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 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 [by] 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.[98]

Although the Board cited no authority, the Senate Report was the obvious support for this statement.[99]

Next, the Board in *Walker Methodist* stated that, "Congress was concerned that sudden massive strikes could endanger the lives and health of patients in health care institutions. . . . A brief work stoppage by a few unorganized employees simply was not the type of disruption with which Congress was concerned."[100] It is here that the Board, without supportive citation, seems to have deviated from the essence of the Senate Report. Unfortunately, these words from *Walker Methodist* often have been utilized to support other decisions.[101] This is unfortunate since *continuity* of patient care is the theme that pervades the Senate Report. In addition to the portion quoted above, the Report in the "Ten-Day Notice" section twice emphasized the continuity of patient care: (1) "It is in the public interest to insure the continuity of health care to the community and the care and

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97. *See supra* text accompanying notes 83 and 84.

98. 227 N.L.R.B. at 1630 (footnote quoting section 8(g) omitted).

99. SENATE REPORT, *supra* note 18, at 3948 (section entitled "Need for the Bill"). See *supra* text accompanying note 18 for the quote from the Senate Report supporting this portion of *Walker Methodist*.

100. 227 N.L.R.B. at 1631.

101. *See, e.g.*, Keyway, a Div. of Phase, Inc., 263 N.L.R.B. 1168, 1176 (1982); Kapiolani Hosp., 231 N.L.R.B. 34, 42 (1977), *enforced*, 581 F.2d 230, 234 (9th Cir. 1978).

well being of patients by providing for a statutory advance notice of any anticipated strike. . . .";[102] (2) "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."[103]

Massive strikes are a concern because they severely debilitate the continuity of patient care, and affect patient care on an institution-wide basis. The continuity of patient care with which Congress was concerned, however, can be affected by a work stoppage of merely two employees, particularly professionals such as registered nurses or physicians. Yet this holding has not been found in any case.

Because of these congressional concerns, the Board and the courts of appeals addressing a section 8(g) fact situation have also ruled on the concept of fear of harm to patient care. Health care employers usually raise this parallel consideration as an alternative argument should a section 8(g) violation not be found. In some cases the employer has viewed this concept as an independent ground for holding concerted activity unprotected. The next section of this Note will consider the concept of fear of harm to patient care.

V. "SUBSTANTIAL THREAT OF HARM": A NEW TEST?

A. The Industrial Setting

Concerted activity in the industrial setting has been held unprotected when it was deliberately timed, without prior warning, and with the purpose of causing damage to the employer or his business.[104] This specific test flows from the "indefensible" arm of the general test in which concerted activity is held to be unprotected if unlawful, violent, in breach of contract, or indefensible.[105] The elements of the indefensible test, as enunciated by the Board in industrial settings, are whether employees

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102. SENATE REPORT, *supra* note 18, at 3949.

103. *Id.*

104. NLRB v. Marshall Car Wheel & Foundry Co., 218 F.2d 409, 413 (5th Cir. 1955).

The word "industrial" is used here to differentiate from health care settings.

105. *See* NLRB v. Washington Aluminum Co., 370 U.S. 9, 14-16 (1962)(cited in Walker Methodist Residence and Health Care Center, 227 N.L.R.B. 1630, 1632 (1977)).

had an unlawful objective or had adopted an improper means of achieving an objective, thus making their conduct unprotected.[106]

B. The Health Care Setting

The indefensible test has been applied in the health care setting as follows: "Except for the very limited notice requirement expressly provided by section 8(g), prior notice has been judicially mandated only when a strike, by its timing or unexpectedness, creates great danger or is likely to damage the employer's business excessively."[107] In the same case, however, the test apparently was altered for health care settings. The new test appears to be that unnoticed concerted activity by professionals in a health care institution is unprotected if patients are endangered.[108] Perhaps this new test is a result of the Supreme Court's statement that health care employees' concerted activity is "undesirable [when there is] evidence of a substantial threat of harm to patients."[109]

Since the Board has not clearly defined a test of harm to patient care, a more solid test needs to be generated by the courts. In 1977, the Board stated that "as a general proposition the Board is concerned with the *possibility* of harm rather than actual harm resulting from strikes, picketing, or other concerted refusals to work at health care institutions."[110] More recently, in 1982, the Board stated that "under [current?] Board policy, managers of health care institutions may not legitimately effect discipline even though the work stoppage is spontaneous and entails *potential harm* to . . . patient care. Instead, to remove the stoppage from the protected ambit of Section 7, actual harm

106. Elk Lumber Co., 91 N.L.R.B. 333, 337 (1950)(cited for this proposition and quoted in Leisure Lodge Nursing Home, 250 N.L.R.B. 912, 918 n.29 (1980), a health care decision).

107. Montefiore Hosp. & Medical Center v. NLRB, 621 F.2d 510, 515 (2d Cir. 1980).

108. *Id.* at 516. *See also* Walker Methodist Residence and Health Care Center, 227 N.L.R.B. 1630, 1635 (1977)("Congress did make a legislative finding of fact that a strike or work stoppage in a health care facility by a labor organization would be so *potentially harmful* as to require notice") (emphasis added).

109. Beth Israel Hosp. v. NLRB, 437 U.S. 483, 499 (1978) (involving solicitation and distribution in a health care institution).

110. District 1199-E, National Union of Hosp. and Health Care Employees, 229 N.L.R.B. 1010, 1011 (1977)(emphasis added).

must be demonstrated."[111] Support for this recent Board statement, however, is derived from the following quote from a pre-Health Care Amendments decision: "Protection of the Act will not be denied merely because someone not directly affected by the controversy might consider the work stoppage to be ill-timed, unreasonable, or showing poor judgment."[112] Further support is demonstrated by the statement that, "While the Board, in determining whether health care employees have engaged in unprotected conduct, has considered whether any harm to the institution's patients was caused by the employees' concerted activity, nevertheless, it has applied the same standards of conduct to health care institutions as it does to other enterprises."[113]

Although not stated by the Board, the underlying support for its "same standards of conduct" approach appears to be the Senate Report: "Likewise, the public interest demands that employees of health care institutions be accorded the same type of treatment under the law as other employees in our society, and that the notice not be utilized to deprive employees of their statutory rights."[114] Immediately after this, however, the Senate Report set up as an example that labor organizations are relieved of their duty to give notice when presented with flagrant unfair labor practices by the employer.[115] This might not give strength to the Board's "same standards of conduct" approach, particularly in light of the Supreme Court's reasoning in this area.[116] Also, as a matter of policy, "[h]ospitals . . . give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar."[117]

It is hoped that the courts or Congress will firmly establish this "potential threat of harm to patient care" test in the health care setting. "Actual harm" may be a viable test in industrial

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111. Keyway, a Div. of Phase, Inc., 263 N.L.R.B. 1168, 1175 (1982)(emphasis in the original). The decision of Administrative Law Judge Joel A. Harmatz was affirmed by the Board. *Id.* at 1168.

112. Masonic and Eastern Star Home of the District of Columbia, 206 N.L.R.B. 789, 790 (1973).

113. 263 N.L.R.B. at 1169.

114. SENATE REPORT, *supra* note 18, at 3949.

115. *Id.* See *supra* notes 33-35 and accompanying text for the discussion on this point.

116. *See supra* note 113 and accompanying text.

117. 437 U.S. at 508 (quoting the court below, NLRB v. Beth Israel Hosp., 554 F.2d 477, 481 (1st Cir. 1977)).

cases, but *not* when it is flesh and blood that may be actually harmed.

VI. THE DECISION IN *East Chicago*

A. The Factual Setting

The East Chicago Rehabilitation Center employed 100 people to provide around-the-clock nursing care for approximately 116 patients.[118] After a representation election in December 1978, a local of the retail clerks union was certified as the collective bargaining representative of the Center's service and maintenance employees.[119] From February to June 1979, approximately twelve negotiating sessions were held in an effort to reach accord on a collective bargaining agreement.[120] During the June 1st session, the practice of allowing the Center's employees to leave the premises during their half-hour, paid lunch break was mentioned.[121] A Center consultant who was acting as a negotiator immediately advised the Center management of the worker's compensation liability should an employee be injured off the premises during this paid lunch break. A part-owner and member of the board of directors stated that the employees would immediately stop leaving the premises during lunch.[122] The union negotiators naturally opposed this change, but the board member was adamant. On June 15, without notice to the union, a memorandum was circulated to the employees telling them of the change to be effective June 18.[123]

About 7:00 a.m. on June 15, the first shift employees received a copy of the memorandum with their paychecks.[124] Disturbed by this change, many employees met with a nursing supervisor and then with the Center administrator.[125] After this meeting, seventeen nurse's aides, orderlies, and maintenance

118. East Chicago Rehabilitation Center, Inc., 259 N.L.R.B. 996, 997 (1982).
119. East Chicago Rehabilitation Center, Inc. v. NLRB, 710 F.2d 397, 399 (7th Cir. 1983).
120. 259 N.L.R.B. at 997.
121. *Id.*
122. 710 F.2d at 399.
123. *Id.*
124. 259 N.L.R.B. at 998.
125. *Id.*

workers walked out in protest of the change,[126] "causing substantial disruption in the normal operations of the facility and causing serious patient care problems."[127]

When informed of the walkout, union representatives told the striking employees that the union was negotiating on the matter, "that it was not proper to leave the facility and that there were Federal laws which governed the matter."[128] The union representatives also told the strikers that the union did not condone or approve of the walkout and asked them to return to work. The strikers immediately agreed to do so.[129]

Although the union met with the Center management following the discussion with the strikers and pleaded their case, the management invoked immediate suspensions, pending determination by the board of directors whether they should be terminated.[130] Contract negotiations successfully concluded on June 19.[131] The board of directors terminated the seventeen strikers on June 20.[132]

Unfair labor practice charges were brought. The National Labor Relations Board determined that the Center, by firing the seventeen workers, had violated section 8(a)(1)[133] because their walkout was protected by section 7. The employer was ordered to reinstate the workers with back pay.[134]

B. The Section 8(g) Issue

The court in *East Chicago* rejected the Center's argument "that the purpose of the 10-day notice requirement would be defeated if workers could get around it simply by striking without

126. 710 F.2d at 399.

127. 259 N.L.R.B. at 998. However, in a footnote the Board stated that there was "no showing that the strike jeopardized any patients' safety or health." *Id.* at 996 n.2.

128. *Id.* at 998.

129. *Id.*

130. *Id.*

131. 710 F.2d at 400. The lunch period was converted into unpaid time, but the employees received two twenty-minute, paid coffee breaks. *Id.*

132. 259 N.L.R.B. at 998-99.

133. Section 8(a)(1), 29 U.S.C. § 158(a)(1) (1976), states, "It shall be an unfair labor practice for an employer . . . (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." See *supra* note 40 for a paraphrase of section 7.

134. 710 F.2d at 400.

their union's authorization."[135] The court agreed that the argument had merit, but ruled that the legislature and not the judiciary should address that issue.[136]

In rejecting this argument, the court cited numerous grounds, including its belief that if the argument were sustained, the words "labor organization" would be judicially excised from section 8(g).[137] The court chose not to disregard

> the pointed warning by Senator Harrison Williams, a sponsor of the 1974 Health Care Amendments, that "this legislation is the product of compromise, . . . 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. . . ."[138]

The court *did* set aside the floor statement of Senator Taft, another sponsor of the Amendments, that "[i]t would not be protected activity for employees acting without a labor organization to engage in a work stoppage . . . without giving the required notice,"[139] because the court found "no indication that any other member of Congress agreed with [his] statement."[140]

Senator Taft's words are often quoted, but always rejected. For example, the Board in *Walker Methodist* rejected his floor comments because "a reading of the legislative history as a whole leads to the opposite result."[141] Here, however, the rejection of Senator Taft's comments and the acceptance of Senator Williams' comments, *neither* of which apparently "any other members of Congress agreed with," seems inconsistent.

The court also found that section 8(g) is not irrational "when read, as it is written . . . to limit the notice requirement

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135. *Id.* at 403.

136. *Id.*

137. *Id.*

138. *Id.* (citing 120 CONG. REC. 22, 575 (1974)). This statement by Senator Williams is also quoted in Walker Methodist Residence and Health Care Center, 227 N.L.R.B. 1630, 1631 (1977) and Lein-Steenberg, 219 N.L.R.B. 837, 839 (1975), *enforcement denied sub nom.*, Laborers Int'l Union of N. Am. v. NLRB, 567 F.2d 1006 (D.C. Cir. 1977)(finally reversed by the Board in Henry C. Beck Co., 246 N.L.R.B. 970 (1979)).

139. 120 CONG. REC. 12,945 (1974).

140. 710 F.2d at 403.

141. 227 N.L.R.B. at 1631. I disagree with this. A reading of the Senate Report, reflective of congressional intent, might convince others. *See supra* notes 18, 94, 103 and accompanying text.

to strikes *called* by organizations—which will usually mean, by unions."[142] The court's mistake here is obvious: The labor organization's duty under section 8(g) to give a ten-day notice is predicated not on calling the strike but rather on mere engagement in the strike. This is evident from the following words of section 8(g): "A labor organization before *engaging* in any strike . . . shall notify the institution. . . ."[143]

C. *Concerns for Patient Care*

The court in *East Chicago* rationalized that strikes called without notice by organizations "generally are more costly than wildcat strikes."[144] The court viewed a union-authorized strike as "apt to last longer, involve more workers, and command more support from other unions than a wildcat strike (though wildcat strikes, especially if protected by section 7, may be more frequent)."[145] It is uncertain whether the court envisioned union-authorized strikes as "more costly" to the employer and his business, to patient care, or to both. The dissent, however, rightfully focused on the court's apparent *overall* lack of concern for patient care:

> The majority's holding is . . . disturbing as it involves a "wildcat" strike in the health care field, where the health, welfare and safety of infirm and dying patients are directly threatened by sudden interruptions in physical and medical assistance. . . . [H]ealth care facilities, whether they be hospitals, nursing homes or psychiatric care institutions, play a vital role in preserving our society's health and well-being and, therefore, the rights of patients and the public to receive uninterrupted services becomes critically important in cases dealing with "wildcat" strikes in the medical field. Judge Posner's cold and detached analysis treats this case as though we were considering a walkout occurring on an assembly line, in a steel mill or in a coal mine, where at most an interruption in production would result. Rather, I dissent as I believe it is important to

142. 710 F.2d at 403 (emphasis added).

143. 29 U.S.C. § 158(g) (1976)(emphasis added).

144. 710 F.2d at 403. A "wildcat strike" is a common labor term. Here it is used to mean a "strike called without authorization from the union." BLACK'S LAW DICTIONARY 1433 (rev. 5th ed. 1979).

145. 710 F.2d at 403.

> emphasize that this walkout occurred in the health care field, where human lives are all too frequently hanging in the balance.[146]

The court did state that the medical equivalent of the judge-made exception to section 7 for intolerably destructive concerted activity

> would be a nurse's walking out of an operating room in the middle of an operation. This would not be protected activity, nor would . . . the many less extreme examples that could be put involving danger to life or health, but even they would be remote from this case. Nurse's aides are not professionals and are not entrusted with critical responsibilities, and the walkout was of short duration. . . . [A]t some point the cumulative distress to helpless patients caused by a walkout of nurse's aides might cross the line that separates inconvenience from inhumanity. . . .[147]

The majority opinion and the dissent are not as far apart as they might seem at first blush. The court impliedly created a category of unprotected concerted activity for professionals entrusted with critical responsibilities when a danger to life or health is created by a walkout of more than a short duration. This "test" is certainly unwieldy, if not irrational, and disregards what might be the Supreme Court's test of a "substantial threat of harm to patients."[148]

Professional nurses generally are entrusted with critical responsibilities, but they do not handle patient care alone. Some of their responsibilities are delegated to nurse's aides. If these aides walk off their jobs without giving notice, the professional nurses would be sidetracked from their critical responsibilities of patient care to handle the formerly delegated duties. Also, a rip-

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146. *Id.* at 406 (Coffey, J., dissenting).

147. *Id.* at 405. I optimistically believe this is not an "actual harm" test. *See infra* notes 149-51 and accompanying text.

148. Beth Israel Hosp. v. NLRB, 437 U.S. 483, 499 (1978) (involving solicitation and distribution in health care institutions).

At least the court in *East Chicago* did not embrace the more recent Board standard of "actual harm" to patient care set forth in *Keyway*, 263 N.L.R.B. at 1175. One wonders, of course, what the parameters of "actual harm" in a health care setting are. Would a diabetic patient's slipping into a coma during a work stoppage be enough "actual harm"? Or would the patient have to die? One can conceive numerous hypotheticals on this question. See *East Chicago*, 710 F.2d at 409-10 (Coffey, J., dissenting).

ple effect created by unnoticed work stoppages of janitorial, maintenance, or food-preparation employees could divert nurses and other professionals from their patient care responsibilities. Thus, patient care can be threatened substantially by walkouts of health care employees with much less critical responsibilities than professionals.

The court and the dissent in *East Chicago* also disagreed on the label to be placed on the effects on patient care during the approximate two hours of the work stoppage. The court apparently thought "the strike merely caused inconvenience to the Center's patients,"[149] but described the "hardship" and "anxiety" to some patients,[150] while referring to "the unpleasantness of . . . [this] nasty strike."[151] The dissent viewed "the disruption in patient care [as] far more serious than 'merely inconvenience,' "[152] and chastised the court for "[glossing] over the suffering, severe emotional strain and potential danger the patients were subjected to as a result of the . . . strike."[153] For support of its view of the strike, the dissent quoted testimony of the administrator of the Center. The testimony described the body of a patient (who apparently died during the strike) being left unattended,[154] patients not being fed,[155] patients lying in urine and feces,[156] and patients who developed bedsores and rashes during the strike.[157]

The court labeled this a "close case," but found the seventeen workers' concerted activity to be protected.[158] The dissent strongly disagreed and stated, "[T]here is no reason why the Rehabilitation Center management should be required to allow the . . . strikers to return to work. No employer should be required to employ workers who demonstrated such cold and callous disregard for sick and weak human beings entrusted to their

149. *See* 710 F.2d at 404.
150. *Id.* at 405.
151. *Id.*
152. *Id.* at 407.
153. *Id.*
154. *Id.* at 407-08.
155. *Id.* at 408.
156. *Id.*
157. *Id.* To a person untrained in medicine, this last seems like an overstatement of the results of a *two hour* strike.
158. *Id.* at 405.

care. . . ."[159]

D. *The Section 2(5) Issue*

The test for a labor organization used in *East Chicago* has been discussed earlier.[160] One point in its application deserves criticism here. The court in passing referred to "the explicit and . . . *restrictive* definition of [the term] labor organization in section 2(5)."[161] By saying that the term is restrictively defined, the court ignored the legislative history of that section as quoted by the Supreme Court: "The term 'labor organization' is phrased very broadly. . . ."[162] The dissent cited several sources[163] contrary to the court's position and concluded that the court gave "an unduly narrow reading to the obviously broad definition of labor organization contained in section 2(5) of the Act."[164]

VII. Summary Comments

The Health Care Amendments have been enacted for almost ten years. The first three years were relatively devoid of decisions on section 8(g). On January 28, 1977, the Board handed down its *Walker Methodist*[165] decision, which has apparently attained a landmark status. To say that *Walker Methodist* was erroneously decided might be overreaching, but to say that its section 8(g) analysis was incomplete without a section 2(5) analysis is not.[166] The problem is that other decisions have followed *Walker Methodist* without questioning its broad language or acknowledging that the overall congressional purpose in

159. *Id.* at 409.

160. *See supra* notes 77-80 and accompanying text.

161. 710 F.2d at 403 (emphasis added).

162. NLRB v. Cabot Carbon Co., 360 U.S. 203, 211 n.7 (1959)(quoting the legislative history of the Wagner Act)(citation omitted). The court in *East Chicago* also spoke *contra* to *Cabot Carbon* when it stated that one of the purposes of a labor organization "must be bargaining with an employer." 710 F.2d at 404. *Cabot Carbon* stated without equivocation that "nothing . . . indicates that the broad term 'dealing with' [in section 2(5)] is to be read as synonymous with the more limited term 'bargaining with.'" 360 U.S. at 211. This was discussed *supra* at notes 78-79 and accompanying text, but bears repetition in this context.

163. 710 F.2d at 410-11.

164. *Id.* at 411.

165. 227 N.L.R.B. 1630 (1977).

166. *See supra* notes 90-91 and accompanying text.

enacting the Health Care Amendments was to provide health care employers with notice of strikes so that continuity of patient care would be preserved.[167] In making bare statements that Congress' concern was with massive strikes,[168] the judiciary appears to have forgotten that this concern was merely reflective of Congress' overall purpose to ensure the continuity of patient care.

Congress surely did not envision the problems with spontaneous work stoppages in nonunion health care institutions that have developed. The solution to these problems can come from any of the sources of labor law: Congress, the Supreme Court, the Board, or the courts of appeals. Since Congress has not yet attempted to resolve the problems, the solution lies with the judge-made exception to concerted activity for indefensible conduct.[169] This exception can be readily adapted to the health care setting. The Supreme Court's *Beth Israel Hospital v. NLRB*[170] decision on solicitation and distribution in the health care setting must serve as a guide until certiorari is granted on a case more closely tied to the problems discussed in this Note.

One of the guiding principles of *Beth Israel* is the Supreme Court's directive to the Board to "stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact jeopardized."[171] Since the Board seems to have ignored this directive, it is up to the courts of appeals to flesh out a "substantial threat of harm to patients" test.[172] The Supreme Court's opportunity to guide the Board and the courts of appeals on this important point of law was set aside for another day when the court denied certiorari on the *East Chicago* case.[173] The third question on the petition for certiorari asked: "Was employees' walking out of skilled health-care facility with-

167. See *supra* notes 102-03 and accompanying text for quotations from the Senate Report supporting this statement of Congress' overall purpose.

168. *See, e.g.*, 227 N.L.R.B. at 1631; cases cited *supra* note 101.

169. See *East Chicago*, 710 F.2d at 405, for a brief discussion of this exception in the health care setting. The court appeared to be headed in a direction more protective of patients but did not venture far enough into the uncharted waters of "patient care first."

170. 437 U.S. 483 (1978).

171. *Id.* at 508 (quoting the court below). This portion of the *Beth Israel* decision was quoted by the dissent in *East Chicago*, 710 F.2d at 407.

172. 437 U.S. at 499.

173. 104 S. Ct. 1414 (1984).

out any advance notice and leaving seriously ill patients so callous and indefensible that employees forfeited any protection under [the Act]?"[174] Had certiorari been granted, the problems presented by this Note would be moot.

It is hoped that the Board and the courts of appeals in the immediate future will remember to balance the interests of patients with those of the health care employers and employees. In doing so, perhaps the eloquence of Justice Blackmun, concurring in *Beth Israel*, will provide some food for thought:

> Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activities, and where the patient and his family—irrespectiveof whether that patient and that family are labor or management oriented—need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.[175]

Max G. Mahaffee

174. 52 U.S.L.W. 3564 (U.S. Jan. 31, 1984).

175. 437 U.S. at 409 (Blackmun, J., concurring). This quote appeared in Circuit Judge Coffey's dissent in *East Chicago*, 710 F.2d at 407.