

**Duke University and American Federation of State, County and Municipal Employees, AFL-CIO, Petitioner and National Union of Hospital & Nursing Home Employees, RWDSU, AFL-CIO, Local 1199D, Petitioner.** Cases 11-RC-3234 and 11-RC-3251

November 18, 1971

DECISION, ORDER, AND DIRECTION  
OF ELECTION

BY CHAIRMAN MILLER AND MEMBERS  
FANNING, JENKINS, AND KENNEDY

Upon separate petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a consolidated hearing was held before W. Britton Smith, Jr., Hearing Officer. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, by direction of the Regional Director for Region 11, these cases were transferred to the Board for decision. Briefs were filed by the Employer and National Union of Hospital & Nursing Home Employees, RWDSU, AFL-CIO, Local 1199D, herein Local 1199.

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

Upon the entire record in these cases, the Board finds:<sup>1</sup>

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the policies of the Act to assert jurisdiction herein.<sup>2</sup>

2. The labor organizations involved claim to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

American Federation of State, County and Municipal Employees, AFL-CIO, herein called ASCME, Petitioner in 11-RC-3234, filed a petition seeking a unit of what amounts to all service employees, excluding maintenance employees, on Duke's cam-

pus. The National Union of Hospital & Nursing Home Employees, RWDSU, AFL-CIO, Local 1199D, herein called Local 1199, filed its petition seeking a unit of "all service and maintenance employees at Duke University Medical Center, a medical teaching center of Duke University."<sup>3</sup> Each Petitioner intervened in the other's case and each wishes to participate in any election the Board should direct. The Employer, Duke University, takes the position that a university-wide unit is the only appropriate unit. All parties, although actively contesting the scope of the unit, have agreed that a unit of "biweekly" service employees would be appropriate. Biweekly employees are hourly paid, nonacademic, nonprofessional employees throughout all components of the University, who are covered by a uniform set of personnel policies and fringe benefits and who are paid every other week. Duke employs in excess of 2,500 biweekly employees.

Duke, a private nonprofit university incorporated under the Nonprofit Corporation Act of the State of North Carolina, has an enrollment of approximately 7,200 students in 44 academic departments and 7 graduate schools. Duke is governed by a 36-member board of trustees, with 9 such trustees sitting on the Executive Committee. Administratively, the President is the principal officer of the University, and the Chancellor acts on behalf of the President. There is a university counsel and Secretary. The Provost is the chief academic officer whose responsibilities include the Medical School and associated paramedical programs. The principal administrative offices are located in one building and all checks, including paychecks, are centrally issued from this building. Budgets are prepared on a departmental level, but flow through the Vice President for Business and Finance at the university level to the President and then to the Trustees. "Auxiliary enterprises," operated on a self-sustaining budgetary basis, include the Duke Hospital on the Duke campus at Durham, the Highland and Sea Level divisions of the Medical Center, both of which are hospitals located over 220 miles away from the main campus, retail stores, housing operations, and the student laundry.

All accounting, including accounts payable, are handled at a central office. Although budgets are

housekeepers and porters, and messengers in Community Health Services; lab assistants in the Department of Surgery; housekeepers and lab assistants in the Department of Anesthesiology; lab assistants in the Department of Pathology; lab assistants in the Department of Pediatrics; orderlies in the Department of Ophthalmology, housekeepers, porters and lab assistants in the Department of Micro-Biology and Immunology; animal caretakers in the Department of Anatomy; housekeepers, lab assistants and the head clerk in the Department of Medicine; housekeepers in the Department of Obstetrics and Gynecology; and animal caretakers in the Department of Veterinarian Medicine.

<sup>1</sup> Duke University requested oral argument and the American Federation of State, County and Municipal Employees, AFL-CIO, filed a letter opposing the Employer's motion. We hereby deny the Employer's request for oral argument, as the record, including the briefs, adequately presents the issues and the positions of the parties.

<sup>2</sup> *Cornell University*, 183 NLRB No. 41; Rules and Regulations, Series 8, as amended, Section 103.1.

<sup>3</sup> This petition was amended at the hearing to describe the unit as: Service employees at Duke Hospital, including its satellites, Duke Pavilion, the Rehabilitation Center, the Child Guidance Center, the storeroom, located in the Anlyan Duke Medical Services Building 6; and including also, clinical assistants in the Medical Diagnostic Clinic,

made up at departmental levels they are approved and passed up the line, eventually reaching the full Board of Trustees before final approval.

Personnel policy is centrally handled. Duke has established a Personnel Policy Committee which initiates and directs all personnel activity, including personnel activity in the hospital. The Personnel Policy Committee has conceived and published a manual, which is distributed university-wide, governing all personnel actions applying to all biweekly employees. The University's Personnel Office is also centrally administered with its staff occupying space at a number of locations, including the hospital personnel office. The University's Personnel Office handles applications; screens and refers applicants to all university departments which have the final say on hiring; holds orientation classes for employees on all departments; and makes a list of, and posts, job vacancies about once a week throughout the University. Finally, that office is responsible, university-wide for: (a) posting of personnel notices; (b) the affirmative action program; (c) training; (d) handling grievances at the third step; and (e) applying the same insurance programs to all employees.

Similarly, support operations for the University are centrally administered. These include housekeeping in nonresidential, nonmedical areas and support services for special events; central purchasing; surplus salvage and disposal; maintenance; operation of the dining halls; housekeeping in residential areas, on and off campus; and the Operations Department which consists of sections of transportation, mail clerk and messengers, tailors and laundry workers, grounds and maintenance, university stores, office machine repairmen, exterminators, security, and attendants of locker rooms.

The Medical Center, headed by the Vice President for Health Affairs, encompasses the Medical School, which offers Ph.D.'s in the five basic science departments of Anatomy, Physiology-Pharmacology, Biochemistry, Microbiology, and Pathology; the Medical School also contains the clinical departments of Medicine Surgery, Pediatrics, Obstetrics and Gynecology, Ophthalmology, Psychiatry, Radiology, and Community Health Services. The School of Nursing is also, administratively, part of the Medical Center. Duke Hospital, headed by a Director, serves as a laboratory for the clinical departments. The Hospital, primarily concerned with patient care, contains 835 beds and, in addition, has 35 beds located at the Hilton Inn and approximately 35 beds at the Durham Rehabilitation Center located a mile from Duke Hospital. Also related to the Hospital's administration is the Durham Child Guidance Center which is an outpatient clinic in the Division of Child Psychiatry.

The Hospital's budget is self-sustaining; revenues are from patient income. Working within the Department of Nursing Services and Patient Care Assistants are biweekly employees who directly service patients. The housekeeping biweekly employees, called unit service aides, clean patient areas. There is some interchange between housekeeping employees in the Hospital and Medical Center. Some biweekly food service workers prepare meals and others distribute trays to patients.

Within the Hospital are the Clinical Chemical laboratory (routine chemical analysis of blood, urine, and spinal fluids), the Medical laboratory (routine clinical tests on blood and some other fluids and specimens taken from patients), and the Clinical Microbiology laboratory (diagnoses for infection of specimens from patients). Working within the laboratories and departments connected with the Hospital are biweekly employees classified as technicians and technician trainees.

Duke purchased Sea Level Hospital, formerly a private nonprofit hospital, in May 1969. Sea Level Hospital, located about 220 miles east of Durham, is headed by a Director who reports to the Vice President for Health Affairs of the Medical Center. The Sea Level Hospital has 80 beds and serves as a community hospital for acute patients. Sea Level is a self-sustaining operation with a separate local banking account. Wages are determined by the area standards, but employees are covered by the same benefits as are biweekly employees at the University, and the Personnel Policy manual is used as a guideline for personnel policies. Differences do exist, as employees at Sea Level do not receive as much vacation leave as employees at Duke, and Sea Level only recognizes six holidays, while Duke grants nine holidays.

The Highlands Hospital, a psychiatric hospital with about 109 patients located in Asheville, North Carolina, 230 miles from the Duke campus, is operated substantially the same as the Sea Level Hospital, except it has no separate banking account. All bills are paid by the University and all checks are issued by the University. However, it is self-sustaining and prepares its own budget. There are some differences in sick leave and funeral leave policies, but other personnel policies are the same as for other university employees except wages, which follow area standards. There is no interchange of service employees among the Highlands, Sea Level Hospital, and Duke.

At the outset, the Board must deal with Local 1199's petition as it seeks mainly the biweekly employees who spend a majority of their time working within Duke University Hospital. Section 2(2) of the National Labor Relations Act precludes the Board from

asserting jurisdiction over hospitals operated by corporations or associations where no part of the net earnings inure to the benefit of any private shareholder or individual. As Duke University Hospital is a nonprofit hospital operated by a nonprofit university it appears that, literally, the exclusion contemplated in Section 2(2) applies to it.<sup>4</sup> Although it is true that the hospitals, particularly the Duke Hospital located on the Duke University campus, have no separate legal existence apart from the University, we find nothing in this circumstance which would remove hospital functions from the exclusions related in Section 2(2) of the Act. To put the matter another way, a nonprofit hospital operated by another nonprofit entity—albeit one over which we would assert jurisdiction—is nonetheless still a nonprofit hospital. Accordingly, we conclude that we are prohibited by the statute from asserting jurisdiction over the hospital functions of Duke University.

The record indicates that the hospital services rendered by the satellite units and laboratories are closely and intimately related to, and in some situations may be inseparable from, the hospital services. We shall therefore exclude from the overall unit found appropriate, *infra*, any employees who are employed over 50 percent of their working time within the hospitals,<sup>5</sup> Duke University Hospital satellites which are related to patient care, including Duke Pavilion, the Durham Rehabilitation Center, the Child Guidance Center, and Hilton Inn, or laboratories<sup>6</sup> intimately connected therewith.<sup>7</sup> Accordingly, as Local 1199's petition, as amended, predominately sought these employees, we shall dismiss that petition.

The Petitioner, ASCME, contends that an otherwise overall university unit of biweekly service employees would be an appropriate unit. Such a unit would be accord with *Cornell University, supra*,<sup>8</sup> where the Board set out the factors it considers controlling in determining appropriate university units, and concluded that the principles it applied in the industrial sphere could also be reliable guides in the educational context. Although employees of the Medical Center

and Nursing School were excluded *per se* in *Cornell*, it was by stipulation of the parties. As there is no such stipulation here, and as both the Employer and Petitioner contend that an overall unit is appropriate,<sup>9</sup> and as the record shows that biweekly service employees share a separate community of interest, we find that a university-wide unit of all biweekly service employees, excluding, as noted, biweekly service employees who spend a majority of their time in the hospitals or related satellite units, is appropriate.<sup>10</sup>

The parties were in disagreement on the placement of maid-pages in the unit. The only special training the maid-pages receive over maids is to handle incoming telephone calls in the women's dorms. They do not perform clerical work. In view of the facts that the maid-pages only take messages, that they are supervised by supervisors of other biweekly service employees, that they have formerly been maids and may revert to their maid status during the time the school year is not in session, we find that they share a community of interests with other biweekly service employees and are properly includable in the appropriate unit.

The parties are also in disagreement on the placement of biweekly employees classified as "technicians" and "technician-trainees." Most of these classifications are found in the laboratories intimately connected with the Hospital and have been excluded. However, there are some "research technicians" who are not connected to the Hospital, but are associated with the Medical Center. Although they clean and wash their work areas and equipment, they have a separate line of supervision from other biweekly employees, are being trained in a technical line, receive close immediate supervision by other technicians, and the nature of their work is substantially different from other biweekly employees. We find that their community of interest is separate from that of biweekly service employees, and we shall not include them in the unit.

We find the following employees of the Employer constitute a unit appropriate for purposes of collective

<sup>4</sup> See *Loyola University*, 194 NLRB No. 30, and cases cited at fn. 5 therein.

<sup>5</sup> Excluded under this determination are nurses, nurses aides, ward clerks, orderlies, messengers, patient care assistants, housekeepers known as unit service aides, dietary service employees, laundry workers in the hospital, stock clerks, issue clerks, and receiving clerks in the hospital locations, clinical assistants I, II, III, and IV, morgue attendants, pharmacist helpers, laboratory assistants, and all other employees under the Director of Duke Hospital, the Director of Sea Level Hospital, and the Director of Highlands Hospital.

<sup>6</sup> Biweekly employees are located in the following Laboratories: Microbiology, Immunology, Clinical Chemistry, Pathology, Surgery, Anesthesiology, Physiology, Pediatrics, Anatomy and Medicine, and Biochemistry, and since they spend a majority of their time performing duties related to the patient care functions of the Hospital, are hereby excluded.

<sup>7</sup> See *The Horn & Hardart Company*, 154 NLRB 1368, *Inter-County Blood Banks, Inc.*, 165 NLRB 252.

<sup>8</sup> Petitioner, ASCME, limited its request to employees on the campus of Duke University. The record shows that some biweekly service employees are actually located off the campus, but are within the general campus area. We shall include such employees in the unit.

<sup>9</sup> See also *Yale University*, 184 NLRB No. 101.

<sup>10</sup> The parties stipulated to numerous inclusions and exclusions of employees relating to any unit finding. The stipulations are based on usual Board policy, i.e., supervisory authority, office clericals, and consequently, we accept the parties' stipulations. The parties also stipulated to the inclusion of laundry workers employed in the Duke University laundry and housekeepers, other than unit service aides. As those classifications are properly part of the category of biweekly service employees of Duke University included in the appropriate unit, we accept the parties' stipulation.

bargaining within the meaning of Section 9(b) of the Act:

All biweekly service employees of Duke University, excluding biweekly service employees performing a majority of their work in the hospital, assistant laboratory mechanics in the Department of Chemistry and Mechanical Engineering, and other biweekly service employees who perform technical work, maintenance employees, Security Department employees, exterminators, sales clerks, office clericals, program managers, planners and assistant planners, buyers and junior buyers, part-time food service aides, head cooks, head bakers, head butchers, and cashiers, dispatcher, repairmen, the musician, and all supervisors as defined in the Act.

### ORDER

It is hereby ordered that the petition filed in Case 11-RC-3251 be, and it hereby is, dismissed.

[Direction of Election<sup>11</sup> omitted from publication.]

MEMBER FANNING, dissenting in part:

Duke University, the employer herein, is a private nonprofit university. It offers academic training in a wide variety of disciplines, maintaining 44 academic departments and operating 7 graduate schools. One of the latter is a medical school. In furtherance of its medical training objectives, the Employer operates a Medical Center which encompasses a Medical School offering Doctorates in Anatomy, Physiology, Pharmacology, Biochemistry, Microbiology, and Pathology. The Medical School also contains clinical departments of Medicine, Surgery, Pediatrics, Obstetrics and Gynecology, Ophthalmology, Psychiatry, Radiology, and Community Health Services. The School of Nursing is also part of the Medical Center. Duke Hospital, headed by an administrator, serves as a laboratory for the various clinical departments of the Medical School.

The crucial question in this case is whether the Board has jurisdiction over the operations of Duke University because it operates a hospital in furtherance of its educational objectives. This question arises from the fact that Section 2(2) of the Act defines the term "employer" in such a way as to exclude "any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual." Inasmuch as Duke University is a nonprofit corporation, and inasmuch

as it is engaged in operating a hospital, a respectable argument can be made that Duke University is not an "employer" within the meaning of Section 2(2).<sup>12</sup> There is, however, an ambiguity in the statutory language which refers to a "nonprofit corporation operating a hospital." Duke operates a hospital, but it is not engaged only in hospital operations. Duke University is engaged in operating a university and a hospital as part of its university operations. It is, therefore, far from certain that Duke University falls within the narrowly drawn exemption from the definition of "employer" and resort to the legislative history is necessary to properly construe the legislative language.

The language in issue was offered as an amendment to Senate Bill 1126 by Senator Tydings during floor debate. In response to questioning by Senator Taylor as to the purpose of his amendment, Tydings declared:<sup>13</sup>

It simply makes a hospital not an "employer" in the commercial sense of the term. It is not a business operating on a profit basis. It is a charitable institution which is kept open, and it is to lift it out of the category of ordinary business, and is to except such charitable institutions. . . . Such institutions cannot keep open, in certain cases, I may say to the Senator, unless relief is afforded. The people who are affected are the poor people of the country. The amendment affects only charitable institutions, which do not derive a cent of profit, but are maintained by donations almost entirely, except for a small amount of revenue received for services rendered. . . .

. . . A hospital is a local institution, quite often kept up by the donations of benevolent persons. I hope the Senate will let the amendment go to conference. Employees of such a hospital should not have to come to the National Labor Relations Board. A charitable institution is away beyond the scope of labor-management relations in which a profit is involved. No profit is involved in this work.

. . . The most of these institutions are maintained by the benevolence of thousands of people who contribute to community funds and so on, to keep them going. I am told it will be a big aid to the community if they are not brought in under the strict scope of labor-management commercial relations where no profit is involved.

<sup>11</sup> In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236; *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 11 within 7 days of

the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed

<sup>12</sup> Neither Duke University nor my colleagues make that argument.

<sup>13</sup> 93 Cong. Rec. 5129 (May 12, 1947)

Other than for Senator Taft's statement that the Committee had considered the amendment but did not act on it because it "felt it would open up the question of making other exemptions,"<sup>14</sup> the Tydings-Taylor colloquy constitutes the entire legislative history of this language. From Senator Tydings' explanations of the purpose of the amendment, it is reasonably clear that the purpose of the language was to exempt those charitable organizations whose charity is wholly channeled into the operation of hospitals for the benefit of the local community.

The Duke University hospital does not fit the Tydings prescription. Not only does the record reflect that its operations are self-sustaining, but it reflects that it is operated in substantial part as an educational laboratory and training ground for its medical students. Accordingly, I find that Duke University, though it is a nonprofit corporation and though it operates a hospital, is not an exempt employer within the meaning of Section 2(2) of the Act. I therefore would assert jurisdiction over all of its operations specifically including its hospital operations.<sup>15</sup>

In this connection, I cannot join my colleagues in reading the relevant statutory language as a prohib-

<sup>14</sup> *Id.*

<sup>15</sup> The Board's policy is to assert jurisdiction over the whole of an employer's operations whenever part of its operations satisfy the relevant jurisdictional criteria. See *Siemons Mailing Service*, 122 NLRB 80, 84.

<sup>16</sup> Compare congressional treatment of agricultural employees who are excluded from the definition of "employee" contained in Section 2(3) of the Act. The treatment of agricultural employees demonstrates that

ition against directing an election amongst Duke University's hospital employees. Contrary to their assertion, the literal language of the Act does not require such a holding. Indeed they must recast language exempting from the definition of "employer" a corporation or association operating a hospital, into language which would, in effect, exclude from the definition of "employee" those employees working in a hospital operated by a nonprofit corporation.<sup>16</sup> I cannot join in so rewriting the words of the statute in the face of Senator Tydings' explicit statement of a contrary intention. The majority cannot have it both ways. Either Duke University is not an "employer" within the meaning of Section 2(2) because its operations include a hospital, or it is an "employer" within the meaning of that section as to all its employees, because it is engaged in much broader operations.

In view of the foregoing, I dissent from the majority's failure to include the biweekly employees working in Duke's hospital operations in the overall unit of biweekly employees, which I would find to be appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

Congress knew how to extend the provisions of the Act to some, but not all, of the employees of a particular type of employer. The failure to exclude employees employed by a nonprofit hospital from the definition of "employee" and the exemption instead of corporations or associations operating a nonprofit hospital from the definition of "employer" clearly forecloses the majority's construction of the statute, for the majority chooses a route rejected by Congress.