Capital Medical Center *and* UFCW Local 21. Case 19–CA–105724

August 12, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On July 17, 2014, Administrative Law Judge Eleanor Laws issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.[3]

This case involves allegations that the Respondent unlawfully interfered with informational picketing by off-duty employees at the Respondent's nonemergency entrances.[4] The judge found that the Respondent violated Section 8(a)(1) by attempting to prevent the off-duty employees from picketing, threatening the employees with discipline and arrest for engaging in picketing, and summoning the police to the scene. We agree with the judge, for the reasons she states and those set forth below.

Facts

The Respondent is an acute care hospital. The Union, UFCW Local 21, has been the certified collective-bargaining representative of the Respondent's technical employees for about 14 years. The parties' collective-bargaining agreement expired on September 30, 2012, and in September, the Respondent and the Union began bargaining for a successor contract. As of May 2013, a new agreement had not been reached. Frustrated with the state of the negotiations, the Union and some of the employees planned to engage in informational picketing and handbilling on May 20, 2013, the day before a scheduled bargaining session. The goal of the activity was to educate the public and encourage the Respondent to discuss some key issues and settle on a contract. On May 9, the Union provided the Respondent with a notice, pursuant to Section 8(g) of the Act, of its intent to engage in picketing and handbilling on May 20. The activity was scheduled to take place from 6 a.m. to 6 p.m.

The employees decided to distribute handbills at two entrances: the main lobby entrance of the hospital and the physicians' pavilion entrance.[5] The handbillers were instructed to stand to the sides of the doors, not to block entrances, and to avoid emergency entrances and any areas that could impede patient care.

On the morning of May 20, a group of picketers gathered on the public sidewalk adjacent to the hospital driveway.[6] At 6 a.m., 20–25 employee picketers dispersed to different locations on the public sidewalk. Until about 4 p.m., no picketing took place at the hospital entrances. From 6 a.m. until about 2 p.m. there were two off-duty employees handing out handbills at the front lobby entrance, two doing the same at the physicians' pavilion entrance, and others carrying picket signs on the sidewalk bordering the hospital. Between about 3:30 and 4:15 p.m., about 50–60 employees picketed and

[1] No exceptions were filed to the judge's recommended dismissal of allegations that the Respondent unlawfully denied employees access to its property to engage in handbilling or other nonpicketing activity.

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

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by threatening the employees with discipline and arrest for engaging in picketing activity, we do not rely on the judge's statement that "Arland felt threatened by Bunting."

[3] In adopting the judge's recommended remedy, we do not rely on her citation to *Teamsters Local 25*, 358 NLRB 54 (2012).

We shall substitute a new notice to conform to the violations found by the judge and to the Board's standard remedial language.

[4] For purposes of this decision, we assume arguendo that the employees' activity constituted picketing within the meaning of the Act.

[5] The handbills stated:

> OUR PATIENTS MATTER
>
> We are the health care providers who care for patients at Capital Medical Center.
>
> Right now, we are in contract negotiations with our employer, but wanted to let you know that we are having difficulty reaching a compromise. Management continues to refuse to fix problems that leave us short-staffed and cause us to miss our breaks and meals. In addition, they have been unwilling to support fair wage increases.
>
> We have already voted down a prior offer from management and are back in negotiations.
>
> THANK YOU
>
> Supporting hospital workers means standing up for the middle class values that respect the dignity of hard work. This includes fair wages, fair benefits, and dependable hours.

[6] The picket signs were two feet by three feet, and stated "Capital Medical Center Workers" at the top and "Informational Picket, UFCW 21" at the bottom. The signs also contained phrases such as: "Fair Wages," "Fair Contract Now," and "Respect Our Care."

handbilled on the sidewalk. The Respondent did not attempt to interfere with this activity.

At about 4 p.m., unit employees Gina Arland and Derek Durfey went to the main lobby entrance with handbills and picket signs. Arland stood about 10–12 feet from the entrance and Durfey stood to her right, farther away from the entrance. Durfey held two picket signs and did not speak with any patients or visitors. Arland tried to remain in line with the outside pillars alongside the entryway, and went past the pillars only when she was handing a handbill to someone. Arland initially attempted to hand out handbills while holding a picket sign, but she ultimately ceased handbilling because she found it too cumbersome. Afterwards, she just held the picket sign. Neither employee patrolled, chanted, or blocked the entrance. The employees were simply standing in the vicinity of the hospital entrance, holding picket signs with the messages "Respect Our Care" and "Fair Contract Now."

At around 4 p.m., Heather Morotti, the Respondent's director of human resources, received a report that employees were picketing adjacent to the front lobby entrance. Security Manager Bruce Hillard, accompanied by several security guards, approached the employees. Hillard told Arland she was welcome to stay at the doorway with handbills, but she was not permitted to stand on hospital property with her picket sign. He politely asked her to leave and she politely declined. This scenario repeated itself several times during the next hour.

Morotti and Glenn Bunting, an attorney who was the hospital's lead bargaining negotiator, followed behind Hillard the third or fourth time he approached the picketers. Bunting told Arland she could be on the property with leaflets but not with her sign. At that point, Durfey went to the sidewalk to get Jenny Reed, the union official who was in charge of the activity. Reed went to the main entrance, accompanied by fellow union representative Cathy MacPhail. Reed expressed her belief that the employees had the right to picket by the entrance, and after a brief conversation outside, Bunting asked Reed and MacPhail to come inside to Morotti's office. There, Bunting told Reed and MacPhail that the employees needed to leave, and stated that they could face discipline if they remained.

In reply, Reed told Bunting and Morotti that the Union's attorney, James McGuinness, had told her the employees had the right to picket outside the hospital doors. Bunting called McGuinness and expressed his disagreement. Bunting told McGuinness that if they could not resolve the situation, the Respondent's options were to discipline the employees or call law enforcement.

After the phone call, Morotti consulted with the Respondent's CEO and they decided they would not issue discipline, but would call the police at 5 p.m. if the picketers were still present near the entrances.

Shortly after the meeting and phone call, Bunting and Morotti returned to the hospital entrance, and Bunting told Arland that she should not be there. Arland recalled being told that she, not the Union, could get in a lot of trouble.[7] Durfey and union steward (and employee) Allison Zassenhaus, who had been handbilling near the pavilion entrance, heard Bunting mention calling the police. Durfey returned to the sidewalk after Arland told him that he should leave. At that point, Zassenhaus took Durfey's picket sign.

Bunting and Morotti went back inside. At 4:59 p.m., James Sen, a hospital security officer, called the Olympia Police Department. At 5:11 p.m., Olympia Police Department Patrol Sergeant Dan Smith arrived at the hospital. Bunting and Morotti came out and told Smith they wanted the picketers removed from the hospital's premises. Smith spoke to Reed, who told him they were almost done picketing for the day and asked if he was going to arrest anyone. Smith went back and talked to Bunting and Morotti, and told them he could not force the picketers to leave because they were not being disruptive and they were not blocking doors or preventing people from entering the hospital. He encouraged the parties to resolve their differences. Because the picketing was scheduled to end at 6:00 p.m., and that time was approaching, the picketers decided to leave. Smith left the hospital at 5:49 p.m.

There were no confrontational interactions between the picketers and anyone entering or exiting the hospital entrances. Arland recalled that there was not much traffic at the main lobby entrance when she was there with her picket sign, and Zassenhaus testified that fewer than five individuals entered or exited the hospital during the time she carried her picket sign.

Discussion

Applicable Test

The complaint alleges that the Respondent violated Section 8(a)(1) by prohibiting employees from picketing near the hospital's main lobby and pavilion entrances. The judge concluded, after an extensive review of the

[7] The judge referenced this testimony in setting forth the facts, but noted that Arland "could not recall the precise words." Later in her decision, the judge stated that Arland recalled that "Bunting said words which implied to her" that she could be disciplined. Although the judge did not resolve precisely what was said, she found that "[a]t the very least, it is clear Bunting told Reed discipline could ensue" and that "Reed then conveyed to Arland that the Hospital could hold her accountable for her actions."

case law, that *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945)[8] and its progeny provided the applicable analytical framework. In so concluding, the judge noted that "the individuals who engaged in the Section 7 activity at the Hospital on May 20 were employees, the disputed Section 7 activities took place on property the Hospital owned and controlled, and the prohibition targeted the specific Section 7 activity of carrying picket signs at the hospital's nonemergency entryways." Although she acknowledged that *Republic Aviation* did not involve picketing, the judge found, relying on *Town & Country Supermarkets*, 340 NLRB 1410, 1413–1414 (2004), that *Republic Aviation* was also applicable when employees engaged in picketing. We agree with the judge's analysis.

In *Town & Country*, the Board applied *Republic Aviation* and found that the employer violated the Act by calling the police, threatening arrest, and causing the arrest of off-duty employees who were picketing and handbilling at the front entrances of its stores. The Board in *Town & Country* did not distinguish between handbilling and picketing, finding the employer's prohibition of both activities on its property unlawful in the absence of a justification based on its need to maintain order or discipline. See *Town & Country*, 340 NLRB at 1413–1414. Thus, as found by the judge, *Town & Country* supports applying *Republic Aviation* and its progeny to cases involving picketing by off-duty employees, and we do so here.[9]

[8] Under *Republic Aviation*, employers may not bar employees who are not on working time from engaging in solicitation or distributing literature in nonworking areas of its property, unless such a bar is necessary to maintain discipline and production.

[9] The dissent, observing that both picketing and handbilling were at issue in *Town & Country*, argues that *Town & Country* "cannot reasonably be construed to establish that . . . a picketing-only prohibition is unlawful." This argument disregards the holding of *Town & Country*. The Board in *Town & Country* did not find it necessary or appropriate to apply different analyses to each activity, but instead, applied *Republic Aviation* to both. The dissent cites no authority for the proposition that, *Town & Country* notwithstanding, picketing is excepted from the general rule of *Republic Aviation*, and we are aware of none.

Lacking authority for its position, the dissent leaps from an undisputable but limited proposition—that "picketing is qualitatively different from other modes of communication," citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council*, 485 U.S. 568 (1988)—to the surprising conclusion that all picketing on the premises of a hospital can lawfully be prohibited, including the disputed picketing in this case, consisting of two employees holding signs near a nonemergency entrance without any patrolling, chanting or obstruction of the entrance. While purporting to balance the employees' Sec. 7 right to picket with the particular interests of a hospital employer, the dissent ignores the fact that these interests have already been balanced by Congress, with a very different result.

In the 1974 Health Care Amendments, Congress extended to employees of nonprofit hospitals the protections of the Act, "including the right lawfully to picket and strike." *Laborers Local 1057 v. NLRB*, 567 F.2d 1006, 1011 (D.C. Cir. 1977). In doing so, Congress recognized the adverse effects that picketing might have on patient care, and explicitly balanced the interest in limiting such effects against the workers' newly granted rights. The result was Sec. 8(g) of the Act, which required 10-day advance notice to the hospital of any picketing or strike. Senator Harrison A. Williams, Jr., sponsor of the bill that was ultimately enacted and chairman of the committee that drafted it, emphasized the balance struck by Congress:

> [T]his legislation is the product of intensive efforts over a long period of time by the Congress and the parties to focus upon adapting general principles of the Taft-Hartley Act to the concrete problems that are encountered on a day-to-day basis in the health care industry. The Senate Committee strove for a balanced solution, and the language of its bill and its report and the explanations thereon by its managers, reflect the precise results of its studied effort to deal specifically and in an even handed manner with these problems. This legislation is the product of compromise, and the National Labor Relations Board 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.

120 Cong. Rec. 22575 (1974), *reprinted in* S. Comm. on Labor and Public Welfare, Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974, at 361 (1974). Both the plain language of Sec. 8(g) and the legislative history of the provision show that Congress contemplated picketing of hospitals once the notice requirement was satisfied, with no suggestion that picketing on hospital property, without regard to the circumstances, would be strictly prohibited. Yet under the dissent's "balancing," all picketing anywhere on hospital property would effectively be stripped of the protection Congress intended employee picketing to enjoy: if, as the dissent would have it, the quiet, two-person, exterior picket at issue here could lawfully be prohibited, there is, as a practical matter, no on-premises picketing that would ever be found lawful. This is just the sort of "reading into" against which the amendments' sponsor warned.

The dissent mischaracterizes today's decision as holding that on-premises picketing must be permitted "to the same degree as on-premises solicitation and handbilling." We can easily envision circumstances, not present here, where picketing on hospital property would disrupt operations or interfere with patient care while solicitation and distribution would not. In such cases, a restriction on picketing would be lawful.

In support of its position that the Act requires a total ban on on-premises picketing, the dissent argues that picketing "has a substantially greater impact on legitimate employer interests" and is "substantially more coercive and disruptive than other types of protected activity," citing *DeBartolo*, supra. However, the Court in *DeBartolo*, while observing that picketing is "qualitatively different" from other modes of communication, did not state that it is necessarily or inherently "coercive" or "disruptive." Indeed, the Court stated that its decision in *NLRB v. Fruit Packers*, 377 U.S. 58 (1964) (*Tree Fruits*), "makes untenable the notion that *any* kind of . . . picketing . . . is 'coercion' within the meaning of § 8(b)(4)(ii)(B) if it has some economic impact on the neutral." 485 U.S. at 579 (emphasis in original). In fact, picketing is often neither coercive nor disruptive; we need look no further for an example than the peaceful display of picket signs by two employees that occurred in this case. There is nothing in the nature of picketing per se that would support a conclusion that *Republic Aviation* is inapplicable to that activity.

We are not, as suggested by the dissent, invalidating all restrictions on employee on-premises hospital picketing. Under the longstanding holding of *Republic Aviation*, such restrictions—like those on other types of employee Section 7 activity—are valid if the employer shows that they are necessary to maintain discipline and production. *Republic Aviation* itself explicitly required a balance between protection of employees' Section 7 rights and employers' property rights and business interests. In our view, *Republic Aviation* adequately accommodates and protects employers' interests, allowing for restrictions on employee Section 7 activity where the employer meets its burden to show that such a restriction is necessary to maintain discipline and production.[10]

In recognition of the special considerations involved in an acute care hospital setting, the Board and courts have modified the *Republic Aviation* presumption in such cases, holding that an employer may prohibit Section 7 activities in non-patient care areas if it shows that the prohibition is needed to prevent patient disturbance or disruption of health care operations. *NLRB v. Baptist Hospital*, 442 U.S. 773, 781–787 (1979); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500 (1978).[11] We find this test applicable in the instant case.[12]

In arguing that *Town & Country* does not support our application of *Republic Aviation* to picketing, the dissent also notes that the picketing in *Town & Country* occurred outside the entrances to stores that were tenants of shopping malls rather than owners of the premises, and that the employer in *Town & Country* "did not maintain any rule imposing lawful constraints on solicitation and distribution." These distinctions do not, in our view, limit the applicability of *Town & Country*. To the extent the dissent suggests that the employer in *Town & Country*, as a tenant, may have lacked a sufficient property interest to exclude picketers, there is nothing in the Board's decision to indicate that it relied on such a rationale. And we fail to see how the existence of a solicitation/distribution rule here governing activities on working time or in work areas would have any relevance to activities by off-duty employees in nonwork areas.

[10] In purporting to balance the parties' competing interests, the dissent minimizes the strength of the employees' Sec. 7 interest. The dissent argues that because employees have the right to engage in picketing on public property, it is "unreasonable" to conclude that employees have an "equally compelling" interest under Sec. 7 to engage in on-premises picketing. That argument contravenes longstanding, fundamental principles of American labor law. Like it or not, picketing is an activity protected by Sec. 7. There is nothing "unreasonable" in stating that employees' right to engage in Sec. 7 activity should not be restricted absent a showing by the employer that the prohibition is necessary to maintain discipline and production. See, e.g., *Republic Aviation*, 324 U.S. at 802–804 & fn. 7, 8, 10. The dissent further argues that we "never define[ ] the extent of the right to engage in on-premises picketing." But there is no reason in the context of this case to do so. Nothing in the Act supports the argument that picketing loses its protection simply because it occurs on the employer's property.

In arguing that our application of *Republic Aviation* to picketing does not adequately protect employer property rights, the dissent relies on a 40-year-old Board holding that has long since been superseded. *GTE Lenkurt, Inc*., 204 NLRB 921 (1973), overruled on other grounds in *Resistance Technology, Inc*., 280 NLRB 1004, 1007 fn. 7 (1986), enfd. 830 F.2d 1188 (D.C. Cir. 1987). In *GTE Lenkurt*, the Board found that a rule prohibiting off-duty employees from "enter[ing] the plant or remain[ing] on the premises" was "presumptively valid absent a showing that no adequate alternative means of communication are available." Id. at 921. In so finding, the Board reasoned that off-duty employees are "more nearly analogous" to non-employees than employees and are therefore subject to the principles applicable to non-employees with respect to access to an employer's premises. Subsequently, however, in *Nashville Plastic Products*, 313 NLRB 462, 463 (1993), the Board specifically rejected this reasoning and held that off-duty employees should not be treated like non-employee union organizers for purposes of access. In *Nashville Plastic Products*, the Board observed that the Board in *Tri-County Medical Center*, 222 NLRB 1089 (1976), "narrowly construed" the holding of *GTE Lenkurt* in order to prevent undue interference with the rights of employees under Section 7 of the Act" and established a test for determining whether a no-access rule for off-duty employees is valid. The Board in *Tri-County* held that such a rule is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. The Board also held that, except where justified by business reasons, a rule that denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid. In light of *Tri-County Medical Center* and *Nashville Plastic Products*, *GTE Lenkurt* is no longer good law with respect to the validity of an off-duty no-access rule. The dissent, conceding that *GTE Lenkurt* was "narrowly construed" in *Tri-County*, nevertheless relies on it in support of the principle that the legality of off-duty no-access rules rests on a balancing of the employer's property rights against the impact of the rule on employee Sec. 7 rights. We have no quarrel with that principle. But, as the Board has previously explained, that balance is found by application of *Republic Aviation* and its progeny. See, e.g., *Saint John's Health Center*, 357 NLRB 2078, 2081–82 (2011).

[11] See, e.g., *Harper-Grace Hospitals*, 264 NLRB 663, 665 (1982), enfd. 737 F.2d 576 (6th Cir. 1984), in which the Board, applying *Beth Israel Hospital v. NLRB*, supra, found that the employer could not lawfully restrict distribution of literature at hospital entrances by off-duty employees where there was no showing of disruption of patient care or disturbance of patients.

[12] The dissent asserts that we "discount" cases holding that "hospitals have an especially important interest in preventing the on-premises picketing of patients and visitors." To the contrary, we have considered that interest, but we find that it is adequately protected by *Baptist Hospital* and *Beth Israel Hospital.*

The dissent relies on *Providence Hospital*, 285 NLRB 320 (1987) in support of the argument that restrictions on picketing are especially warranted when the employer is a hospital. For the reasons set forth by the judge, *Providence Hospital* is no longer good law because "it turned on application of precedent that has since been overruled." We do not disagree that under certain circumstances, picketing on hospital property could disturb patients or disrupt patient care and that prohibiting such picketing could be necessary in order to prevent such disturbance or disruption. But there is nothing in the Act or the decisions of the Board or the courts to support the dissent's categorical assertion that picketing by off-duty employees anywhere on the exterior grounds of a hospital is so inherently disturbing or disruptive as to warrant prohibition without proof. For that reason, the dissent errs in asserting that a blanket limitation of hospital picketing to the public sidewalk adjacent to the hospital is "dictated by our statute." Rather, consistent with the 1974 Health Care Amendments and our treatment of other Sec. 7 activi-

Application of Baptist Hospital/Beth Israel Hospital to the Facts

Applying *Baptist Hospital* and *Beth Israel Hospital* to the facts presented here, we agree with the judge that the Respondent did not meet its burden of showing that prohibiting the type of picketing that occurred in this case was necessary to prevent patient disturbance or disruption of health care operations. The judge noted, and we agree, that the only evidence of any potential disruption caused by the picketing is that hospital official Morotti heard one visitor state that he usually did not cross picket lines, but that he had to in order to visit a patient.[13] There was no other evidence regarding the likely impact, if any, of the Section 7 activity. In particular, the judge found no evidence that the employee picketers "patrolled the doorway, marched in formation, chanted or made noise, created a real or symbolic barrier to the entryways, or otherwise engaged in behavior that disturbed patients or disrupted hospital operations." The dissent does not dispute these findings. The judge further noted that Sergeant Smith testified that the employees' behavior was not disruptive, he had no basis for removing them from the property, and he would not have arrested them if requested.

We agree with the judge's finding of violations. There was no evidence in this case that merely holding a stationary picket sign near the entrance to the hospital was likely to be any more disruptive or disturbing than the distribution of literature, which the Respondent did not restrict. Although the Respondent argues that the picketing here was disruptive or had the potential to disturb patients, those claims were not supported by the record. "In the healthcare context, establishing 'special circumstances' requires evidence that a ban is 'necessary to avoid disruption of healthcare operations or disturbance of patients.'" *HealthBridge Management, LLC v. NLRB*, 798 F.3d 1059, 1068 (D.C. Cir. 2015) (quoting *Beth Israel Hospital*, 437 U.S. at 507). The Respondent, having based its argument on speculative and exaggerated contentions about potential harm that could result from the picketing, has not succeeded in making the required showing. Although we recognize the importance of hospitals' maintaining a therapeutic environment, we conclude, in this case, that the Respondent did not meet its burden to show that the ban on off-duty employee picketing at the hospital entrance was necessary to maintain discipline and production or that the prohibition was necessary to prevent patient disturbance or disruption of health care operations.[14]

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ty in a hospital setting, it is appropriate to place on the employer the burden of showing a likelihood of disturbance or disruption in a particular case. The Respondent has not met its burden here.

The dissent berates us for taking a "one size fits all" approach by applying *Republic Aviation*, *Baptist Hospital*, and *Beth Israel Hospital* to picketing as well as solicitation and distribution. It is the dissent, however, which adopts such an approach by stating categorically that no picketing on the premises of a hospital should ever be allowed, without regard to whether it would disturb patients or disrupt patient care. The dissent further criticizes our approach because it "contemplates case-by-case determinations," which it contends will fail to provide "clear guidance to employers and employees alike." But it is inherent in *Republic Aviation* that balances will have to be struck case by case; the alternative is simply eliminating the protection of Sec. 7 activity. Under the approach historically taken by the Board and the courts to analogous questions, the interests of the hospitals and their patients are adequately protected because hospitals have the opportunity to justify restrictions on employees' Sec. 7 activity they deem necessary to protect the welfare of the patients. The dissent's blanket "one size fits all" prohibition is an unnecessary and unwarranted curtailment of employees' Sec. 7 rights.

[13] The Respondent argued that "[b]y positioning picketers at the Main Entrances of the Hospital and causing patients and family members to walk (or to be pushed in a wheelchair) past those picketers patrolling at the doorways, the Union subjected these most vulnerable Hospital patrons to additional stress that was both undeserved, and unnecessary for the accomplishment of the Union's goals." The judge found that there was no evidence the picketers 'patrolled' the doorways." She also noted that the evidence shows that the picketers stationed themselves outside the main pathways to the doors, and only stepped into the entryways briefly when handbilling.

[14] Relying on *Beth Israel Hospital v. NLRB*, 437 U.S. at 505, the dissent argues that the Board "must consider alternative means of communicating" before invalidating the picketing ban in this case and states that we disregard the necessity of conducting an "alternative means" analysis in a hospital setting. Even assuming that *Beth Israel Hospital* requires us, in a healthcare setting, to consider the availability of alternative locations in the facility where communications may occur, see *Purple Communications, Inc.*, 361 NLRB No. 126, slip op. at 13 fn. 62 (2014), we do not view the availability of locations off the employer's property as an adequate alternative in cases involving employee Sec. 7 activity. Cf. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), observing that the holding in *Republic Aviation*, applicable to employee Sec. 7 activity, "obtained even though the employees had not shown that distribution off the employer's property would be ineffective." 437 U.S. at 571 (citing *Republic Aviation*, 324 U.S. at 798–799). The dissent has not suggested that there are other areas on the Respondent's property where employee picketing is allowed and would have been effective in communicating with the target audience.

In considering alternative means, the dissent observes that employees were allowed to engage in on-premises handbilling. Contrary to the dissent, we do not view handbilling as an alternative means sufficient to justify prohibiting the picketing that occurred here. Handbilling, by its nature, requires the intended recipient to take the handbill and read it in order for the message to be communicated. By contrast, the picket signs in this case facilitated communication with the hospital's patrons because even those who did not take a handbill would have been able to see the employees' message. We do not believe that employees should be required to forgo their chosen method of communication, in this case, engaging in a quiet, stationary two-person picket outside of the hospital building, when the Respondent has not met its burden of showing that such restriction was necessary to prevent patient disturbance or disruption of health care operations. The dissent erroneously claims that we turn the alternative means analysis upside down by finding that picketing must be permitted here *because* it is more "confrontational" than handbilling. We do not so find. Furthermore, the limited picket-

For these reasons, as well as those set forth by the judge, we find that the Respondent violated Section 8(a)(1) by attempting to prevent off-duty employees from picketing, threatening the employees with discipline and arrest for engaging in picketing, and summoning the police to the scene.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Capital Medical Center, Olympia, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

Dated, Washington, D.C. August 12, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

The Respondent, an acute care hospital, permitted employees to engage in *handbilling* on private property at entrances to the hospital. However, employees then engaged in *picketing* at the same locations, and they refused to cease picketing when the hospital advised them that picketing on hospital property was not permitted.

I agree that the employees had a right to engage in solicitation and handbilling on the employer's premises, but I disagree with my colleagues' conclusion that this means employees also had a Section 7 right to engage in on-premises picketing, and I disagree with the finding that Respondent violated Section 8(a)(1) of the Act by prohibiting the on-premises picketing. In my view, this holding contradicts Supreme Court precedent recognizing that picketing is qualitatively different from handbilling. I also believe my colleagues improperly discount Board and court cases holding that hospitals have an especially important interest in preventing the on-premises picketing of patients and visitors. For these reasons, I respectfully dissent.

Facts

While negotiations for a collective-bargaining agreement were underway, the Union notified the Respondent that it would engage in picketing and handbilling on May 20, 2013. On that date, employees picketed on a public sidewalk bordering the hospital, adjacent to the hospital driveway. Other employees leafleted on the Respondent's premises outside the main lobby entrance and the entrance to the physician's pavilion building. The Respondent did not interfere with these activities in any manner. Later in the day, between two and four employees carried picket signs and stationed themselves at the main lobby and physician's pavilion entrances. Initially, at least one of the pickets approached individuals as they entered and left the hospital to hand them a leaflet. Subsequently, the pickets ceased leafleting but remained at the entrances with their picket signs. The Respondent informed the pickets that they were welcome to stay at the doorway and engage in leafletting, but they were not permitted on hospital property with the picket signs. After the pickets repeatedly refused to leave, the Respondent sought to have them removed by the police.[1]

Analysis

The judge found that the Respondent's efforts to prevent picketing on hospital property violated the Act. She specifically rejected any balancing of the employer's property rights and business interests against the employees' Section 7 rights. Instead, relying solely and entirely on one case—*Town & Country Supermarkets,* 340 NLRB 1410 (2004)—the judge concluded that because the employees were permitted to be on the hospital's premises and had a Section 7 right to solicit there while off duty and distribute literature in nonworking areas, they necessarily had a Section 7 right to engage in picketing on hospital property as well. While recogniz-

ing at issue in this case was by no means "confrontational." Indeed, the quiet, stationary, two-person picket was even less confrontational than the permitted handbilling in an important respect: it involved no direct contact with the recipient of the handbill. Thus, even if we were to consider the availability of alternative means of communicating in balancing the competing interests in this case, we would find no adequate alternative means and would find in favor of the employees' Sec. 7 right to engage in protected activity on the Respondent's property. Cf. *UPMC*, 362 NLRB No. 191, slip op. at 4–5 fn. 13 (2015).

[1] I do not dispute the judge's findings, adopted by the majority, that the pickets did not march in formation, chant or make noise. The picketing here was peaceful, but it is uncontroverted that the conduct still constituted picketing. Thus, the instant case is materially different from cases in which a divided Board ruled that the conduct at issue—the erection and display of stationary banners—was not picketing for purposes of Section 8(b)(4)(B) of the Act. See, e.g., *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB 797 (2010); *Carpenters Local 1506 (Marriott Warner Center Woodland Hills)*, 355 NLRB 1330 (2010); *Southwest Regional Council of Carpenters (Richie's Installations)*, 355 NLRB 1445 (2010); *Southwest Regional Council of Carpenters (New Star)*, 356 NLRB 613 (2011). I do not reach or pass on the merits of the position espoused by the Board majorities in those cases.

ing that "special considerations" apply to Section 7 activity in a hospital setting, the judge found those considerations inapplicable because the picketing did not occur in an immediate patient care area. In the judge's view, the Respondent failed to show that its prohibition of picketing at the entrances was needed "to prevent patient disturbance or disruption of health care operations."

The majority affirms the judge's conclusions, though their analysis differs from hers in certain respects. They correctly acknowledge that in each case where the lawfulness of a restriction on the exercise of Section 7 rights is at issue, those rights must be balanced against the employer's property rights and business interests. Like the judge, however, my colleagues rely on *Town & Country Supermarkets*, alone, for the proposition that the same balance that applies to restrictions on handbilling and solicitation necessarily applies when an employer restricts on-premises picketing. In addition, the majority asserts that Congress mandated that balance in Section 8(g) of the Act, which requires labor organizations to provide advance notice before engaging in any strike, picketing, or other concerted refusal to work at any health care institution. For the following reasons, I respectfully disagree with the latter two propositions.

First, my colleagues and I agree that employee Section 7 rights and employer property rights and business interests must be balanced in each case. Regarding the balance to be struck between the Section 7 right of self-organization and employers' business interests, the Supreme Court in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–798 (1945), stated that the Board's responsibility includes the need to

> work out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.

Section 7 rights must also be balanced against employer property rights, as the Court held in *NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105, 112 (1956): "Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." While a "different balance" is called for in cases involving employees as opposed to nonemployees, *Hudgens v. NLRB*, 424 U.S. 507, 521 fn. 10 (1976),[2] the competing rights still must be balanced in "cases involving *employee* activities," *Lechmere v. NLRB*, 502 U.S. at 537 (emphasis in original). See also *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967) (referring to the Board's "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy"); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228 (1963) (actions that undermine or discriminate against the exercise of NLRA-protected rights may nonetheless be justified on the basis that they "were taken in the pursuit of legitimate business ends and . . . to accomplish business objectives acceptable under the Act"); *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 13–14 (2015) (Member Miscimarra, dissenting in part) (stating that the Board has the responsibility to discharge the "delicate task" of "weighing the interests of employees in concerted activity" against the "interests of the employer" and "the business ends to be served by the employer's conduct") (quoting *Erie Resistor*, 373 U.S. at 228–229); *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 11–21 (2016) (Member Miscimarra, concurring in part and dissenting in part) (reviewing the need to balance legitimate justifications against the impact of facially neutral work rules on Section 7 rights).

My colleagues and I part company, however, when they take the standards governing on-premises solicitation and distribution and apply them without change to on-premises picketing. The Board developed its standards for solicitation and literature distribution after carefully considering both the Section 7 interests of employees and the rights and interests of employers. The Board recognized that permitting a complete prohibition of workplace solicitation and distribution would have a substantial adverse impact on Section 7 activity, but unrestricted solicitation and distribution would unduly interfere with an employer's legitimate control over production, discipline and property interests. Accommodating these competing considerations, the Board concluded it was presumptively lawful for employers to adopt rules restricting solicitation to nonworking time (such as lunch or break periods) and restricting literature distribution to nonworking time and nonworking areas (such as break rooms).[3] Because these restrictions are presumptively

[2] Where nonemployees seek access to an employer's property, the Board may *not* engage in a balancing of rights and interests because Sec. 7 only gives rights to employees, not to nonemployees. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992).

[3] *Peyton Packing Co.*, 49 NLRB 828, 843 (1943) (addressing no-solicitation rules), enfd. 142 F.2d 1009 (5th Cir. 1944), cert. denied 323 U.S. 730 (1944); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962) (addressing no-distribution rules). As the Board has observed, "employees cannot realize the benefits of the right to self-organization

lawful, employers may implement them without any showing that they are necessary to maintain discipline or production in the particular circumstances of their workplace. Broader restrictions on solicitation or distribution, in contrast, are presumptively unlawful and must be justified by proof that they are necessary to maintain production or discipline.

However, this case involves *picketing*, not solicitation or distribution.[4] Nothing in *Republic Aviation* or any other Supreme Court case suggests that *picketing* on an employer's premises is entitled to the same protection as solicitation and distribution.[5] Indeed, especially because the Board and the courts require employers to permit employee solicitation and handbilling on the employer's property (subject to the lawful restrictions referenced above), and employees have the right to engage in picketing on public property to communicate their message to other employees and the general public, it is unreasonable to conclude that employees have an equally compelling interest under Section 7 to engage in *on-premises* picketing.

Moreover, the Supreme Court and the Board have repeatedly recognized that picketing has a significantly greater impact on legitimate employer interests than solicitation, handbilling and other forms of communication. As the Court stated in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council,* 485 U.S. 568, 580 (1988), "picketing is qualitatively different from other modes of communication . . . . [It] is a mixture of conduct and communication and the conduct element often provides the most persuasive deterrent to third persons about to enter a business establishment. . . . [T]he very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication" (citations and internal quotations omitted). These distinctive aspects of picketing have resulted in substantial restrictions that do not apply to handbilling, and restrictions on picketing are especially warranted when the employer is a hospital. See, e.g., *Providence Hospital,* 285 NLRB 320, 322 (1987) ("The presence of picketers on hospital property could well tend to disturb patients entering and leaving the hospital.").[6] Thus, the Respondent—an acute care hospital—plainly had legitimate reasons to prohibit the on-premises picketing of patients and visitors, and the picketing prohibition had, at most, a *de minimis* impact on the exercise of Section 7 rights, especially considering that employees both handbilled at hospital entrances and picketed on adjacent public property without any interference.

There is nothing new about the principle that employers may lawfully restrict access to their premises by off-duty employees consistent with the balancing mandated by *Republic Aviation.* In *Tri-County Medical Center,* 222 NLRB 1089 (1976), the Board established rules for determining the validity of no-access rules for off-duty employees.[7] These rules evolved from an earlier case, *GTE Lenkurt, Inc.*, 204 NLRB 921 (1973), where the Board, in finding a no-access rule lawful, explained that

guaranteed them by the Act, unless there are adequate avenues of communication open to them whereby they may be informed or advised as to the precise nature of their rights under the Act and of the advantages of self-organization, and may have opportunities for the interchange of ideas necessary to the exercise of their right to self-organization." *Le Tourneau Co. of Georgia*, 54 NLRB 1253, 1260 (1944), revd. 143 F.2d 67 (5th Cir. 1944), revd. 324 U.S. 793, above. A complete prohibition of such activity in the workplace would necessarily choke off those avenues of communication at "the very time and place uniquely appropriate and almost solely available to them therefor." *Republic Aviation,* 51 NLRB 1186, 1195 (1943), enfd. 142 F.2d 193 (2d Cir. 1944), affd. 324 U.S. 793, above.

[4] The majority never defines the extent of the right to engage in on-premises picketing that they find in this case. To the contrary, their analysis contemplates case-by-case determinations in which the lawfulness of an employer's conduct in response to on-premises picketing is left to be decided after the fact based on the particular circumstances of each case. The uncertainty this creates stands in marked contrast to the Board's development of standards for solicitation and distribution, where the Board provided clear guidance to employers and employees alike. And it also fails the test articulated by the Supreme Court in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678–679 (1981), where the Court emphasized the importance of giving regulated parties "certainty beforehand as to when [they] may proceed to reach decisions without fear of later evaluations labeling [their] conduct an unfair labor practice."

[5] In *Republic Aviation*, the Supreme Court held that "[n]o restriction may be placed on the employees' right to *discuss* self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." *NLRB v. Babcock & Wilcox,* above, 351 U.S. at 113 (citing *Republic Aviation*, above) (emphasis added).

[6] In *Providence Hospital,* the Board held that a hospital lawfully prohibited on-premises picketing by both employees and nonemployees, applying a test set forth in *Fairmont Hotel*, 282 NLRB 139 (1986), that balanced the competing interests of the employer and those seeking access to determine whether nonemployees had a Sec. 7 access right. My colleagues assert that *Providence Hospital* is no longer good law, but that is because the Supreme Court, in *Lechmere*, above, subsequently repudiated the use of *any* balancing test to measure nonemployee access rights. Nothing in *Lechmere* disturbed the Board's holding in *Providence Hospital* with respect to on-premises picketing *by employees*. As noted, that analysis turned on a balancing of the employer and employee interests involved, the same balancing that *Republic Aviation* requires. Accordingly, I believe that *Providence Hospital* remains instructive with regard to the issue presented in this case.

[7] In *Tri-County*, the Board held that a no-access rule for off-duty employees "is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity." 222 NLRB at 1089. Absent a business justification, a rule that denies off-duty employees access to parking lots, gates, and other exterior nonwork areas is invalid. Id.

it did not significantly diminish employees' Section 7 rights, given the protection afforded employees to engage in Section 7 activity "during nonwork periods when employees are on the premises in connection with their jobs." Id. While the holding in *GTE Lenkurt* was "narrowly construed" in *Tri-County,* see *Nashville Plastic Products*, 313 NLRB 462, 463 (1993), the principle that the legality of off-duty no-access rules rests on a balancing of the employer's property rights and other legitimate interests against the impact of the rule on employee rights protected under the Act remains as valid today as it was then.

My colleagues do not explain the reasons that lead them to conclude that the Respondent's prohibition of on-premises picketing was presumptively unlawful. No such analysis appears anywhere in *Town & Country Supermarkets,* the sole case on which my colleagues rely. Indeed, as explained below, the Board in *Town & Country* did not even address the issue presented here—i.e., the lawfulness of a restriction limited to on-premises picketing—since the employer in *Town & Country* prohibited handbilling as well as picketing, and the Board did not address those prohibitions separately. At most, the Board in *Town & Country* assumed without explanation that restrictions on on-premises picketing were presumptively unlawful to the same extent as similar restrictions on handbilling. However, as the Supreme Court cautioned in *Republic Aviation*, the validity of such a presumption "depends upon the rationality between what is proved and what is inferred." 324 U.S. at 804–805. In the absence of any analysis comparable to that undertaken in the solicitation and distribution cases, I believe the majority's assumption fails this test.

My colleagues' assumption is also inconsistent with the Act, which expressly imposes greater limitations on picketing than on other types of activity because picketing involves conduct that goes beyond mere communication. For example, Section 8(b)(4) of the Act makes it unlawful for unions to engage in secondary picketing (which is considered to be unlawful coercion or restraint for purposes of the Act), but the statute protects the right of employees to engage in "publicity, *other than picketing*" that truthfully advises the public of a primary dispute. Id. (emphasis added). Thus, the Board and the courts have long recognized that picketing directed against neutral parties is unlawful under Section 8(b)(4)(B) even though comparable solicitation, handbilling and other non-picketing activity is lawful. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council,* above, 485 U.S. at 578–588.

I likewise disagree with my colleagues' suggestion that Section 8(g) of the Act compels a finding that on-premises picketing must be permitted to the same degree as on-premises solicitation and handbilling.[8] Section 8(g) requires labor organizations to give advance notice "before engaging in any strike, picketing, or other concerted refusal to work at any health care institution."[9] By its terms, Section 8(g) *limits* the protection afforded picketing of health care institutions. The majority's reading of Section 8(g) as *expanding* the protection afforded to picketing cannot be reconciled with the statute's plain language.[10] Although the Act protects some picketing of health care institutions, nothing in the text of Section 8(g) or its legislative history addresses the question of on-premises picketing, much less indicates that

[8] My colleagues maintain they are not precluding a distinction between on-premises picketing and other on-premises activities like solicitation and handbilling. Thus, my colleagues state they can "easily envision circumstances . . . where picketing on hospital property would disrupt operations or interfere with patient care while solicitation or distribution would not," and that a restriction on such disruptive picketing would be lawful. It is clear, however, that my colleagues make no such differentiation in the instant case. Of course, *Republic Aviation* establishes that any Sec. 7 activity may lawfully be prohibited when necessary to maintain production or discipline. The point remains, however, that under the majority's view, the same presumption of illegality applies to restrictions on picketing as to restrictions on other, less disruptive forms of communication, such as solicitation and distribution of literature (as discussed above). I believe that nothing in Sec. 8(g) or any other provision of the Act justifies applying the same presumption of illegality to picketing even though, as the majority agrees, it is "qualitatively different" from these other modes of communication. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Const. Trades Council,* 485 U.S. at 580.

[9] Section 8(g) provides:

> A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of subsection (d) of this section. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

[10] The majority cites to the legislative history of Sec. 8(g), which includes an admonition against reading into its text "something that is not contained in the bill, its report and the explanation thereof." But it is my colleagues, not I, who rely on Sec. 8(g) to resolve the issue presented here, and it is they who read into Sec. 8(g) a congressional intent that "is not contained in the bill, its report and the explanation thereof" to broadly protect on-premises picketing of health care institutions. In any event, the majority's reliance on the cited passage from the legislative history of Sec. 8(g) cannot be reconciled with the Board's decision in *Alexandria Clinic, P.A.*, 339 NLRB 1262, 1267 fn. 15 (2003), review denied sub nom. *Minnesota Licensed Practical Nurses Assn. v. NLRB*, 406 F.3d 1020 (8th Cir. 2005), where the Board specifically refused to rely on legislative history that actually spoke to the issue presented "when, as here, the statute is clear and unambiguous on its face."

on-premises picketing must be permitted to the same degree as on-premises solicitation or distribution. Moreover, a prohibition limited to on-premises picketing is entirely consistent with a finding that off-premises picketing of a health care institution cannot be prohibited, provided the notice requirements imposed by Section 8(g) have been complied with.[11] That is the line drawn by the Respondent in this case, which permitted the picketing on public sidewalks adjacent to the hospital. This is the same line that I believe is dictated by our statute.

My colleagues' view that picketing is interchangeable with other types of Section 7 activity cannot be reconciled with the substantial body of well-established precedent described above. My colleagues' view fails to take into account the fact that picketing has been long regarded by the Board and the courts as materially different and substantially more coercive and disruptive than other types of protected activity. This was recognized by the Supreme Court in *Edward J. DeBartolo*, as noted above, and it is reflected in the Act itself. Finally, as the Board held in *GTE Lenkurt* and other cases, an employer's property rights and other legitimate interests permit reasonable restrictions on Section 7 activity, which I believe warrants a conclusion that the Respondent lawfully prohibited on-premises picketing while making no effort to restrict on-premises handbilling.

In my view, the Board's decision in *Town & Country Supermarkets*, on which the judge and the majority rely, fails to support my colleagues' position for several reasons.

First, the picketing at issue in *Town & Country* did not even occur on the employer's premises; it took place outside the entrances to stores that were tenants of shopping malls. 340 NLRB at 1432, 1435. The Board has held that an employer lacks the right even to exclude *nonemployees* from leased premises absent proof that the employer, as a lessee, has a sufficient property interest under the law of the State where the alleged trespass was committed. See, e.g., *Food For Less*, 318 NLRB 646, 649–650 (1995). No such proof was made in *Town & Country*.

Second, unlike the Respondent in the instant case, the employer in *Town & Country* did not permit solicitation or distribution within the boundaries deemed lawful in *Republic Aviation*, *Peyton Packing*, and *Stoddard-Quirk*. See 340 NLRB at 1414. Accordingly, because it did not maintain any rule imposing lawful constraints on solicitation and distribution, the employer in *Town & Country* was barred from imposing *any* restriction on such activity even if it occurred in work areas and during work time, absent proof that the restriction was required by "an actual interference with or disruption of work." *Mast Advertising & Publishing*, 304 NLRB 819, 827 (1991).

Third and most importantly, as mentioned above, the issue presented in this case—whether a prohibition limited to on-premises *picketing* is lawful—was not presented in *Town & Country*. In *Town & Country*, the relevant issues were whether the employer violated the Act by (i) prohibiting employees from engaging in picketing *and* handbilling, (ii) threatening employees with arrest for engaging in picketing *and* handbilling, and (iii) causing the arrest of an employee engaged in picketing *and* handbilling. Because the employer's coercive actions were directed at protected handbilling as well as picketing, the employer violated the Act *regardless* whether prohibitions and threats directed solely at picketing would have been lawful. Therefore, the Board in *Town & Country* had no occasion to pass on the issue the instant case presents. Because the lawfulness of a restriction limited to on-premises picketing was not even before the Board, *Town & Country* cannot reasonably be construed to establish that such a picketing-only prohibition is unlawful. Moreover, such a construction is contradicted by decades of Board and court cases, including decisions of the Supreme Court.

It again bears emphasis that this case does not involve just any workplace. The Respondent is an acute care hospital. The Board and the courts have long recognized that "the primary function of a hospital is patient care and . . . a tranquil atmosphere is essential to the carrying out of that function." *St. John's Hospital*, above, 222 NLRB at 1150.[12] As the Supreme Court has emphasized:

> Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family—irrespective of whether that patient and that family are labor or management oriented—need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.

NLRB v. Baptist Hospital, 442 U.S. 773, 783 fn. 12 (1979) (internal quotation omitted). Consistent with this principle,

[11] Unless the Act specifically prohibits picketing on public property against a particular employer (e.g., where the picketing violates Section 8(b)(4)(B) or Section 8(b)(7)(C)), I agree that an employer may not lawfully prevent employees from engaging in peaceful picketing on public property, such as the off-premises picketing that occurred in this case.

[12] See also *Providence Hospital,* 285 NLRB at 322.

the Supreme Court in *Beth Israel Hospital v. NLRB,* 437 U.S. 483 (1978), stated that the Board must consider alternative means of communicating before invalidating restrictions on certain types of protected activity:

> While outside of the health-care context, the availability of alternative means of communication is not, with respect to employee organizational activity, a necessary inquiry, it may be that the importance of the employer's interest here demands use of a more finely calibrated scale. For example, the availability of one part of a health-care facility for organizational activity might be regarded as a factor required to be considered in evaluating the permissibility of restrictions in other areas of the same facility.[13]

Nothing could be farther from the "restful atmosphere" envisioned by the Supreme Court than a hospital forbidden to impose restrictions against on-premises picketing of patients and visitors. My colleagues acknowledge, as they must, that a hospital may prohibit on-premises picketing "to prevent patient disturbance or disruption of health care operations," but this is the same standard that applies to any other form of on-premises Section 7 activity in the hospital setting outside of immediate patient care areas. As explained above, the majority's "one size fits all" approach fails to accommodate the reality that picketing is inherently different from other forms of communication, as the Supreme Court and Congress have recognized. *Edward J. DeBartolo*, supra; Section 8(b)(4), supra.

The majority also fails to properly consider the availability of alternative means of communication, contrary to the Supreme Court's admonition that alternative means should be considered when evaluating restrictions on Section 7 activity in the hospital setting. Instead, my colleagues contend that, even when addressing on-premises picketing in a hospital setting, it is unlawful to impose a restriction where employees must "forgo their chosen method of communication . . . when the Respondent has not met its burden of showing that such restriction was necessary to prevent patient disturbance or disruption of health care operations." In other words, when hospital employees engage in on-premises picketing, the majority does not evaluate whether an "alternative means" of communicating exists unless there is already proof that picketing has caused, or will cause, a disturbance or disruption of patient care or other hospital operations. I disagree with this aspect of my colleagues' reasoning in three respects.

First, my colleagues improperly disregard the purpose of an "alternative means" inquiry, which makes it lawful to impose a restriction on protected conduct—the nature of which does not warrant its complete prohibition—when other activities provide an alternative means of conveying the same message in a less disruptive manner. See generally *Beth Israel Hospital v. NLRB,* above, 437 U.S. at 505. If hospital employees engaged in *any* type of activity that was proven to disturb or disrupt patient care and hospital operations, existing law would permit the employer to prohibit it without any consideration of whether alternative means exist.

Second, the record supports a finding that handbilling was a reasonable alternative means of communication because employees could engage in handbilling at the same locations at which they sought to picket. In fact, the handbilling reached the same audience that picketing would address, and the literature distributed by employees described employment-related concerns in far greater detail than could be explained in the picket signs.

Third, even more objectionable is my colleagues' conclusion that on-premises picketing by hospital employees must be deemed lawful, in part, because picketing cannot be avoided by unwilling third parties who might choose not to accept handbills. Here, my colleagues not only disregard the necessity of conducting an "alternative means" analysis in a hospital setting, contrary to *Beth Israel Hospital v. NLRB*, supra, they turn this analysis upside down by finding that picketing on the premises of an acute-care hospital must be permitted *because* it is more confrontational. According to my colleagues, handbilling is an inadequate alternative because it "requires the intended recipient to take the handbill and read it in order for the message to be communicated." This justification effectively repudiates the fundamental point emphasized so many times by the Supreme Court and the Board itself. Hospitals "are not factories or mines or assembly plants," patients and family members "often are under emotional strain and worry," and there is a fundamental need for "a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed." *NLRB v. Baptist Hospital,* 442 U.S. 773, 783 fn. 12. See also *Beth Israel Hospital v. NLRB,* 437 U.S. at 505; *St. John's Hospital,* 222 NLRB at 1150; *Providence Hospital,* 285 NLRB at 322.

CONCLUSION

Decades of Board and court decisions establish that Section 7 rights do not exist in a vacuum, particularly when they are exercised on private property. Employer property rights and business interests must also be considered, and these rights and interests must be afforded

[13] Id. at 505 (citation omitted).

even greater weight when the employer is an acute care hospital. Rather than properly applying these principles, my colleagues assume—with no supporting analysis—that on-premises picketing must be permitted by employers to the same extent as on-premises solicitation and distribution. Here, the majority relies on a single decision—*Town & Country Supermarkets*—which also lacks any supporting analysis, and which does not even address the sole issue presented here: whether a prohibition limited to on-premises employee picketing at a hospital is lawful. For the reasons set forth above, I believe that well-established legal principles and an appropriate balancing of the rights and interests at issue here permitted Respondent to restrict on-premises picketing, notwithstanding the protection afforded to Section 7 activity other than picketing. Accordingly, I respectfully dissent.

Dated, Washington, D.C. August 12, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT attempt to prevent you from publicizing a contract dispute at our nonemergency entrances by carrying picket signs and acting in a non-confrontational manner that does not disturb patients or disrupt hospital operations.

WE WILL NOT threaten you with discipline for engaging in such activity.

WE WILL NOT threaten you with arrest for engaging in such activity.

WE WILL NOT summon police to our facility in response to your engaging in such activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

CAPITAL MEDICAL CENTER

The Board's decision can be found at www.nlrb.gov/case/19-CA-105724 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Elizabeth Devleming, Esq., for the General Counsel.
Glenn Bunting, Esq. and Henry Warnock, Esq., for the Respondent.
Brittany Pitcher, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Seattle, Washington, on March 17–18, 2014. The United Food and Commercial Workers Local 21 (Local 21 or Union) filed the charge on May 22, 2013[1] and the General Counsel issued the complaint on December 20.

The complaint alleges that on May 20, 2013, the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening employees who were engaged in stationary picketing and handbilling with discipline and arrest, by summoning police to the Hospital, and by denying its off-duty employees access to parking lots, gates, and other outside nonworking areas to engage in activities protected by Section 7 of the Act. Capital Medical Center (the Respondent or Hospital) filed a timely answer denying all material allegations.

The parties filed a joint motion for partial stipulation of facts which I granted and admitted into the hearing record as Joint Exhibit 1 (Jt. Exh.).[2]

[1] All dates are in 2013 unless otherwise indicated.

[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "R Exh." for Respondent's exhibit; "GC Exh." for General Counsel's exhibit; "Jt. Exh." for joint exhibit; "GC Br." for the General Counsel's brief; and "R Br." for the Respondents' brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Washington corporation with an office and place of business in Olympia, Washington, is engaged in the business of providing patient and health care services and operating an acute care hospital. At all relevant times, the Respondent derived gross revenues in excess of $250,000, and purchased and received at its Washington facilities goods valued in excess of $50,000 from points outside the State of Washington. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

This case involves whether or not informational picketing activities occurring over a roughly 2-hour period on May 20, 3013, were protected by the Act.

The Respondent operates an acute care hospital. The Union has been the certified collective-bargaining representative of a mixed unit of the Hospital's technical employees for about 14 years.

Jenny Reed is the Union's membership action director for healthcare. During the relevant time period, she was a representative for Local 21 assigned to the Hospital. The Hospital and the Union began bargaining for a successor contract in September 2012, and as of May 2013, there was not yet a collective-bargaining agreement (CBA) in place. Glenn Bunting, a private attorney who represents the Hospital for labor relations matters, was the lead negotiator for the Hospital. Heather Morotti, the Hospital's director of human resources, also served on the negotiating committee. The Union's lead negotiator was Janet Parks.

Gina Arland, an x-ray technician and Local 21 steward, was a member of the negotiating committee. She knew the employees were becoming frustrated about the state of the negotiations. As a response, the Union and some of the employees planned an informational picket for May 20. That date was selected to directly precede an upcoming bargaining session scheduled for May 21–22. The goal of the picket was to educate the public and encourage the Hospital to discuss some key issues and settle on a contract. On May 9, the Union, by way of a letter from Parks, provided the Respondent with notice of its intent to engage in picketing and handbilling on May 20.[3] (Jt. Exh. 5.)

On May 16, Morotti, Bunting, and Dean Rutledge, the director of engineering with oversight of security, spoke with Lieutenant Holmes from the Olympia Police Department to make the police aware of the pickets.[4] Holmes provided Bunting with a copy of Olympia Municipal Code 9.68.020, a local ordinance regarding trespass and interference at health care facilities.

Bunting and Morotti also spoke with Parks, who told him Reed was in charge of the pickets.[5] (GC Exh. 9.) The purpose of the discussions with Holmes and Parks, according to Bunting, was to make sure channels of communication were open and clear and to try to avoid misunderstandings. The Hospital also arranged to have an additional security guard present for the picketing. Security was instructed security to ensure any picketing remained outside the Hospital's property lines.[6]

On May 17, Arland provided Morotti with a picture of Reed and her contact information. (Jt. Exh. 6.)

During the evening of May 19, Reed and some other organizers and members put together picket signs and went over general rules about the picket. They discussed that because there were patients and other customers coming to the Hospital the Union wanted to keep their approach positive. Employees were instructed to introduce themselves and, if they were leafleting, hand leaflets to the people walking by them. With regard to leafleting, the organizers instructed members to stand to the sides of the doors and not to block entrances. They also discussed avoiding emergency entrances and any areas that could impede patient care. They decided to distribute leaflets at two entrances: the main lobby entrance, which is primarily for family members of patients, reps, and employees; and the physician's pavilion entrance, which is used primarily by people attending appointments in the physicians' offices and employees. Reed did not instruct the picketers to chant, yell, sing, or march back and forth.

Picket signs identified the picketers as "Capital Medical Center Workers" on the top, and on the bottom, "Informational Picket, UFCW 21." In the middle were phrases such as: "Fair Wages," "Fair Contract Now," or "Respect Our Care." The signs were standard-size, about two feet by three feet. (Jt. Exh. 8; GC Exhs. 2–8.) The leaflets said:

> OUR PATIENTS MATTER
>
> We are the health care providers who care for patients at Capital Medical Center.
>
> Right now, we are in contract negotiations with our employer, but wanted to let you know that we are having difficulty reaching a compromise. Management continues to refuse to fix problems that leave us short-staffed and cause us to miss

[3] This notice is required by Sec. 8(g) of the Act.

[4] The General Counsel requests that I draw an adverse inference based on Rutledge's failure to testify. (GC Br. 40, fn. 27.) I decline to grant this request because my decision is based on what occurred, which is a matter of record, and I cannot see how his testimony, favorable or unfavorable, would impact my decision in any way.

[5] Bunting also testified that Parks told him picketing would be confined to the sidewalk. Parks testified, "I recall him saying that we couldn't picket on the property. I told him we were on the sidewalk." (Tr. 292.) She claimed she did not make any assurances. Ambiguities aside, what Parks and Bunting may have said to each other on the phone does not impact my decision.

[6] The General Counsel requests that I draw an adverse inference based on the failure of any of the security guards to testify. (GC Br. 40, fn. 26.) Because Arland's testimony about her interactions with security are unrefuted, and she is an otherwise credible witness, there is no dispute of fact warranting an inference.

> our breaks and meals. In addition, they have been unwilling to support fair wage increases.
>
> We have already voted down a prior offer from management and are back in negotiations.
>
> THANK YOU
> Supporting hospital workers means standing up for the middle class values that respect the dignity of hard work. This includes fair wages, fair benefits, and dependable hours.

(Jt. Exh. 7.)

The informational picket took place on May 20 from 6 a.m. to 6 p.m. Reed arrived at 5:45 a.m. and parked near the driveway to the Respondent's premises where she met with the employee picketers. The picketers gathered on the sidewalk adjacent to the driveway and this location served as meeting point throughout the day. At 6 a.m., Reed went over the logistics of the picket and started dispersing around 20–25 employee picketers to different locations. (Jt. Exh. 9.)

Arland participated in the picket from 6 a.m. until she was called to work her shift at 2p.m. During that time period, there were two employees handing out leaflets at the side of the front lobby entrance, two employees doing the same beside of the physician's pavilion entrance, and anywhere from 15 to 30 employees out on sidewalk bordering the Hospital carrying picket signs. The employees on the sidewalk used a bullhorn and did some chants. Some employees held signs that said something like "honk for fair wages," so some cars were honking as they drove by.

The number of participants was highest between about 3:30 and 4:15 p.m.. At that point 50–60 employees were picketing and leafleting.

Arland's shift ended at 4 p.m. and, after checking in with Reed, she and fellow employee Derek Durfey went to the main lobby entrance with picket signs. Around this same time, Allison Zassenhaus, who at the time was an employee and Local 21 steward,[7] was leafleting near the pavilion entrance. Arland recalled she and Durfey were the only two picketers at the main lobby entrance. Bunting and Morotti recalled seeing more employees with picket signs at the main lobby entrance. At some point, an individual other than Arland, Durfey, or Zassenhaus was near the main lobby entrance with a picket sign, though not necessarily at the same time. (GC Exh. 6.)

Arland stood to the right of the entrance and Durfey stood to her right, farther away from the entrance, about 10–12 feet from it. Durfey carried two picket signs. Arland tried to remain in line with the outside pillars alongside the entryway. The only times she went past the pillars was when she was briefly engaging a patron to hand him/her a leaflet. Arland initially attempted to hand out leaflets while holding the picket sign, but found it too cumbersome so she ultimately ceased leafleting and just held the picket sign. Durfey did not speak with any patrons.

Morotti received a report that employees were picketing adjacent to the front lobby entrance at around 4p.m. According to Bunting, they saw 3–4 picketers with signs at the front lobby entrance and at the pavilion entrance. Before Arland or Durfey approached any patrons, three security guards came to the entryway. Bruce Hillard, the security manager, approached Arland and told her she was welcome to stay at the doorway with leaflets, but she was not permitted to stand on the Hospital property with her picket sign. He politely asked her to leave and she politely declined. This scenario repeated itself every 15–20 minutes for the next hour or so.

Bunting and Morotti followed behind Hillard the third or fourth time he approached the picketers. Bunting told Arland she could be on the property with pamphlets but she could not be out at the entrance with her sign.

Durfey went down to the sidewalk to get Reed. Accompanied by fellow Local 21 Representative Cathy MacPhail, Reed went up to the main entrance. Reed expressed her belief to Bunting that the employees had the right to picket by the entrance. After a brief conversation outside, Bunting asked Reed and MacPhail to come inside to Morotti's office. While there, Bunting told Reed and MacPhail they needed the employees to leave, and said they could face discipline if they remained.

Reed attempted to clarify whether there would be repercussions for the employees engaging in concerted activity, so she asked him, repeatedly, "Yes or no?" Bunting responded by using hand gestures similar to Reed's and repeating to her, "Yes or no", which Reed perceived as mocking. Reed said the union attorney, James McGuinness,[8] had told her the employees had the right to picket outside the hospital doors, and Bunting asked her to get McGuinness on the phone. Reed responded that she did not intend to call McGuinness, but Bunting was free to call him if he wanted. At this point, Reed and MacPhail left.

Bunting called McGuinness and expressed his view that the picketers were not entitled to picket at the entryways and the Hospital was entitled to exercise its property rights. He did not report any disruption, just that they were enforcing property rights. Bunting recalled they disagreed on the law regarding where the employees could picket and he asked if McGuinness would call the Union so they could attempt to resolve the matter. He conveyed that if they could not resolve the situation, the Hospital's options were to discipline the employees or call law enforcement.

After the phone call, Morotti consulted with the Hospital's CEO and they decided they would not issue discipline, but would call the police at 5p.m. if the picketers were still present near the entryways.

Following the meeting with Bunting and Morotti, Reed and MacPhail checked in on the picketers. Reed informed Arland that Bunting said she could be accountable for what she was doing.

Shortly thereafter, Bunting and Morotti came out again and Bunting told Arland she should not be there. She expressed her belief that she had a right to be there. Arland could not recall the precise words, but recalled being told she, not the Union, could get in a lot of trouble. Reed came back and conversed with Bunting. Reed asked Arland if she wanted to remain where she was, and she replied that she did. Durfey and

[7] Zassenhaus stopped working for the Respondent in June 2013.

[8] McGuinness was not specifically identified as the attorney until the end of their conversation.

Zassenhaus heard Bunting mention calling the police. Arland told Durfey he should leave because she was concerned about him getting in trouble. Durfey was nervous, so he returned to the sidewalk. At that point, Zassenhaus took his picket sign.

Bunting and Morotti went back inside. Reed went back to the sidewalk area and called Pam Blauman, the Union's membership action director.[9] Shortly thereafter, at 4:59 p.m., James Sen, a security officer, called the Olympia Police Department. (GC Exh. 8.)

At 5:11 p.m., Olympia Police Department Patrol Sergeant Dan Smith arrived at the Hospital. Upon seeing him, Arland called Reed, who came back to the main lobby entryway. Bunting and Morotti came out and told Smith they wanted the picketers removed from the Hospital's premises. Smith also spoke to Reed, who told him they were almost done picketing for the day and asked if he was going to arrest anyone. Smith went back and talked to Bunting and Morotti, and told them he could not force the picketers to leave because they were not being disruptive and they were not blocking doors or preventing people from entering the Hospital. He encouraged the parties attempt to come to a compromise. The time for the picket to end was nearing, so the picketers started packing and left, which resolved the situation. Smith left the Hospital at 5:49 p.m.

Arland recalled there was not much traffic at the main lobby entrance when she was there with her picket sign. Durfey did not talk to anyone entering or exiting the Hospital. Zassenhaus talked to about 10–15 people when she was handbilling at the pavilion entrance. Less than five individuals entered or exited the Hospital during the time she carried her picket sign. There were no negative or confrontational interactions between the picketers and anyone entering or exiting the Hospital entrances.

III. DECISION AND ANALYSIS

A. Alleged Denial of Access to Publicize Dispute

The complaint, at paragraph 8(b), alleges that the Respondent violated Section 8(a)(1) of the Act on May 20, 2013, by denying off-duty employees access to parking lots, gates, and other outside nonworking areas for the purpose of publicizing their dispute by engaging in Section 7 activity that did not constitute picketing. The evidence demonstrates that the only activity the Respondent sought to exclude on its property was picketing. Handbilling and leafleting on the Hospital's property was permitted on May 20, and had been permitted on previous occasions.[10] Accordingly, I recommend dismissal of this complaint allegation.

Paragraph 8(a) of the complaint alleges that the Respondent violated Section 8(a)(1) of the Act by denying off-duty employees access to parking lots, gates, and other outside nonworking areas for the purpose of publicizing their dispute by picketing or distributing materials. As set forth directly above, distribution of leaflets was permitted in the past and on May 20. Accordingly I recommend dismissal of this part of the complaint allegation.

The remaining allegation with regard to access is whether the Respondent violated the Act by prohibiting employees from picketing near the main lobby and pavilion entrances of the Hospital.

Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "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 . . ." The Board's longstanding test to determine if there has been a violation of Section 8(a)(1) of the Act is whether the employer engaged in conduct which might reasonably tend to interfere with the free exercise of employee rights under Section 7 of the Act. *American Freightways Co.*, 124 NLRB 146 (1959). Further, "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *American Tissue Corp*., 336 NLRB 435, 441 (2001) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946)).

The parties cite to two different lines of cases to support their respective positions. The General Counsel and the Union rely on *Tri-County Medical Center*, 222 NLRB 1089 (1976), where the Board held that an employer's rule barring off-duty employees access to their employer's facility is valid only if it: (1) limits access solely to the interior of the facility, (2) is clearly disseminated to the employees, and (3) applies to off-duty access for all purposes, not just for union activity.

The Respondent cites to Supreme Court precedent for the proposition that the Board's task is to seek a proper accommodation for conflicts involving Section 7 rights and property rights, and to balance these competing interests "with as little destruction of one as is consistent with the other." *NLRB v. Babcock & Wicox Co.*, 351 U.S. 105, 1112 (1956); *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976). More specifically, the Respondent relies on the Board's decision in *Jean Country*, 291 NLRB 11, 14 (1988),[11] to assert that the following test applies in the instant case:

> [I]n all access cases our essential concern will be the degree of impairment of the Section 7 right if access should be denied, as it balances against the degree of impairment of the private property right if access should be granted. We view the consideration of the availability of reasonably effective alternative means as especially significant in this balancing process.

For the following reasons, I decline to apply either *Tri-County Medical Center* or *Jean Country*.

[9] At the time of the hearing, Blauman had retired.

[10] The Hospital maintains a solicitation policy that prohibits flyers or other forms of mass distribution and prohibits solicitation of (which includes distribution to) members of the public. The policy was not alleged to be unlawful in the complaint, and none of the parties reference it in their respective closing briefs.

[11] The Respondent also cites to a non precedential administrative law judge (ALJ) decision, *In re Fuji Foods US, Inc*., Case No. 27–CA–17596, 2002 NLRB LEXIS 313 (2002). That case involved access rights of employees on strike. Even if it had precedential value, it would not apply here.

The *Jean Country* balancing approach, as applied to nonemployees, was repudiated by the Supreme Court in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1988). *Lechmere* did not concern access for off-duty employees, so the Court, not surprisingly, was silent on the matter.

Following *Lechmere*, the Board has declined to apply the *Jean Country* test to cases involving off-duty employee access to the work premises. In *Nashville Plastic Products*, 313 NLRB 462, 463 (1993), the Board stated, "*Lechmere* itself emphasized the critical distinction between employees and nonemployees as established in *NLRB v. Babcock & Wilcox*,[12] and*, a fortiori*, the rule enunciated in *Lechmere* does not apply to employees." (Fn. omitted.) The Board also squarely rejected the employer's argument that off-duty employees should be treated like non-employee union organizers for purposes of access. In the words of the Court of Appeals for the Sixth Circuit, in a case involving off-duty employees' distribution of union literature, "The championed balancing test of *Jean Country* is no more." *Timken Co. v. NLRB*, 29 Fed.Appx. 266, 268 (6th Cir. 2002).

Accordingly, I find the test set forth in *Jean Country* does not apply to the instant case. In addition to its repudiation by subsequent caselaw, another reason I decline to apply *Jean Country* is that the instant case does not involve a no-access rule or policy. It is undisputed that off-duty employees were permitted to be on the Hospital's premises both on May 20 and before, so long as they did not carry picket signs. Likewise, no evidence was presented that off-duty employees were otherwise prohibited from coming to the Hospital. It is not access to the Hospital that is central to this case, but rather the participants' pursuit of the Section 7 activity. For this same reason, the General Counsel and Union's reliance on *Tri-County Medical Center*, 222 NLRB 1089 (1976), is misplaced. See *Santa Fe Hotel & Casino*, 331 NLRB 723, 729 (2000).

I find instead that the proper legal authority is the Supreme Court's decision in *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945), which governs employee rights to engage in Section 7 activity on an employer's property, and upon which the General Counsel relies in tandem with *Tri-County Medical Center*. Pursuant to *Republic Aviation*, employers may not bar employees who are not on working time from: (1) engaging in solicitation, or (2) distributing literature in nonworking areas of its property, unless such a bar is necessary to maintain discipline and production.

In *Town & Country Supermarkets*, 340 NLRB 1410, 1413–1414 (2004), the Board applied *Republic Aviation* to find that the employer violated the Act by calling the police, threatening arrest, and causing the arrest of employees who were picketing and handbilling at the front entrances of its stores. The Board contrasted nonemployee organizers, who may be considered trespassers, with off-duty employees, stating:

> The critical distinction is that employees are not strangers to the employer's property, but are already rightfully on the employer's property pursuant to their employment relationship, thus implicating the employer's management interests rather than its property interest. . . . In sum, under *Republic Aviation*, supra, off-duty employees may engage in protected solicitation and distribution in nonwork areas of the employer's property.

(Citations omitted.) The Board in *Town & Country* did not distinguish between handbilling and picketing, finding the employer's prohibition of both activities on its property unlawful in the absence of a justification based on its need to maintain order or discipline.

The fact that the picketing at issue here was informational rather than organizational is of no consequence. As the Board stated in *NCR Corp*., 313 NLRB 574, 576 (1993), "Employees have a statutorily protected right to solicit sympathy, if not support, from the general public, customers, supervisors, or members of other labor organizations." See also *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *Stanford Hospital & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003); *Providence Hospital*, 285 NLRB 320, 322 (1987)(economic protest against employer to publicize bargaining position in a contract negotiation dispute is primary activity involving a core Section 7 right); *Santa Fe Hotel & Casino*, supra at 723.; *New York New York LLC* (*NYNY*), 356 NLRB 907 (2011).

The Respondent asserts, as an affirmative defense, that its actions were in accordance with state law and a local ordinance. Section 9A.52.080 of the Revised Code of Washington (RCW) states, in relevant part, "A person is guilty of criminal trespass in the second degree if he or she knowingly enters or remains unlawfully in or upon premises of another. . . ." Olympia Municipal Code 9.68.020, entitled, "Interference with Health Care Facilities," states:

> It is unlawful for a person except as otherwise protected by state or federal law, alone or in concert with others, to willfully or recklessly interfere with access to or from a health care facility or willfully or recklessly disrupt the normal functioning of such facility by:
>
> A. Physically obstructing or impeding the free passage of a person seeking to enter or depart from the facility or the common areas of the real property upon which the property is located;
>
> B. Making noise that unreasonably disrupts the peace within the facility;
>
> C. Trespassing on the facility or the common areas of the real property upon which the facility is located; . . .

(R. Exh. 1.) As set forth above, the off-duty employees were not trespassers, so any defense based on state trespass law fails. Moreover, the local ordinance limits its own application by stating, "except as otherwise protected by state or federal law . . . ." Here, the actions at issue were protected by the Act. In any event, there is no evidence any of the picketers willfully or recklessly disrupted the normal functioning of the Hospital.

Citing to *Hillhaven Highland House*, 336 NLRB 646, 649 (2001), the Respondent contends that the conduct of an off-duty employee can change his status from an invitee to a trespasser. The Board, however, was discussing the status of offsite employees in *Hillhaven Highland House*, not employees who worked onsite, as here. Moreover, that case involved enforcement of a rule barring offsite employees from access to facilities other than the jobsite where they worked. There is no such

[12] 351 U.S. 105 (1956).

general access rule at issue in this case.

The Respondent also relies on *NYNY*, supra, which involved handbilling by employees of Ark, a food service provider that contracted with the Respondent, a hotel. The Respondent's brief cites to a portion of the *NYNY* decision, which states:

[I]t also seems clear that, purely from the perspective of state property law, the Ark employees were trespassers at the moment they began to distribute handbills. Whatever their status as NYNY's invitees at other times and for other purposes, there is no suggestion that the offduty Ark employees had an invitation from NYNY that privileged them to distribute handbills to the public in the locations involved here.

Slip op. at 13. This portion of the decision, however, concerned the hotel owners' property rights when Ark employees distributed handbills in areas of the hotel outside of Ark's leasehold. The Board came to a rather different conclusion when analyzing whether employees could do the same at entrances to the hotel and a restaurant Ark serviced. The cited portion of *NYNY* is therefore is inapplicable here, as the Hospital owned the property where the disputed activity occurred.

The case that weighs most strongly in the Respondent's favor is *Providence Hospital*, supra. In *Providence Hospital*, offduty hospital employees frustrated with the state of contract negotiations engaged in informational picketing and handbilling on public property adjacent to the hospital and at the hospital's entryway. The Board relied on *Fairmont Hotel*, 282 NLRB 139 (1986), and applied its then-current test, as follows:

If the property owner's claim is a strong one, while the Section 7 rights at issue is clearly a less compelling one, the property right will prevail. If the property claim is a tenuous one, and the Section 7 right is clearly more compelling, then the Section 7 right will prevail. Only in those cases where the respective claims are relatively equal in strength will effective alternative means of communication become determinative.

This test was short-lived, as *Fairmont Hotel* was overruled less than 2 years later by *Jean Country*, supra, to the extent that it held the test required consideration of alternative means of communication only if property interests and Section 7 rights were relatively equal. As discussed above, *Jean Country* was subsequently overruled by *Lechmere,* supra, at least as to the rights of nonemployees.

Though *Providence Hospital* has not been expressly overruled, it turned on application of precedent that has since been overruled—*Fairmont Hotel*.[13] The Board, with guidance from the Supreme Court, has since refined its caselaw, and though the lines are at times blurred, there appear to be distinctions based on various permutations of three primary considerations: (1) the characteristics of the individuals engaging in the activity at issue, i.e*.,* employee versus nonemployee; (2) the ownership of the property, i.e., ownership by the employer versus ownership by another entity; and (3) the nature of the rule or prohibition, i.e., a rule barring access to anyone other than employees who are on the clock versus a rule targeting certain activities on the work premises. The caselaw I have chosen to apply is guided by the facts that the individuals who engaged in the Section 7 activity at the Hospital on May 20 were employees, the disputed Section 7 activities took place on property the Hospital owned and controlled, and the prohibition targeted the specific Section 7 activity of carrying picket signs at the hospital's nonemergency entryways. *Providence Hospital*, which applied a now defunct test for nonemployees, appears to be an outlier in the wake of the caselaw that has since developed concerning off-duty employees who engage in Section 7 activity in nonworking areas of their own employer's property.

In addition to relying on *Providence Hospital* to assert its property rights, the Respondent argues that case supports its contention that, because of the unique nature of the hospital setting, having picketers at the doorway creates undue stress for hospital patrons. Put in terms that conform to the precedent I believe is correct and applicable here, the Respondent contends that enforcement of a rule prohibiting picketing activity at the entryway to the hospital is tailored to legitimate business concerns regarding the impact of such activity on hospital patients and their families.

Recognizing the need for hospitals to provide a tranquil atmosphere to carry out its primary function of patient care, the Supreme Court and the Board have recognized some special considerations when it comes to Section 7 activity in a hospital setting. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500 (1978); *St. John's Hospital & School of Nursing, Inc*., 222 NLRB 1150 (1976), enfd. in part 557 F.2d 1368 (10th Cir. 1997). As such, hospitals "may be warranted in prohibiting solicitation even on nonworking time in strictly patient care areas, such as the patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas." *St. John's Hospital*, supra. As to other areas, a hospital may place prohibitions on employees who engage in Section 7 activities only if it proves the prohibition is needed to prevent patient disturbance or disruption of health care operations. Id.; *NLRB v. Baptist Hospital*, 442 U.S. 773, 781–787 (1979).

I find the Respondent has not met its burden of proof. The Respondent argues that it has an interest in ensuring "patients, along with their family members and loved ones, are not forced to negotiate their way through a picket line as they enter and exit the Hospital." (R Br. 20.) The Respondent contends:

By positioning picketers at the Main Entrances of the Hospital and causing patients and family members to walk (or to be pushed in a wheelchair) past those picketers patrolling at the doorways, the Union subjected these most vulnerable Hospital patrons to additional stress that was both undeserved, and unnecessary for the accomplishment of the Union's goals.

(R. Br. 20.) This contention does not amount to proof, however. The only evidence regarding any potential disruption caused by the picket is that Morotti heard one visitor stated that he usually did not cross picket lines, but that he had to in order to visit a patient. (Tr. 280.) There was no testimony or other evidence regarding the impact, if any, on patients or hospital

[13] I note also that *Fairmont Hotel* concerned handbilling activities of nonemployees, so it is unclear why the Board chose to apply it given that employees conducted the handbilling and picketing in *Providence Hospital*. This is particularly confounding, considering the Board did not endorse the ALJ's rationale that off-duty employees are analogous to nonemployees under *GTE Lenkurt, Inc*., 204 NLRB 921 (1973), stating it agreed with the judge's decision, but only for the reasons set forth in its decision.

operations.

Moreover, the contention is slightly embellished, in that there was no evidence the picketers "patrolled" the doorways. In fact, the evidence shows the picketers stationed themselves outside the main pathway to the door, and only stepped into the entryway briefly when engaging a patron.[14] This is what had occurred previously when the employees handbilled. The difference had nothing to do with the employees' presence on the property, but rather was solely the fact they later carried picket signs.

Relying on *Providence Hospital*, the Respondent asserts that the "presence of picketers on hospital property could well tend to disturb patients entering and leaving the hospital." 285 NLRB at 322. While this is certainly a possibility, the Respondent has failed to meet its burden of proof given the facts present here. The evidence is unrefuted that the hospital was not very busy between 4:00 and the time the picketing activity ceased shortly before 6:00 that day. Arland provided unrefuted testimony that traffic at the front door was very low. Zassenhaus recalled less than five employees entered or exited the Hospital when she held her picket sign. Under these circumstances, the Respondent has not met its burden of proof. *Beth Israel*, supra; *NLRB v. Southern Maryland Hospital Center*, 916 F.2d 932, 935 (4th Cir. 1990).

The Respondent also asserts that Section 8(g) of the Act imposes different constraints on picketing, as opposed to handbilling, due to its coercive nature.[15] Citing to *Nurses CAN* (*City of Hope*), 315 NLRB 468, 470 (1994), the Respondent argues that picketing is restricted at health care institutions because it may disrupt patient care by causing a work stoppage. That case, however, involved picketing during an economic strike. The threat of work stoppage in the strike context certainly does not carry over to the informational picket as it was implemented here.

Next, the Respondent avers that Section 8(b)(4) of the Act recognizes the inherently coercive nature of picketing. There is a wealth of caselaw regarding the coercive nature of secondary picketing pursuant to Section 8(b)(4), including numerous painstaking dissections of how "picketing" is defined.[16] Such a discussion is thankfully not warranted here. There is no evidence that the employee picketers at issue here patrolled the doorway, marched in formation, chanted or made noise, created a real or symbolic barrier to the entryways, or otherwise engaged in behavior that disturbed patients or disrupted hospital operations. Indeed, Sergeant Smith testified the employees' behavior was not disruptive, he had no basis for removing them from the property, and he would not have arrested them if requested.

The Respondent contends that the requirement to show that the employees have not disrupted business operations begs the question of when the Hospital may assert its property rights. It asserts that it should "not have to engage in an after-the-fact analysis of a trespasser's incremental destruction of an employer's property rights in order to determine whether the employer is legally privileged to enforce those rights." (R Br. 31.) The off-duty employees, however, were not trespassers. This same question, if it pertained to nonemployees, would yield a different result.

In sum, I find the General Counsel has met its burden to prove the Respondent interfered with protected Section 7 activity by informing the employees that they could not carry picket signs near the main lobby and pavilion entrances, in violation of Section 8(a)(1).

B. Alleged Threats

Paragraph 7 of the complaint alleges that the Respondent threatened employees with discipline and arrest, and summoned police to the Hospital.

When determining if statements amount to threats of retaliation, the Board applies the test of "whether a remark can reasonably be interpreted by an employee as a threat." The actual intent of the speaker or the effect on the listener is immaterial. *Smithers Tire*, 308 NLRB 72 (1992); See also *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981) (inquiry under Sec. 8(a)(1) is an objective one which examines whether the employer's actions would tend to coerce a reasonable employee). The "threats in question need not be explicit if the language used by the employer or his representative can reasonably by construed as threatening." *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to coerce. *KSM Industries*, 336 NLRB 133, 133 (2001).

The parties do not dispute that all interactions between the employees and Hospital management, including the security manager, were cordial and respectful. With regard to the threat of discipline, the parties dispute precisely who said what to whom. Arland recalled Bunting said words which implied to her she could be disciplined. At the very least, it is clear Bunting told Reed discipline could ensue. Reed then conveyed to Arland that the Hospital could hold her accountable for her actions. As to the threats of calling the police, Reed and Zassenhaus both heard Bunting reference calling the police.[17] This made Durfey feel nervous, so he returned to the sidewalk because he "didn't want to get in trouble." (Tr. 190.)

The Board has held that an unlawful threat of discipline communicated to a union representative rather than directly to employees, is the legal equivalent of a threat directed to an employee. See *Schrock Cabinet Co.,* 339 NLRB 182 (2003). Moreover, aside from the threat of discipline conveyed through Reed, Arland felt threatened by Bunting, and it is clear that she

[14] The Respondent contends that GC Exh. 5 shows Arland engaged a patron in the pathway to the door. I note, however, that she and the patron are to the side of the carpet leading to the door.

[15] As part of the balancing test that I find does not apply in the instant case, the Respondent points out that the Union planned and orchestrated the picket. The employees, however, carried the signs forming the basis for the complaint before me.

[16] I note that the term "picket" and its grammatical variants are used throughout this decision, but this is not meant to denote a hypertechnical definition of the word such as might be required if notice pursuant to Sec. 8(g) or a secondary boycott under Sec. 8(b)(4) was squarely at issue.

[17] Though Bunting denies he made threats to actually make the call himself, I am unconcerned with sorting out the semantics in light of what directly ensued.

was repeatedly asked to leave by security. The threats to call police, which caused Durfey to leave the main lobby entryway area, came to fruition.

Based on the foregoing, I find the General Counsel has easily met its burden to prove the Respondent violated Section 8(a)(1) by making threats and summoning law enforcement, as alleged in complaint paragraph 7.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By attempting to prevent employees from publicizing a contract dispute at its nonemergency entrances by carrying picket signs and acting in a non-confrontational manner that did not disturb patients or disrupt hospital operations, threatening employees with discipline for engaging in this activity, summoning the police to the scene, and threatening employees with arrest the Respondent has violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having unlawfully attempted to prevent employees from publicizing a contract dispute at its non-emergency entrances by carrying picket signs and acting in a non-confrontational manner that did not disturb patients or disrupt hospital operations, the Respondent will be ordered to cease and desist from these actions.

Having unlawfully threatened employees with discipline and arrest for engaging in this activity, and having summoned the police, the Respondent will be ordered to cease and desist from these actions.

I will order that the employer post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11, 15–16 (2010). Also in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. Id, slip op. at p. 3. See, e.g., *Teamsters Local 25*, 358 NLRB 54 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

Capital Medical Center (the Respondent),Olympia, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Attempting to prevent employees from publicizing a contract dispute at its non-emergency entrances by carrying picket signs and acting in a non-confrontational manner that does not disturb patients or disrupt hospital operations;

(b) Threatening employees with discipline for engaging in such activity;

(c) Threatening employees with arrest for engaging in such activity;

(d) Summoning police to its facility in response to employees engaging in such activity; and

(e) In any like or related manner interfering with employee rights under Section 7 of the Act.

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

(a) Within 14 days after service by the Region, post at its hospital in Olympia, Washington, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 20, 2013.

(b) Within 21 days after service by the Region, file with the Regional Director of Region 19 of the Board a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. July 17, 2014

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

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

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

Choose a representative to bargain with us on your behalf;

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

Accordingly, we give our employees the following assurances:

WE WILL NOT do anything to prevent you from exercising these rights.

WE WILL NOT attempt to prevent you from publicizing a contract dispute at its nonemergency entrances by carrying picket signs and acting in a non-confrontational manner that does not disturb patients or disrupt hospital operations.

WE WILL NOT threaten you with discipline or arrest, call the police to remove you, or in any other way interfere with you engaging in protected activities, including publicizing a contract dispute at its nonemergency entrances by carrying picket signs and acting in a nonconfrontational manner that does not disturb patients or disrupt hospital operations.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

CAPITAL MEDICAL CENTER

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-105724 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.