Syracuse Region Blood Center, Syracuse and Onondaga County Chapter of the American Red Cross *and* International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, Local Union 182 Utica and Central New York. Case 3–RC–9588

March 19, 1991

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On June 22, 1990, the Regional Director for Region 3 issued a Decision and Direction of Election in which he found that the Employer is a health care institution within the meaning of Section 2(14) of the Act. Applying the ''disparity of interests'' test for unit determinations in the health care industry,[1] the Regional Director further found, contrary to the Petitioner, that the only appropriate unit comprises all the Employer's nonprofessional employees.[2] The Petitioner filed a timely request for review, and the Employer filed a statement in opposition. By order dated August 22, 1990, the Board granted the Petitioner's request for review. Both parties subsequently filed additional briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has carefully considered the record and the briefs of the parties and has decided to affirm the findings of the Regional Director as modified below, and to adopt his Decision and Direction of Election.

1. The Employer is a blood bank. It is the sole source of blood-related services for 38 hospitals in a 15-county area in central and southern New York State.[3] Those services are provided at the Employer's central facility at Syracuse; at three fixed sites in Utica, Watertown, and Ithaca; at various mobile sites (via mobile units or bloodmobiles); and, to a limited degree, at hospitals in the region.

The Employer performs some 90,000 homologous blood collections (i.e., from healthy donors) per year. Those procedures are performed at all the sites just enumerated. It also annually performs approximately 4000 autologous collections (i.e., donations from individuals who will receive their own blood during subsequent procedures). Most of the autologous donations are made at the fixed sites or at the bloodmobiles, but some, involving immobile donors, are made at hospitals. In addition, the Employer performs two forms of a procedure known as pheresis.[4] Donor pheresis, which is performed about 1500 times a year, consists of separating donated blood into its components, retaining those that are desired (such as platelets) for transfusions, and returning the rest to the donor. Donor pheresis is performed at the Employer's Syracuse facility. Therapeutic, or patient, pheresis is a similar process in which diseased or unwanted components of the patient's blood are removed and the rest are returned to the patient. Between 200 and 300 of these procedures are performed annually, typically in hospital intensive care facilities. The Employer also performs some 200 to 300 therapeutic phlebotomies[5] each year as part of the medical treatment of the individuals concerned. Those procedures are performed chiefly at the Syracuse facility and at the other fixed sites; they differ from other blood donations in that the blood drawn in a therapeutic phlebotomy is not transfused to patients.

The Employer's laboratories test blood samples for blood type, antibodies, and diseases; perform laboratory work related to pheresis procedures; and perform 25 to 30 immunohematology consultations per month with hospitals or physicians seeking medical advice. The Employer's operations also include a bone marrow donor program and a tissue bank program.

Section 2(14) of the Act defines ''health care institution'' as ''any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person[s]. ''In cases in which there was no indication that a blood bank performed any activities other than the collection, processing, and distribution of blood and blood products, the Board has found that the blood bank was not a health care institution within the meaning of the Act.[6]

We agree with the Regional Director, however, that the Employer's activities extend beyond the collection, processing, and distribution of blood; they also include patient pheresis and therapeutic phlebotomies, both of

[1] See *St. Francis Hospital*, 271 NLRB 948 (1984) (*St. Francis II*), remanded sub nom. *Electrical Workers IBEW Local 474 v. NLRB*, 814 F.2d 697 (D.C. Cir. 1987), decision affirmed on remand 286 NLRB 1305 (1987); see also *St. Vincent Hospital*, 285 NLRB 365 (1987).

[2] The petition, as amended at the hearing, sought a unit consisting only of the full-time and regular part-time per diem nurses and medical assistants in the Employer's Department of Donor and Patient Services at its Syracuse facility.

The unit found appropriate by the Regional Director excludes mobile unit (bloodmobile) and other drivers currently represented by the Communications Workers of America (CWA). No party contends that those employees should be included in any unit found appropriate here. Accordingly, references here to ''all nonprofessionals'' do not encompass the mobile unit drivers or any others represented by CWA.

[3] The Employer states in its brief that, after the hearing, its jurisdiction was expanded to include the former Albany region of the American Red Cross. The Employer stated at the hearing, however, that, notwithstanding the planned expansion of its jurisdiction, it did not contend that any unit found appropriate should include employees based at Albany.

[4] Pheresis is apparently sometimes called ''apheresis.'' See *Oklahoma Blood Institute*, 265 NLRB 1524 (1982); Taber's Cyclopedic Medical Dictionary, Am Jur Proof of Facts, 3d Series, p. 116.

[5] ''Phlebotomy'' is the medical term for drawing blood.

[6] *Dane County American Red Cross*, 224 NLRB 323 (1976); *Greene County American Red Cross*, 221 NLRB 776 (1975); *Sacramento Medical Foundation Blood Bank*, 220 NLRB 904 (1975); *San Diego Blood Bank*, 219 NLRB 116 (1975).

which indisputably involve patient care.[7] Although those patient-related functions make up only a small fraction of the Employer's overall activities, we find that they are performed with sufficient regularity and in a sufficiently large number (taken together, from 400 to 600 times a year) that the Employer is properly viewed to be ''devoted to the care of sick . . . persons.'' We therefore agree with the Regional Director that the Employer is a health care institution within the definition of Section 2(14).[8]

We do not agree with our dissenting colleague that the word ''devoted'' in Section 2(14) of the Act requires us to apply what is, in essence, a percentage-of-the-employer's-business standard for determining whether an employer is a health care institution.[9] A part of an employer's operations may have a substantial and regular impact on patient care, even if that part makes up only a small percentage of the employer's total business. In such a case, the employer is, in our view, ''devoted'' to patient care, notwithstanding that the employer's nonpatient care functions are more substantial than those involved with patient care.[10]

In affirming the Regional Director's finding, however, we do not agree with him (or with the Seventh Circuit in *North Suburban Blood Center*, supra) that the Employer's performance of donor pheresis and autologous collections is an indicator that it is a health care institution. Donor pheresis is distinguishable from whole blood donations only in the relative complexity of the procedure. The majority of autologous donations are made by individuals who, as patients at some time in the future, will receive the same blood.[11] The only distinction between autologous donations, on the one hand, and homologous donations and donor pheresis, on the other, is the identity of the recipient patient. We are unable to find autologous donations to involve patient care simply because the donors will, as patients in the future, be the recipients of the donated blood.

In further contrast with the court in *North Suburban*, we do not base our finding on the fact that, in contrast with other entities, such as drug companies, that supply products or services to hospitals, a work stoppage at a blood bank could have a more serious impact on the hospitals' operations because blood is a crucial commodity with few (if any) satisfactory substitutes. By that reasoning, a blood bank such as the Employer, which is the sole supplier of blood to hospitals in its region, might be found for that reason to be a health care institution, whereas an otherwise identical blood bank, located in a region in which other sources of blood were available, might not be. We respectfully decline to base our analysis in such cases on whether or not the blood bank in question is, in effect, a monopolist.

2. We find that the Regional Director correctly applied the ''disparity of interests'' standard for unit determinations in the health care industry,[12] and that, for the reasons discussed in the attached portions of his Decision and Direction of Election, he properly found that ''sharper than usual'' disparities do not exist between the wages, hours, and working conditions of employees in the petitioned-for unit and those of the Employer's other nonprofessional employees. Consequently, we affirm the Regional Director's finding that, under the ''disparity of interests'' standard, the only appropriate unit is an all-nonprofessional unit.

ORDER

It is ordered that the Regional Director's Decision and Direction of Election is affirmed as modified above, and that this proceeding is remanded to the Regional Director for further appropriate action.[13]

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[7] See *Oklahoma Blood Institute*, supra (blood bank that performed (a)pheresis found to be health care institution); *North Suburban Blood Center v. NLRB*, 661 F.2d 632, 634, 637 (7th Cir. 1981) (blood bank that performed, inter alia, therapeutic phlebotomies and plasma ''freezes'' (probably should be ''pheresis'' found to be health care institution).

[8] In so finding, we do not rely on the Employer's performance of laboratory services or on its consultations with hospitals and physicians. Neither of those functions is an indicator of health care institution status. See *Greene County*, supra.

Nor do we rely on the Employer's participation in the bone marrow donor and tissue donor programs, because in neither of those programs is the Employer involved in patient care. Most tissue donors are dead, and the rest, as well as the bone marrow donors, make their donations in hospitals, in procedures with which the Employer's employees are only peripherally involved.

We also disavow the Regional Director's implication that fn. 39 of *St. Francis II* establishes that all blood banks are health care institutions. The statement in that footnote is clearly dictum, and any suggestion therein that all blood banks are health care institutions is contrary to the cases cited in fn. 6, supra, which have not been overruled.

[9] Indeed, the dictionary definition of ''devoted'' cited by our colleague apparently would require an employer to be ''wholly or chiefly'' centered on patient care in order to be classified as a health care institution. That implies that she would not find an employer to be a health care institution unless more than half of its operations were devoted to patient care. Although it is possible to disagree over where to set the minimum level of patient care-related activities for defining health care institution status, we doubt seriously that the threshold can be set that high and be consistent with Congress' indication that the term ''health-care institution'' should be construed broadly. See *Kirksville College*, 274 NLRB 794, 795 (1985).

[10] See *Kirksville College*, supra, overruling in pertinent part *Albany Medical College*, 239 NLRB 853 (1978) (and, by implication, its progeny. See *University of Pennsylvania*, 247 NLRB 970 (1980); *Albert Einstein College of Medicine*, 247 NLRB 693 (1980)).

[11] Autologous donations apparently are sometimes made by individuals who are patients at the time of the donations. However, because the record does not indicate the number or regularity of such donations, we do not rely on those procedures in finding the Employer to be a health care institution.

[12] In *St. Vincent Hospital*, supra, the Board announced that it would process representation petitions in the health care industry under existing law—i.e., under the ''disparity of interests'' standard—until the Board's final rule governing health care unit determinations had issued. 285 NLRB at 366. Although the final rule has issued (29 CFR Part 103, 54 Fed.Reg. 16336), it has been challenged in court, and its validity has not yet been decided. Accordingly, the Board will treat the final rule as though it had not issued, and will continue to process petitions under the ''disparity of interests'' standard until the validity of the rule has been finally adjudicated.

[13] At the hearing, the Petitioner expressed a willingness to proceed to an election in any unit found appropriate. We therefore are remanding these proceedings to the Regional Director for further action, rather than dismissing the petition.

MEMBER CRACRAFT, dissenting in part.

Although I agree with a case-by-case approach in determining whether a blood bank is a health care institution within the meaning of Section 2(14) of the Act, contrary to my colleagues I would not find the Employer to be such a health care institution.

As stated by the majority, the Employer performs over 96,000 procedures annually, of which only 400–600 constitute patient care.[1] The majority finds on the basis of these 400–600 procedures that the Employer performs patient care activities ''with sufficient regularity'' to be considered a health care institution. Section 2(14) defines a health care institution as one which is ''devoted to the care of sick, infirm, or aged person.'' (Emphasis added.) The Board's task is to determine whether particular employers are within Section 2(14)'s definition of health care institutions. The patient care services provided by the Employer here total less than 1 percent of all its activities. In my view, this barely measurable percentage of the Employer's business falls far short of the amount of patient care activity that is required before one can define an institution as being ''devoted'' to patient care. Certainly the Employer here does not center its activities wholly or chiefly on the care of the sick, aged, or infirm.[2] Congressional concerns regarding the impact of collective bargaining on the health care industry are inappropriately applied to an employer with such a minimal patient care component.[3]

Accordingly, I would find this Employer is not a health care institution[4] and would apply the Board's community of interest test in determining the appropriateness of the petitioned-for unit.

In *Francis Hospital*, supra, the Board, in analyzing the criteria for establishing appropriate units in the health care industry, held:

> [T]he appropriateness of the petitioned-for unit is judged in terms of normal criteria, but sharper than usual differences (or ''disparities'') between the wages, hours, and working conditions, etc., of the requested employees and those in an overall professional or nonprofessional unit must be established to grant the unit. Requiring greater disparities in the usual community-of-interest elements to accord health care employees separate representation must necessarily result in fewer units and will thus reflect meaningful application of the congressional injunction against unit fragmentation.
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> The Board evaluates employees' wages, hours, and working conditions; qualifications, training and skills; frequency of contact and degree of interchange with other employees; frequency of transfer to and from the petitioned-for unit; commonalty [sic] of supervision; degree of integration with the work functions of other employees; area practice and patterns of collective bargaining; and collective-bargaining history. . . .

See also *St. Vincent Hospital*, 285 NLRB 365, 366 (1987). Moreover, and contrary to Petitioner's contention, the Board's rules regarding appropriate bargaining units in the health care industry, 29 CFR Part 103, Federal Register Vol. 54, No. 76 (April 21, 1989), are inapplicable herein inasmuch as the rules apply only to acute care hospitals. Thus, since this Employer is not an acute care hospital, it is proper to determine this appropriate units question by adjudication.

Under the disparity-of-interest test which is controlling herein, I find, contrary to Petitioner's contention, that the record fails to establish that the employees sought in the petition have a disparity of interests from those of the other non-professional employees. Accordingly, I find that the only apropriate unit is one consisting of all non-professional employees (excluding those currently represented by the Communications Workers of America). This determination is based upon the following application of the applicable criteria.

With regard to wages, hours and working conditions, the record reveals that all non-professional employees receive the same vacation, holiday, sick leave, health insurance, and retirement benefits. There is a common grievance policy. All those employees on travel status receive the same reimbursement for travel, food, and lodging. The performance review procedure, upon which merit increases are based, is uniform. All job openings are posted in the employee canteen, which is used by all employees. The Employer affords current employees a preference in filling openings. The hiring procedure applies equally to all employees. The non-professional employees are classified within pay grades B, C, D, and E (based on an overall pay system

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[1] I agree with my colleagues that patient pheresis and therapeutic phlebotomies constitute the Employer's only patient care. I also agree that the Employer's status as the sole source of blood for the region it serves is irrelevant to the determination of its status as a health care institution.

[2] Webster's Third New International Dictionary defines ''devote'' as to ''center the activities or (oneself) wholly or chiefly on a specified object, field, or objective.''

I disagree with my colleagues' characterization of my position as requiring an employer to commit more than half of its operations to patient care in order to be considered a health care institution. Although I need not decide today what percentage of an employer's activities must relate to providing patient care to be a health care institution, clearly an employer with less than 1 percent of its activities so committed can never be said to be devoted to patient care within the meaning of Sec. 2(14).

[3] Although it is true that in *Oklahoma Blood Institute*, 265 NLRB 1524 (1982), the Board ''found'' a blood bank that engaged in pheresis to be a health care institution, that finding was reached without an independent analysis of the facts and appeared to be based in large part on the parties' stipulation to that effect. Thus, it is impossible to discern the number of pheresis procedures conducted by that employer or the ratio of those procedures in connection with the total number of procedures performed at the facility. Under the circumstances, I do not find this precedent to be particularly persuasive.

[4] Although I recognize that my view virtually eliminates blood banks from the health care institution category of employers, I believe the Act requires such an outcome. Moreover, I note that my position does not leave employees unprotected by the Act. Their units simply are determined in accordance with a different standard.

with grades ranging from A through L). While the employees sought by Petitioner are in grades C, D, and E, the other non-professional employees are in the same three grades, with the exception of only the shipping and receiving clerk and the telerecruiters, who are classified in grade B.

While the standard workweek is not uniform, I do not find the variance (35, 37-1/2, and 40 hours) to be significant. In this regard, I note that the scheduling of employees in the donor and patient services department is contingent upon and directly coordinated with the scheduling and arranging of donors by the donor resource development department. In addition, the scheduling of the research and development laboratory employees is directly based in part upon the pheresis schedule.

With regard to qualifications, training and skills, the record reveals that the petitioned-for unit includes medical assistants, for whom there is no educational requirement, and nurses I and II who may be either registered nurses or licensed practical nurses. With regard to other non-professional employees, the medical technician position requires two years of post-high school education, whereas positions such as records retention clerk, laboratory aide, and telerecruiters require no education past high school. I therefore find no disparity in this respect.

With regard to the frequency of contact and degree of interchange, the record reveals that ten laboratory employees regularly work in the department of donor and patient services, performing the same work under the same conditions as those employees in the petitioned-for unit. The employees in production management are responsible for contacting on-call employees. While volunteers are normally responsible for transporting the product from the center donor room to the processing laboratory, if volunteers are not available, either the nurse or medical assistant will perform this function. As noted, the pheresis staff and the research and development laboratory staff are in regular direct contact. Similarly, the staff of the processing and research and development laboratories are in regular direct contact concerning confirmatory testing. The quality control section of the research and development laboratory conducts nurse proficiency testing on a regular basis. Accordingly, I find that the degree of contact and interchange between the employees in the petitioned-for unit and other non-professional employees to be, at the very least, more than minimal.

With regard to frequency of transfer, I note that a medical assistant in donor and patient services transferred to a pheresis coordinator position, and a nurse II in donor and patient services became the organ and tissue coordinator. I also note that another nurse transferred to a district consultant position in the donor resource development department. Finally, the record reveals that other non-professional employees have transferred, or have applied to transfer, between the various other departments. In this regard, current research and development laboratory employees have worked in the product laboratory, data processing, and pheresis.

With regard to commonality of supervision, I note that each department is separately supervised. However, the pheresis and autologous positions within the donor and patient service department, whom the Petitioner would exclude, are evaluated by the director of the department, as are the nurses and medical assistants in the department. In addition, the associate director for technical operations is responsible for five departments, including donor and patient services, and the standard operating procedures utilized to fulfill compliance with regulatory requirements apply equally to all of these five departments.

As noted earlier, I find a substantial degree of integration of operations. Accordingly, it is clear that the work functions of the employees in the petitioned-for unit are highly integrated with those of the other non-professional employees.

With regard to the area practice and pattern of collective bargaining, I note that the collective bargaining unit at the Albany-based facility is essentially an overall professional and non-professional unit.

Finally, with regard to collective bargaining history, while I note that the Communications Workers of America currently represent the drivers employed by the Employer, in view of the admonition against undue proliferation of bargaining units in the health care industry, I conclude that a unit consisting of all other non-professional employees will minimize the risk of any such undue proliferation.