

**Bishop Randall Hospital and Wyoming Nurses' Association, Inc., Petitioner. Case 27-RC-4960**

May 28, 1975

**DECISION AND DIRECTION OF ELECTION**

BY MEMBERS JENKINS, KENNEDY, AND PENELLO

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Wayne L. Benson of the National Labor Relations Board on January 15 and 16, 1975. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, and by direction of the Regional Director for Region 27, this proceeding was transferred to the Board for decision. Thereafter, the Employer and the Petitioner filed briefs.<sup>1</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 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 this proceeding the Board finds:

1. A question is presented whether the Lutheran Hospitals and Homes Society of America, herein called the Society or the Employer, is an "employer" within the meaning of Section 2(2) of the Act. The Society, a North Dakota corporation with headquarters in Fargo, North Dakota, is lessee-operator of the Bishop Randall Hospital facility<sup>2</sup> in Lander, Wyoming. At the hearing, the Employer acknowledged that it "is an organization engaged in interstate commerce to such a degree that it would meet the jurisdictional standards of the National Labor Relations Act were it to be found an Employer in this case."

The Employer contends that it is exempt from coverage of the Act because: (1) the Hospital is a county funded and controlled political subdivision of the State of Wyoming;<sup>3</sup> (2) the government of Fremont County is, at least, a joint employer with the Society; or (3) a "unique relationship" exists between the Society and

Fremont County, Wyoming, in respect of which the Board, assuming it had technical jurisdiction, ought to exercise its discretionary authority to refuse to assert jurisdiction.

The Hospital was constructed at public cost with funds appropriated for that purpose by the Board of Commissioners of Fremont County. In accord with the state law, the Hospital is officially designated a county memorial hospital, and Fremont County retains title to the Hospital's land, buildings, and an estimated 95 percent of the equipment therein. Furthermore, the board of county commissioners is authorized to levy taxes and declare special bond issues in order to sustain a fund for maintenance, improvements, and expansion of the Hospital plant. Capital expenditures from this fund have amounted to an estimated \$60,000 to \$250,000 per annum. Responsibility for direct oversight of the Hospital's operation has been delegated to the board of trustees, a five-member panel selected by the county commissioners to serve without compensation for individual 5-year terms. The board of trustees is required to submit annual and periodic interim financial reports on the Hospital to the board of county commissioners. In addition, the trustees are empowered, subject to the approval of the county commissioners, to contract with other parties for the operation of the Hospital.

The Hospital was opened in 1960 and has been exclusively operated since that date by the Society pursuant to the terms of a 15-year lease agreement.<sup>4</sup> At the hearing, the parties stipulated that the Society:

. . . has day-to-day operation and control of this hospital within the terms of the lease, or subject to the terms of the lease, that includes day-to-day decisions to hire, to fire, to institute personnel rules or regulations . . . .

It was further stipulated that the examples of operational control were "not totally inclusive." Record evidence indicates that employees at the Hospital are hired directly by the Society, paid entirely from the Society's own operational funds, and subject to the Society's own personnel policies. The Hospital administrator, Roger Lehr, is clearly the individual retained by the Society and answerable thereto for the overall daily operation and control of the Hospital.

In light of the above evidence and the record as a whole, it is our opinion that the Hospital as a functional entity is controlled and administered by the Society. We further conclude that the Hospital does not qualify for exemption from coverage under the Act as a governmental subdivision, since it is neither (1) directly created by the State, so as to constitute a department

<sup>1</sup> The record fails to substantiate Petitioner's allegation that the Employer's brief was untimely filed or service made in noncompliance with the Board's Rules and Regulations. Employer's brief and a written statement of service on the parties were timely received by the Board on February 18, 1975. Simultaneous, i.e., same day, service of a copy of the Employer's brief was made upon the Petitioner. We therefore deny Petitioner's motion to strike the Employer's brief from the record.

<sup>2</sup> Hereinafter referred to as "the Hospital."

<sup>3</sup> Sec 2(2) of the Act excludes from the definition of "employer" "any wholly owned Government corporation . . . or any State political subdivision thereof . . . ."

<sup>4</sup> The original lease expired in February 1975, but the record indicates that the parties to the agreement have negotiated its renewal in substantially the same form.

or administrative arm of the state government, nor (2) administered by individuals who are responsible to public officials or to the general electorate.<sup>5</sup> Actual operations and characteristics of the Hospital under the Employer's administration reveal that it functions essentially as a private enterprise. In addition, the employees of the Employer charged with administrative duties at the Hospital are only incidentally responsible to public officials, in much the same way as directors of any business subject to licensure and inspection by public authorities are responsible to those authorities.

The Employer, however, contends that certain statutory and lease requirements make Fremont County or its instrumentality, the board of trustees, at least a joint employer indispensable to labor relations matters and therefore exempt from the Board's jurisdiction. The Board's determination of such jurisdictional allegations depends on the extent of control exercised by the undisputedly exempt governmental authority over the operations and labor relations of the Employer.<sup>6</sup> We find the evidence of such control in this case to be insubstantial. The effect of the lease agreement has clearly been to establish the Employer as an independent lessee-operator for the Hospital. Responsibility and control vested in the Hospital's board of trustees relates only to the general purpose of insuring the physical condition of the Hospital and its continued use as the health care facility it was designed to be. To that end, the trustees have the legal authority to allocate funds appropriated and approved by the county for use in capital projects. In addition, the board of trustees has incorporated certain statutory safeguards as terms within the lease to guarantee satisfactory performance by the Employer of its agreement to operate the Hospital in accord with its conceived purpose. Therefore, the Employer must: (1) present to the trustees detailed periodic accountings of its Hospital business; (2) operate the Hospital continuously as a duly accredited institution pursuant to certain written and established standards cited by the lease; (3) avoid "excessive or exorbitant" ratemaking by charging patient fees comparable to those of other accredited Wyoming hospitals of comparable size; and, (4) accept indigent patients regardless of their inability to pay for treatment. Breach of any lease provision is ground for cancellation of the lease pursuant to the notice procedures provided therein.

We find that the independence of the Employer's enterprise is not substantially affected by any of the above alleged "controls." The financial reporting requirement is no more than a bookkeeping and monitoring device which does not impose any actual control

on the operations referred to in the reports. The accreditation and practitioner standards mentioned in the lease appear upon examination to be no less than those required of any similarly sized public health facility in the State of Wyoming whether maintained as a public or private, profit or nonprofit business. The rate limitations are general in nature and seem to afford the Employer considerable latitude in setting its own patient service fees. Finally, the Employer failed to note, in urging the financial restrictiveness of the obligation to accept indigent patients, that the Employer need only accept these patients "whenever financially feasible" and that Wyoming law provides for remuneration of the Employer by the board of trustees for services thus rendered.<sup>7</sup>

The Employer contends that the provisions noted above impinge to a substantial degree on its ability, absent the approval and cooperation of Fremont County, to bargain collectively concerning employee wages and benefits, and on the ability of employees to engage in an effective protected bargaining strike, or, alternatively, the ability of the Employer to engage in an effective protected bargaining lockout. We disagree with this contention, dependent as it is on speculative and irrelevant premises.

It is clear from the record that the Employer has exclusive control over its personnel with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment. A basis for the collective-bargaining relationship therefore exists. The alleged inability of the Employer, subject as it is to a moderate rate or revenue ceiling, to be a "wage leader" or respond effectively to employee wage and benefit demands is not probative of the jurisdictional issue herein. Once the Board has ascertained whether the employer meets established interstate commerce standards, it does not base its assertion of jurisdiction on financial indicia predictive of strength at some future bargaining table. The parties concede, and we find, that the Employer is engaged in commerce within the meaning of the Act. Furthermore, we will not deny jurisdiction on the speculative chance that in the event of an employee strike or employer lockout the board of trustees would consider the Hospital's operations so impaired as to be in breach of the lease requirement of "continuous operation" according to prescribed standards and would therefore invoke its discretionary right to cancel the contract and assert direct county control over the Hospital and its employees. It is by no means an inevitable consequence of the collective-bargaining relationship that strikes or lockouts should occur or that their occurrence in as yet unknown circumstances would automatically motivate the representatives of Fremont County to terminate, after a 60-day notice

<sup>5</sup> See *N.L.R.B. v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 604 (1971).

<sup>6</sup> *Ohio Inns, Inc.*, 205 NLRB 528 (1973), *Servomation Mathias Pa., Inc.* 200 NLRB 1063 (1972); *Slater Corporation*, 197 NLRB 1282 (1972)

<sup>7</sup> Wyoming Stats Sec 18-323

period, what has to date apparently been a successful and satisfactory long-term lease arrangement.

In sum, we find that the Society is not a political subdivision of the State of Wyoming, nor subject to any substantial degree of state control in its operations, and is accordingly an employer within the meaning of the Act. In addition, we find no support in the record for the contention of the Society and our dissenting colleague that the Board should decline to assert jurisdiction because of a "special relationship" or "intimate connection" between the services provided by the Society and the allegedly exempt operations of the Hospital.<sup>8</sup>

Contrary to our colleague, we do not find that the operation of a hospital is necessarily a "government function," or that the Hospital herein is an exempt institution. In finding that the Hospital is an exempt institution our dissenting colleague relies on the fact that the Supreme Court of Wyoming has held that the operation of county memorial hospitals under the state statutes is a "governmental function." As the Supreme Court stated in *N.L.R.B. v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 602-603 (1971):

Federal, rather than state, law governs the determination, under §2(2), whether an entity created under state law is a "political subdivision" of the State and therefore not an "employer" subject to the Act.

We are satisfied, for the reasons set forth above, which are based on the record herein, that the Society operates the Hospital as an essentially private venture, with insufficient identity with or relationship to the State of Wyoming to support the conclusion that the Hospital is an exempt governmental employer under the Act. Our colleague's reliance on *Rural Fire Protection Company, supra*, is thus misplaced as the services provided by the Society are not by the aforesaid analysis intimately connected with the operation of an exempt institution. Accordingly, since the Employer is engaged in commerce within the meaning of the Act, we find it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

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

4. As to the appropriate unit, there is no history of collective bargaining for the employees sought to be represented here.

The Petitioner seeks a unit of approximately 32 registered nurses and professional employees employed by the Employer in its nursing services at the Hospital. The Employer contends that the appropriate unit should be expanded to include the allegedly professional employee classifications of pharmacist and medical technologist.<sup>9</sup> In addition, the Employer contends that four nurse supervisors and three head nurses should be excluded from the unit because they are allegedly supervisory personnel within the meaning of Section 2(11) of the Act.<sup>10</sup>

While we have repeatedly recognized and honored the need to avoid undue proliferation of bargaining units in the health care industry, it has been the Board's policy, subject to the facts in each case, to find appropriate a separate bargaining unit for registered nurses when such a unit has been requested by the petitioner.<sup>11</sup> The registered nurses sought to be represented herein are all employed within a single department and subject to the single overall supervision of the director of nursing services. They are all graduates of an accredited 2- or 3-year nursing school program and the parties have stipulated to their professional status. While four medical technologists and one pharmacist at the Hospital may have some daily contact with registered nurses, they are subject to different supervision and pay scales, and their primary duties, educational prerequisites, and job backgrounds are distinguishable from those which all registered nurses have in common. We conclude that the requested separate unit for registered nurses constitutes an appropriate unit. We shall, therefore, exclude medical technologists and pharmacists from the unit found appropriate.<sup>12</sup>

The Hospital's nursing service department is subject to the overall supervision of Director Godtfring, who is answerable to the Hospital administrator. A chart introduced into evidence by the Employer purported to show that the supervisory line of authority over the 25 staff registered nurses and approximately 17 nonunit auxiliary employees in nursing services runs from the director through the nurse supervisor position to the head nurses. Other record evidence relative to the alleged supervisory status of the Hospital's nurse supervi-

<sup>9</sup> At the hearing, the Employer raised the issue whether licensed practical nurses ought also to be made part of the appropriate unit. In its posthearing brief, however, the Employer concedes that the inclusion of such employees in a professional unit is unlikely, unless the Board reverses its present position which holds that licensed practical nurses are not considered to be professional employees within the meaning of the Act. E.g., *Waterloo Surgical & Medical Group*, 213 NLRB 321 (1974); *Pikeville Investors, Inc. d/b/a Mountain Manor Nursing Home*, 204 NLRB 425 (1973). In accord with this precedent, we shall exclude licensed practical nurses from the professional unit found appropriate herein.

<sup>10</sup> The parties stipulated that Director of Nursing Services Catherine Godtfring is a supervisor and should be excluded from the unit.

<sup>11</sup> *Mercy Hospitals of Sacramento, Inc.*, 217 NLRB No. 131 (1975).

<sup>12</sup> Accordingly, we need not and will not decide whether the medical technologists and pharmacist are professional employees within the meaning of the Act.

<sup>8</sup> *Rural Fire Protection Company*, 216 NLRB No. 95 (1975)

sors and head nurses is almost entirely limited to the credible and undisputed portions of testimony given by Director Godtfring. None of the employees whose inclusion in the unit is challenged appeared at the Board's hearing. From the record as a whole we find the following facts.

The position of nurse supervisor is a long-established one at the Hospital and is currently held by four registered nurses, three of whom are assigned duties on the three separate shifts of the Hospital's 24-hour workday. The fourth nurse supervisor has shift duty in the operating room. The three head nurses are all assigned separate area responsibilities within the same shift. One head nurse works within the intensive care/coronary care unit and the other two work in separate wings of the Hospital. We are not persuaded by the Petitioner's argument that the elevation of three staff nurses to the newly created head nurse positions upon or near the September 18, 1974, filing date of the petition in this case indicates the artificiality of head nurse authority or the Employer's spurious design in creating the position. The record reveals that Director Godtfring and the nurse supervisors had felt and communicated a need for additional staff coordination at least 6 months prior to the Hospital administrator's final authorization of the thrice-requested head nurse positions, which were immediately filled. The perceived need stemmed from increased demands on nursing services, especially after the new second wing of the Hospital was opened. Furthermore, the actual authority exercised by head nurses belies the premise that their supervisory powers are solely pretextual.

It is true that nurse supervisors and head nurses continue to spend a significant part of their workweek in attending to patient care responsibilities. We find, however, that these individuals also spend a substantial amount of time in functions which conclusively indicate supervisory status within the meaning of Section 2(11) of the Act. We specifically rely on the un rebutted evidence that all nurse supervisors and head nurses (1) adjust the grievances of other employees, and (2) effectively recommend merit raises for other employees and whether probationary employees will be permanently employed. With respect to the adjustment of grievances, employees in nursing services have been told that in accord with Step 1 of the Employer's written grievance procedure (which is included in the booklet of personnel rules and regulations given to every employee) they are to discuss their grievances with a head nurse or nurse supervisor. The designated adjustors of grievances understand they are to serve in such a capacity and have apparently done so. In reference to the second function cited above, both nurse supervisors and head nurses prepare written employee work evaluation statements which Director Godtfring stated,

without subsequent contradiction, are independently determinative of whether merit raises are granted or probationary employee status is changed to permanent employment. In addition, the evaluator is responsible for discussing the report with the employee affected. Every departmental employee is evaluated at least once a year. Nurse supervisors evaluate head nurses.

In our opinion, the above primary indicia of supervisory status are conclusive. There is, however, additional evidence which strongly shows that individual nurse supervisors and head nurses have the supervisory authority to assign work and to effectively recommend the discharge and discipline of other employees. Finally, we note these secondary indicia of supervisory status: the employees at issue have been told they are supervisors; they attend regular bimonthly meetings with Director Godtfring at which no staff nurses are present; nurse supervisors outearn staff nurses of equal seniority by \$50 to \$100 per month; and, head nurses outearn staff nurses of equal seniority by \$35 per month.

Based on the foregoing, and the record as a whole, we find and conclude that nurse supervisors and head nurses are supervisors within the meaning of the Act. We shall therefore exclude them from the unit found appropriate herein.<sup>13</sup>

Accordingly, we find that the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

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.

[Direction of Election omitted from publication.]<sup>14</sup>

MEMBER KENNEDY, dissenting:

I disagree with my colleagues' assertion of jurisdiction in this case. Whether the "employer" is deemed to be the Bishop Randall Hospital itself (Hospital), or the Lutheran Hospital and Homes Society of America which administers it (Society), Board and court precedent requires a dismissal of the RC petition on jurisdictional grounds.<sup>15</sup>

<sup>13</sup> The Employer has requested the exclusion of persons holding the position of "relief supervisor," alleging their statutory supervisory status. According to the record, two relief supervisor positions have been newly authorized but remain unfilled. Conclusions as to the actual authority and functions of relief supervisors are therefore purely speculative, and we will adhere to the Board's policy in refusing to pass on such open classifications. See *Trans World Airlines, Inc.*, 211 NLRB 733 (1974).

<sup>14</sup> [*Excelstor* fn omitted from publication.]

<sup>15</sup> The petition names Bishop Randall Hospital as the Employer. At the hearing, however, counsel for the Employer stipulated that the Society was

Bishop Randall Hospital is operated by Fremont County (county) as a "county memorial hospital" pursuant to the Wyoming state statutes.<sup>16</sup> The Hospital was constructed largely at public expense and the building, land, and 95 percent of the equipment are county owned. Should the Hospital require physical expansion in the future, the funds for such a project could be acquired by the county through issuance of revenue securities, and the land acquired through eminent domain. Each year, between \$60,000 and \$200,000 in county tax money (derived from property taxes) is appropriated for the Hospital's maintenance and operation.

Statutory control over the Hospital resides in a five-member board of trustees. The trustees—each of whom must be a county resident—are appointed by the Fremont Board of County Commissioners, an elected body. The trustees are subject to removal from office in precisely the same manner and for precisely the same reasons as are other county officials.

State law provides that the trustees may operate the Hospital directly or may lease its operation to another organization. As noted, the trustees at Bishop Randall have elected to lease the administration of the Hospital to the Society, a private, nonprofit organization.

Both the state and county governments exercise direct financial regulation over the Hospital. For example, an annual comprehensive fiscal plan and budget, as well as quarterly reports of appropriations, expenditures, and balances, must be submitted to a state examiner. In addition, the Hospital is statutorily required to provide free care for indigents so long as it is "economically feasible" to do so. Finally, under the Society's lease with the county, fees charged for Hospital services must be "comparable to the fees and charges of other accredited or registered hospitals of comparable size . . . ."

Assuming Bishop Randall Hospital to be the "employer," I would find it to be a "political subdivision" and therefore not an "employer" within the meaning of Section 2(2) of the Act. In *N.L.R.B. v. National Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600 (1971), the Supreme Court discussed the "political subdivision" language of Section 2(2) in the context of determining whether the Board had properly asserted jurisdiction over a county utility district.

The Supreme Court in *Hawkins County* noted Board precedent holding that "political subdivisions" include

entities which are "administered by individuals who are responsible to public officials or to the general electorate."<sup>17</sup> Since the utility district there was administered by a board of commissioners who were both appointed by an elected county judge and subject to statutory removal proceedings, the Court determined that the Board's test had been satisfied. Accordingly, the Court concluded that the Board's assertion of jurisdiction over the district had been improper even under its own precedent. Likewise in the instant case, the Hospital is administered by a board of trustees who are also both appointed by elected county commissioners and subject to statutory removal proceedings.

The Supreme Court in *Hawkins County*, however, went beyond the Board's test and determined that the utility district's administration "in the light of other 'actual operations and characteristics' " sufficiently established an identity with the government so as to make the district a "political subdivision." Many of the "actual operations and characteristics" relied on by the Court are likewise present here. For example, the Hospital has been established as a public corporation pursuant to state law<sup>18</sup> and has been officially designated a "public county hospital."<sup>19</sup> Annual and quarterly financial reports are required by state law<sup>20</sup> and all records are available for public inspection. Finally, as noted earlier, the Hospital may—through the county—levy taxes and acquire additional property through eminent domain.

In light of the above, I cannot agree with my colleagues' finding that the Hospital "functions essentially as a private enterprise." I am inclined, instead, to agree with the Supreme Court of Wyoming that the operation of county memorial hospitals under the state statutes is a "governmental function."<sup>21</sup> The governmental nature of its operation, when combined with the fact that it is administered by "individuals [the trustees] who are responsible to public officials [the board of county commissioners] or to the general electorate," convinces me that Bishop Randall Hospital is a "political subdivision" within the meaning of Section 2(2) of the Act.

If it is assumed that the "employer" herein is not the hospital but rather the Lutheran Hospitals and Homes Society of America which administers it, the Board still lacks jurisdiction. The parties stipulated that the Society:

<sup>17</sup> 402 U.S. at 605

<sup>18</sup> Wyo Stats., *supra*, fn. 2, at Sec 18-318

<sup>19</sup> *Id* at Sec 18-320

<sup>20</sup> Wyo Stats., Title 9 (referred to in the record as the Wyoming Municipal Budget Act).

<sup>21</sup> *Bondurant v. Board of Trustees of Memorial Hospital*, 354 P.2d 219 (1960) In *Bondurant*, the court held that, since the operation of county memorial hospitals is a governmental function, the hospitals share in governmental immunity from tort liability

engaged in interstate commerce within the meaning of our Act "were it to be found an Employer in this case" It is unnecessary for me to resolve this question, since, in either event, I would not assert jurisdiction. In addition, since I would dismiss the petition, it is unnecessary for me to determine the appropriateness of the unit limited to registered nurses sought by Petitioner For a discussion of my views on this question, see my separate opinion in *Mercy Hospitals of Sacramento, Inc.*, 217 NLRB 765 (1975).

<sup>16</sup> Wyo Stats., Title 18, Ch. 9, Secs 18-315 to 18-325 (Cum Supp., 1973)

. . . has day-to-day operation and control of this hospital within the terms of the lease, or subject to the terms of the lease, that includes day-to-day decisions to hire, to fire, to institute personnel rules or regulations . . . .

In *Rural Fire Protection Company*,<sup>22</sup> the Board recently reaffirmed its policy of refusing to assert jurisdiction over nonexempt providers of services to exempt institutions in situations where the services provided are "intimately connected" with the exempt operations of the institution.<sup>23</sup> As has already been indicated, I

<sup>22</sup> 216 NLRB No 95 (1975).

<sup>23</sup> The Board in *Rural Fire Protection Company* also indicated that application of the "intimate connection" test was in no way dependent upon the

would find Wyoming's county memorial hospitals to be exempt institutions. Since there is little doubt that providing both direct and indirect patient care is "intimately connected" with the operation of a hospital,<sup>24</sup> Board precedent requires a finding that the Society shares in the exemption enjoyed by Bishop Randall Hospital.

For the foregoing reasons, I dissent from my colleagues' assertion of jurisdiction in this case.

exempt institution exercising control over the labor relations policies of the nonexempt provider of services

<sup>24</sup> Compare *Bay Ran Maintenance Corporation of New York*, 161 NLRB 820, 821 (1966), where the Board asserted jurisdiction over a company providing janitorial services to an exempt hospital because, *inter alia*, "the cleaning work performed by the Employer has no direct relationship to patient care."