Vencare Ancillary Services, Inc. ***and*** **Martha J. Severs.** Case 25–CA–26096–2

August 6, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On May 28, 1999, Administrative Law Judge Jerry M. Hermele issued the attached decision. The General Counsel and the Respondent each filed exceptions, a supporting brief, and an answering brief, and the Respondent filed a reply brief. Additionally, the General Counsel filed a motion to expedite and the Respondent filed a response.[1]

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, and conclusions only to the extent consistent with this Decision and Order.

For the reasons set forth below, we reverse the judge's dismissal of the complaint allegations and find that the Respondent violated Section 8(a)(1) of the Act by discharging employees Martha Severs, Norman deCaussin, Evonne Higdon, Barbara Thomas, and Lisa Winkler because they engaged in a protected concerted work stoppage on June 23, 1998.[2]

I. FACTUAL BACKGROUND

The facts as set out by the judge, and supplemented by the uncontradicted testimony, are as follows. The Respondent is a Kentucky corporation engaged in the business of providing short-term and long-term rehabilitation services, i.e., physical, occupational, and speech therapy. It provides these services on a contract basis to facilities owned by its parent company, Vencor, Inc., a nationwide healthcare provider. One of those facilities is the Hermitage Nursing & Rehabilitation Center, a 90-bed, skilled nursing facility located in Owensboro, Kentucky, the facility involved in this proceeding.

In May 1998, the Respondent's rehabilitation staff at Hermitage comprised physical therapist Norman deCaussin, physical therapist assistants Evonne Higdon, Barbara Thomas, and Lisa Winkler, occupational therapists Traci O'Rourke and Nil Kanth-Bohre, speech-language pathologists Martha Severs and Melissa O'Keefe, and rehabilitation technician Marsha Bell. Bryan Stuart, a former physical therapist, supervised the Respondent's rehabilitation department at Hermitage and reported directly to Kevin Mack, the Respondent's regional operations manager for Kentucky and Tennessee.[3] In turn, Mack reported to Mary Lynn Lee, the Respondent's regional director, who reported to Frank Anastasio, the Respondent's vice president.

On May 29, at the therapists' regularly scheduled morning meeting, Stuart announced that the Respondent would be implementing wage cuts, effective July 1. He stated that all of the therapists, except for one, would receive a wage cut, and that some of those cuts would be substantial. He explained that although he did not personally agree with the Respondent's decision, there was nothing he could do. He then informed the therapists that he would be meeting with each of them individually later that day to discuss how their salaries would be affected, and that they could then ask questions or make comments about the wage cuts. The Respondent also distributed a memo that day regarding the wage cuts.

Stuart met with each of the employees later that day as promised. He met first with Severs. According to Severs, Stuart advised her that her rate of pay, as of July 1, would be reduced from $23 to $18.03 per hour. He said that he thought her proposed wage cut was drastic and that he had asked the Respondent to reconsider its decision to cut her salary several times, without success. He explained that the Respondent had asked him to solicit employees' comments about the wage cuts. Severs inquired how the Respondent had arrived at her new rate of pay. Stuart informed her that a nationwide survey had been conducted and that, as a result, a new wage scale had been established. When Severs asked if she could see the survey, Stuart replied that he had been instructed by the Respondent not to give that information out to employees.

Stuart met next with Thomas. According to Thomas, Stuart told her that the decision to reduce her salary had nothing to do with her work performance. He told her that he disagreed with the Respondent's proposed wage cuts, some of which he believed were drastic. He then handed her a piece of paper and told her that her rate of pay, as of July 1, would be reduced from $16.35 per hour to $14.18 per hour. Thomas said that she disagreed with the wage cut.

Stuart then met with Higdon, and informed her that her rate of pay would be reduced from $15.75 to $14.18 per hour as of July 1. According to Hidgon, when Stuart asked for her comments regarding the wage cut, she asked to see the Respondent's new

[1] The General Counsel's motion is denied as moot.

[2] All dates are in 1998, unless stated otherwise.

[3] With the exception of the rehabilitation department staff, all employees, including the administrator and the director of nursing, were employed by Vencor.

wage scale. Stuart declined to show it to her, however, claiming that if he did, she would then know what other employees earned.

Stuart's final meeting that day was with deCaussin. He informed deCaussin that because of his many years of experience, his rate of pay would not be affected by the Respondent's proposed wage cuts. Nonetheless, deCaussin told Stuart that he did not agree with the Respondent's decision to cut his coworkers' wages.[4]

Following the Respondent's May 29 announcement, the employees discussed among themselves their various concerns about the impending wage cuts. On June 10, Severs asked Stuart whether he had heard back from the Respondent about the concerns Severs had raised on May 29. Stuart replied that he had no additional information. Later that same day, she spoke with Stuart again, and asked for a second time if she could see the Respondent's new wage scale. Stuart showed her a wage scale with a few figures on it. He explained that the wage scale had a low, medium, and high point, and that where one fell on the scale would determine one's new salary. He said that under the new wage scale, she would have to work for the Respondent for an additional 8 years to equal her present rate of pay.

Having received no response from the Respondent's upper management regarding the concerns they had shared with Stuart earlier, the employees decided to meet to discuss what, if anything, they could do about the wage cuts. On Friday, June 19, at approximately 4:30 p.m., Severs, deCaussin, Thomas, Higdon, and Kanth-Bohre met at the Moreland Park baseball field. They decided to draft a memo to the Respondent's upper management expressing their dissatisfaction with the Respondent's decision to cut their wages. They agreed they would present that memo to Stuart at the therapists' morning meeting on Monday, June 22. They also agreed that deCaussin should present the memo, because they believed that as the only employee unaffected by the wage reduction, he might lend additional credibility to their protest. In addition, they decided that they would refuse to see any patients until the Respondent's upper management responded to their memo.

The memo, which was drafted with input from everyone who attended the meeting, stated, among other things, that the employees strongly objected to the Respondent's implementation of the wage adjustments and requested that alternative "fiscal solutions" to the proposed wage adjustments be considered by the Respondent. The memo was directed to the attention of Anastasio, the Respondent's vice president, and Gregory F. Bellomy, the Respondent's national director. Severs agreed to type the memo over the weekend, and on Monday, June 22, Severs circulated it among her coworkers for their signatures. Although Severs, deCaussin, Hidgon, Thomas, and Winkler signed the memo that day, they decided against presenting it to Stuart at that day's morning meeting as originally planned because their coworker O'Rourke was away from work that day.

On Tuesday, June 23, prior to the start of the therapists' morning meeting, O'Rourke agreed to sign the memo; however, Bell refused when asked.[5] Stuart, Severs, deCaussin, Higdon, Thomas, Winkler, O'Keefe, Kanth-Bohre, and O'Rourke all attended that day's morning meeting. As Stuart started the meeting, deCaussin handed him the memo and asked him to read it. Stuart took the memo, placed it underneath some other papers he had, and stated that he would read it later because they had other issues to address that day. DeCaussin told him that the memo contained the issues of the day, whereupon Stuart read it and informed them that he agreed with a majority of it. DeCaussin told him that they felt that the Respondent had failed to respond to their concerns about the wage cuts, and that they wanted the Respondent to take them seriously. Severs then stated that they were not unionized, that they had no representative to voice their concerns for them, and that they felt very strongly about the issues. Thomas told him how unfair the Respondent's wage cut was in her case given that she had just been hired 3 months earlier at an agreed-upon rate, which had included the potential for a 50-cent increase after a 90-day review, but now the Respondent was planning on cutting her salary by more than $2.

Severs and deCaussin then informed Stuart that the employees were not going to see patients that day until the Respondent's upper management responded to their memo, and that they would remain at the facility and wait for a response. Stuart indicated that he did not think that the Respondent would respond in a positive manner to their refusal to see patients, and he urged them to reconsider their decision. He indicated that he viewed their grievance regarding the wage cuts and their refusal to see patients as two separate issues. He told them that he would transmit the letter to Mack via facsimile.

[4] The record does not reflect what occurred during the other employees' meetings with Stuart.

[5] O'Rourke told her fellow employees immediately after the morning meeting that she was not participating in their refusal to see patients. She also informed Stuart that she was not refusing to see patients despite the fact that she had signed the memo.

After the meeting, deCaussin returned to his desk and sat there doing nothing. After about an hour, he was called to go see Stuart. Stuart informed him that he had been instructed by Mack to meet individually with the employees who had signed the memo to confirm that they were not going to see patients. He explained to deCaussin that the refusal to see patients could lead to termination. DeCaussin said he understood, but that he had agreed not to see patients until the Respondent's upper management responded to their memo. He left and returned to his desk to wait for a response. According to deCaussin, he performed no more work.[6] At noon, he went to Stuart and told him that he was leaving, and that he would probably not return because he was not feeling well, but that he should be contacted if needed. He left work that day without recording his work hours on his daily activity report (DAR). According to deCaussin, he did not fill out his DAR because he did not expect to be paid for work that day.

Hidgon returned to her office after the morning meeting and worked on some patient progress notes generated from prior patient appointments.[7] At about 9:30 a.m., she met with Stuart, who inquired if she intended to see patients that day. She informed him that she did not. She also informed him that none of them had any intention of accepting pay that day. Higdon returned to her office, where she remained until she went out to lunch with Severs, Winkler, and Thomas.

Thomas likewise returned to her office after the morning meeting, where she did some filing and some patient care documentation. When she met with Stuart at 10 a.m., she informed him that she was not going to see patients until the Respondent's upper management addressed the memo. According to Thomas, Stuart replied that he knew what Mack's response would be, but he did not elaborate. Before going to lunch, Thomas went back to Stuart and told him that if the issues were not addressed she would quit because, based on his earlier comment, she believed that Mack was going to fire them for refusing to see patients.

Severs also returned to her office after the morning meeting and worked on some paperwork, including patient progress notes generated from prior patient appointments. She also sorted through papers and cleaned out her filing cabinet. Stuart called her into his office before lunch. Severs confirmed that she would not see patients that day until the Respondent's upper management responded to the memo. Severs informed him that although she was refusing to see patients, any patient who required her services that day, i.e., speech therapy, could be seen by her fellow speech pathologist who, unlike her, was not refusing to see patients. She also informed him that patients who required occupational therapy that day could still be seen because the two occupational therapists were likewise not refusing to see patients. She advised him that any physical therapy patient not seen that day could also be seen later that week, including Saturday, because physical therapists not only had discretion when scheduling their appointments with patients, but they also had to cover weekends at the facility. Like the others, she told him that she did not expect to be paid for work that day. She did not complete her DAR for that day.[8]

After lunch, Severs, Thomas, and Hidgon returned to their offices. Winkler did not return after lunch. At Mack's instruction, Stuart informed each of them to leave the facility and not return until they were contacted by the Respondent. Thomas called deCaussin and informed him what Stuart had told them. Thereafter, he met Severs, Hidgon and Thomas at Moreland Park, where they agreed to wait to hear from the Respondent as instructed. The next morning, however, Severs, deCaussin and Hidgon met and wrote a memo to Anastasio and Bellomy, and another memo to Bruce Lunsford, Vencor's CEO, regarding what had transpired on June 23. In the memos, they requested, once again, that the Respondent's upper management consider alternative fiscal solutions to the wage cuts.

Later that same day, Stuart contacted deCaussin, Severs, Winkler, Thomas, and Hidgon by telephone to advise each of them to come to the facility individually on June 25 at assigned times. Later, it was agreed that the five employees would meet with Stuart and Mack as a group at 9 a.m. When they met on the morning of June 25, Stuart handed them each discharge notices. The discharge notices state that the five employees were discharged for: "violation of company policy, failure to perform job assignment, insubordination, violation of code of ethics, and standards of practice."

[6] Bell recalled deCaussin doing paperwork prior to the therapists' morning meeting on June 23, but also on June 24. However, as discussed below, Thomas informed deCaussin on the afternoon of June 23 that they were not to report back to work until contacted by the Respondent's legal department. DeCaussin specifically denied being at work on June 24.

[7] Progress notes, which are made in patient charts and/or files, record patient care information, such as whether the patient has moved from a walker to a cane or whether the patient is now walking 100 feet as opposed to 50 feet.

[8] The record establishes that shortly before the hearing, almost 8 months after the Respondent had discharged the five employees, it sent them paychecks for June 23.

II. THE JUDGE'S DECISION

The judge concluded that the five employees' refusal to see any patients until the Respondent's upper management agreed to meet with them to discuss the wage cuts was a short-term, single work stoppage protected by Section 7 of the Act. The judge rejected the Respondent's contention that the five employees were engaged in an unprotected partial strike because they continued working after announcing their intent not to see any patients. The judge found that the paperwork completed after the group's announcement was nothing more than incidental wind-up work done in preparation for the work stoppage, that they did not expect to be compensated for this work, and that they left the Respondent's premises immediately when directed to do so by Stuart.

However, notwithstanding his conclusion that the employees' work stoppage was protected concerted activity under Section 7 of the Act, the judge dismissed the complaint in its entirety. He did so based on the Respondent's argument, raised for the first time in its posthearing brief, that the employees had failed to provide Respondent with 10-day written notice of an intent to strike pursuant to Section 8(g) of the Act, which requires a labor organization to give at least 10 days written notice before engaging in a strike or concerted refusal to work at a health care institution.[9] The judge found that Hermitage was a health care facility as defined by Section 2(14) of the Act. Relying on *Betances Health Unit*, 283 NLRB 369 (1987), he also found that because these five employees held several meetings, decided on a course of action, selected a leader, and embarked upon the work stoppage, they constituted a labor organization as defined by Section 2(5) of the Act. He therefore concluded that Section 8(g) applied, that the employees were required to give the Respondent 10-day written notice prior to engaging in the work stoppage, and that because they failed to do so, they forfeited their status as employees under the Act pursuant to Section 8(d) of the Act,[10] and the Respondent properly terminated them.

[9] In relevant part, Sec. 8(g) provides 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." 29 U.S.C. § 158(g).

[10] In relevant part, Sec. 8(d) provides that: "Any employee who engages in a strike within any notice period specified in this subsection, or 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 . . . ." 29 U.S.C. § 158(d).

III. CONTENTIONS OF THE PARTIES

The General Counsel contends that the judge erred in finding that the five employees constituted a labor organization under Section 2(5) of the Act and were therefore required to give 10-day notice under Section 8(g) prior to engaging in the work stoppage. The General Counsel contends that the employees did not constitute a labor organization because they did not meet the "dealing with" requirement of Section 2(5). The General Counsel further contends that the Board's decision in *Betances,* supra*,* fails to support the judge's finding that the employees comprised a labor organization.

The Respondent agrees with the judge's dismissal of the complaint, but asserts that even if the employees did not constitute a statutory labor organization, their refusal to see patients on June 23 was unprotected because of the "unduly and disproportionately disruptive [and] intemperate means" employed. Additionally, the Respondent contends that the judge erred in concluding that the work stoppage engaged in by these employees was protected concerted activity under Section 7 of the Act. According to the Respondent, the employees engaged in an unprotected partial strike by refusing to see patients while at the same time continuing to perform other tasks associated with patient care such as completing patient progress notes. The Respondent also contends that, independent of the partial strike issue, the employees were lawfully terminated for unprotected insubordination, and that two employees, Hidgon and Thomas, voluntarily quit or resigned.

IV. ANALYSIS

Contrary to the judge, we find that the five employees did not constitute a labor organization, and thus did not lose their protected status as employees by failing to give 10 days advance notice of their work stoppage pursuant to Section 8(g). We further find, in agreement with the judge, that their concerted refusal to see patients until the Respondent's upper management responded to their memo was a short-term, single work stoppage protected by Section 7 of the Act. Accordingly, we find that the Respondent violated the Act by discharging the employees.

A. 8(g) *Notice*

Contrary to the judge, we find as a preliminary matter, that the Respondent failed to timely raise the 8(g) issue.[11] As indicated above, the Respondent did not

[11] The case cited by the judge, *A & D Davenport Transportation, Inc.*, 256 NLRB 463 fn. 2 (1981), enfd. 688 F.2d 844 (7th Cir.

raise the issue either in its answer to the complaint or at the hearing, but rather waited until its posthearing brief to the judge. We find that the Respondent's 8(g) argument was in the nature of an affirmative defense, and that the Respondent therefore waived the argument by failing to raise it in a timely manner. See generally *Richard Mellow Electrical Contractors Corp.*, 327 NLRB 1112 (1999); *Prestige Ford*, 320 NLRB 1172 fn. 3 (1996); and *McKeeson Drug Co.*, 257 NLRB 468 fn. 1 (1981).

Even assuming that the defense was timely raised, however, we find that it is without merit. It is clear that the notice requirement of Section 8(g) is applicable only if the work stoppage is by a "labor organization."[12] As shown below, the work stoppage here was not by a "labor organization."

The term labor organization is defined in Section 2(5) of the Act as:

> any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employees concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 152(5).

At a minimum, for unrepresented employees collectively to constitute a labor organization under Section 2(5) of the Act: (1) employees must participate; (2) the organization, must exist, at least in part, for the purposes of "dealing with" the employer; and (3) these dealings must concern "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." See *Electromation, Inc.*, 309 NLRB 990, 994 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994). As discussed below, our review of the record reveals that while employees obviously "participated" in the ad hoc group here, the five employees considered together, did not satisfy the second element of this test.

The term "dealing with" contemplates "a bilateral mechanism involving proposals from an employee committee concerning subjects listed in Section 2(5), coupled with real or apparent consideration of those proposals by management." *Electromation*, supra, 309 NLRB at 995 fn. 21. The Board has required that "dealing with" consist of "a pattern or practice in which a group of employees, over time, makes proposals to management, [and] management responds to those proposals by acceptance or rejection." *Stoody Co.,* 320 NLRB 18, 20 (1995), quoting *E.I. du Pont & Co.*, 311 NLRB 893, 894 (1993). "If the evidence establishes such a pattern or practice, or that the group exists for a purpose of following such a pattern or practice, the element of dealing is present. However, if there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing." Id.

Here, the record reveals no such "pattern or practice." Rather, the five employees coalesced in response to the announced wage cuts, they presented their memo to management on this single issue, and they began a work stoppage. This isolated incident fails to establish the element of "dealing with." True, they acted concertedly and within the protection of Section 7 of the Act. *NLRB v. Washington Aluminum Co*., 370 U.S. 9 (1962). But, every protected activity does not give rise to "labor organization" status among those acting "in concert." Like the employees in *Washington Aluminum*, supra, these employees had "no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer. Under the circumstances, they had to speak for themselves as best they could." Id. at 14. Imposing the notice requirement of Section 8(g) here would serve only to frustrate Section 7 rights. We agree with the General Counsel that if we were to find, as the judge did here, that any concerted activity by employees was the activity of a "labor organization," Section 8(g) would require advance notice of any walkout by two or more employees acting in concert. That result is clearly at odds with the unambiguous language of both Sections 2(5) and 8(g) of the Act.

Contrary to the judge, we find that *Betances Health Unit*, supra, is distinguishable from this case. In *Betances*, the Board adopted the judge's finding that a group of unrepresented employees was a labor organization within the meaning of Section 2(5) and that it was required to give proper 8(g) notice prior to engaging in a strike. 283 NLRB at 389. There, a group of nine employees met at the home of another employee to discuss problems they were having at work. At that

1982), cert. denied 459 U.S. 1108 (1983), does not hold otherwise. In that case, the Board did not expressly address whether the Respondent raised the 8(g) argument in a timely manner.

[12] See *East Chicago Rehabilitation Center* v. NLRB, 710 F.2d 397, 403 (7th Cir. 1983), cert. denied 465 U.S. 1065 (1984); *Montefiore Hospital & Medical Center v. NLRB*, 621 F.2d 510, 514–515 (2d Cir. 1980); *NLRB v. Long Beach Youth Center*, 591 F.2d 1276, 1278 (9th Cir. 1979); NLRB *v. Rock Hill Convalescent Center*, 585 F.2d 700 (4th Cir. 1978); *Bethany Medical Center*, 328 NLRB 1094 (1999); *Walker Methodist Residence & Health Care Center*, 227 NLRB 1630, 1631–1632 (1977).

meeting the employees decided to call themselves, collectively, the Staff Association, and they elected a grievance committee and drafted a set of demands for presentation to management. Id. at 374. These demands included an end to harassment of employees by certain members of management, the reinstatement of three discharged employees, the discharge of another employee, and the recognition of the grievance committee to act as a liaison between management and the employees. Id. at 379. The Staff Association had a second meeting and held a second election. Id. at 378. It also presented a revised set of demands to the employer several days later. Id. at 389. Thereafter, the staff association's grievance committee met with the employer regarding the discharge of an employee and the staff association engaged in a strike in furtherance of it various demands. Id. at 375.[13]

The facts here are far different. The five employees elected no leaders, they met only once as a group prior to engaging in the work stoppage, they did not request recognition from the Respondent, they asked to meet with upper management on only a single issue (the wage cuts), and they presented their grievance memo at their regularly scheduled morning meeting prior to engaging in the work stoppage.

Accordingly, had the Respondent timely raised the 8(g) issue, we would find that the five employees did not meet the statutory definition of a labor organization. Thus, they were not required to comply with the notice provisions of Section 8(g) prior to engaging in the work stoppage, nor were they subject to the sanctions of Section 8(d).

We now address Respondent's other arguments, which the judge correctly rejected.

B. Partial Strike

As indicated above, the Respondent contends that the five employees engaged in an unprotected partial strike when they refused to see patients, and at the same time, continued to perform other tasks associated with patient care. Partial strikes, where employees continue working on their own terms, are not protected by Section 7 of the Act. See *Audubon Health Care Center,* 268 NLRB 135, 137 (1983); and *Valley City Furniture Co.*, 110 NLRB 1589, 1594–1595 (1954), enfd. 230 F.2d 947 (6th Cir. 1956). Thus, employees lose their statutory protection when they perform only part of their job functions while accepting their pay and avoiding the risks of a total strike. *Vic Koenig Chevrolet*, 263 NLRB 646, 650 (1982).

We reject the Respondent's contention that the employees here were engaged in an unprotected partial strike. We find that any work done after the group announced that they were refusing to see patients, was done in preparation for, and in conjunction with the work stoppage.[14] Rather than sitting idly by after the morning meeting, waiting to see if the Respondent's upper management would respond by agreeing to meet with them, most of the five employees used that short time to make sure that their patient records were up-to-date. Thus, the patient progress notes completed that morning were connected to, and were the outcome of, the patient therapies previously administered just days or weeks before. As noted by the judge, those employees who completed paperwork did not expect to be compensated and they left the Respondent's premises immediately when directed to do so by Stuart. Compare *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 256 (1939) (sit-down strikes, where employees occupy the employer's premises and refuse to leave when asked do not enjoy the Act's protection).

The record here demonstrates that the employees were not attempting to set their own terms and conditions of employment. *Valley City*, supra, 110 NLRB at 1594–1595. At no time did these employees usurp the managerial role of the Respondent, actively and defiantly performing only some of their work, while insisting that they be paid for such tactics. On the contrary, by completing the patient progress notes on therapies previously administered, the employees acted responsibly prior to engaging in the work stop-

[13] In light of these facts, the General Counsel agreed that the Staff Association was a labor organization for purposes of Sec. 8(a)(5), and argued that the employer therefore violated that Sec. when it temporarily closed its facility without giving the Staff Association notice and an opportunity to bargain about that decision. Nevertheless, the General Counsel argued that the Staff Association was not a labor organization for purposes of Sec. 8(g). The judge rejected the General Counsel's latter argument and found that 8(g) notice was required. 283 NLRB at 389. The Board agreed with the judge's finding.

[14] In reaching this conclusion, we find it unnecessary to determine the percentage of time the employees normally spent performing paperwork, or the percentage of billable time attributable to paperwork. The judge found that the employees' paperwork function took up to 10 to 20 percent of their time and approximately 40 percent of their billable time. However, the testimony in this regard was ambiguous, (particularly with respect to the 40-percent figure), or was given in response to leading questions, and the exhibits do not clearly support the testimony. For the reasons discussed below, we find that, regardless of the percentage of time the employees normally spent on or billed for paperwork, the fact that they performed paperwork while waiting to hear back from upper management did not render their work stoppage an unprotected partial strike.

page.[15] Thus, we find that the employees did not lose their statutory protection on this basis.

C. Unprotected Insubordination

Relying on *Bird Engineering*, 270 NLRB 1415 (1984), the Respondent also contends that the five employees forfeited the protection of the Act because they engaged in unprotected insubordination. We find *Bird Engineering* distinguishable and thus reject this contention.

In *Bird Engineering*, employees concertedly ignored, as unfair, a newly established company rule, which prohibited them from leaving the employer's facility during their lunch break. Prior to this time, the employees had followed a practice of punching in and out from lunch when leaving and returning to the facility. The employees ignored the employer's warnings, clocked out in protest, and were discharged. The Board held that their actions "in defiance of the Respondent's authority left the Respondent with little choice but to take the disciplinary action it had announced." Id. at 1416. The Board noted that the employees did not engage in a work stoppage, rather they "attempted to have it both ways—avoiding the involvement in a labor dispute and deciding for themselves which rules to follow and which rules to ignore." Id. at 1415 fn. 3.

The employees' concerted action here was very different. They engaged in a work stoppage, and did not take it upon themselves to decide which rules to follow and which to ignore. By refusing to see any more patients until the Respondent's upper management met with them to discuss the wage cuts, the therapists staged a permissible form of protest that is clearly distinguishable from merely ignoring rules and directives in defiance of management. All work stoppages involve refusals to work and the argument that such refusals to "follow orders" constitute insubordination is clearly contrary to basic Section 7 rights.

D. Indefensible Activity

Citing *Bob Evans Farms, Inc. v NLRB*, 163 F.3d 1012, 1024 (7th Cir. 1998), the Respondent contends that by refusing to see patients in order to protest the impending wage cuts, the employees here resorted to "unduly and disproportionately disruptive or intemperate means." We also reject this contention.

It is well established that Section 7 does not protect activity that is unlawful, violent, in breach of contract, or otherwise indefensible.[16] *Washington Aluminum*, supra, 370 U.S. at 17. The Board has held concerted activity indefensible where employees fail to take reasonable precautions to protect the employer's plant, equipment, or products from foreseeable imminent danger due to sudden cessation. *Marshall Car Wheel*, supra, 107 NLRB at 314. In cases involving health care employees, the Board has acknowledged that the risk of harm caused to patients by the employees' concerted activity is a factor in determining whether that activity was protected. Nevertheless, the Board has applied the same standards of conduct to employees of health care facilities as it does to employees of other businesses. *Bethany*, supra, 328 NLRB 1094; citing *Phases, Inc.*, 263 NLRB 1168, 1169 (1982). Thus, the test for whether the group's work stoppage lost the protection of Act is not whether their action resulted in actual injury, but whether they failed to prevent such imminent damage as foreseeably would result from their sudden cessation of work. Id.

Here, the record is devoid of any evidence that patient therapy schedules were not adhered to that day. Indeed, it is undisputed that these five employees knew that there were other therapists on duty that day. Thus, occupational therapists O'Rourke and Kanth-Bohre, speech-language pathologist O'Keefe and rehabilitation technician Marsha Bell were all available for work that day. Stuart, himself a former physical therapist, was available to cover, if necessary. Additionally, the physical therapists also knew they had the discretion to delay patient appointments and reschedule them later in the week. And, as noted above, prior to engaging in the work stoppage, these employees also completed patient progress notes, thereby bringing up-to-date their patient's records. Under these circumstances, we find that their refusal to see patients did not foreseeably create such a risk of harm as to justify depriving them of the Act's protection.

E. Voluntary Quit (Higdon and Thomas)

Finally, the Respondent's argument that Higdon and Thomas voluntarily quit or resigned must also be rejected. It is clear from the record that there was no agreement to resign if management did not respond to the employees' memo. Higdon did keep a diary, in which she stated that when she signed the memo, she had in fact resigned, but the resignation was never

[15] Compare *NLRB v. Reynolds & Manley Lumber Co.*, 212 F.2d 155 (5th Cir. 1954) (employee walked off the job and left boilers unattended); *U.S. Steel Co. v. NLRB*, 196 F.2d 459 (7th Cir. 1952) (employee walked off and left coke ovens unattended); *Marshall Car Wheel & Foundry Co.*, 107 NLRB 314 (1943), enf. denied 218 F.2d 409 (5th Cir. 1955) (employee walkout at moment molten iron ready to be poured).

[16] There is no contention here that the employees' conduct was unlawful, violent, or in breach of contract.

mentioned in that memo. We further agree with the judge that given the rapid sequence of events the morning of June 23, Thomas' threat to quit when she met with Stuart that morning was merely that. On June 24, Stuart called Thomas and Higdon, along with the other three employees, and asked them to come to the Respondent's facility on June 25, when they were all handed discharge notices. That Thomas reiterated on her notice that she felt she had already quit because the Respondent did not live up to its employment agreement is of no consequence. What matters is the Respondent's action, since actually it had already terminated the employment relationship. Under these circumstances, we cannot conclude that either Higdon or Thomas voluntarily quit or resigned their positions.

Accordingly, for the reasons set forth above, we find that the work stoppage was protected under Section 7 of the Act and that these employees were discharged for refusing to see patients until the Respondent's upper management responded to their memo regarding the wage cuts, a matter plainly affecting the terms and conditions of their employment. Accordingly, we find that by discharging employees Martha Severs, Norman deCaussin, Evonne Higdon, Barbara Thomas, and Lisa Winkler for engaging in this protected activity, the Respondent thereby violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Vencare Ancillary Services, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging employees Martha Severs, Norman deCaussin, Evonne Higdon, Barbara Thomas, and Lisa Winkler on June 25, 1998 because of their protected concerted activities, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent violated Section 8(a)(1) of the Act, we shall order it to cease and desist from such activity and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent will be ordered to offer Martha Severs, Norman deCaussin, Evonne Higdon, Barbara Thomas, and Lisa Winkler reinstatement to their former jobs or, if such positions no longer exist, to substantially equivalent positions, and to make them whole for any loss of earnings and other benefits, in the manner set out in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order the Respondent to remove from its files any reference to these unlawful discharges.

ORDER

The National Labor Relations Board orders that the Respondent, Vencare Ancillary Services, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of 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 Martha Severs, Norman deCaussin, Evonne Higdon, Barbara Thomas, and Lisa Winkler, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights and privileges they previously enjoyed.

(b) Make Martha Severs, Norman deCaussin, Evonne Higdon, Barbara Thomas, and Lisa Winkler whole 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 this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and, within 3 days thereafter, notify the employees in writing that this has been done and that the discharges 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 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.

(e) Within 14 days after service by the Region, post at its facility in Owensboro, Kentucky, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Re-

[17] 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."

spondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since June 25, 1998.

(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.

APPENDIX

NOTICE TO EMPLOYEES
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.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees because they engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you under Section 7 of the National Labor Relations Act.

WE WILL, within 14 days from the date of the Board's Order, offer Martha Severs, Norman deCaussin, Evonne Higdon, Barbara Thomas, and Lisa Winkler full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they previously enjoyed.

WE WILL make whole Martha Severs, Norman deCaussin, Evonne Higdon, Barbara Thomas, and Lisa Winkler for any loss of earnings and other benefits sustained by them resulting from their unlawful discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Martha Severs, Norman deCaussin, Evonne Higdon, Barbara Thomas, and Lisa Winkler, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

VENCARE ANCILLARY SERVICES, INC.

Joseph P. Sbuttoni and *Michael T. Beck, Esqs.,* for the General Counsel.

John V. Nordlund, Esq. (Nordlund & Ryan), of Larkspur, California, and *Keith M. Sherman, Esq.,* of Louisville, Kentucky, for the Respondent.

DECISION

I. STATEMENT OF CASE

JERRY M. HERMELE, Administrative Law Judge. In an October 30, 1998 complaint, the General Counsel alleges that the Respondent, Vencare Ancillary Services, Inc. (Vencare), violated Section 8(a)(1) of the National Labor Relations Act by discharging five therapists at a nursing home in Owensboro, Kentucky, after they ceased work concertedly and engaged in a strike in June 1998. The Respondent denied this allegation in its November 11, 1998 answer.

This case was tried in Owensboro on February 22 and 23, 1999, during which the General Counsel called five witnesses[1] and the Respondent called three witnesses. Finally, on March 29, 1999, both parties filed briefs.

II. FINDINGS OF FACT

Vencor, Inc., "America's Long-Term Healthcare Network" based in Louisville, Kentucky, owns Vencare Ancillary Services, Inc. (Vencare).[2] Vencare acquired the Hermitage Nursing & Rehabilitation Center (the Hermitage), a 90-bed nursing home, in Owensboro, on January 1, 1998. The Hermitage is both a long-term care facility and a short-term location where patients are transferred from hospitals. Patients are provided with physical, occupational, and speech therapy by a staff of nine therapists. Bryan Stuart supervises the therapy staff and Kevin Mack oversees Vencare's regional operations, including the Hermitage. Vencare derives annual gross revenues exceeding $100,000 in operating the Hermitage, and performs over $50,000 in services in its other facilities outside Kentucky (G.C. Exs. 1(c), 12; Tr. 22, 25, 39, 42–43, 110).

On May 29, 1998, Stuart met with the therapists to inform them that Vencare was implementing a wage cut, effective

[1] Lisa Winkler, one of the five discharged therapists, did not appear at the trial.

[2] At trial, the General Counsel changed the name of the Respondent in this case to Vencare Ancillary Services, Inc. (Tr. 192).

July 1, 1998. The nine employees on the therapy staff were physical therapist Norman deCaussin, assistant physical therapists Evonne Higdon, Barbara Thomas and Lisa Winkler, speech/language therapists Martha Severs and Melissa O'Keefe, rehabilitation technician Marsha Bell, and occupational therapists Traci O'Rourke[3] and Nilkanth Bohre (G.C. Ex. 7; Tr. 28, 39, 110, 172, 212, 264, 272). Stuart told deCaussin that he was exempt from the pay cut because of his experience, but Severs' pay would fall from $23 to 18.03 an hour, Higdon's from $15.75 to $14.18 an hour, and Thomas' from $16.35 to $14.18 an hour[4] (Tr. 50–52, 112-14, 173-75, 212-13). Unhappy with this news, six of the eight therapists—deCaussin, Severs, Thomas, Higdon, Winkler, and Bohre–met on Friday, June 19, after work in a park across the street from the Hermitage. They decided that they would meet with Stuart the following week and inform him that they would no longer see any patients until management met with them to discuss their concerns. Also, they decided that a memorandum should be presented to Stuart. To that end, Severs decided to type it up over the weekend. Finally, the group decided that because Bohre was an alien, it was best if he did not join in this action (Tr. 53-58, 117-18, 175, 215).

On Monday, June 22, Severs circulated the memo among the therapists, and six signed it: O'Rourke, Severs, deCaussin, Higdon, Thomas, and Winkler. The memo stated:

> After carefully reviewing your memo concerning our wage adjustments, we are compelled to respond in the only manner left open to us, voicing our grievances and strong objection to its implementation. It is not acceptable nor will it be tolerated that our current wage scale be decreased July 1, 1998, as proposed by your arbitrary salary structure.
>
> We intend to continue to put patient care as our highest priority. However, Vencor's proposal of wage adjustments is intolerable and totally unacceptable. Therefore, the therapists of Hermitage Nursing and Rehabilitation Center hereby demand the continuation of present salaries for:
>
> (1) Bryan Stuart, A.P.M.
> (2) Traci O'Rourke, O.T.
> (3) Marsha Bell, Rehab. Tech.
> (4) Melissa O'Keefe, SLP
> (5) Nilkanth Bohre, O.T.
> (6) Martha Severs, SLP
> (7) Norman deCaussin, P.T.
> (8) Evonne Higdon, P.T.A.
> (9) Barbara Thomas, P.T.A.
> (10) Lisa Winkler, P.T.A.

(G.C. Ex. 7). Bell declined to sign, telling the others that Stuart would not be able to do anything quickly (Tr. 266). The other therapists decided that deCaussin should present it to Stuart. So, they met with Stuart on Tuesday, June 23 and deCaussin told Stuart that "some of us were not going to see patients until some action was taken on this." Nobody used the word "strike." Stuart then said that they could be fired for this. According to Severs, the group expected a quick response from Stuart, and accordingly she told Stuart that the physical therapists were delaying seeing any patients for 24 hours; a practice Stuart typically permitted for individual patients. The therapists told Stuart that they would stay at the Hermitage to await his response (Tr. 59-61, 89, 119-22, 160-65, 239).

The therapists at the Hermitage did not use a timeclock to record their hours at work. Rather, they completed an electronic "daily activity report" (DAR), every day, in order to get paid for that day's work (Tr. 33-35, 45, 145-46). In addition to seeing patients, part of each therapist's job required the completion of paperwork, such as patient progress notes (R. Exs. 2, 7, 11, 13). The paperwork function took up about 10 to 20% of the therapists' time and approximately 40% of their billable time (Tr. 96, 103-04). Often, paperwork would be done the day after a patient was seen because of problems with the machine (Tr. 95, 160). The paperwork function was billed by the therapists under "patient care" on their DARs (Tr. 145). The DAR requested information on "patient care hours" and "time on premises hours." The former category usually comprised the majority of the therapist's workday (R. Exs. 5, 10, 16).

After the June 23 meeting, Stuart sent a "fax" to Mack to explain what had just happened (R. Ex. 17). O'Rourke then told the other therapists that she would continue to see patients (Tr. 275-76). deCaussin went back to his office and did nothing for about an hour (Tr. 61-62). Although deCaussin testified that he did no paperwork after the meeting (Tr. 85-86, 99), rehabilitation technician Marsha Bell testified that deCaussin came to the office early on June 24 to complete patient paperwork (Tr. 267-68). Severs returned to her office to catch up on paperwork, consisting of patients' progress notes (Tr. 123). Higdon also returned to her office to do paperwork (Tr. 177). Thomas likewise caught up on paperwork and did "some filing" because she "was sure that they would. . .agree to meet with us" (Tr. 218-19). Later in the morning, Stuart called each therapist in to his office to ask whether each was still refusing to see patients. deCaussin said he was still refusing and told Stuart that he was going to lunch and would not be back because he was feeling ill (Tr. 61-63). Severs told Stuart that the other speech therapist would see her patients. Severs added that she was going back to her office to "complete the paperwork on patients that I had already seen," but that she did not expect to be paid for the current day (Tr. 124-26, 142, 158-60). Higdon also told Stuart that the therapists did not expect to be paid that day and that she could see her patients on Saturday, if necessary (Tr. 178). Thomas told Stuart that she was quitting if management did not respond to the memo. Severs, Higdon, and Thomas told Stuart they would return after lunch (Tr. 220-21). They then went for a longer-than-usual two-hour lunch (Tr. 126-27, 147). Mack instructed Stuart to send the therapists home, which Stuart did upon their return from lunch (Tr. 127, 179-80, 222, 286). deCaussin, Severs, Higdon, and Thomas all failed to fill out a DAR for June 23 (Tr. 65-66, 137, 180-81, 224).

[3] She is now Mrs. Witherspoon (Tr. 272).

[4] It is unclear what the other five therapists' wage cuts would be.

The five therapists, whom deCaussin referred to as "The Vencare Five," did not work on Wednesday, June 24, but also decided against picketing (Tr. 194, 225). deCaussin and Severs met at Higdon's home to draft two more memos, which they sent to upper management in Louisville. These memos requested them to "look into this matter" (G.C. Exs. 10-11; Tr. 65, 127-28, 181). Mack consulted with his superiors and decided to terminate the five therapists for insubordination by their refusal to see patients (Tr. 29-31, 286). Stuart called the five therapists at home and told them to come to the Hermitage on Thursday morning, June 25. After deciding that they wanted to meet with Stuart and Mack as a group, Stuart handed discharge notices to Severs, deCaussin, Thomas, Higdon, and Winkler (Tr. 67-69, 130-32, 182-83, 225-26). The notices stated that they were discharged for:

> violation of company policy, failure to perform job assignment, insubordination, violation of code of ethics, and standards of practice.

(G.C. Exs. 2-6).

On September 24, 1998, Severs filed a charge against the Respondent with the National Labor Relations Board. On February 12, 1999, shortly before the trial in this case, Vencare sent paychecks to the therapists for their partial day of work on June 23, 1998 (G.C. Ex. 12; R. Ex. 6; Tr. 35-36, 66, 230).

III. ANALYSIS

The five therapists' refusal to see any more patients until management met with them to discuss the pay cuts was clearly concerted activity. And Section 7 of the Act protects "not only concerted activity under the sanction of a labor union, but also concerted activity of the same nature engaged in by unorganized employees." *Vic Tanny International, Inc. v. NLRB*, 622 F.2d 237, 241 (6th Cir. 1980). But, as the Supreme Court has held, "not. . .all work stoppages are federally protected concerted activities." *Auto Workers Local 232 v. Wisconsin Employment Relations Board*, 336 U.S. 245, 255 (1949). While employees may strike in order to "protest and seek to change any term or condition of their employment," thus assuming the risk of a loss of pay and possibility of being replaced, they may not simultaneously strike and retain the benefits of working. Therefore, partial or intermittent strikes, where employees continue working on their own terms, unilaterally determined, are not protected by Section 7 of the Act. *First National Bank of Omaha*, 171 NLRB 1145, 1149–1151 (1968); *Valley City Furniture*, 110 NLRB 1589 (1954), enfd. 230 F.2d 947 (6th Cir. 1956). For example, employees cannot "refuse to work on certain assigned tasks while accepting pay or while remaining on the employer's premises" *Audubon Health Care Center*, 268 NLRB 135, 136 (1983). Likewise, employees cannot repeatedly refuse to perform additional work such as mandatory overtime. *Sawyer of Napa*, 300 NLRB 131, 137 (1990). But they can engage in a single, walkout *Daniel Construction*, 277 NLRB 795 (1985); *Enamel Products and Plating*, 236 NLRB 1611 (1978).

Here, the five therapists continued working after announcing their intent not to see any new patients after the meeting with Supervisor Stuart on the morning of June 23. Specifically, Severs, Higdon, and Thomas all admitted going back to their offices to complete paperwork on old patients before lunch. While it is unknown what Winkler did after the meeting with Stuart, it appears from Bell's credible testimony that deCaussin also finished up paperwork by returning to the office the next day, in the early morning hours of June 24.[5] Also, Severs told Stuart on June 23 that the four physical therapists would delay seeing any new patients for 24 hours, while the other speech therapist would see all of Severs' patients. Finally, Higdon later told Stuart that she might see new patients in a few days,[6] and Thomas told Stuart that she would quit if management did not respond to the group's memo.

The Presiding Judge concludes that the five therapists' work stoppage was protected by Section 7 of the Act. The General Counsel correctly characterizes the "old patient" paperwork performed after the group's announcement to Stuart as incidental wind-up work done in preparation for their work stoppage regarding new patients. Moreover, they told Stuart that they did not expect to be paid for this paperwork and immediately left the premises when Stuart told them to do so after lunch on June 23. *Audubon*, supra. Further, given the rapid-fire sequence of events after June 23, Thomas' threat to quit was merely that. Thus, it is concluded that she did not resign. Lastly, the employees did not "pick and choose" when they would perform their work duties by announcing either a 24-hour or few days' delay in seeing patients. *Audubon*, supra at 137. Rather, their action was simply a short-term, single work stoppage—the first of its kind–whose only goal was to obtain a meeting with management. *NLRB v. C. J. Krehbiel Co.*, 593 F.2d 262 (6th Cir. 1979).

But the concerted work stoppage had a fatal flaw. Section 8(g) of the Act requires 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, 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 [subsection (d) of this section]. 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.

As the Board has recognized, Congress' purpose in enacting Section 8(g) in 1974 was "to allow a health care institution to make arrangements for the continuity of patient care in the

[5] Significantly, while deCaussin testified that he did no paperwork after the June 23 meeting, he did not rebut Bell's later testimony about the events of June 24.

[6] The Respondent contends that Thomas also told Stuart that the group was postponing seeing patients. But the Presiding Judge does not read Thomas' testimony that way (Tr. 240-41).

event of a strike or picketing by a labor organization." *Walker Methodist Residence*, 227 NLRB 1630, 1631 (1977).

Although the Section 8(g) issue was raised for the first time in the Respondent's brief, this argument warrants consideration because the facts are clear. See *A & D Davenport Transportation*, 256 NLRB 463 n. 2 (1981). First, the Hermitage was a health care institution as defined by Section 2(14) of the Act. *Local Union No. 200, S.E.I.U.*, 263 NLRB 400 (1982). Second, the five therapists failed to give management any notice of their work stoppage. The third and pivotal matter is whether the Vencare Five constituted a labor organization under Section 2(5) of the Act, which reads:

> The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes,wages, rates of pay, hours of employment, or conditions of work.

Over the decades, the courts have liberally defined this term, declaring that "the complete absence of by-laws or a formal structure is irrelevant." *NLRB v. Sweetwater Hospital Assn*., 604 F.2d 454, 457 fn. 5 (6th Cir. 1979). See also *NLRB v. Cabot Carbon Co*., 360 U.S. 203, (1959). Although the Board has stated that the notice requirements of Section 8(g) "run to the Unions, not employees" *East Chicago Rehabilitation Center*, 259 NLRB 996, 999 (1982), enfd. 710 F.2d 397 (7th Cir. 1983), and that "[a] brief work stoppage by a few unorganized employees" does not trigger the notice requirement of Section 8(g), Walker, supra at 1631, the Vencare Five were hardly a "totally unstructured" group. Compare A & D Davenport Transportation, supra. They held several meetings, decided on a course of action, selected a leader, and embarked upon the work stoppage. Thus, in the Presiding Judge's view, the instant group, comprising a majority of the facility's therapy staff, did not differ significantly from the "Staff Association" in *Betances Health Unit*, 283 NLRB 369 (1987), which the Board concluded was a labor organization, notwithstanding the lack of any formal structure whatsoever. Indeed, "[a] group of individuals may comprise a labor organization," even though they lack any formal structure. *Prime Time Shuttle International*, 314 NLRB 838, 841 (1994). Therefore, it is concluded that the striking therapists met the statutory definition of Section 2(5).

In sum, the therapists' work stoppage was concerted activity protected by Section 7 of the Act. However, their failure to comply with the notice requirement of Section 8(g) rendered their activity unprotected by Section 8(d) of the Act. Therefore, the Respondent properly terminated them.

IV. CONCLUSIONS OF LAW

1. The Respondent, Vencare Ancillary Services, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The five striking therapists—Martha Severs, Norman deCaussin, Evonne Higdon, Barbara Thomas, and Lisa Winkler—are a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate Section 8(a)(1) of the Act by terminating employees Martha Severs, Norman deCaussin, Evonne Higdon, Barbara Thomas, and Lisa Winkler on June 25, 1998.

[Recommended Order omitted from publication.]