

Visiting Nurses Association, Inc. Serving Alameda County and California Nurses Association affiliated with the American Nurses Association, Petitioner. Case 32-RC-246

January 13, 1981

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS
JENKINS, PENELLO, AND ZIMMERMAN

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a Hearing Officer of the National Labor Relations Board. Thereafter, on April 13, 1978, the Acting Regional Director for Region 32 issued a Decision and Direction of Election in the present case. Subsequently, both the Employer and the Petitioner filed requests for review. The Board, by telegraphic order dated May 10, 1978, granted the Employer's request for review in light of the Board's then pending reconsideration of *Sierra Vista Hospital, Inc.*, 225 NLRB 1086 (1976). The Board also granted the Petitioner's request for review on the ground that it raised substantial issues warranting review. On March 30, 1979, the Board issued its decision in *Sierra Vista Hospital, Inc.*, 241 NLRB 631. Thereafter, on May 14, 1979, the Board, in accordance with the principles set forth in *Sierra Vista*, supra, issued an order¹ remanding the present case to the Regional Director for Region 32 for receiving evidence as to whether the presence of the supervisors of the Employer or of third parties in positions of authority within the Petitioner disqualified the Petitioner from acting as the collective-bargaining representative of the Employer's employees.

At the hearing, the parties stipulated that there was no member of the Petitioner who had decisionmaking authority within the Petitioner who was either a supervisor for the Employer or for third-party competitors of the Employer. The Employer contended, however, that there was a conflict of interest between the Petitioner and the Employer in that the Petitioner was engaged in competition with the Employer through the Nurses Professional Registry, Inc., of the Alameda County Nurses Association (ACNA). At the close of the hearing, the Hearing Officer quashed the Employer's subpoenas of, *inter alia*, records regarding the dispatch by the Nurses Professional Registry,² hereafter referred to as the Registry, of nurses, aides, and orderlies to patients' homes; the minutes of the board meetings of the Registry from May 1,

1977; records pertaining to the certification of the Registry by the Petitioner; minutes of the board meetings of the Alameda County Nurses Association from May 1, 1977; the bylaws of the ACNA; and the minutes of the board meetings of the Petitioner from May 1, 1977. Thereafter, the case was transferred to the Board, and the Employer appealed to the Board the Hearing Officer's quashing of the subpoenas. The Board in an "Order Revoking the Hearing Officer's Quashing Subpoenas and Direction of Hearing" issued May 12, 1980,³ reversed the Hearing Officer's quashing of the Employer's subpoenas, except with respect to the records showing the number of dispatches of nurses, aides, and orderlies to patients' homes by the Registry. The Board further ordered that a hearing be held for the purposes of receiving into evidence the subpoenaed evidence.

A hearing was held on June 4 and 30, 1980, before Hearing Officer Ed Kaplan, at which the Employer submitted into evidence the numerous documents procured by the subpoenas. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director for Region 32 transferred this case to the Board for decision. Thereafter, the Employer and the Petitioner filed briefs.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds them free from prejudicial error. They are hereby affirmed.

On the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.
2. The labor organization involved claims to represent certain employees of the Employer.
3. No question affecting commerce exists concerning representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Petitioner seeks to represent all professional employees, including registered nurses, employed by the Employer at its Oakland and Hayward, California, offices. The Employer urges dismissal of the petition on the basis that the Petitioner is in competition with the Employer in providing home nursing services.

The Employer is a licensed home health care agency engaged, *inter alia*, in providing part-time skilled nursing and personal care to homes in Alameda County. It sends registered nurses and home health aides to patients' homes to provide these ser-

¹ Not published in bound volumes of Board Decisions.

² The Nurses Professional Registry is now officially named the Alameda County Nurses Registry, Inc.

³ Not published in volumes of Board Decisions.

vices, usually on a 20-hour-per-week basis. It also sends registered nurses to hospitals to engage in discharge planning for the patients. For the reasons set forth below, we find that the Petitioner, through the Registry, competes with the Employer in providing home care nursing services in Alameda County.

The ACNA is one of the 10 regional associations comprising the Petitioner. The Petitioner exercises considerable control over the regional associations. It authorizes their formation and delineates their geographic boundaries. It also reviews the regional associations' bylaws to see that they conform with its bylaws, and it also has the power to dissolve a regional association. The Petitioner's members pay dues to the Petitioner which then remits the money to the regional associations on a per capita basis. Finally, the regional associations are responsible for implementing the Petitioner's policies on a regional level.

The Registry was established by the ACNA and directly employs health care practitioners who it places as temporary employees in hospitals. The Registry also acts as a placement agency for private duty care practitioners who work in patients' homes, and there are numerous ties between the ACNA and the Registry. The Registry and the ACNA shared office space and equipment until March 1980, when they both moved to a different office building where they are presently located on adjacent floors. In 1977, the board of trustees of the Registry established a policy of trying to get the Petitioner to include in its collective-bargaining agreements with employers a clause requiring the employers to use the Petitioner's registries before resorting to other registries; and in December 1979 the Petitioner considered including such a provision in said agreements. The ACNA's bylaws, until early 1980, required that the ACNA's president and treasurer be members of the Registry's board of trustees, and gave the ACNA's board of directors the right to appoint four members to serve on the Registry's board of trustees. On the advice of counsel, the above provision was deleted from the ACNA's bylaws in early 1980. However, the president of the ACNA is presently a member of the Registry board of trustees. Finally, the Registry has consistently met the Petitioner's criteria for receiving the Petitioner's certificate of approval; one of these criteria is that the Registry be under the control and management of the ACNA's board of directors.

As stated above, the Registry acts as both an employer of health care employees and as a placement agency for private duty practitioners, who pay the Registry a fee for being placed in patients' homes.

The Employer contends that in this latter capacity the Registry operates as the Employer's business competitor. The Registry and the Employer operate in the same geographic area. Although the Employer offers primarily private duty care on a 20-hour-per-week basis while the Registry's registrants offer 40-hour-per-week care, the services performed in the patients' homes are the same. In fact, on occasion nurses of the Registry and the Employer have treated the same patient. Further, when Mediserve Home Health Agency, which like the Employer is a licensed home health agency, attempted to place an advertisement in the ACNA's newsletter in 1977, it was told that its ad could not be accepted because it was in competition with the Registry. Finally, the record indicates that there is a severe shortage of registered nurses and aides in the Alameda County area and that the Registry and the Employer compete in recruiting and retaining such nurses and aides.

The Petitioner maintains that it is not in competition with the Employer because the private home placement service comprises only a minute portion of the Registry's business. However, an examination of the Registry's statement of income and expenses for the first quarter of 1980 indicates otherwise. The record shows that for the first 3 months of 1980 the Registry received \$13,000 from registrants it placed in patients' homes and approximately \$412,000 from health care facilities. But a comparison of these figures is misleading because they represent different accountings. Thus, when the Registry places a registrant in a patient's home, the patient pays the registrant directly for any services provided, and the registrant in turn remits either 7 or 10 percent of the payment to the Registry.⁴ If the remainder of these payments are factored in, the total revenue—as opposed to receipts—generated by the Registry's home placement service in the first quarter of 1980 was approximately \$130,000. On the other hand, when the Registry places its own health care employees in hospitals and other health care institutions, such institutions pay the Registry a gross fee for providing them with employees out of which the Registry must pay the employees their salaries, payroll taxes, workers compensation, and other expenses. Hence, after deduction of these payments and expenses, the Registry's quarterly net revenue from what was left of the fees paid it by the health care institutions amounted to less than \$50,000.

⁴ CNA members, who are placed in patients' homes by the Registry, are required to remit to the Registry 7 percent of their total gross compensation received from the patient, while non-CNA members are required to remit to the Registry 10 percent of the total gross revenue they received from the patient.

We find that, based on a comparison of either the net revenue generated by the private home placement service with the net generated by the employment of health care employees by health care institutions, or of the total business, in dollar terms, generated by the private placement service versus the gross amount generated by the institutional employment of health care employees, the Registry's home placement service is not a minimal part of the Registry's business.

The Board has held that a union which is also a business rival of an employer is precluded from acting as the collective-bargaining representative of the employer's employees.⁵ Here, as discussed above, the Registry, in the operation of its placement service, competes with the Employer in providing home nursing services. Since the Registry is a creature of the ACNA which in turn is a regional arm of the Petitioner, the Petitioner is thus in substantial competition with the Employer.

The Petitioner maintains that it is not in competition with the Employer because, despite the various ties in the past between the Registry and the Petitioner, the Registry presently operates independently of and has no discernible connections with the ACNA (and therefore of the Petitioner). Al-

though the bylaws provision requiring that officers and members of the board of directors of the ACNA concurrently serve as members of the Registry board of trustees has been deleted, and the Registry no longer shares office space with the ACNA, strong ties remain between the Registry and the ACNA (i.e., the Petitioner). Indeed, the president of the ACNA is presently a member of the board of trustees of the Registry, and the Registry recently received the Petitioner's certificate of approval for, among other things, being under the ACNA's control and management. Further, there is nothing in the record to indicate that the Registry has renounced its aim to cause the Petitioner to include in its contracts a provision requiring employers to use its registries before resorting to other registries. In these circumstances we conclude, and find, that the Registry competes with the Employer, and that the Petitioner is therefore precluded from representing the Employer's employees. Accordingly, we shall dismiss the petition herein.

ORDER

It is hereby ordered that the petition filed in Case 32-RC-246 be, and it hereby is, dismissed.

⁵ *Bausch & Lomb Optical Company*, 108 NLRB 1555 (1954).