

**Alcoholism Services of Erie County, Inc. and Buffalo
& Western New York Hospital & Nursing Home
Council, AFL-CIO. Case 3-CA-6968**

June 14, 1978

DECISION AND ORDER

BY CHAIRMAN FANNING AND MEMBERS JENKINS
AND TRUESDALE

On February 9, 1978, Administrative Law Judge John P. von Rohr issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel filed cross-exceptions and a supporting brief.

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.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions¹ of the Administrative Law Judge and to adopt his recommended Order.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Alcoholism Services of Erie County, Inc., Buffalo, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ In asserting jurisdiction over Respondent, we do not rely on Respondent's lack of intimate connection with the county of Erie, but rather rely on Respondent's degree of control over the working conditions of the employees which enables Respondent to bargain effectively with the Union. *Catholic Bishop of Chicago, A Corporation Sole, Department of Federal Programs*, 235 NLRB No. 105 (1978). We note, in agreement with the General Counsel's exception, that Buffalo Area Council on Alcoholism and the Union did, in fact, reach agreement.

² Members Jenkins and Truesdale adopt the Administrative Law Judge's recommended order requiring Respondent to bargain with the Union. While he specified in the section of his Decision entitled "Remedy" that the initial period of certification will be construed as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining agent in the appropriate unit, we find that a general bargaining order is the appropriate remedy, without stating a specific extension of the certification year. See *Federal Pacific Electric Company*, 215 NLRB 861 (1974).

Chairman Fanning would affirm the Administrative Law Judge on this point. Where, as here, the Respondent, a successor employer, has neither adopted the contract negotiated by its predecessor nor recognized the certified Union, the Chairman would hold that the Union has been effectively deprived of all the benefit of the certification. Cf. *Glomac Plastics, Inc.*, 234 NLRB 1309, fn. 4 (1978).

DECISION

STATEMENT OF THE CASE

JOHN P. VON ROHR, Administrative Law Judge: Upon a charge filed on March 14, 1977, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 3, issued a complaint on April 27, 1977, against Alcoholism Services of Erie County, Inc., herein called Respondent, alleging that it had engaged in certain unfair labor practices in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, herein called the Act. The Respondent filed an answer denying the allegations of unlawful conduct alleged in the complaint.

Pursuant to notice, a hearing was held before the undersigned in Buffalo, New York, on August 8, 9, and 10, 1977. Briefs were received from the General Counsel and the Respondent on October 3, 1977, and they have been carefully considered.¹

Upon the entire record in this case, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

A. *Background; the Issues*

On May 7, 1976, following an election, the Board certified as the exclusive bargaining agent of the employees of the Buffalo Area Council on Alcoholism, hereinafter called BACA, all employees in an appropriate bargaining unit consisting of all regular full-time and regular part-time senior emergency technicians, junior emergency technicians, senior aides, aides, and clerk typists employed at the Erie County Rehabilitation Center, 291 Elm Street, Buffalo, New York, excluding the senior clerk typist, vocational counsellors, registered nurses, social workers, guards, and supervisors as defined in the Act, and all other employees.² Although the parties thereafter engaged in negotiations, no collective-bargaining agreement was ever reached.

On January 1, 1977, the Respondent, Alcoholism Services of Erie County, Inc., hereinafter called ASEC or Respondent, entered into contracts with the Erie County (New York) Department of Mental Health to operate the Erie County Rehabilitation Center at 291 Elm Street, Buffalo, New York, which is the same facility previously operated by BACA. Although the Union subsequently requested Respondent to bargain for the employees in the foregoing unit certified by the Board, Respondent declined recognition and refused to bargain.

The complaint alleges that Respondent is a successor to BACA and that its admitted refusal to bargain was in violation of Section 8(a)(5) and (1) of the Act. Respondent defends itself on two grounds. One is that ASEC shares the statutory exemption of the County of Erie and the State of New York under Section 2(2) of the Act and hence is not

¹ The General Counsel's unopposed motion to correct the transcript, dated September 29, 1977, is hereby granted.

² Case 3 RC 6560.

subject to the jurisdiction of the Board. The second is that ASEC is not a successor of BACA.

B. The Jurisdictional Issue

It may be stated at the outset that with respect to the jurisdictional issue the General Counsel relies on *Mental Health Services—Erie County South East Corp. V*, 220 NLRB 96 (1975), in which case the Board found that the named employer was not exempt under Section 2(2) of the Act, and accordingly asserted jurisdiction.

At all times material hereto, Respondent has maintained its principal office, facilities, and place of business at 291 Elm Street, Buffalo, New York, where it is engaged in the business of providing alcoholism treatment, rehabilitation, and related services. During the year 1977 Respondent performed services valued in excess of \$500,000 for the Erie County Department of Mental Health and services valued in excess of \$40,000 for private patients, approximately \$30,000 of which latter amount was derived from New York State Medicaid.

Organized pursuant to section 402 of the Not-for-Profit Corporation Law of the State of New York in December 1976, Respondent is a nonprofit organization. Owning no assets of its own, the facility operated by Respondent at 291 Elm Street, including the furniture and equipment, belongs to either Erie County or the State of New York. For all practical purposes, Respondent's activities are entirely supported by public funding.

The first of two basic programs undertaken by Respondent at the 291 Elm Street facility is a sobering-up station which provides emergency treatment for intoxicated persons. This program is operated pursuant to contract with the county of Erie and is entirely funded by State revenues. The second basic program involves a residential program featuring long term care, treatment, rehabilitation, and training for nonintoxicated alcoholics. This program and the services involved are provided under a separate contract with Erie County and is supported by funds contributed equally by the county and the State. Both of these programs, it is to be noted, are part of a comprehensive program administered under statute by the State Department of Mental Hygiene for the care of mentally ill, including alcoholics. However, although these services may be provided directly by the State via the county, Respondent ASEC is in fact a private sector counterpart to the Erie County Department of Mental Health, one of several agencies having the same status.³

The record reflects that in this case, as in *Mental Health Services—Erie County South East Corp. V*, *supra*, the relationship between Respondent and Erie County is a contractual one; and although the county has "ultimate control" over Respondent's activities, their respective rights and obligations are spelled out in the contracts. Similarly, except for overall guides and standards, the county does not have the authority to tell the Respondent how to conduct its day-to-day operation.

Robert Shear, the executive director of Respondent, is

³ G.C. Exh. 17.

responsible for the interviewing, hiring, and termination of employees, subject only to review by the Erie County Department of Mental Health set forth in the qualifications of approved job descriptions. Although Respondent may not pay its employees more than the maximum that a comparable county employee can receive, Respondent is free to exercise its discretion in paying its employees lesser amounts or at hiring employees below the county's usual starting rates. Respondent is also responsible for developing its own fringe benefit program, although these benefits may not exceed comparable benefits paid to county employees.

Respondent's agreement with the county contemplate that Respondent may or will enter into a collective-bargaining agreement with a labor organization. Aside from a restriction that "the County shall not reimburse the Agency for any expenditures pursuant to such labor agreement or Agency plan which exceed the line item budget provisions in Appendix A," insofar as labor relations are concerned the contract otherwise only requires Respondent to provide the county with copies of all collective-bargaining agreements that have been negotiated.

Section 2(4) of the Act enlarged the Board's jurisdiction in the health field to include:

Any hospital, convalescent hospital, health maintenance organization, health clinics, nursing home, extended care facility, or other institution, devoted to the care of sick, infirm, or aged person:

Aside from the jurisdictional issue herein raised by the Respondent, I think it clear, and I would find, that alcoholics are "sick persons" within the meaning of the above Section of the Act. Indeed, this was so recognized in an attached document of a memo to the ad hoc committee, whose function was to form the Respondent corporation, by Dr. David S. Reynolds, which states in pertinent part as follows:⁴

The concept of alcoholism as a *disease to be treated* has become more commonly accepted today though it was only in the 1950's that the AMA officially designated alcoholism as a disease. The general principle of *treatment* of alcoholism rests on the assumption that alcoholism is a *progressive disease* of drug addiction with greater prognosis for arrest and treatment when detected and treated in the earlier stages.

Upon the entire record in this case, I find no merit in Respondent's contention that the factual circumstances in the present case are materially different from those in *Mental Health Services—Erie County South East Corp. V*. To the contrary, I find that the factual circumstances to be so similar that I must regard the *Mental Health Services* case to be controlling here. Accordingly, in rejecting Respondent's contention that Respondent shares the exemption of the county of Erie and the State of New York under Section 2(2) of the Act, I adopt as applicable here the following finding of the Board in the *Mental Health Services*, *supra*:

Moreover, we find that the services provided by the

⁴ G.C. Exh. 17.

Employer are not so intimately connected with the county of Erie as to consider it a joint-employer with the county, or to justify the extension of the county's exempt status as a political subdivision of the State of New York under Section 2(2) of the Act to the Employer. We further find that the Employer exercised sufficient control over the wages, hours, and other conditions of employment of its employees to enable it to bargain effectively with the Union. [Footnotes omitted.]

In sum, and upon all the facts heretofore related, I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it is subject to the jurisdiction of the Board.

II. THE LABOR ORGANIZATION INVOLVED

Buffalo & Western New York Hospital & Nursing Home Council, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

Respondent was organized as a corporation pursuant to the efforts of an ad hoc committee during the latter part of 1976. It took over the aforementioned facilities at 291 Elm Street previously operated by BACA on January 1, 1977, and immediately continued, with minor subsequent modifications, the same operations and services as had been provided by BACA.

As previously noted, notwithstanding Board certification of the Union on May 7, 1976, the Union and BACA commenced bargaining but never reached a collective-bargaining agreement prior to January 1, 1977. By letter addressed to Respondent dated January 25, 1977, and February 7, 1977, the Union requested Respondent to bargain.⁵ It is undisputed that at all times material hereto Respondent has refused to recognize and bargain with the Union. As has also been previously noted, the complaint alleges, and Respondent denies, that Respondent is a successor to BACA and that Respondent's refusal to bargain with the Union was therefore violative of Section 8(a)(5) and (1) of the Act.

The facts in this case are such that no lengthy discussion of the successorship issue is required. As has been indicated, there was no hiatus in operations when Respondent took over the 291 Elm Street facilities on January 1, 1977. Respondent retained a majority of the same unit employees formerly employed by BACA⁶ and continued opera-

⁵ Conceding that the February 7 letter constituted a request to bargain, Respondent apparently questions the letter of January 25 as constituting a request to bargain. While the matter does not warrant detailed discussion, I would construe the letter of January 25 as also being sufficiently clear to constitute a request to bargain. This is particularly true because Robert Shear, Respondent's executive director to whom the letter was addressed, concededly was previously aware of the Union's status as the collective-bargaining agent as well as the fact that the Union had undertaken collective-bargaining negotiations with BACA.

⁶ In fact, with the exception of Executive Director Shear, all 25 of the employees (including supervisors) on Respondent's payroll as of January 1,

tions at the same location and in the same facilities as its predecessor, with the same equipment. Although the testimony of Executive Director Shear indicates that Respondent intends to place more emphasis on the long term treatment of alcoholics than did its predecessor, the fact remains that Respondent's basic function, as was that of its predecessor, is to provide for the care and treatment of alcoholic persons. Considering all the foregoing factors and circumstances, I find that Respondent's operations is essentially the same as that of its predecessor in every material respect and that Respondent therefore is a successor employer. *N.L.R.B. v. Burns International Security Services, Inc., et al.*, 406 U.S. 272 (1972); *Nazareth Regional High School v. N.L.R.B.*, 549 F.2d 873 (1977); *Dynamic Machine Co.*, 221 NLRB 1140 (1975). Accordingly, since Respondent was bound to bargain with the Union, I find that its refusal to do so violated Section 8(a)(1) and (5) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the 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, I shall recommend that Respondent cease and desist therefrom, and that it take certain affirmative action designed to effectuate the policies of the Act.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, I 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 *Dynamic Machine Co., supra*, and cases cited therein.

CONCLUSIONS OF LAW

1. Alcoholism Services of Erie County, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Buffalo & Western New York Hospital & Nursing Home Council, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) is:⁷

1977, were former BACA employees.

⁷ Although the names or titles of certain job classifications have been changed by Respondent since the initial Board certification, the parties should have no difficulty in determining which of the new classifications

Continued

All regular full-time and regular part-time senior emergency technicians, junior emergency technicians, senior aides, aides, and clerk typists employed by Respondent at the Erie County Rehabilitation Center, 291 Elm Street, Buffalo, New York, excluding the senior clerk typist, vocation counsellors, registered nurses, social workers, guards, and supervisors as defined in the Act, and all other employees.

4. Since May 7, 1976, 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 purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. By refusing on or about February 10, 1977, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive 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)(1) and (5) of the Act.

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

On the basis of the above findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER ⁸

The Respondent, Alcoholism Services of Erie County, Inc., Buffalo, 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 Buffalo & Western New York Hospital & Nursing Home Council, AFL-CIO, as the exclusive bargaining representative of its employees in the appropriate unit set forth in the above Conclusions of Law, paragraph 3.

(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.

were intended to be included in or excluded from the initial Board certification.

⁸ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and the recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁹ 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."

2. Take the following affirmative action designed to effectuate the policies 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 facilities in Buffalo, New York, copies of the attached notice marked "Appendix." ⁹ Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's authorized 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 3, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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 Buffalo & Western New York Hospital & Nursing Home Council, AFL-CIO, as exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or 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 regular full-time and regular part-time senior emergency technicians, junior emergency technicians, senior aides, aides, and clerk typists employed by us at the Erie County Rehabilitation Center, 291 Elm Street, Buffalo, New York, excluding the senior clerk typist, vocational counsellors, registered nurses, social workers, guards, and supervisors as defined in the Act, and all other employees.

ALCOHOLISM SERVICES OF ERIE COUNTY, INC.