No. 98-492

# In the Supreme Court of the United States

OCTOBER TERM, 1998

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., ET AL., PETITIONERS

*v.*

GERALD KOBELL, REGIONAL DIRECTOR FOR REGION SIX OF THE NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION


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## QUESTION PRESENTED

Whether the court of appeals erred in summarily affirming the district court's determination that the Regional Director of the National Labor Relations Board was entitled to interim injunctive relief, pursuant to Section 10(j) of the National Labor Relations Act, 29 U.S.C. 160(j), pending the Board's disposition of an administrative complaint against petitioners.

TABLE OF CONTENTS



TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

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## OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. B5-B7) is unpublished, but the judgment is noted at 142 F.3d 428 (Table). The opinion of the district court (Pet. App. C24-C47) is reported at 987 F. Supp. 409. An earlier opinion of the district court (Pet. App. C10-C23) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on February 18, 1998. A petition for rehearing was denied on July 2, 1998. Pet. App. B3-B4. The petition for a

writ of certiorari was filed on September 23, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. Petitioners Beverly Health and Rehabilitation Services, Inc. and Beverly Enterprises-Pennsylvania, Inc. operate twenty nursing homes in Pennsylvania. Pet. 1; Pet. App. C11.[1] The employees at those facilities are represented by locals of the Service Employees International Union (Union). Pet. App. C25 n.1. After the collective-bargaining agreements covering the facilities expired on November 30, 1995, petitioners and the union began negotiating new agreements; the employees continued to work as negotiations proceeded. *Id.* at C11.

The Union later filed unfair labor practice charges against petitioners with the National Labor Relations Board (Board). In particular, the Union alleged that, after the collective-bargaining agreements expired, petitioners (among other things) unilaterally changed the employees' terms and conditions of employment in violation of the National Labor Relations Act (Act), 29 U.S.C. 151 *et seq.* Pet. App. C11-C12. On March 15, 1996, the Union gave petitioners written notice, pursuant to Section 8(g) of the Act, 29 U.S.C. 158(g),[2] that

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[1] Each of the twenty facilities is also named as a petitioner before this Court. Pet. iii, 1. For purposes of this case, petitioners are treated collectively as a single employer. Pet. App. C10-C11, C44.

[2] In relevant part, Section 8(g) provides: "A labor organization before engaging in any strike * * * at any health care institution shall, not less than ten days prior to such action, notify the institution in writing * * * of that intention. * * * The notice shall state the date and time that such action will commence. The

it intended to commence an unfair labor practice strike at fifteen of the facilities on March 29, 1996, at 7:00 a.m. Pet. App. C12.

A strike did not begin, however, on March 29, 1996. Rather, on March 27, the Union notified petitioners in writing that it planned to delay the commencement of the strike by 71 hours, from March 29 at 7:00 a.m. to April 1 at 6:00 a.m. Pet. App. C12, C28. Petitioners advised the Union that, in their view, the Union's extension notice "failed to fulfill the literal statutory requirements set forth in §8(g)," and that they "would consider unlawful any strike held pursuant to the seventy-one hour extension notice." *Id.* at C13. The Union commenced a strike at the fifteen facilities on April 1 in any event. *Ibid.* The strike concluded on April 4, when the employees made petitioners an unconditional offer to return to work; petitioners, however, refused to reinstate many of the former strikers. *Id.* at C28-C29; see also *id.* at C13. The Union therefore filed further unfair labor practice charges with the Board in which they challenged petitioners' refusal to reinstate the former strikers.

2. a. Acting on the Union's charges, the Board's General Counsel issued a consolidated administrative complaint against petitioners on June 19, 1996. Pet. App. C14. The administrative complaint alleged, among other things, that petitioners violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by failing to reinstate about 450 employees at the conclusion of the strike. App. A, *infra*, 2a-3a. On July 8, 1996, the Board's Regional Director filed a petition in federal district court under Section 10(j) of the Act, 29

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notice, once given, may be extended by the written agreement of both parties." 29 U.S.C. 158(g).

U.S.C. 160(j), which authorizes the Board to seek, and district courts to grant, such preliminary and interim injunctive relief as is "just and proper."[3] Pet. App. C14. Among other things, the Regional Director requested that the district court order petitioners to reinstate all employees who had unconditionally offered to return to work at the conclusion of the strike, pending the Board's adjudication of the unfair labor practice complaint. *Id.* at C11, C14-C15. One week later, on July 15, 1996, a hearing on the administrative complaint commenced before an administrative law judge (ALJ). App. A, *infra*, 1a.

b. On April 4, 1997, the district court granted the Regional Director's request for an interim injunction under Section 10(j). Pet. App. C24-C47; see also *id.* at C10-C23 (earlier unreported decision). The court explained that "[t]he temporary relief available under §10(j) requires a determination by the district court of 'whether there is reasonable cause to believe that an unfair labor practice has occurred and whether an injunction would be just and proper.'" Pet. App. C33 (quoting *Pascarell* v. *Vibra Screw Inc.*, 904 F.2d 874, 877 (3d Cir. 1990)) (internal quotation marks and footnote omitted). "Reasonable cause," the court noted, requires "a substantial, non-frivolous, legal theory, implicit or explicit, in the Board's argument," and, "taking

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[3] In relevant part, Section 10(j) provides: "The Board shall have power, upon issuance of a complaint * * * charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred * * *, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court * * * shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper." 29 U.S.C. 160(j).

the facts favorably to the Board * * * sufficient evidence to support that theory." Pet. App. C17 (quoting *Vibra Screw*, 904 F.2d at 882). To determine whether interim injunctive relief is "just and proper," the court further noted, "[t]he focus * * * is * * * 'on the *unusual* likelihood . . . of ultimate remedial failure'" of a Board order, absent an injunction. Pet. App. C36 (quoting *Kobell* v. *Suburban Lines, Inc.*, 731 F.2d 1076, 1091 n.26 (3d Cir. 1984)).

The court concluded that the Regional Director had satisfied the "reasonable cause" requirement for interim injunctive relief under Section 10(j). Pet. App. C19-C23, C34-C36. In particular, the court found that the Regional Director had "present[ed] evidence that would support not only the elements of the unfair labor practices prior to the strike, but also that the strike was in protest of the alleged unfair labor practices." *Id.* at C35-C36. Under settled law, the court noted, "unfair labor practice strikers * * * are entitled to immediate reinstatement upon making an unconditional offer to return to work." *Id.* at C21 n.3.

In making its "reasonable cause" finding, the court rejected petitioners' contention that, because "the notice extending the strike date for 71 hours was issued unilaterally" rather than with petitioners' agreement, the ensuing strike was not protected by the Act. Pet. App. C15-C16. Instead, the court concluded that "the Board's legal theory that the April 1, 1996 strike complied with the notice requirements of §8(g) [is] substantial and nonfrivolous." *Id.* at C34. In response to petitioners' contention that Section 8(g) bars extensions of strike notices except by written agreement between the parties, the court explained that (under long-standing Board precedent) written agreement is not the *exclusive* mechanism for extending strike notices.

Instead, the Board repeatedly had held that a union can unilaterally extend strike notices for a short time (*i.e.*, less than 72 hours), so long as the union also provides at least 12 hours of advance notice to the employer. *Id.* at C19-C20 (citing *Bio-Medical Applications, Inc.*, 240 N.L.R.B. 432 (1979)).[4] The district court saw no reason why the Board's construction of Section 8(g) should not be given deference, given the Board's expertise and the strong support for its construction in Section 8(g)'s legislative history. See Pet. App. D56 ("I believe that [the Board is] entitled to deference because of the special expertise that they have and because also * * * the legislative history was entitled to some deference there as well.").

The court also concluded that the Regional Director had satisfied the "just and proper" requirement for interim injunctive relief under Section 10(j). Pet. App. C36-C42, C44-C45. The Regional Director had presented "sufficient evidence to demonstrate that, without the issuance of an injunction, the Board's ultimate remedial powers may be frustrated." *Id.* at C41. Peti-

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[4] In *Bio-Medical*, the Board held that the language of Section 8(g) "does not expressly provide that a written agreement of the parties is the exclusive manner of extending an initial strike date," and that such a "restrictive interpretation" would be "clearly contrary to the expressed intent of Congress as revealed in the legislative history of Section 8(g)." 240 N.L.R.B. at 434. The Board held that a union may extend "the time set forth in the initial 10-day notice for the commencement of a strike by unilateral notification to the employer, at least in circumstances in which postponement of the strike is between 12 and 72 hours of the time set forth in that initial notice and where there is at least 12 hours advance notice given to the employer of the postponement." *Id.* at 435. See also *Bricklayers & Allied Craftsmen, Local 40 (Lake Shore Hosp.)*, 252 N.L.R.B. 252, 253 (1980); *California Nurses Ass'n (City of Hope Nat'l Med. Ctr.)*, 315 N.L.R.B. 468, 468 (1994).

tioners' alleged unfair labor practices, the court explained, had been "selectively geared to destroy or at least impede the communication network among [U]nion members"; the alleged violations "tended to * * * impede whatever collective bargaining has occurred"; and, "[i]n the absence of full reinstatement, the communication network of the [Union] at some of the facilities may be nonexistent when final adjudication by the Board is issued." *Id.* at C41-C42, C45.

Accordingly, the district court issued a Section 10(j) interim injunction requiring petitioners to "offer full reinstatement to all employees who engaged in the unfair labor practice strike which began on April 1, 1996, said reinstatement to be to their former positions of employment * * * displacing, if necessary, any employees hired to replace said employees." Pet. App. C46. The court specified that the order would "expire six months from the date of its issuance," *i.e.*, on October 4, 1997, but provided that the Regional Director could seek extensions as appropriate. *Id.* at C46-C47.

3. Petitioners appealed. On February 18, 1998, the court of appeals summarily affirmed the district court's issuance of the Section 10(j) injunction. Pet. App. B5-B7.

a. While the appeal was pending, on June 28, 1997, petitioners and the Union entered into new collective-bargaining agreements covering the employees at petitioners' facilities. The new contracts contain a provision entitled "Reinstatement Agreement," which states:

> Notwithstanding the pending litigation relating to the 1996 strike, or the term of this Agreement, the Employer agrees to complete the reinstatement of all strikers to their former positions prior to the

> strike, as required by the 10(j) injunction, regardless of the outcome of this litigation.

C.A. Supp. App. 1, 10 (reproduced at App. B, *infra*, 23a).[5]

b. On November 26, 1997—after the new collective bargaining agreements were signed, but before the appeal was decided—the ALJ assigned to the administrative proceedings instituted against petitioners issued his decision. App. A, *infra*, 1a-18a. The ALJ found that petitioners had committed "numerous and diverse unfair labor practices before the strike," and that "the strike was to protest those unfair labor practices." *Id.* at 7a. The ALJ thus concluded that petitioners "had an obligation under the Act immediately to reinstate the strikers to their former positions upon their unconditional offer to return to work," and that "their failure to do so constitutes an additional unfair labor practice." *Ibid.* (footnotes omitted).

The ALJ rejected petitioners' contention that, because "the Union's action in extending the [strike] deadline was taken unilaterally * * * the subsequent 3-day strike commencing on April 1 was unlawful." App. A, *infra*, 4a. Instead, he concluded that the Union's extension of the strike date was proper under *Bio-Medical*, *supra*, where the Board "adopt[ed] the 72-

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[5] The parties provided that the new contracts would become effective as to two particular bargaining units (the service and maintenance unit at Grandview Healthcare and the unit of licensed practical nurses at Mt. Lebanon Manor Convalescent Center) in the event that the Union prevailed on charges that petitioners unlawfully withdrew recognition from the Union as the representative of those employees. App. B, *infra*, 21a-22a. In the summer of 1997, the Regional Director issued administrative complaints against petitioners, based in part on those charges. The complaints are presently pending before an ALJ.

hour window and 12-hour advance notice rule as a parameter for allowing [unilateral] extensions of strike times previously announced in notices issued under Section 8(g)." App. A, *infra*, 5a; see also *id.* at 4a. The ALJ therefore ordered petitioners, among other things, "to offer immediate reinstatement to their former jobs to all employees who went on strike on April 1 * * * and to make them * * * whole for any loss of wages and other benefits." *Id.* at 8a.

On February 6, 1998, petitioners filed exceptions to the ALJ's decision with the Board. Petitioners' exceptions are currently pending before the Board.

c. During the pendency of the appeal, the Regional Director twice sought and obtained extensions of the interim relief entered by the district court under Section 10(j). App. C, *infra*, 24a-25a; App. D, *infra*, 26a-27a. After the second extension, the interim injunction was set to expire on May 4, 1998. Following the ALJ's issuance of his decision, the court of appeals' affirmance of the district court order, and petitioners' and the Union's agreements for reinstatement of striking workers, the Regional Director decided not to seek any further extension of the Section 10(j) interim injunction. Accordingly, on May 4, 1998, the injunction automatically expired, App. D, *infra*, 27a, and petitioners are no longer subject to its requirements.

**ARGUMENT**

Petitioners seek review of the court of appeals' order summarily affirming the district court's issuance of a Section 10(j) injunction. In particular, petitioners argue that courts of appeals have articulated different standards for determining whether such Section 10(j) injunctions should issue. See Pet. 6. But petitioners' challenge to the propriety of the district court's deci-

sion to issue an injunction in this case, and to the appropriateness of the standard that court employed, is largely academic and potentially moot. Moreover, because the interim injunction would have been proper under any standard, this case is not an appropriate vehicle for resolving the alleged conflict identified by petitioners. Accordingly, the petition for certiorari should be denied.

1. Section 10(j) of the National Labor Relations Act, 29 U.S.C. 160(j), "authorizes the NLRB to seek, and the United States district courts to grant, interim relief pending the NLRB's resolution of unfair labor practices." *Rivera-Vega* v. *Conagra, Inc.*, 70 F.3d 153, 158 (1st Cir. 1995). As petitioners point out, the courts of appeals have adopted somewhat different approaches to the determination of whether the Regional Director is entitled to a Section 10(j) injunction. Most courts (including the Third Circuit) follow a two-step inquiry. First, they determine whether the Regional Director has demonstrated "reasonable cause" to believe that the party against whom relief is sought has violated the Act; proof of "reasonable cause," the courts generally agree, includes a showing that the Regional Director's legal theories are "substantial and not frivolous."[6]

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[6] See *Kobell* v. *Suburban Lines*, 731 F.2d 1076, 1084 (3d Cir. 1984); *Frye* v. *Specialty Envelope, Inc.*, 10 F.3d 1221, 1225 (6th Cir. 1993) (per curiam); *Arlook* v. *S. Lichtenberg & Co.*, 952 F.2d 367, 371 (11th Cir. 1992); *Boire* v. *Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1188-1189 (5th Cir. 1975), cert. denied, 426 U.S. 934 (1976). Cf. *Danielson* v. *Joint Bd. of Coat Garment Workers' Union*, 494 F.2d 1230, 1244-1245 (2d Cir. 1974) (although district court's "duty of scrutiny" is not limited to determining whether Regional Director's claim is "insubstantial and frivolous," nonetheless, "on an issue of law, the district court should be hospitable to the views of the General Counsel, however novel").

Second, the courts ask whether the Regional Director has shown that an injunction would be "just and proper" under the circumstances.[7] In making the "just and proper" inquiry, courts often ask (as the Third Circuit does) "whether the failure to grant interim injunctive relief would be likely to prevent the Board * * * from effectively exercising its ultimate remedial powers."[8] Some courts also require an inquiry into the traditional equitable factors governing the issuance of preliminary relief.[9]

Two courts of appeals have adopted a different verbal formula. They ask only whether relief is "just and proper," and do so by "evaluat[ing] the propriety of the [Regional] Director's request with an eye toward the traditional equitable principles that normally guide such an inquiry," *Kinney* v. *Pioneer Press*, 881 F.2d 485, 490 (7th Cir. 1989), *i.e.*, the Regional Director's "likelihood of success on the merits," "the potential for irreparable injury in the absence of relief," whether "such injury outweighs any harm preliminary injunctive relief would inflict on the employer" and whether "preliminary relief is in the public interest," *Conagra*,

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[7] See, *e.g.*, *Silverman* v. *Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1059 (2d Cir. 1995); *Suburban Lines*, 731 F.2d at 1079; *Specialty Envelope*, 10 F.3d at 1224-1225; *S. Lichtenberg & Co.*, 952 F.2d at 372; *Pilot Freight Carriers*, 515 F.2d at 1188-1189.

[8] *Suburban Lines*, 731 F.2d at 1091-1092. See also *S. Lichtenberg & Co.*, 952 F.2d at 372; *Fleischut* v. *Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 30 (6th Cir. 1988).

[9] See *Conagra*, 70 F.3d at 164; *Kaynard* v. *Mego Corp.*, 633 F.2d 1026, 1033 (2d Cir. 1980). Cf. *Pilot Freight Carriers*, 515 F.2d at 1192-1193 ("though traditional rules of equity may not control the proper scope of §10(j) relief, some measure of equitable principles come into play")

70 F.3d at 164.[10] Although that formulation differs from the two-part "reasonable cause" and "just and proper" approach used by other courts, in practice the same result is often reached under either test.

2. Notwithstanding the different verbal formulae used by various appellate courts,[11] this case does not present a suitable vehicle for resolving any conflict that

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[10] See also *NLRB* v. *Electro-Voice, Inc.*, 83 F.3d 1559, 1566-1567 (7th Cir. 1996), cert. denied, 117 S. Ct. 683 (1997); *Miller* v. *California Pac. Med. Ctr.*, 19 F.3d 449, 456-461 (9th Cir. 1994) (en banc).

[11] Although we agree that the courts of appeals have used different verbal formulae, we do not agree with petitioners' further contention (Pet. 14-19) that the two-step framework used by the district court in this case is inconsistent with *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), and *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944). In *Romero-Barcelo*, this Court concluded that the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, does not "requir[e] a district court to issue an injunction for any and all statutory violations"; rather, the Court construed the statute "'in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings . . . in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect.'" 456 U.S. at 320 (quoting *Hecht Co.*, 321 U.S. at 330). In *Hecht Co.*, the Court reached a similar conclusion with respect to a federal emergency price control statute. See 321 U.S. at 328-330 ("A grant of *jurisidiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances."). Consistent with those holdings, the two-step framework applied by the district court does not *require* issuance of an injunction under Section 10(j) "for any and all statutory violations." *Romero-Barcelo*, 456 U.S. at 320. To the contrary, federal courts may deny interim relief if it is not "just and proper," such as where the Board cannot show that the absence of interim injunctive relief could potentially jeopardize its ability to offer a full and effective remedy for the violation. See, *e.g.*, *Eisenberg* v. *Lenape Prods., Inc.*, 781 F.2d 999, 1004-1005 (3d Cir. 1986); *Suburban Lines*, 731 F.2d at 1092-1094.

may exist. As an initial matter, the dispute petitioners seek to put before the Court is largely academic and potentially moot for two independent reasons.

First, on May 4, 1998, roughly ten weeks after the court of appeals issued its judgment order, the Section 10(j) interim injunction about which petitioners complain expired, and petitioners ceased to be subject to its terms. See p. 9, *supra*; App. D, *infra*, 27a. This Court has repeatedly recognized that, once an interim injunction expires, any appeal challenging its issuance becomes moot:

> The decision we are asked to review upheld only the validity of an injunction, an injunction that expired by its own terms [long ago]. Any judgment of ours at this late date "would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which has already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain."

*Local No. 8-6, Oil Workers Int'l Union* v. *Missouri*, 361 U.S. 363, 371 (1960) (quoting *Brownlow* v. *Schwartz*, 261 U.S. 216, 217-218 (1923)); see also *University of Texas* v. *Camenisch*, 451 U.S. 390, 398 (1981) (appeal challenging standard under which preliminary injunction was issued is moot where the injunction had been "fully and irrevocably carried out").

Second, on June 28, 1997, petitioners and the Union negotiated a "Reinstatement Agreement" which requires petitioners to reinstate striking employees—under the same terms as the Section 10(j) injunction—

regardless of the outcome of this litigation. See pp. 7-8. *supra*; App. B, *infra*, 23a (agreement providing that petitioners will restore "all strikers to their former positions prior to the strike, as required by the 10(j) injunction, regardless of the outcome of this litigation"). That agreement renders the current dispute over the propriety of the preliminary injunction largely academic. And it renders further review inappropriate, as this Court recognized in *McLeod* v. *General Elec. Co.*, 385 U.S. 533 (1967) (per curiam). There, as here, the union and the employer had entered into a new collective bargaining agreement after the preliminary injunction had been issued. *Id.* at 535. There, this Court held that the new agreement was an intervening event that rendered further review of the Section 10(j) injunction inappropriate. See *ibid.* ("We do not think it appropriate, however, to decide * * * the proper construction of §10(j)" because "the company and [the union] agreed upon a three-year collective bargaining agreement to replace the expired contract."). The new collective bargaining agreements in this case likewise render further review inappropriate here.[12]

3. Even apart from the potential problem of mootness and the academic nature of the dispute, this case does not present an appropriate vehicle for articulating a standard to govern issuance of preliminary relief under Section 10(j), as the injunction in this case would have been proper under any standard. Cf. *General*

[12] In *General Electric*, this Court vacated the court of appeals' judgment and remanded the case to the district court to "determine in the first instance the effect of this supervening event [*i.e.*, the new contract] upon the appropriateness of injunctive relief." 385 U.S. at 535. Here, no remand is required because the injunction has expired, and the Regional Director has not sought further interim relief.

*Elec.*, 385 U.S. at 535 ("The controversy over the proper standard for [Section 10(j)] injunctive relief is immaterial if such relief is now improper whichever standard is applied.").

As discussed above, see pp. 4-7, 10-11, *supra*, the district court applied a two-step analytical framework. As part of the first step, the court concluded that the Regional Director had shown "reasonable cause" to believe a violation had occurred because, among other things, the Regional Director had articulated a "substantial and non-frivolous" legal theory in support of his contention that the Union's 71-hour extension of the original strike date was consistent with Section 8(g). See Pet. App. C15-C16, C19-C20, C23, C34. Indeed, that theory was a direct application of the Board's long-standing decision in *Bio-Medical Applications*, 240 N.L.R.B. 432 (1979), under which "a union's unilateral extension of a strike date within a 12 to 72 hour period does not constitute an unfair labor practice." Pet. App. C19-C20. The court's ruling was correct. See *Lewis* v. *New Orleans Clerks & Checkers*, 724 F.2d 1109, 1116 (5th Cir. 1984) (court "cannot deem the Regional Director's legal theory insubstantial or frivolous" where based on applicable Board precedent).

a. Nonetheless, petitioners argue that, "[i]f the District Court had been free to apply the four-part test that it customarily would use for injunction cases, the District Court plainly would have concluded that the Board's legal theory was not likely to prevail on the merits," and therefore would have declined to issue a Section 10(j) injunction in this case. See Pet. 12. That contention lacks merit.

As an initial matter, the "likelihood of success on the merits" factor as it has been applied in this context does not materially differ from the "substantial and non-

frivolous" inquiry made by the district court in this case. See, *e.g.*, *NLRB* v. *Electro-Voice, Inc.*, 83 F.3d 1559, 1568 (7th Cir. 1996) ("some likelihood of succeeding on the merits" means "a better than negligible chance of winning") (internal quotation marks omitted), cert. denied, 117 S. Ct. 683 (1997); *Miller* v. *California Pac. Med. Ctr.*, 19 F.3d 449, 460 (9th Cir. 1994) (en banc) (Board "can make a threshold showing of likelihood of success by producing * * * an arguable legal theory").[13] Petitioners are thus incorrect to assert that

[13] *Pye* v. *Sullivan Bros. Printers, Inc.*, 38 F.3d 58 (1st Cir. 1994) (Pet. 10 n.5) is not apposite here. In *Sullivan Brothers*, the court stated that "[w]hen * * * the interim relief sought by the Board is essentially the final relief sought, the likelihood of success should be *strong*." 38 F.3d at 63 (internal quotation marks omitted). In this case, however, the interim relief ordered by the district court (reinstatement of the strikers) is not essentially the final relief sought by the General Counsel in the Board proceeding. See App. A, *infra*, 13a, 17a (ALJ's order requires petitioners, among other things, not only to reinstate the strikers, but also to "make them whole * * * for any loss of earnings and other benefits"; to rescind "all unilateral actions * * * found to have been effected in violation of collective bargaining obligations"; and "[to] make any employee adversely affected by those actions * * * whole for any loss of earnings and other benefits"). Moreover, the use of a "heightened standard" in preliminary injunction cases "must be supplemented by a further requirement that the effect of the order, once complied with, cannot be undone." *Tom Doherty Assocs., Inc.* v. *Saban Entertainment, Inc.*, 60 F.3d 27, 35 (2d Cir. 1995). The First Circuit itself has recognized that a Section 10(j) reinstatement order does not have such an effect. See *Asseo* v. *Pan Am. Grain Co.*, 805 F.2d 23, 28 (1986) (employer's "burden" of interim reinstatement "will only last until the Board's final determination").

looking to the Board's "likelihood of success on the merits" would have altered the result in this case.[14]

To the extent petitioners argue that the district court concluded otherwise and ruled that the Regional Director in fact was not likely to succeed, see Pet. 11-12, petitioners misread the district court. As explained above, the Board has consistently read Section 8(g) as permitting strike notices to be extended not only by mutual agreement of the parties, but also by unions acting unilaterally so long as the extension is brief (less than 72 hours) and sufficient notice is given. See pp. 5-6 & n.4, 8-9, *supra*; see also pp. 18-20, *infra*. Relying on the district court's assertion (made from the bench) that it would not itself have read Section 8(g) that way in the first instance, petitioners argue that the district court was unwilling to accept the Board's theory as a likely candidate for success. See Pet. 11 (quoting Pet. App. D56). But the district court's further discussion reveals that, even if the district court might have interpreted Section 8(g) differently *absent* guidance from the Board, it nonetheless recognized that (under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)) the Board's interpretation is entitled to deference and must be upheld so

[14] Moreover, the "likelihood of success on the merits" inquiry has been described as an evaluation of "the probability that the General Counsel will succeed in convincing *the NLRB* that someone has in fact violated the labor laws." *Pioneer Press*, 881 F.2d at 491 (emphasis added). On that view, it is clear that the Regional Director was entitled to a Section 10(j) injunction in this case, for his legal theory in respect to the Section 8(g) issue was based on a direct application of long-standing Board precedent. Cf. *Danielson*, 494 F.2d at 1244 (describing inquiry as whether there is "some significant possibility that the Board will enter an enforceable order").

long as it constitutes a permissible construction of the statute; and the district court further noted that the Board's construction was strongly supported by Section 8(g)'s legislative history. Pet. App. D56 ("I believe that [the Board is] entitled to deference because of the special expertise that they have and because also * * * the legislative history was entitled to some deference there as well."). Thus, far from demonstrating that the district court believed the Board's construction of Section 8(g) to be an unlikely candidate for success, that court's comments reveal its unwillingness to overturn the Board's permissible construction of the statute.

b. For similar reasons, petitioners' assertion (Pet. 19) that the Regional Director's legal theory was "groundless"—and thus an improper basis for an injunction under any standard—is incorrect. According to petitioners, Section 8(g) cannot be permissibly construed as permitting unilateral extensions under *any* circumstances because "Congress specifically mandated in Section 8(g) that any extension of a strike notice be done through the written agreement of both parties." Pet. 20.

Petitioners' construction of Section 8(g) rests on the mistaken premise that the mechanism for extending strike notices given by Section 8(g)—joint agreement—is *exclusive.* The statute nowhere declares that to be the case. See *Bio-Medical,* 240 N.L.R.B. at 434 ("[T]he cited language does not expressly provide that a written agreement of the parties is the exclusive manner of extending an initial strike date."). Instead, Section 8(g) merely provides that "[t]he notice, once given, may be extended by the written agreement of both parties." The word "may" expresses "ability, competency, liberty, permission, [or] possibility." *Black's Law Dictionary* 883 (5th ed. 1979). It does not nec-

essarily exclude the possibility that the notice may be extended by other means as well. Thus, petitioners do not ask that Section 8(g) be read as written, but rather ask that it be rewritten to declare that "the notice, once given, may be extended, but *only* by the written agreement of both parties." Even if that is a plausible construction of Section 8(g), it is not an inevitable one; consequently, it cannot displace the Board's contrary interpretation. See *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 401 (1996) (rejecting employer's "plain language" argument that offered "a plausible, but not an inevitable, construction" of statute).[15] Indeed, imposing such a restrictive construction on Section 8(g)—and thus constricting by implication the conditions under which employees may strike—would be particularly inappropriate given the principle that "any limitation on the employees' right to strike against [unfair labor practices] * * * must be * * * explicit and clear."

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[15] *NLRB* v. *Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, 897 F.2d 1238 (2d Cir. 1990), discussed by petitioners at Pet. 26-29, has little bearing on the instant case. As petitioners acknowledge (Pet. 28), the court there "found it unnecessary * * * to directly rule on the Board's construction" of Section 8(g). See 897 F.2d at 1246-1247 (finding ineffective union's attempt to unilaterally extend strike date because it was not "in written form" and, in any event, "did not provide twelve-hour supplementary notice of the time of day that the strike would begin"). Nor is there "significan[ce]" (Pet. 28) to that court's discussion of whether certain types of unfair labor practice strikes are exempt from Section 8(g). The court expressly declined to resolve that issue, see 897 F.2d at 1248, and, in any event, the Regional Director did not rely on such a theory in seeking Section 10(j) relief against petitioners in this case.

*Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 287 (1956).[16]

Moreover, the legislative history of Section 8(g) confirms the correctness of the Board's longstanding construction. Both the Senate and House Reports accompanying the bills that became Section 8(g) made it clear that it was not Congress's intention that unions "be required to commence a strike or picketing at the precise time specified in the notice." S. Rep. No. 766, 93d Cong., 2d Sess. 4 (1974); H.R. Rep. No. 1051, 93d Cong., 2d Sess. 5 (1974). To the contrary, the House and Senate Reports expressly indicate that it would be permissible for a union to delay its strike by up to 72 hours, so long as "12 hours notice [is] given of the actual time for commencement of the action." S. Rep. No. 766, *supra*, at 4; H.R. Rep. No. 1051, *supra*, at 5; see also *Bio-Medical*, 240 N.L.R.B. at 434-435 (citing and quoting additional legislative materials). Petitioners nowhere dispute that these legislative materials support the Board's construction;[17] nor do they offer a persuasive reason for rejecting the Board's construc-

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[16] In addition, because a strike that does not comply with Section 8(g) "deprive[s] the strikers of their status as employees," *Bio-Medical*, 240 N.L.R.B. at 435-436, it is reasonable for the Board to construe the statute in a fashion that avoids such an "unwarrantedly harsh result," *id.* at 436, absent a contrary statutory directive.

[17] Petitioners do argue that the Board should not have consulted the legislative history because Section 8(g) itself is unambiguous with respect to extensions of strike dates. See Pet. 23. However, as shown in the text above, see pp. 18-19, *supra*, Section 8(g) by no means declares that agreement of the parties is the *exclusive* method for extending a strike notice. And where the statutory language has an element of ambiguity, an agency's "consideration of relevant legislative history" is proper. *Mastro Plastics Corp.*, 350 U.S. at 287.

tion and adopting one that directly conflicts with Section 8(g)'s legislative history.[18]

c. Besides, the correctness of the Board's construction of Section 8(g) is not properly before this Court. Where a court passes on a Section 10(j) injunction, the question is not whether the Board has correctly construed the statute that Congress directed it to administer; that question may be determined only on review of the Board's final orders. Instead, the question is whether the Board's construction is sufficiently plausible to support interim relief. *California Pac. Med. Ctr.*, 19 F.3d at 460; see also *Silverman* v. *Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1059 (2d Cir. 1995) (question is whether Board's legal theory is "fatally flawed"); Pet. App. C22-C23; 29 U.S.C. 160(e) and (f); *NLRB* v. *Auciello Iron Works, Inc.*, 60 F.3d 24 (1st Cir. 1995), aff'd, 517 U.S. 781 (1996). For that reason, this Court has in the past expressly declined to reach the merits of a case on review of a preliminary injunction. See *Camenisch*, 451 U.S. at 394-398. Here, there can be no doubt that the Board's reading of Section 8(g)—given the deference owed to the Board, and the legislative history's strong support

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[18] Petitioners' further suggestion (Pet. 22) that the Board's interpretation of Section 8(g) renders the statutory language "completely superfluous" and "meaningless" is wide of the mark. The Board's construction fully preserves mutual written agreement as the basic method by which an initial strike date may be extended; it merely affords an additional mechanism through which the strike date may be extended, but only for a very short period (up to 72 hours) and only when there is sufficient notice to the employer. If the union desires an extension in excess of 72 hours, it must either obtain the employer's written consent or, if consent is withheld, issue a new 10-day strike notice. See *California Nurses Ass'n*, 315 N.L.R.B. at 468.

for the Board's construction—more than meets the threshold requirement of sufficient plausibility.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1998

**APPENDIX A**

**[Excerpts from decision of Administrative Law Judge]**

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

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CASE 6-CA-27873, ET AL.

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., ITS OPERATING REGIONAL OFFICES, WHOLLY OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM, AND/OR ITS WHOLLY OWNED SUBSIDIARY BEVERLY ENTERPRISES—PENNSYLVANIA, INC., D/B/A BEVERLY MANOR OF MONROEVILLE, ET AL.

AND

DISTRICT 1199P, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC, ET AL.

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**DECISION**

Statement of the Case

Robert T. Wallace, Administrative Law Judge: These cases were tried at 6 locations in Pennsylvania (Scranton, Franklin, Harrisburg, Pittsburgh, Johnstown and Reading) on 20 days between July 15, 1996 and May 6, 1997.

The original charge was filed on February 13, 1996[1] by District 1199P, Service Employees International Union, AFL-CIO, CLC. Thereafter numerous additional charges[2] were filed by that union and by two other SEIU affiliated unions (Local 585 and Local 668). A Consolidated Complaint against the captioned Respondents issued on May 9 and this was succeeded on June 19 by an Amended Consolidated Complaint, and the latter was amended up to and through conclusion of hearings.[3]

At issue is whether Respondents violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act by unilaterally changing terms and conditions of employment, by: refusing the Unions' information requests, refusing to bargain over specific issues, delaying grievance processing, and by-passing the Locals and dealing directly with employees. Also, there are numerous allegations of coercive and discriminatory conduct

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[1] All dates are in 1996 unless otherwise indicated.

[2] 6—CA-28061, 28073, 27874, 28046, 28075, 28049, 28074, 27876, 28013, 28050, 27877, 28014, 28015, 27878, 28020, 28054, 27879, 28019, 28047, 27880, 28023, 28045, 27881, 28024, 28057, 27882, 28025, 28052, 27883, 28026, 28051, 27884, 28058, 28076, 27889, 28012, 28059, 27890, 28048, 27891, 27892, 28060, 28077, 27893, 28079, 27894, 28053 and 28081.

[3] In its brief General Counsel seeks further to amend the complaint to delete paragraph G6 and to include 4 additional charges. Respondents opposed the latter. The requested deletion is granted. Inclusion of additional charges is denied. No adequate reason is advanced as to why inclusion was not sought before close of the hearing. Failure to do so precluded Respondents from responding either at trial or on brief. In any event, procedural fairness would require reopening for that purpose and I see no compelling need for the attendant delay in disposition of these proceedings. *United Artists Theater*, 277 NLRB 115, 130 (1985).

in violation of Section 8(a)(1) and (3) of the Act, including failing promptly to reinstate approximately 450 employees who engaged in a three day strike beginning on April 1.

* * * * *

VII. Sufficiency of Strike Notices Under Section 8(g)

Section 8(g) was added to the Act in 1974 as part of the Nonprofit Hospital Amendments that extended coverage to include health care institutions. It provides, *inter alia*, that a union must give 10 days written notice of a strike against such institutions. The 10-day notice, according to Congressional Committees sponsoring the legislations,[63] was intended to give them sufficient advance notice of a strike or picketing to permit timely arrangements for continuity of patient care.

In this case, the Unions on March 14 and 15 sent to administrators of 15 of the involved nursing homes[64] and the Federal Mediation and Conciliation Service notices advising that a strike would occur at those facilities on March 29. It is conceded that those notices fully comply with Section 8(g).

On March 27, however, other letters were sent to the same addressees advising that the Unions had extended the strike deadline by 72 hours, from 7:00 a.m. March 29 to 6:00 a.m. Monday, April 1. Respondents contend that the extension of the strike notices does not comply with "clear and unambiguous language" in the

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[63] S. Rept 93-766, 93d Cong., 2d Sess. at 4; H. Rept. 93-1051, 93d Cong., 2d Sess. at 5.

[64] Monroeville, Clarion, Fayette, Franklin, Haida, Meadville, Meyersdale, Mt. Lebanon, Murray, Richland, William Penn, Reading, Lancaster, Caledonia and Carpenter.

concluding sentence of Section 8(g), to wit: "The notice, once given, may be extended by the written agreement of both parties." Since, admittedly, the Unions' action in extending the deadline was taken unilaterally, Respondent's argue that the subsequent 3-day strike commencing on April 1 was unlawful and, consequently, that they were under no constraint to take back the approximate 450 employees who participated—even assuming the strike was in protest against unfair labor practices.

That precise issue was presented and resolved in the "*Bio-Medical*" case, *Greater New Orleans Artificial Kidney Center*. 240 NLRB 432 (1979). There the Board, after citing the following language in the Congressional Committee Reports:[65]

> It is not the intention of the Committee that a labor organization shall be required to commence a strike or picketing at the precise time specified in the notice; on the other hand, it would be inconsistent with the Committee's intent if a labor organization failed to act within a reasonable time after the time specified in the notice. Thus, it would be unreasonable, in the Committee's judgment, if a strike or picketing commenced more than 72 hours after the time specified in the notice. In addition, since the purpose of the notice is to give a health care institution advance notice of the actual commencement of a strike or picketing, if a labor organization does not strike at the time specified in the notice, at least 12 hours notice should be given of the actual time for commencement of the action . . .

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[65] *Ibid*, fn. 63.

went on to adopt the 72-hour window and 12-hour advance notice rule as a parameter for allowing extensions of strike times previously announced in notices issued under Section 8(g). In this regard, it held that the rule established a reasonable "substantial compliance" standard needed to avoid an application of Section 8(g) that would produce "an unwarrantedly harsh result [i.e. depriving strikers of protected status] not intended by the Congress."

The *Bio-Medical* precedent has been uniformly followed by the Board since 1979. *District 1199-E National Union of Hospital and Health Care Employees (Federal Hill Nursing Center, Inc.)*, 243 NLRB 23 (1979); *Bricklayers & Allied Craftsmen, (Lake Shore Hospital)*, 252 NLRB 252 (1980); *Nurses Ana (City of Hope)*, 315 NLRB 468 (1994).

In light of the clear and consistent precedent set by *Bio-Medical* and its progeny, any change of interpretation in this area is matter for Board determination; and Respondents' recourse is at that level. *Iowa Beef Packers, supra.* Applying existing policy, I find that the extensions of the strike notices satisfied the requirements of Section 8(g).

## VIII. Nature of the Strike

At each of the 15 homes that experienced a strike, issuance of the strike notice and the decision to strike were put to separate votes at meetings conducted by the Union representatives. At these meetings, the Union representatives enumerated the various perceived unfair labor practices at the facility, and in many cases, apprised the members of similar unfair labor practices occurring at other facilities as well. The Union representatives clearly informed the bargaining

unit members that the vote was being undertaken to protest Respondents' unfair labor practices. It was made clear to members that the strike was not in furtherance of the Unions' demands in contract negotiations. The testimony of the Union representatives conducting the meetings at each facility as well as the testimony of corroborating employee witnesses attending meetings at each facility is consistent and credible. It clearly establishes that the employees voted to strike in protest against persistent and numerous unfair labor practices which, on this record are shown to have occurred at each of the 15 facilities.

Further, in addition to striking over Respondent's unfair labor practices in their own facilities, the employees struck in sympathy over unfair labor practices at the 5 other facilities operated by Respondents. That aspect of the strike is also protected under the Act. *C. K. Smith & Co., Inc.*, 227 NLRB 1061, 1072 (1977), enf'd. 569 F.2d 162, 165-166 (1st Cir. 1977).

Respondents were well aware the strikers were protesting unfair labor practices. In their notices, the Unions characterized the strike as an unfair labor practice strike; and through picket signs and public statements, the Unions and striking employees amply conveyed that they were engaged in an unfair labor practice strike.[66]

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[66] The local Unions had supported a "Dignity" campaign that made general contract demands for all nursing home workers in Pennsylvania, including those employed at Respondent facilities as well as other facilities owned by entities unrelated to Respondent. Literature and T-shirts supporting the Dignity campaign had the logo "one contract, one fight." The fact that some Union members wore such T-shirts to Union meetings or even on the picket line,

It is well settled that a strike is considered to be an unfair labor practice strike as long as one of its objectives is to protest unfair labor practices. *Kosher Plaza Supermarket*, 313 NLRB 74, 88 (1993); *R & H Coal Co.*, 309 NLRB 28 (1992); *Northern Wire Corp.*, 291 NLRB 727, fn. 4 (1988), enfd. 887 F.2d 1313 (7th Cir. 1989). This being the case, the fact that frustration over the slow progress of contract negotiations may have played a part in the strike vote lacks significance.

Having established that that Respondent committed the numerous and diverse unfair labor practices before the strike and, further, that the strike was to protest those unfair labor practices, it follows that Respondents had an obligation under the Act immediately to reinstate the strikers to their former positions upon their unconditional offer to return to work[67] and that their failure to do so constitutes an additional unfair labor practice.[68] *Teledyne Still-Man*, 298 NLRB 982, 985

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albeit under coats, jackets and rain gear, does not transform what was clearly an unfair labor practice strike into an economic strike.

[67] Respondents stipulated there was an unconditional offer to return to work on behalf of every striker. (Tr. 221)

[68] At the conclusion of the strike, about 350 former strikers were completely denied reinstatement and an additional 100 were not reinstated to their former positions at 15 facilities based upon Respondents' claim that it had a right to and did permanently replace the strikers. After the strike, Respondent continued to reinstate former strikers only as positions became available, without regard to placing them in their former classification, department, number of hours or shift. Typically, a former striker was first offered reinstatement as a casual (on call) or part-time employee and only later, if at all, offered a full-time position. As casual or part-time employees, many former strikers lost their health insurance and other contractual benefits. In January 1997, 11 months after the three day strike, 66 former strikers still had not been offered reinstatement in any capacity and 237 former

(1990); *American Gypsum Co.*, 285 NLRB 100 (1987). It is a violation of Section 8(a)(3) of the Act to fail to reinstate such strikers. *Radio Electric Service Co.*, 278 NLRB 531, 535 (1986). See also *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407-408 (3rd Cir.), cert. denied 409 U.S. 850 (1972); *Grondorf, Field, Black & Co.*, 318 NLRB 996 (1995); *Orit Corp.*, 294 NLRB 695, 699 (1989); *Accurate Die Casting Co.*, 292 NLRB 284 (1989).

* * * * *

Remedy

Having found that the named Respondents have engaged in unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

* * * * *

Among other things, BHRI and BE-P will be ordered to offer immediate reinstatement to their former jobs all employees who went on strike on April 1 as well as employees (Sharon Proper, Diane McNulty and Sara Sharbaugh) found to have been discriminatorily discharged, and to make them and other employees found to have been wrongfully suspended (Connie Kollar) or otherwise deprived of income, whole for any loss of wages and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950),

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strikers who were not reinstated to the positions they held before the strike. In addition, other former strikers were offered reinstatement to positions that were not their former positions and which were, for various reasons, unacceptable.

plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Because of the Respondents' wide-ranging and persistent misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring them to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

Disposition

On these findings of fact and conclusions of law and on the entire record, I issue the following two recommended Orders[69]

ORDER
(BE-P)

Respondent Beverly Enterprises—Pennsylvania, Inc. (BE-P), of Leesburg, Virginia, its officers, agents, successors, and assigns, at the following nursing homes in Pennsylvania: Beverly Manor of Monroeville, Clarion Care Center, Fayette Health Care (Uniontown), Franklin Care Center (Waynesburg), Grandview Health Care (Oil City), Haida Manor (Hastings), Meadville Care Center, Meyersdale Manor, Richland Manor (Johnstown), Beverly Manor of Reading (Mt./Penn), Caledonia Manor (Fayettsville), Camp Hill Care Center, Carpenter Care Center (Tunkhannock), York Terrace Nursing Center (Pottsville), shall:

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[69] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Failing to reinstate unfair labor practice strikers immediately upon receipt of their unconditional offer to return to work.

(b) Ceasing to allow union representatives access to the above facilities as required under provisions of a collective bargaining agreement.

(c) Ceasing to allow posting of union-related notices on bulletin boards in those facilities as required under provisions of a collective bargaining agreement.

(d) Adopting a health insurance plan for employees without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(e) Reducing employees' hours of work and overtime opportunities without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(d) Laying off employees without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(e) Eliminating unit positions and assigning unit work to non-unit employees without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(f) Requiring employees to work overtime and, for some, eliminating opportunities for voluntary overtime without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(g) Failing to give employees' bargaining representatives adequate prior notice and opportunity for bargaining before changing contractual terms and conditions of employment, including: work schedules and advance posting requirements with respect thereto, absentee policies, the period required for doctor certification of absences for illness, rules relative to vacation scheduling and duration, and job descriptions.

(h) Failing to honor union bargaining requests.

(i) Bypassing appropriate union representative and dealing directly with unit employees.

(j) Failing to comply with union requests for information relevant and necessary for collective bargaining.

(k) Failing to process grievances in a timely manner.

(l) Engaging in and threatening unlawful surveillance of employees' union activities.

(m) Threatening employees with discipline and discharge for supporting unions and for complaining about working conditions.

(n) Threatening to grant wage increases to replacement workers in the event of a strike.

(o) Soliciting and impliedly promising to remedy employee grievances.

(p) Disparaging employees from engaging in the protected concerted action of protesting perceived

unfair working conditions by calling them "assholes and fucking idiots."

(q) Prohibiting employees from leaving union literature in the breakroom and prematurely removing it therefrom and from selling union insignia at offduty times in the breakroom.

(r) Suspending employee Connie Kollar for urging other employees to support the union.

(s) Changing the job description of unionized Licensed Practical Nurses (LPNs) without affording to their bargaining representative adequate prior notice and opportunity for bargaining, and for discriminatory reasons.

(t) Refusing to respond to an information request of the union relative to the changes in LPN status and refusing to bargain and dealing directly with LPNs about the changes.

(u) Changing LPN work and vacation schedules without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(v) Refusing to allow a duly selected employee union representative to attend an [*sic*] a labor-management meeting.

(w) Reducing the working hours of employee Beverly Higbee for engaging in union activities.

(x) Discharging LPNs Sharon Proper, Diane McNulty and Sara Sharbaugh for actively supporting unionization and to deter others from doing so.

(y) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days from the date of this Order offer full reinstatement to their former jobs Sharon Proper, Diane McNulty and Sara Sharbaugh as well as all employees who participated in the unfair labor practice strike which commenced on April 1, 1996 without prejudice to their seniority or any other rights or privileges previously enjoyed; and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the Remedy section of the decision.

(b) On request, rescind all unilateral actions here found to have been effected in violation of collective bargaining obligations and make any employee adversely affected by those actions, or by unlawful discriminations, whole for any loss of earnings and other benefits suffered as a result thereof in the manner set forth in the Remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges and the suspension of Connie Kollar and within 3 days thereafter notify the employees in writing that this has been done and that the discharges/ suspension will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examina-

tion and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at the nursing homes named above copies of the attached notice marked "Appendix."[70] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees 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.

(f) 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.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found in relation to this Respondent

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[70] If this Order is enforced by a Judgment of the 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."

Issues concerning whether remedies should extend to any or all of the interrelated Beverly companies, including Respondents BHRI and BE-P, because of asserted common responsibility for the unfair labor practices, are hereby severed and reserved for resolution by me in a separate supplemental proceeding.

ORDER
(BHRI)

Respondent Beverly Health and Rehabilitation Services, Inc. (BHRI), of Ft. Smith, Arkansas, its officers, agents, successors, and assigns, at the following nursing homes in Pennsylvania: Mt. Lebanon Manor, Murray Manor (Murrysville), William Penn (Lewistown), Beverly Manor of Lancaster, Blue Ridge Haven Convalescent Center (Camp Hill), and Stroud Manor (Stroudsburg), shall:

1. Cease and desist from

(a) Failing to reinstate unfair labor practice strikers immediately upon receipt of their unconditional offer to return to work.

(b) Ceasing to allow union representatives access to the above facilities as required under provisions of a collective bargaining agreement.

(c) Ceasing to allow posting of union-related notices on bulletin boards in those facilities as required under provisions of a collective bargaining agreement.

(d) Laying off employees without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(e) Reducing employees' hours of work and overtime opportunities without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(f) Requiring employees to return home and retrieve their identification badges before permitting them to work without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(g) Eliminating unit positions and assigning unit work to non-unit employees without affording to their bargaining representative adequate prior notice and opportunity for bargaining.

(h) Engaging in unlawful surveillance of employees' union activities.

(i) Changing the break schedule of union supporters to inhibit their ability to engage in union related activities at the facilities.

(j) Coercively soliciting employees to resign from union membership, interrogating them about their willingness to strike, and threatening them with reduced hours if they did so.

(k) Reducing employees' hours to discourage them from continuing to support the union.

(l) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days from the date of this Order offer all employees who participated in the unfair labor practice strike which commenced on April 1, 1996 full reinstatement to their former jobs without prejudice to their seniority or any rights or privileges previously enjoyed; and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them in the manner set forth in the remedy section of the decision.

(b) On request, rescind all unilateral actions here found to have been effected in violation of collective bargaining obligations and make any employee adversely affected by those actions, or by unlawful discriminations, whole for any loss of earnings and other benefits suffered as a result thereof in the manner set forth in the Remedy section of the decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at the nursing homes named above copies of the attached notice marked "Appendix."[71] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's

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[71] If this Order is enforced by a Judgment of the 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."

authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees 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.

(f) 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.

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found in relation to this Respondent

Issues concerning whether remedies should extend to any or all of the interrelated Beverly companies, including Respondents BHRI and BE-P, because of asserted common responsibility for the unfair labor practices, are hereby severed and reserved for resolution by me in a separate supplemental proceeding.

Dated, Washington, D.C. November 26, 1997

/s/ ROBERT T. WALLACE
ROBERT T. WALLACE
Administrative Law Judge

**APPENDIX B**

**[Excerpts from Court of Appeals Supplemental Appendix]**

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Docket Nos. 97-3200 AND 97-3357

GERALD KOBELL, REGIONAL DIRECTOR FOR REGION SIX OF THE NATIONAL LABOR RELATIONS BOARD FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, APPELLEE/CROSS-APPELLANT

vs.

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., ITS OPERATING REGIONAL OFFICES, WHOLLY OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM, AND/OR ITS WHOLLY-OWNED SUBSIDIARY BEVERLY ENTERPRISES-PENNSYLVANIA, INC.; D/B/A BEVERLY MANOR OF MONROEVILLE, D/B/A CLARION CARE CENTER, D/B/A FAYETTE HEALTH CARE CENTER, D/B/A FRANKLIN CARE CENTER, D/B/A GRANDVIEW HEALTH CARE, D/B/A HAIDA MANOR, D/B/A MEADVILLE CARE CENTER, D/B/A MEYERSDALE MANOR, D/B/A MT. LEBANON CONVALESCENT CENTER, D/B/A MURRAY MANOR, D/B/A RICHLAND MANOR, D/B/A WILLIAM PENN NURSING CENTER, D/B/A BEVERLY MANOR OF READING, D/B/A BEVERLY MANOR OF LANCASTER, D/B/A BLUE RIDGE HAVEN CONVALESCENT CENTER WEST, D/B/A CALEDONIA MANOR, D/B/A CAMP HILL CARE CENTER, D/B/A CARPENTER CARE CENTER, D/B/A STROUD MANOR, D/B/A YORK TERRACE NURSING CENTER, APPELLANTS/CROSS-APPELLEES

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APPEAL FROM THE MEMORANDUM AND ORDER ISSUED APRIL 14, 1997 BY THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA IN CASE NO. 96-1280

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**SUPPLEMENTAL APPENDIX**

LITTLER, MENDELSON, P.C.
WARREN M. DAVISON
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World Trade Center, Suite 1653
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STIPULATION

Counsel for Appellants/Cross-Appellees[1] and counsel for Appellee/Cross-Appellant hereby enter into the following Stipulation regarding the documents in Supplemental Appendix pages SA.4-64:

1. On or about June 28, 1997, Appellants in Docket Nos. 97-3200 and 97-3357, entered into collective bargaining agreements with the respective unions who

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[1] Counsel for the parties in this litigation differ as to whether Beverly Health and Rehabilitation Services, Inc. *et al.* should be identified as a single entity (Appellant/Cross-Appellee) or as a collection of separate entities (Appellants/Cross-Appellees). For purposes of this Stipulation, Beverly Health and Rehabilitation Services, Inc. *et al.* will be referred to Appellants/Cross-Appellees, but counsel for the parties agree that this designation is being made in this Stipulation solely for convenience and does not constitute a waiver by either party of its arguments regarding single employer status or the correct designation of Beverly Health and Rehabilitation Services, Inc. *et al.* in connection with this Appeal and Cross-Appeal.

represented units of employees at those facilities involved in this case, except for Grandview Healthcare and the LPN unit at Mt. Lebanon Manor Convalescent Center.

* * * * *

5. The document entitled Attachment #8 identified at Supplemental Appendix page SA.64 is a true and correct copy of an Agreement entered into between the Appellants in this litigation and the respective unions who represent units of employees at the facilities covered by this appeal. This Agreement provides that the Grandview Healthcare facility and the LPN unit at Mt. Lebanon Manor Convalescent Center facilities will have similar contract terms as set forth in the Agreement if the unions prevail in the pending National Labor Relations Board proceedings. In those pending proceedings, Appellant withdrew recognition from the unions representing the service and maintenance employees at Grandview Healthcare and representing the LPN unit at Mt. Lebanon Manor Convalescent Center.

IT IS SO STIPULATED.

/s/ JUDITH KATZ by TPD
Ellen Farrell
Judith Katz
Margaret Luke
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, NW
Washington, D.C. 20570-0001

Counsel for Appellee/Cross-Appellant

/s/ WARREN M. DAVISON
WARREN M. DAVISON
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(410) 528-9545

Counsel for Appellants/Cross-Appellees

Dated: August 15, 1997

* * * * *

REINSTATEMENT AGREEMENT

Notwithstanding the pending litigation relating to the 1996 strike, or the term of this Agreement, the Employer agrees to complete the reinstatement of all strikers to their former positions prior to the strike, as required by the 10(j) injunction, regardless of the outcome of this litigation. Accordingly, these individuals will be restored to the status of regular employees within their respective bargaining units for all employment purposes. Entitlement to backpay, seniority accrual, or reimbursement for any expenses caused by a loss of benefit coverage during the period between the end of the strike and their reinstatement shall be determined through the pending litigation. If employees returning to work request different positions from their former position prior to the strike, granting such request shall not be considered a violation of this section.

| | |
|---|---|
| For the Employer | For the Union |
| Date | Date |

**APPENDIX C**

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

---

Civil No. 96-1280

GERALD KOBELL, REGIONAL DIRECTOR FOR REGION SIX OF THE NATIONAL LABOR RELATIONS BOARD FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., ITS OPERATING REGIONAL OFFICES, WHOLLY OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM, AND/OR ITS WHOLLY-OWNED SUBSIDIARY BEVERLY ENTERPRISES-PENNSYLVANIA, INC.; D/B/A BEVERLY MANOR OF MONROEVILLE; D/B/A CLARION CARE CENTER; D/B/A FAYETTE HEALTH CARE CENTER; D/B/A FRANKLIN CARE CENTER; D/B/A GRANDVIEW HEALTH CARE; D/B/A HAIDA MANOR; D/B/A MEADVILLE CARE CENTER; D/B/A/ MEYERSDALE MANOR; D/B/A/ MT. LEBANON CONVALESCENT CENTER; D/B/A MURRAY MANOR; D/B/A RICHLAND MANOR; D/B/A WILLIAM PENN NURSING CENTER; D/B/A BEVERLY MANOR OF READING; D/B/A BEVERLY MANOR OF LANCASTER; D/B/A BLUE RIDGE HAVEN CONVALESCENT CENTER WEST; D/B/A CALEDONIA MANOR; D/B/A CAMP HILL CARE CENTER; D/B/A CARPENTER CARE CENTER; D/B/A STROUD MANOR; D/B/A YORK TERRACE NURSING CENTER; RESPONDENT

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**Consent Order Extending Injunction**

AND NOW, this 3d day of October, 1997, upon consideration of Petitioner's amended motion to extend injunction and Beverly Health and Rehabilitation Services, Inc., et al.'s consent thereto, it is hereby ORDERED that the motion is granted and the injunction is extended for a period of 60 days from October 4, 1997 and will expire on December 4, 1997, subject to the right of Petitioner to move to extend it as set forth in the order granting the injunction.

/s/ D. BROOKS SMITH
D. BROOKS SMITH
United States District
Judge

**APPENDIX D**

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

---

Civil No. 96-1280

GERALD KOBELL, REGIONAL DIRECTOR FOR REGION SIX OF THE NATIONAL LABOR RELATIONS BOARD FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., ITS OPERATING REGIONAL OFFICES, WHOLLY OWNED SUBSIDIARIES AND INDIVIDUAL FACILITIES AND EACH OF THEM, AND/OR ITS WHOLLY-OWNED SUBSIDIARY BEVERLY ENTERPRISES-PENNSYLVANIA, INC.; D/B/A BEVERLY MANOR OF MONROEVILLE; D/B/A CLARION CARE CENTER; D/B/A FAYETTE HEALTH CARE CENTER; D/B/A FRANKLIN CARE CENTER; D/B/A GRANDVIEW HEALTH CARE; D/B/A HAIDA MANOR; D/B/A MEADVILLE CARE CENTER; D/B/A/ MEYERSDALE MANOR; D/B/A/ MT. LEBANON CONVALESCENT CENTER; D/B/A MURRAY MANOR; D/B/A RICHLAND MANOR; D/B/A WILLIAM PENN NURSING CENTER; D/B/A BEVERLY MANOR OF READING; D/B/A BEVERLY MANOR OF LANCASTER; D/B/A BLUE RIDGE HAVEN CONVALESCENT CENTER WEST; D/B/A CALEDONIA MANOR; D/B/A CAMP HILL CARE CENTER; D/B/A CARPENTER CARE CENTER; D/B/A STROUD MANOR; D/B/A YORK TERRACE NURSING CENTER; RESPONDENT

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**Consent Order Further Extending Injunction**

AND NOW, this 2nd day of December, 1997, upon consideration of Petitioner's motion to further extend injunction, it appearing that there is good cause for the extension, it is hereby ORDERED that the motion is granted and the injunction is further extended for a period of six months from December 4, 1997 and will expire on May 4, 1998, subject to the right of Petitioner to move to extend it as set forth in the order granting the injunction.

/s/ D. BROOKS SMITH
D. BROOKS SMITH
United States District
Judge