

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

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4
5 August Term, 2008

6
7 (Argued: December 4, 2008

Decided: June 19, 2009)

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9 Docket No. 07-5041-ag

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13 CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 1000, AFSCME,

Petitioner,

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16 — v . —

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18 NATIONAL LABOR RELATIONS BOARD,

Respondent,

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21 CORRECTIONAL MEDICAL SERVICES,

Intervenor.

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26 Before: LEVAL, POOLER, AND B.D. PARKER, *Circuit Judges.*

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29 Petition for review of an NLRB decision and order holding lawful an employer's
30 termination of non-union employees for having picketed a health clinic for the purpose of
31 seeking recognition of a union as a collective bargaining agent without providing 10-days prior
32 notice. We conclude that the termination was not lawful because such picketing is a right of an
33 employee recognized in 29 U.S.C. § 157, § 158(g) on its face does not apply to employees in
34 their individual capacities, and the distinctions Congress made in § 158(d) between striking and
35 picketing indicate an intent to protect an employee from such discipline imposed by reason of
36 participation in picketing without the notice required of labor organizations by § 158(g).
37 GRANTED.

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23 BARRINGTON D. PARKER, *Circuit Judge:*

24 This petition by the Civil Service Employees Association, Local 1000, AFSCME,
25 requires us to consider whether the National Labor Relations Board offered a defensible
26 construction of section 8 of the National Labor Relations Act when it upheld a health care
27 institution’s discharge of employees by reason of their having participated in picketing for the
28 purpose of securing recognition of a union as their collective bargaining agent without having
29 given the 10-days notice which is required of a labor organization by section 8(g). We conclude
30 that the Board’s construction was not defensible and grant the petition.

31 **BACKGROUND**

32 The Petitioner (“Union”) represents correctional officers at the Albany County

1 Correctional Facility in Albany, New York, and sought to organize and represent employees of a
2 health clinic located in the Albany facility operated by Correctional Medical Services, Inc.
3 (“CMS”), the Intervenor.¹ In August 2002, the Union requested that CMS recognize it as the
4 collective-bargaining representative of all clinic employees except physicians, supervisors and
5 one clerical worker. CMS rejected the request.

6 The Union responded by organizing a demonstration at the facility without giving prior
7 notice to CMS. On September 12, twenty individuals, including five clinic employees, walked in
8 a circle in front of the facility’s main entrance for approximately 40 minutes, demonstrating and
9 picketing for recognition of the Union by CMS as their collective bargaining agent. The entrance
10 was used, among other things, by vehicles making daily deliveries of pharmaceuticals and other
11 supplies to the clinic, and served as the point of exit for vehicles transporting inmates in need of
12 off-site emergency medical care. None of the five picketing clinic employees was a member of
13 the Union. None was on duty at the time. They did not block the entrance, and vehicles were
14 able to enter and exit the facility unimpeded. The demonstration was peaceful.

15 The next day, CMS issued letters to its five employees who had participated. The letters
16 stated that the Union’s picketing without advance notice had been illegal and that “[e]mployees
17 who participate in an unlawful picket lose their protection under the Act.” The letters indicated
18 that CMS intended to file charges with the NLRB (“Board”) and that, upon completion of the
19 Board’s investigation, CMS would advise the employees of what it intended to do. On
20 September 16, CMS filed charges alleging that the picketing violated section 8(g) because the

¹ The parties agree on the relevant facts.

1 Union failed to provide 10-days prior notice, as required by that section.

2 Subsequently, the Regional Office issued a complaint against the Union, alleging that it
3 violated section 8(g).² Shortly thereafter, CMS fired the five employees for engaging in an
4 “illegal picket.” CMS also posted a notice advising its employees of section 8(g)’s notice
5 requirement and stating, apparently based on the issuance of the complaint alone, that “[t]he
6 NLRB has ruled [the Union’s] picket was illegal.” One month after the employees’ dismissal,
7 CMS reinstated them without backpay.

8 In October 2002, the Union filed charges with the NLRB alleging that CMS had violated
9 the Act by terminating the five employees. The Regional Office issued a complaint alleging that,
10 notwithstanding the Union’s prior violation of section 8(g), CMS violated section 8(a)(1) and
11 (a)(3) by dismissing the participating employees. The parties agreed to waive a hearing before an
12 Administrative Law Judge and provided the NLRB with a stipulated record.

13 On May 31, 2007, a divided panel of the NLRB held that CMS’s dismissal of the
14 employees did not violate the Act. The majority reasoned that:

15 [t]he Union violated Section 8(g) of the Act by conducting
16 picketing of a health care institution without giving the required
17 advanced notice. The employees who engaged in the picketing
18 were not protected by the Act, and, accordingly, [CMS] did not
19 violate the Act by discharging them.
20

21 The majority contended that, even though section 7 had been interpreted to permit employees to
22 engage in picketing, an “employee who pickets in violation of section 8(g) is engaged in

² The Union later entered into an informal settlement agreement of the case with a non-admissions clause.

1 unprotected conduct, and is thus vulnerable to employer discipline.” For support, the majority
2 cited NLRB precedent that identified picketing that violated sections 8(b)(4) and 8(b)(7) as
3 unprotected conduct that interfered with the “legitimate interests of the employer.” Finally, the
4 majority rejected the dissent’s contention that the Act expressly limited the Board’s authority to
5 determine that picketing in violation of section 8(g) was unprotected employee conduct,
6 contending instead that, notwithstanding section 7’s general authorization of picketing, the Board
7 had discretion to fashion this exception.

8 The dissenting member argued that “Congress [chose] to preclude employers from taking
9 action against picketing [health care industry] employees” because, unlike its treatment of health
10 care employees who engage in an improperly noticed strike, section 8(d) does not eliminate the
11 “employee” status of health care workers who engage in improperly noticed pickets. According
12 to the dissenting member, the majority’s approach rendered superfluous section 8(d)’s disparate
13 treatment of improperly noticed striking, on the one hand, and improperly noticed picketing, on
14 the other, because the net effect is that “[b]oth strikers and picketers could be lawfully discharged
15 without reference to [s]ection 8(d) solely because [s]ection 8(g) proscribes both kinds of
16 conduct.” Moreover, unlike picketing under section 8(b), where Congress left “the Board free to
17 fashion its own rule with respect to sanctions,” the dissent argued that “[w]here picketing of
18 health-care employers is concerned . . . [s]ection 8(d), in conjunction with 8(g), provides an
19 express limitation on the Board’s authority.” She argued that the majority’s decision exceeded
20 this limitation because sections 8(d) and 8(g) show “Congress itself chose not to treat employees’
21 picketing, as opposed to striking, as lawful grounds for discharge, notwithstanding the

1 collective bargaining that does not accord with the notice section 8(g) requires of the labor
2 organization exposes employees who participate in such picketing to discharge, notwithstanding
3 “employee” protections under section 7 of the Act. This exercise in statutory analysis necessarily
4 begins with the plain meaning of the Act and, absent ambiguity, generally ends there. *Puello v.*
5 *BCIS*, 511 F.3d 324, 327 (2d Cir. 2007). To discern plain meaning, we examine the statutory
6 language and design of the statute as a whole. *Id.* When analyzing the meaning of successive
7 legislative actions, we “assume that Congress passed each subsequent law with the full
8 knowledge of the existing legal landscape.” *In re Northwest Airlines Corp.*, 483 F.3d 160, 169
9 (2d Cir. 2007). Finally, we may resort to legislative history to determine a statute’s meaning if,
10 after this analysis, the meaning of the statute is ambiguous. *Puello*, 511 F.3d at 327. Although
11 the parties devote substantial portions of their briefs to argument based on the 1974 amendments’
12 legislative history, we find it unnecessary to engage in an examination of this sometimes
13 inconclusive material because the plain meaning of the statute is sufficiently evident.

14 Section 7 grants “[e]mployees” the right to form and join “labor organizations,” and
15 undertake concerted activity “for the purpose of collective bargaining or other mutual aid or
16 protection.” 29 U.S.C. § 157. The Supreme Court and the NLRB have long recognized
17 employee picketing not prohibited by the Act as activity protected under this provision. *See*
18 *Bristol Farms, Inc.*, 311 N.L.R.B. 437, 438 n.8 (1993). Under section 8(a), an employer commits
19 an unfair labor practice if it interferes with these rights or discriminates in regard to hiring,
20 tenure, or any term or condition of employment to discourage union membership. 29 U.S.C. §
21 158(a)(1), (3). Section 2 of the Act explicitly distinguishes between an “employee,” and a “labor

1 organization” such as a union. *See* 29 U.S.C. § 152(3), (5). On its face, the Act’s definition of
2 “labor organization” does not include employees in their individual capacities, even if they are
3 acting in coordination with a union to organize a work place. A “labor organization” is defined
4 as “any organization of any kind, or any agency or employee representation committee or plan, in
5 which employees participate and which exists for the purpose . . . of dealing with employers
6 concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of
7 work.” 29 U.S.C. § 152(5).³ In contrast, section 8(b), which describes unfair labor practices by
8 unions, explicitly includes individuals acting as agents for a labor organization within its scope,
9 stating in substance that a union engages in an unfair labor practice if the union “or its agents,”
10 among other things, (1) coerce any person to require another employer to recognize the labor
11 organization as the representative of the other employer’s employees where the labor
12 organization is not already their certified representative, 29 U.S.C. § 158(b)(4)(ii)(B), or (2)
13 picket or cause to be picketed an employer in an effort to force the employer to recognize a union
14 unless it is already the certified representative of the employees, 29 U.S.C. § 158(b)(7).

15 In 1974 Congress amended the Act in a number of ways. Before the amendments, the
16 Act defined “employer” not to include “any corporation or association operating a hospital, if no
17 part of the net earnings inure[d] to the benefit of any private shareholder or individual.” Pub. L.
18 No. 80-101, sec. 101, § 2(2), 61 Stat. 136, 137 (1947). The amendments eliminated this

³ The Act’s definition of “labor organization” does not include employees in an individual capacity who are not yet part of a union, even if their purpose is to promote union organization, unless they are acting as an “employee representation committee or plan.” 29 U.S.C. § 152(5). There is no allegation that the five CMS employee-pickers were acting as an “employee representation committee or plan.”

1 exclusion, thereby bringing hospitals and other health care facilities under the coverage of the
2 Act. *See* Pub. L. No. 93-360, § 1(a), 88 Stat. 395, 395 (1974). Congress also imposed limits on
3 activities in which labor organizations could engage with respect to health care institutions, and
4 provided for new sanctions against employees who undertook certain prohibited activities against
5 these institutions. *See id.* § 1(c)-(g), 88 Stat. at 395-96. Codified in the newly-added section 8(g)
6 of the Act, the limits require “a labor organization” to give “not less than ten days prior notice” to
7 various parties “before engaging in any strike, picketing, or other concerted refusal to work at any
8 health care institution.” 29 U.S.C. § 158(g). Thus, a “labor organization” violates the Act if it
9 strikes or pickets a health care institution without giving the specified period of notice. But the
10 statute does not state that an employee who does the same commits a violation. *Id.*

11 Under the modified section 8(d), an employee who engages in “any *strike*” at the
12 institution that does not satisfy the ten-day notice requirement is no longer an “employee” under
13 the Act, thereby becoming ineligible for the section 7 rights that employee status confers. 29
14 U.S.C. § 158(d) (emphasis added).⁴ But section 8(d) does not include a comparable provision
15 about employees who participate in *picketing* conducted by the labor organization in violation of
16 those notice requirements. We conclude that Congress intended a clear distinction. While labor
17 organizations are subject to sanction for *either* striking or picketing without observing the notice
18 requirement specified by section 8(g) because of the obligation that section attributes to them, the
19 statute specifies sanctions for employees who participate in the violation only in the case of

⁴ “Any employee . . . who engages in any strike within the appropriate period specified in [29 U.S.C. § 158(g)] . . . shall lose his status as an employee of the employer engaged in the particular labor dispute” 29 U.S.C. § 158(d).

1 strikes and not in the case of picketing (unless the employees are agents of the labor organization
2 and have violated section 8(b)).

3 We believe this interpretation is consistent with the design of the statute. In the 1974
4 amendments, Congress extended the protections of the Act to employees of hospitals and other
5 health care organizations by eliminating an exclusion that had exempted these entities. At the
6 same time, Congress imposed in section 8(g) a ten-day notice requirement on labor organizations
7 organizing strikes or pickets of healthcare institutions but did not extend the notice requirement
8 to individual employees. Congress also provided in section 8(d) that employees who strike after
9 a labor organization fails to give the required notice lose their status as employees protected by
10 the Act, and, as a result, could be discharged or otherwise disciplined. Section 8(d), however,
11 did not extend the “loss-of-status” sanction to employees who merely picket.

12 This interpretation of section 8(g) comports with the role section 8 as a whole plays in the
13 structure of the Act. Section 7, which provides “[e]mployees” with the right to, among other
14 things, “form, join, or assist labor organizations . . . and to engage in other concerted activities
15 for the purposes of collective bargaining,” functions as a broad conferral of rights upon
16 employees. 29 U.S.C. § 157. Section 8 defines unfair labor practices by employers and labor
17 organizations, serving both to protect employees’ section 7 rights and identify behavior that
18 Congress has judged impermissible. *See* 29 U.S.C. § 158. A construction of section 8(g) that
19 imposes no implicit obligation on, and hence on its own authorizes no sanction against,
20 employees in their individual capacity is consistent with this statutory structure. Rather, section
21 8(d), which explicitly refers to employee conduct, specifies the sanctions to which employees in

1 their individual capacities are subject for behavior that does not conform with the notice
2 requirements of section 8(g).

3 Other provisions of section 8 that limit picketing support our interpretation. *See, e.g.*, 29
4 U.S.C. § 158(b)(4), (7). For example, section 8(b) prohibits “a labor organization *or its agents*”
5 from picketing for certain purposes. 29 U.S.C. § 158(b) (emphasis added). In contrast to our
6 interpretation of section 8(g), the NLRB has held that, in certain circumstances, this subsection
7 applies to individual employees. *See, e.g., Rapid Armored Truck Corp.*, 281 N.L.R.B. 371, 371
8 n.1 (1986); *Local 707, Motor Freight Drivers*, 196 N.L.R.B. 613, 614 (1972). However, the
9 explicit reference in section 8(b)’s prohibition to “agents” of a labor organization stands in
10 contrast to the language of section 8(g), whose express prohibitions name only “labor
11 organization[s].” For this reason, the extensive case law explicating section 8(b) which the
12 majority relied on and which the General Counsel cites to us is inapposite.⁵ *See Corr. Med.*
13 *Servs.*, 349 N.L.R.B. 1198, 1203 (2007).

14 Considering the 1974 amendments in the light of the legal landscape in place at the time
15 of their enactment reinforces the view that employees who picket peacefully for the purpose of
16 collective bargaining without providing the notice section 8(g) requires have generally not acted
17 contrary to law in their individual capacity or forfeited the protections of section 7. On multiple
18 occasions prior to 1974, the Supreme Court recognized peaceful picketing as conduct protected
19 by the First Amendment. *See e.g., Amalgamated Food Employees Union v. Logan Valley Plaza,*

⁵ We express no view whether the employees who were dismissed were subject to sanctions for violation of section 8(b)(7), as the Board did not proceed in that theory and made no finding that any were acting as an “agent” of the labor organization.

1 391 U.S. 308, 313 (1968) (“[P]eaceful picketing . . . is, absent other factors involving the purpose
2 or manner of the picketing, protected by the First Amendment.”), *overruled on other grounds by*
3 *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Bldg. Serv. Employees Int’l Union v. Gazzam*, 339 U.S.
4 532, 536 (1950) (“[P]icketing is in part an exercise of the right of free speech guaranteed by the
5 Federal Constitution.”). While Congress had previously imposed statutory limitations on
6 peaceful picketing in the context of labor relations, the Court recognized that Congress’s actions
7 were aimed at targeting “isolated evils.” *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No.*
8 *639*, 362 U.S. 274, 284 (1960); *see also NLRB v. Fruit & Vegetable Packers & Warehousemen*,
9 *377 U.S. 58, 62* (1964) (“Throughout the history of federal regulation of labor relations,
10 Congress has consistently refused to prohibit peaceful picketing except where it is used as a
11 means to achieve specific ends which experience has shown are undesirable.”). As a result, the
12 Supreme Court narrowly interpreted limitations on peaceful picketing and required a clear
13 statement from Congress of the conditions in which it intended to limit such picketing. *See Fruit*
14 *& Vegetable Packers*, 377 U.S. at 63 (“We . . . have not ascribed to Congress a purpose to outlaw
15 peaceful picketing unless there is the clearest indication in the legislative history that Congress
16 intended to do so as regards the particular ends of the picketing under review.” (internal citation
17 and quotation marks omitted)). We assume by convention that Congress was aware of this
18 interpretive approach when it considered the amendments and approved their final language.

1 Since the text of sections 8(g) and 8(d) shows no intention to punish individual employees who
2 do not strike but peacefully picket, it would not be appropriate for us to attribute one.⁶

3 Finally, the General Counsel contends that unless the picketing employees are subject to
4 discipline, health care facilities would be at risk and employers would be without remedy for non-
5 compliance with section 8(g). But this case involves peaceful picketing by off-duty employees
6 that caused no disruption to the operation of the clinic. Although we are not required to decide
7 the issue, we note that health care facilities confronted with strikes or union-inspired disruptive
8 behavior are not without potent remedies in appropriate cases. *See Montefiore Hosp. & Med.*
9 *Ctr. v. NLRB*, 621 F.2d 510 (2d Cir. 1980). CMS successfully charged the Union with violating
10 section 8(g) for its role in organizing the picketing. Congress has empowered the NLRB to issue
11 cease-and-desist orders and seek injunctive relief. *See* 29 U.S.C. § 160(c), (j). Congress has also
12 rendered labor organizations “bound by the acts of [their] agents” in certain cases. 29 U.S.C. §
13 185(b). Nonetheless, the General Counsel’s argument is not without force. It is indeed possible
14 for us to conceive of certain circumstances where protected picketing could cause disruption in

⁶ On appeal, the Board argues that at the time of the 1974 amendments, Congress was aware of a clear distinction between an employee’s *loss of status* under the Act, which makes a worker vulnerable to discharge for any reason, and *unprotected conduct*, which makes an employee vulnerable to discharge for engaging in that conduct. *See Fort Smith Chair Co.*, 143 NLRB 514, 517-18 (1963), *enforced sub nom. United Furniture Workers of America, AFL-CIO, Local 270 v. NLRB*, 336 F.2d 738, 742 (D.C. Cir. 1964). The Board argues that Congress intended section 8(d) to impose a loss-of-status sanction on employees who strike in violation of 8(g), whereas employees who participated in any action that did not conform with section 8(g)’s notice requirement engaged in unprotected conduct because their actions violated the law. We are not persuaded by this argument because nothing in the statutory language indicates that section 8(g) imposes an obligation on employees in their individual capacity, and peaceful picketing was generally protected conduct at the time of the 1974 amendments.

1 the ability of a health care facility to deliver health care. The only answer a court can give,
2 however, is that, as we read the governing statutes, this is what Congress decreed in its effort to
3 balance competing interests. If the balance is imperfect, the Board should petition Congress to
4 fix it. When Congress has addressed an issue with sufficient clarity, a court is not at liberty to
5 deviate from the statutory commands merely because it may find that it would have been wiser
6 for Congress to set the balance otherwise.

7 **CONCLUSION**

8 The petition for review is GRANTED, the decision and order of the NLRB are
9 VACATED, and the case is REMANDED for further proceedings consistent with this opinion.