The New York State Nurses Association[1] ***and*** **The Mount Sinai Hospital.** Case 2–CG–75

July 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On January 23, 1998, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed an answering brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent Union, the New York State Nurses Association, induced and directed employees of Mount Sinai Hospital (the Hospital) to refuse to volunteer to work overtime until the Hospital responded to a grievance concerning staffing issues, and thereby directed the hospital employees to engage in a concerted refusal to work, without providing the notices to the Hospital and the Federal Mediation and Conciliation Service required by Section 8(g) of the Act.[3] The judge found that the Union recommended that employees refuse to volunteer to work overtime or to work through their lunch periods; that some employees did, in fact, refuse to volunteer; and that the Union never provided 8(g) notices. He also found, however, that even though some employees did not volunteer for overtime, when the Hospital actually assigned overtime, none of the nurses represented by the Union refused to do it. Accordingly, because he found that there had never actually been a refusal to work by any bargaining unit employee, the judge found that there had not been a strike, picketing, or other concerted refusal to work, and consequently that the Union had not violated Section 8(g).[4] The General Counsel and the Hospital have excepted to these findings.

We agree with the General Counsel and the Hospital that the judge erred in finding that no employee refused to work overtime. The record shows that several refused to do so by exercising a contractual right to decline overtime work. Further, for the reasons discussed below, we find that both the nurses who refused to volunteer for overtime at the Union's request and those who refused assigned overtime were engaged in a concerted refusal to work within the meaning of Section 8(g). Accordingly, because the Union failed to give the required 10-day notices, we find that it violated that Section.

Facts

The Union represents a bargaining unit of registered nurses employed by the Hospital. Section 5.03 of the parties' collective-bargaining agreement provides that employees are not required to work involuntary overtime except in a disaster/emergency, which includes unplanned staffing shortages. An employee may postpone overtime assignments three times a year. When a disaster/emergency arises, overtime is first to be sought on a voluntary basis among nurses on duty who are qualified to perform the job functions required. If there are no volunteers, the Hospital will seek coverage from qualified nurses in other units and per diem and part-time staff. Involuntary overtime is to be assigned on a rotating basis, in reverse order of seniority, and in an equitable and consistent manner.

Although the contract provides for involuntary overtime, the Hospital has not had to impose it in recent years in its surgical departments, because it has been able to cover its overtime needs with volunteers. Thus, many nurses signed a voluntary overtime sheet indicating the days on which they were available for overtime, and others reported their availability to nursing supervisors and coordinators. Likewise, when asked to cover surgical needs by working through their lunch periods, nurses generally did so.[5] Indeed, management witnesses testified that they scheduled surgeries on the assumption that

[1] The caption has been modified to reflect the Respondent's full name.

[2] The Charging Party has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Parkway Pavilion Healthcare, 222 NLRB 212 (1976), cited by the judge, was denied enforcement by the Second Circuit Court of Appeals in an unpublished decision, 556 F.2d 558 (1976).

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

> A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention. . . . The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

[4] No exceptions were filed to the judge's refusal to defer the case to the contractual grievance/arbitration mechanism.

[5] The contract provides for a 1-hour lunch period.

the procedures would be covered in part by nurses working overtime and through lunch.

In the spring of 1997, some nurses began to complain among themselves about consistently working overtime and through lunch. According to Union President Marva Wade, the nurses thought that by agreeing to forego their lunches and to work after the end of their shifts, they were enabling the Hospital to avoid hiring sufficient staff, thus contributing to the problem of excessive overtime work.

On May 14, at a meeting of the staffing committee, made up of representatives from each of the Hospital's surgical "clusters," Wade recommended that employees refuse to volunteer to work overtime during their lunch periods and not sign up for voluntary overtime. Wade and other members of the committee took that recommendation back to their respective "clusters." On May 21, at a staff meeting attended by 60 to 65 staff members, Wade again recommended that employees not volunteer to work overtime or through their lunchbreaks.[6] After Wade's announcements—and, clearly, as the proximate result thereof—some nurses who had previously volunteered for overtime work ceased doing so and/or asked that their names be removed from the overtime list. Some nurses also refused to volunteer to work through lunch or after the end of their shifts at 4 p.m. As a result, on about eight occasions, the Hospital was unable to find enough volunteers to work overtime and had to assign overtime work. As the judge found, this caused extra work for supervisors and delays of some surgeries for an hour or two. Those delays were caused in part by the fact that the Hospital did not have a seniority list to use in assigning overtime.

In addition, several of the nurses exercised their contractual right to refuse overtime assignments. Thus, one of the Hospital's clinical coordinators, Dorothy Kaminski, testified that some nurses exercised their contractual right to refuse overtime, and Clinical Nurse Manager Mary Boyle testified that she believed that to be the case. In addition, the Hospital's staffing records indicate that 12 to 14 nurses refused to work assigned overtime on and after May 21.

The Hospital's supervisors testified that no unit employee was disciplined for exercising the contractual right to decline to work overtime or to work through lunch. The Hospital acknowledged that, because overtime had not been mandated in at least 7 years, each nurse had the right to refuse overtime three times, and that many exercised that right. Thus, although some of the nurses refused overtime assignments, it is clear that those assignments were not mandatory.[7]

The Judge's Decision

The judge acknowledged that the Board and courts have held that a concerted refusal by employees to work voluntary overtime constitutes a strike or work stoppage.[8] However, he distinguished those cases as involv-

[6] The Hospital has excepted to the judge's finding that Wade recommended only that the employees refuse to *volunteer* to work overtime and through lunch, and to his failure to find that she recommended that the employees refuse *to work* overtime and through lunch. We find no merit in those exceptions. We find that the judge implicitly credited the witnesses who testified that Wade recommended only a refusal to volunteer, and we discern no reason to overturn his finding.

The Union argues that Wade's May 14 and 21 statements were made in her capacity as an operating room nurse and not in her capacity as president of the Union and chair of the bargaining unit, and therefore that they are not attributable to the Union. We reject that argument as well. Although the Union contends that the recommendation voiced by Wade was actually a recommendation of the staffing committee, rather than of the Union, we find that the judge implicitly credited the witnesses who testified that Wade simply made the announcements, without indicating that she was only a spokesperson for the committee. Again, we see no reason to overturn that finding. The judge also found that, as the Union's president and the chair of the bargaining unit, in which latter capacity she participated in collective bargaining and grievance handling, Wade was an agent of the Union, and the Union has not excepted to that finding. Although a union is not accountable for every utterance of its officers, regardless of content or context, Wade's recommendations addressed overtime work and working through lunch, which are terms and conditions of employment subject to collective bargaining. As such, they would be of concern to the Union as the employees' bargaining representative, and it would be natural for the Union to take a position with regard to them. In these circumstances, and especially given Wade's status as a high official of the Union, we find that the employees would reasonably have believed that her recommendations reflected the views of the Union, and therefore that her statements can reasonably be imputed to the Union. See, e.g., *Teamsters Local 886 (Lee Way Motor Freight)*, 229 NLRB 832 (1977) ("Responsibility attaches if, applying the 'ordinary law of agency,' it is made to appear the union agent was acting in his capacity as such." (Citations omitted.))

Moreover, when the Hospital complained to the Union concerning the employees' refusal to volunteer for overtime and requested that the Union disapprove of the employees' conduct and instruct them to stop it, the Union failed to do so. By failing to disavow the employees' actions, the Union condoned them. *Penn Yan Express*, 274 NLRB 449 (1985).

[7] We correct two potentially misleading statements in the judge's decision. The judge found that the Hospital "mandate[d] overtime" several times and that "no nurse ever refused to work overtime when ordered to do so." As we have found, however, the Hospital's overtime assignments were not mandatory, because the nurses had a right under the collective-bargaining agreement to decline three assignments. Thus, the judge's references to the Hospital's "ordering" and "mandating" are mistaken. Also, contrary to the judge, some nurses exercised their contractual right to refuse overtime assignments.

[8] The judge cited the following cases: *Meat Cutters Local P-575 (Iowa Beef Packers)*, 188 NLRB 5 (1971); *Electronic Workers Local 742 (Randall Bearings)*, 213 NLRB 824 (1974), enfd. 519 F.2d 815 (6th Cir. 1975); *Elevator Mfrs. Assn. v. Elevator Constructors Local 1*, 689 F.2d 382 (2d Cir. 1982); *Avco Corp. v. Auto Workers Local 787*, 459 F.2d 968 (3d Cir. 1972); and *American Ship Building Co. v. Boilermakers Local Union 358*, 459 F.Supp. 491 (N.D.Ohio 1978).

ing actual refusals to work overtime, whereas here, he found that the employees did not actually refuse to *work* overtime, but only refused to *volunteer* for overtime work. Because he found that no unit employee actually refused to work overtime, the judge found that no strike had taken place.

The Parties' Exceptions

Relying on the above-cited Board and court precedent, the General Counsel and the Hospital contend that the nurses refused to volunteer for overtime and to work overtime, and that they thereby engaged in a strike or concerted refusal to work. They contend that both of those actions fall within the definition of "strike" contained in Section 501(2) of the Act, which includes "any strike or other concerted stoppage of work by employees . . . and any concerted slowdown or other concerted interruption of operations by employees."

Discussion

When Congress enacted the 1974 amendments to the Act, extending coverage to nonprofit hospitals, it added a new Section 8(g), which requires unions to give 10 days notice "before engaging in any strike . . . or other concerted refusal to work at any health care institution[.]" Section 8(g) was added because, in extending the protections of the Act to hospital employees, Congress meant to protect the public against undue disruptions in health care services resulting from labor disputes.[9] As the Senate committee's report on the measure stated,

> In the Committee's deliberations on this measure, it was recognized that the needs of patients in health care institutions required special consideration in the Act including a provision 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.[10]

In short, "Congress chose to treat the health care industry uniquely because of its importance to human life."[11]

Clearly, Section 8(g) was intended to cover a broad range of union activity. Notice is required not only for strikes involving complete walkouts by employees, but for *any* "other concerted refusal to work" by a union at a health care institution. Moreover, Section 501(2) of the Act defines "strike" to include "any strike or other concerted stoppage of work by employees . . . and any concerted slowdown or other concerted interruption of operations by employees." Thus, the term "strike," as used in Section 8(g), is not limited to traditional walkouts.

This broad coverage is in keeping with Congress' purpose in enacting Section 8(g). Congress' goal of ensuring continuity of patient care could not be achieved if notice were required only in cases of traditional strikes. That goal can be met only if notice is also required whenever unions attempt concertedly to slow down or otherwise interfere with the operations of health care institutions by means short of complete walkouts.

In light of the congressional purpose in enacting Section 8(g) and of the broad statutory language discussed above, we find that the nurses' actions here constituted a "strike" (as defined in Sec. 501(2)) and a "concerted refusal to work," within the meaning of Section 8(g). To begin with, as noted above, the record indicates that a number of nurses refused to work assigned overtime. Thus, contrary to the judge, those employees' actions constituted a concerted refusal to *work*, rather than merely a refusal to *volunteer*. As to those employees, there is no distinction between this case and those the judge attempted to distinguish.

In any event, contrary to the judge, we find that the nurses' concerted refusal to volunteer for overtime and to work through their lunch periods, contrary to their established practice, was clearly meant to cause, and did cause, an interruption of the Hospital's surgical functions within the meaning of Section 8(g).

The Board has held that, to be considered a strike, a work stoppage or interruption must be intended to bring pressure on the employer to change its ways.[12] Thus, for example, a brief work stoppage is not a strike if it is called simply to share information with employees regarding workplace concerns[13] or in spontaneous reaction to the employer's egregious flouting of its statutory obligations.[14]

Here, the nurses' concerted refusal to volunteer for overtime work was plainly intended to put pressure on the Hospital to change its staffing practices. The Union recommended that employees follow this course. It was not called for informational purposes. It was not a spontaneous reaction to any unlawful conduct by the Hospital. And it was not brief or transitory, but persisted over a period of several weeks.

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[9] *Hospital & Health Care Employees District 1199 (United Hospitals of Newark)*, 232 NLRB 443, 444 (1977); *Plumbers Local 630 (Lein-Steenberg)*, 219 NLRB 837, 838–839 (1975), enf. denied on other grounds 567 F.2d 1006 (D.C. Cir. 1977), overruled on other grounds 246 NLRB 970 (1979).

[10] S. Rept. 93-766, 93d Cong., 2d Sess. (1974).

[11] *Hospital & Health Care Employees District 1199 (United Hospitals of Newark)*, 232 NLRB at 444.

[12] *Empire Steel Mfg. Co.*, 234 NLRB 530, 532 (1978).

[13] Id.

[14] *Health Care Employees District 1199-E*, 229 NLRB 1010, 1011 (1977).

The record also establishes that when the employees began to refuse to volunteer, some surgical procedures were delayed. And even when such delays did not occur, the task of obtaining the personnel needed to cover overtime work became considerably harder. The record reflects that, before Wade's announcements, the clinical coordinators were able to find staff to work overtime in about 20 minutes; afterward, the task took 1 to 2 hours. In fact, the process became so involved that the coordinators often found it easier to cover overtime themselves. Thus, both the surgeries and the process of staffing them were disrupted by the nurses' refusal to continue to volunteer for overtime.

Contrary to our dissenting colleague, we are unwilling to abandon longstanding court-approved precedent.[15] In *Randall Bearings, Inc.*, 213 NLRB 824 (1974), and *Iowa Beef Packers*, *Inc.*, 188 NLRB 5 (1971), the Board held that concerted refusals to perform voluntary overtime urged by the respective unions were unlawful where the union utilized employees' power to refuse work to achieve ends prohibited by the Act. In *Iowa Beef Packers*, the union suggested that employees refuse to perform voluntary overtime in furtherance of the union's secondary objective. In *Randall Bearings*, the union urged a series of concerted refusals by employees to refuse to perform overtime that was voluntary under the contract to influence the company to accept the union's demands for contract modification. The Board noted that when

> employees decline to work overtime because they wish to attend a picnic, their action cannot constitute a strike in violation of the contract or of Section 8(d). On the other hand, the contractual and statutory right to decline to work overtime may not be utilized to procure a result contrary to law. [213 NLRB at 826.]

That reasoning is equally applicable in the instant case. To be sure, Section 8(g) does not prevent employees from exercising their rights under the collective-bargaining agreement.[16] It does, however, in the absence of the required written 10-day notice, prohibit a union from inducing employees to exercise their contractual rights as part of the union's effort to pressure an employer to change terms and conditions of employment. If the union is going to call for a strike or concerted refusal to work, the employer is entitled to the appropriate statutory notice.

We reject the dissent's suggestion that the Board's decisions in *Paperworkers Local 5 (International Paper)*, 294 NLRB 1168 (1989), and *Riverside Cement Co.*, 296 NLRB 840 (1989), arguably have "implicitly overruled" *Randall Bearings* and *Iowa Beef Packers*. At issue in this case is whether conduct that normally is protected by the Act, employees' exercise of a contractual right to refuse to volunteer for overtime at their union's request, is a work stoppage subject to the notice provisions of Section 8(g). In contrast, in *International Paper*, the issue before the Board was whether a union's direction to members to refuse to remain in nonunit positions was unprotected activity. After concluding that there was insufficient evidence that the employer could compel the employees to remain in those positions, the Board found that the union's direction to members under threat of internal union discipline to leave those positions was not an attempt by the union to unilaterally change terms and conditions of employment or the equivalent of calling a partial strike. In *Riverside*, the issue presented was again whether a concerted refusal to perform a voluntary action was protected or unprotected activity. Rejecting the employer's contention that the employees were engaged in an unlawful partial strike, the Board found that the employer violated Section 8(a)(3) and (1) by promulgating and enforcing a work rule in retaliation for employees' decision through the union to exercise their right, contained in the recently implemented final offer, not to provide personal tools. Thus, we find nothing in either *International Paper* nor *Riverside Cement* that would cast

[15] Like the dissent, we recognize that there is a crisis in the nursing profession. In our view, however, the solution to this crisis does not lie in permitting a union to ignore the congressionally mandated notice requirements of Sec. 8(g).

[16] Thus, contrary to the suggestion of our dissenting colleague, our finding that the concerted refusal to perform voluntary overtime at the Union's request is a concerted refusal to work for purposes of Sec. 8(g) neither deprives employees of their contractual rights nor permits the Hospital to modify the contract unilaterally by making voluntary overtime mandatory.

We find the dissent's reliance on the line of cases dealing with and distinguishing "partial strikes" equally unavailing. As our colleague correctly notes, although employees normally may refuse to work under the terms offered by the employer (i.e., engage in a complete strike), the Board and courts have consistently held that employees may not consistently or repeatedly refuse to do part (as opposed to all) of the work assigned them. To remain on the job while insisting on the right to decide which tasks they will or will not perform amounts to an attempt to dictate terms and conditions of employment unilaterally. Such an action is sometimes called a "partial strike" and is not protected by the Act. See, e.g., *Graphic Arts Local 13-B (Western Publishing Co.)*, 252 NLRB 936, 938 (1980), enfd. 682 F.2d 304 (2d Cir. 1982).

The cases cited by our colleague hold that this rule does not apply to a refusal to perform work that is voluntary, because in such a case, employees are not attempting to dictate terms to the employer. See, e.g., *Dow Chemical Co.*, 152 NLRB 1150, 1152 (1965). As our colleague concedes, however, the partial strike cases are not on point here. This is not a *partial* strike case. The question here is whether the nurses' refusal to perform that work at the Union's request was a strike or at least a concerted refusal to work, and therefore violated Sec. 8(g) because the Union failed to give the required notices.

doubt on the principles of *Randall Bearings or Iowa Beef Packers*.[17]

We also find *Indiana Hospital*, 315 NLRB 647 (1994), distinguishable. In that case, the employer had an existing policy that maintenance employees perform snow removal on the second and third shifts, holidays and weekends. Each autumn, the employer posted a signup sheet, seeking volunteers. The policy, however, did not provide for the situation when there were insufficient volunteers. The Board adopted, without comment, an administrative law judge's finding that the hospital violated Section 8(a)(5) by revising its snow removal policy after no maintenance employees volunteered without giving their newly certified collective-bargaining representative notice or an opportunity for bargaining. In finding the violation, the judge rejected the hospital's defense that the refusal to volunteer violated Section 8(g). The judge concluded not only that the maintenance employees did not engage in a work stoppage, but also found no evidence that the concerted refusal to volunteer was authorized or organized by the union.[18]

Contrary to the implication of the dissent, we are not suggesting that the employees could not concertedly refuse to work voluntary overtime. We are simply saying that, under Section 8(g), any such refusal must be preceded by a 10-day notice if a union is responsible for the refusal.

Unlike our dissenting colleague, we are also unwilling to assume that, because employees have a contractual right to volunteer and to defer overtime three times within a given period before the assignment becomes mandatory, there is a "foreseeable possibility that the work will not be performed at all." The overtime system provided by the parties' contract is clearly designed to assure that the required nursing functions are performed. Indeed, for 7 years the practice has been that nurses volunteered in such numbers that the Hospital has not had to assign overtime. When the nurses stopped volunteering, the Hospital's operations were, without question, interrupted.[19]

Contrary to the dissent, we do not pass on the issue of whether there would be a contractual violation if employees refuse to work voluntary overtime, in circumstances where the contract contains an express provision to permit such refusal and contains a no-strike clause. That contractual issue would appear to depend on the precise language of the contract and perhaps on negotiating history. We will not speculate, as does our colleague, that the conduct would be in breach of contract. Rather, that contractual issue is not present here, and we do not pass on it. We simply hold that the conduct here was a "strike or other concerted refusal to work" within the meaning of Section 8(g).

For all of the above reasons, we find that the Union violated Section 8(g) of the Act by inducing and directing the nurses to refuse to volunteer to work overtime without providing the Hospital and the Federal Mediation and Conciliation Service 10 days' notice of the job action as required by Section 8(g).

ORDER

The National Labor Relations Board orders that the Respondent, The New York State Nurses Association, its officers, agents, and representatives, shall

1. Cease and desist from engaging in any strike, picketing, or other concerted refusal to work, including a concerted refusal to volunteer for overtime work, at the premises of Mount Sinai Hospital, or any other health care institution, without timely notifying, in writing, any such health care institution and the Federal Mediation and Conciliation Service, not less than 10 days prior to such action, of that intention.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its business office and meeting halls copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[17] The dissent asserts that these cases hold that the conduct therein was not a strike. Chairman Hurtgen disagrees. The issue in these cases was not whether the conduct was a strike. If the conduct had been a strike, the conduct would clearly have been protected. The holding was that the conduct (less than a strike) did not amount to a unilateral change and was not unprotected.

[18] Chairman Hurtgen disagrees with the judge's finding, in *Indiana Hospital*, that the concerted refusal to volunteer was not a work stoppage. He does, however, agree with the judge's finding in that case that there was no 8(g) violation. There was no 8(g) violation because there was no union involved.

[19] Cf. *Meat Cutters Local P-575 (Iowa Beef Packers)*, 188 NLRB at 6 (refusal to perform voluntary overtime constituted "strike," particularly in light of fact that it had been the employees' practice to work overtime).

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Furnish to the Regional Director signed copies of the notice for posting by Mount Sinai Hospital, if it is willing, in places where notice to employees are customarily posted.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER LIEBMAN, dissenting.

By many accounts,[1] mandatory overtime for nurses is both a cause and a consequence of the current crisis in nursing. There is simply too much work for too few nurses. As working conditions deteriorate, recruiting and retaining nurses become even harder, labor disputes multiply, and patient care is jeopardized. This case is symptomatic of the problem.

Here, ironically, nurses had already addressed the issue of mandatory overtime through collective bargaining. As it turns out, their success was illusory. In the majority's view, the nurses had no right—despite the guarantees in their contract—to reject voluntary overtime and so encourage their employer to remedy staffing shortages and overwork. The unfortunate result reached by the majority will, I fear, make it more difficult for nurses to act together to improve both their working conditions and the care their patients receive. Neither the Act nor our earlier decisions compel that result. Indeed, before today, the Board recognized the basic legal difference between mandatory and voluntary work.

My colleagues find that the Respondent Union, the New York State Nurses Association, violated Section 8(g) of the Act by inducing and directing nurses employed by Mount Sinai Hospital to refuse to volunteer to work overtime without providing the 10-day notices required by Section 8(g).[2] I respectfully disagree. I would find that employees' refusal to perform voluntary overtime or to volunteer for overtime does not constitute a strike, and therefore that the Union did not violate Section 8(g) by not providing the notices.

Section 8(g) requires unions to provide a 10-day notice "before engaging in any strike . . . or other concerted refusal to work at any health care institution [.]" Section 501(2) of the Act defines "strike" to include "any strike or other concerted stoppage of work by employees . . . and any concerted slowdown or other concerted interruption of operations by employees." Only if the nurses' actions in declining overtime, or in not volunteering to perform overtime, meets those definitions would the Union's failure to provide the requisite 10-day notice be unlawful.

In my view, neither a concerted refusal to perform voluntary overtime work, or to volunteer for overtime, falls within the meaning of Sections 8(g) and 501(2).[3] Broad as the language of those provisions is, it would stretch their meaning, without promoting the policies of

[1] See, e.g., Kathleen Fackelman, *Working Conditions Send the Nurses Walking*, USA Today, 2001 WL 5464285 (June 7, 2001); Nicole Fay, *Nurses Fear Effect of Staff* Shortages, San Antonio Express-News, 2001 WL 1978472 (May 20, 2001); Marilyn Weber Serafini, *Trouble in the ER*, National Journal, 2001 WL 7182145 (May 19, 2001); Laurel Campbell, *Need for Nurses Is Soaring*, The Cincinnati Post, 2001 WL 5096700 (May 17, 2001); Erik Kriss, *Nurses Protest Ills of Job*, The Post-Standard (Syracuse, N.Y.), 2001 WL 5543628 (May 16, 2001); Glenn Howat, *Patients Suffer When Nursing Is Undervalued, Nurses Say*, Minneapolis-St. Paul Star-Tribune, 2001 WL 9625652 (May 13, 2001); Julia Malone, *Nurses Rally for Better Conditions*, Palm Beach Post, 2001 WL 18209001 (May 10, 2001); Ben Kieckhefer, *Nurses Group Rallies at Capitol to Push Staffing Legislation*, State Journal-Register (Springfield, Ill.), 2001 WL 8877020 (May 10, 2001); Kathleen Fackelmann, *Nurses Step into the Health Care Fray*, USA Today, 2001 WL 5462155 (May 10, 2001); Anne T. Denogean, *Nurses' Shortage Hits Hard*, Tucson Citizen, 2001 WL 5515384 (May 9, 2001); Kevin Lamb, *Nursing Shortage Hurting Patients*, Dayton Daily News, 2001 WL 3842589 (May 7, 2001); Judy Artunian, *No Quick, Easy Solution to Nursing Shortage*, Chicago Tribune, 2001 WL 4070254 (May 6, 2001); Mary Powers, *A Critical Shortage of Nurses*, The Record (Bergen County, N.J.), 2001 WL 5250460 (May 6, 2001); Aaron Nathans, *UW Nurses See OT as Top Contract Issue*, The Capital Times (Madison, Wis.), 2001 WL 5887540 (May 3, 2001); Trebor Banstetter, *Acute Shortage: Nurses and Hospitals Struggle to Cope as Pressures Mount*, Fort Worth Star-Telegram, 2001 WL 5148956 (Apr. 30, 2001); Victor Godinez, *Survey Says Shortage of Nurses Could Worsen*, Dallas Morning News, 2001 WL 20288920 (April 29, 2001); David Goldstein, *Nurses Address Retention Issue*, Kansas City Star, 2001 WL 2599726 (April 22, 2001); Roni Rabin, *Survey Shows Nursing Shortage Worsening on LI*, Newsday, 2001 WL 9227375 (Apr. 19, 2001); Milt Freudenheim & Linda Villarosa, *Nursing Shortage Is Raising Worries on Patients' Care*, New York Times, p. A-1, (Apr. 8, 2001); Lee Burnett, *Tired Nurses Seek Legislative Support*, Maine Times, 2001 WL 12255074 (March 8, 2001); e.g., Anne Bernard, *Needed: RNs to Aid Ailing Profession, Local Shortages Worsen as Many Shun Nursing*, Boston Globe, 2001 WL 3921455 (Feb. 25, 2001).

[2] Sec. 8(g) provides, in pertinent part, that

> A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention . . . . The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

Employees who participate in a strike in violation of Sec. 8(g) are engaged in unprotected activity. Sec. 8(d) of the Act provides that "[a]ny employee . . . who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act[.]"

[3] I find it difficult to see how a refusal to volunteer for work could be deemed a strike. See *Indiana Hospital*, 315 NLRB 647, 661 (1994). Nevertheless, because I find that a concerted refusal to perform voluntary overtime work does not trigger 8(g) notice, a fortiori I also find that a refusal to volunteer does not.

the Act, to construe their terms to encompass a concerted refusal to perform work that is voluntary, particularly where the voluntary nature of the work is established in a collective-bargaining agreement. Rather, in declining such nonmandatory assignments, employees are following an established condition of employment. Observing an established condition cannot be a "strike," a "refusal to work," or an "interruption of operations." These terms surely refer to situations where employees withhold services that they ordinarily would be expected to perform, under existing terms and conditions of employment. An employee who declines *voluntary* overtime is no more on strike, refusing work, or interrupting operations than an employee who fails to report to work on her day off.

The foundation of my position is the nature of voluntary overtime as opposed to mandatory overtime. The Board has long drawn a clear distinction between mandatory and voluntary overtime in determining whether the refusal to perform overtime constitutes an unprotected partial strike—that is, a consistent refusal to perform part, but not all, of employees' job duties.[4] It is well established that the repeated refusal to perform *mandatory* overtime work is a partial strike. See *Graphic Arts Local 13-B (Western Publishing Co.)*, 252 NLRB 936, 938 (1980), enfd. 682 F.2d 304 (2d Cir. 1982). By contrast, the Board has repeatedly held that a concerted refusal to perform *voluntary* overtime is not a partial strike, but rather protected activity. As the Board explained in *Imperia Foods*, 287 NLRB 1200, 1203–1204 (1988) (emphasis added):

> the concept of partial strikes as being unprotected derives from the fact that employees cannot be permitted to impose on the employer their own terms and conditions of employment. *The Board interprets this to mean that when the overtime refused by employees is voluntary, it cannot be said that employees are imposing conditions on the employer, since the employer has permitted employees to decide for themselves whether they wish to work overtime or not.* Therefore, since in the instant case the overtime is voluntary, the refusal to perform overtime is a protected, concerted activity.

See also *Excavation-Construction, Inc.*, 248 NLRB 649, 661 (1980), enf. denied on other grounds 660 F.2d 1015 (4th Cir. 1981) (driver who refuses to work voluntary Saturday work, regardless of the reason, is "observing an established condition of his employment and is not seeking 'to work upon terms prescribed solely by him'" (citation omitted)); and *Riverside Cement Co.,* 296 NLRB 840 (1989) (employees' refusal, at the union's direction, to continue their voluntary practice of bringing certain personal tools to work did not constitute an unlawful partial strike).[5]

These cases, which correctly recognize a significant distinction between voluntary and mandatory overtime, support finding that a refusal to perform voluntary overtime is not a strike or work stoppage. Indeed, the Board has observed as much in an analogous context. In *Paperworkers Local 5 (International Paper),* 294 NLRB 1168 (1989),[6] which involved a union's direction to employees to cease performing certain kinds of voluntary nonunit work, the Board stated:

> If the employer could compel unit employees to continue to fill temporary nonunit positions once they had accepted them, the [union's] ban . . . would have been tantamount to calling for their members to take part in the equivalent of an unlawful partial strike.

Id. at 1170. By contrast, if the choice was at the employees' discretion, "their refusal to do so, taken either singly or in concert, *can hardly be considered a strike or even a partial strike.*" Id. at 1171 (emphasis added).[7]

[4] The Board and courts have long held that such actions are not protected because they constitute attempts by employees to remain on the job, draw their pay, and at the same time set their own terms of employment. See, e.g., *Highlands Medical Center*, 278 NLRB 1097 (1986), quoting *Valley City Furniture Co.*, 110 NLRB 1589, 1594–1595 (1954), enfd. 230 F.2d 947 (6th Cir. 1956).

[5] In *Riverside Cement*, the Board found that the employer violated Sec. 8(a)(3) and (1) by refusing to allow employees to work when they failed to bring their tools. In so holding, the Board stated (id. at 841):

> Where an action is voluntary, the concerted refusal by employees to perform that action is a protected concerted activity and does not constitute an unlawful partial strike [citation omitted]. In *Dow Chemical* [, 152 NLRB 1150, 1152 (1965)], the Board explained that the vice of a partial strike is the employees'attempt to "establish and impose upon the employer their own chosen conditions of employment." Where, as here, the action employees refrain from engaging in is within the employees' discretion, they cannot be said to be imposing their own terms on the Employer.

[6] *International Paper* held that a union did not violate Sec. 8(b)(1)(A) of the Act by directing its members, under threat of internal union discipline, to refrain from performing certain kinds of voluntary nonunit work they had performed, and fining members who failed to comply. In addressing whether the union's ban on further participation in nonunit employment "impaired any policy Congress has embedded in the labor laws," the decision recognized that the critical issue was whether performance of the nonunit jobs was within the employees' discretion or whether the employer had the authority to order employees to remain in those positions. In addition to finding that the refusal to perform nonmandatory work was not a strike, the Board also stated that such a refusal would not violate the parties' contractual no-strike clause, nor would the union be effecting a unilateral change in working conditions by seeking to cause their members to exercise their right to choose in a particular way. Id. at 1171.

[7] Similarly, in *Riverside Cement Co.,* the Board held that employees who, consistent with the collective-bargaining agreement, ceased voluntarily bringing in personal tools, "were not engaged in a refusal to work or a strike of any kind. Rather, they were at all times willing and

That conclusion reflects a basic fact: Where work may be performed at the employees' option, there is a foreseeable possibility that the work will not be performed at all. That employees may often, or even always, choose to perform the work does not make it mandatory.[8] In those circumstances, I reject my colleagues' finding that employees' exercise of their option to decline the work is somehow a refusal to work or an "interruption of operations." Rather, the employees are working under the established terms, which set the voluntary character of the work.

This principle applies, or should apply, with special force where the voluntary nature of the work is established in a collective-bargaining agreement. Thus, where a union has negotiated a contract providing that overtime is voluntary, that contract provision is likely rendered meaningless if concerted exercise of the right is found to be a strike, since virtually all contracts include explicit or implicit prohibitions against strikes. Yet that seems to be the result my colleagues reach today, although they declare otherwise. Moreover, their finding that a union violates Section 8(g) in those circumstances means that employees lose the protection of the Act for exercising their contractual right to decline work. In other words, they may well be subject to discharge and discipline. It is no answer to say that all employees have lost is their ability to engage in concerted activity. They bargained for a right that may be exercised as they see fit, individually or jointly.

The General Counsel relies on two Board decisions holding that employees' refusal of voluntary overtime constituted a strike within the meaning of the Act. In *Meat Cutters Local P-575 (Iowa Beef Packers)*,[9] the Board held that by telling employees to refuse voluntary overtime to protest their employer's use of a product of another employer, a union violated Section 8(b)(4)(B) by inducing employees to strike in furtherance of a secondary objective. In *Electronic Workers Local 742 (Randall Bearings)*,[10] the Board held that employees' concerted refusal, at the behest of the union, to work voluntary overtime constituted a strike within the meaning of Section 8(d)(4) of the Act.

I believe that those two decisions were wrongly decided and are not authoritative on the issue of whether a concerted refusal to perform voluntary overtime is a strike within the meaning of Section 8(g). Those decisions relied on cases concerning *mandatory* overtime. They provided no rationale for why *voluntary* overtime should be treated the same as mandatory overtime. They did not address any of the implications of treating the two situations the same. And they never acknowledged the line of cases holding that a concerted refusal to perform voluntary overtime is not a partial strike. Thus, the Board in *Iowa Beef Packers* deemed the fact that overtime was voluntary under the contract to be irrelevant, stating that the Board had held "that a concerted refusal to work overtime is a strike." However, the only two cases cited—*Leprino Cheese Mfg. Co.*[11] and *First National Bank of Omaha*[12]—found that a one-time refusal to perform *mandatory* overtime was not a partial strike, but was protected activity, for which the employees could not be disciplined. Similarly, in *Randall Bearings*, the Board, in addition to citing *Iowa Beef Packers*, relied on two Board cases holding that refusals to work *mandatory* overtime were strikes under Section 8(d) of the Act, and therefore subject to the conditions imposed by that section.[13]

For the reasons stated above, in analyzing whether employee actions constitute a strike, there are dispositive differences between voluntary and mandatory overtime. Accordingly, I would overrule *Iowa Beef Packers* and *Randall Bearings* to the extent they hold that a concerted refusal to perform voluntary overtime is a strike within the meaning of the Act.[14]

available to work under the terms of the contract [.]" 296 NLRB at 842.

[8] It is immaterial that the nurses had what the judge described as an informal system of volunteering to work overtime or through lunch, on which the Hospital had come to rely. See *Riverside Cement Co.*, 296 NLRB at 841. Notwithstanding that system, which may have made it easier for the Hospital to fill overtime needs, the Hospital had a contractual procedure for assigning overtime. That it did not prepare to implement that contractual procedure, especially by preparing a seniority list, is no reason to deprive employees of contractual or statutory rights.

[9] 188 NLRB 5 (1971).

[10] 213 NLRB 824 (1974), enfd. 519 F.2d 815 (6th Cir. 1975).

[11] 170 NLRB 601 (1968), enfd. 424 F.2d 184 (10th Cir. 1970), cert. denied 400 U.S. 915 (1970).

[12] 171 NLRB 1145 (1968), enfd. 413 F.2d 921 (8th Cir. 1969).

[13] See *Telephone Workers of New Jersey Local 827 (New Jersey Bell Co.)*, 189 NLRB 726 (1971), and *Communications Workers (New York Telephone Co.)*, 186 NLRB 625 (1970).

[14] Indeed, I would argue that they were implicitly overruled in *International Paper* and *Riverside Cement*. The majority's attempts to distinguish those decisions are unpersuasive. In each case, one issue was whether employees' concerted refusal to perform voluntary acts was a strike. In each case, the Board explicitly held that it was not. Thus, contrary to the majority's suggestion, the Board in those decisions did not hold merely that the employees' withholding of voluntary services did not constitute *partial strikes*; it also held that they did not constitute *strikes*.

The General Counsel and the Hospital also rely on three judicial decisions, each of which found that the refusal to perform voluntary overtime was a strike under contractual no-strike clauses. *Avco Corp. v. Electronic Workers Local 787*, 459 F.2d 968, 974 and fn. 10 (3d Cir. 1972); *Elevator Mfrs. Assn. v. Elevator Constructors Local 1*, 689 F.2d 382, 386 (2d Cir. 1982); *American Ship Building Co. v. Boilermakers*

Here, in line with this reasoning, I would find that the Union did not engage in a strike or refusal to work, so as to trigger the notice requirements of Section 8(g). The record shows that Marva Wade, union president and chair of the bargaining unit, recommended that employees not volunteer to work overtime or through their lunchbreaks. Some nurses refused to volunteer to work through lunch, and some asked that their names be removed from the overtime list. Some also declined overtime work, exercising their right under the collective-bargaining agreement to postpone up to three overtime assignments per year. Clearly, under that contract provision, overtime work is voluntary where nurses exercise their right to turn down up to three assignments. There is no evidence that any nurse turned down an assignment that could be deemed mandatory, that is, after having already rejected three previous overtime assignments, and indeed, nurses did work overtime assigned by the Hospital.

As the recommendation made by the Union concerned only voluntary overtime, I would find that the Union did not engage in a strike or other concerted refusal to work under Section 8(g). Rather, the nurses exercised their rights under a collective-bargaining agreement that authorized them to reject overtime work. Their action was perfectly proper under their contract and under the Act. Creating legal obstacles to such efforts, where none exist, will not promote stable labor relations. It may well place an even greater burden on nurses who, despite their difficult working conditions, remain in such a vital profession.

I therefore find that did not violate Section 8(g) by failing to give 10-day notice of its action, and I would dismiss the complaint.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT induce our members to engage in any strike, picketing, or other concerted refusal to work, including a concerted refusal to volunteer for overtime work, at the premises of Mount Sinai Hospital, or any other health care institution, without timely notifying, in writing, any such health care institution and the Federal Mediation and Conciliation Service, not less than 10 days prior to such action, of that intention.

Local Union 358, 459 F.Supp. 491, 494 (N.D.Ohio 1978). Those decisions, however, relied on *Iowa Beef Packers*, which I would overrule, and on other Board decisions that concern mandatory overtime. They are therefore inapposite. Here, in addition, there was no issue raised involving a no-strike clause.

THE NEW YORK STATE NURSES ASSOCIATION

Vonda Marshall, Esq., for the General Counsel.
Richard Silber, Esq., for the Respondent.
Marina O. Lowy, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York, New York, on December 1, 1997. The charge was filed on June 24, 1997, and the complaint was issued on August 19, 1997. In substance, the complaint alleges that on or about May 21, 1997, the Respondent, by Marva Wade, induced and directed employees of the Respondent to refuse to volunteer to work overtime and thereby engaged in a work stoppage without having filed the written notices as required by Section 8(g) of the Act.

The Respondent makes the following arguments: (1) that this matter should be deferred to arbitration; (2) that Marva Wade, to the extent that she made any statements, did so not in her capacity as a union representative, but in her capacity as an employee; and (3) that the facts do not show that there was ever any strike or threat to strike within the meaning of Section 8(g).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

It is admitted and I find that the Charging Party, the Employer, is a person engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act. Also admitted is the conclusion that the Employer is a health care facility within the meaning of Section 2(14) of the Act. Finally, it is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICE ALLEGATION

The Mount Sinai Hospital (the Hospital) is a large full service hospital located at One Gustave L. Levy Place in New York City. (It also operates a medical school.) For many years it has maintained a collective-bargaining relationship with the New York State Nurses Association which represents various employees including operating room nurses. The bargaining unit is called "the Council of Nursing Practitioners" or "CNP." The most recent contract runs from January 1, 1996, to January 1, 1999.

Marva Wade is a staff nurse who also was the president of the Nurses Association from November 1995 to November 1997. Additionally, she was chairperson of the CNP at Mount

Sinai which meant that she participated in collective-bargaining negotiations and grievance handling. She clearly should be considered to be an agent of the Respondent. *Yellow Freight Systems*, 307 NLRB 1024, 1028 (1992), *Plumbers Union 250, (Murphy Bros.)*, 311 NLRB 491 (1993), *Penn Yan Express*, 274 NLRB 449 (1995).

The Hospital has a substantial surgery schedule, with operations generally running from 8 a.m. to 4 p.m. in 14 operating rooms. Because of complications, emergencies, and other contingencies, the Hospital has, for a period of time, had to utilize nurses to volunteer to either work through their lunch breaks or work overtime in order to accommodate the operations scheduled for any given day. For some period of time, there has been a past practice whereby nurses have been willing to volunteer to work overtime and either have signed up to work specific hours or have made it known to management that they were available. With this somewhat informal system in place, the Hospital has been able to have the nurses it needed to perform the scheduled surgeries.

The collective-bargaining agreement at section 5.03 provides, in effect, that employees will not be required to work involuntary overtime except in a "disaster/emergency." The contract provision goes on to allow employees to postpone overtime assignments three times a year. Ultimately, however, the Employer may mandate overtime when necessary, albeit it must assign such overtime on an equitable and consistent manner, in reverse order of seniority on a rotating basis.

On or about May 14, 1997, Marva Wade announced to other nurses at a meeting of the staffing committee (a committee consisting of staff nurses and technicians from each of the Employer's surgical clusters) that she recommended that the staff refuse to volunteer to work overtime during their lunch periods and not to sign up for voluntary overtime. This recommendation was thereupon communicated back to the staff nurses in their respective clusters. The underlying issue apparently was her opinion that by volunteering to work overtime, the nurses were exacerbating a short staffing situation and thereby tending to allow the Employer either to justify layoffs or to put off the hiring of staff needed to perform the amount of work required.

On May 21, 1997, Wade again announced to the staff that they should continue to *not* volunteer to work overtime or through their lunches. At no time did Wade make any threats to bargaining unit employees that the Union would initiate any disciplinary action against them if they continued to volunteer for overtime.

The evidence shows that at least some of the nurses who had previously signed up for overtime, or who had consistently made known their availability to volunteer to work overtime, stated to management that they no longer would volunteer. Thus, after the May 14 statements by Wade, some nurses began to refuse to volunteer to work through their lunches and others refused to volunteer to work past 4 p.m. Others, however, continued to volunteer, albeit they indicated to management that they wanted to be circumspect in doing so.

Given the statements of Wade and the corresponding actions of the nurses thereafter, the Hospital, on several occasions, had to mandate overtime work to its nurses when it could not obtain sufficient volunteers.[1] This involved some extra work by its supervisory people (the clinical coordinators) but in the end *no nurse ever refused to work overtime when ordered to do so.* That is, given the refusal of many nurses to volunteer to work overtime, the Hospital exercised its prerogative under the contract to mandate overtime. And whenever it did so, the nurses did the work.[2] There is also no evidence that any patient was either adversely affected or even significantly inconvenienced by this situation. That is to say that no procedures were canceled and, at most, a few surgeries were delayed for an hour or two.

The evidence indicates that the Union never gave any written notice to the Employer or to the Federal Mediation and Conciliation Service prior to (or subsequent) to May 14, 1997, when Marva Wade recommended to employees that they refuse to volunteer for overtime.

III. ANALYSIS

Section 8(g) of the Act states:

> 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, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act . . . . 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.

In *Parkway Pavilion Healthcare*, 222 NLRB 212 (1976), the Board stated:

> The purpose behind the 10 day notice provision is to provide health care institutions with sufficient time to make arrangements for continuing patient care during the labor dispute. Patient needs, staffing requirements, and supplies must all be examined. It is crucial, therefore, to analyze such factors as the ability to receive supplies during the strike, the ability of strike replacements to cross the picket line, and the willingness of nonstriking personnel to work behind the picket line. In some instances, it may even be necessary to remove the patients to another facility in order to insure proper care.
>
> In order to assess the extent to which normal operations are likely to be disrupted, the health care institution is entitled under Section 8(g) to receive at least 10 days notice from any labor organization which plans to begin picketing, engage in a strike, or work stoppage at a spe-

[1] According to Mary Boyle, the clinical nurse manager, this situation arose about seven times during the period from May 21, to the end of June 1997.

[2] According to Dorothy Kaminski, the clinical coordinator of the neurological operating rooms, there were some occasions when the supervisory nurses did the overtime when there were insufficient volunteers. But this, according to Kaminski, was a matter of choice and she could have mandated overtime in each such situation.

> cific future time. It may very well be that suppliers, nonstriking employees, and strike replacements who may be willing to cross one union's picket line, will refuse to do so if another labor organization begins picketing. If one union decides to join another union's picket line in sympathy and does not give the 10 day notice required by Section 8(g), health care institutions may suddenly find themselves with an unexpected disruption in services because of the picketing by two different unions instead of one.
>
> Furthermore, the Act specifically requires that written notice also be given to the Federal Mediation and Conciliation Service where a labor organization plans to picket a health care facility.

I shall refuse to defer this matter to the contract's grievance/arbitration provisions. While in either forum, a key question is whether or not the Union induced employees to engage in a strike or concerted refusal to work, the contractual issues and the statutory issues are, in my view, significantly different. Under the contract, the question would be whether the Union breached the terms of the no-strike clause. Under the NLRA, the issue is whether the Union engaged in conduct which required a prior 10-day written notice to the employer and to the Federal Mediation and Conciliation Service. Further, there is a question here which requires the Board to determine, in the first instance, the statutory definition of Section 8(g) and not merely its application to a particular set of facts.

The issue here is whether the actions of the Union constituted a strike or other concerted refusal to work.

There are a number of cases where the concerted refusal to work overtime, even overtime which is voluntary under a collective-bargaining agreement, has been construed to be a strike, either under some provision of the NLRA or as defined in a collective-bargaining agreement.

In *Meat Cutters Local P-575 (Iowa Beef*), 188 NLRB 5 (1971), a union was charged with violating the secondary boycott provisions of the Act. It had a primary dispute with Iowa Beef and the evidence showed that its steward and president urged employees at Kelly Beef to refuse to work overtime which they complied with. In this regard, Union President Craig told Kelly's employees that although they could not strike because they were bound by a no-strike clause, he suggested that they could refuse to work overtime scheduled for 6 a.m. the following morning. The Board overruled the administrative law judge and held that the union's agents induced or encouraged individuals employed by Kelly to engage in a strike or work stoppage in violation of Section 8(b)(4)(i) and (ii)(B) of the Act. The Board stated:

> We disagree with the Trial Examiner's view that because these stoppages of work occurred largely during overtime periods which were voluntary under the contract the motive therefore was irrelevant. The Board has held with court approval that a concerted refusal to work overtime is a strike, and Section 8(b)(4)(B) of the Act prohibits strikes for a secondary object. That the overtime was designated as voluntary in the contract does not, in our view, render the concerted refusal to perform it any the less a strike, or less coercive, particularly where, as here, the uncontradicted evidence shows it had been the employees' practice to work overtime during these hours for 5 months at New York, and for 5 years at Kelly.

In *Electronic Workers Local 742 (Randall Bearings*), 213 NLRB 824 (1974), the union was charged with violating Section 8(d)(4) and 8(b)(3) of the Act by not giving the required 60-day notice before engaging in a strike in support of its demands for a new contract. In finding that such concerted refusals constituted a strike, the american law judge cite *Meat Cutters* supra, and also cited a number of 8(d) cases where the Board has held that concerted refusals to work overtime constituted strikes.

In *American Ship Building Co. v Boilermakers Local Union 358*, 459 F.Supp. 491 (N.D.Ohio 1978), the employer sought a temporary injunction prohibiting the union from striking in breach of the contract's no-strike clause while a grievance was pending arbitration. The union moved to dismiss the complaint and argued inter alia, that it was not engaged in a strike inasmuch as the employees were merely refusing to perform overtime assignments. The facts showed that by virtue of union inducement, many more employees than in the past, refused overtime assignments, albeit some employees continued to accept them. The court rejected this argument, citing among other cases, *Iowa Beef Packers*. The court stated:

> First, it is apparent that the concerted refusal of a union's membership to perform overtime assignments can constitute an economic strike or work stoppage, as both the federal courts and the National Labor Relations Board... have recognized prior and subsequent to the decision of the Supreme Court in *Boys Markets*, supra. In a leading decision, the Court of Appeals for the Third Circuit stated in *Avco Corp. v. Local No. 787*, 459 F.2d 968, 974 (3d Cir. 1972), as follows:
>
> > [T]he Union claims that the order of the district court was proper because there was no strike to enjoin. The union points out that employees are obligated to work only five consecutive eight hour days, that there was no allegation that they did not do so, and that since the prior arbitration held that employees could refuse overtime, there has been no strike or work stoppage as contemplated under the terms of the "no-strike" clause. We believe that the Union construes this provision . . . too restrictively. In the contract, the Union agreed "that there shall be no strikes, walkouts, sit-downs, [etc.] What may be the effect of individual decisions not to work overtime, in light of Avco's past reliance on overtime to meet its production demands, the resolution discouraging such overtime work is clearly an attempt by the Union to retard production, or to interrupt or interfere with the work.
> >
> > . . . .
>
> Although the defendants assert that a concerted refusal to work overtime cannot constitute a "strike or concerted stoppage of work" within the meaning of the collective-bargaining agreement because the acceptance of overtime assignments under the contract is allegedly voluntary rather than compulsory, both the Court of Appeals in *Avco*

Corp., supra and the Board in *Iowa Beef Packers*, supra, recognized that a concerted refusal to work overtime, even if such overtime is nominally voluntary, constitutes a strike where the object of the concerted action is "to retard production or to interrupt or interfere with work."

In *Elevator Mfrs. Assn. v. Elevator Constructors Local 1*, 689 F.2d 382 (2d Cir. 1982), the circuit court concluded that the district court erred in refusing to issue a *Boy's Market* injunction against a Union for breaching the no-strike provisions of the collective-bargaining agreement where the underlying grievance was subject to arbitration. Although the union contended that there was no breach of the no-strike clause because employees merely refused to perform "voluntary" overtime, the court rejected this argument and found that employees, despite a past practice of signing up for emergency overtime, refused to perform this overtime when ordered to cease by the union's shop steward. Moreover, there was evidence that employees were told by the union steward that if they did work overtime, they would be brought up on union charges.

The Respondent points out that the key distinguishing feature between the cited cases and the situation in the present case is that in each of those cases there was an *actual refusal to perform work*, whereas in the present case this factor does not exist. That is, it argues that for purposes of Section 8(g), there is a difference between refusing to work overtime (even if it is voluntary under a contract) and a refusal to volunteer to work overtime where the employees have nevertheless continued to work overtime when ordered to do so by management. In the present case, the Respondent argues and I agree that there has never been a refusal to work by any bargaining unit employee and therefore there has not been a strike, picketing, or other concerted refusal to work.

CONCLUSION OF LAW

The Respondent has not violated the Act in any other manner alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]