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MEDIATION BY MASS DISCHARGE:
HOW AN OBSCURE NOTICE REQUIREMENT IN
THE NLRA WAS MADE A DEATHTRAP FOR
INNOCENT STRIKERS

MIKE LEWIS*

The workers at Boghosian Raisin Packing Company were fed up. Their union, Local 616 of the International Brotherhood of Teamsters, had represented them for many years, and relations between the union and the company had always been good. But in the negotiations for a new collective-bargaining agreement to succeed the one that expired on May 31, 1999, the employer, located in Fowler, California, had taken a harder line than ever before, demanding major concessions in pay and other terms of employment.¹

And so, on September 22, 1999, the workers took a vote to reject the company’s latest offer and to authorize a strike.² On October 1, at their leaders’ call, they walked out of the plant.³

But seven days before, upon hearing that the union would strike if an agreement had not been reached by the end of the month, the company’s counsel and chief negotiator contacted the Federal Mediation and Conciliation Service (“FMCS”) and asked whether the union had filed a notice of dispute with the agency.⁴ He was told that no such notice had been filed. From that day until the strike began, the company’s counsel did not reveal to the union’s negotiators that he knew this—even at the parties’ last negotiating session on September 30.⁵

A half hour after the employees walked out on October 1, the employer’s counsel called the union and informed its officers that its strike was illegal because the union had not sent a notice of dispute to the FMCS.⁶ After quickly confirming that this was true, the union offered to end the strike.⁷ But the company replied that it was “reserving all its options,” including “the right to impose discipline up to and including discharge.”⁸ It also said it might “pick and choose, bring back some but not all” of the workers.⁹ The company agreed to meet with the union, but only to see if it was ready

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² Id. at 388.
³ Id. at 384.
⁴ Id.
⁵ Id. at 384, 388.
⁶ Id. at 384.
⁷ Id.
⁸ Id.
⁹ Id. at 389.
to make new bargaining concessions.\textsuperscript{10}

At that meeting the following day, the company repeated that it “was reserving all options.”\textsuperscript{11} The union made no new proposal, and nothing was resolved.\textsuperscript{12} Two days later the union again offered to return to work under the parties’ pre-existing terms of employment and resume bargaining.\textsuperscript{13} The company again reserved its right to terminate “all employees who engaged in the illegal strike,” and now stated that all the strikers would be fired unless the union proved by the following day that it had given timely notice to the FMCS.\textsuperscript{14} The next day the union again offered to return to work, this time on the basis of the company’s last offer.\textsuperscript{15} But later that day the Company sent discharge letters to forty-two of the forty-five striking employees.\textsuperscript{16} The company then hired replacements.\textsuperscript{17} Four months later, acting on a petition from the new employees saying they did not want the union to represent them, the company withdrew recognition from the union.\textsuperscript{18}

As Boghosian’s counsel had known, the union, as the party seeking to renegotiate the expired contract, was required under Section 8(d)(3) of the National Labor Relations Act (“NLRA” or “the Act”) to file a notice of dispute with the FMCS at least 30 days before engaging in a strike.\textsuperscript{19} Before the strike the union’s leaders thought they had complied with this requirement. They had in fact sent such a notice to the California Mediation and Conciliation Service, the state agency analogous to the FMCS, as Section 8(d)(3) also required.\textsuperscript{20} However, although the union’s secretary-treasurer had also filled out a notice form for the FMCS, that notice was never mailed due to a clerical oversight. The secretary-treasurer, who had never before led a strike, later testified that he never checked for a return receipt to confirm that the FMCS notice was sent because he “just didn’t know the legal significance . . . of mailing it.”\textsuperscript{21}

The legal significance for the Boghosian strikers lay in the following sentence in the Act’s Section 8(d): “Any employee who engages in a strike within any notice period specified in this subsection . . . shall lose his status

\textsuperscript{10} Id. at 384, 388-89.
\textsuperscript{11} Id. at 389.
\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{14} Id. at 384, 389, 394
\textsuperscript{15} Id. at 389.
\textsuperscript{16} Id. (“The Respondent . . . retain[ed] only three strikers who had special needed skills.”).
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{20} Boghosian, 342 N.L.R.B. at 388.
\textsuperscript{21} Id. at 384.
as an employee of the employer engaged in the particular labor dispute, for
the purposes of sections 8, 9, and 10 of this Act . . . .”22 Because Sections 8,
9, and 10 protect the rights only of statutory “employees,” this meant—as
that sentence (the “loss-of-status provision”) has been interpreted—that the
strikers had lost the Act’s protection and could be fired at the employer’s
whim for almost any reason.

The mass discharge at Boghosian cost forty-two people their jobs—in all
likelihood the last union-represented jobs they would ever have. Those
workers had not shared in the union’s negligence, and they almost certainly
knew nothing about Section 8(d)(3) or its notice requirements. They had no
intention of violating the law and, like their union officers, they had
believed that their strike was lawful. The union had also complied with
every other procedural requirement the NLRA imposes.

The union filed unfair labor practice charges with the National Labor
Relations Board (“NLRB” or “the Board”), and the agency’s General
Counsel issued a complaint alleging that the company had violated
Sections 8(a)(3) and 8(a)(5) of the Act by discharging the strikers in
retaliation for union activity and by withdrawing recognition from the
union.23 But on June 30, 2004, the majority of a three-member panel of the
Board (Chairman Robert Battista and Member Peter Schaumber), with one
member dissenting (Member Wilma Liebman), held that the strikers lost
their status as statutory employees under Section 8(d) and that their mass
discharge was lawful. They relied for this finding on an earlier Board
case—Fort Smith Chair Co.24

In reaching their conclusion, the majority found that the company had
done nothing wrong—even though, as Member Liebman noted in her
dissent, it had concealed its awareness of the union’s notice infraction
before the strike, used the infraction as a club to extract additional
bargaining concessions after the strike began, and after this attempted
coercion had failed (and only then) fired the strikers.25 It did not even
matter if the company, having failed to obtain satisfactory concessions, was
motivated primarily by a wish to rid itself of the union rather than to punish

23 Boghosian, 342 N.L.R.B. at 393. Section 8(a)(3), in pertinent part, makes it unlawful
for an employer “by discrimination in regard to hire or tenure of employment or any
term or condition of employment to encourage or discourage membership in any labor
unlawful for an employer “to refuse to bargain collectively with the representatives of
24 Id. at 385 n.7 (citing Fort Smith Chair Co., 143 N.L.R.B. 514 (1963), affd. sub nom.
United Furniture Workers of America, AFL-CIO, v. NLRB, 336 F.2d 738, 742 (D.C.
Cir. 1964)).
25 Id. at 385.
its employees for breaking the law.\textsuperscript{26} To the majority, “the Respondent’s willingness to continue bargaining [was] indicative of its good faith,” and “it was entitled to press its advantage in negotiations.”\textsuperscript{27}

\textit{Fort Smith}, on which the Boghosian majority relied, was the Board precedent that first applied Section 8(d)’s loss-of-status provision to an 8(d)(3) infraction. That case, decided in 1963, addressed Section 8(d) in its original form, as it had been inserted into the NLRA in 1947 by the Taft-Hartley Act.\textsuperscript{28} Although \textit{Fort Smith} was only an opinion from a two-member plurality from a full Board (i.e., a panel of all five Board members), that opinion has consistently, though with little analysis, been treated as authoritative by the Board and the federal courts ever since. This deference continued after 1974, when Congress amended the Act, including Section 8(d), to cover nonprofit hospitals and to address specific issues related to collective bargaining in the health-care industry (“the Health Care Amendments”).\textsuperscript{29} Because of this deference, the Boghosian episode was only one of the latest in a line of cases in which hundreds of employees outside the health-care industry have lost or been threatened with the loss of their jobs in consequence of similar failures by their unions to file timely notice with the FMCS.

This has resulted in a feature unique in American law. In the 223 years since the first Congress convened in 1789, Congress has imposed various obligations and related liabilities on U.S. citizens and organizations. But in no other instance has a federal statute that supposedly protects the rights of individuals to engage in peaceful activity been held to deprive those individuals of that protection—and at the cost of their very livelihoods, with no remedy or recourse—if an organization representing those individuals violates a notice-filing requirement without their even being aware of it. No other sector of American law contains a feature so barbaric. (As a matter of corporate law, by contrast, most corporations have the legal effect—and purpose—of shielding their shareowners from liability for the misconduct they commit.)

And as Boghosian illustrates, the negligence that results in a union’s failure to file the required notice with the FMCS recurs periodically. All organizations—even public enforcement agencies—make ministerial errors on occasion. This is particularly true of local unions outside the health-care sector whose members work at isolated facilities that do not bargain through multi-unit, nationally administered chains. It is not difficult for even highly competent local union officers to overlook a technical

\textsuperscript{26} Id. at 386.
\textsuperscript{27} Id.
\textsuperscript{29} See infra Part III.A.
requirement for which compliance rarely has any practical effect.\textsuperscript{30} Unless the Board revisits \textit{Fort Smith}, this precedent will be applied each time that happens and the employer involved takes advantage of it.

But the \textit{Fort Smith} plurality opinion, despite its lineage, was wrong. The Taft-Hartley Congress, anti-union though it was, did not intend to subject striking workers to the complete loss of the Act’s protection, and of their jobs, for an infraction of Section 8(d)(3) committed by their union. Still less did it intend to give employers like Boghosian an offensive weapon to extort additional bargaining concessions. Nor did Congress later endorse \textit{Fort Smith} or its interpretation of Section 8(d) in the 1974 Health Care Amendments with respect to employees outside the health-care sector, even though the manner in which Congress re-worded that section’s loss-of-status provision may seem to obscure this. The Act, which recognizes and protects employees’ right to engage in concerted activity to improve their working conditions, has never authorized the mass firing of strikers outside the health-care sector for a clerical omission to file a notice with the FMCS which they were not responsible for—nor should it.

This article will explain how this part of the Act has been misinterpreted for 50 years. Section I will review the 1947 enactment of Section 8(d), its original loss-of-status provision, the Taft-Hartley Congress’s intent behind that provision, and the provision’s initial implementation. Section II will explain why the interpretation of the loss-of-status provision by the \textit{Fort

\textsuperscript{30} As discussed \textit{infra} Part I.A, the theoretical purpose of the FMCS notice requirement is to facilitate the peaceful resolution of bargaining disputes. In practice, however, scarcity of resources and the need (not to mention a statutory mandate) to prioritize have always precluded the FMCS from taking a proactive role in response to most such notices. In fiscal year 2012, the agency received 18,101 “F-7” notices of dispute at non-health care employers in the private sector. Of these, only 9,476 were actually assigned to mediators. FMCS Response to the author’s Freedom of Information Act Request, October 31, 2012. Under the agency’s established procedure, it is the assignment of a case to a mediator that triggers the sending of a letter offering FMCS assistance to both parties in the dispute. The parties in almost half of the private-sector, non-health care disputes that were noticed to the FMCS therefore had no further involvement with the agency. Moreover, only 1,297 of the cases assigned to a mediator were actually mediated. \textit{Id.} In addition, by informal practice the agency prioritizes notices of dispute by imminence of contract expiration and size of bargaining unit, with only those units of 1,000 or more workers receiving automatic priority. FMCS Response to the author’s FOIA Request, March 6, 2012. In short, although due to no fault of the FMCS, in most cases (and particularly for smaller employers) an 8(d)(3) notice amounts to little more than a bureaucratic exercise, and the failure to file the notice has no practical consequence for resolving the dispute. \textit{Cf. Chauffeurs Local 572, 223 N.L.R.B. 1003, 1006 (1976), decided two years after the enactment of the Health Care Amendments (“It is generally agreed between the parties . . . that these agencies [the FMCS and the analogous state mediation agency] do not systematically intervene unless requested by the parties, even where they have been notified, pursuant to the statutory provisions, of the existence of a dispute.”)}.
Smith plurality was fundamentally wrong. Section III will review the Health Care Amendments of 1974 and what Congress intended—and, more important, what it did not intend—when it revised Section 8(d) at that time. Section IV will review the continued application of Fort Smith in the wake of the Health Care Amendments to date. The article concludes that Congress did not legislate with respect to employees in industries other than health care in 1974, and that the NLRB therefore remains free to correct an error that will otherwise victimize other innocent workers.

I. THE ORIGINAL LOSS-OF-STATUS PROVISION

A. The Taft-Hartley Act

The Taft-Hartley Act changed the NLRA, as enacted in the original Wagner Act of 1935,31 in many ways, some of them favoring employers and most of them disfavoring unions.32 But it reconfirmed the NLRA’s essential objective:

"to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."33

Taft-Hartley also preserved intact the NLRA’s original charter of workers’ organizing rights, its Section 7: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .”34

In short, Taft-Hartley retained the dual purpose of the original NLRA. One purpose was “to preserve a competitive business economy;”35 the other was “to preserve the rights of labor to organize to better its conditions

through the agency of collective bargaining.”36 Any reasonable application of the Act’s requirements and sanctions had to be made in the light of both those purposes.

Among the innovations Taft-Hartley created to minimize the disruption of commerce caused by strikes was the FMCS—a federal agency (created from an existing agency) to facilitate the orderly resolution of industrial disputes.37 The FMCS was mandated to “assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.”38 It was authorized to “proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce;”39 but it was specifically “directed” to “avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties.”40

That is, with respect to mediating collective-bargaining disputes, the FMCS—like any agency with a mission—was to set priorities. Given the national scope of its mission, it could hardly do otherwise. It would prioritize threats of “substantial interruptions of commerce,” while skipping over minor disputes whenever alternative state or other conciliation services were available – i.e., the large majority of disputes.41 This meant that in a significant number of cases it would not—could not—be involved.42

Taft-Hartley also imposed the notice and bargaining requirements embodied in Section 8(d) on the parties to collective-bargaining agreements.43 Where an agreement was in effect and one of the parties

36 Id.
37 The resources and functions of the former agency, the Department of Labor’s Conciliation Service, were transferred to the FMCS. House Conf. Rep. No. 510, (1st Sess. 1947), at 62; NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 566. 
39 Id. at 153-54; now codified at 29 U.S.C. § 173(b) (2006).
40 Id. at 154.
41 The FMCS was also mandated/authorized to facilitate the settlement of grievance disputes arising from collective-bargaining agreements, but “only as a last resort and in exceptional cases.” Id. at 154; now codified at 29 U.S.C. § 173(d) (2006).
42 See supra note 30.
43 Section 8(d) in its original entirety provided as follows: For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question thereunder, and the
intended to seek an extension or modification of its terms after its date of expiration, the employer or union came under four enumerated requirements: (1) to give written notice to the other party of that intent at least sixty days before the contract’s expiration date;\textsuperscript{44} (2) to offer to bargain with the other party for a new or modified contract;\textsuperscript{45} (3) to notify the FMCS and any analogous state mediation agency of the dispute “within thirty days after such notice” if no agreement had been reached by that time;\textsuperscript{46} and (4) to maintain all the current terms of employment without resorting to strike or lock-out “for a period of sixty days after such notice is given” or until the contract expired, whichever occurred later.\textsuperscript{47}

The underlying reason for each of these requirements was obvious. In order to ensure that the union and the employer would have an opportunity to agree on new terms of employment before the previous ones expired, it was necessary for the initiating party to provide the other with timely notice of intent to seek changes. This would ensure that bargaining could start long enough before the end of the contract term to permit a peaceful settlement by the date of expiration, minimizing the risk of a strike, lockout, or unilateral change in terms of employment. In order for the FMCS to have an opportunity to intervene in any dispute in time to be effective, the agency had to receive timely notification that a settlement had not yet been reached. In order for bargaining to proceed without disruption during this protected period, it was necessary for the parties to maintain their current terms of employment without engaging in self-help.

It is significant in the light of later events, however, that the party seeking to renegotiate was required under Section 8(d)(1) to “serve a written notice” on the other party “sixty days prior to the [contract’s] expiration date,” and by Section 8(d)(4) to refrain from striking, locking out, or imposing unilateral changes for “a period of sixty days after such notice is given.” This is because the same party was required by Section 8(d)(3) only to “notify” the FMCS of the potential dispute within thirty days after giving “such notice.” Although the emphasized terms are similar and overlap in meaning, their use would normally reflect a distinction in Congressional intent.

In this instance, the reason for the use of different terms was made clear elsewhere in Section 8(d). For in order to ensure that unions and the workers they represented took the above requirements seriously, the section’s original loss-of-status provision imposed a penalty for noncompliance specifically in connection with strikes: “Any employee who engages in a strike within the sixty-day period specified in this subsection 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, as amended . . . .”

50 See, e.g., Sosa v. Alvarez-Machain, 542 U.S. 692, 711 n.9 (2004) (“It is difficult to reconcile the Government’s contrary reading [of a provision not specifying ‘act or omission’] with the fact that two of the Act’s other exceptions specifically reference an ‘act or omission.’”); White v. Lambert, 370 F.3d 1002, 1011 (9th Cir. 2004) (“It is axiomatic that when Congress uses different text in ‘adjacent’ statutes it intends that the different terms carry a different meaning.”), overruled on other grounds, Hayward v. Marshall, 603 F.3d 546 (9th Cir. 2010).
51 Labor-Management Relations Act, 1947, Public Law 80-101, 61 Stat. 136, 143 (emphasis added). Some recent authorities refer to the loss-of-status provision as being part of Sec. 8(d)(4). E.g., Douglas Auto Parts, 357 N.L.R.B. No. 111, slip op. at 3 n.8,
The divergent use of “serve a written notice” in Section 8(d)(1) and (by reference) (4), and “notifies” in Section 8(d)(3), coupled with the loss-of-status provision’s explicit correlation to “the sixty-day period specified” in Section 8(d)(1) and (4), was a direct reflection of Congressional intent. The legislative history of the language in the Senate bill that became Section 8(d) is entirely consistent on this point. From the moment this language was introduced, its sponsors referred to the application of the loss-of-status provision exactly as did the final provision itself—as a sanction for striking during “the 60-day period” initiated by the notice to the opposite party of intent to renegotiate the contract.\(^5\) No member of Congress, no committee report, and no language in any bill or amendment under consideration in 1947 referred to the loss-of-status provision, directly or indirectly, as applicable to the FMCS notification requirement imposed by Section 8(d)(3), or to any failure to comply with that requirement.

This was understandable. Of the two notifications required, the first—the “written notice” to the other party to the contract, required by Section 8(d)(1)—was clearly viewed as the more elementary and essential. Assistance from the FMCS in cases that threaten a “substantial interruption of commerce”\(^5\) might be helpful, sometimes even critical. But the participation of both parties, timely communication between them, and an orderly bargaining schedule were vital to the renegotiation of each and every collective-bargaining agreement, no matter how obscure. In addition, Congress recognized that wildcat strikes sometimes occur even where the union’s leaders attempt to prevent them. It was therefore not unreasonable for Congress to impose a severe sanction on strikers for striking within “the sixty-day period specified in this sub-section.”

Nor was it irrational (though it was highly draconian) for Congress to attribute responsibility to employees for ensuring that their union complied with Section 8(d)(1) before they embarked on a strike. Although represented workers could not be expected to know everything their union leaders were doing from day to day, they were presumably in regular contact with the union and in daily contact with their employer. The subject of impending contract negotiations could reasonably be expected to come up in their conversations with their stewards, their union officers, and their supervisors. If the employer had received no 8(d)(1) notice from the union before contract expiration, that might (at least in theory) become known to

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4 (2011), review pending (D.C. Cir.). Given the atypical structure of Sec. 8(d), this is arguably permissible. However, in order to avoid confusion this article refers to the loss-of-status provision as an independent component of Section 8(d).

5 S. 1126, 80th Cong. § 8(d) (1947) at 166; H.R. 3020, 80th Cong. § 8(d) (1947) (as passed by the Senate); S. REP. NO. 105 § 8(d) (1947) (1947); HOUSE REP. NO. 510, (1947) (Conf. Rep.), 35; 93 Cong Rec. 1015, 1048 (1947); NLRB, Legislative History of the Labor-Management Relations Act, 1947.

the unit members through these conversations. There was therefore a
perceivable (if strained) logic to treating the union and its members as
sharing a common responsibility for ensuring that the employer received
the required “written notice” of intent to bargain and possibly strike.

It would not have been realistic, however—even for the Republican
Congress in 1947—to attribute to every worker in a bargaining unit a close
familiarity with Section 8(d)(3)’s requirement of notification to the FMCS.
Nor would it have been reasonable to inflict a complete loss of the Act’s
protection on strikers for their union’s failure to comply with that
requirement. It is a safe generalization that employees are less aware of the
FMCS, with which they have no direct contact, than they are of their own
employer and their union. Nor are workers frequent practitioners—let alone
attorneys—in the field of labor law. Treating strikers as responsible for
their unions’ 8(d)(3) infractions would therefore have been a highly
inefficient means of ensuring union compliance with that notification
requirement. So while a failure to “notify” the FMCS in compliance with
Section 8(d)(3) might be unlawful, it did not follow as a matter of logic,
equity, or policy that the penalty imposed should extend beyond the
culpable union. It would have been particularly disproportionate to subject
unknowing strikers to permanent discharge for their union’s infraction
under a statute which the Supreme Court had by 1947 already held never to
authorize the imposition of “punitive” remedies on employers for any
unfair labor practices they might commit, no matter how blatant or
destructive those practices might be.\(^{54}\)

For these reasons, it is not surprising that Section 8(d)’s original loss-of-
status provision applied by its own terms solely to “the sixty-day period
specified in this subsection [i.e., Section 8(d)(1) and (4)],” and not to the
thirty-day notification period in Section 8(d)(3) pertaining to the FMCS.
Moreover, the loss-of-status provision was explicitly mandated by the Act
to be read narrowly. Section 13, also inserted by Taft-Hartley, provided
that “[n]othing in this Act, except as specifically provided for herein, shall
be construed so as either to interfere with or impede or diminish in any way
the right to strike or to affect the limitations or qualifications on that
right.”\(^{55}\) Under this interpretive prohibition, any restriction on—or penalty
for—striking imposed in Section 8(d) had to be clear and explicit, and
could not be imputed from a different one.

Collective bargaining, including mediation and the FMCS, functioned

\(^{54}\) Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 208-09 (1941) (noting that the remedies
are remedial rather than punitive); Consolidated Edison Co. v. NLRB, 305 U.S. 197,
235 (1938) (emphasizing that power to invoke remedies does not give the Board
absolute power; damages must be remedial).

163) (emphasis added).
quite well under this implicit understanding of the law until 1963.

B. The Implementation of Section 8(d)’s Notice Requirements

From 1947 to 1963, the NLRB and the courts enforced Section 8(d) in a relatively straightforward manner. The loss-of-status provision was applied, pursuant to its terms, where a union engaged in a strike without having given sixty days’ notice to the employer pursuant to Section 8(d)(1) and (4).\(^{56}\) And specifically with respect to Section 8(d)(3)’s requirement of notification to the FMCS, in Retail Clerks\(^{57}\) the Board found that a union that engaged in a strike without providing the required notification to the FMCS refused to bargain collectively within the meaning of Section 8(d) and consequently violated the Act’s Section 8(b)(3).\(^{58}\)

In Retail Clerks, the Board rejected the union’s argument that the FMCS notification requirement was “a mere subordinate or ‘ancillary’ aspect of the statute,” and emphasized that “[t]here is nothing to indicate that Congress regarded this mandatory requirement as less significant than any other of the mandatory provisions of Section 8 (d) . . . .”\(^{59}\) In that case, however, the loss-of-status provision was not put at issue, even though the strike was continuing.\(^{60}\) The Board therefore did not address it and gave no indication that it viewed the “significance” it attributed to Section 8(d)(3) as warranting the forfeit of strikers’ protected employee status. Its decision merely confirmed that a strike following the union’s failure to comply with Section 8(d)(3) was, like a strike following the failure to comply with Section 8(d)(1), an unfair labor practice by the union and would be treated as one. The remedy ordered for noncompliance was the same for both: the union was ordered to cease and desist from striking or ordering a strike without complying with Section 8(d).\(^{61}\)


\(^{57}\) Retail Clerks Int’l Ass’n, Local 1179,109 N.L.R.B. 754 (1954).


\(^{59}\) 109 N.L.R.B. at 758.

\(^{60}\) Id. at 759.

\(^{61}\) Id. at 759. The Board similarly found that where a union filed the required FMCS notification but went on strike less than thirty days after doing so, the union violated sec. 8(d)(3). Local Union 219, Retail Clerks Int’l Assoc.,120 N.L.R.B. 272, 279-80 (1958), aff’d and enf’d, 265 F.2d 814 (D.C. Cir. 1959); United Mine Workers of Am., Dist. 50, 118 NLRB 220, 226 (1957). The Board also found that a strike called without the filing of timely notice with the appropriate state mediation agency (where one existed) also violated secs. 8(b)(3) and 8(d)(3). Local No. 156, United Packinghouse
In other respects, the Board defined the requirements of Section 8(d) in ways that respected Section 7 activity, including the right to strike. In *Mastro Plastics*\(^62\) it found, with the Supreme Court’s approval, that Section 8(d)’s strike restrictions and sanctions applied only to economic strikes, as opposed to unfair labor practice strikes.\(^63\) This was true even where the unfair labor practice strike occurred during the term of a contract that by its own terms prohibited “any strike”—and notwithstanding the terms of Section 8(d)(4), which on their face would seem to prohibit any strikes during the term of any contract.\(^64\)

In upholding the Board’s position, the Supreme Court recognized “the two declared congressional policies” embodied in the Act, noted supra, that had to be reconciled: “[t]he one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining.”\(^65\) In addition to attributing equal weight to these two policies, the Court found that Section 13’s negation of any restriction on the right to strike which the Act did not make fully explicit “adds emphasis to the Board's insistence upon preserving the employees' right to strike to protect their freedom of concerted action.”\(^66\) Since the Act did not state that unfair labor practice strikes were unlawful, the Court observed, “Section 13 adds emphasis to the congressional recognition of their propriety.”\(^67\) A contrary interpretation of the Act, the Court continued, “would have the incongruous effect of

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\(^63\) *Id.* at 518. While an economic strike is intended to defend or improve employees’ terms of employment, an unfair labor practice strike is a protest against misconduct committed by the employer in violation of the Act. *E.g.*, *Mastro Plastics Co.*, 350 U.S. at 286-87. Economic strikers can be “permanently replaced” during the strike, and after being replaced they can recover their jobs only as they are vacated by the replacement employees. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 346 (1938); Laidlaw Corp., 171 N.L.R.B. 1366, 1368-69 (1968), *enfd.*, 414 F.2d 99 (7th Cir. 1969). Unfair labor practice strikers, on the other hand, are entitled to recover their jobs when they unconditionally offer to return to work. NLRB v. Int’l Van Lines, 409 U.S. 48, 50-51 (1972).

\(^64\) *Mastro Plastics*, 103 NLRB at 516-18. *Mastro Plastics* did not determine whether the strike at issue had violated the contract’s no-strike provision, or otherwise address the legal consequences of violating that provision apart from Section 8(d).


\(^66\) 350 U.S. at 284.

\(^67\) *Id.*
cutting off the employees’ freedom to strike against unfair labor practices aimed at [their union] representative.”

The loss-of-status provision, in short, was not to be applied outside the context specifically intended for it by Congress.

In *Lion Oil*, again with the Supreme Court’s approval, the Board found that where a collective-bargaining agreement authorized negotiations for a pre-expiration modification of particular contract terms—e.g., pay increases—and the union gave the required notice of intent to modify those terms under Section 8(d)(1), the union could strike in connection with that modification after the prescribed sixty-day period even though the contract had not “expired” by reaching its termination date. The Board took this position notwithstanding Section 8(d)(4)’s prohibition on striking before the end of the sixty-day period or until the contract’s expiration date, “whichever occurs later.” The Board also noted that Section 8(d)’s loss-of-status provision, “by its terms . . . applies only to those employees who strike within the sixty-day period specified by the statute.”

The Court agreed with the Board that Section 8(d)’s imposition of its notice requirements on any “termination or modification” of a contract showed that Congress intended the section to permit midterm modifications, even though Section 8(d)(4) referred only to a contract’s “expiration” date. Accordingly, “Congress meant by ‘expiration date’ in § 8(d)(1) to encompass both situations, and the same phrase in § 8(d)(4) must carry the same meaning.” In addition, the Court observed, given the “dual purpose in the Taft-Hartley Act—to substitute collective bargaining for economic warfare and to protect the right of employees to engage in concerted activities for their own benefit . . . [a] construction which serves neither of these aims is to be avoided unless the words Congress has chosen

68 *Id.* at 286.
70 *Id.* at 683-84; *see also* United Packinghouse Workers of Am., 89 N.L.R.B. 310 (1950) (defining “expiration date” through its reading of Congressional intent as signifying the date when a labor contract is subject to modification or termination). In *United Packinghouse,* the Board noted that a union in that setting would have committed a violation under “a purely literal reading of Section 8(d)(4),” but that that such a reading would lead to “patently unreasonable” consequences for midterm modification arrangements. 89 N.L.R.B. at 313-14. The Board relied on Taft-Hartley’s legislative history to confirm that “the prime purpose of Section 8(d) was to prevent so-called ‘quickie’ strikes.” *Id.* at 316.
71 *Lion Oil Co.,* 109 NLRB at 769; 89 NLRB at 335.
72 *United Packinghouse Workers,* 89 N.L.R.B. at 314 (emphasis in original).
74 *Id.* at 290.
clearly compel it.” Again, accordingly, the loss-of-status provision was not applied in a situation for which it was not intended by Congress; and Section 8(d)’s notice requirements were interpreted in a way that respected unions’ bargaining rights.

In short, until 1963 the Board, with the Supreme Court’s endorsement, had inferred the Congressional intent behind Section 8(d) by focusing not only on its procedural requirements but on its underlying purpose—to encourage collective bargaining while respecting the Section 7 rights of workers. This balanced approach was about to change.

II. FORT SMITH: A PLURALITY OPINES

A. The Case

On March 27, 1961, United Furniture Workers Local 270 gave timely notice to Fort Smith Chair Co. of its intention to bargain for “a new and modified agreement” to replace the one to expire on May 31. The union did not, however, file a notice with the FMCS or any state mediation agency. At two negotiating sessions on May 29 and 31, the parties agreed on some issues but failed to reach a total agreement. The employer, asserting that it had lost money over the four preceding years, insisted on a clause stating that “no employee has a vested right in any level of incentive earnings,” which the union refused to accept. On June 1, the union’s members voted the employer’s final offer down, and later the same day they went on strike.

On June 7, the parties met again, this time with an FMCS agent present. The parties failed to reach agreement, but either the day before or at this session the employer learned that the union had filed no FMCS notice. According to the Court of Appeals for the District of Columbia Circuit, which reviewed the record, the company learned of the Union’s infraction in a conversation with a federal mediator on June 6. United Furniture Workers of Am. v. NLRB, 336 F.2d 738, 740 (1964).

75 Id. at 289 (internal citation omitted). In a separate concurrence, Justice Frankfurter stated categorically that “[t]he loss-of-status clause... speaks of ‘the sixty-day period specified in this subsection,’ and, to be effective under the present Board’s construction [i.e., that Sec. 8(d)’s 60-day notice and no-strike requirements were applicable to midterm modifications], this clause has to be understood as reading ‘the period specified in paragraph (4).’” Id. at 303 (Frankfurter, J., concurring).
76 Fort Smith Chair Co., 143 NLRB 514, 528 (1963).
77 Id. The reason is not clear, but there is no indication that the omission was deliberate.
78 Id. at 528-29.
79 Id. at 529.
80 Id. According to the Court of Appeals for the District of Columbia Circuit, which reviewed the record, the company learned of the Union’s infraction in a conversation with a federal mediator on June 6. United Furniture Workers of Am. v. NLRB, 336 F.2d 738, 740 (1964).
who have participated in the unlawful strike is terminated.”81 The employer also sent letters to all the strikers stating: “As a result of your participation in the illegal work stoppage . . . your services with this Company are terminated.”82 On June 13, the employer hired replacements and the plant resumed production.83 The union subsequently notified the employer that the strike was terminated and requested reinstatement of all the strikers, but none were taken back; some were eventually rehired as new employees.84

At trial before a trial examiner (“TE”),85 the General Counsel contended that the strike had not been intended to “terminate or modify” the parties’ contract within the meaning of Section 8(d), and that the union was therefore not covered by Section 8(d)(3)’s FMCS notification requirement.86 Moreover, the General Counsel contended, the company’s motive for the mass discharge had been to rid itself of the union, and the action consequently violated section 8(a)(3); and the company’s subsequent refusal to bargain further with the union violated Section 8(a)(5).87

The union agreed with the General Counsel but argued in addition that the company had not bargained in good faith from the outset, that this had caused the strike, and that the strike was accordingly an unfair labor practice strike rather than an economic practice strike.88 On this additional ground, the union contended that the strike was exempted from Section 8(d)(3)’s notification requirement under Mastro Plastics, in which the Supreme Court had limited Section 8(d)’s notice requirements to economic strikes.89 The company, of course, asserted that the strikers had lost their status as protected employees due to the union’s failure to file timely notification with the FMCS and were lawfully discharged for participating in an unlawful strike, and that its withdrawal of recognition from the union was lawful as well.90

The TE rejected the union’s argument that the company had bargained in bad faith and that the work stoppage was an unfair labor practice strike.91 But he accepted the General Counsel’s argument that the union had not

81 Id.
82 Id. The employer also sent letters to those employees who had not been scheduled to work on June 1 stating that they would be treated as participating in the strike and similarly terminated if they did not report for work by June 13. Id.
83 Id.
84 Id. at 530.
85 Prior to the advent of administrative law judges, Board cases were tried by trial examiners.
86 Id.
87 Id. at 515.
88 Id. at 530.
89 Id.
90 Id.
91 Id. at 530-31.
sought to “modify or terminate” the contract, finding on the basis of a purported admission at trial that it was the company which had sought a modification.\footnote{Id. at 530-31, 531 n.12. In the TE’s view, the strike was intended “to force the Respondent to abandon its insistence upon substantial changes in the contract, particularly the ‘no vested rights’ clause,” and “[a]lthough the union's position on May 31 was that it would renew the old contract with the two changes already agreed to, it cannot seriously be contended that it struck to obtain these two minor changes. A union does not strike to obtain terms to which the employer has already agreed.” Id. at 531 and n.14.} Furthermore, in the TE’s view, under Mastro Plastics “[t]he notice requirements of Section 8(d)(1) and (3) do not apply . . . to every economic strike,” and since this one, like the unfair labor practice strike in Mastro Plastics, was not to “terminate or modify” the contract those requirements did not apply here.\footnote{Id. at 531.} On this basis, the TE found that the strike was lawful, that the mass discharge violated Section 8(a)(3) and that the company’s withdrawal of recognition violated Section 8(a)(5) as alleged.\footnote{Id. at 531.}

Significantly, neither the General Counsel nor the union had chosen to argue to the TE that Section 8(d)’s loss-of-status provision was not applicable to a violation solely of Section 8(d)(3). For this reason, and because the TE found that Section 8(d) was entirely inapplicable, the TE did not need to address that issue. Although the company’s exceptions\footnote{A party dissatisfied with a TE’s (or ALJ’s) decision in a Board case has the option of filing “exceptions” – the equivalent of an appeal – with a supporting brief on the disputed issue[s] with the Board. 29 U.S.C. § 160(c) (2006); 29 C.F.R. § 102.46 (2006); 29 C.F.R. 101.11(b) (2006). In the absence of exceptions filed within 28 days after an ALJ issues a decision, the ALJ’s decision becomes final. 29 C.F.R. § 102.48(a) (2006).} and briefs to the Board undoubtedly repeated its argument that the strikers had lost their protected status as a matter of Section 8(d), they would necessarily have focused primarily on refuting the TE’s findings.\footnote{The NLRB reports that the agency’s case files for Fort Smith, including the parties’ briefs, no longer exist and were not electronically recorded.} By the same token, the General Counsel’s and the union’s briefs would have concentrated on defending the TE’s findings and urging the Board to accept his rationale. Although they must also have addressed the loss-of-status provision, they would have done so only as a contingency argument in the event the Board rejected the TE’s rationale. Their analyses of the provision’s application would therefore have been comparatively perfunctory at best. The significance of this is that if any analysis of the loss-of-status provision of any depth was presented to the Board, it was most likely the company’s. In all likelihood, the Board heard no extensive argument from the General Counsel or the union of why the strikers should
not be deprived of the Act’s protection.

The case, on exception, was heard by the full Board—i.e., by a panel consisting of all five of its members. This reflected their recognition that the case was important. The decision, however, was not unanimous, and with respect to the loss-of-status issue there was not even a binding majority. As noted supra, a plurality of two members—Philip Rogers and Boyd Leedom—wrote the opinion which has been treated as the *Fort Smith* “decision.” Chairman Frank McCulloch wrote an opinion concurring only in part, without reaching the loss-of-status issue. Member Gerald Brown wrote a personal footnote taking essentially the same position. The fifth Member, John Fanning, dissented at length.

The first oddity in the plurality opinion is that it put the cart before the horse. Since the company relied on Section 8(d)’s loss-of-status provision, that had to be the threshold issue in the case: if the Fort Smith strikers had lost their status as protected “employees” under the Act, they could not seek the Act’s protection against unlawful discharge under Section 8(a)(3) and the Board did not need even to address that issue. Only if the strikers were found not to have lost their protected status would it be necessary to decide whether their discharges were unlawfully motivated. The plurality, however, reversed this order.

The plurality first rejected the TE’s finding that the company rather than the union had sought to “terminate or modify” the parties’ contract within the meaning of Section 8(d). The union was consequently subject to the requirements of Section 8(d)(3). The plurality also found that *Mastro Plastics* was not applicable, because the TE had correctly found that the company had not bargained in bad faith. The strike was accordingly an economic strike in support of the union’s desired contract changes, not an unfair labor practice strike. Since the union had undisputedly failed to send a notice to the FMCS, the strike was unlawful under Section 8(d)(4).

This much was unobjectionable. The TE’s findings that the union did not

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97 The Board consists of five members appointed by the President and confirmed by the Senate, 29 U.S.C. § 153(a) (2006). However, as authorized by the Act, The Board decides the vast majority of its cases by three-Member panels. 29 U.S.C.A. § 153(b) (2012).
98 *Fort Smith Chair Co.*, 143 N.L.R.B. at 514.
99 *Id.* at 520.
100 *Id.* at 535 n.10.
101 *Fort Smith Chair Co.*, 143 N.L.R.B. at 521.
102 Like a court or any adjudicatory body, the Board usually declines to reach fact or legal issues that it does not need to address in order to resolve the case.
103 *Fort Smith Chair Co.*, 143 N.L.R.B. at 516-17.
104 *Id.* at 517.
105 *Id.*
come under Section 8(d)(3)’s notice obligation and that the strike was exempt from Section 8(d) restrictions could only be described as a contortion of the facts. The TE—like the General Counsel and the union—clearly had wanted to avoid having to deal with the loss-of-status issue.

Then, however, instead of addressing the strikers’ protected employee status, the plurality jumped to the unlawful-discrimination allegation and to what is usually the key element of a discrimination case: the company’s motive for discharging the strikers. “As we have found the June 1 strike to be unlawful, the Respondent could, as it contends it did, lawfully discharge employees because they engaged in the strike.”\textsuperscript{106} The plurality took note of the General Counsel’s contention that “the real reason for discharging the strikers was not the strike but the desire of the Respondent to rid itself of the union.”\textsuperscript{107} This contention was based on the testimony by a company official that his decision to discharge the strikers was motivated by “the Respondent’s financial difficulties, the Respondent's difficulty in obtaining changes in working conditions, the union's harassment of Respondent through the filing of grievances, and the union's uncompromising attitude.”\textsuperscript{108} To the plurality, however, this was no indication of unlawful motive.

[T]his is no more than a formulation of the background against which the Respondent decided to exercise its lawful right to discharge its employees for engaging in an unlawful strike. It falls short of being an admission of illegal motivation. Given a valid reason, as here, for discharging its employees and the fact that this reason was set forth in the Respondent's letter to these employees shortly after Respondent learned of the noncompliance with Section 8(d), there is ample basis on the entire record for concluding, as we do here, that employee participation in the unlawful strike was the real reason for the discharge.\textsuperscript{109}

This interpretation of the facts was highly slanted. By 1963 it was already well established in Board law that an employer—regardless of the employer’s “financial condition” or its “difficulty” in dealing with an “uncompromising” union—did not have to agree to any bargaining proposal and could even engage in a lockout to impose its own bargaining...
position.\textsuperscript{110} It was elementary, however, that such “difficulties” in bargaining do not create a legal justification for attempting to oust the union by coercive means. At the very least, problems of “financial condition” and difficult bargaining do not establish that the employer’s sole motivation is to punish an unlawful strike, as the plurality chose to assume. But at least this finding of lawful motive was not a statement of law that would apply in the future. It left open the possibility that in similar cases the General Counsel could show that the employer’s real motive was to rid itself of the union and was therefore unlawful.\textsuperscript{111}

Here the plurality might have stopped, at least as far as the mass discharge was concerned. Its finding that the company’s motive was lawful negated the General Counsel’s 8(a)(3) allegation and established (at least to the plurality’s satisfaction) that the strikers had been lawfully discharged. This made it unnecessary to decide whether their protected status had been affected by the union’s 8(d)(3) infraction. The only issue that still had to be resolved was the union’s representative status after the mass discharge. But the plurality chose to ignore the finding it had just made as not “relevant” and to address the issue that should have come first: had the strikers, by their action, lost the protection of the Act? The answer, in the plurality’s view, was yes.

Moreover, apart from the foregoing, we find that the Respondent's motive in discharging the strikers is not a relevant consideration. The strike here was an unlawful, and not merely an unprotected, activity [citing California Ass., 109 N.L.R.B. 754, and Local 219, Retail Clerks v. NLRB, 265 F.2d 814 (D.C. Cir. 1959), enforcing Carroll House of Bellville, supra], and by engaging in such a strike, the employees “forfeited their rights to protection of the Act.” [Citing Mackay Radio, 96 NLRB 740, 742-743 (1951).] To hold otherwise would, in effect, protect the strikers in their unlawful conduct, a result clearly in collision with the Board's


\textsuperscript{111} Under long-standing Board law, even where a lawful basis is found to have existed for an employer’s disciplinary action, this will not preclude a finding that the discipline was unlawful if the General Counsel establishes that the employer acted with unlawful animus and the employer fails to show that it was actually motivated by the lawful basis. E.g., La Gloria Oil and Gas, 337 N.L.R.B. 1120, 1123 (2002), aff’d, 71 Fed. Appx. 441 (5th Cir. 2003) (Table); Stemilt Growers, 336 N.L.R.B. 987, 990 (2001); Robbins Tire and Rubber, 69 N.L.R.B. 440, 441 n.21 (1946), enf’d, 161 F.2d 798 (5th Cir. 1947); Eagle-Pitcher Mining & Smelting, 16 N.L.R.B. 727, 801 (1939, enf’d, 119 F.2d 903 (8th Cir. 1941); Borden Mills, 13 N.L.R.B. 459, 474-75 (1939).
responsibility to discourage such conduct.\textsuperscript{112}

As noted above, \textit{California Ass’n}, and \textit{Local 219, Retail Clerks}, cited in the above passage, had held that a strike following noncompliance with Section 8(d)(3) was a violation of Section 8(b)(3). Those cases had not, however, even addressed the application of Section 8(d)’s loss-of-status provision. And \textit{Mackay Radio}, the only authority the plurality cited for its assertion that the strikers had “forfeited their rights to protection of the Act,” did not rely on—or even cite—Section 8(d) or the loss-of-status provision.\textsuperscript{113} \textit{Mackay Radio} found that the union went on strike for the specific purpose—with its members’ apparent knowledge and approval—of obtaining unlawful contract provisions.\textsuperscript{114} Since that strike was “to compel the Respondents to violate a clear congressional mandate,” the strikers were held to have lost the Act’s protection.\textsuperscript{115} The \textit{Fort Smith} plurality proffered no reason why the loss-of-status sanction for a union’s and its members’ knowing attempt to force an employer to accept unlawful contract terms should also apply to a union’s negligent failure, unknown to its members, to file a notice with the FMCS.

It was at the end of the Rogers-Leedom plurality’s passage quoted above that Member Brown, not a member of the plurality, inserted a personal footnote:

Agreeing with the majority that Respondent did not have a discriminatory intent, Member Brown finds it unnecessary to consider what the situation would be had Respondent's motive been otherwise; and, in view of the specific language of Section 8(d), he also finds it unnecessary to rely on \textit{Mackay Radio} . . . .\textsuperscript{116}

This statement was not a model of clarity, but Member Brown was unmistakably saying that it was not necessary for the Board to go beyond finding that the company’s motive was lawful, and that he therefore declined to do so. If the employer had been found to have a “discriminatory” (i.e., unlawful) intent, the “situation would be” that the lawfulness of the mass discharge depended entirely on whether the strikers had lost protection under Section 8(d). Although Member Brown then

\textsuperscript{112} \textit{Fort Smith Chair Co.}, 143 N.L.R.B. at 518 (emphasis in original).
\textsuperscript{113} Although the union in \textit{Mackay Radio} had failed to comply with the filing requirements of then-Section 9(e) of the Act, which required unions to file non-communist affidavits, noncompliance with Section 8(d) was not an issue in the case. \textit{See} 96 N.L.R.B. 740, 741, 745 n.18, 749 n.3, (1951).
\textsuperscript{114} Id. at 741-42 n.7, 753-54, 761.
\textsuperscript{115} Id. at 741-43.
\textsuperscript{116} \textit{Fort Smith Chair Co.}, 143 N.L.R.B. at 518 n.10.
referred to Section 8(d), this was solely (given what he had just said) to point out that in any event Mackay Radio could have no bearing on the case.\(^\text{117}\)

The plurality continued, however, acknowledging the glaring contradiction that it could not ignore: the loss-of-status provision, by its terms, referred only to “the sixty-day period specified in [Section 8(d)(1) and (4)],” and not to the thirty-day notification period in Section 8(d)(3); and the union had complied with Section 8(d)(1) by sending timely notice to the company.\(^\text{118}\) In the plurality’s view, however, this did not matter.

\[T\]o give such a literal construction of the waiting period to the loss-of-status provision is to wrench it from the rest of Section 8(d) . . . . [T]he section must be interpreted in light of the dual purposes of the Act to protect concerted activities and to substitute collective bargaining for economic warfare . . . . While subsections (1) through (4) place certain obligations upon the contractual parties in order to assure that bargaining and mediation can proceed for a reasonable time free from direct economic pressures, the loss-of-status provision, in effect, places an obligation upon employees for the same purpose. Consequently, it seems obvious to us that the various parts of Section 8(d) here involved must be read together in order to create an effective and consistent statutory means for achieving the purpose of the section.\(^\text{119}\)

The plurality cited the Board’s prior holdings that a union sending late notice to the FMCS is required to wait the full thirty days before striking, even if that period extends beyond the sixty-day period following the required 8(d)(1) notice to the employer.\(^\text{120}\) To the plurality, the sixty-day period referred to in the loss-of-status provision “requires the same interpretation to protect the period for mediation.”\(^\text{121}\) Moreover, “the statutory language suggests no basis for concluding that the similarly worded waiting periods of Section 8(d) should vary from clause to clause . . . .”\(^\text{122}\) By this, the plurality apparently meant that there was no difference between “sixty days” and “thirty days.” Accordingly, the plurality concluded that the loss-of-status provision applied to violations not only of Section 8(d)(1) and (4) but also of Section 8(d)(3), and that the Fort Smith

\(^{117}\) Id. at 517-18.  
\(^{118}\) Id. at 518.  
\(^{119}\) Id. at 518-519.  
\(^{120}\) Id. at 519 (citing California Ass’n. of Employers, and Retail Clerks v. NLRB, 265 F.2d 814 (D.C. Cir. 1959)).  
\(^{121}\) Id.  
\(^{122}\) Id. (emphasis added).
The strikers had lost the Act’s protection. Consequently, such motive as may have been behind the Respondent’s actions with respect to them is immaterial.

Finally, the plurality found that since the strikers had been lawfully discharged, their bargaining unit no longer existed. The employer therefore acted lawfully in withdrawing recognition from the union.

Chairman McCulloch filed a separate concurrence, agreeing that the strike was unlawful due to the 8(d)(3) infraction “and as such was an unprotected concerted activity for which the employees could validly be discharged.” He also agreed that the mass discharge was not “in truth motivated by any other consideration.”

But he also agreed with Member Brown that there was no need to address Section 8(d).

Hence, like Member Brown, I find it unnecessary to determine what the situation might have been had the record established discriminatory motivation on some other basis. Nor do I find it necessary now to pass on the question of whether the employee “loss of status” penalty provision contained in the final sentence of Section 8(d) is applicable in the case of a strike preceded by compliance with the 8(d)(1) 60-day notice requirement but not by compliance with the notice requirement of Section 8(d)(3). The unprotected activity ground adverted to above is enough, without more, to support the dismissal order in which I join.

In short, two Board Members had joined the plurality in finding that the Employer acted with lawful motivation, but not in reaching the impact of Section 8(d)’s loss-of-status provision on the strikers.

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123 Id.
124 Id at 518-19.
125 Id. at 520. At the time Fort Smith was decided, there was authority for the presumption that striker replacements did not support the union and that the employer, having replaced the strikers, therefore had the right to withdraw recognition. See NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 262 (1939); Titan Metal Manufacturing, 135 N.L.R.B. 196, 215 (1962); Jackson Manufacturing, 129 N.L.R.B. 460, 478 (1960); Stoner Rubber Co., 123 N.L.R.B. 1440, 1444 (1959); Marathon Electric Manufacturing, 106 N.L.R.B. 1171, 1180-82 (1953), aff’d sub nom. United Electrical, Radio & Machine Workers Local 1113 v. NLRB, 223 F.2d 338 (D.C. Cir. 1955), cert. denied 350 U.S. 981 (1956).
126 Fort Smith Chair Co., 143 N.L.R.B. at 520.
127 Id.
128 Id. at 520-21.
129 In fact, although this is not legally significant, the Fort Smith plurality opinion shared three strangely analogous features with the Supreme Court’s notorious Dred Scott decision of 1856. First, the opinion that was subsequently treated as the Dred Scott decision was similarly not issued by a majority. Second, the Court, after deciding
It was left to the lone dissenter, Member Fanning, to point out the fallacies in the plurality's "strained construction" of that issue. He noted that the loss-of-status provision's explicit reference to the 60-day period specified in Section 8(d)(1) and (4) "was not the result of happenstance" but of compromise, given that the provision's Congressional opponents had opposed the provision altogether, arguing that no restriction on the right to strike was justified. The provision's legislative history, he emphasized, "is literally punctuated with the equation of 'loss of status' to that [the sixty-day] period."

Moreover, Member Fanning continued, citing the Act's dual purpose of protecting concerted activities and encouraging collective bargaining, the Supreme Court had already laid down that "[a] construction which serves neither of these aims is to be avoided unless the words Congress has chosen clearly compel it." In conjunction with this he cited Section 13's emphatic admonition that "[n]othing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

I believe that a limitation on the right of employees to strike which goes beyond the 60-day period specified in Section 8(d)(1) and (4) must be more explicit and clear before it can be said to have been intromitted in Section 8(d)(3). For, under my colleagues' "parity of reasoning," the failure of a union to notify the [FMCS] may result in the forfeiture of the right to strike for weeks, or months, or even years after that period has elapsed. In my opinion, such a construction throws the concerted rights of employees into imbalance under the statutory scheme, and does little if anything to enhance true collective bargaining.

an issue that was entirely dispositive of the case, reached out to decide an additional issue it had no need to reach. Third, and most important, in seizing on that additional issue the Court severely injured many innocent people. See Dred Scott v. Sandford, 60 U.S. 393 (1856) (the Court, after deciding that the plaintiff, an African American, had no right to sue in court, went on to hold that the Missouri Compromise, in which Congress prohibited slavery in U.S territories, was unconstitutional).

130 Fort Smith Chair Co., 143 N.L.R.B. at 521-26.
131 Id. at 523.
132 Id. See also notes 51-55 and related text.
133 Id. at 524 (quoting NLRB v. Lion Oil, 352 U.S. 282, 289 (1957)).
134 Id. (emphasis by Member Fanning).
135 Id. (quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 234 (1963)) ("While Congress has from time to time revamped and redirected national labor policy, its concern for the integrity of the strike weapon has remained constant. Thus when Congress chose to qualify the use of the strike, it did so by prescribing the limits and conditions of the abridgement in exacting detail, e.g., Sections 8(b)(4), 8(d) [of the
In short, Member Fanning concluded, “[i]f Congress has sought to relate the ‘loss-of-status’ provision to each and every notice clause in Section 8(d), it could readily have done so. It has not.”\textsuperscript{136}

Finally, quite apart from Section 8(d), Member Fanning pointed out that the plurality had cited no applicable authority for concluding that the strikers could lawfully be fired, or even that the 8(d)(3) infraction made their strike unlawful.\textsuperscript{137} This was not a case where a strike violated a no-strike agreement or was called to compel an employer to violate the Act—the respective situations in \textit{Budd Electronics}, and \textit{Mackay Radio}, on which the plurality relied.\textsuperscript{138} Nor did the strike violate Section 8(d)(4), which was also limited by its terms to the sixty-day period for notice to employers specified in Section 8(d)(1).

Here, the employees struck, not in furtherance of the union's failure to give the 30-day notice under Section 8(d)(3), but to exert economic pressure upon Respondent to obtain a lawful collective-bargaining agreement. Their strike was therefore totally unrelated to their union's violation of that section. I fail to perceive how such a strike acquired a taint of illegality or how the employees' otherwise lawful conduct can be translated into unprotected concerted activity. If my colleagues' assertion is pressed to its logical conclusion, then all employee strike action, regardless of how lawful its object or purpose, becomes unprotected whenever

\textsuperscript{136}Id. \textit{at} 524-25 (citing \textit{Independent Union v. Procter & Gamble}, 312 F. 2d 181, 188 (C.A. 2 1962)) (describing how the court in \textit{Procter & Gamble} had rejected a union's contention that its own delay in filing an 8(d)(3) notice with the FMCS effectively extended the contract beyond its expiration date: “[T]he requirement of paragraph (3) [in Section 8(d)] that federal and state agencies be notified is entirely independent of paragraph (4). There is no suggestion in the text that a failure to meet the notice requirements of paragraph (3) will have any effect on paragraph (4). The only notice mentioned in (4) is the 60-day notice of termination.”). Justice Frankfurter, in his concurrence in \textit{NLRB v. Lion Oil}, had similarly correlated the loss-of-status provision specifically to Sec. 8(d)'s 60-day notice to the employer and no-strike requirements. \textit{See} 352 U.S. \textit{at} 303.

\textsuperscript{137}143 N.L.R.B. \textit{at} 526. With respect to whether the strike itself was unlawful, Member Fanning implicitly disagreed with California Ass., Broward Builders Exchange, and Carrol House of Bellville, which had found to the contrary. However, whether he was right or wrong in that respect, the point was separate from the strikers' loss of status as protected employees. I.e., if the strikers retained their status as employees protected by the Act, even if their strike was unlawful they could be found unlawfully discharged under Sec. 8(a)(3) if the company's motive was shown to be to rid itself of the union.

\textsuperscript{138}E.g. \textit{Budd Electronics}, Inc., 137 N.L.R.B. 498 (1962); \textit{Mackay Radio and Telegraph Company}, Inc. 96 N.L.R.B. 740 (1951).
their union concurrently violates the Act.  

Member Fanning concluded that the Fort Smith strikers had not lost the Act’s protection, that their strike was lawful, that the company consequently had fired them in violation of Section 8(a)(3) in retaliation for engaging in protected activity, that the union consequently retained its majority representative status, and that the company was obligated to bargain with them once the union complied with Section 8(d)(3).  

It may be noted, in addition to the points made by Member Fanning, that the plurality ignored the Board’s earlier categorical statement in Lion Oil, echoed in Justice Frankfurter’s concurrence on review, that Section 8(d)’s loss-of-status provision, “by its terms . . . applies only to those employees who strike within the sixty-day period specified by the statute.” Nor did the plurality address the significance of Congress’s varying use of “written notice” in Section 8(d)(1) and “notifies” in Section 8(d)(3). Nor, most important, did the plurality explain how holding strikers who were not even aware of their union’s negligent infraction of Section 8(d)(3) responsible for the error and subjecting them to mass discharge would prevent such negligence in the future.

On appeal by the union, the Court of Appeals for the District of Columbia Circuit upheld the plurality’s opinion. The court rejected the union’s contention—still its primary argument—that it was the company rather than the union which had been obligated to file notice with the FMCS. And the court agreed with the Board majority’s determination that the company acted with a lawful motive in firing the strikers, finding that “this determination has adequate support in the record.”

Significantly, however, the court noted that the plurality opinion on loss of protected status under Section 8(d) represented the votes of only two Board members and, like Chairman McCulloch and Member Brown, the court explicitly declined to reach that issue.

In short, a plurality of two Board members out of five had opined that Section 8(d)’s loss-of-status provision applied to strikers in situations

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139 143 NLRB at 526. Member Fanning also noted that while California Ass. of Employers, , and Retail Clerks Local 219, also relied on by the plurality, found that a union violated Section 8(b)(3) by failing to comply with Section 8(d)(3), neither case referred to the loss-of-status provision or implied that it was applicable. Id. at 526 n.28.
140 Id.
141 352 U.S. at 289, 296.
142 United Packinghouse Workers (Wilson & Co.), 89 N.L.R.B. 310, 314 (emphasis in original).
143 United Furniture Workers v. NLRB, 336 F.2d 738, 742.
144 Id. at 741-42.
145 Id. at 742.
146 Id. at n.3.
where the only violation of the law committed, unknown to them, was their union’s failure to comply with Section 8(d)(3). Their three colleagues and the reviewing court of appeals had categorically refused to endorse this position. As an institutional matter, since only two of the five voting Board Members had joined the plurality opinion with respect to Section 8(d), that opinion did not express a Board majority’s view and therefore was not a statement of law with binding precedential authority in subsequent cases.147

Moreover, as Member Fanning had cogently pointed out, the plurality opinion had no support in the Taft-Hartley Act or its legislative history, flew in the face of Section 13’s injunction against impeding the right to strike “except as specifically provided for herein,” and flatly ignored the Court’s affirmation in Lion Oil that the loss-of-status provision applied only to 8(d)(1) infractions.

The plurality’s position was also completely unproductive in the light of its own justification for depriving strikers of protection for their union’s 8(d)(3) infraction. As indicated supra, that justification was that (1) not to do so would violate the Board’s duty to discourage “unlawful conduct;” and (2) “in order to assure that bargaining and mediation can proceed for a reasonable time free from direct economic pressures.”148 But the deterrent purpose behind punitive sanctions is premised on misconduct that is intentional. Where workers go on strike in complete ignorance of an 8(d)(3) infraction which their union had no intention of committing, how would treating the strikers as wrongdoers after the fact deter other unions from committing the same negligent mistake in the future? How does firing the strikers en masse and obliterating their bargaining unit—leaving their employer conveniently free of any future bargaining obligation—deter “unlawful conduct” or encourage 8(d)(3) compliance, collective bargaining, resolution by mediation, or the flow of commerce?

As noted above, the plurality left this unanswered. But the only possible rationale it could have posited was that the extremity of such a known

147 See Dubuque Packing Co., 303 N.L.R.B. 386, 389-90 (1991) (noting that the plurality opinion and the two other opinions in Otis Elevator, 269 NLRB 891 (1984) each “retain[ed] vitality” but that “no single opinion has commanded the support of the majority of the Board”), enf’d in part, 1 F.3d 24 (D.C. Cir. 1993), cert. dismissed, 511 U.S. 1138 (1994); see also Hacienda Resort Hotel and Casino, 355 N.L.R.B. 742, 743 n.1 (2010) (Chairman Liebman and Member Pearce, concurring) (“[i]t is the tradition of the Board that the power to overrule precedent will be exercised only by a three-member majority of the Board.”); New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010) (establishing that Sec. 3(b) of NLRA requires the Board to have a quorum of at least three sitting Members to issue decisions). Although Hacienda Resort and New Process Steel do not address the authority of a plurality opinion, they strongly suggest what is intuitively obvious: a majority of any Board panel, whatever its size, is required to make affirmative Board law with precedential authority.

148 143 N.L.R.B. at 518-19.
sanction would motivate every union to be mindful of the FMCS filing requirement and to comply with it unfailingly, giving the FMCS a chance to intervene.\textsuperscript{149} This was not only unacceptably draconian but contrary to the entire thrust of the NLRA. If workers had the right to engage in concerted activity to improve their terms of employment, they had the even more elementary right to not be treated as expendable pawns for the purpose of enforcing a second-party reporting requirement to a third-party agency which there was no reason to assume they had ever heard of. As the Court had emphasized in \textit{Lion Oil,} given the “dual purpose in the Taft-Hartley Act—to substitute collective bargaining for economic warfare and to protect the right of employees to engage in concerted activities for their own benefit . . . [a] construction which serves neither of these aims is to be avoided unless the words Congress has chosen clearly compel it.”\textsuperscript{150}

Yet from its issuance—but without any subsequent analysis that could be considered an independent affirmation by a Board majority—the Board and the courts have indeed treated \textit{Fort Smith} as binding and correct. From 1963 to 1974, in at least two reported cases summarily relying on \textit{Fort Smith}, strikers were fired and treated as unprotected by their unions’ failure to send timely notice of dispute to the FMCS or to an analogous state agency.\textsuperscript{151} Then Congress decided it was time to amend the Act.

\textbf{III. CONGRESS EXTENDS THE ACT TO NONPROFIT HOSPITALS}

\textbf{A. The Health Care Amendments}

In 1974, for the first time since Taft-Hartley, Congress enacted a significant extension of the Act’s coverage to additional employees. This legislation, commonly referred to as the 1974 Health Care Amendments to the NLRA,\textsuperscript{152} extended the Act’s protection to the employees of private nonprofit hospitals and other private nonprofit health-care institutions. It was necessary because the Taft-Hartley Act, in 1947, had specifically excluded those employers from the Wagner Act’s definition of

\begin{footnotesize}
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\item\textsuperscript{149} It clearly made no difference to the plurality that on this occasion the FMCS had in fact been made aware of the Fort Smith dispute, was represented at negotiations, and had an opportunity to influence the outcome.
\item\textsuperscript{150} 352 U.S. at 289 (emphasis added).
\item\textsuperscript{151} United Mine Workers (McCoy Coal Co.), 165 N.L.R.B. 592 (1967); Publicity Engravers, 161 N.L.R.B. 221 (1966); see also Texaco, Inc., 179 N.L.R.B. 989 (1969) (relying on Fort Smith with respect to violations of Sec. 8(d)(1)).
\item\textsuperscript{152} Public Law 93-360, July 30, 1974, 88 Stat. 395.
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\end{footnotesize}
“employer.”\textsuperscript{153} The absence of a regulatory framework for authorizing representation and resolving labor-management disputes in this sector had resulted in the increasing disruption of institutionalized health care due to recognition or economic strikes at nonprofit hospitals, just as it had in the rest of the private sector before the passage of the Wagner Act in 1935.\textsuperscript{154}

The Health Care Amendments eliminated this exclusion and defined a covered “health care institution” as any nonpublic “institution devoted to the care of sick, infirm, or aged person.”\textsuperscript{155} This effectively gave health-care employees the same rights to organize and engage in protected concerted activity under Section 7 enjoyed by most other private-sector workers. However, out of concern that strikes at hospitals might deprive patients of vitally needed care, Congress added additional requirements to Section 8(d) specifically for health-care institutions. As discussed below, these included earlier notice to the opposite collective-bargaining party and to the FMCS than were already imposed on other employers by Section 8(d).\textsuperscript{156} In addition, where the union was bargaining for an initial agreement with a health employer it was required to give separate notice to the FMCS of intent to strike at least thirty days in advance.\textsuperscript{157} In contract modification or renegotiation situations, a new subsection 8(g) required the union to give ten days written notice to both the health-care employer and to the FMCS.

\textsuperscript{153} Labor-Management Relations Act, 1947, Public Law 80-101, 61 Stat. 136, 137; Sec. 2(2).
\textsuperscript{154} H. Report No. 93-1051, Coverage of Nonprofit Hospitals Under the NLRA, House Committee on Education and Labor, May 20, 1974, at 4-5; Legislative History of Coverage of Nonprofit Hospitals under the National Labor Relations Act, 1974, Senate Committee on Labor and Public Welfare, at 272-73.
\textsuperscript{156} The language pertaining to notice that was added at the end of Sec. 8(d) by the Health Care Amendments, in its entirety, was as follows (emphasis added):

Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) [this subsection] shall be modified as follows:

(A) The notice of section 8(d)(1) [paragraph (1) of this subsection] shall be ninety days; the notice of section 8(d)(3) [paragraph (3) of this subsection] shall be sixty days; and the contract period of section 8(d)(4) [paragraph (4) of this subsection] shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days’ notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3) [in paragraph (3) of this subsection].

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute. Pub. L. 93-360, July 26, 1974, 88 Stat. 395, 396; 29 U.S.C. § 158(d) (emphasis added).
in advance of any strike. An additional section authorized the Director of the FMCS to appoint a board of inquiry to investigate and report concerning any labor dispute that might “substantially interrupt” the delivery of health care. None of these amendments affected workers outside the health-care sector.

But the Health Care Amendments made one other significant change to Section 8(d)—specifically to the loss-of-employee-status provision. While the original provision stated that “[a]ny employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee,” the provision as revised in 1974 stated that “[a]ny 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) . . . shall lose his status as an employee.”

This change in text was not, like the others, limited by its terms to the health-care sector. And “any notice period specified in this subsection,” unlike the former “sixty-day period,” would arguably include the applicable notice period in Section 8(d)(3) with respect to non-health-care employees, not just employees in health care. That is, this change, at least taken literally, applied the loss-of-status provision as the Fort Smith plurality had applied it to workers outside health care—not only to a union’s failure to provide sixty days’ notice to an employer in advance of contract expiration in compliance with Section 8(d)(1), but also to the failure to give notice to the FMCS “within 30 days after such notice” in compliance with Section 8(d)(3).

The textual changes made by the Health Care Amendments make it clear that Congress, in view of the life-threatening implications of work stoppages in health-care facilities, intended to impose Section 8(d)’s loss-of-status sanction as a penalty on health-care strikers whose unions failed to comply with Section 8(d)(3). But did Congress, by this change, also intend to ratify and legislate Fort Smith’s interpretation of the law for all other employees subject to the Act? Did Congress intend merely to defer to the Board’s interpretation of the law for workers outside health care, as expressed in Fort Smith, without barring the agency from subsequently changing that interpretation? Or did Congress even intend to legislate at all with respect to those workers? Only if it did were those workers affected.

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160 88 Stat. 395; 29 U.S.C. § 158(d) (emphasis added). The loss-of-status provision was also amended to apply specifically to violations of the new 10-day notice requirements in advance of health-care strikes in the new Section 8(g).
B. Congress’s Intent – For Workers Outside Health Care

1. How to Interpret the Amendments?

The established framework for interpreting an act of Congress is deceptively simple. First a court (or an agency) looks to the statutory text at issue and the text surrounding it to determine whether the intent is clearly expressed in the statute itself. If it is, the inquiry is over; if not, the court looks to the statute’s legislative history. However, there are notable exceptions with respect to both prescribed steps. Although clear statutory language will often be dispositive, “ascertainment of the meaning apparent on the face of a single statute need not end the inquiry . . . The circumstances of the enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect.”

For that matter, the Supreme Court has categorically stated, “[t]he definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities.” More to the point, as the Supreme Court observed in United States v. American Trucking Ass’ns., when a literal interpretation of statutory language “has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the act . . . Even when the plain meaning did not produce absurd results but merely an unreasonable one plainly at variance with the policy of the legislation as a whole this Court has followed that purpose, rather than the literal words.”

163 Watt v. Alaska, 451 U.S. 259, 266 (1981); see also id. at n.9 (citing Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945) (L. Hand, J.), aff’d, 326 U.S. 404 (1945)) (“Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”).
164 Dolan v. U.S. Postal Service, 546 U.S. 481, 486 (2006) (“Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.”).
165 310 U.S. 534 (1940).
166 Id. at 543 (internal citations omitted). Judge Learned Hand put it even more succinctly: “[t]he duty of ascertaining [the] meaning [of a statute] is difficult at best, and one certain way of missing it is by reading it literally . . . .” General Service
In National Woodwork Manufacturers Ass'n v. NLRB, the Court made the same observation it made in American Trucking Ass'ns. with respect to sections of the NLRA other than Section 8(d):

It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers. That principle has particular application in the construction of labor legislation which is to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests.

Moreover, and significantly with respect to the Health Care Amendments, caution in applying statutory wording literally is particularly warranted where Congress clearly did not focus on the particular issue in dispute. Where an issue was the direct subject of Congressional discussion and the resulting statutory language is the direct result of that consideration, it may fairly be assumed that the language was carefully chosen to reflect the legislative will. By contrast, where the question at issue was not even addressed, the literal meaning of the statutory language is not necessarily dispositive.

Of course, such exceptions are anathema to the “textualist” school of statutory interpretation, whose adherents refuse (purportedly always and without bias) to look beyond a statute’s text regardless of the interpretive consequences. The supplementary interpretive step of consulting legislative history where statutory language is not clearly dispositive has come under

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Employees Local 73 v. NLRB, 578 F.2d 361, 367 (D.C. Cir. 1978) (quoting speech to Massachusetts Bar Ass’n.).

Id. at 619 (1967) (interpreting Sec. 8(e) (internal citations omitted) (emphasis added); see also NLRB v. Fruit and Vegetable Packers Local 760, 377 U.S. 58, 72 (1964) (quoting United States v. American Trucking Ass’ns., 310 U.S. 534, 543 (1940)) (interpreting Sec. 8(b)(4)(ii)(B)).

See, e.g., Maine v. Thiboutot, 448 U.S. 1, 7-8 (1980) (the phrase “and laws,” which was inserted into the legislation that became 42 U.S.C. § 1983, should be interpreted literally to mean all rather than a subset of laws, because “Congress’ attention was specifically directed to this new language . . . [and] was aware of what it was doing”); United States v. Falvey, 676 F.2d 871, 875 (1st Cir. 1982) (“Cases construing changes in statutory language tend to rely in part on evidence of congressional intent or at least attention to the change in deciding whether to give the change its literal effect”) (emphasis added), and authorities cited therein.

United States v. Falvey, 676 F.2d 871, 875 (1982).
increasing challenge from this quarter in recent years.\textsuperscript{171} However, without becoming immersed in that controversy here, it seems safe to observe that the best way to interpret a particular clause in a particular statute would be highly individual to the statute, its background, and the dispute at issue.\textsuperscript{172} Moreover, few would dispute that the authority of a legislative history, if not dispositive, could at least be increased or reduced by the closeness or distance between the issue in dispute and the declared subject of the legislation.

In this instance, however, a fruitful analysis can be made solely of the textual change the Health Care Amendments made in the loss-of-status provision, even before consulting their legislative history.

2. “Any Notice Period” – The Text

Why would “any notice period specified in this subsection,” as it was drafted in the 1974 amendment to Section 8(d)’s loss-of-status provision, not have referred to every single notice period specified in Section 8(d), including Section 8(d)(3)’s FMCS notification requirement as applied to workers outside health care? Or, why would “any,” as used in Section 8(d), not always mean any?

First, because the Supreme Court has already said it doesn’t, if indirectly. In \textit{Mastro Plastics Corp. v. NLRB},\textsuperscript{173} as noted above, the Court found that Section 8(d)’s loss-of-status provision did not apply to unfair labor practice strikes. This was so even though the provision applied by its terms to “any” employee who engaged in “a strike”—i.e., to any strike—within the sixty-day notice period specified in Sections 8(d)(1) and (4). To hold otherwise, the Court observed, would be to read the words of the provision “in complete isolation from their context in the Act.”\textsuperscript{174} Furthermore, noting that the distinction between economic strikes and


\textsuperscript{172} See also Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 133 (2001) (J. Stevens dissenting) (internal citation omitted) (“[T]he ‘minimalist judge’ who holds that ‘the purpose of the statute may be learned only from its language’ has more discretion than the judge who will seek guidance from every reliable source. A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court's own views of how things should be, but it may also defeat the very purpose for which a provision was enacted.”).

\textsuperscript{173} 350 U.S. 270 (1956).

\textsuperscript{174} 350 U.S. at 285.
unfair labor practice strikes pre-existed Taft-Hartley, the Court observed that Congress could have eliminated that distinction but “[could] not fairly be held to have made such an intrusion on employees’ rights . . . without some more explicit expression of its purpose to do so than appears here.”

In addition, since the strike at issue in Mastro Plastics had occurred during the term of the parties’ collective-bargaining agreement, the Court had to construe the contract’s ban on “any strike or work stoppage.” The Court found that the contract “dealt solely with the [parties’] economic relationship” and was intended to prohibit economic strikes, not unfair labor practice strikes; and consequently that the strike at issue did not violate the prohibition notwithstanding its reference to “any” strike.

The Mastro Plastics Court, in short, refused to interpret “any” literally in two different wording contexts—one of them the loss-of-status provision itself related to strikes. Although not dispositive, this answers our opening question, even though Mastro Plastics did not specifically address “any notice period” in the loss-of-status provision: “any” does not always mean literally any or “every” in Section 8(d)(1), and the mere fact of Congress’s having used the word in referring to the section’s notice periods is not dispositive.

Moreover, for the same reasons that the Fort Smith plurality opinion was misguided (and consistent with the Mastro Plastics holding), a literal interpretation of “any notice period specified in this sub-section,” as it now appears in the loss-of-status provision, defeats the NLRA’s dual purpose: to protect the flow of commerce while encouraging collective bargaining. Perpetuating the Fort Smith approach to labor relations by interpreting “any notice period” literally leads precisely to the “absurd or futile result . . . plainly at variance with the policy of the legislation as a whole,” which the Supreme Court warned against in American Trucking Ass’ns.

And the remaining text of the Health Care Amendments not only does not require such an interpretation but militates against it.

3. The Surrounding Text

A more restrictive reading of “any notice period” is warranted not only

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175 Id. at 288-289.
176 Id. at 281.
177 Id. at 281-282.
178 Cf. Nixon v. Missouri Municipal League, 541 U.S. 125, 132 (2004) (interpreting “any” not to include political subdivisions of a state); Raygor v. Regents of University of Minnesota, 534 U.S. 533, 542-46 (2002) (“any” interpreted not to include claims against states so as to effectively extend state statute of limitations); Falvey, 676 F.2d at 875 (interpreting “any” not to include coins not used as U.S. currency); Nixon, 541 U.S. at 132 (“[A]ny can and does mean different things depending upon the setting.”).
179 310 U.S. 534, 543 (1940).
as a matter of NLRA policy but by the clearly limited purpose of the Health Care Amendments themselves: to *extend* the coverage of the NLRA to health-care employers and workers. The entire text of the amendments, by itself, confirms that Congress had no thought of affecting the Act’s application to workers outside health care, who were seen to constitute an entirely different category of employees. And this concentrated focus solely on the health-care sector makes it easier to understand why Congress used the phrase “any notice period specified in this sub-section,” which at first glance seems to include Section 8(d)(3) as applied to workers outside health care, without intending that inclusion.

The Health Care Amendments inserted four additional notice periods into Section 8(d), each applicable by its terms only to health-care institutions. This more than doubled the total number of required waiting periods prescribed in Section 8(d) from three to seven. As noted above, Congress clearly did intend to apply the loss-of-status provision to strikes by health-care workers and their unions in violation of any of these new notice requirements, given the “unique” features of their industry. In addition, in view of its pre-1974 wording, the loss-of-status provision was clearly intended to continue to apply to any strike outside health care in violation of Section 8(d)(1)’s requirement of 60 days’ notice to the employer. But this did not mean that Congress was endorsing *Fort Smith*, or that it intended to apply the loss-of-status provision to workers outside health care for their unions’ negligent violations of Section 8(d)(3).

It can certainly be argued that if Congress did not have that intent it could have made this more explicit. The drafters of the Health Care Amendments might have affirmatively listed each of the notice requirements Congress meant to include in the amended loss-of-status provision (just as the original 1947 provision had specified “the sixty-day notice period”), including Section 8(d)(3)’s notification period as it applied to health-care workers. The reason why the drafters’ failure to do this is not dispositive is that it was obviously more convenient to state simply that the loss-of-status provision would now apply to “any notice period specified in this subsection.” Congress, like any legislative body, favors economy of verbiage in the drafting of statutory language. It was easy to overlook that this summary phrase, by its literal terms, would cover non-health as well as health-care workers, because this change was the *only* provision in the entire text of the Health Care Amendments of that nature: all of the other amendments, without exception, were explicitly limited by their terms to

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180 29 U.S.C § 8(d)(A) - (B).
181 The new requirement of 10 days’ notice to the employer and to the FMCS before a health-care strike had to be referenced specifically in the loss-of-status provision because that requirement was added in the new and separate sub-section 8(g). 29 U.S.C. §158(g) (2006).
health care. And it was just as easy to continue to overlook the unintended (and indirect) reference to workers outside health care from the bill’s drafting all the way through final passage of the legislation because, as demonstrated below, no one in Congress was even thinking about those workers at the time.

Another textual reason not to interpret “any” literally in this case is the pre-existing divergence in wording between Section 8(d)’s notice requirements. As noted supra, Section 8(d)(1) requires a union to give “written notice” of “sixty days” to the employer before contract expiration if it seeks to renegotiate the contract, and the loss-of-status provision in its original form referred specifically to Section 8(d)(1)’s “60-day notice period.” Section 8(d)(3), by contrast, requires the union to “notif[y]” the FMCS and analogous state agency “within thirty days after such [Section 8(d)(1)’s required] notice” of the dispute.

Before 1974, as demonstrated supra, this was a powerful and possibly dispositive distinction that should arguably have precluded the application of the loss-of-status sanction to 8(d)(3) violations. The only notice specifically characterized as a “notice” in the original Section 8(d) of 1947 was the sixty-day “notice” to the other collective-bargaining party required in Section 8(d)(1) and referred to in Section 8(d)(3) and (4). Section 8(d)(3)’s additional requirement to “notif[y]” the FMCS within thirty days

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182 Cf. Falvey, 676 F.2d at 875 (“The draftsman [of a different statute], we surmise, merely sought to ‘clean up the language’—falling into the trap, as can easily occur where statutory language is rephrased, of unintentionally suggesting a substantive change.”) (emphasis added).

183 Nor would this have been the only drafting error found in the Health Care Amendments’ revision of Sec. 8(d). In Sinai Hosp’l of Baltimore, Inc. v. Scearce, 561 F.2d 547 (4th Cir. 1977) the Fourth Circuit recognized that by increasing the thirty-day FMCS notification requirement in Section 8(d)(3) to sixty days in the case of health-care institutions, Congress did not intend—as the amended requirement stated—to require that notification to be made “within sixty days after such notice [i.e., the 90-day notice to the health employer required by Section 8(d)(1)]” is given. A literal reading of this “error in drafting” would have permitted the FMCS notification to be made only thirty days before contract expiration, even though it was clearly the intent of Congress to make that notice period at least sixty days. 561 F.2d at 549 n.2; see also Affiliated Hosp.s of San Francisco v. Scearce, 583 F.2d 1097, 1098 n.3 (9th Cir. 1978) (agreeing with the Fourth Circuit that this was a “drafting error”); Trinity Lutheran Hospital, 218 N.L.R.B. 199 (1975) (Health Care Amendments require “60 days’ notice” to the FMCS before contract expiration). Cf. Mammoth Coal, 358 N.L.R.B. No. 159, slip op. at 5 n.17 (2012) (Board’s previous statement, in Toering Electric, 351 N.L.R.B. 225, 233 (2007), that a particular showing requirement for the General Counsel applied to “all” hiring discrimination cases “was obviously an unintentional overstatement,” since the Board had previously held otherwise).

184 29 U.S.C § 158(d)(1) (emphasis added).

185 61 Stat. 136, 143 (emphasis added).

after the Section 8(d)(1) “notice” was given clearly had a different meaning. As noted earlier, where Congress uses similar but different terms at two different places in the same statute, it may normally be assumed that the difference is deliberate and significant.\textsuperscript{187} By this reasoning, the original loss-of-status provision could not have referred to Section 8(d)(3)’s requirement that the initiating party “notif[y]” the FMCS.

Congress arguably weakened this argument when it enacted the Health Care Amendments by adding the sentence containing clauses (A), (B), and (C) to Section 8(d). This new sentence referred not only to the “notice of section 8(d)(1),” but also to the “notice of section 8(d)(3)” and the “notice . . . given to the [FMCS] under either clause (A) or (B) of this sentence.”\textsuperscript{188} The additional use of “notice” rather than “notifies” or “notification” with respect to the FMCS arguably blurred Section 8(d)’s previous distinction between the required notice to the other party and the required notification to the FMCS; and this in turn might be read to imply that the loss-of-status provision applied to both terms. However, since the new sentence in which clauses (A) and (B) appeared referred solely by its own terms to a dispute at a “health care institution,” it follows that the blurring of “notice” and “notify” in that sentence is inapplicable to workers outside health care. Accordingly, Section 8(d)’s original use of those terms still weighs against applying the loss-of-status provision to strikers outside health care for their unions’ 8(d)(3) infractions.

4. Other Adjudicatory Authority

This interpretation of the loss-of-status provision is confirmed not only by the Health Care Amendments’ own legislative history—discussed separately below—but also by the Supreme Court’s, the Board’s and other courts’ treatment of the amendments ever since they were enacted. In 1975, the year after the amendments became law, the Board, in \textit{Bio-Medical Applications of San Diego},\textsuperscript{189} stated categorically: “[i]n our opinion an examination of this legislation and its legislative history shows that the purpose of the 1974 health care amendment was to extend the jurisdiction of the Board to all health care institutions . . . .”\textsuperscript{190} Two years later, in

\textsuperscript{187} See supra note 50 and accompanying text.
\textsuperscript{189} 216 N.L.R.B. 631 (1975).
\textsuperscript{190} \textit{Id.} at 631 (emphasis added). \textit{Bio-Medical Applications} confirmed that the Health Care Amendments’ coverage included institutions which were “local in character.” \textit{See also Walker Methodist Residence and Health Care Center}, 227 NLRB 1630, 1632 (1977) (“[t]he purpose of the 1974 amendments was to extend the protection of the Act to employees of nonprofit health care institutions who were excluded from coverage by the 1947 Taft-Hartley Amendment.”).
the Board, in interpreting the amendments’ new Section 8(g),\textsuperscript{192} recognized that “Congress chose to treat the health industry uniquely because of its importance to human life . . . . Consequently, a determination of the lawfulness of any picketing without notice of a health care institution must take into account the high public interest in uninterrupted health services.”\textsuperscript{193} The Board distinguished precedent addressing picketing by workers outside health care: “[t]hose cases did not deal with the unique circumstances presented by health care institutions and did not therefore require the same balancing of interests mandated by the health care amendments.”\textsuperscript{194}

The following year, in \textit{Beth Israel Hospital v. NLRB},\textsuperscript{195} the Supreme Court reviewed the Health Care Amendments for the first time.\textsuperscript{196} Like the Board, the Court noted from the outset that the amendments were intended “to extend [the Act’s] coverage and protection to employees of nonprofit health-care institutions.”\textsuperscript{197} Moreover, the Court observed, the features of the health-care industry were distinctive: “[i]n extending coverage of the Act to nonprofit hospitals, Congress enacted special provisions for strike notice and mediation, applicable solely to the health-care industry, intended to avoid disruptions of patient care caused by strikes.”\textsuperscript{198} And yet again, echoing the Board: “Congress addressed its concern for the unique problems presented by labor disputes in the health-care industry by adding specific strike-notice and mediation provisions designed to avert interruption in the delivery of critical health-care services . . . .”\textsuperscript{199}

\begin{footnotes}
\item[191] 232 N.L.R.B. 443 (1977), enf’d, 582 F.2d 1275 (3d Cir. 1978) (table).
\item[192] 29 U.S.C. §158(g) (2006). Section 8(g) (requiring that a union to give ten days written notice to a health-care employer and to the FMCS in advance of any strike); \textit{see also United Hospitals}, 232 N.L.R.B. 443 (1977) (addressing whether non-strike picketing fell within Sec. 8(g)’s notice requirement).
\item[193] 232 N.L.R.B. at 444 (emphasis added); \textit{see also New York State Nurses Ass.}, 334 N.L.R.B. 798, 800 (2001) (quoting \textit{United Hospitals}, 232 N.L.R.B. at 444); \textit{St. Francis Hospital}, 271 N.L.R.B. 948, 950 (1984) (“Congress was concerned that the needs of patients in health care institutions required special consideration in the Act, and therefore imposed certain restrictions not applicable to other industries”) (internal citation omitted, emphasis added), remanded for other reasons, 814 F.2d 697 (D.C. Cir. 1987).
\item[194] 232 N.L.R.B. at n.11 (emphasis added). In dissent with respect to Sec. 8(g), Member Jenkins agreed that “[t]he major purposes of [the] Health Care Amendments of 1974, of which Section 8(g) is a part, were (1) to extend coverage of the Act to employees of nonprofit health care facilities and (2) to provide a mechanism to insure the minimization of disruptions in patient care caused by labor disputes.” \textit{Id.} at 446 (emphasis added).
\item[195] 437 U.S. 483 (1978).
\item[196] \textit{Beth Israel} addressed Sec. 7 solicitation rights on hospital property.
\item[197] 437 U.S. at 485 (emphasis added).
\item[198] \textit{Id.} at 496-497 (emphasis added).
\item[199] \textit{Id.} at 499 (emphasis added).
\end{footnotes}
In 1991, in *American Hospital Ass. v. NLRB*, the Court again reviewed the Health Care Amendments, this time in connection with the Board’s rulemaking authority. Again the Court noted (and the hospital association challenging the Board agreed) that the amendments “extended” the Act to the health-care industry.

If Congress’s only purpose in the Health Care Amendments was to “extend” the NLRA to cover the “unique” features of the health-care sector—as the amendments’ legislative history, discussed below, further confirms—then the Health Care Amendments did not change the law with respect to workers outside the health-care sector, even by the substitution of “any notice period” for “the sixty-day period” in Section 8(d)’s loss-of-status provision. That is, the sole authority for applying the loss-of-status provision to Section 8(d)(3) infractions for workers outside health care remains the plurality opinion in *Fort Smith*.

5. The Legislative History

The above analysis of the Health Care Amendments has not relied on the amendments’ legislative history, except indirectly to the extent it was relied upon by the cited Board and court authorities. This was for the purpose of demonstrating the force of the argument that the amendments did not legislate or endorse the plurality position in *Fort Smith* for workers outside health care, even without support from the legislative history. But that history only strengthens the argument, not by what it affirmatively states but by what it confirms by omission—that in 1974 Congress did not intend to legislate except in the health-care sector.

If Congress had intended to legislate the holding in *Fort Smith* for workers outside health care, or even simply to defer to the Board’s application of the loss-of-status provision to those workers whatever that application might be (or however it might change), one would expect to find this expressed somewhere in the legislative history, even with minor emphasis. One would at least expect the history to state, at some point, something to the effect that “the bill extends the same strike sanctions that already exist for other workers to the health-care sector, with even stricter

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201 *Id.* (addressing the Board’s authority to issue rules defining appropriate representation units in health care).
202 *Id.* at 615, 616.
203 “[I]n the complete absence of any evidence that the rewording was aimed at bringing about substantive changes other than the one expressly reflected in the legislative history [or] evidence of congressional intent or at least attention to the change in deciding whether to give the change its literal effect . . . [internal citations omitted] courts are not bound to read a statute literally in a manner entirely at odds with its history and apparent intent.” *Falvey*, 676 F.2d at 875.
features;” or that “the Board’s holding in *Fort Smith* will now also apply to health-care workers;” or that “the union’s failure to provide any of the required timely notices to the FMCS will deprive its health-care members of the Act’s protection if they go on strike, just as it already deprives strikers in other industries.” The legislative history says none of these things—anywhere. It never refers to the loss-of-status provision’s application to workers outside health care, and it never even mentions *Fort Smith*. In fact, the legislative history almost never even refers to workers in other industries, let alone to strikes by them or to Section 8(d)’s related sanctions.

The report of the Senate Committee on Labor and Public Welfare on the bill that was eventually enacted began by summarizing its essential effects, stating that it “repeals the present exemption [for nonprofit hospitals], establishes certain new procedures governing labor relations in health care institutions, and creates a new definition of health care institution . . . . The bill also contains several additional special provisions designed to facilitate collective bargaining settlements and to provide advance notice of any strike or picketing involving a health care institution . . . .” 204 With respect to notice requirements, the report stated:

In the Committee’s deliberations on this measure, it was recognized that the needs of patients in health care institutions required special consideration in the Act including a provision requiring hospitals to have sufficient notice of any strike or picketing to allow for appropriate arrangements to be made for the continuance of patient care in the event of a work stoppage. In this respect the Committee believed that the special notice requirements should be extended to all proprietary and nonprofit hospitals, convalescent hospitals, health maintenance organizations, health or medical clinics, nursing homes, extended care facilities or other institutions devoted to the care of sick, infirm or aged persons. Accordingly this bill will provide the same procedures for employees of all health care institutions. 205

In short, the “special” notice requirements which were being added to Section 8(d) to meet the “special” needs of medical patients were being extended only to “all health care institutions.” 206

The Committee’s opening description of the bill’s central provisions was

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205 Legislative History at 10 (emphasis added).

206 Id.
similarly correlated strictly to health care. For example, with respect to the new subsection (g), requiring an additional 10-day notice to a health-care employer and to the FMCS in advance of an actual strike, “[v]iolation of this provision will constitute an unfair labor practice [and t]he failure to give the statutory notice will be remedial under Section 10(j) of the Act [i.e., subject to injunction].” The Committee made one reference to “other employees” in connection with Section 8(g), but this was only to emphasize that health-care employees were not to be disfavored under the new requirement.

With respect to the amendments’ extension of the sixty-day and thirty-day notice periods already required in Sections 8(d)(1) and (3) to ninety days and sixty days respectively, the Committee stated only: “[t]he bill extends the 60 day notice to 90 days and requires the FMCS to receive 60 days’ notice instead of 30 days, in the case of health care institutions.”

Further with respect to the FMCS, in the subsection of its report entitled “Contract Notice Requirements,” the Committee stated only that the bill “provides for mandatory mediation by the parties with the FMCS,” and for initial contract negotiations “requires 30 days’ notice to the FMCS, in the case of collective bargaining involving health care institutions.” In the subsection of the report entitled “Effect On Existing Law,” the Committee addressed bargaining units, secondary employer status, supervisors, recognition picketing, priority case handling—all specific to health care—and the cost of the legislation. This subsection made no reference to any effect on “existing” notice requirements or on the related consequences of noncompliance. In discussing priority case handling, however, the Committee noted that “[m]any of the witnesses before the Committee, including both employee and employer witnesses, stressed the uniqueness of health care institutions” and “the need to avoid disruption of patient care wherever possible.” In consequence, the Committee affirmed:

It was this sensitivity to the need for continuity of patient care that led the Committee to adopt amendments with regard to notice

207 Id. at 11, citing 29 U.S.C. § 160(j).
208 Id. (“[T]he public interest demands that employees of health care institutions be accorded the same type of treatment under the law as other employee[s] in our society, and that the [8(g)] notice not be utilized to deprive employees of their statutory rights. It is clear, therefore, that a labor organization will not be required to serve a ten day notice or to wait until the expiration of the ten day notice when the employer has committed unfair labor practices as in Mastro Plastics Corp v. NLRB, 350 U.S. 270 . . .
209 Id. at 12.
210 Id.
211 Legislative History at 12-14
212 Id. at 13.
requirements and other procedures related to potential strikes and picketing.213

Neither the “Contract Notice Requirements” nor the “Effect On Existing Law” subsection of the committee report made any reference to Section 8(d)’s loss-of-status provision. The report’s section-by-section breakdown, however, stated as follows: “[t]he Amendment substitutes ‘any notice’ in lieu of the ‘sixty-day notice’ in existing law to allow for the additional notice requirements placed on representations of employees of health care institutions. The loss of status is also extended to violations of the newly created ten-day notice period of section 8(g).”214

None of this report language endorsed in any way the application of the loss-of-status provision to violations of Section 8(d)(3) for workers outside health care; still less did it endorse _Fort Smith_. It rather confirmed that the sole purpose for the substitution of “any notice period” for “the sixty-day notice period” in the loss-of-status provision was to “allow for” the “additional” notice requirements created for “employees of health care institutions.”215

The report of the House Committee on Education and Labor on the amendments was practically verbatim of the Senate Committee report.216

The treatment of the amendments on the Senate floor was entirely consistent with the Senate Committee report, because virtually no reference was made by any senator to the loss-of-status provision.217 Attention focused on other provisions in the bill, and on controversial floor amendments which were offered concerning other issues, some of them not limited to health care. In opposing those amendments, the bill’s sponsors were forced to emphasize repeatedly that the bill as reported from the Committee was limited strictly to the health-care industry. This was a major justification for their opposing the floor amendments, approval of which would have jeopardized the bill’s passage. In opposing an
amendment to shift jurisdiction over unfair labor practices from the Board to the federal courts, for example, Senator Taft (R-Ohio) declared: “[t]he issue before us relates solely to the coverage of nonprofit hospitals and similar health care institutions. The bill is tailored specifically to deal with labor-management relations in that area.” Senator Jacob Javits (R-N.Y.), another key sponsor, agreed: “This bill is designed for a specific purpose at a specific time, to stabilize relations in a particular field . . . [w]e have resisted such amendments to this bill, which deals only with the question of access of hospital workers to the NLRB.” The legislative purpose, in short, remained consistently to make law only in the health-care sector.

On the House floor, the emphasis was the same. The key Republican sponsor, John Ashbrook (R-Ohio), did make a reference to the loss-of-status provision, but only in connection with health care.

When the legislation approved by each chamber went to House-Senate conference, the notice requirements and the loss-of-status provision were left as written. In presenting the conference report on the Senate floor, Committee Chairman Harrison Williams (D-N.J.) emphasized:

This legislation is the product of compromise, and the NLRB in administering the act should understand specifically that this committee understood the issues confronting it, and went as far as it decided to go and no further and the Labor Board should use extreme caution not to read into this act by implication—or general logical reasoning—something that is not contained in the bill, its report, and the explanation thereof.

Senator Williams concluded:

My overriding point is that in this carefully tailored legislation

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219 Id. at 12983, 13537; see also id. at 13538.
220 According to Rep. Ashbrook, “The mandated mediation and the ten-day strike notice provide protection to the public, involve the mediation services to help resolve disputes, and give the hospital ample warning should the dispute fail to be resolved. If the union or employees fail to observe the notice provisions, including the ten-day strike notice, they lose their status as employees. In other words, they can be dismissed for striking without giving the public the protection the bill provides.” Id. at 16900.
221 The conference changes were limited to exceptions for employees with religious convictions and a board of inquiry in cases where the FMCS fails to successfully resolve a dispute which threatens to disrupt health care. Legislative History at 348-349.
222 120 Cong. Rec. 22575 (1974) (emphasis added). In denying that a violation of Sec. 8(g) would also violate Sec. 8(b)(3), or that a threat to strike in violation of Sec. 8(g) would be unlawful, Sen. Williams emphasized that “if the committee had intended” either meaning “it would have said so.” Id.
Congress decided to treat the health care industry uniquely in certain respects. It decided to go so far, and no more. I trust this bill will be treated by the NLRB and its General Counsel in the same spirit, and not as an excuse to search out and litigate all possible situations, or substitute its will for that of Congress.\textsuperscript{223}

In emphasizing that Congress “decided to go so far, and no more,” Senator Williams was clearly referring to the application of the amendments to the health-care industry. However, this emphasis on going “so far and no more,” combined with the sponsors’ emphatic limitation of the amendments’ impact to the health-care sector, raises a powerful barrier against inferring a Congressional endorsement of \textit{Fort Smith}. If the Board was barred from reading into the Health Care Amendments “something that is not contained in the bill, its report, and the explanation thereof” even with respect to health-care employees, the subject of the legislation, it would be all the less permissible for the Board to interpret them to affect other workers.

In short, all the available evidence indicates that workers outside health care were unaffected by the change from “the sixty-day period” to “any notice period specified in this sub-section” in Section 8(d)’s loss-of-status provision. Moreover, Congress “[could] not fairly be held to have made such an intrusion on employees’ rights . . . without some more explicit expression of its purpose to do so than appears” in the Health Care Amendments or their legislative history.\textsuperscript{224} The plurality opinion in \textit{Fort Smith} therefore remains the only purported authority for applying the loss-of-status provision to 8(d)(3) violations outside health care.\textsuperscript{225}

\textsuperscript{223} \textit{Id.} at 22576. In a joint statement on the conference report for himself and the chief Democratic sponsor of the amendments in the House, Rep. Ashbrook again referred to the loss-of-status provision and its application to Sec. 8(d)’s “notice periods,” as amended, but solely in connection with violations of Sec. 8(g). \textit{Id.} at 22949.

\textsuperscript{224} \textit{Mastro Plastics}, 350 U.S. 289.

\textsuperscript{225} Nor can Congress’s inaction with respect to the NLRA from 1963 to 1974 be considered “acquiescence” to the ruling in \textit{Fort Smith}. See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, 511 U.S. 164, 186 (1994) (quoting Patterson v. McClean Credit Union, 491 U.S. 164, 175 n.1 (1989)) (“[O]ur observations on the acquiescence doctrine indicate its limitations as an expression of Congressional intent. ‘It does not follow . . . that Congress’s failure to overturn a statutory precedent is reason for this Court to adhere to it. It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [courts’] statutory interpretation . . . .’”); \textit{see also} Helvering v. Hallock, 309 U.S. 106, 121 (1940) (“[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle”).
IV. *Fort Smith Abides*

Since their enactment in 1974, the Board has not addressed the Health Care Amendments’ change in Section 8(d)’s loss-of-status provision with respect to workers outside the health sector. In fact, the Board has continued to rely on *Fort Smith* without even noting that “the sixty-day period” was changed to “any period.” In a 1975 case focusing on whether the amendments’ new notice requirements should be applied retroactively to workers at a nursing home, the Board decided in the negative but implicitly recognized, citing only *Fort Smith*, that a strike following a violation of Section 8(d)(3) after the amendments’ enactment would deprive health-care strikers of the right to reinstatement. At least seven subsequent reported cases to date relying on *Fort Smith* involved situations where strikers outside health care either lost their protected status and their jobs or were put at risk of those consequences by their unions’ negligent failure to comply with Section 8(d)(3). None of these cases questioned the viability of *Fort Smith* or discussed the impact of the Health Care Amendments on the protected status of workers outside health care.

In 2001, *Fort Smith* was applied for the first time to a hiring hall setting.

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226 Grand Lodge of Free and Accepted Masons, Masonic Home, 220 N.L.R.B. 1318 n.3 (1977), aff’d, 548 F.2d 1276 (6th Cir. 1977), cert. denied, 434 U.S. 822 (1977).
227 Mulvaney Mech., Inc. v. Sheet Metal Workers Int’l. Ass Local 38, 288 F.3d 491 (2002) (noting that the union had filed notice with FMCS and with the state mediation agency of the wrong state and that the strikers lost protected status); Douglas Autotech, 357 N.L.R.B. 11 (2011), review pending (D.C. Cir.); Boghosian Raisin Packing Co., 342 N.L.R.B. 383 (2004); Freeman Decorating Co., 336 N.L.R.B. 1 (2001), enf. denied, 334 F.3d 27 (2d Cir. 2003); Fairprene Indus. Prod’s., 292 N.L.R.B. 797, 802-03 (1989), enf’d, 880 F.2d 1318 (2d Cir. 1989) (table), cert. denied, 493 U.S. 1019 (1990) (where employer fired some strikers following union’s failure to comply with Sec. 8(d)(3), Board found the strikers initially lost protection under *Fort Smith* but the employer agreed to reinstate them before announcing the discharges and thereby restored their protected employee status); Sheet Metal Workers Local 49 (Aztech Int’l.), 291 N.L.R.B. 282 (1988), aff’d, 902 F.2d 810 (10th Cir. 1990), cert. granted on other grounds and remanded, 499 U.S. 933 (1991),for consideration in light of Airline Pilots Ass. Int’l v. O’Neill, 499 U.S. 65 (1990) (in duty-of-fair-representation case against union that called a strike less than 30 days after providing notice to the FMCS, the Board assumed the strikers were lawfully discharged, quoting loss-of-status provision without further discussion); The Brandeis School, 287 N.L.R.B. 836 (1987), aff’d as modified, The Brandeis Sch. v NLRB, 871 F.2d 5 (2d Cir. 1989) (where union called strike without filing 8(d)(3) notices, General Counsel had no viable claim that employer acted unlawfully in refusing to reinstate strikers when they offered to return to work). See also Retail Store Employees Local 322 (Town & Country Supermks), 240 N.L.R.B. 1109 (1979) (although union sent notice only to FMCS in the belief that no state mediation agency existed, state department of human resources was such an agency and union violated Sec. 8(d)(3), “potentially” exposing strikers to loss of status).
In *Freeman Decorating Co.*,\(^{228}\) eleven convention and trade show employers in New Orleans who were under separate contract but negotiated jointly with the International Association of Stage and Theatrical Employees Local 39, decided they wanted to change their pool of available workers. Under their contracts with Local 39, they were required to hire all their employees through the local’s hiring hall (almost always for temporary slots), at which the local’s members and non-members were registered.\(^{229}\) When the parties failed to reach new agreements by the time their contracts expired in 2001, the union called a strike and refused to refer registrants from its hiring hall to those employers. Over the next few weeks, as the strike continued, the employers learned that Local 39 had not filed an 8(d)(3) notice with the FMCS. They quickly sent “termination” letters to over 2,600 individuals who had been referred to work for any employers under contract with Local 39 in the recent past, telling these people in effect that they were ineligible for future employment.\(^{230}\) Some of these people had never worked for any of the respondent employers, and nearly half were not even currently registered with the local.\(^{231}\) In fact, none of the approximately 2,200 individuals whom the Board found to be discriminatees was being employed by any of the respondent employers when the strike began.\(^{232}\)

In addition, before and during the contract negotiations preceding the strike, the employers had deliberated among themselves whether it would be legally possible to “fire the union” and use another source for employee referrals, including the United Brotherhood of Carpenters.\(^{233}\) During the strike, several of the employers opened discussions with Carpenters for this purpose.\(^{234}\) When or shortly after they sent out their termination letters, the respondent employers also withdrew recognition from Local 39.\(^{235}\) A few months later, three of them (including the two largest) signed contracts with the Carpenters.\(^{236}\)

A Board majority (Members Wilma Liebman and Dennis Walsh) found that the workers who received termination letters had no employment relationship with any of the employers, and were therefore not those


\(^{229}\) *Id.* at 2-3.

\(^{230}\) *Id.* at 4 n.17.

\(^{231}\) *Id.* at 3-4. The employers used a list of covered beneficiaries of Local 39’s health and welfare fund. Each employer under contract with the local made contributions to the fund for the employees it hired by referral from the union. Many workers on that list had never worked for the respondent employers in Freeman. *Id.* at 4, 7-8.

\(^{232}\) *Id.* at 7.

\(^{233}\) *Id.* at 2-3.

\(^{234}\) 336 N.L.R.B. at 3 (2001).

\(^{235}\) *Id.* at 4.

\(^{236}\) *Id.* at 2-3.
employers’ “employees” subject to loss of protected status under Section 8(d).\textsuperscript{237} In addition, the majority found that the recipients, even if assumed to be employees subject to loss of protected status, had not been shown to have engaged in the strike. In this connection, the Board emphasized that the established hiring procedure “did not involve, or even permit, their soliciting employment from the respondent employers;” that only about half were even registered with the hiring hall at the time of the strike; and that “it is not clear how many even knew which employers were being struck.”\textsuperscript{238} They had therefore not lost the protection of the Act. Their global “discharge” by the respondent employers for the open purpose of “firing the union” and the respondents’ withdrawal of recognition were consequently unlawful.\textsuperscript{239}

In passing, the majority noted that application of the loss-of-status provision here “might seem especially harsh, since it would follow from an apparent ministerial error by the union or its counsel in failing to give notice, as opposed to some action that would suggest culpability on the part of the union or complicity on the part of represented employees.”\textsuperscript{240} The majority also observed that “[t]he parties here appear to have assumed that employees lose their protected status where they engage in a strike which is unlawful solely due to the union’s failure to file timely notification with the FMCS, under the authority of Fort Smith.”\textsuperscript{241} These comments seemed to question, for the first time, the viability of Fort Smith. However, having found that Section 8(d) was not applicable in this setting for other reasons, the majority found it unnecessary to address “the application of Fort Smith to this case.”\textsuperscript{242}

Chairman Peter Hurtgen dissented, finding that the discriminatees were employees covered by Section 8(d) and that they had engaged in an unlawful strike through their union’s refusal to refer them for employment.\textsuperscript{243}

On appeal, a panel majority of the court of appeals agreed with Member Hurtgen and denied enforcement.\textsuperscript{244} It found that Section 8(d)’s loss-of-status provision’s reference to “any employee” “signals that ‘employee’

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\textsuperscript{237} Id. at 5-8.
\textsuperscript{238} Id. at 8.
\textsuperscript{239} Id. at 8-10.
\textsuperscript{240} 336 N.L.R.B. at 6 (2001). The same observation could have been made, of course, in almost every case where an 8(d)(3) infraction has led to the mass firing of strikers or the risk thereof.
\textsuperscript{241} Id. n.26 (full citation omitted).
\textsuperscript{242} Id.
\textsuperscript{243} Id. at 18-19. Chairman Hurtgen did not cite Fort Smith or the Health Care Amendments.
\textsuperscript{244} International Alliance of Stage and Theatrical Employees Local 39 v. NLRB, 334 F.3d 27 (D.C. Cir. 2003).
should receive its broadest statutory definition, which both the Court and the Board have consistently held to include hiring hall registrants and other ‘on call’ workers, regardless of whether they are engaged in a direct employment relationship.” In addition, the court rejected the Board’s finding that the discriminatees had not engaged in a strike within the meaning of Section 8(d) as arbitrary, capricious, and “border[ing] on the absurd.” And in one conclusory sentence, it found that the employers’ withdrawal of recognition after the mass “discharge” had been lawful.

So in at least one U.S. Circuit, the doctrine of *Fort Smith* now applies even to registrants of hiring halls, whether or not they are actually employed, or actively participate in a strike, or ever were employed by any of the struck employers. In the case of a strike following an 8(d)(3) infraction in a hiring hall setting, all of the hall’s registrants lose the Act’s protection unless they affirmatively apply for work to each and every struck employer.

And then, in *Boghosian Raisin*, the Board legitimized a new use for the loss-of-status provision as bequeathed by *Fort Smith*: as an excellent employer’s club for extracting contract concessions from a recalcitrant

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245 *Id.* at 34. In the D.C. Circuit’s view, the Board’s holding “creates an entire category of employees who enjoy NLRA rights but do not shoulder its responsibilities,” and forces employers to choose between “‘terminating’ hiring hall registrants and incurring unfair labor practice charges or acceding to the union’s demands, no matter that they were raised unlawfully.” *Id.* at 34-35. The D.C. Circuit’s expansive construction of “any employee” as used in Sec. 8(d) ran counter to the Supreme Court’s narrow construction in *Mastro Plastics*, which held that “any employee” did not include ULP strikers and that such strikers were not covered by the loss-of-status provision. It also clearly did not occur to the *Freeman* court that the Supreme Court and Board authorities it cited for interpreting “employee” broadly were decided in the context of *protecting* as many workers as possible and therefore favored interpreting an employee exclusion as narrowly as possible. The court also ignored the employer’s privilege of hiring striker replacements, and apparently considered it insignificant that no employer in *Freeman* ever actually sought to hire more than a relatively few hiring hall registrants at any time. The Act’s priority, in the D.C. Circuit’s apparent view, was to punish any individual who had ever been employed by any employer under contract with Local 39. The court however, did not address the scope of the phrase “any notice period specified in this subsection” as it appears in the loss-of-status provision. Nor, like Chairman Hurtgen, did the court cite *Fort Smith* or the Health Care amendments.

246 334 F.3d at 35.

247 *Id.* at 37 (ignoring the implications of *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 788-96 (1990)). *Curtin Matheson Scientific* upheld the Board’s ruling that an employer may not presume that a bargaining unit has lost majority support simply because the unit’s members have been “permanently replaced” in an economic strike, and absent a showing to that effect the employer must continue to recognize the union. *See* Mimbres Mem’l Hosp. and Nursing Home, 342 N.L.R.B. 398, 403 (2004), *aff’d*, 483 F.3d 683 (10th Cir. 2007) (“The Board applies a presumption that newly hired employees support the union in the same proportion as the employees they have replaced, absent strong evidence to the contrary.”).
union.248 With the Board’s endorsement, an alert employer could exploit an unfortunate union’s 8(d)(3) infraction not only to rid itself of a unionized workforce; it could first use the threat of discharge to extract the bargaining concessions it wanted from the union. If the coercion worked, the employer would have achieved its bargaining goals while retaining an experienced but demoralized workforce and a badly discredited union. If the coercion failed, as in Boghosian, the workforce (or its most pro-union members) could be replaced, the union ousted, and the terms of employment unilaterally reduced in the employer’s favor. Also, of course, if the employer discovered before a strike even occurred that the union had failed to file timely notice with the FMCS, the employer was under no obligation—notwithstanding Section 8(d)’s mandate to bargain “in good faith”—to warn the union of its peril and lost nothing by withholding its knowledge until it could threaten the strikers with mass discharge.249

The Boghosian Board completed the logical circle initiated by the Fort Smith plurality: a notice requirement intended to strengthen collective bargaining and to reduce industrial warfare has instead been made an employer’s weapon to curtail union representation, avoid collective bargaining, and return labor relations to the dark ages preceding the NLRA. Board law in this respect is a “construction which serves neither of [the Act’s] aims . . . to substitute collective bargaining for economic warfare and to protect the right of employees to engage in concerted activities for their own benefit.”250 And to apply the post-1974 loss-of-status provision for 8(d)(3) infractions outside health care is to do precisely what Senator Williams, its chief Democratic sponsor, warned the Board not to do—“to read into this act [the Health Care Amendments] by implication—or general logical reasoning—something that is not contained in the bill, its

248 See supra notes 1-25.
249 Boghosian was not the first instance of an employer manipulating Sec. 8(d)’s notice requirements for the purpose of subjecting its workers to mass discharge. In ABC Auto. Prod.’s., 307 N.L.R.B. 248 (1992), enf’d, 986 F.2d 500 (2d Cir. 1992), the employer became aware that although the union had timely mailed its 8(d)(1) notice of intent to modify the expiring contract, delivery of the notice to the employer had (unknown to the union) been significantly delayed in the mail due to negligence by the postal service. As a result, the union was unaware that the sixty-day notice period had not expired by the date it called a strike. Like the Boghosian employer, however, the employer sat on its knowledge and goaded the union into striking, then fired all the strikers. In that instance, the Board found that the employer, by its actions, had waived its right to enforce the loss-of-status provision and acted unlawfully. 307 N.L.R.B. at 249. The Boghosian majority, however, distinguished ABC on the grounds that in the latter case the union was not even guilty of negligence while (“most importantly”) the employer overtly manipulated it into launching the strike. 342 N.L.R.B. at 387. The passive manipulation that occurred in Boghosian, in the majority’s view, was entirely distinguishable.
250 Lion Oil, supra, 352 U.S. at 289.
report, and the explanation thereof.”

The most recent reported case implicating Fort Smith is *Douglas Autotech,* decided in 2011. Here again the union intended to comply with Section 8(d)(3) and thought it had done so before it went on strike; again the notice to the FMCS was not actually sent due to a ministerial error; and again the employer discovered the error and attempted to use the loss-of-status sanction as a bargaining club, then attempted to fire all the strikers. Here, however, a Board majority found that even though the strikers had initially lost their protected status, the employer had effectively restored it during the strike by repeatedly promising to reinstate them in their former positions whenever the strike ended. The employer had thereby “reemployed” the strikers within the meaning of the loss-of-status provision’s proviso that loss of protected status “shall terminate if and when [the striker] is reemployed by such employer.” Their subsequent mass discharge for engaging in otherwise protected activity was consequently unlawful. As a result, 114 unit members narrowly escaped losing their jobs, but *Fort Smith* was again cited without analysis.

**CONCLUSION**

Unions, like other human institutions, remain fallible. This is particularly true of local unions that have no strike experience, and also of physically isolated or newly organized local unions which are still learning their myriad representational responsibilities, often in highly embattled and under-staffed circumstances. And ministerial and clerical errors of omission will be committed on occasion, not only by union officers but by employers and even by federal agencies like the NLRB and the FMCS.

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253 In this case, the human impact of the error on the responsible union official, given its potential consequences, is palpable in the ALJ’s decision: “Winkle’s [the union’s chief negotiator] testimony about the failure to file the required 30-day notice was quite dramatic. Twice during his account, he struggled to keep his composure. It was evident that his role in precipitating these unfortunate events has had a profound effect on him.” 357 N.L.R.B., No. 111, slip op. at 21 n.13.
254 *Id.* at 2-3.
255 *Id.* at 4-6.
256 *Id.* at 3 n.7.
257 *Id.* at 5-8. Douglas Autotech and its holding were similar to Fairprene Industrial Products, 292 N.L.R.B. 797; see supra note 228.
258 357 NLRB No. 111, slip op. at 4. The majority, moreover, specified in effect that it was not narrowing the holding in Boghosian: “We do not hold that reemployment will occur whenever an employer responds to an unlawful strike with anything other than immediate termination.” *Id.* at 8 n.23.
Unions outside the health sector will unknowingly fail to file timely FMCS notice in the future, and their union members will again go on strike in fatal ignorance. In most cases these infractions will have no impact on resolving the underlying bargaining dispute.① Are they to be deprived of their jobs and their vulnerability exploited by their employers in the same way as their predecessors since 1963?

As noted earlier, the Board has never held that the Health Care Amendments’ replacement of “the sixty-day period” with “any notice period specified in this subsection” in Section 8(d)’s loss-of-status provision was a Congressional endorsement of the plurality opinion in Fort Smith.② For that matter, the Board has never discussed the impact of that change on workers outside health care. But there is no need for the Board to address that question as long as it continues to rely on Fort Smith as its operative precedent. If the Board ever reconsiders Fort Smith, of course, it will also have to address the 1974 change in the loss-of-status provision.

When the Board decides to review an important precedent for possible reversal and invites interested parties to file briefs, it likes to emphasize that it “continues to believe that it is its obligation under the Act to continually evaluate whether its decisions and rules are serving their statutory purposes.”③ A precedent which subjects untold numbers of innocent workers outside the health care sector to loss of the Act’s protection and their jobs for engaging in what is supposed to be protected activity would seem to qualify for such evaluation. This is particularly true where the precedent did not even command a Board majority when it was issued. “Unlike a good wine, a mistake does not get better with age.”④

The Board is barred from abandoning the Fort Smith plurality’s interpretation of Section 8(d)’s loss-of-status provision for non-health care workers only if Congress, in the Health Care Amendments, prohibited it from doing so. As shown above, Congress did no such thing. The Board should therefore correct this error in labor law when the next opportune case arises. It should do so even if it is uncertain whether that correction would today be upheld in federal court. The increasing hostility to unions, to the Board, and even to the Act shown by ideologically driven federal judges in recent years does not displace the Board’s responsibility to act on behalf of the principles and policy goals embodied in the NLRA: to encourage and protect collective bargaining for the purpose of maintaining industrial peace. If American labor law is to become an instrument for achieving social Darwinism, that should happen over the Board’s

① See supra note 30.

② See supra Part III(B).


opposition; not by its failure to correct its own mistakes.