

**Albert Einstein Medical Center and Pennsylvania Nurses Association, Case 4-CA-7024**

March 3, 1980

**DECISION AND ORDER**

Upon a charge filed on September 23, 1974, by Pennsylvania Nurses Association, herein called the Union, and duly served on Albert Einstein Medical Center, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 4, on August 25, 1978, issued and served on the parties a complaint and notice of hearing, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. In substance, the complaint alleges, *inter alia*, that commencing on or about August 13, 1974, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union, although the Union has requested and is requesting it to do so. On September 7, 1978, Respondent filed its answer to the complaint denying the commission of any unfair labor practice.

Thereafter, on January 22, 1979, a hearing was held before Administrative Law Judge George F. McInerny. At the hearing, all parties entered into a stipulation in which they petitioned the Board to approve the transfer of this proceeding to the Board, and waived the making of findings of fact and conclusions of law by an administrative law judge and the issuance of an administrative law judge's decision. The parties further stipulated that the entire record in this proceeding would consist of the charge, the complaint, the answer, the stipulation with exhibits attached thereto, and the transcript of the proceeding. Upon conclusion of the hearing, the parties moved that the proceeding be transferred directly to the Board in Washington, D.C., for decision. Thereafter, the Administrative Law Judge granted the parties' motion. On August 23, 1979, the Board approved the stipulation of the parties, and ordered the case transferred to the Board, advising the parties to file briefs with the Board in Washington, D.C. Thereafter, Respondent, the Union, and the General Counsel filed briefs with the Board.

Upon the basis of the stipulation, the briefs, and the entire record in this proceeding, the National Labor Relations Board makes the following:

**FINDINGS OF FACT**

**I. THE BUSINESS OF RESPONDENT**

Respondent is a nonprofit corporation organized under the laws of the Commonwealth of Pennsylvania, and is engaged in providing full medical and hospital care of patients at its northern division, located at York and Tabor Roads in Philadelphia, Pennsylvania. During the 12 months preceding the issuance of the complaint herein, a representative period, Respondent received gross revenues from its operations in excess of \$500,000. During this same period, it had combined purchases, in interstate commerce, of goods valued in excess of \$50,000 directly from points located outside the Commonwealth of Pennsylvania.

Respondent admits, and we find, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

**II. THE LABOR ORGANIZATION INVOLVED**

Respondent, in its answer to the complaint, denies the allegation that the Union is a labor organization. The parties stipulated that the Union was certified by the Pennsylvania Labor Relations Board, herein called the PLRB, as bargaining representative of a unit of nurses. The complaint alleges, and Respondent admits, that the Union has sought unsuccessfully to bargain with Respondent in the certified unit. The record shows that the Union is an organization in which employees participate, and which exists, at least in part, for the purpose of representing employees in collective bargaining. Furthermore, we previously have found the Union to be a labor organization.<sup>1</sup>

We find that the Union is a labor organization within the meaning of Section 2(5) of the Act.<sup>2</sup>

<sup>1</sup> *Albert Einstein Medical Center*, 245 NLRB No. 26 (1979), and *Lancaster Osteopathic Hospital Association, Inc.*, 246 NLRB No. 96 (1979).

<sup>2</sup> Respondent, in support of its argument relating to the Union's labor organization status, contends, *inter alia*, that the Union may not act as exclusive bargaining representative for the certified unit because licensed practical nurses (LPNs) enjoy only limited participation in the Union, and thus there is no assurance that they will be afforded adequate representation. Respondent also contends that a further hearing is warranted to determine whether there is any danger of a conflict of interest due to the participation in the leadership of the Union by Respondent's supervisors or those of Respondent's competitors. However, the Board has held that "[T]he question of statutory labor organization status is . . . distinct from the question of a statutory labor organization's qualification to act as a bargaining representative in all instances and without regard to the circumstances under which bargaining takes place or will take place." *Sierra Vista Hospital, Inc.*, 241 NLRB No. 107 (1979). In view of our decision herein, we find it unnecessary to reach the issues raised by Respondent concerning the Union's qualification to act as bargaining representative for the unit involved herein.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. *The Stipulated Facts*

On June 28, 1973, the Union filed petitions for representation with the PLRB. Following a hearing, the PLRB issued an "Order and Notice of Election" on March 5, 1974, directing that the employees in a voting group consisting of "all full-time and regular part-time Registered Nurses, including Assistant Head Nurses, Public Health Nurse Coordinator, Home Care Nurse Coordinators, In-Service Instruction Coordinators and General Duty Nurses," as professionals, were entitled to vote separately on the question of whether they wished to be included in a bargaining unit with a voting group consisting of "all full-time and regular part-time Licensed Practical Nurses." Alternatively, the PLRB found that each voting group constituted a separate appropriate collective-bargaining unit.

A representation election was conducted by the PLRB on March 21, 1974. After the resolution of certain challenged ballots, the results of the election were as follows: (1) on the issue of whether professionals desired to be included in a unit comprised of both professional and nonprofessional employees, 100 ballots were cast for inclusion, and 77 ballots were cast in favor of a unit comprised of professionals only; and (2) on the issue of whether the employees wished to be represented by the Union, 193 ballots were cast in favor of representation by the Union, 192 ballots were cast for no representative, and 1 ballot was void. Thereafter, on April 25, 1974, the PLRB issued a "Nisi Order of Certification" which certified the Union as the exclusive representative for the following unit:

All full-time and regular part-time Registered Nurses including Assistant Head Nurses, Public Health Nurse Coordinators, Home Care Nurse Coordinators, In-Service Instruction Coordinators, and General Duty Nurses; and all full-time and regular part-time Licensed Practical Nurses; and excluding management level employees, supervisors, confidential employees, and guards as defined in the Act.

Respondent filed exceptions to this order and, on July 11, 1974, the PLRB issued a final order dismissing Respondent's exceptions. Thereafter, Respondent appealed the final order of the PLRB through the Pennsylvania courts. Respondent's appeals culminated on February 10, 1978, with the Pennsylvania Supreme Court's denial of Respondent's petition for allowance of appeal from the decision of the Commonwealth Court of Pennsylvania which had affirmed the PLRB's final order.

During the pendency of Respondent's court appeals, the Union requested that Respondent bargain with it in the PLRB certified unit, but Respondent refused to do so. On September 23, 1974, the Union filed the instant unfair labor practice charges with the Board, which were held in abeyance until the state court proceedings were completed. Thereafter, as noted above, the instant complaint issued on August 25, 1978, alleging that Respondent unlawfully had refused to bargain with the Union.

#### B. *Contentions of the Parties*

The General Counsel contends Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize or meet and bargain with the Union concerning a collective-bargaining agreement. The General Counsel argues, *inter alia*, that the extension of comity by the Board to the PLRB certification is appropriate because the proceedings which resulted in the PLRB certification reflected the true desires of employees, contained no election irregularities, and resulted in no substantial deviation from due-process requirements, and, further, that the certified unit is not repugnant to the Act. The General Counsel relies on, *inter alia*, *Allegheny General Hospital*, 230 NLRB 954 (1977), enforcement denied 608 F.2d 965 (3d Cir. 1979). The General Counsel further contends that neither the passage of time since the certification, nor the alleged employee turnover in the unit, is sufficient to relieve Respondent of its obligation to bargain with the Union.

The Union takes essentially the same position as the General Counsel, but also contends that, even if the Board decides not to extend comity, it should nevertheless find the certified unit appropriate based on an independent review of the record. In this regard, the Union asserts that both licensed practical nurses (LPNs) and registered nurses (RNs) are professional employees within the meaning of Section 2(12) of the Act. Although the Union recognizes that the Board held in *St. Catherine's Hospital of Dominican Sisters of Kenosha, Wisconsin, Inc.*, 217 NLRB 787 (1975), and other cases, that LPNs are technical employees, it asserts that the LPNs at Respondent's facility are professionals.

The Union further asserts that, even if the Board were to find that LPNs at this facility are technical rather than professional employees, the certified unit is appropriate due to the close working relationship, common duties and supervision, and other interests which the LPNs share with RNs. Finally, the Union argues that other technical employees have no community of interest with LPNs or RNs, inasmuch as other technical employees are not involved in direct patient care.

Respondent contends that the Board may not grant comity to the PLRB certification, citing, *inter alia*, *Memorial Hospital of Roxborough v. N.L.R.B.*<sup>3</sup> Respondent contends that, inasmuch as the record in the PLRB proceedings is 6 years old, the Board may not rely on that record to issue a bargaining order, but must hold further hearing to receive current evidence concerning the appropriateness of the unit.

Respondent further argues that the unit certified by the PLRB is inappropriate for two reasons. First, Respondent asserts that the unit improperly includes both RNs and LPNs, while excluding other employees whose functions give them a community of interest with the included employees. Respondent urges that RNs should have been included in a larger unit of all professionals, while LPNs should have been included in a unit of all technical employees. Secondly, Respondent contends that the certified unit includes supervisors and/or managerial employees. In this regard, Respondent asserts that assistant head nurses, nurse coordinators, and instructors should have been excluded from any certified unit.

Finally, Respondent argues that the Union does not enjoy majority support in the certified unit. Respondent notes that the vote in the underlying PLRB election was 193 for, and 192 against, representation, with 1 void ballot. Respondent argues that the void ballot should be considered analogous to an abstention, and that, because only 193 out of 386 eligible employees voted for representation, the Union has not received a majority of the votes cast. Respondent further asserts that, since the election, the unit has expanded from approximately 400 nurses to 684 nurses, of whom only 32.9 percent were eligible to vote in the election. Additionally, it asserts that turnover in the unit since 1974 has resulted in the departure of a majority of the eligible voters, so that only 45.2 percent of those eligible to vote in the election remain in the bargaining unit.

For all of the above reasons, Respondent contends that the complaint should be dismissed.

### C. Discussion and Conclusions

For the reasons set forth below, we find that Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain collectively with the Union with respect to the unit certified by the PLRB.

It is well settled Board policy that, in the health care industry, absent special circumstances such as a stipulation by the parties, existing separate repre-

<sup>3</sup> 545 F.2d 351 (3d Cir. 1976), denying enforcement to 220 NLRB 402 (1975).

sentation, or a separate bargaining history, LPNs should be included in a bargaining unit of all technical employees.<sup>4</sup> Furthermore, absent special circumstances, the Board has declined to direct elections in combined units of LPNs and RNs which excluded other technical employees.<sup>5</sup> It is clear from the record that the PLRB certified unit excludes technical employees other than LPNs<sup>6</sup> contrary to our well-established policy.

We find that it would not effectuate the purposes of the Act to extend comity to the PLRB certification of the combined unit of LPNs and RNs here. In this regard, we conclude that there are no special circumstances here which warrant a departure from the Board's policy concerning the unit placement of LPNs and other technical employees. Thus, the parties have not agreed to the combined unit of LPNs and RNs, either through stipulations or as a result of voluntary recognition. And, although the unit was certified by the PLRB, there has been no bargaining pursuant to that certification. Furthermore, we find that the PLRB certification in itself is insufficient to warrant a departure from our strong policy against requiring bargaining in the type of unit involved here. Therefore, in view of the particular circumstances of this case, we decline to extend comity to the PLRB certification.

Accordingly, we find that Respondent did not violate Section 8(a)(5) and (1) of the Act when it refused to bargain with the Union herein. We therefore shall dismiss the complaint in its entirety.<sup>7</sup>

### CONCLUSIONS OF LAW

1. Albert Einstein Medical Center is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Pennsylvania Nurses Association is a labor organization within the meaning of Section 2(5) of the Act.

<sup>4</sup> *St. Catherine's Hospital of Dominican Sisters of Kenosha*, 217 NLRB at 789. See also *Pontiac Osteopathic Hospital*, 227 NLRB 1706 (1977), where the Board recognized its policy of including LPNs with other technical employees, but directed an election in a unit of technical employees which excluded LPNs because of a history of separate bargaining for LPNs.

<sup>5</sup> See *Lancaster Osteopathic Hospital Association*, 246 NLRB No. 96, and *The Presbyterian Medical Center*, 218 NLRB 1266 (1975). We find inapposite *Maple Shade Nursing Home, Inc. d/b/a Maple Shade Nursing Home and Convalescent Center*, 228 NLRB 1457 (1977), cited by the General Counsel. In that case, the Board found appropriate a combined unit of RNs and LPNs. However, unlike here, there was no evidence in that case that the employer employed technical employees other than LPNs.

<sup>6</sup> Although the Union contends that the LPNs in this case are professional rather than technical employees, the record does not establish that they possess the attributes of a professional employee as defined in Sec. 2(12) of the Act.

<sup>7</sup> In view of our decision herein, we find it unnecessary to reach the other defenses raised by Respondent.

3. Respondent has not violated the Act as alleged.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

**MEMBER PENELLO**, concurring in the result:

I agree that comity should not be extended to the PLRB certification here, and that the com-

plaint should be dismissed. In so deciding, I make clear that, unlike my colleagues, I would not, in the absence of special circumstances, find appropriate a unit limited to technical employees in a health care institution. See my dissents in *Nathan and Miriam Barnert Memorial Hospital Association d/b/a Barnert Memorial Hospital Center*, 217 NLRB 775 (1975), and in *Newington Children's Hospital*, 217 NLRB 793 (1975). See also my dissenting opinion in *Allegheny General Hospital*, 239 NLRB No. 104 (1978), enforcement denied 608 F.2d 965 (3d Cir. 1979).