

**Bishop Randall Hospital<sup>1</sup> and Wyoming/Montana Association, American Nurses Association. Case 27-CA-4740**

November 14, 1977

**DECISION AND ORDER**

BY CHAIRMAN FANNING AND MEMBERS  
JENKINS AND PENELLO

On March 15, 1977, Administrative Law Judge George Christensen issued the attached Decision in this proceeding. Thereafter, the Respondent and Trustees filed exceptions and supporting briefs, and the General Counsel and the Charging Party filed answering briefs.<sup>2</sup>

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 conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.<sup>3</sup>

**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, as modified below, and hereby orders that the Respondent, Lutheran Hospitals and Homes Society at the Bishop Randall Hospital facility, Lander, Wyoming, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1:

"1. Cease and desist from:

"(a) Refusing to recognize and bargain with the Wyoming/Montana Association, American Nurses Association, as the exclusive bargaining representative of its employees in the unit found appropriate herein.

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

2. Substitute the attached notice for that of the Administrative Law Judge.

<sup>1</sup> Board of Trustees of the Memorial Hospital of Fremont County, Wyoming, herein called Trustees, intervened and participated in this proceeding as an interested party.

<sup>2</sup> The Respondent requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

<sup>3</sup> In par. 1 of his recommended Order, the Administrative Law Judge inadvertently omitted the narrow cease-and-desist language, "in any like or related manner," which the Board traditionally provides in cases involving 8(a)(1) and (5) violations. See *N.L.R.B. v. Entwistle Manufacturing Co.*, 120 F.2d 532, 536 (C.A. 4, 1941). Accordingly, we shall modify the recommended Order. We shall also modify the posting notice to reflect his entire recommended Order.

**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 recognize and bargain with the Wyoming/Montana Association, American Nurses Association, as the exclusive bargaining representative of its employees in the unit found appropriate.

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 collectively in good faith with the Wyoming/Montana Association, American Nurses Association, as the exclusive bargaining representative of all employees in the bargaining unit described below with respect to wages, rates of pay, hours, and working conditions and, if an understanding is reached, embody it in a signed agreement. The bargaining unit is:

All registered nurses employed at the Bishop Randall Hospital in Lander, Wyoming, excluding medical technologists, pharmacists, licensed practical nurses, supervisors as defined in the Act, guards, and all other employees.

LUTHERAN HOSPITALS  
AND HOMES SOCIETY

**DECISION**

**STATEMENT OF THE CASE**

GEORGE CHRISTENSEN, Administrative Law Judge: On September 8 and 9, 1976, I conducted a hearing at Lander, Wyoming, to try issues raised by a complaint issued on November 28, 1975<sup>1</sup> pursuant to a charge filed by the Wyoming/Montana Association, American Nurses Association<sup>2</sup> on November 17, 1975.

The amended complaint alleges Lander Hospital<sup>3</sup> violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (hereafter called the Act), by refusing to bargain with the Association concerning the

<sup>1</sup> As amended on December 8, 1975.

<sup>2</sup> Hereafter called the Association.

<sup>3</sup> At all times pertinent the grounds and buildings constituting the Bishop

rates of pay, wages, hours, and working conditions of the Lander Hospital's registered nurses.<sup>4</sup>

Neither the Society nor the Trustees deny the former refused to comply with the Association's request for recognition and bargaining following the Association's certification; they contend the Board lacks power to direct such bargaining because: (1) Lander Hospital is funded and controlled by a political subdivision of the State of Wyoming, i.e., the Trustees, and such political subdivisions are not "employers" within the meaning of the Act; (2) the Society and the Trustees are joint employers of Lander Hospital's registered nurses and, since the latter is not an employer subject to the Act, neither is the former. Alternatively, the Society and the Trustees contend a "unique relationship" exists between them which should dissuade the Board from ordering the Society to bargain with the Association.

The basic issue before me for decision is whether the Board has or should decline to exercise jurisdiction in this case.

The parties appeared by counsel at the hearing and were afforded full opportunity to produce evidence, examine and cross-examine witnesses, argue, and file briefs. Briefs have been received from the General Counsel, the Association, the Trustees, and the Society.

Based upon my review of the entire record,<sup>5</sup> observation of the witnesses, perusal of the briefs and research, I enter the following:

#### FINDINGS OF FACT

##### I. JURISDICTION

(as far as effect on interstate commerce)

The complaint alleged and the answers of the Society and the Trustees admitted Lander Hospital and the Society, in the course and conduct of their business operations, annually grossed over \$500,000 and purchased goods and materials which traveled interstate valued in excess of \$50,000.

Based on the foregoing, I find and conclude that at all times pertinent Lander Hospital and the Society grossed over \$500,000 annually in income and each purchased goods and services which traveled between the States valued in excess of \$50,000 and therefore their operations affected interstate commerce within the meaning of Section 2(6) and (7) of the Act.

Randall Hospital (hereafter called the Lander Hospital) have been owned by Fremont County, Wyoming (hereafter called the County); pursuant to Wyoming statute, the County's commissioners appointed a board of trustees (hereafter called the Trustees) to oversee the operation of the Lander Hospital; pursuant to powers granted the trustees by Wyoming statute, the Trustees entered into a contract with the Lutheran Homes and Hospitals Society (hereafter called the Society) wherein the latter leased and operated the Lander Hospital from the day it opened its doors. Throughout these and a related representation proceeding (Case 2-RC-4960) the Society has been treated and acted as the Respondent. The Trustees intervened and participated in this proceeding as an interested party. While the Trustees did

## II. JURISDICTION (EMPLOYER)

Section 2(2) of the Act excludes from coverage of the Act "any State or political subdivision thereof." The Society and the Trustees contend that the Trustees at all times pertinent were a political subdivision of the State of Wyoming and the actual employer of the nurses or, alternatively, that the Trustees and the Society were joint employers of Lander Hospital's registered nurses and therefore the Board lacked jurisdiction to proceed against the Society.<sup>6</sup>

The first question is whether the Trustees were at times pertinent a political subdivision of the State of Wyoming.

### A. *Were the Trustees a "Political Subdivision"*

Wyoming is a large and sparsely populated State. Wyoming's legislature passed a statute authorizing Wyoming county governments to establish public hospitals for the care of their sick and injured. The counties were authorized to exercise the power of eminent domain to acquire the necessary land, to issue bonds, and to accept subscriptions from the public to finance the purchase or construction of such hospitals, and to levy property taxes to retire such bond issues and to finance improvements, repairs, alterations, maintenance, etc. The statute also provided the land and buildings utilized in the operation of such hospitals were exempt from property taxes. Of the 26 hospitals currently operating in the State of Wyoming, only 1 is privately owned and operated.

The pertinent Wyoming statute further requires medical services be provided by such hospitals to indigents without charge and requires the elected county commissioners to appoint trustees to administer the hospitals.

The two major population centers in Fremont County, Wyoming, are Riverton and Lander. The County built its first public hospital in Riverton in 1950 with funds raised by public subscription and a bond issue and acquired (and subsequently improved) its second public hospital in Lander in 1960 by similar means.<sup>7</sup> The hospital in Riverton is generally known as the Fremont County Memorial Hospital and the Lander Hospital as the bishop Randall Hospital.

At all times pertinent, the County has owned the land and the buildings on which both hospitals conducted their operations and practically all of the equipment. Neither the land nor the buildings are subject to Wyoming property taxes. The funding of the bond issues and costs for improvements, additions, alterations, and major equipment

not formally participate in the representation proceeding as a party, the Trustees' counsel (W. A. Smith) in this proceeding participated therein as Respondent's major witness.

<sup>4</sup> On October 10, 1975, the Board certified that a majority of Lander Hospital's registered nurses cast ballots designating the Association as their collective-bargaining representative.

<sup>5</sup> Errors in the transcript have been noted and corrected.

<sup>6</sup> And erred in processing the representation dispute.

<sup>7</sup> The Lander Hospital was owned by private parties and operated by the Lander Chamber of Commerce.

purchases are defrayed in whole or part by county tax revenues.<sup>8</sup>

The parties stipulated (and the pertinent statute provided) at all times pertinent the Trustees were appointed by duly elected commissioners of Fremont County, Wyoming; that the Trustees served without pay; that the Trustees were charged with the same duties and responsibilities public officials of the State of Wyoming are charged with; that the Trustees possessed the same powers, liabilities, and immunities public officials of the State of Wyoming possessed; and that the Trustees were removable from office in the same manner public officials of the State of Wyoming are removed.

The record establishes that from the time the two hospitals came under county ownership the Trustees, as their general overseers and pursuant to statute, conducted monthly meetings open to the public; received reports of the hospitals' income, expenditures, usage, needs, and problems submitted by the administrators of the two hospital facilities; reviewed and, on occasion, suggested revisions in annual budgets proposed by the administrators; reviewed, authorized, modified, or rejected proposals submitted by the administrators for new construction, alteration, renovation, or repairs to buildings or renovation, repair of existing equipment or purchase of new equipment; received input from the citizens of the County concerning the hospitals' operations; maintained public records of their meetings; and periodically prepared and submitted reports and accountings to the County commissioners concerning the financial condition, receipts and disbursements of the two hospitals and requests for disbursements from county tax revenues to defray the costs for improvements, alterations, or maintenance of the hospitals' buildings and purchase or repair or maintenance of its equipment.

On the basis of the foregoing, I find and conclude since by specific Wyoming statute:

1. The County owns the land, buildings, and practically all the equipment utilized in the operation of the hospitals.
2. The foregoing property is exempt from state or county property taxes.
3. The hospitals were and are financed and supported in part from county tax revenues, and were established to meet the health needs of the citizens of the County, including its indigent citizens.
4. The County commissioners choose a number of responsible citizens of the County to serve without compensation as a board of Trustees to oversee the operations of the hospitals and those Trustees must and do account to the County commissioners at regular intervals concerning the operations of the hospitals.
5. The Trustees operate as a public body and possess the same duties, responsibilities, powers, liabilities, and immunities as all Wyoming public officials and are removable in the same manner as such officials are removable; the board of Trustees is a political subdivision of the State of Wyoming within the meaning of Section 2(2)

<sup>8</sup> The major financial support for the hospitals is derived from fees and charges to patients.

<sup>9</sup> The Trustees' counsel, W. A. Smith, testified in the representation proceeding (Case 27-RC-4960) Bishop Randall Hospital was acquired from

of the Act (cf. *N.L.R.B. v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600 (1971)).

B. *Were the Trustees the Real or a Joint Employer of the Nurses Prior to November 10, 1975*

As noted heretofore, the Riverton Hospital was built in 1950 as a public county hospital, and the Lander Hospital was acquired by the County in 1960.<sup>9</sup>

Exercising specific powers spelled out in Wyoming statutes, the Trustees executed a succession of contracts with the Society from the date each hospital opened its doors under county auspices wherein the Society agreed to lease and operate the hospitals. The first contract was executed in 1950 for a term of 15 years covering the lease and operation of the Riverton Hospital. That contract was supplanted by a contract executed on February 3, 1960, for a 15-year term extending from February 3, 1960, to February 3, 1975, and provided the Society would lease and operate both the Riverton and Lander Hospitals over that period. On January 22, 1975, the Society and the Trustees renewed that agreement for another 15 years extending from February 3, 1975, to February 2, 1990.

On September 27, 1973, the board of directors of the Society and the board of Trustees of the Fremont County Memorial Hospital also executed a document entitled "Articles of Organization and Understanding" wherein the signatories agreed the Society's board of directors would constitute the governing board of the two county hospitals; the president of the Society would control and administer the policies and programs of the hospitals through administrators appointed by him; the governing board of the Society would appoint the medical staff in accordance with the Society's medical staff bylaws, rules, and regulations; the administrators, with the assistance of the home office of the Society, would comply with all rules, regulations, laws, and standards of the State of Wyoming in conducting the operations of the hospital and seek accreditation of the hospitals; the local board<sup>10</sup> would consist of the board of Trustees "and such other persons as may be agreed upon by the Local Board and the Administrator of the local institution, with all appointments thereto made by the Governing Board of the Society"; the local board would send one or more delegates to the annual meetings of the Society and participate therein; the administrators would keep the local board (Trustees) informed concerning the policies and programs of the Society and their application within the hospitals; that to accomplish this, the administrators would present to the local board (Trustees) at their regular meetings clinical and statistical information and financial reports, interpret same, counsel with and seek the advice and guidance of the local board (Trustees) on matters of policy, rates, charges, collections, finance, improvement, equipment, personnel, professional staff, and all other matters affecting the service of the respective hospitals of the community and welcome and invite suggestions and constructive criticism from the local board (Trustees); the local board (Trustees)

private owners. He further testified it was operated for its private owners by the Lander Chamber of Commerce.

<sup>10</sup> For all intents and purposes, the board of Trustees and the local board were one and the same.

would have the administrators attend all their meetings and would consult with the administrators in formulating any plans or programs; and that the function of the local board (Trustees) would be to "assist, advise, counsel and guide the [Society's] Administrators and Governing Board in promoting its program of Christian service in the field of health and welfare, as it relates to Fremont County and surrounding area, and in maintaining and establishing institutions for the care of persons suffering from illness, disabilities, chronic disease or old age, who may need institutional care" and to interpret the institution to the community and the community's desires to the administrators.

Under the 1975-90 contract, the Trustees agreed to lease the grounds, buildings, and equipment of the two hospitals for a nominal consideration, with the Society agreeing to secure licenses to operate the hospitals for health care needs in accordance with standards prescribed by the Wyoming Board of Health; to take charge of and be responsible for the operation of the hospitals; to appoint qualified medical doctors to staff the hospitals; to appoint hospital administrators to conduct the day-to-day operations of the hospitals; to hire and supervise supporting staff; to maintain the grounds, buildings, and equipment; to furnish supplies, replace worn equipment, and make improvements and alterations in equipment and buildings as required (with the consent of the Trustees); to set fees and charges at rates not exceeding those charged by Wyoming hospitals of comparable size.

The record is limited with regard to information concerning the organization, structure, and operations of the Society. The Society's personnel policy manual distributed to all its employees (including its employees at Riverton and Lander Hospitals), however, discloses the Society was organized in 1937 by a group of Lutheran laymen and clergymen, as a nonprofit North Dakota corporation; that it started with seven hospitals and two nursing homes and now operates "many times that number" of general hospitals, homes for aged, nursing homes, and a hospital-school for crippled children at locations throughout the United States; that anyone who supports the Christian program of the Society is eligible to join on payment of a prescribed fee and dues, with employees urged to join; that the Society is governed by a 21-member board of directors chosen from its membership; that it owns some of the institutions heretofore mentioned and leases others, in all cases operating them through administrators appointed by its president, plus additional hired personnel. The record further discloses all persons employed by the Society at the various hospitals, nursing homes, etc., it operates (including the Lander and Riverton Hospitals) are covered by a uniform contributory retirement plan and Blue Cross-Blue Shield hospital/surgical plan; and that the working conditions and

most of the fringe benefits its employees receive at the various hospitals, etc., are identical.

Over the period of the various leases (prior to the November 10, 1975, amendment of the current lease), the Society both possessed and exercised power to decide the size and composition of the professional, administrative, and supporting staff at both hospitals; to appoint or hire and to fire whomever it chose; to set salary and wage scales; to set hours of employment; to set fringe benefits; to supervise the staff in the performance of their duties; and to set all other conditions of employment.

The Society provided appropriate medical services to bed and outpatients, did all billing and collection, retained all receipts (including receipts from the County), and paid all bills incurred in the course of operating the hospitals.<sup>11</sup> The Society retained any excess of receipts from the hospitals' operations over its operational costs or absorbed any excess of such costs over receipts.<sup>12</sup>

As expressed in the 1960-75 and 1975-90 lease and operations agreements between the Society and the Trustees covering the two hospitals and the September 10, 1973, articles of organization and understanding between them, prior to November 10, 1975,<sup>13</sup> the Trustees for the most part acted as consultants and advisors to the Society.<sup>14</sup>

Prior to the November 10, 1975, amendments, the board of Trustees spent most of its time considering, authorizing, and checking on the progress of projects concerning the purchase, renovation, or modification of equipment; construction, alteration, modification, improvement, or repair of buildings; and improvements or maintenance of the grounds.<sup>15</sup> While the two administrators informed the board of Trustees of personnel problems and changes as they arose, such as difficulty in recruiting certain categories of medical personnel, the identity of new hires, replacements, etc., these were in the nature of reports rather than matters for board decision; similarly, the periodic reports submitted by the administrators concerning monthly receipts, expenditures, numbers of beds occupied, outpatients treated, etc., normally, simply were received and noted.

On the basis of the foregoing, I find and conclude (as did the Board in its Decision issued on May 28, 1975, in Case 27-RC-4760) that prior to the November 10, 1975, lease amendments the Society was the sole and exclusive employer of the Lander Hospital's registered nurses within the meaning of Section 2(2) of the Act.

*C. Did the Trustees Become the Real or a Joint Employer on and after November 10, 1975*

Following the Board's October 10, 1975, certification that 17 of the 2 registered nurses eligible to vote in an election conducted on September 25, 1975, pursuant to the

<sup>11</sup> Including expenses for National Labor Relations Board, court, and other proceedings.

<sup>12</sup> The combined revenues from the two hospitals have regularly exceeded costs although at times one or the other hospital had costs exceeding revenues.

<sup>13</sup> When the Association requested bargaining and the 1975-90 lease was amended.

<sup>14</sup> The Society so stipulated in the representation proceeding, though it withdrew from such stipulation before me.

<sup>15</sup> Reasonably, since the Trustees had to seek and secure funds to defray the costs of such projects from the County commissioners or the public and any improvements in buildings, land, or equipment became county property; the lease agreement specifically required the Society to secure Trustee approval for such projects.

Board's May 28, 1975, decision in the representation proceeding, voted for Association representation,<sup>16</sup> the Association sent a mailgram to counsel for the Society (James Baird) in this and the representation proceeding, noting the certification and requesting that the Society meet and bargain with the Association concerning the wages, etc., of Lander Hospital's registered nurses.

On October 21, 1975, the Society's administrator at the Lander Hospital, Roger A. Lehr, sent a letter to the Trustees' counsel, W. A. Smith, requesting that he bring the Association's October 10, 1975, request for bargaining to the attention of the Trustees, enclosing a copy of the mailgram. The Trustees responded with advice that the subject matter of the mailgram would be taken up at the regular November 10, 1975, meeting of the board of Trustees with Lehr in attendance.

Prior to the November 10, 1975, Trustees' meeting, representatives of the Trustees and the Society negotiated amendments to the 1975-90 lease agreement between them providing:

Whereas recent events, including certain legal proceedings before the National Labor Relations Board and before the Federal courts appear to have cast some doubt on the degree of control over the hospital's operations . . . the parties hereto do mutually agree as follows:

1. Except as specifically amended herein, the provisions of the 1975 Lease shall remain in full force and effect for the period therein set forth.

2. A new paragraph shall be added immediately following paragraph 7 of the 1975 Lease, to read as follows:

7a. Lessee, in operating the said Units, shall continue to provide care for indigent persons in accordance with Chapter 9, Section 18-323 of the Wyoming Statutes, and shall in this and all other respects continue to conform to its operating policies to the requirements of Wyoming law governing the operation of County Memorial Hospitals, including promptly supplying all required reports to the Board of Trustees of the Memorial Hospital of Fremont County, Wyoming and operating at all times subject to the policy control required by Wyoming law to be maintained over such hospitals by the said Board of Trustees.

7b. In accordance with Section 18-323 of the Statutes of the State of Wyoming, Lessee shall furnish Lessor with semi-annual reports showing the financial condition of the hospital and all monies received and expended by Lessee. Such reports shall include a complete list of all persons then employed at each Unit of the Hospital, together with the rate range of compensation then applicable to the classification in which each is employed, and the total wages expended for each classification. Lessee shall, in addition, prior to January 1, 1976 and at a reasonable time in

advance of the commencement of each calendar year thereafter (or such other twelve month period as may be mutually agreed to by the parties) submit to Lessor Lessee's recommendations with respect to each Unit of the Hospital for minimum and maximum authorized staffing for each job classification, minimum and maximum authorized wage rates for each classification and authorized major fringe benefits, together with a certification that except in emergencies or situations beyond Lessee's control, no increase or decrease in authorized staffing, or authorized wage rates, or authorized major fringe benefits will be made during the applicable twelve month period except by written express authorization of Lessor. Lessor reserves the right, within 60 days after submission of either the semi-annual or annual report, to approve or disapprove, in writing, of, in the case of the annual report, the recommended authorized staffing, wage rate ranges and fringe benefits, or, in the case of the semi-annual reports, (a) the employment of any person listed, and (b) the amount of total compensation paid to employees collectively in any given classification. . . . *Lessee further agrees not to enter into any written contract of employment with any person for employment at the hospital, or any collective agreement covering terms and conditions of employment at the hospital without the express written consent of Lessor, and Lessee further agrees that any breach of this provision shall be grounds for termination of this lease upon the giving of sixty days notice in the manner hereinbefore set forth. Because this lease calls for continuous operation and maintenance of the hospital, the occurrence of any interruption of services by reason of a strike, lockout, slowdown or other concerted interference with normal operations shall be deemed a breach of this lease and in such event Lessor may give immediate notice of cancellation of this lease, which notice may be either hand delivered to the administrator of the hospital or sent by registered mail to Lessee at the address set out in paragraph 23 hereof. If the interruption of service persists, in whole or in part, beyond 48 hours after the receipt of such notice, this lease shall be effectively cancelled.*

4. A new sentence shall be added to paragraph 9 of the 1975 Lease to read as follows:

No increase in daily room rates to the public shall be effectuated without prior approval by the Lessor.

5. The first paragraph of paragraph 10 of the 1975 Lease shall be revised to read as follows:

the ground it involved an exempt employer under the Act (89 LRRM 2822) and reversal thereof as premature by the U.S. Court of Appeals for the tenth Circuit (523 F.2d 845).

<sup>16</sup> The delay between the date the decision issued and the election date was occasioned by proceedings wherein the Trustees sought and secured an injunction from the U.S. District Court for Wyoming barring the election on

10. Cooperation of Lessor and Lessee. All matters of policy pertaining to the public relations and the relationship of Hospital units to the community which they and each of them serve shall be determined as set forth in the Articles of Organization and Understanding between Lessee and the Local Board of the Riverton and Lander Units, it being understood, however, that as to operational matters Lessee is in charge of the operation and maintenance of the Hospital and shall have full responsibility for its operation, subject to the control reserved to Lessor, in accordance with the terms of this Lease Agreement and such other policies as may be mutually agreed upon by the parties. [Emphasis supplied.]

The amended lease agreement was ratified by the Trustees at their November 10, 1975, meeting and immediately executed (an official from the home office of the Society was in attendance at the meeting).

Exercising powers just set forth, the Trustees at the same November 10, 1975, meeting adopted a resolution directing the Society to refrain from engaging in collective bargaining with the Association pursuant to its October 10, 1975, request. On the same date, the Trustees sent a letter to the Society directing the Society to refuse to comply with the Association's October 10, 1975, bargaining request.

On November 21, 1975, Lehr sent a letter to the Association advising it of the Trustees' November 10, 1975, action and stating the Society, in compliance with the Trustees' directive, declined to meet and bargain with the Association over the Lander Hospital nurses' rates of pay, wages, hours, and working conditions. The Society has persisted in its refusal to meet and bargain with the Association concerning the above matters at all times thereafter.

Since the November 10, 1975, amendments to the 1975 lease agreement, the Trustees, other than directing the Society to refrain from compliance with the Association's request, have continued to interest themselves for the most part in questions concerning new equipment purchases, remodeling of portions of the hospital, expansion of services (i.e., establishment of a kidney dialysis center, enlarging the coronary and intensive care units, adding new beds and a wing); and financing same. While the Society began to submit the newly required staffing and wage reports specified in the amended lease, the Trustees, as before, have simply accepted the Society's actions and/or recommendations.

Though the Society since November 10, 1975, amendments to the 1975 lease has been required to submit periodic reports to the Trustees concerning compensation and fringe benefits of Lander Hospital's staff (with Trustee power to require modification thereof within a specified period after receipt of such reports) and provides the Trustees may cancel the lease in the event of a strike or other concerted disruption of services, these same lease amendments reaffirm the September 27, 1973, "Articles of Organization and Understanding" between the Society and

the Trustees wherein it was agreed the Society's board of directors constituted the governing board of the two hospitals, the president of the Society controlled and administered the affairs of the two hospitals through his appointed administrators, the administrator would inform the Trustees concerning the Society's policies and programs and their application within the hospitals, and the Trustees would "assist, advise, counsel and guide the Administrator and the Governing Board in promoting its program of Christian service in the field of health and welfare as it relates to Fremont County and surrounding area and in maintaining and establishing institutions for the care of persons suffering from illness, disabilities, chronic disease or old age who may need institutional care" and interpret the institution to the community and the community's desires to the administrator.

There is no evidence since the adoption of the November 10, 1975, amendments to the 1975 lease agreement that the Society has done other than continue in effect at Lander Hospital its uniform fringe benefit and employment policies, and its wage and staffing policies and procedures, nor that the Trustees have done other than accept the Society's decisions in these areas, as was the practice previous to the amendments.

The Society continued, as before, to run the two hospitals, including functions as staff hiring, directing the work, continuing its uniform fringe benefit and employment policies, billing, and collecting.

The General Counsel contends the Society joined in the November 10, 1975, amendments to evade its obligations under the Act and that, as a matter of public policy, this should not be permitted.<sup>17</sup> The General Counsel further contends despite the amendments, the Society since November 10, 1975, has retained and exercised sufficient control over the administration of the hospitals to warrant a finding it continued to be the sole and exclusive employer of Lander Hospital's registered nurses within the meaning of the Act.

Taking the latter contention first, I find and conclude the Society retained and continued to exercise such control over the operations of the Lander Hospital to warrant a finding it continued to qualify as the sole employer of Lander Hospital's registered nurses within the meaning of Section 2(2) of the Act.

And even were it presumed the existence of the new or additional powers granted by the Society to the Trustees under the November 10, 1975, lease amendments are sufficient indicia of increased control over the former by the latter to warrant the Board's declination of jurisdiction as a general premise, I would nevertheless find under the circumstances of this case such jurisdiction should be exercised. The Board and the Federal courts have consistently held a respondent may not circumvent the issuance of an order designed to remedy its conduct violative of the Act by interposing a contract it has executed, without regard to the apparent (on its face) legality of the contract in question (*International Ladies' Garment Workers Union AFL-CIO [Bernhard-Altmann Texas Corp.] v. N.L.R.B.*, 366 U.S. 731 (1961); *Williams, et al. v. Wisconsin Barge*

<sup>17</sup> I deny the Society's motion to strike those portions of the General Counsel's brief making this contention.

*Line, Inc.*, 416 F.2d 28 (C.A. 7, 1970), cert. denied 396 U.S. 1060; *N.L.R.B. v. American Beef Packers, Inc.*, 438 F.2d 331 (C.A. 10, 1971), cert. denied 403 U.S. 919). The timing and circumstances of the Society's negotiation of the lease amendments and the language of the preamble thereto clearly show the Society intended by such amendments (and their immediate specific exercise in the issuance of a Trustee order directing the Society's refusal to bargain with the Association) to circumvent the application of Federal labor policy to the Society following the success of Lander Hospital's registered nurses in securing the certification of the Association as their exclusive representative for collective-bargaining purposes and the consequent duty of the Society under Federal labor law to meet and bargain with the Association concerning those nurses' rates of pay, wages, hours, and working conditions.

Under these circumstances, I find and conclude the 1975 lease amendments (and their specific exercise in the issuance thereunder of a Trustee order directing the Society to refuse to comply with the Association's request for bargaining) should not, and shall not, be given any force or effect.

#### D. The "Intimate Connection" Issue

The Society argues that even were a finding to issue holding the Society exercised sufficient control over the operations of Lander Hospital to warrant exercise of the Board's jurisdiction, the Board is nevertheless precluded from exercising such jurisdiction because the services provided by the Society are "intimately connected" with the conduct of a governmental function, health care, by a political subdivision of the State, citing *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Rural Fire Protection Company*, 216 NLRB 584 (1975); *Roesch Lines, Inc.*, 224 NLRB 203 (1976); *MTL, Inc.*, 223 NLRB 1071 (1976); and *Transit Systems, Inc.*, 221 NLRB 299 (1975) (and seeking to distinguish *Grey Nuns of the Sacred Heart*, 221 NLRB 1215 (1975), on the ground the Board erred in that case in not realizing hospital care is a governmental function).

The Society recites statistics from "Hospital Statistics." (American Hospital Assoc. 1975) to the effect in that year 2,697 hospitals were operated by governmental units as opposed to 3,900 hospitals in private operation, the fact only one privately owned hospital is currently in operation in the State of Wyoming, and that local, state, and Federal government units over the years have operated hospitals. Unless the Society is contending a large proportion of the privately operated hospitals belong in the public sector because they are publicly owned, its statistics appear to demonstrate most hospital care is a private rather than a governmental function. No one is contending here that government-owned and -operated hospitals are exempt from the Act nor that privately owned and operated hospitals are subject to the Act; apparently the Society contends that all publicly owned and privately operated hospitals must be classified with the former on the ground hospital care is "basically, essentially and traditionally" a government function.

The Board has not gone so far, nor does it appear it should do so. Clearly hospital care is both a government and a private function. Thus, the Board in the case of

publicly owned/privately operated hospitals examines the degree of control exercised by the public entity on a case-by-case basis to determine whether its jurisdiction should be exercised (*Grey Nuns, supra*).

Findings have been entered heretofore that Lander Hospital was a private operation until the County purchase of 1960 and that since then Lander Hospital has operated under programs and policies developed by a private operator in common with other hospitals it operates throughout the United States. The Trustees for the most part have been content with a consulting and advisory role. The Society attempts to derive more income than it expends in its operations, and commingles the excess of income over expenses from its operation of Lander and Riverton Hospitals with its income from its other operations, offset its losses elsewhere, and reserves the right in the lease to terminate it if its operations at Riverton and Lander prove unprofitable. The Society expects to receive and does receive compensation from the County for providing services to members of the public who are unable to pay for them.

On balance, I find and conclude the Society's operation of Lander and Riverton Hospitals is more akin to a private than a public operation and that its discretion in conducting that operation as the governing board of Lander Hospital and under policies it establishes generally in all its hospitals represents a sufficient degree of control to qualify it as a private rather than a public operation.

I therefore find and conclude the operation of Lander Hospital by the Society is not so "intimately connected" a governmental operation the Board should decline to exercise its jurisdiction in this case.

#### E. Conclusion

On the basis of the foregoing, I find the Society at all times pertinent was the sole employer of Lander Hospital's registered nurses within the meaning of Section 2(2) of the Act and was engaged in commerce in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

### III. LABOR ORGANIZATION

The complaint alleged, the parties either admitted or stipulated, and I find at all times pertinent the Association was a labor organization within the meaning of Section 2(5) of the Act.

### IV. THE ALLEGED UNFAIR LABOR PRACTICE

#### A. The Unit

On May 28, 1975, the Board ruled (in Case 27-RC-4960) that

All registered nurses employed by the Employer at the Bishop Randall Hospital facility in Lander, Wyoming; excluding medical technologists, pharmacists, licensed practical nurses, supervisors as defined in the Act, guards, and all other employees

constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and I therefore so find and conclude.

#### B. *Majority Representative Status*

In its May 28, 1975, decision the Board directed that an election be conducted by its agents among the employees in the unit set out above. That election was conducted by secret ballot on September 25, 1975, and resulted in 17 of the 23 nurses eligible to vote casting ballots designating the Association as their representative for the purpose of bargaining collectively with their employer concerning their rates of pay, wages, hours, and working conditions.

On October 10, 1975, the Board duly certified that by virtue of the foregoing the Association was the exclusive agent of Lander Hospital's registered nurses for the purpose of bargaining collectively with their employer concerning their rates of pay, wages, hours, and working conditions.

On the basis of the foregoing, I find at all times since September 25, 1975, the Association has represented a majority of the employees within the aforesaid unit.

#### C. *The Refusal To Bargain*

As noted heretofore, on October 10, 1975 the Association requested that the Society bargain with it concerning the rates of pay wages, hours, and working conditions of the unit employees, and that on November 21, 1975, the Society refused to comply with the Association's request.

I therefore find and conclude the Society by its November 21, 1975, refusal to comply with the Association's October 10, 1975, request for bargaining over the rates of pay, wages, hours, and working conditions of its employees within the aforementioned unit thereby violated Section 8(a)(1) and (5) of the Act.<sup>18</sup>

#### CONCLUSIONS OF LAW

1. The board of Trustees at all times pertinent was a political subdivision of the State of Wyoming within the meaning of Section 2(2) of the Act.

2. The Society at all times pertinent was an employer engaged in commerce in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. At all pertinent times the Association was a labor organization within the meaning of Section 2(5) of the Act.

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

All registered nurses employed by the Society at the Bishop Randall Hospital facility in Lander, Wyoming, excluding medical technologists, pharmacists, licensed practical nurses, supervisors as defined in the Act, guards, and all other employees.

<sup>18</sup> In view of this finding, I hereby deny the Society's motion to revoke the Association's certification as the exclusive collective-bargaining representative of Lander's Hospital's registered nurses.

<sup>19</sup> 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,

5. Since September 25, 1975, the Association has represented a majority of the Society's employees within the above unit.

6. Since November 21, 1975, the Society has refused to bargain with the Association concerning the wages, rates of pay, hours, and working conditions of its employees within the aforesaid unit and thereby violated Section 8(a)(1) and (5) of the Act.

7. The aforesaid unfair labor practice affects interstate commerce.

#### THE REMEDY

Having found the Society engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend it be directed to cease and desist therefrom and take affirmative action designed to effectuate the purposes of the Act.

It shall be recommended that the Society be ordered to cease and desist from its refusal to meet and bargain with the Association concerning the wages, rates of pay, hours, and working conditions of its employees within the unit heretofore specified and to meet and bargain with the Association at its request over those matters and, if agreement thereupon is reached, to reduce such agreement to writing and execute it.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I recommend the issuance of the following:

#### ORDER<sup>19</sup>

Lutheran Hospital and Homes Society at Bishop Randall Hospital, Lander, Wyoming, its officers, agents, successors, and assigns, shall:

1. Cease and desist from refusing to recognize and bargain with the Wyoming/Montana Association, American Nurses Association, as the exclusive bargaining representative of its employees in the unit found appropriate herein.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, bargain collectively in good faith with the above-named Association with respect to the rates of pay, wages, hours, and working conditions of the unit employees and, if an understanding is reached, embody it in a signed agreement. The appropriate unit is:

All registered nurses employed by the Society at the Bishop Randall Hospital facility in Lander, Wyoming; excluding medical technologists, pharmacists, licensed practical nurses, supervisors as defined in the Act, guards, and all other employees.

(b) Post at Bishop Randall Hospital in Lander, Wyoming, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional

conclusions, and 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.

Director for Region 27, after being duly signed by the Society's authorized representative, shall be posted by it 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 the

Society to insure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps the Society has taken to comply herewith.