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8th Circuit Notice Ruling

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The 8th U.S. Circuit Court of Appeals recently denied a petition for review of a National Labor Relations Board (NLRB) order that a union violated the National Labor Relations Act (NLRA) by unilaterally delaying the commencement of a strike beyond the time described in a 10-day notice. *Minnesota Licensed Practical Nurses Association v. NLRB*, 406 F.3d 1020 (8th Cir. 2005), denying petition to review *Alexandria Clinic P.A.*, 339 NLRB 1261 (2003). The court there held that the statutory advance-notice requirement of a strike by unionized health care employees unambiguously precluded unilateral extensions of the commencement of a strike, and that individual nurses lost their protected status by unilaterally delaying commencement of a strike beyond the time described in the 10-day notice. Thus, the employer did not act unlawfully by discharging them for engaging in an unlawful strike.

Until 1974, health care employees employed by nonprofit hospitals were not entitled to collective-bargaining rights under the NLRA. Congress amended the NLRA that year by extending the NLRA's jurisdiction to cover all nonprofit health care institutions, thereby bestowing upon employees of such institutions the same collective-bargaining rights possessed by employees in other industries.

But accompanying this extension of the NLRA's protection was a tradeoff: To address the concern of health care business groups that extending coverage to this new group of employees might lead to an increased disruption in health care services caused by labor disputes, Congress added § 8(g) to the amendments. Section 8(g) provides, in relevant part:

"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 . . . .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."

'Greater New Orleans' allowed leeway in timing

In *Greater New Orleans Artificial Kidney Center*, 240 NLRB 432, 435-36 (1979), the board held that a union did not violate § 8(g) by unilaterally delaying the start of a strike "between 12 and 72 hours . . . where there is at least 12 hours advance notice given to the employer of the postponement." In rejecting a contrary "restrictive" interpretation of § 8(g), the board relied on legislative history, not the plain meaning of the statute.

Specifically, it relied on a Senate report to the 1974 amendments, which stated: "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 . . . 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. No. 93-766 at 4 (1974), reprinted in 1974 U.S.C.C.A.N. 3946, 3949.

Applying that view to the third sentence of § 8(g), the board in *Greater New Orleans* 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." 240 NLRB at 435.

Although not previously questioned by the board, the rule adopted in *Greater New Orleans* was rejected by the two circuit courts that have considered it. In *NLRB v. Washington Heights-West Harlem Inwood Mental Health Council*, 897 F.2d 1238, 1247 (2d Cir. 1990), the 2d U.S. Circuit Court of Appeals denied

enforcement of a board order because the union had violated § 8(g); the court declined to rely on legislative history "to depart from the straight forward unambiguous language of the statute requiring the Union to specify in writing the date."

Similarly, in *Beverly Health & Rehabilitation Services Inc. v. NLRB*, 317 F.3d 316, 321 (D.C. Cir. 2003), the court refused to enforce a board order because the union violated § 8(g) by unilaterally delaying the strike three days. The D.C. Circuit expressly rejected the board's reliance on *Greater New Orleans*; it instead relied on the plain language of § 8(g)'s mandatory 10-day notice requirement and nothing in the statutory language indicating any intention to allow either party to extend the notice unilaterally.

In *Alexandria Clinic*, the board concluded that the union violated § 8(g) and therefore the employer did not unlawfully discharge the striking nurses for two reasons. First, the union did not satisfy the "substantial compliance" requirements of *Greater New Orleans* because it did not give the employer at least 12 hours notice of when the nurses' strike would begin. Second, the board majority expressly overruled *Greater New Orleans* and, consistent with the 2d and D.C. circuits, held that the plain language of § 8(g) bars a union from unilaterally extending the date and time of the strike as in the union's 10-day notice. Relying on the last sentence of § 8(g), the board majority concluded that "a union cannot unilaterally extend the commencement time of its strike." 339 NLRB at 1263. "In our view," the board majority explained, "by relying on the legislative history to find that the unilateral extensions of strike notices were permissible, the board in *Greater New Orleans* effectively rewrote § 8(g) to make its requirements discretionary rather than mandatory." Id. at 1265. That alternative holding was the focus of the union's appeal.

The 8th Circuit, like the board majority in *Alexandria Clinic* and the 2d and D.C. circuits, agreed that § 8(g) unambiguously precluded unilateral extensions of the commencement of a strike. The court adopted the D.C. Circuit's reasoning in *Beverly*, 317 F.3d at 321, which had relied on the last sentence of § 8(g), providing that "notice, once given, may be extended by the written agreement of both parties." "Instead [of allowing unilateral extension,] 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. This is a case where the canons of avoiding surplusage and expressio unius are at their zenith because they apply in tandem." Id.

While recognizing there was "strong evidence" that at least the principal sponsor of § 8(g) intended the board to apply a reasonableness standard, the court further explained that the U.S. Supreme Court "has given less emphasis to legislative history in recent years," finding that legislative committee reports are frequently an unreliable indication of congressional intent. 406 F.3d at 1024. In any event, the court found that even if the legislative history cast doubt on the board's interpretation of § 8(g)'s plain meaning, the union's statutory argument still did not prevail because the board majority's interpretation was based on a "permissible construction" of the statute. Id. at 1025. In this regard, the court found that the board majority "bolstered its analysis of the statute's plain meaning by explaining that its new interpretation of § 8(g) effectuates the policy underlying the statute-to protect patient health care-and eliminates the uncertainty and concomitant litigation created by the imprecise and ambiguous "substantial compliance" standard of *Greater New Orleans*." Id.

This case is significant because a federal court of appeals had an opportunity to review a decision by the current Bush-era board where a deep division existed between the majority and minority opinions. In contrast to the majority, the dissent in *Alexandria Clinic* claimed that the statutory language was ambiguous and that the board in loss-of-statutory-protection situations should look to "the whole law, and to its objectives of policy," rather than just be guided by a single sentence in the text of the statute. According to the dissent, the legislative history of § 8(g) purposely left room for the board to follow a case-by-case approach.

Board majority focused on plain language of statute

In contrast to the dissent, the board majority in *Alexandria Clinic* gave significant weight to the clear and unambiguous plain language of the statute and followed the guidelines from the federal circuit courts of appeals, including the D.C. Circuit.

Based on the plain language of § 8(g) and the guidance from the two other circuits, as well as the board majority bolstering its analysis of the statute's plain meaning by explaining that its new interpretation of § 8(g) better effectuates the policy underlying the statute (to protect patient health care), the 8th Circuit upheld the board's construction of § 8(g). Contrary to the dissent, the board majority in *Alexandria Clinic* was simply unwilling to rewrite the statutory language to make the § 8(g) requirements discretionary rather than mandatory.

In addition to the board majority's decision in *Alexandria* being more true to the text of § 8(g) and more

consistent with two courts of appeals pronouncements than the dissent's, an argument can be made that the decision also better effectuates policy considerations. Specifically, the argument goes, policy considerations are better effectuated by applying § 8(g) as written because of the high interest in uninterrupted health services, which would be ill-served by permitting unilateral extensions of strike notices. Such unilateral extensions carry the risk of disrupting health care delivery. Also, strict adherence to the statutorily mandated requirement of written bilateral consent eliminates the uncertainty and needless litigation resulting from the application of the imprecise and ambiguous "substantial compliance" standard of *Greater New Orleans*.

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