Albert Einstein College of Medicine of Yeshiva University *and* International Association of Security Officers. Case 2–CA–16205

January 30, 1980

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS PENELLO AND TRUESDALE

Upon a charge filed on February 9, 1979, by International Association of Security Officers, herein called the Union, and duly served on Albert Einstein College of Medicine of Yeshiva University, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 2, issued a complaint and notice of hearing on February 15, 1979, against Respondent, 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. Copies of the charge, complaint, and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on or about January 19, 1979, following a Board election in Case 2–RC–18122, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about February 5, 1979, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On February 26, 1979, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint and asserting certain affirmative defenses.

On April 19, 1979, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on April 26, 1979, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, Respondent admits numerous factual allegations of the complaint, but contends, in substance, that the Board's certification of the Union is invalid. In support thereof, Respondent asserts that, contrary to the Board's conclusion in the underlying representation proceeding, at all times it was not in its entirety, or primarily, a health care institution within the meaning of Section 2(14) of the Act. Rather, Respondent argues that it must be treated for purposes of the Act as an educational institution. In its response to the Notice To Show Cause, Respondent further contends that the characterization of its operation in the underlying representation proceeding as either primarily or entirely a health care institution is clearly erroneous as a matter of fact and law, and is directly contrary to the Board's recent decision in *Albany Medical College of Union University,* 239 NLRB 853 (1978). Respondent admits in its answer, however, that it has refused, and continues to refuse, to bargain with the Union.

In support of the Motion for Summary Judgment, counsel for the General Counsel argues that the decision in *Albany Medical College, supra,* does not affect the Board's decision in the underlying representation proceeding that Respondent is a health care institution under Section 2(14). The General Counsel also argues that the Motion for Summary Judgment should be granted even if Respondent is not found to be a health care institution within the meaning of Section 2(14).

For the reasons set out below, we find merit in certain of Respondent's contentions. Nevertheless, we find that Respondent violated Section 8(a)(5) and (1) by refusing to bargain with the Union, and that the Motion for Summary Judgment should be granted.

Our review of the record herein establishes that on October 2, 1978, the Union filed a petition in Case 2–RC–18122, in which it sought a unit of Respondent's "guards and security personnel." The petition described Respondent as a "school and health care facility" providing "education and health services." Thereafter, on October 6, 1978, the Union filed a second petition with the Regional Director, in Case 2–

[1] Official notice is taken of the record in the representation proceeding, Case 2–RC–18122, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello,* 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

RC-18129, which sought the same unit and contained the same description of Respondent and its activities.[2]

On October 12, 1978, the Regional Director issued an Order consolidating Cases 2-RC-18122 and 2-RC-18129 and an amended notice of representation hearing. Thereafter, in her Decision, Order, and Direction of Election, dated November 20, 1978, the Regional Director found, *inter alia* (and contrary to Respondent's contentions that is was basically not a health-related facility but rather an educational institution), that Respondent operated an "integrated health care and teaching facility." The Regional Director dismissed the petition in Case 2-RC-18129 and, based upon the petition in Case 2-RC-18122, directed an election in the petitioned-for unit.[3]

On November 29, 1978, Respondent filed with the Board a request for review of the Regional Director's decision, in which it contended that it was primarily an educational research institution and only secondarily a health care institution for purposes of the different provisions applicable to each under the Act. By telegraphic order dated December 29, 1978, the Board denied Respondent's request for review as raising no substantial issues warranting review. Thereafter, on January 19, 1979, pursuant to the election results,[4] the Regional Director certified the Union as the exclusive collective-bargaining representative of all employees in the appropriate unit.

As indicated previously, in its opposition to the General Counsel's Motion for Summary Judgment, Respondent argues that the result which the Board reached in the representation proceeding in classifying Respondent as an "integrated health care and teaching facility" is in conflict with the Board's decision in *Albany Medical College of Union University*, 239 NLRB 853 (1978). In *Albany Medical College*, the Board found that the medical school involved was not a health care institution within the meaning of Section 2(6) and (7) of the Act. Upon further reflection, and consistent with the reasoning and result reached in *Albany Medical College*, we conclude that Respondent was not properly classified as a health care institution under Section 2(14) of the Act in the underlying representation proceeding.

In finding *Albany Medical College* not to be a health care institution, we stated that "[o]ur conclusion rests on the finding that Albany Medical College's primary purpose—its *raison d'etre* —is to train physicians and to promote research and not to provide medical services to the community."[5] We have carefully reviewed the record in its entirety and are satisfied that the record establishes that the primary purpose of the Einstein College of Medicine is to train physicians and to promote research and not to provide medical services to the community. Accordingly, and in light of *Albany Medical College, supra*, we find that Respondent herein is not primarily or entirely a health care institution.

We further conclude, however, that this finding is not crucial in assessing Respondent's duty to bargain with the Union upon request. Thus, the fact that we agree with Respondent that it is primarily an educational institution rather than primarily or entirely a health care institution is ultimately of no legal consequence since, in either case, the Union involved herein was properly certified as the exclusive collective-bargaining representative of the employees in an appropriate unit.[6] In this regard, we emphasize that, inasmuch as the petition in the underlying representation proceeding was filed exactly 90 days prior to the expiration date of the collective-bargaining agreement between Respondent and the Intervenor, the petition was timely under both the rules for health care institutions and for non-health care institutions.[7]

With respect to other issues now raised by Respondent, we note that while Respondent denies that the Union is a labor organization based on insufficient knowledge of the issue, Respondent failed to file a request for review of the finding by the Regional Director in the representation proceeding that the Union was a labor organization. We also note that while Respondent denies the appropriateness of the unit at the present time, it failed to file a request for review of the Regional Director's finding on that issue in the representation proceeding.[8]

[2] At the time these petitions were filed, Respondent and Union of Security Personnel of Hospitals and Health Related Facilities, herein the Intervenor, had a contract which, according to the Regional Director, was to terminate December 31, 1978. The unit described in that contract was the unit which the Union sought in its petitions.

[3] In the course of her decision, the Regional Director specifically found that the Union was a labor organization within the meaning of the Act, and that the unit sought, i.e., all full-time and regular part-time security guards employed by Respondent at its medical school campus, Van Etten Drug Program and Methadone Treatment Program, with various exclusions, was an appropriate unit.

[4] The election tally revealed that of approximately 34 eligible voters, 28 cast ballots for the Union and 6 cast ballots for the Intervenor, with no ballots challenged.

[5] 239 NLRB *supra* at 854.

[6] Respondent does not contest that it is subject to the Board's jurisdiction but only the classification that the Board gave it in the representation proceeding. It is clear from the Regional Director's orginal decision that Respondent meets the jurisdictional standards for educational institutions. See below in the conclusions of law.

[7] See *Trinity Lutheran Hospital, et al.*, 218 NLRB 199 (1975), and *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000 (1962). Moreover, were we to find the petition initially untimely filed, we would nevertheless have found the election held pursuant to it to have been valid. See *W. A. Foote Memorial Hospital, Inc.*, 230 NLRB 540, 541 (1977), and cases cited at fn. 7 thereof.

[8] In passing, we do recognize that the Regional Director's unit determination in the underlying representation proceeding regarded as relevant, *inter alia*, the congressional mandate against proliferation of units in the health care industry. This factor is no longer of relevance to the unit determination. However, this now-extraneous finding of the Regional Director does not in any way detract from our agreement with the conclusion reached by her that Respondent was certified in an appropriate unit. Where, as here, the appropriateness of the petitioned-for unit is supported, *inter alia*, by a prior collective-bargaining history, and the fact that both Unions sought such an overall unit, Respondent's status as primarily an educational institution, rather than primarily a health care institution, does not operate to render said unit inappropriate. Finally, it is clear that the factor of undue proliferation

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[9]

The issues with respect to the Union's labor organization status and the appropriateness of the unit are issues raised by Respondent in this proceeding which were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence regarding them, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision regarding them made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigatable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, at all times material herein, has been a division of Yeshiva University, a private institution of higher education chartered under the Not-for-Profit Corporation Law and the Education Law of the State of New York, and has maintained its principal office and place of business in the Bronx, New York.

Annually, Respondent, in the course and conduct of its operations, derives gross revenues of approximately $87 million, and it purchases goods valued in excess of $25,000 directly from sources located outside the State of New York.

We find, on the basis of the foregoing, 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

International Association of Security Officers is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time security guards employed by Respondent at its Medical School campus, Van Etten Drug Program and Methadone Treatment Program, Bronx, New York, excluding all other employees and supervisors as defined in the Act.

2. The certification

On January 11, 1979, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 2, designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on January 19, 1979, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about January 25, 1979, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about February 5, 1979, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since February 5, 1979, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.[10]

was only one of many factors relied on by the Regional Director in reaching the results with respect to the appropriate unit which we still affirm.

[9] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[10] Chairman Fanning agrees with the result reached herein that by refusing to bargain collectively with the Union as the exclusive bargaining representative of all employees of Respondent in the appropriate unit Respondent has engaged in and is engaging in unfair labor practices within the meaning of Sec.

(Continued)

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Albert Einstein College of Medicine of Yeshiva University is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Association of Security Officers is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time security guards employed by Respondent at its medical school campus, Van Etten Drug Program and Methadone Treatment Program, Bronx, New York, excluding all other employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since January 19, 1979, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about February 5, 1979, and at all times thereafter to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Albert Einstein College of Medicine of Yeshiva University, Bronx, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Association of Security Officers as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time security guards employed by Respondent at its Medical School campus, Van Etten Drug Program and Methadone Treatment Program, Bronx, New York, excluding all other employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

8(a)(5) and (1) of the Act. However, as for Respondent's contention that it is primarily an educational institution, Chairman Fanning, for the reasons set forth in his dissenting opinion in *Albany Medical College of Union University*, 239 NLRB 853 (1978), would find that Respondent herein is a health care institution within the meaning of Sec. 2(14) of the Act.

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its medical school campus, Van Etten Drug Program and Methadone Treatment Program facilities, Bronx, New York, copies of the attached notice marked "Appendix."[1] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[1] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice 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."

APPENDIX

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

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Association of Security Officers as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, of coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time security guards employed by us at the Medical School campus, Van Etten Drug Program and Methadone Treatment Program, Bronx, New York, excluding all other employees and supervisors as defined in the Act.

ALBERT EINSTEIN COLLEGE OF MEDICINE
OF YESHIVA UNIVERSITY