

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
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4

5 August Term, 2012
6

7 (Argued: January 30, 2013 Decided: February 27, 2013)
8

9 Docket No. 11-3147-ag
10

11 NATIONAL LABOR RELATIONS BOARD,
12

13
14 *Petitioner,*

15
16 -v.-
17

18 SPECIAL TOUCH HOME CARE SERVICES, INC.,
19

20 *Respondent,*

21
22 1199SEIU UNITED HEALTHCARE WORKERS EAST,
23

24 *Intervenor.*
25
26

27
28 Before:

29 WESLEY, CHIN, *Circuit Judges*, LARIMER, *District Judge*.*
30

31 Petitioner National Labor Relations Board applies to
32 this Court for enforcement of its January 30, 2011
33 Decision and Order finding that Respondent Special Touch
34 Home Care Services, Inc. ("Special Touch") violated the
35 National Labor Relations Act, 29 U.S.C. § 158(a)(1) and
36 (3), by failing to immediately reinstate striking workers

* The Honorable David G. Larimer, of the United States District Court for the Western District of New York, sitting by designation.

1 engaged in protected conduct. Home health care aides who
2 work for Special Touch went on strike after their Union
3 gave ten days of advance notice as required by statute, 29
4 U.S.C. § 158(g). Special Touch lawfully polled its
5 approximately 1400 employees scheduled to work on the
6 first day of the strike. Forty-eight of the aides who
7 indicated their intention to work failed to report to
8 their patients' homes. Because we find that these
9 employees engaged in unprotected, indefensible conduct
10 that created a reasonably foreseeable risk of imminent
11 danger, we DENY the National Labor Relations Board's
12 petition for enforcement.

13
14 DENIED.
15
16

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19 Solomon, Acting General Counsel, Celeste J.
20 Mattina, Deputy General Counsel, John H.
21 Ferguson, Associate General Counsel, Linda
22 Dreeben, Deputy Associate General Counsel,
23 Amy H. Ginn, Attorney, *on the brief*),
24 National Labor Relations Board, Washington,
25 DC, *for Petitioner*.
26

27 RICHARD J. REIBSTEIN (Russell E. Adler, *on the*
28 *brief*), Pepper Hamilton LLP, New York, NY,
29 *for Respondent*.
30

31 DAVID M. SLUTSKY, Levy Ratner, P.C., New York NY,
32 *for Intervenor*.
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37 WESLEY, Circuit Judge:

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39 This petition for enforcement presents two issues: (1)
40 whether a health care employer may enforce an individual
41 notice rule after its employees' union provides advance

1 notice of an impending strike pursuant to 29 U.S.C. §
2 158(g); and (2) whether health care employees who fail to
3 report to work at individual patients' homes without
4 alerting their employer create a reasonably foreseeable risk
5 of imminent danger.

6 7 8 **Background**

9
10 Respondent Special Touch Home Care Services, Inc.
11 ("Special Touch") subcontracts with nursing and health-
12 related services to provide home health aides for patients
13 who require assistance. Special Touch's patients have four
14 common characteristics: (1) a physician ordered home health
15 care services; (2) they have an illness that prevents them
16 from normal functioning and daily living activities; (3)
17 they are "homebound;" and (4) they are receiving skilled
18 nursing, physical, occupational or speech therapy. Given
19 the nature of its services, Special Touch has a call-in rule
20 requiring aides who will not be able to report to their
21 patients' homes as scheduled (for any reason) to notify
22 Special Touch. Because aides go directly to patients'
23 homes, Special Touch uses an automated attendance system.
24 The company gets a report of which aides have not called in
25 after the start of their shifts, at which point Special

1 Touch calls each home to verify whether or not the aide is
2 there. Confirming an aide's presence takes approximately
3 twenty minutes.

4 In 2004, Special Touch had approximately 2500 aides on
5 its roster, with about 1400 of these aides regularly
6 assigned to specific clients. Aides are typically matched
7 with patients based on common language, primarily English,
8 Spanish, Chinese or Russian. Patients receive varying
9 amounts of care; some have an aide present twenty-four hours
10 per day, seven days a week, while others require just a few
11 hours each week. The necessary amount of care is determined
12 by the patient's physician. A nursing agency sets the
13 specific "plan of care" and then subcontracts the work to
14 Special Touch.

15 Aides who work for Special Touch undergo two-and-a-half
16 weeks of mandatory training before being assigned to
17 patients. The specific responsibilities of an aide depend
18 on the individual patient's plan of care, but they will
19 often include helping the patient bathe and maintain good
20 personal hygiene, helping patients move around and transfer
21 from a chair to bed or to the bath, meal planning and
22 preparation, light housekeeping, and grocery shopping and

1 errands. Aides often remind patients to take medication and
2 ensure they are taking the proper doses, but aides do not,
3 and cannot, perform medical procedures. Special Touch's
4 handbook explicitly lists functions its aides are *not* to
5 perform, including: taking vital signs, changing bandages,
6 giving medication, and "[g]iv[ing] any care not included on
7 the nursing care plan."

8 According to Inessa Lutinger, a registered nurse
9 instructor who trains aides for Special Touch, "our role is
10 prevention, prevention of higher level care, prevention [of]
11 patient hospitalization, and prevention [of a] patient
12 [becoming] a resident in the nursing home." To achieve this
13 end, aides are taught, among other things, how to look for
14 signs of distress, to prevent falls and to recognize signs
15 of internal bleeding. In addition, aides are trained how to
16 respond to an emergency, whether health-related or external
17 (such as a fire). According to Lutinger, one of the biggest
18 worries with patients is their susceptibility to falling -
19 particularly falling backwards - because of their lack of
20 balance and strength. Lutinger explained that the high risk
21 of falls is the reason the aides are tasked with light
22 housekeeping: "[I]f you keep your floor neat and nice, it

1 decrease[s the] probability of falling, and as a
2 consequence[] of possible fatal injuries.”
3
4

5 **Facts**

6
7 On May 27, 2004, New York’s Health and Human Service
8 Union 1199SEIU, AFL-CIO, CLC (the “Union”) notified Special
9 Touch of its intent to strike from Monday, June 7, 2004 at
10 6:00 a.m. until Wednesday, June 10, 2004 at 6:00 a.m.
11 During the week prior to the strike, coordinators and
12 supervisors from Special Touch contacted the approximately
13 1400 aides scheduled to work to inquire whether they planned
14 to take any time off during the upcoming week.² The
15 majority of the aides indicated their intent to work as
16 scheduled. Approximately seventy-five aides said that they
17 anticipated being absent during part of the following week
18 (whether for purposes of striking or for other reasons).
19

²In *Preterm, Inc.*, the Board determined that a health care organization may survey its employees to determine whether they plan to work during an upcoming strike after receiving a ten-day notice from the union. 240 N.L.R.B. 654, 656 (1979). The Board proceeded to specify three requirements for a pre-strike survey: (1) explain the purpose of the questioning, (2) assure employees that “no reprisals would be taken against them as a result of their response,” and (3) refrain from otherwise creating a coercive atmosphere. *Id.* At oral argument, the Board agreed that the poll here was never alleged to be unlawful and is therefore not challenged in this action.

1 Special Touch arranged for replacements to cover these
2 employees' patients.

3 Forty-eight³ aides who had not previously conveyed their
4 plans to be absent during the strike did not appear for work
5 on Monday morning, June 7, 2004. Most of these aides spoke
6 Spanish, which made finding emergency replacements for them
7 difficult. Unbeknownst to Special Touch, the Union had held
8 a meeting shortly before the strike, at which it advised
9 aides that they did not need to notify the company if they
10 planned to strike because the Union had already provided the
11 requisite ten-day notice required by 29 U.S.C. § 158(g) for
12 health-care workers.⁴

13 On June 7, when forty-eight aides who were expected to
14 work failed to call in or report, Special Touch struggled to
15 get replacements to its patients. These patients included
16 people suffering from recent strokes, Parkinson's disease,

³ Although forty-eight aides struck after saying they would report to work, the disciplinary measures Special Touch took are relevant for only forty-seven of these aides because Crecencia Miller was lawfully discharged for other reasons. See *Special Touch Home Care Servs., Inc.*, 351 N.L.R.B. 754, 754-55, 757 (2007) (*Special Touch II*).

⁴ The Union explains in its brief that: "1199 correctly informed the Aides that the Union's notice was the only notice lawfully required, and individual Aides had no obligation to provide individual notice to Special Touch."

1 early-onset Alzheimer's disease and other memory problems,
2 epilepsy, broken limbs, diabetes, osteoporosis, breast
3 cancer, developmental disabilities, and impaired mobility;
4 some of these individuals were over eighty years old.
5 Forty-three of the patients received partial coverage, while
6 five patients did not receive any coverage. According to
7 Special Touch Vice President of Operations Linda Keehn,
8 "[s]ome of them got partial service because we didn't find
9 out right away [It] was very, very confusing, very
10 chaotic. Here all of a sudden, we thought we had everything
11 sort of covered"

12 Following the strike, the seventy-five aides who had
13 advised Special Touch of their planned absence when asked
14 during the pre-strike poll were immediately reinstated to
15 work with their previously-assigned patients. The forty-
16 eight aides who responded during the poll that they intended
17 to work but failed to report as expected were advised not to
18 return to their assigned patients until further notice.
19 These forty-eight aides were ultimately reassigned over the
20 next few months, but not always to their prior patients or
21 to similar work schedules. One week after the strike began,
22 Keehn sent letters to these forty-eight aides detailing the

1 company's position on their absence:
2

3 You were asked if you would be taking any
4 time off the week of June 7th. You told
5 us that you would be working.
6

7 Despite your assurance, you did not show
8 up at the patient's home on June 7th, nor
9 did you call into the office at any time
10 prior to the start of your shift to
11 advise us that you would not be working
12 that day. As a result, you left the
13 patient at risk of being unattended by a
14 home health aide.
15

16 You know that Special Touch policies and
17 procedures require you to call in.
18

19 (JA 863.)
20

21 The letter goes on to state that Special Touch was aware of
22 the confusion over notification following the Union meeting,
23 and, as a result, the company had determined not to
24 terminate any of the employees.
25

26 **Procedural History** 27

28 After the Union filed charges against Special Touch,
29 the National Labor Relations Board's ("Board") General
30 Counsel issued a complaint charging Special Touch with
31 violating the National Labor Relations Act ("NLRA"), 29
32 U.S.C. § 158(a)(1) and (3),⁵ by failing and refusing to

⁵ Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and (3), provides that:

1 reinstate the forty-eight aides who participated in the
2 strike unexpectedly. Administrative Law Judge Raymond P.
3 Green ("ALJ") held a hearing, at which he heard testimony by
4 eleven of the striking aides, various Special Touch
5 supervisors and coordinators, Keehn, and Luttinger. The ALJ
6 ruled that Special Touch could not defend its treatment of
7 the forty-eight aides as unprotected strikers because their
8 failure to comply with the company's call-in rule did not
9 alter their status as protected workers. *Special Touch Home*
10 *Care Servs., Inc.*, 2005 N.L.R.B. LEXIS 472, at *20-22 (Sept.
11 15, 2005) (*Special Touch I*). The ALJ reasoned that to find
12 otherwise would mean that "an employer could, by enactment
13 of a private rule, nullify the public rights guaranteed by a
14 statute of the United States" - namely, 29 U.S.C. § 158(g).
15 *Id.* at *14.

16 The ALJ discussed Congress's enactment of Section 8(g)

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer-

(1) to interfere with, restrain, or coerce employees in the
exercise of the rights guaranteed in section 157 of this
title;

(3) by discrimination in regard to hire or tenure of
employment or any term or condition of employment to
encourage or discourage membership in any labor organization
. . . .

1 in 1974, which requires unions to give ten days of notice to
2 health care facilities before their employees go on strike.⁶
3 He confirmed that the notification requirement is limited to
4 unions and does not apply to individual employees. See *id.*
5 at *17. The ALJ rejected Special Touch's argument that some
6 type of notice requirement was appropriate in this situation
7 because of the "imminent danger" to patients that would be
8 created otherwise: "[a]ssuming arguendo that an 'imminent
9 danger' qualification can be read into the Act's conference
10 of the right to strike, the evidence does not establish that
11 such a danger existed in this case." *Id.* at *19. The ALJ
12 reasoned that "there were only about five clients for whom
13 the Respondent could not get coverage. And as to them,
14 there was no evidence that they suffered any adverse
15 consequences." *Id.* at *20. Accordingly, the ALJ concluded
16 that Special Touch had violated 29 U.S.C. § 158(a)(1) and
17 (3) by failing to immediately reinstate the forty-eight

⁶ Section 8(g) of the NLRA, 29 U.S.C. § 158(g), provides that:

A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention The notice shall state the date and time that such action will commence

1 strikers upon their unconditional offer to return to work.

2 See *id.* at *35.

3 The Board adopted the ALJ's reasoning with respect to
4 Special Touch's violation of Section 8(a) and petitioned
5 this Court for enforcement of its September 29, 2007
6 Decision and Order. *Special Touch Home Care Servs., Inc.*,
7 351 N.L.R.B. 754 (2007) (*Special Touch II*). We issued a
8 decision enforcing the order in part, modifying and
9 enforcing as modified in part, and remanding for the Board
10 to consider the intersection of the "plant rule" doctrine
11 and Section 8(g). *NLRB v. Special Touch Home Care Servs.,*
12 *Inc.*, 566 F.3d 292 (2d Cir. 2009) (*Special Touch III*). We
13 were concerned with the potential incompatibility between
14 the plant rule doctrine, which allows employers to enforce
15 neutral plant rules governing employees on company time
16 (such as Special Touch's call-in rule), and Section 8(g)'s
17 union notification requirement. See *id.* at 297-301. We
18 remanded and advised the Board to balance three key
19 interests in resolving the issue: "(1) the employer's
20 attempt to maintain a properly regulated workforce, (2) the
21 employees' interest in striking (including their interest in
22 not having to decide in advance that they wished to

1 participate), and (3) the risk to the clients, including the
2 nature of the care provided by the aides." *Id.* at 300. We
3 did not reach Special Touch's remaining arguments regarding
4 indefensible conduct (imminent danger), permanent
5 replacement and the legitimate business justification
6 defense. *See id.* at 301.

7 On remand, the Board re-affirmed its prior conclusion
8 that Special Touch had violated Section 8(a)(1) and (3) by
9 refusing to promptly reinstate the forty-eight striking
10 aides. *Special Touch Home Care Servs., Inc.*, 2011 N.L.R.B.
11 LEXIS 322 (June 30, 2011) (*Special Touch IV*). The Board
12 concluded that Congress had already balanced the relevant
13 interests at stake with respect to health care strikes and
14 reached a conclusion: Section 8(g).⁷ *See id.* at *13-19.
15 The Board determined that the union notification rule
16 represented a compromise reached by legislators endeavoring
17 to balance two competing interests: first, the previously
18 limited rights of health care employees, and second, the
19 special protection necessary for patient care. *See id.* at
20 *15-16.

⁷ The Board further noted that "[i]f the balance established by Congress in the 1974 amendments is imperfect, it is up to Congress, not the Board, to adjust it." *Special Touch IV*, 2011 N.L.R.B. LEXIS 322, at *19.

1 With respect to patient care, the Board acknowledged
2 that even health care employees who “cease work without
3 taking ‘reasonable precautions to protect’ the employer’s
4 plant, equipment, or patients ‘from foreseeable imminent
5 danger due to sudden cessation of work’” are not protected
6 under the NLRA. *Id.* at *41 (quoting *Bethany Med. Ctr.*, 328
7 N.L.R.B. 1094, 1094-95 (1999)). The Board rejected the
8 claim that Special Touch’s aides’ failure to warn the
9 company about their intent to strike created an “imminent
10 danger.” See *id.* at *19-22. However, the Board noted that
11 “under appropriate circumstances, we would entertain an
12 argument that despite prior notice, a strike, or particular
13 employees’ participation in a strike, created an imminent
14 danger.” *Id.* at *22 n.17.

15 Finally, the Board reviewed and rejected Special
16 Touch’s argument that its aides’ misrepresentations during
17 its pre-strike polling justified denying immediate
18 reinstatement. Disavowing Special Touch’s contention that
19 the right to poll employees loses all value if the employees
20 need not answer accurately, the Board declined to adopt a
21 rule requiring honesty in polling or allowing discipline in
22 its absence. See *id.* at *33.

1 Member Hayes dissented, arguing that under “the
2 particular facts of this case,” Special Touch acted lawfully
3 because the company had shown a “sufficiently compelling
4 business justification for enforcing its call-in rule and
5 that justification outweighs the minimal burden imposed on
6 employees’ protected right to strike.” *Id.* at *47
7 (dissent). The dissent focused on the forty-eight aides’
8 affirmative misrepresentations upon being polled. Member
9 Hayes reasoned that the majority’s ruling meant that
10 employees need never provide a lawful answer to a post-
11 notice of strike survey, “thus eviscerating the poll as an
12 effective aid in arranging for continuing patient care.”
13 *Id.* at *51. The dissent noted further that this would allow
14 unions and employees the opportunity to wield their ability
15 to strike in a dangerously disruptive manner – essentially,
16 by purposely misleading their employer. *See id.* at *51-52.

17 The Board’s June 30, 2011 Decision and Order holding
18 Special Touch responsible for violating Section 8(a)(1) and
19 (3) is now before us on the Board’s petition for
20 enforcement.

1

2 **Discussion**

3 Special Touch makes two main arguments before this
4 Court. First, Special Touch contends that the Board ignored
5 our mandate instructing it to balance the interests of
6 employees, employers and clients in determining whether
7 failure to comply with the company's call-in rule renders
8 otherwise lawful strikers' actions unprotected. The NLRB
9 argues that the Board did consider the interests of the
10 aides, Special Touch and patients "by giving heed to the
11 balance Congress already struck with regard to their
12 interests." (Petitioner's Br. at 28.)

13 Second, Special Touch argues that the Board erred in
14 rejecting its "imminent danger" defense, pursuant to which
15 the company claims that forty-eight aides failed to take
16 reasonable precautions to protect their patients from
17 foreseeable imminent danger. The NLRB gives little
18 attention to this argument, stating that the record fails to
19 show that patients were subject to substantial risk of harm
20 and, instead, only that the company was inconvenienced.

21 We will enforce the Board's order if its legal
22 conclusions have a "reasonable basis in law." See *NLRB v.*

1 *Windsor Castle Health Care Facilities, Inc.*, 13 F.3d 619,
2 623 (2d Cir. 1994)(citing *Universal Camera Corp. v. NLRB*,
3 340 U.S. 474, 488 (1951)). We review the Board's factual
4 findings for whether they are supported by substantial
5 evidence. See *id.* Here, the facts are not in dispute.
6 Accordingly, we review the Board's application of law to
7 fact *de novo*, deferring to the Board's decision if there is
8 "more than one reasonable resolution," one of which the
9 Board has adopted. See *Sheridan Manor Nursing Home, Inc. v.*
10 *NLRB*, 225 F.3d 248, 252 (2d Cir. 2000).

11 12 **I. "Plant Rule" Doctrine**

13
14 We previously remanded to the Board for the specific
15 purpose of considering the intersection between the plant
16 rule doctrine and Section 8(g). We understand the plant
17 rule doctrine to "permit[] an employer to enforce neutral
18 'reasonable rules covering the conduct of employees on
19 company time.'" See *Special Touch III*, 566 F.3d at 297
20 (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803
21 n.10 (1945)).

22 In *Republic Aviation*, the Supreme Court upheld the
23 Board's finding that a company's rule prohibiting any type
24 of solicitation on company property could not be used to

1 prohibit union solicitation on the premises during an
2 employee's free time without violating Section 8(3). See
3 324 U.S. at 795, 805. The Court reached this result by
4 endorsing the Board's established presumption that the NLRA
5 does not prevent employers from establishing "reasonable
6 rules" governing employee conduct while "on company time."
7 *Id.* at 803 n.10 (quoting *Peyton Packing Co.*, 49 N.L.R.B.
8 828, 843 (1943)). The Court (like the Board) emphasized the
9 importance of rules regulating the workplace applying to
10 conduct occurring "during working hours." See *id.*

11 The Board subsequently relied on the plant rule doctrine
12 to uphold the termination of employees who violated a neutral
13 notification rule at a chicken-processing plant. See *Terry*
14 *Poultry Co.*, 109 N.L.R.B. 1097 (1954). In *Terry Poultry*, the
15 company had a "long-standing plant rule" requiring factory
16 workers to notify other personnel if they were leaving the
17 assembly line. See *id.* at 1097-98. Two employees violated
18 this rule by leaving the line to make a labor complaint to
19 the plant's superintendent. See *id.* Their undisclosed
20 departure caused disruption of the production line. See *id.*
21 at 1098. The employees were terminated for violating the
22 plant rule. *Id.* at 1099. The Board upheld their
23 terminations after finding that the rule was not adopted for

1 a discriminatory purpose but was instead aimed solely at
2 ensuring efficient business practices. See *id.* at 1098-99.
3 The Board further supported this decision by reasoning that
4 the rule did not constitute an “unreasonable impediment” to
5 the employees’ exercise of their rights under the NLRA. See
6 *id.* at 1098.

7 The Board later cited to *Terry Poultry* in upholding
8 employee suspensions for violating a chemical plant’s
9 “longstanding, well-publicized rule requiring operators to be
10 properly relieved before leaving the plant” during a strike.
11 See *Gen. Chem. Corp.*, 290 N.L.R.B. 76, 83 (1988). This case
12 brought in elements of both the plant rule doctrine and the
13 imminent danger doctrine, discussed *infra*, because the rule
14 at issue in *General Chemical* was not intended merely for
15 factory efficiency, but primarily for “ensur[ing] safety to
16 the equipment, the plant, and the general public.” *Id.* The
17 Board found that the employees’ failure to take the
18 reasonable precaution of spending fifteen minutes obtaining
19 relief at their stations created a “reasonably foreseeable
20 possibility of danger.” *Id.* However, because the “danger
21 was eminent (significant) rather than imminent (impending),”
22 the Board relied primarily on the plant rule doctrine to find
23

1 that the employer's response did not violate the NLRA. See
2 *id.* at 83-84.

3 In its analysis of these key plant rule decisions, the
4 Board noted some crucial differences between the facts
5 therein and those at issue here, see *Special Touch IV*, 2011
6 N.L.R.B. LEXIS 322, at *26-30, as did we, see *Special Touch*
7 *III*, 566 F.3d at 298-99. First, the companies in the plant
8 rule cases did not receive any prior notice of concerted
9 activity. *Special Touch* had ten days' notice provided by the
10 Union. Second, the plant rule cases emphasize the propriety
11 of reasonable rules regulating employee conduct "on company
12 time." Here, the relevant rule focuses specifically on
13 employee conduct outside of working hours by requiring
14 advance notice of an employee's intent to miss work.

15 The Board contends that a better match for this case is
16 *Savage Gateway Supermarket*, 286 N.L.R.B. 180 (1987), *enfd.*,
17 865 F.2d 1269 (6th Cir. 1989) (unpublished decision), in
18 which the Board examined when an employer's desire to enforce
19 a plant rule is supported by compelling business interests
20 sufficient to outweigh certain rights held by employees. In
21 *Savage Gateway*, the Board determined that a grocery store had
22 violated the NLRA by terminating an employee who did not show
23 up for work on two consecutive days while picketing was

1 ongoing in front of the store. See *id.* at 183-84. The
2 company argued that its termination of the employee was due
3 to her failure to comply with its “longstanding work rule
4 requiring notification of absence to the store manager.” *Id.*
5 at 183. The Board rejected this contention, finding that the
6 employer did not have a compelling business interest for
7 enforcing its rule that was sufficient to outweigh the
8 employee’s right to engage in protected activity. See *id.*
9 Instead, the company sought to apply its rule for the sake of
10 convenience. See *id.*

11 Special Touch argues that the Board’s reliance on *Savage*
12 *Gateway* is misplaced in light of this Court’s decision in
13 *Business Services by Manpower, Inc. v. NLRB*, which is cited
14 in *Savage Gateway* and features facts more closely analogous
15 to those at issue here. 784 F.2d 442 (2d Cir. 1986). In
16 *Manpower*, the company supplied temporary employees to
17 businesses with industrial or clerical short-term
18 assignments. See *id.* at 443. Because the employees reported
19 directly to the temporary employer that had contracted with
20 Manpower, the company had a policy that any employee who
21 could not make it to an assignment had to call in and that
22 anyone who failed to call in or report to work would be
23 considered to have resigned. See *id.* Two employees sent to

1 fill a shift at a factory chose not to work after seeing a
2 "stranger" picket line composed of five or six workers from
3 one of the temporary-employer's plants located 100 miles
4 away. See *id.* at 443-44.

5 Manpower considered these employees to have resigned
6 after they did not show up for their assignment. See *id.* at
7 444. The Board ruled that the company violated the
8 employees' rights under the NLRA. See *id.* at 445. We
9 declined to enforce this order because we determined that
10 Manpower had "compelling business reasons" for enforcing its
11 policy that were sufficient to overcome the employees'
12 exceptionally "thin" protected rights under the
13 circumstances. See *id.* at 454.

14 Here, Member Hayes takes a similar position in dissent:
15 Special Touch's business reasons for enforcing its call-in
16 rule were sufficiently compelling to override the minimal
17 burden that compliance with the rule imposed on the aides'
18 right to strike. The dissent notes that Congress intended
19 for health care workers to be treated the same as any other
20 industry employees, such that legitimate business reasons
21 that would justify a non-health care company's conduct should
22 suffice equally in the health care field. See *Special Touch*
23 *IV*, 2011 N.L.R.B. LEXIS 322, at *52 (dissent). This argument

1 is tempting. After all, Special Touch has compelling
2 business interests for enforcing its call-in rule (providing
3 aides when and where the company said it would) that are very
4 similar to the interests cited by the company in *Manpower*.

5 The problem with this position, however, is that it
6 elevates the company's preferences over those espoused by
7 Congress. Congress's decision to require *union* notification
8 via Section 8(g) trumps Special Touch's interests in
9 enforcing its call-in rule, regardless of whether its argued
10 basis for doing so is business-related or safety-oriented.⁸
11 As the Board correctly determined, to hold otherwise would
12 constitute a rejection of the balance struck by Congress in
13 enacting Section 8(g).

14 Section 8(g), one of Congress's amendments to the NLRA
15 in 1974, is part of a package intended to remedy the
16 exclusion of nonprofit hospital workers⁹ from the protections

⁸ Member Hayes' dissent assures us that "the call-in rule here comes into play only *after* the Respondent conducted the lawful survey . . . and only for those aides who answered that they would work on June 7, then failed to do so without giving notice." *Special Touch IV*, 2011 N.L.R.B. LEXIS 322, at *48 (dissent) (emphasis in original). But the dissent's argument is, nonetheless, that Special Touch's call-in rule should be enforced.

⁹ At the time, 56 percent of all hospital employees worked at nonprofit, non-public hospitals. See *Staff of S. Comm. on Labor, 93d Congress, Legislative History of the Coverage of Nonprofit Hospitals under the National Labor Relations Act*,

1 guaranteed by the NLRA while still ensuring “that the needs
2 of patients would be met during contingencies arising out of
3 labor disputes.” See *Staff of S. Comm. on Labor, 93d*
4 *Congress, Legislative History of the Coverage of Nonprofit*
5 *Hospitals under the National Labor Relations Act*, (Comm.
6 Print 1974) (hereinafter *Legislative History*). The 1974
7 amendments were the result of “extensive discussion with
8 those groups representing employers, employees and the
9 administration” in the health care industry. *Id.* The goal
10 of the amendments was to incorporate “the public interest
11 demand[] that employees of health care institutions be
12 accorded the same type of treatment under the law as other
13 employees in our society.” *Legislative History*, S. Rep. No.
14 93-766, at 11 (1974). With this in mind, the union
15 notification provision is intended as a sufficient safeguard
16 to enable health care workers to strike; there is no
17 requirement that individual employees provide notice. The
18 Board, and this Court, have recognized this principle
19 repeatedly.

20 For example, in *Montefiore Hospital and Medical Center*
21 *v. NLRB*, we confirmed that Section 8(g) contains a “clear

(Comm. Print 1974).

1 limitation" requiring notice from labor organizations and not
2 from individual workers - an interpretation that had been
3 confirmed by numerous other Circuits as well as the Board.
4 621 F.2d 510, 514-15 (2d Cir. 1980). Our comments in dicta
5 that after a "union has given notice of its intention to
6 strike, the hospital would be well-advised to inquire of the
7 rest of its employees whether they plan to stay out in
8 sympathy" and that "[a]n employee who strikes after promising
9 to show up may well forfeit protection under the Act" have no
10 bearing on Section 8(g)'s requirements. *Id.* at 515. We
11 supported this assertion by citing to *Silbaugh v. NLRB*, 429
12 F.2d 761, 762 (D.C. Cir. 1970), which proposes that an
13 employee who strikes "in violation of a union's commitment to
14 an employer not to do so" is not engaging in protected
15 activity. See *id.* But this cannot change our finding that
16 the language of Section 8(g) is "crystal clear" that no
17 individual health care employee is required to give notice.
18 *Montefiore*, 621 F.2d at 514.

19 In addition, our statement in dicta is directed toward
20 the "rest" of a hospital's employees, meaning the ones who
21 are not covered by the union notification. See *id.* For
22 these employees to misrepresent their intentions to strike is
23 distinguishable: union employees have *already given notice* of

1 their intent to strike via union compliance with Section
2 8(g).

3 For these reasons, the Board correctly determined that
4 an employer cannot subvert the Congressional compromise
5 reached in Section 8(g) by enforcing a plant rule requiring
6 notification of absence. The Foreword to the 1974 amendments
7 makes it apparent that Congress specifically weighed the
8 interests of employers and employees, in light of the
9 “special considerations” relevant in the health care
10 industry, in adopting a union notice rule but not an
11 individual employee notice rule. *See Legislative History.*
12 Notably, Congress balanced these interests in 1974, *after* the
13 plant rule doctrine had been established.

14 Special Touch cannot override this policy choice:
15 Section 8(g) trumps Special Touch’s legitimate business
16 reasons for enforcing an individual notice rule. Thus, we do
17 not believe that the aides’ conduct was stripped of
18 protection because they did not comply with Special Touch’s
19 call-in rule. Instead, we hold that the aides’ actions were
20 unprotected because their uncorrected affirmative
21 misrepresentations regarding their plans to strike in
22 response to the pre-strike poll placed forty-eight of Special
23 Touch’s patients in foreseeable imminent danger.

II. Imminent Danger Doctrine

The Board and Special Touch agree that otherwise lawful strikers' conduct is unprotected when employees "cease work without taking 'reasonable precautions to protect' the employer's plant, equipment, or patients 'from foreseeable imminent danger due to sudden cessation of work.'"¹⁰ *Special Touch IV*, 2011 N.L.R.B. LEXIS 322, at *41 (quoting *Bethany Med. Ctr.*, 328 N.L.R.B. at 1094-95). The case that is often cited as providing the basis for this doctrine is *Marshall Car Wheel & Foundry Co.*, 107 N.L.R.B. 314 (1953), *enf. denied*, 218 F.2d 409 (5th Cir. 1955).

In *Marshall Car Wheel*, almost half of the employees at a foundry deliberately timed their walk-out (without giving advance notice) to coincide with the moment when molten iron in the plant cupola was ready to be poured off. 218 F.2d at 411. In determining whether the employees had engaged in protected conduct, the Board first recognized the general principle that an employee's right "to engage in concerted

¹⁰ In its 2011 Order, the Board spelled out the NLRB's position as follows: "the General Counsel further asserts that Section 8(g)'s 10-day notice requirement, *combined with the principle that a strike will be deemed unprotected if employees fail to take reasonable precautions to protect the employer's plant, equipment, or products from foreseeable imminent danger*, already strikes the proper balance." *Special Touch IV*, 2011 N.L.R.B. LEXIS 322, at *13 (emphasis added).

1 activity is limited by the duty to take reasonable
2 precautions to protect the employer's physical plant from
3 such imminent damage as foreseeably would result from their
4 sudden cessation of work." *Marshall Car Wheel*, 107 N.L.R.B.
5 at 315. Although the Board found that the employees had
6 deliberately endangered the plant, the Board determined that
7 the evidence showed that the employer disciplined the
8 employees because they violated a plant rule, not because
9 their action caused a risk of damage. *See id.* at 318-19.
10 The former basis for reprisal was insufficient to undermine
11 the employees' rights to engage in concerted activity;
12 therefore the Board declared the employees' conduct to be
13 protected. *See id.* at 319.

14 The Fifth Circuit declined to enforce the Board's
15 decision. *NLRB v. Marshall Car Wheel & Foundry Co.*, 218 F.2d
16 409 (5th Cir. 1955). The court disagreed with the Board's
17 reasoning that the company "was not primarily concerned with
18 the imminent threat of damage" but instead with the violation
19 of its plant rule forbidding employees from leaving the plant
20 without notice and permission:

21 [The Board's] ultimate conclusion that it
22 was the violation of the plant rule, and
23 that alone, which respondent refused to
24 condone or forgive seems to us
25 illogically to confuse cause and effect,

1 to make the tail wag the dog. Assuredly
2 the respondent was not more interested in
3 preserving the inviolability of its plant
4 rule, as such, than it was in protecting
5 its plant from the extensive damage and
6 loss which might have resulted from the
7 illegal walkout. On the ultimate issue of
8 whether respondent was entitled to
9 discharge or deny reinstatement to the
10 offending strikers, the real inquiry is
11 the character of the concerted activity
12 engaged in, not whether the rule was
13 incidentally breached thereby.

14
15 218 F.2d at 416-17 (emphasis added) (internal quotation marks
16 omitted).

17
18 This case is a good example of how the plant rule
19 doctrine and the "imminent danger" principle can be conflated
20 - they will often go hand-in-hand. This is unsurprising;
21 companies with a need to protect against dangerous work-
22 related activity are likely to have rules in place for that
23 purpose. See, e.g., *Gen. Chem. Corp.*, 290 N.L.R.B. at 77.
24 Regardless, while enforcing an internal company rule
25 antithetical to Congressional intent is inappropriate,
26 recognizing the applicability of the imminent danger doctrine
27 (even if it concerns the same subject matter as the plant
28 rule) is not only in keeping with the case law, it is good
29 policy.

30 In the health care context, we cited *Marshall Car Wheel*
31 in *Montefiore Hospital and Medical Center v. NLRB* for the

1 proposition that prior notice of concerted activity is
2 required "only when a strike, by its timing or
3 unexpectedness, creates great danger or is likely to damage
4 the employer's business excessively." 621 F.2d 510, 515 (2d
5 Cir. 1980). This Court then rejected the hospital's argument
6 that two doctors' participation in a strike (without notice)
7 put patients at risk and therefore stripped the doctors'
8 conduct of protection. See *id.* at 516.

9 We reached this result because the doctors' main duties
10 were in teaching and consulting, rather than patient care,
11 and "[t]his was not a case in which patients were left lying
12 on the operating table, emergency room personnel walked off,
13 or people in need of immediate treatment were left to fend
14 for themselves." *Id.* In addition, this Court noted that the
15 clinic remained open with one doctor, three nurses and a
16 receptionist during the strike. See *id.* at 512. Though
17 short of its usual ten or twelve doctors and approximately
18 twenty-five other personnel, the clinic was able to, and did,
19 treat patients. See *id.*

20 The Seventh Circuit dealt with a comparable scenario in
21 *East Chicago Rehabilitation Center, Inc. v. NLRB*, in which
22 the majority determined that a brief walk-out by seventeen
23 nurse's aides and support personnel at a nursing home did not

1 endanger the health of the facility's patients. 710 F.2d
2 397, 405 (7th Cir. 1983). The majority gave several reasons
3 for its conclusion that the unexpected walk-out was
4 protected.

5 First, the court affirmed the Board's finding that the
6 walk-out "caused inconvenience" but did not endanger
7 patients. *Id.* at 404. Specifically, the Board had found
8 that patients' meals and medications were delayed, patients'
9 sheets were not changed punctually, and one deceased person's
10 body was not removed in a timely fashion – a fact that the
11 majority deemed "unpleasant[]." *See id.* at 405. Second,
12 none of the strikers were doctors or nurses, supporting the
13 Board's finding that the strike did not "jeopardize[] any
14 patient's safety or health." *See id.* at 404 (internal
15 quotation marks omitted). Third, the court noted that the
16 nursing home refused to allow the striking employees to
17 resume work, implying that the company was operating ably
18 without them (and there was no evidence of replacements
19 arriving). *See id.* at 405. Even so, the court viewed this
20 as a "close case" which "might well have gone the other way,"
21 and noted that "at some point the cumulative distress to
22 helpless patients caused by a walkout of nurse's aides might
23 cross the line that separates inconvenience from inhumanity."
24 *Id.*

1 In the final health care case discussed in *Special Touch*
2 *IV*, the Board re-affirmed the principle that Section 8(g)
3 only requires notice from unions, not from individual health
4 care employees. See *Bethany Med. Ctr.*, 328 N.L.R.B. 1094,
5 1094 (1999). In *Bethany Medical Center*, the Board determined
6 that a two-hour walk-out by catheterization laboratory
7 employees who provided fifteen minutes' notice before the
8 first procedure scheduled for the day was not "indefensible"
9 conduct and did not create imminent danger. See *id.* at 1094-
10 95. Before analyzing the facts, the Board stated that the
11 "same standards of conduct" apply to health care employees as
12 to employees in other industries. *Id.* at 1094.
13 "Accordingly, the test of whether the catheterization
14 laboratory employees' work stoppage lost the protection of
15 the Act is not whether their action resulted in actual injury
16 but whether they failed to prevent such imminent damage as
17 foreseeably would result from their sudden cessation of
18 work." *Id.*

19 Based on this standard, the Board determined that the
20 employees' conduct was protected. *Id.* First, at the time of
21 the walk-out, no patients were actually in the laboratory,
22 nor did any patients require emergency treatment. See *id.* at
23 1094-95. Second, all of the procedures scheduled for the day
24 were routine and able to be transferred to nearby hospitals.

1 See *id.* at 1094. The Board noted that any delays experienced
2 were not exceptional and that the lab had a set policy for
3 rescheduling, or “bumping,” procedures – both routine and
4 emergency. *Id.* at 1095. Third, the Board found that because
5 there were “numerous other hospitals . . . in the near
6 vicinity” with the same capabilities as the lab, the
7 circumstances did not demonstrate a foreseeable risk of harm
8 to patients. *Id.*

9 Board Chairman Truesdale analogized the fact pattern in
10 *Bethany Medical Center* to that in *East Chicago*, finding that
11 both of these cases involved situations where “there were
12 other persons to ‘provide cover’ for the employees.” *Id.* at
13 1095 n.9. Chairman Truesdale distinguished circumstances
14 like these, in which striking workers are “provided cover,”
15 from those in *NLRB v. Federal Security, Inc.*, 154 F.3d 751
16 (7th Cir. 1998), in which a walk-out by security guards left
17 a housing project unprotected. See *id.*

18 In *Federal Security*, the Seventh Circuit refused to
19 enforce the Board’s decision that security guards who
20 abandoned their stations at a dangerous public housing
21 complex in Chicago (leaving at least four posts completely
22 unguarded) had engaged in protected activity. 154 F.3d at
23 752-53, 756. The housing complex hired around-the-clock
24 armed guards to staff posts, sweep buildings for weapons and

1 drugs, and verify that only residents and guests entered the
2 facilities. See *id.* at 753. The court determined that the
3 protection provided by the guards was critical – a finding
4 contained “in record evidence undisputed by the parties but
5 largely unmentioned by the ALJ.” *Id.* at 756. Given the
6 guards’ protective duties, the Seventh Circuit determined
7 that even though the complex was left unguarded for only
8 twenty minutes, that was enough to place residents in danger.
9 See *id.* at 757.

10 The court identified a “clear” distinction between the
11 facts in *Federal Security* and those in *East Chicago*: “[W]hile
12 the nurses’ aides left behind doctors, nurses, and other
13 front-line health care workers to provide cover, here the
14 guards were the front line, leaving behind unattended
15 stations and vulnerable residents.” *Id.* at 756. Moreover,
16 the Seventh Circuit took issue with the ALJ’s focus on
17 whether harm *actually* occurred as a result of the walk-out.
18 See *id.* at 756-57. The court explained that the imminent
19 danger doctrine¹¹ “does not ask whether anyone actually was
20 harmed by the activity otherwise protected; it asks whether
21 the activity endangered anyone to the point that harm was
22 foreseeable.” *Id.* at 757. Since “otherwise protected

¹¹ Therein referred to as the “‘health and safety’ exception.” See *id.* at 757.

1 activity surely loses its protection when it compromises the
2 safety of others," the guards' conduct was not protected
3 under the NLRA. See *id.* at 755, 756.

4 We have no doubt that this case is more akin to *Federal*
5 *Security* than to *East Chicago*. The Board, however, was
6 dismissive of the argument that Special Touch's patients were
7 placed at risk by the aides' conduct. This view is traceable
8 to two sources.

9 First, the ALJ in *Special Touch I* used the wrong
10 standard to assess whether the imminent danger doctrine was
11 in play (as in *Federal Security*), observing that "[a]t the
12 end of the day on June 7, 2004, there were only about five
13 clients for whom the Respondent could not get coverage. And
14 as to them, there was no evidence that they suffered any
15 adverse consequences." 2005 N.L.R.B. LEXIS 472, at *20.
16 Actual harm to patients is not the issue. The appropriate
17 inquiry is focused on the *risk* of harm, not its realization.
18 The Board was quite clear in *General Chemical*: "Although no
19 actual damage took place, that is not the test. There was a
20 reasonably foreseeable possibility of danger – the purpose of
21 the [plant] rule." 290 N.L.R.B. at 83. Likewise, in *Federal*
22 *Security*, the Seventh Circuit specifically noted that
23 "[w]hether actual harm resulted is hindsight and
24 irrelevant. The proper focus is that the unguarded stations

1 unquestionably heightened the danger to residents.” 154 F.3d
2 at 757. The standard is well-established for good reason.
3 Penalizing companies for disciplining employees whose
4 indefensible conduct fortuitously yields no damage would not
5 serve the underlying purpose of the doctrine – avoiding
6 unreasonable risk. It would be cruel to hold well-meaning
7 entities accountable for their employees’ good luck.

8 Second, although the Board cabined its focus to danger
9 (rather than actual harm) in *Special Touch IV*, it also
10 observed that it was unaware of any case in which “imminent
11 danger” existed along with properly given Section 8(g)
12 notice. 2011 N.L.R.B. LEXIS 322, at *22. And, while “under
13 appropriate circumstances, [the Board] would entertain an
14 argument that despite prior notice, a strike, or particular
15 employees’ participation in a strike, created an imminent
16 danger,” the Board did not believe that the situation here
17 qualified. See *id.* at *22 n.17.

18 The facts in this case are not disputed. The Board
19 acknowledged that Special Touch patients “have a wide range
20 of physical and mental conditions ranging from depression to
21 diabetes to poststroke partial paralysis.” *Id.* at *3.
22 Still, the Board did not believe that Special Touch aides’
23 presence in patients’ homes was necessary to prevent a
24 foreseeable risk of harm. At oral argument, attorneys for

1 the NLRB supported this position by explaining that many of
2 the aides advised their patients or patients' families that
3 they would be absent on the day of the strike (thus
4 alleviating the danger) and that, regardless, if an emergency
5 did arise, the aides are unable to administer medication. We
6 disagree with the Board's application of the law to these
7 facts and to the record as a whole. Neither the aides'
8 individual notice to patients nor the aides' inability to
9 perform medical services significantly mitigates the risks
10 posed when a home health care aide neglects to attend his or
11 her patient.

12 It was undisputed that Special Touch aides care for
13 patients who are referred to nursing agencies by physicians
14 or hospitals and it is this contracting agency that
15 ultimately determines whether a patient can be left alone at
16 any given time. For example, Special Touch Vice President
17 Keehn testified that if a patient resists having an aide on
18 any given day, or even if a family member of the patient
19 offers to take care of the patient instead, Special Touch

20 would then consult with the contracting
21 agency just to see if that would be
22 acceptable to them because we couldn't
23 cancel the service even for the one day
24 without reporting it to the nursing
25 staff, contracting agency nursing staff.
26 And they do say no. Sometimes they say,
27 no, we don't think it's a good idea.

28 (JA 503.)

1 There is an obvious explanation: medical professionals do not
2 want people without training to be responsible for taking
3 care of elderly, sick and/or homebound patients.

4 For this reason, it is irrelevant that many of the
5 forty-eight aides who did not call in or show up on June 7,
6 2004 warned their patients in advance. While this gesture is
7 well-meaning, it does not remove the danger. First, many of
8 the patients served by Special Touch live alone and there is
9 no one readily available to cover for an absent aide. Some
10 of the company's patients live with equally aged and infirm
11 spouses or siblings.¹² Second, even if a patient does live
12 with family, these individuals have not been trained to
13 provide the care the patient needs. And finally (but
14 critically), many of Special Touch's patients do not
15 appreciate the degree of care that their conditions require.

16 The aides who work at Special Touch receive weeks of
17 training designed to help them take care of patients who,
18 like some of the forty-eight who were left alone on June 7,
19 2004, have conditions including Parkinson's disease, early-
20 onset Alzheimer's disease and other memory problems,

¹² For example, Norma Lindao, one of the forty-eight aides at issue, was assigned to care for a couple from 9:00 a.m. to 5:00 p.m. six days per week in June of 2004. The husband had Parkinson's disease and early-stage Alzheimer's disease and the wife suffered from epilepsy.

1 epilepsy, broken limbs, diabetes, osteoporosis, breast
2 cancer, developmental disabilities, impaired mobility and
3 recent strokes. Although not all of these patients were
4 slated to receive twenty-four hour care, they were all
5 subject to nursing plans that prescribe some measure of
6 supervision and assistance. The primary reason for aides to
7 be present in patients' homes is prevention. The Special
8 Touch aides are the primary link between the nursing agency
9 and the patients and their job is to observe the patients and
10 ensure their safety.

11 The consequences of aides not showing up to patients'
12 homes and failing to secure replacements in advance could
13 very well be dire. In the Decision and Order that the Board
14 asks us to enforce, the Board makes light of the aides'
15 duties, describing them as "cleaning, shopping, bathing,
16 reminding customers to take their medication, and observing
17 customers for signs of immediate distress, such as dizziness
18 or chest pains." *Special Touch IV*, 2011 N.L.R.B. LEXIS 322,
19 at *3. But the reason aides perform light cleaning is to
20 decrease the chance that their frail and elderly patients
21 will trip over an obstacle or slip on a dirty floor.
22 Likewise, the reason the aides help their patients with

1 shopping is that many of the patients have trouble walking
2 and are homebound.

3 It is true that some patients are occasionally left
4 alone – even when an aide is on duty – but in these
5 situations, the aide first places a phone with emergency
6 phone numbers near the patient, ensures that the patient has
7 taken any necessary medications, has gone to the bathroom and
8 is in a comfortable position, *and* the aide must call a
9 coordinator at Special Touch to inform the agency. The
10 evidence shows that patients who are left alone when they,
11 their families and their physicians expect that an aide will
12 be present are exposed to “foreseeable imminent danger.”

13 On June 7, 2004, when forty-eight aides did not arrive
14 as expected at their patients’ homes, their actions gave rise
15 to this danger. This is not a case like *Montefiore*, where
16 one physician and three nurses remained available to help
17 patients in need. See 621 F.2d at 512. This is not a case
18 like *East Chicago*, where two nurse’s aides and four nurses
19 kept working in the nursing home and were available to assist
20 the elderly. See 710 F.2d at 407 (dissent). This is not a
21 case like *Bethany Medical Center*, where routine operations
22 were delayed and transferred to other hospitals, and
23 emergency procedures could be redirected to “numerous other

1 hospitals . . . in the near vicinity." See 328 N.L.R.B. at
2 1095. Instead, this is a case like *Federal Security*, where
3 workers completely abandoned their assigned posts, exposing
4 the people they were hired to care for and protect to
5 foreseeable and imminent danger. See 154 F.3d at 753-57.

6 Before this Court, the Board emphasized the lack of
7 prior notice provided to employers in each of these cases.
8 Here, the Union gave the requisite ten-day notice of its
9 intent to strike pursuant to Section 8(g). As previously
10 discussed, the employees were not required to give individual
11 notice – not by Section 8(g) and not by Special Touch's plant
12 rule. But the aides were required to take "'reasonable
13 precautions to protect' the employer's . . . patients 'from
14 foreseeable imminent danger due to sudden cessation of
15 work.'" *Special Touch IV*, 2011 N.L.R.B. LEXIS 322, at *41
16 (quoting *Bethany Med. Ctr.*, 328 N.L.R.B. at 1094-95). By
17 misleading Special Touch into believing that each of the
18 forty-eight aides' patients would be covered during the
19 strike, the aides exposed their patients to the risk of harm.

20 To be clear, this is not a roundabout way of
21 establishing an individual employee notification rule. Had
22 Special Touch not reached out to their aides in advance of
23 the strike in an attempt to plan ahead (as the company is

1 authorized to do pursuant to Board precedent), the aides
2 would not have been required to call in. The Union's notice
3 sufficed to advise the company that all of the approximately
4 1400 aides scheduled to work on June 7, 2004 might be on
5 strike. If an employer does not take it upon itself to
6 inquire further, the employer should be considered to have
7 received notice of 1400 absences. Moreover, there is no
8 requirement that an employee answer its employer's request
9 for information. The Board made it clear in *Preterm* that an
10 employee cannot be forced to tell the employer whether or not
11 the employee plans to strike - this would constitute an
12 impediment to engaging in protected activity. See 240
13 N.L.R.B. at 656. What employees cannot do is mislead their
14 employer into expecting their presence when the lack thereof
15 will result in foreseeable imminent danger.

16 Despite the fact that forty-eight aides never started
17 work on June 7, 2004, it can still be said that foreseeable
18 imminent danger resulted from their "sudden cessation of
19 work." Until approximately twenty minutes after each of the
20 forty-eight aides' shifts began, Special Touch believed that
21 it had these patients covered. The "sudden cessation of
22 work" occurred when the company determined that nearly fifty
23 of its aides were absent and that it would need to secure

1 replacements (many of whom would need to speak Spanish) as
2 fast as possible.¹³ This twenty-minute period (the bare
3 minimum for which a patient might have been without coverage
4 on June 7), was enough time for harm to have occurred. See
5 *Federal Security*, 154 F.3d at 757. Moreover, while forty-
6 three patients received partial coverage on the first day of
7 the strike, an additional five patients were left alone
8 entirely when the company could not secure replacements.

9 The burden on employees is minimal. It is simply not to
10 mislead an employer about whether an employee plans to work
11 when an unexpected absence will create a risk of harm to the
12 employer's plant, equipment or patients. This obligation
13 extends to all industries. Indeed, the resolution of this
14 case has very little to do with Section 8(g) or the
15 requirements imposed on health care employees and employers
16 by Congress.

17 This case, and our opinion, merely invokes the
18 established Board principle that an employee must take
19 reasonable precautions not to create foreseeable imminent
20 danger. The parties and the Board all agree that this is the
21 standard. Indeed, the Board identifies the employer's right

¹³ This task was made even more difficult because Special Touch had already pulled seventy-five replacements from its additional pool of aides to fill in for the aides who informed the company of their plans to strike.

1 to discipline employees who fail to meet this burden as one
2 of the reasons why an individual employee notification
3 requirement is unnecessary in the health care industry.
4 *Special Touch IV*, 2011 N.L.R.B. LEXIS 322, at *41. The
5 forty-eight Special Touch aides who affirmatively
6 misrepresented their intent to work on June 7, 2004 engaged
7 in “indefensible conduct” that is not protected by the NLRA.
8 As a result, Special Touch’s failure to immediately reinstate
9 these employees did not violate Section 8(a)(1) or (3).

11 **Conclusion**

12 For the foregoing reasons, the petition of the National
13 Labor Relations Board to enforce its June 30, 2011 Decision
14 and Order is **DENIED**.