

**Fort Tryon Nursing Home, Employer-Petitioner and Registered Nurses Guild, Local 144, Hotel, Hospital, Nursing Home and Allied Service Employees Union, SEIU, AFL-CIO. Case 2-UC-83**

April 8, 1976

**DECISION AND ORDER**

BY CHAIRMAN MURPHY AND MEMBERS FANNING  
AND JENKINS

This decision arises from a petition for clarification of a unit filed by Fort Tryon Nursing Home (herein the Petitioner) on October 14, 1975. A hearing was held on October 31 and November 3, 4, 7, and 11, 1975, before Hearing Officer Frank H. McCulloch. On November 11, 1975, the Regional Director for Region 2 issued an order transferring the case to the Board for decision.

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 case, the Board finds:

1. The Petitioner is engaged in the business of operating a private nursing home providing health care and related services. It has a gross annual revenue exceeding \$1 million annually and receives goods and supplies from outside the State of New York having an annual value exceeding \$50,000. The parties stipulated, and we find, that the Petitioner is engaged in commerce within the meaning of the Act. We further find that it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The parties stipulated, and we find, that Registered Nurses Guild, Local 144, Hotel, Hospital, Nursing Home and Allied Service Employees Union, SEIU, AFL-CIO (herein the Union), is a labor organization within the meaning of the National Labor Relations Act and is currently the recognized representative of various categories of employees including registered nurses (or RN's) some of whom, it is alleged, are supervisors within the meaning of the Act.

The Petitioner is a member of the Metropolitan New York Nursing Home Association, Inc. (herein the Association) which has since 1965 negotiated with the Union<sup>1</sup> as the recognized representative of

"all full-time and regular part-time registered nurses, excluding directors of nursing services and nursing supervisors" employed by member-employers of the Association.

The aforementioned bargaining unit was found appropriate by the New York State Labor Relations Board (herein the State Board) in a decision and direction of election issued in 1965. At that time, the State Board considered arguments, advanced by the Association and the New York State Nurses Association, that the appropriate RN unit should exclude "all supervisory employees." For its part, the Union, an intervenor in the State Board proceeding, maintained that the RN unit should exclude "only those who act in an administrative capacity and who, in fact, have the power to, and do, hire and discharge other registered nurses." As noted, the State Board eventually excluded the "director of nursing services and nursing supervisors."

The parties to the instant proceeding, the Union and the Petitioner,<sup>2</sup> generally agree that "nursing supervisor," as used by the State Board, is a term of limited meaning and application not necessarily synonymous with "supervisors" as defined in Section 2(11) of our Act. Specifically, the State Board, in its decision, noted that the hospital code of the city of New York required that all nursing homes with more than 120 beds have a director of nursing services in addition to the required number of registered nurses. However, for homes with 120 beds or less, an RN from the minimum RN staff could serve as the director of nursing services. In this latter circumstance, the State Board observed that the RN performing the duties of a director of nursing services in a home with 120 beds or less was, as a matter of custom in the "nursing home field," referred to as the "nursing supervisor."

Finally, after finding that directors of nursing services and "nursing supervisors" were "supervisors," the State Board excluded them from the RN unit and placed them in a separate unit.<sup>3</sup>

As mentioned, over the past 10 years or so, the Association and the Union have engaged in collective bargaining for the RN unit. The parties' 1972 contract, which by its terms expired on November 30, 1974, contains virtually the same unit description as that contained in the State Board's 1965 decision.

The instant matter before us concerns some six of the Petitioner's RN's who, although they are members of the RN unit, carry the title of "nursing super-

licensed practical nurses (or LPN's) and service and maintenance employees employed by Association members.

<sup>2</sup> Although served notice by the Regional Director, the Association did not appear or participate in this proceeding.

<sup>3</sup> This latter unit of directors of nursing services and nursing supervisors is represented by the New York State Nurses Association.

<sup>1</sup> Other affiliates of the same local, Local 144, represent separate units of

visor." The Petitioner maintains that these six individuals are "supervisors" within the meaning of Section 2(11) of the Act, and that they should be excluded from the RN unit certified by the State Board. As explained more fully below, while the Union challenges the petition on a number of other grounds, it does not seriously attack the Petitioner's claim that these six "nursing supervisors" possess supervisory status. Indeed, much of the Union's testimony adduced at the hearing corroborates the evidence presented by the Petitioner, and the Union, in its post-hearing brief, does not address itself to this specific issue.

Thus, the record before us shows that the Petitioner, a 6-floor, 200-bed nursing home, employs approximately 13 RN's, including the 6 "nursing supervisors," and a number of LPN's, aides, and orderlies. The Petitioner's nursing department is managed by a director of nursing services who is ultimately responsible for the nursing care provided on a 24-hour, 7-day-a-week basis. Serving directly under her are the six RN's with the title of "nursing supervisor": two "nursing supervisors" work on the weekday shift (7:30 a.m. to 3:30 p.m.); two other nursing supervisors are each assigned to the afternoon (3:30 p.m. to 11:30 p.m.) and night (11:30 p.m. to 7:30 a.m.) weekday shifts; and the remaining two nursing supervisors work on the rotating weekend shifts. The record shows that each of the nursing supervisors is responsible and answerable for any of the other 7 RN's and the 18 to 30 LPN's, aides, and orderlies assigned to her shift. Generally, the nursing supervisors spend the majority of their time in their office on administrative matters, including devising monthly and daily floor assignments and work schedules, which includes arranging breaktimes, overtime, transfers, and vacations, and obtaining replacements for absent employees. While on the nursing floor, the nursing supervisors personally direct other RN's, LPN's, and the aides and orderlies in their work. The nursing supervisors continually evaluate employees and effectively recommend promotion or discipline. The record shows that they possess and, on occasion, effectively carry out authority to hire, reprimand, and even terminate employees. Moreover, it is clear that the nursing supervisors are effectively in charge of the entire nursing home, as well as the nursing department, when neither the director of nursing services nor her superior, the Petitioner's administrator—both of whom normally work from 9 a.m. to 5 p.m. on weekdays—is present.

From the foregoing, we find that the Petitioner's nursing supervisors clearly possess supervisory status within the meaning of the Act. See *The Trustees of Noble Hospital*, 218 NLRB 1441 (1975); *Wing Memo-*

*rial Hospital Association*, 217 NLRB No. 172 (1975). Therefore, as it is obvious that the RN unit in issue is presently comprised of both supervisors and nonsupervisors, such unit is clearly inappropriate for purposes of collective bargaining.

Rather than seriously challenge the Petitioner's valid contention that supervisors have been included within the RN unit, the Union asserts that the petition should be dismissed because it is time-barred by an outstanding contract and that it is also defective because it seeks clarification in an inappropriate unit. In the alternative, the Union contends that the Board should extend comity to the State Board decision of 1965 or defer to arbitration. We shall first consider the latter two arguments.

As the Union recognizes, it is not the policy of this Board to disturb representation findings made by other governmental agencies, such as the State Board, which appear to conform to certain commonly recognized standards of due process and which are not on their face at variance with the policies of the Act. See, e.g., *Brookhaven Memorial Hospital*, 214 NLRB 933 (1974). In short, we will, as a matter of informed discretion, extend comity where to do so conforms with our duty to effectuate the purposes and policies of the Act.

Initially, here we note that it is not clear that we are squarely presented in this case with an extension of comity. Thus, if, as the Union claims, the State Board intended to exclude from the RN unit *all* supervisors, as well as those specialized "nursing supervisors" who assumed responsibilities of the directors of nursing services in the smaller homes, it is abundantly clear that the parties misconstrued the State Board's direction and certification because supervisors were included within the RN unit, at least at this nursing home.<sup>4</sup> Therefore, in this posture, the question is not whether we shall recognize the State Board's determination but rather, simply, whether we find the RN unit, as agreed to by the parties, inappropriate.

If, on the other hand, we assume, as the Petitioner argues, that the State Board excluded only *some* of the supervisors—that is, the directors of nursing services and "nursing supervisors"<sup>5</sup>—and not all RN's who perform supervisory functions, then it is apparent that the State Board's decision is at odds with the

<sup>4</sup> There is no evidence that other RN's within the multiemployer bargaining unit possess the same indicia of supervisory status as the Petitioner's nursing supervisors. Of course, we make no finding in that regard.

<sup>5</sup> Although we need not decide the issue, there appears to be some merit to the Petitioner's claim, insofar as the State Board appears to have limited its definition of "nursing supervisors" to those RN's who, by applicable law, could perform the director of nursing services functions in homes with fewer than 120 beds. Moreover, as mentioned, the Union appears to concede that "nursing supervisors" has such a limited meaning.

Act and we could not extend comity. See, e.g., *Brookhaven Memorial Hospital, supra*. In any event, if we assume that the State Board passed on the matter intending to exclude all supervisors, then, as stated, we find that the parties misconstrued the State Board's decision.

We find it unnecessary to decide which alternative is correct. In either circumstance it would be inappropriate for us to extend comity.

We also find that this matter is properly before us and, in view of our subsequent findings, we shall not defer to arbitration. *Peerless Publications, Inc.*, 190 NLRB 658 (1971).

The Union maintains that there is at present an outstanding bargaining agreement which bars consideration of this petition, at least at this time. In support of its contention, the Union presented testimony that on December 9 and 10, 1974, a week after the 1972-74 contract expired, the Association and the Union negotiated certain "basic" terms of a new agreement, running from December 1, 1974, through November 30, 1976. Concededly, not all of the terms of the agreement were settled at that time. Although announcements of a new contract were made, no written signed agreement was prepared. After several months of further "hot" negotiations, the parties allegedly executed, in April or May 1975, a 4-page, hand-printed, updated stipulation, signed by the Association and the Union, which purportedly embodied new terms and, further, carried forward unchanged terms and conditions of the 1972-74 contract. This stipulation specifically mentions the term (December 1, 1974-November 30, 1976) for the purported new agreement and concludes with the statement that certain items remained "as per old Master Agreement."

Moreover, it appears that following the execution of the stipulation the Union was successful in several third-party grievance proceedings involving, *inter alia*, the Petitioner's contributions to the Union's welfare fund. On the other hand, the Union concedes that no final contract document has been prepared.

The Petitioner maintains that no final, written or oral, agreement was ever reached. In support of its position, the Petitioner refers to a letter, dated December 11, 1974, from the Association to its members which states that a "tentative agreement" was reached with respect to "money matters" and that "[w]e are still in the process of negotiating many important language changes in the Master contracts." Clearly, as the Union admits, no final agreement was reached on December 9 and 10, 1974.

As for the April or May stipulation, the Petitioner argues that agreement was not final and that thereafter the Union continued to negotiate certain changes.

In this regard the Petitioner introduced, over the Union's objection, a letter dated October 16, 1975, from the Association to its members in which the members were told that "contracts with [the Union] have still not been signed . . . due to the fact that the Union maintains that it has the right to renegotiate certain clauses already agreed to." Appended to the Association's letter is a printed copy of an agreement which the Union has allegedly refused to sign. The Petitioner calls our attention to the fact that this printed, but unsigned, agreement differs in certain material respects from the Union's alleged agreement (i.e., the expired contract and the stipulation). Although this letter was sent 2 days after the petition was filed, it is evidence that the parties had not as yet reached a final agreement.

There remains to be considered one final document, a letter dated October 7, 1975, from the Union to Petitioner's counsel to which the Union appended an outline of its alleged agreement with the Association. It is clear that certain discrepancies exist between this outline and the previous stipulation. Thus, the stipulation notes that the uniform allowance will be the same as in the expired contract, \$2.50. Yet the Union's October 7 letter states that this benefit has been increased to \$3. Moreover, there is no mention of many of the other changes allegedly made in the stipulation for such items as pensions and welfare.

We have no doubt that the parties reached substantial agreement on many matters. But substantial agreement is not final agreement, and in absence of a written signed contract we find that the Union has not presented sufficient evidence that such a contract exists for purposes of invoking our contract-bar rule.

Lastly, the Union maintains that the petition for clarification should be dismissed because it seeks clarification in an inappropriate unit. Thus, the Union contends that the multiemployer bargaining unit is the only appropriate unit for filing such a petition. However, the Union recognizes that we have recently rejected such an argument on facts similar to those presented here. *Peninsula Hospital Center and Peninsula General Nursing Home Corp.*, 219 NLRB 139 (1975).

In *Peninsula*, as here, we noted that the multiemployer association, although requested to participate, failed to do so. As a result we do not know whether the Association, or any of its other members, would support or challenge the instant petition. In any event, granting the petition does not alter the right of any other employer who is a member of the Association to maintain the status quo in conducting its relationship with the Union. In this regard, we emphasize that we find no evidence in this record that other supervisors, within the meaning of our Act, em-

ployed by other Association members have been included within the RN unit.

For the reasons stated, we find merit in the petition and, finding no impediment to granting this petition, we shall exclude all supervisors from the unit of non-supervisory registered nurses recognized by the Petitioner.

#### ORDER

It is hereby ordered that the existing recognized unit of supervisors and nonsupervisors employed by Fort Tryon Nursing Home, and represented by Registered Nurses Guild, Local 144, Hotel, Hospital, Nursing Home and Allied Service Employees Union, SEIU, AFL-CIO, be, and it hereby is, clarified to exclude all supervisors as defined in the Act.