**Ukiah Adventist Hospital d/b/a Ukiah Valley Medical Center *and* California Nurses Association.** Case 20–RC–17458

September 29, 2000

ORDER DENYING REVIEW AND REMANDING

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The National Labor Relations Board has delegated its authority in this matter to a three-member panel, which has considered the Employer's request for review of the Regional Director's Order Denying Motion to Transfer Proceeding and Reopening the Hearing (relevant portions are attached as an appendix), in which he found that asserting jurisdiction over the Employer did not violate either the First Amendment of the Constitution or the Religious Freedom Restoration Act, 42 U.S.C. § 2000 (bb)–1. The Employer's request for review is denied as it raises no substantial issues warranting review.

The facts, which are not in dispute, are set forth in detail in the attached Regional Director's Order. Briefly, the Employer is an acute care hospital operated and managed by the Seventh Day Adventist Church. The Petitioner seeks to represent a unit of the Employer's registered nurses (RNs). On December 8, 1998, the Regional Director issued an order finding that the Board's assertion of jurisdiction over the Employer would violate neither the Religious Freedom Restoration Act (RFRA) nor the First Amendment.[1]

In accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's Order, arguing that the Regional Director's assertion of jurisdiction over the Employer, a Seventh Day Adventist religious institution, would violate the Free Exercise and Establishment Clauses of the First Amendment, and RFRA.[2] For the reasons set forth by the Regional Director, as well as the additional reasons discussed below, we find that asserting jurisdiction over the Employer does not conflict with RFRA, or violate the First Amendment.

As found by the Regional Director, the Board has previously asserted jurisdiction over similar institutions operated by the Seventh Day Adventist Church. For example, in *Mid American Health Services*, 247 NLRB 752 (1980), the Board determined that asserting jurisdiction over the Seventh Day Adventist employer was not precluded by the First Amendment. See also *Cap Santa Vue, Inc. v. NLRB*, 424 F.2d 883 (D.C. Cir. 1970).

Subsequently, in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Supreme Court held that the Government's enforcement of neutral and generally applicable laws against religiously motivated conduct did not run afoul of the First Amendment even absent a showing of compelling government interest. In response to the Supreme Court's decision in *Smith*, Congress enacted RFRA in 1993 to restore the "compelling interest" standard that had been utilized in pre-*Smith* First Amendment cases. See generally Douglas Laycock & Oliver S. Thomas, Interpreting the Religious Freedom Restoration Act, 73 Tex. L. Rev. 209, 217–219 (1994); *University of Great Falls*, 331 NLRB No. 188 (2000). It is therefore necessary for us to reexamine the question of asserting jurisdiction over a health care institution operated by the Seventh Day Adventist Church.[3]

RFRA defines "the exercise of religion" as "the exercise of religion under the First Amendment," and it is clear from the legislative history of RFRA that Congress intended that courts would look to free exercise cases prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened.[4]

[1] Pursuant to a motion filed by the Employer, the Regional Director had bifurcated the hearing, limiting the presentation of evidence to the issue of the Board's jurisdiction. In his Order, the Regional Director also directed that the hearing be reopened to take evidence on the remaining issues.

[2] The Employer also requested that the Board stay the reopening of the hearing. On December 31, 1998, the Board granted the Employer's request to stay the reopening of the record pending the Board's ruling on the jurisdictional issue.

[3] In *University of Great Falls*, 325 NLRB 83 (1997), the Board initially held that the question of whether asserting jurisdiction over the employer violated RFRA was moot on grounds that in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court had found RFRA to be unconstitutional. Subsequently, however, in *University of Great Falls*, supra, the Board reconsidered the issue and concluded that it would assume that RFRA is constitutional as it applies to the National Labor Relations Act and Board proceedings. The Board cited its longstanding position that it is beyond its authority, as an administrative agency, to adjudicate the constitutionality of congressional enactments. It also noted that several courts had concluded that *Flores* addressed only the constitutionality of RFRA as applied to State law, and had either held or assumed that the statute was constitutional as applied Federal law. See, e.g., *Christians v. Crystal Evangelical Free Church*, 141 F.3d 854 (8th Cir. 1998), cert. denied 525 U.S. 811 (1998).

[4] S. Rep. No. 111. 103d Cong., 1st Sess. at 8 (1993). See discussion in *University of Great Falls*, supra. In *University of Great Falls*, we stated that in cases raising free exercise claims, we would continue to be guided by the Supreme Court's pre-*Smith* decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), in which the Supreme Court held that the Board could not assert jurisdiction over lay teachers in parochial schools. This case, however, presents issues that the Court did not have to address in *Catholic Bishop*. In *Catholic Bishop*, the Supreme Court examined the legislative history of the Act and found "no clear expression of an affirmative intention of Congress" that the Act covers teachers in church-operated schools. In the absence of such an intention, the Court said that the Board could not assert jurisdiction, since to do so would create a "significant risk" that First Amendment rights would be infringed and would therefore pose serious constitutional questions. The Court noted that its ruling was in keeping with the "prudential policy" that Acts of Congress ought not to be

In cases decided prior to *Smith*, the Supreme Court held that to show a free exercise violation, the religious adherent has the obligation to prove that a governmental regulatory mechanism burdens the adherent's practice of his or her religion by pressuring the adherent to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates. *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136, 140–141 (1987); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). This interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine. See *Thomas v. Review Board*, 450 U.S. 707 (1981) (burden exists when State's regulation puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs").

As noted above, the Employer here is a hospital operated by the Seventh Day Adventist Church. According to the Employer, the teachings of the Adventist faith prohibit Adventist institutions such as Ukiah from recognizing or bargaining with unions. The Employer states that the Church prohibits its members from participating in labor unions, paying dues to labor unions, or operating with the presence of labor unions, and that the Church strictly adheres to these prohibitions to the point where the Church was prepared to divest itself of another health care facility should the employees have voted to unionize.[5]

It is well settled that should a union become certified as the collective-bargaining representative of the Employer's employees, the Employer is legally obligated to bargain with the union or risk legal sanctions under the provisions of the National Labor Relations Act. Therefore, unless the Employer wishes to risk these consequences, it appears that the Employer will be compelled to engage in conduct that is expressly prohibited by its religion, i.e., recognizing and bargaining with the Petitioner. Thus, although the Employer's primary purpose is secular, we will assume for purposes of the decision that asserting jurisdiction over the Employer creates a "substantial burden" on the Employer's free exercise of religion within the meaning of RFRA.

The determination that asserting jurisdiction substantially burdens the Employer's free exercise of religion does not, however, end our inquiry. Rather, under RFRA, we must decide whether assertion of the Board's jurisdiction is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that interest.

Under this analytical framework, it is clear that application of the Act to the Employer is not precluded by RFRA. The Board and the courts have found that the government has a compelling interest in preventing labor strife and in protecting the rights of employees to organize and bargain collectively with their employers over terms and conditions of employment. In the first case to find the National Labor Relations Act constitutional, the Supreme Court stated that "employees have as clear a right to organize and select their representatives as an employer has to organize its business and select its own officers and agents." *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 33 (1937).[6] See generally *City Disposal Systems v. NLRB*, 465 U.S. 822 (1984). The right of employees to self-organization is constitutionally protected; it is a fundamental right implicit in the Fist Amendment's free assembly language. *Shelton v. Tucker*, 364 U.S. 479, 485–487 (1960); *Thomas v. Collins*, 323 U.S. 516, 532 (1945). In *Cap Santa Vue, Inc. v. NLRB*, 424 F.2d 883 (D.C. Cir. 1970), the court, in holding that the Board's application of the good faith bargaining requirement to all employers was sufficiently compelling to justify the regulation of religion-based conduct, stated that "enforcement of the obligation to bargain collectively was crucial to the statutory scheme." 424 F.2d at 889–890, citing *NLRB v. American National*

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construed to raise constitutional issues if other possible constructions were available. In this case, however, as explained below, we are dealing with a situation where Congress has previously expressed a clear affirmative intention that the Board assert jurisdiction over hospitals operated by religious organizations. Thus, *Catholic Bishop* is not determinative of the issues presented here. See *Bon Secours Hospital,* 248 NLRB 115, 116–117 (1980). Accord: *Tressler Luther Home for Children v. NLRB*, 677 F.2d 302, 305–306 (3d Cir. 1982); *St. Elizabeth Hospital v. NLRB*, 715 F.2d 1193, 1196 (7th Cir. 1983); *St. Elizabeth Community Hospital v. NLRB*, 708 F.2d 1436, 1440 (9th Cir. 1983).

[5] The Employer notes that the Church's governing institution have consistently reaffirmed these prohibitions. Thus, in 1957, the Church's General Conference (its highest governing body) issued a "Statement on Unionization of Our Church Institution" which provided that "not being able, because of religious conviction, to share in measures of coercion, either of labor or capital, we believe that participation in industrial strife accompanied by unfair and unjust practices, either by employers or employees, would subject our consciences to the guilt of sin and the condemnation of the Supreme Judge." The Church's North American Division reiterated the Church's position on unions in a 1972 resolution, and in 1983, the General Conference held that the Church would have to divest itself of a health care institution in Wisconsin if employees there were successful in forming a union.

[6] The Supreme Court stated in *NLRB v. Jones & Laughlin Steel Corp.*:

> Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances. [301 U.S. at 42.]

*Insurance Co.*, 343 U.S. 395 (1952). The court held that the bargaining requirements under the Act were sufficiently invested with the public interest to justify applying the good faith bargaining requirement to the Seventh Day Adventist employers. *Cap Santa Vue*, 424 F.2d at 890.

The Board has previously found application of the National Labor Relations Act to church-operated health care institution to be the legislative expression of a "compelling state interest," relying on the congressional debate over the 1974 amendments and an awareness of the national history of labor strife that led to passage of the Wagner Act and to the subsequent amendments extending coverage to the health care industry. *St. Elizabeth Community Hospital*, 259 NLRB 1135, 1138–1139 (1982), enf. 708 F.2d 1436 (9th Cir. 1983). The legislative history of the 1974 amendments clearly expresses Congress' intent that the Board assert jurisdiction over health care institutions that are owned, operated and/or managed by religious institutions. *Mid American Health Services*, supra at 753; *Bon Secours Hospital*, supra; *Tressler Lutheran Home for Children v. NLRB*, supra; *St. Elizabeth Hospital v. NLRB*, supra; *St. Elizabeth Community Hospital v. NLRB,* supra. In *Mid American Health Services*, the Board observed that the Senate rejected any amendment that would have maintained a jurisdictional exemption for hospitals owned, supported, controlled, or managed by a particular religion, religious corporation, or religious association.[7] The Board stated:

> The health-care amendments, inter alia, removed the preexisting jurisdictional exemption accorded nonprofit hospitals by Section 2(2) of the Act.[6] Given earlier Board determinations,[7] the repeal of the exemption for nonprofit hospitals in effect brought all privately owned health care institutions within the Board's legal jurisdiction. The Seventh Day Adventist Church, throughout the amendment process, opposed repeal of the exemption, on grounds which included those constitutional claims advanced in this proceeding. Thus, the church advocated an amendment which would have maintained a jurisdictional exemption for any hospital which "opposes unionization because of historically held religious teachings or tenets."[8] No such amendment was introduced by any member of the Congress. Senator Ervin did introduce[9] a proposed proviso to the new Section 2(14) of the amendments setting forth the definition of a "health care institution" which would have maintained a jurisdictional exemption for hospitals, "owned, supported, controlled, or managed by a particular religion or by a particular religious corporation or association." The Ervin amendment was rejected by the Senate.[10] This legislative history, when coupled with the enactment by Congress of other legislation specifically directed toward the problem of potential conflict between an employee's religious beliefs and collective-bargaining responsibilities[11] removes in our judgment, any doubt that the Congress clearly intended the Act to apply to health care institutions operated by religious institutions in general and the Seventh Day Adventist Church in particular.[8]

[6] Prior to the health care amendments, Sec. 2(2) provided in relevant part that: "The term 'employer' . . . . shall not include . . . . any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual."

[7] See 120 Cong. Rec. S. 6963–6964 (daily ed. May 2, 1974). See also the discussion in *St. Elizabeth Community Hospital*, 259 NLRB at 1137.

[7] See *Butte Medical Properties*, 168 NLRB 266 (1967) (proprietary hospitals); *University Nursing Homes Inc.*, 168 NLRB 263 (1967) (proprietary nursing homes and related facilities); *Drexel Homes, Inc.*, 182 NLRB 1045 (1970) (nonprofit nursing homes and related facilities).

[8] See, generally, "Hearings on S. 794 S. 2292 Before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 93d Cong. 1st sess." 483–547 (1973) (hereinafter Senate Hearings)

[9] 120 Cong. Rec. S.6950 (daily ed., May 2, 1974).

[10] 120 Cong. Rec. S.6963–6964 (daily ed., May 2, 1974).

[11] Sec. 19, added to the Act by the health care amendments, states:

> Any employee of a health care institution who is a member of an adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious charitable fund exempt from taxation under section 501(c)(3) of the Internal Revenue Code, chosen by such employees form a list of at least three such funds, designated in a contract between such institution and a labor organization, or if the contract fails to

[8] *Mid American Health Services*, supra at 753. See *St. Elizabeth Community Hospital*, 259 NLRB at 1137. In support of his proposal, Senator Ervin discussed the position of the Seventh Day Adventists, i.e., that their hospitals were one of the "evangelistic tools" the church used to accomplish its religious mission. A spokesman maintained that recognition of a labor union in a church-owned hospital would violate the religious tenets of the Seventh Day Adventists. In opposition, Senator Cranston noted that religiously affiliated hospitals were supported by a variety of governmental subsidies and grants, that their health-care operations were the same as non religious institutions, and that both drew on the same manpower pool. 120 Cong. Rec. 12950–12957, cited in *Tressler Lutheran Home for Children v. NLRB*, 677 F.2d 302, 304 (3d Cir. 1982).

> designate such funds, then to any such fund chosen by the employee.
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> Indeed, Sec. 19 closely resemble another proposal submitted to Congress in 1973 by the Seventh Day Adventist Church itself. See Senate hearings, supra, fn. 8, at 509–510. In *Catholic Bishop of Chicago*, supra, the Supreme Court characterized Sec. 19 as "reflecting congressional sensitivity to First Amendment guarantees."

Finally, we agree with the Regional Director that applying the Act to the Employer is the least restrictive means of furthering the government's compelling interest of preventing labor strife and protecting the employees' ability to exercise their rights under Section 7 of the Act.[9] We are mindful that Congress and the courts have been sensitive to the needs flowing from the Free Exercise clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. As the Supreme Court has stated, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *U.S. v. Lee*, 455 U.S. at 259. The RNs that the Petitioner seeks to represent do not forfeit their statutory rights simply because of the Employer's beliefs.[10] "[R]eligious beliefs can be accommodated, but there is a point at which accommodation would radically restrict the operating latitude of the legislature, and that '[t]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good.'" See *U.S. v. Lee*, 455 U.S. at 259 citing *Braunfeld v. Brown*, 366 U.S. 599, 605–606 (1961). See also *Cantwell v. Connecticut*, 310 U.S. 296, 303–304 (1940) "the [First] Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but in the nature of things the second cannot be. Conduct remains subject to regulation for the protection of society". As the Regional Director noted, the Seventh Day Adventist Church owns and operates many health care institutions throughout the United States, employing thousands of employees, many of whom are not Church members. Application of the National Labor Relations Act to these institutions is the least restrictive means of accomplishing the goals of the Act: ensuring the rights of those employees to self-organization and to have representatives of their own choosing, and promoting industrial peace and avoiding disruptions to the delivery of vital health care services through the practice and procedure of collective bargaining. Conversely, as the Regional Director noted, granting an exemption to the Employer and to other Church-operated health care institutions would defeat Congress' intent in enacting the National Labor Relations Act, by denying many thousands of employees the opportunity to self-organize and choose bargaining representation, as well as by putting vital health care services in jeopardy.

Accordingly, we agree with the Regional Director that asserting jurisdiction over the Employer is warranted,[11] and we remand this case to the Regional Director for further appropriate action consistent with this decision.

## APPENDIX

### ORDER DENYING MOTION TO TRANSFER PROCEEDING AND REOPENING HEARING

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board on October 8 and 9, 1998.[1] The hearing was adjourned indefinitely for the reasons discussed below.

On October 8, the Employer filed a motion to bifurcate the hearing on the jurisdictional and unit issues and to transfer the jurisdictional issue to the Board. In support of its motion, the Employer asserts that this case presents novel questions of constitutional and federal law regarding whether the Board should

[9] Sec. 7 provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

In *Cap Santa Vue, Inc. v. NLRB*, 424 F.2d 883 (D.C. Cir. 1970), the court held that two employers, who were practicing members of the Seventh Day Adventist Church, violated the Act by refusing to bargain with a union certified at two of their convalescent centers. The court held that notwithstanding the Church's prohibition against joining or bargaining with a labor union, the nursing homes were obligated to recognize and bargain with the certified union. The court held that the union's certification did not impede the right of the Seventh Day Adventist owners to hold their beliefs and foreseeing no significant intrusion into the employers' religious beliefs, ordered them to comply with the Act's secular purpose.

[10] Of the approximately 170 RNs, about 20 are Church members.

[11] As we find that asserting jurisdiction over the Employer does not violate the RFRA under the stricter "compelling interest" standard, a fortiori there is no violation of the free exercise clause of the First Amendment under the standard set forth in *Smith*.

Member Hurtgen concludes that the Board should construe the Act so as to avoid a constitutional issue is such a construction is "fairly possible." See his concurrence in *University of Great Falls*, 331 NLRB No. 188 citing *Edward J. DeBartalo v. NLRB*, 463 U.S. 147, 157 (1983). In the instant case, as set forth here, it is not "fairly possible' to conclude that Congress intended to exclude employers like Ukiah Valley. Thus, the Board must resolve the constitutional issue. Member Hurtgen agrees with his colleagues that assertion of jurisdiction would not be unconstitutional, i.e., contrary to the First Amendment. Further, Member Hurtgen agrees with his colleagues that assertion of jurisdiction would not be contrary to RFRA.

[1] All dates here refer to calendar year 1998 unless otherwise indicated.

assert jurisdiction over the Employer, a Seventh Day Adventist institution which, for religious reasons, cannot recognize or bargain with a labor union. The Employer further asserts that the Board should address in the first instance, the applicability of the *Religious Freedom and Restoration Act* of 1993 (*RFRA),* 42 U.S.C. Section 2000(bb) et seq., to the instant case because the same issue is currently before the Board in *University of Great Falls,* 325 NLRB 83 (1997).[2] The Employer refiled its motion to transfer this proceeding to the Board on October 9. Contrary to the Employer, the Petitioner asserts that this matter should not be transferred to the Board; that the Employer is subject to the Board's jurisdiction; and that the Employer's motion should be denied.

Because of the jurisdictional issue presented, the Employer's motion to bifurcate the hearing and limit the presentation of evidence to the jurisdictional issue was granted. Upon the completion of the presentation of evidence, the hearing was adjourned indefinitely, and the parties were given the opportunity to brief the jurisdictional issues raised by the Employer. Both parties timely submitted briefs on the jurisdictional issue.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the underlying record,[3] I find as follows:

1. The parties stipulated that the Employer meets the Board's monetary standards for the assertion of jurisdiction. However, the Employer has reserved its contention that the Board lacks jurisdiction over the Employer for the reasons cited in its motion to transfer to the Board. Based on the parties' stipulation,[4] I find that the Employer is a California nonprofit religious corporation engaged in the operation of an acute care hospital in Ukiah, California, and with a place of business at that location. Within the most recent calendar year, the Employer earned gross revenues in excess of $250,000 and purchased and received at its Ukiah, California, facility, goods and services valued in excess of $5000, directly from points outside the State of California. Accordingly, I find that the Employer is a health care institution within the meaning of Section 2(14) of the Act and that it meets the commerce standards for the assertion of jurisdiction by the Board.

2. The parties stipulated, and I find, that the Petitioner is a labor organization under the Act.

3. As noted above, the Employer asserts that the Board lacks jurisdiction over the Employer under the RFRA and the free exercise and establishment clauses of the First Amendment of the United States Constitution and that this case should be transferred to the Board to decide these issues in the first instance. The Employer also requests that if the Board determines that it has jurisdiction over the Employer, it should none-

[2] In *University of Great Falls*, supra, the Board, on November 8, 1997, issued a Decision on Review and Order in a representation case asserting jurisdiction over a liberal arts university that was founded by a religious order of the Sisters of Providence, St. Ignatius Province of the Catholic Church. In so doing, the Board affirmed a Regional Director's decision that jurisdiction was warranted under *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). In its decision, the Board noted that it need not reach the issue as to whether asserting jurisdiction over the employer violated the Religious Freedom and Restoration Act of 1993 (RFRA) because the Supreme Court in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997), had found the RFRA to be unconstitutional thereby rendering the issue moot. Thereafter, on July 21, 1998, the Acting General Counsel issued a complaint alleging that the employer had refused to bargain with the certified union in violation of Sec. 8(a)(1) and (5) of the Act. A motion for summary judgment was filed and, on September 1, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why summary judgment should not be granted. On September 30, the Board issued an Order and Notice to Parties of Opportunity to Submit Statements. In its order, the Board noted that the employer had, in response to the Notice to Show Cause, pointed out that one Circuit Court of Appeals had found that the RFRA was not unconstitutional as applied to federal law and another had "assumed" without deciding that it was constitutional as applied to federal law. In these circumstances, the Board concluded it must address the RFRA issue and the parties were given until November 2, to submit briefs with the Board.

[3] At the hearing, the parties agreed that the Employer would provide at a later date, a full copy of the Employee Opinion Survey received into evidence as E. Exh. 72. That document was received by the Region on October 15. As there has been no objection raised to its inclusion in the record, it is hereby included as E. Exh. 72(a).

As discussed below, at the hearing, the Petitioner adduced evidence from the Employer's CEO, Valorie Devitt, to the effect that Redbud Hospital in Clearlake, California, is also a part of Adventist Health. The parties agreed that the Union would provide at a later date, a copy of a collective bargaining agreement between Redbud Hospital and the association representing its employees. However, on October 19, in lieu of the collective bargaining agreement, the Petitioner submitted the Declaration of Michael Allen dated October 14. In his declaration, Allen recites that he represents the Redbud Community Hospital Employees Association (RCHEA) which was certified as the exclusive collective bargaining representative of a unit of all hospital employees who were not supervisory or confidential employees under the California Government Code Section 3500, Meyers-Milias-Brown Act, and a resolution of the board of directors of the Redbud Community Hospital. According to this declaration, the Seventh Day Adventists purchased the assets of Redbud Community Hospital and began managing it in 1997. In a letter dated November 7, 1997, Adventist Health (on behalf of Adventist Redbud Community Hospital) agreed to extend recognition to RCHEA as the exclusive collective bargaining representative of employees in the unit described above should a majority of the employees hired be employees who had previously worked in bargaining unit positions. According to the declaration, since the Seventh Day Adventists began managing Redbud Community Hospital, they have negotiated two agreements with RCHEA containing terms and conditions of employment for the Redbud Hospital employees. The most recent of these agreements was ratified by the members of RCHEA in approximately September 1998 and is being finalized for signature. According to the declaration, no copy is currently available.

The Employer has objected to the receipt of this declaration into evidence as it is not the document the parties agreed the Petitioner would submit and because it is hearsay with regard to the truth of the matters asserted in the declaration and letter.

I have declined to receive the document proffered by the Petitioner and have placed in a rejected exhibits file as Exh. 1. In so doing, I note that this document is not what the parties agreed the Petitioner would submit. Further, in determining whether the Board may assert jurisdiction over the Employer, I find no basis for examining the consistency with which various entities of the Seventh Day Adventist Church may or may not adhere to its tenets.

[4] After the close of the hearing, the parties entered into a joint stipulation regarding the facts with regard to whether the Employer meets the Board's monetary standards for the assertion of jurisdiction. These documents are hereby included in the record as Jt. Exhs. 1 and 2.

theless grant the Employer an exemption from the Act. The Petitioner takes the opposite position.

## Background: The Employer's Operation and the Instant Petition

As indicated above, the Employer is a religious nonprofit corporation operating an acute care hospital in Ukiah, California. The Employer formed in 1988 when Ukiah Adventist Hospital, formerly called Hillside Community Hospital of Ukiah,[5] took over the operation of Ukiah General Hospital, a hospital which was not affiliated with the Seventh Day Adventist Church. At the hearing, the Employer represented that it currently operates out of four buildings, located on Dora, Leslie, Hospital and Perkins Drives in Ukiah. The Employer is the only hospital in Ukiah and it provides health care services to the general public. The Petitioner seeks to represent a unit comprised of approximately 160 of the Employer's registered nurses, most of whom are not members of the Seventh Day Adventist Church.

### *The Seventh Day Adventist Church*

Alan Rainach was the primary witness for the Employer at the hearing. Rainach is a member of the Seventh Day Adventist Church and is both the Director of the Public Affairs and Religious Liberty Department for the Pacific Union Conference of the Seventh Day Adventist Church and the President of the Church-State Council of Seventh Day Adventists.[6] Rainach testified regarding the history of the Church which is also briefly described in a document contained in the record entitled "1998 Seventh Day Adventist Church Yearbook."[7] Rainach also testified regarding the hierarchy, beliefs and policies of the Seventh Day Adventist Church and its relationship to Ukiah Valley Medical Center.

### Church Hierarchy

According to Rainach, the Church's highest administrative body worldwide is its General Conference, which has its headquarters in Silver Spring, Maryland. The record includes a document entitled: "Working Policy North American Division of the General Conference of Seventh Day Adventists 1997–1998 Edition," which contains the constitution and bylaws of the General Conference. This document is described on its face as "the authoritative voice of the Church in matters relating to the administration of the work of the Seventh Day Adventist denomination in all parts of the world." This document further states that the work of all organizations in every part of the world must be administered in "full harmony with the policies of the General Conference and of the divisions respectively," and that "no departure from these policies shall be made without prior approval from the General Conference Committee except as provided in the 'Working Policy.'

Under the General Conference, the Church is divided into approximately 13 geographical units called divisions. The North American Division encompasses the United States and Canada, Bermuda and a few outlying Pacific islands. Under the North American Division is the Pacific Union Conference which covers the states of California, Arizona, Nevada, Utah, and Hawaii.

According to Rainach, the Church operates a number of different religious ministries, including a hospital system of which Ukiah Valley Medical Center is a part.[8] Rainach testified that

[5] The record contains a document titled "Ukiah Valley Medical Center Departmental Policy and Procedure Manual," which describes the history of the Employer. According to this manual, the Employer is a private, voluntary, nonprofit hospital that depends solely on revenue from patient services rendered. The manual relates that Ukiah Adventist Hospital was formerly called Hillside Community Hospital of Ukiah (herein called Hillside). On September 1, 1978, Hillside took the name Ukiah Adventist Hospital and became a member of Adventist Health System-West, which is described more fully below The manual states that in August 1988, Ukiah Adventist Hospital acquired the assets of Ukiah General Hospital and expanded its number of licensed beds from 43 to 94, with physical facilities located on two campuses, Dora Street (51 beds) and Hospital Drive (43 beds). In 1992, a nine-bed addition was made to the Hospital Drive campus. This document further relates that in 1996, Inhome Health Agency was consolidated into the Employer's operations; in 1997, the Employer purchased and remodeled an adjacent one-acre property of a former restaurant to accommodate its Outpatient Physical Therapy/Rehab and Mammography services; and in the winter of 1997, the Employer constructed a 16 bed perinatal unit at its Hospital Drive site and relocated such services from its Dora Street site to its Hospital Drive site.

The manual states that the Employer is currently licensed by the State of California for 102 acute beds and 15 transitional care beds and provides special facilities/services of critical care unit; basic emergency medical services (24-hour service, with physicians, licensed registered nurses, obstetrical level II nursing and pediatricians on duty), health promotion, operating room, recovery room, outpatient surgery center, physical therapy/rehabilitation, respiratory therapy, pharmacy/IV, medical imaging (i.e., radiology/nuclear medicine/CT scanning, MRI), medical library, occupational medicine, and laboratory/pathology.

[6] According to Rainach, the Public Affairs and Religious Liberty Department monitors legislation that impacts on the Church in the five western states of the Pacific Union Conference (i.e., California, Arizona, Nevada, Utah, and Hawaii).

[7] As described by Rainach and the Church's 1998 yearbook, the Church grew out of a religious revival movement in the 1820s and 1830s known as the Second Great Awakening, which propounded the belief that Christ would imminently return to earth. Dates were predicted for this "Second Advent," the last major date being October 22, 1844. When the Second Advent did not occur as predicted, Advent believers splintered into a number of different groups including a group called the Adventists. In 1860, because of this group's belief in the imminent return of Christ and their conviction to observe the Sabbath from Sundown Friday to sundown Saturday, they became known as the Seventh Day Adventists.

According to Rainach, the Seventh Day Adventist Church is unique among Protestant groups because of its conviction that it is a prophetically inspired movement to prepare the world for the return of Christ. Rainach testified that the Church grew from a few thousand members in the 1800s to about 10 million persons today. The Church was largely confined to North American until 1874 when its first missionary work began. Currently, it operates in approximately 204 countries and has an expansive educational and medical system all over the world. In this regard, the Church's 1998 yearbook discloses that the Church operates 161 hospitals and sanitariums; 313 clinics and dispensaries; and 92 nursing homes and retirement centers. As of 1995, the assets for its health care institutions were valued at approximately 5 billion dollars.

[8] Other ministries/departments of the Church include the public affairs and religious liberty department of which Rainach is the director;

the hospital system is considered to be an integral part of the Church's ministries and that health work "is very, very closely connected to the evangelistic work of preaching the gospel of Jesus Christ . . . health work is what opens the doors of minds and hearts to the love of Jesus Christ . . . ."

The Church's Working Policies With Regard to Health Care Institutions

Section G40 of the Working Policy North American Division of the General Conference document, entitled, "Statement of Operating Principles for Health Care Institutions," states that the mission of the Church includes "a ministry of healing to the whole person—body, mind and spirit." This section further states:

> 2. Health care institutions (hospitals, medical/dental clinics, nursing and retirement homes, rehabilitation centers, etc.) function as an integral part of the total ministry of the Church and follow church standards including maintaining the sacredness of the Sabbath by promoting a Sabbath atmosphere for staff and patients, avoiding routine business, elective diagnostic services, and elective therapies on [sic] Sabbath. These standards also include the promotion of an ovolacto-vegetarian diet free of stimulants and alcohol and an environment free of tobacco smoke. Control of appetite shall be promoted, use of drugs with a potential for abuse shall be controlled, and techniques involving the control of one mind by another shall not be permitted. The institutions are governed as a function of the Church with activities and practices clearly identified as the unique Christian witness of Seventh Day Adventists.

This section further provides that the Church's health care institutions are to give high priority to human life, personal dignity and human relationships; primary prevention and health education; respect for laws and regulations of the land; and operating in a fiscally responsible manner. It further states with respect to the staff of health care institutions:

> 7. The mission of institutions in representing Christ to the community, and especially to those who utilize their services, is fulfilled through a compassionate, competent staff which upholds the practices and standards of the Seventh Day Adventist Church. In the development of the staff, institutions regularly schedule classes which assist the staff in keeping up to date professionally, growing in understanding, and in sharing the love of God. Long-range staff planning supports formal education of prospective staff including utilizing an institution for clinical practice for students.

The Church's Beliefs and Policy Regarding Labor Organizations

Section HR 30 of the North American Division Working Policy for 1997–1998 sets forth the Church's position prohibiting any involvement with labor organizations. This section confirms the Church's historic teaching that Church members refrain from joining or financially supporting labor organizations and refrain from recognizing or bargaining with labor organizations.[9] The record also contains writings by one of the Church's founders, Ellen G. White, including "The Ministry of Healing" and other compilations of her published writings in which she expounds on the Church's disavowal of any association with labor unions and the Biblical bases for its beliefs in this regard.[10] These works apparently date from approximately the turn of the 20th Century.

the education department; the Sabbath school department; the youth ministry; the women's ministry; the health and temperance ministry; the inner city ministries; and the Adventist Development and Relief Agency.

[9] This section states as follows:

> HR 30 Relationship of Church Members and Church Institutions to Labor Organizations
>
> HR 30 05 Biblical Background—The Seventh Day Adventist Church for more than a century has taught its members and instructed administrators of its Church institutions that the Holy Bible clearly instructs that Christ is to be Lord of the life of every Church member and Church institution and that He is to be the ultimate authority to which they will submit their decisions and relationships (Acts 2:36; 5:29; Colossians 3:23, 24). The Church has historically taught that its members and institutions dare not violate their individual or corporate consciences by supporting organizations, policies, or activities incompatible with the principles set forth in the Holy Scriptures (Isaiah 8:12, 13; 2 Corinthians 6:14-18).
>
> HR 30 10 Historical Position-1.
>
> Based on the biblical principles described in HR 30 05 (and many other sources), the Seventh Day Adventist Church hereby confirms its long-standing teaching that Church members should, and institutions must, remain free and independent from organizations which might violate a member's conscience or interfere with the fulfillment of the mission of the Church, through its institutions, as follows:
>
> a. Seventh Day Adventist Church members are following the historic teaching of the Church when they refuse to join or financially support labor unions or similar organizations.
>
> b. Seventh Day Adventist institutions are following the historic teaching of the Church when they refuse to recognize labor unions as bargaining units o [sic] to enter into contractual negotiations with them or similar organizations. Institutions and administrators on all levels shall seek counsel from the North American Division Public Affairs and Religious Liberty Department and the North American Division administration if confronted with requests to recognize a labor union as a bargaining unit or to enter into contractual negotiations with such organizations.
>
> 2. The Seventh Day Adventist Church does not engage in political or economic activities that seek to destroy the labor movement. However, the Church will exercise its lawful right to protect itself and its institutions from involvement with labor unions, just as it endeavors to protect the rights of conscience of members who conscientiously practice the teaching of the Church in this regard.
>
> 3. Through sermons, personal counseling, church publications, and other media, church and institutional administrators as well as pastors should inform Seventh Day Adventist Church members as institutional employees of the Bible principles and the historic teachings on which the Church's position is based. [HR 30 15 which lists resource materials related to the Church's position is omitted.]

[10] In addition, the record contains a document entitled "Counsels From the Spirit of Prophecy on Labor Unions and Confederacies"

### The Organizational Structure of the Church's Health Care System

The record reflects that the Church's health care system in North America is headed by a Church-owned and operated parent organization called North American Health Care Corporation. Under this parent organization are regional Church-owned organizations that serve as the regional governing bodies for the Employer and other Church hospitals. The Employer herein falls under Adventist Health System/West d/b/a Adventist Health under the Pacific Union Region.[11] Adventist Health is a nonprofit corporation organized exclusively for religious purposes.

A document introduced into the record by the Employer entitled "Physician Partners With Adventist Health," discloses that Adventist Health operates approximately 19 hospitals in California, Hawaii, Oregon, and Washington. In addition, it owns, leases, or manages over 50 health care business units and an additional 225 health care businesses, partnerships, affiliations, joint ventures, and "discrete programs" in this four state area and generates approximately $1 billion annually in revenue.

### *The Ukiah Valley Medical Center*

The record contains the Articles of Incorporation and Amendments thereto for the Ukiah Valley Medical Center. This document states that the Employer is a religious corporation organized under the nonprofit religious corporation law "exclusively for religious purposes."

The Employer's CEO, ValGene Devitt, testified that the primary purpose of the Employer is to provide health care. In this regard, Rainach testified that the Employer provides health care services comparable to those provided by non-Adventist hospitals. As indicated above, Ukiah Valley Medical Center is the only hospital in Ukiah and it serves the general public.

CEO Devitt testified that she is a member of the Church. She testified that each Adventist Health hospital, including the Employer, has two boards of directors: a legal board which is the same as that of Adventist Health and which handles major financial issues; and a local governing board which deals with quality, staffing and other local issues within the facility. The amendments to the Articles of Incorporation for both the Employer and Adventist Health disclose that the directors of both boards must be members in good standing of the Seventh Day Adventist Church.

As indicated above, among the Church-based policies applied by the Employer is not serving meat in its cafeteria.[12] The Employer also restricts the performance of abortions to certain specified circumstances[13] and observes the Sabbath from sundown on Friday evening to sundown on Saturday evening by performing only essential activities during that period. Volunteers also distribute cards and flowers to patients during this period.

Rainach testified that religious pictures are posted in the Employer's facility and the parties stipulated, and I find, that Church-related materials are generally available throughout the Employer's facility, including the hallways adjacent to the nursing units and patient rooms, but not in patient rooms.

The Employer has a pastoral care department comprised of a senior chaplain and a staff of chaplains, who provide "pastoral/emotional care to patients, families, volunteers, and hospital employees through visitation, spiritual counseling, crisis intervention, grief support, prayer and spiritual emphasis groups." The record contains a number of excerpts from the Employer's policies and procedures manual that relate to the role of the senior chaplain and other chaplains in carrying out this function. The Employer maintains a chaplain's office at its facility.

Included in the excerpts from the Employer's departmental policy and procedure manual for the pastoral care department is an excerpt entitled: "Standard of Care For A Member of A Care Team." (According to Devitt, the care team includes the nurses, discharge planners, therapists, chaplain, and any other care providers at the Employer's facility who are involved with a patient.) This document states that the members of the care team should, inter alia, take measures for implementing and supporting the patient's spiritual needs by informing the patient of the availability of the chaplain for support; informing the patient's minister of hospitalization if requested or indicated; by providing for privacy; and by observing the protocols of the patient's religion in regard to diet or rituals. However, the record does not disclose whether the registered nurses have been specifically informed of the contents of this document, its requirements or its applicability to them. The record further reflects that the Employer does not require its registered nurses to indoctrinate patients into the Seventh Day Adventist religion or to disseminate religious materials unless a patient specifically requests such materials.

CEO Devitt testified that a brochure which discusses, inter alia, the Employer's religious mission and goals is sent to all persons requesting job applications from the Employer.[14] The

prepared by the Public Affairs and Religious Liberty department of the Church's General Conference; a memo from the October 8, 1968, General Conference and Union Conference Presidents Meeting; a Position Statement by the Church on Labor Unions dated October 16–20, 1972; a document entitled "Seventh Day Adventists, Business Cartels and Labor Unions," by John Stevens, President, Church State Council of Seventh Day Adventists; and minutes from the September 19, 1957 minutes of the General Conference Committee, all of which also discuss the Church's position against labor unions and the reasons for that position. The parties have stipulated that the principles set forth in one of these documents, "Seventh Day Adventists, Business Cartels and Labor Unions," apply to the Employer herein, including those of allegiance to Christ; due benevolence; autonomy; faithful witness; privilege and responsibility; prophetic insight; and service; fellowship; and baptismal vow. Rainach testified that all of these principles of the Church would be violated if the Employer is required to recognize a labor union.

[11] The Employer is listed in the Seventh Day Adventist Church yearbook 1998, which, according to Rainach, indicates that it falls within the Church's 501(c)(3) tax exemption.

[12] The record reflects that the Employer will serve meat to patients upon request.

[13] Such circumstances include those involving rape or incest; the likelihood of the child being deformed or retarded; or if the mother is unwed and under 15 years of age.

[14] This brochure discusses briefly the Church and its health care mission, including the fact that it is a nonsmoking and alcohol-free hospital with a cafeteria that serves vegetarian food; that employees are ex-

Employer also shows a video to applicants who come to the Employer's facility which likewise explains its mission and goals. According to Devitt, she also makes an orientation presentation to new employees which includes coverage of the Employer's mission statement,[15] vision statement,[16] and a brief history of the Church and the health care ministry within the Church.

Although the record does not disclose the precise number of registered nurses who are members of the church, Devitt acknowledged in her testimony that perhaps as few as 20 of the Employer's 170 registered nurses are church members. She testified that the Employer does not require its registered nurses to be church members but stated that "we would hope through the selection process, both them selecting us and us selecting them, that we have many common values."

The record includes the bylaws for the nursing staff in a document titled "Departmental Policy & Procedure Manual." The bylaws pertain to the philosophy, purpose, objectives, standards, governance, and disciplining of the nursing staff. This document states that the role of the professional registered nurse is to "assume accountability for the delivery of nursing care within the institution." The document does not describe any specific religious purpose or function that is to be carried out by the registered nurses nor does it state that nurses are evaluated based on a duty to carry out any religious functions.

Marie Ann Vear testified that she is employed by the Employer as a full-time registered nurse in the intensive care unit. According to Vear, she has previously worked for non-Adventist hospitals (i.e., Ukiah General Hospital for 7 years and Tahoe Forrest Hospital for 2 years) and has worked for at the Employer's facility since 1989. She testified that there had been no changes in her work duties as a result of working for an Adventist hospital as opposed to a non-Adventist hospital.

## Analysis

As stated above, the Employer contends that the Board should consider this case in conjunction with *University of Great Falls*, supra, and that the Board should decline to assert jurisdiction over it because (1) application of the Act to the Employer would violate the RFRA; (2) application of the Act to the Employer would violate the rights of the Hospital, its officers and Board members under the free exercise clause of the First Amendment; (3) application of the Act to the Employer would entangle the Board in questions of Church doctrine, in violation of the establishment clause of the First Amendment; and (4) even if the exercise of jurisdiction were not precluded by the RFRA or the Constitution, the same underlying policy considerations require the Board to grant an exemption to the Employer from the requirements of the Act. The Petitioner takes opposing positions on these issues.

The RFRA prohibits the "[government] from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest."[17]

In *City of Boerne v. Flores,* 521 U.S. 507 (1997), the Supreme Court held that the RFRA was unconstitutional as applied to State law because Congress had exceeded its enforcement powers under Section 5 of the Fourteenth Amendment. Since the Supreme Court rendered its decision in *Boerne*, the Eighth Circuit, in *In Re Young,* 141 F.3d 854, 857 (8th Cir 1998), has found that the RFRA to be constitutional as applied to federal law.[18] As the Eighth Circuit stated with regard to the RFRA and the Supreme Court's decision in *Flores:*

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pected to dress modestly; that the Sabbath is observed by not having routine and noncritical activities conducted on the Sabbath; and that employees will see the Employer's religious mission statements on display throughout the hospital. The brochure further states that "if the values discussed here meet your personal and philosophical goals, you may be just the person we are looking for to step in and fill an important role on our team of dedicated and caring workers."

[15] The mission statement referred to by Devitt is a one-page document titled: "Ukiah Valley Medical Center–Adventist Health Statement of Mission." This document states, inter alia, that the Center will operate: "in a manner consistent with the philosophy of the Seventh Day Adventist Church. This philosophy strives for a balance of physical, mental and spiritual health through prevention and treatment of disease, allowing each person to achieve his or her full potential."

[16] The vision statement is a one-page document stating, inter alia, that the Center is a "continuation of the healing ministry of Christ" and will be known for "providing quality health care through personalized services, technical excellence, and efficient use of resources in a cooperative environment."

[17] The *RFRA* states, in relevant part:

> (a) Findings
>
> The Congress finds that—
>
> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
>
> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
>
> (3) governments should not substantially burden religious exercise without compelling justification;
>
> (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
>
> (5) the compelling interest test as set forth in prior Federal court rulings in a workable test for striking sensible balances between religious liberty and competing prior governmental interests.
>
> (b) Purposes
>
> The purposes of this chapter are—
>
> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner,* 374 U.S. 398 (1963) and *Wisconsin v. Yoder,* 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

[18] In *Alamo v. Clay,* 137 F.3d 1366 (D.C. Cir. 1998), the D.C. Circuit found that a church did not have standing to challenge a Parole Commission's decision to deny parole to its pastor. In rendering its decision, the court assumed, without deciding, that notwithstanding the Supreme Court's decision in *Boerne*, the RFRA was still valid law with regard to its application to Federal law.

> [The] RFRA was enacted as a legislative response to the Supreme Court's decision in *Employment Div., Dep't. of Human Resources v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, (1990). In *Smith,* the Supreme Court held that the First Amendment "right of free exercise [of religion] does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." Id. at 879, 110 S.Ct. at 160 (quotations omitted). In reaching this holding, the Supreme Court effectively overruled precedent that had provided greater protection to individuals whose religious practices were burdened by the operation of neutral laws. See Id., at 883–885, 110 S.Ct. at 1602–04 (rejecting rule of *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, (1963), that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest").

As noted above, the Board has delegated its authority to the undersigned pursuant to Section 3(b) of the Act to determine whether a question of representation exists and this requires a determination of whether to assert jurisdiction over the Employer. Therefore, I decline to transfer this case to the Board and will make a determination as to whether the Board may properly assert jurisdiction over the Employer.

In *Mid American Health Services,* 247 NLRB 752 (1980), a decision that predates the RFRA and the Supreme Court's decision in *Smith,* the Board asserted jurisdiction over a health care institution operated by an employer that stood in a similar hierarchical relationship to the Seventh Day Adventist Church as the Employer herein. In that case, the employer, a Wisconsin corporation that owned and operated six extended care nursing homes, was in turn owned by Great Lakes Adventists Health Services, Inc., the regional arm of the Seventh Day Adventist Church that operates the Church's health care delivery system in the States of Illinois, Indiana, Wisconsin, and Michigan.

Like the Employer in the instant case, the employer in *Mid American Services* asserted that the Board's assertion of jurisdiction over it would substantially impair its practice of religion and infringe upon its constitutional rights in contravention of the establishment and free exercise clauses of the First Amendment to the Constitution. Like the Employer in the instant case, the employer in *Mid American Services*, asserted that as:

> a matter of religious principle and on the basis of Holy Scripture, the church teaches that an individual may not properly relinquish his or her own spiritual autonomy by joining a labor union. Moreover, the Employer contends that, as a direct result of its religious beliefs, institutions of the church may not deal or bargain with labor unions.

The employer in *Mid American Services* further contended, like the Employer in the instant case, that the Church's operation of the nursing home at issue merited First Amendment protection because the operation of its health care facilities was an integral and inseparable part of the Church's spiritual and religious mission. As with the Employer in the instant case, the majority of the employees in the proposed bargaining unit were not members of the Seventh Day Adventist Church.

In determining whether to assert jurisdiction over the employer in *Mid American Services,* the Board first addressed the Supreme Court's decision in *Catholic Bishop of Chicago,* supra,[19] In addressing *Catholic Bishop*, the Board noted that the Supreme Court had held that "because the Board's assertion of jurisdiction raised serious constitutional questions it was first necessary to determine whether the legislative history of the Act manifested a clearly expressed affirmative intention, on the part of Congress, that the Board assert jurisdiction in such cases." The Board noted that in *Catholic Bishop,* the Supreme Court had found no clear expression of legislative intent that the Board assert jurisdiction over religious schools and had "declined to construe the Act in a manner which would . . . necessitate resolution of the serious constitutional questions which an assertion of jurisdiction would otherwise raise." 247 NLRB at 752.

The Board then examined the legislative history of the 1974 health care amendments to the Act[20] and found that Congress had clearly expressed an affirmative intention that the Board assert jurisdiction over hospitals owned, operated or managed by religious institutions. Accordingly, the Board asserted jurisdiction over the employer in that case. In so finding, the Board stated the following:

> The health care amendments, inter alia, removed the preexisting jurisdictional exemption accorded nonprofit hospitals by Section 2(2) of the Act. (footnote omitted). Given earlier Board determinations, the repeal of the exemption for nonprofit hospitals in effect brought all privately owned health care institutions within the Board's legal jurisdiction. The Seventh Day Adventist Church, throughout the amendment process, opposed repeal of the exemption, on grounds which included those constitutional claims advanced in this proceeding. Thus, the Church advocated an amendment which would have maintained a jurisdictional exemption for any hospital which "opposes unionization because of historically held religious teaching or tenets." No such amendment was introduced by any member of the Congress. Senator Ervin did introduce a proposed proviso to the new Section 2(14) of the amendments (setting forth the definition of a "health care institution") which would have maintained a jurisdictional exemption for hospitals "owned, supported, controlled or managed by a particular religion or by a particular religious corporation or association." The Ervin Amendment was rejected by the Senate. The legislative history, when coupled with the enactment by Congress of other legislation specifically directed toward the problem of potential conflict between an employee's religious beliefs and collective-bargaining re-

[19] In *Catholic Bishop,* the Supreme Court held that the Board did not have jurisdiction over the parochial schools in question because there was no showing of a specific congressional intent to mandate their coverage under the Act. The Supreme Court found that in the absence of a clear expression of an affirmative intention by Congress that teachers in church-operated schools be covered by the NLRA, the Supreme Court would not construe the Act in a manner that could, in turn, call upon the court to resolve difficult and sensitive questions arising out of guarantees of Religion clause of the First Amendment.

[20] Public Law 93–360, 88 Stat. 397 (1974).

> sponsibilities, removes, in our judgment, any doubt that the Congress clearly intended the Act to apply to health care institutions operated by religious institutions in general and the Seventh Day Adventist Church in particular. [Footnotes Omitted.]

In asserting jurisdiction over the employer in *Mid American Services,* the Board stated that by doing so it was following a clear legislative mandate. 247 NLRB at 753. The Board's interpretation of the legislative history of Section 2(14) of the Act in this regard has been affirmed by the courts. See, e.g., *St. Elizabeth Community Hospital v. NLRB*, 708 F.2d 1436, (9th Cir. 1983) ("This legislative history indicates an affirmative intention of Congress to subject church-operated hospitals to Board jurisdiction. . . ."); *Tressler Lutheran Home v. NLRB,* 677 F.2d 302 (3d Cir. 1982).[21]

The Board's *Mid American Services* decision illustrates the basis for distinguishing the employer in the instant case from that in *University of Great Falls,* the case currently pending before the Board. Thus, in *University of Great Falls*, the employer, a university owned and operated by a religious order of the Catholic Church, contends that the Board lacks jurisdiction over it because it is a religious school and the Supreme Court found in *Catholic Bishop*, no clear expression in the legislative history of the Act that the Board assert jurisdiction over religious schools. However, in *Mid American Services* and subsequent cases, the Board has found that the legislative history of the health care amendments to the Act expresses the clear intent of Congress that the Board assert jurisdiction over health care institutions that, like the Employer, are owned, operated and managed by religious institutions. Accordingly, the instant case is plainly distinguishable from the *Catholic Bishop* line of cases based on the Board's analysis in *Mid American Services*.[22]

In *Mid American Services*, the Board stated that "any final determination concerning the constitutionality of that mandate must . . . come from the courts, who have the unquestioned authority to review legislative enactments in light of constitutional safeguards." Id. at 753.[23] The Board thereupon asserted jurisdiction over the employer in *Mid American Services* without addressing the employer's challenges to the Board's assertion of jurisdiction under the free exercise and establishment clauses of the First Amendment. Thus, under the Board's analysis in *Mid American Services*, the Employer is plainly be subject to the Board's jurisdiction.[24]

The Employer contends, however, that the enactment of the RFRA mandates an analysis of the First Amendment issues presented by the assertion of Board jurisdiction over its operations. In response to this contention, I have applied the tests established under the free exercise clause of the First Amendment as set forth in *Employment Div., Dept. of Human Resources v. Smith,* supra, and in the RFRA, and the Supreme Court's test under the establishment clause of the First Amendment as set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), in order to establish whether the Board may validly assert jurisdiction over the Employer. [25]

In *Smith*, the Supreme Court held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest. See *City of Boerne v. Flores*, 521 U.S. 507. The Act clearly falls within this broad category of statutes. And, as observed by the Ninth Circuit, "Neither would anyone plausibly assert that the NLRA is not a "valid law of general applicability." *NLRB v. Hanna Boys Center*, 940 F.2d. 1295 (9th Cir. 1991).

Under the Supreme Court's analysis in *Smith,* application of the Act to the employer would not violate the free exercise

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[21] In *NLRB v. World Evangelism, Inc*., 656 F.2d. 1349 (9th Cir. 1981), the Ninth Circuit further observed as follows:

> In contrast to its practice with regard to private schools, the Board has long asserted jurisdiction over non-profit religious organizations engaged in commercial operations. See *Christian Board of Publications*, 13 NLRB 534, 547 4 LRRM 323 (1939), enfd. 113 F.2d 678, 6 LRRM 971 (8th Cir. 1940). In 1947 Congress rejected proposed amendments to exempt all non-profit organizations from the Act. Congress appeared to ratify the Board's assertion of jurisdiction at least as to the commercial activities of non-profit organizations. H.R.Rep.No. 510, 80th Cong., 1st Sess. 31–32 (1947), reprinted in 1 NLRB Legislative History of the Labor Management Relations Act, 1947, at 535–36 (1948). See *NLRB v. Wentworth Institute*, 515 F.2d. 550, 554–55, 89 LRRM 2033 (1st Cir. 1975).

[22] See, e.g., *Livngstone College*, 286 NLRB 1308 (1987); *Jewish Day School of Greater Washington*, 283 NLRB 757 (1987); *Trustees of St. Joseph's College*, 282 NLRB 65 (1986).

[23] This view was reiterated by the Board in *St. Elizabeth Community Hospital*, 259 NLRB 1135, 1137 (1982), when, on remand from the Ninth Circuit, it was ordered to consider the employer's First Amendment challenge to the Board's assertion of jurisdiction in light of the Supreme Court's decision in *Catholic Bishop, supra*. Upon remand, the Board observed that: "Under normal circumstances, there is a philosophical question regarding whether or not an administrative agency, such as the Board, should attempt to determine the constitutionality of its own act. [quote and citation to *Mid American Services* omitted]. . . . This, however, is not the normal case. The court of appeals has specifically directed the Board to determine whether or not the assertion of jurisdiction over Respondent is constitutional." Id. at 1137. The Board thereupon proceeded to apply the First Amendment establishment test and found that jurisdiction was validly asserted over the employer. Its decision was subsequently upheld by the Ninth Circuit. *St. Elizabeth Community Hospital v. NLRB,* supra, 708 F.2d 1436.

[24] In order to determine whether to assert jurisdiction over the commercial operations of religious organizations, the Board has generally applied the following two-fold test: (1) Is the employer engaged in activities which are commercial in the generally accepted sense? and (2) do the employees sought to be represented allocate a substantial amount of time to activities which are commercial in nature? See *Ecclesiastical Maintenance Services,* 325 NLRB 629 (1998), and *Riverside Church*, 309 NLRB 806 (1992). In the instant case, the Employer is clearly engaged in the commercial operation of an acute care hospital and the employees in question are registered nurses who spend all or most of their work time providing health care to patients of the hospital and none of their work time teaching patients or anyone else of the specific religious beliefs of the Seventh Day Adventist Church. Thus, to the extent this test is applicable to the Employer, its application would plainly support the Board's assertion of jurisdiction over the Employer.

[25] It is also noted that in light of the remand by the Ninth Circuit in *St. Elizabeth's Hospital*, requiring the Board to apply the First Amendment establishment analysis, it appears sensible to include an analysis of that First Amendment test in my analysis inasmuch as it has also been raised by the Employer here.

clause of the First Amendment even if the Employer's exercise of religion were severely infringed by Board jurisdiction, unless the employer's free exercise claim fell within one of two exceptions to *Smith's* general rule. Id. As explained by the Ninth Circuit in *Hanna Boys Center*, those two exceptions are for "hybrid claims (those involving an alleged infringement of another constitutional right in addition to the free exercise). Id. at 1601–1602, and for claims arising in 'a context that lends itself to individualized governmental assessment of the reasons for the relevant conduct. [e.g.,] where a 'good cause' standard create[s] a mechanism for individualized exemptions." Id. at 1305.

The Employer contends that the instant case falls within the exemption involving claims arising in "a context that lends itself to individualized governmental assessment of the reasons for the relevant conduct" because the Board has in place a system of exempting certain employers such as federal reserve banks, domestic employees, government employees, etc. I will not attempt to address each of the groups cited by the Employer as exempted from Board jurisdiction and distinguish the reasons for their exemptions. Suffice it to say that with regard to certain exemptions, such as those for federal and state employees, there are other federal and state agencies, such as the Federal Labor Relations Authority (FLRA), which have been created to perform a parallel function to the Board's with regard to such groups.

One of the cases relied upon by the Employer in support of its exemption argument is the Supreme Court's *Catholic Bishop* decision. However, as noted above, in contrast to the situation presented in *Catholic Bishop*, there is a clear legislative history supporting the Board's assertion of jurisdiction over health care institutions operated by religious groups including, in particular, those institutions owned and operated by the Seventh Day Adventist Church. In these circumstances, the second exception to *Smith* would not be applicable to the Employer. Inasmuch as the legislative history of Section 2(14) of the Act reflects that the Congress declined to exempt health care institutions operated by the Seventh Day Adventist Church from the Board's jurisdiction when it was specifically requested to do so by the Seventh Day Adventist Church, the legislative history does not support the granting of the individualized exemption requested by the Employer.

The Employer also contends that the instant case falls within the "hybrid claims" exception to *Smith* (i.e., those involving an alleged infringement of another constitutional right in addition to the free exercise exception) because the assertion of Board jurisdiction would infringe not only upon the Employer's religious beliefs but would also burden its constitutional rights of free speech and free association. I find no need to address this contention because, as discussed below with respect to the Employer's contentions regarding the RFRA, assuming that the Employer's claim is a "hybrid claim" under *Smith*, the Board's assertion of jurisdiction over the Employer would still pass muster under the compelling state interest/strict scrutiny test as discussed below.

Application of the RFRA Supports the Assertion of Jurisdiction Over the Employer

The Ninth Circuit has stated that in construing and applying the RFRA, it will look to its decisions prior to *Smith*, which held that:

> To show a free exercise violation, the religious adherent . . . has the obligation to prove that a governmental regulatory mechanism burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates. This interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine.

*Graham v. Commissioner,* 822 F.2d. 844, 850–851 (9th Cir. 1987); *Goehring v. Brophy*, 94 F.3d 1294, 1299 (9th Cir. 1996). Under the Ninth Circuit's decisions, if a party is able to show a substantial burden to his or her free exercise of religion, then the Government must demonstrate that its regulatory mechanism furthers a compelling interest; and (2) that it is the least restrictive means of furthering that compelling state interest. Id. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963).

With regard to whether the Board's assertion of jurisdiction over the Employer would substantially burden the practice of religion by the Employer as an institution and by the Employer's CEO, Boards of Directors and others involved with recognition of a labor organization, I find that the application of the Act would clearly burden the exercise of religion by the Employer as an entity and by such persons. There is no dispute either in the evidence presented herein or in the case law that the Seventh Day Adventist Church has an established belief against its members joining or bargaining with labor organizations that would be impacted by a certification of the Petitioner here. Thus, the Employer has asserted that being required to bargain with a labor organization runs against a central tenet of its religious beliefs to the extent that it may be required to divest itself of its facility herein if it is required to bargain with a labor organization. Accordingly, I do not question that a certification of the Petitioner or the requirement to bargain with the Petitioner would burden the Employer and its directors in the exercise of their religious beliefs.

However, it is well established that the freedom of exercise of religion is not absolute. See *Yott v. North American Rockwell Corp.,* 501 F.2d 398 (9th Cir. 1974).[26] Case law has "long drawn the distinction between the absolute freedom to hold religious beliefs and the freedom of conduct based on religious beliefs, which latter freedom may be curtailed in some circumstances for the protection of society." *Cap Santa Vue, Inc. v.*

[26] In *Yott,* supra, the Ninth Circuit ruled that an employee's First Amendment rights were not infringed by being forced to pay union dues under a union-security clause even though it burdened his belief as a Seventh Day Adventist against not associating with unions, the court finding that the public and private interest in collective bargaining and industrial peace outweighed the employee's interest.

*NLRB*, 424 F.2d. 883, (D.C. Cir. 1970),[27] *Cantwell v. Connecticut*, 310 U.S. 296, 303–304 (1940). In the instant case, what is at issue is the application of the Act not to the holding of religious beliefs per se but to the Employer's conduct based on those beliefs with respect to its operation of its health care facility which serves the general public and employs many non-Seventh Day Adventists employees, including registered nurses, in order to provide care to its patients.

Thus, with regard to the second prong of the RFRA test, I note that both the Board and the Courts have concluded the Government has a compelling interest in applying the Act to employers who, like the Employer, are religious entities engaged in commercial enterprises, including hospitals. See *Cap Santa Vue, Inc. v. NLRB,* supra; S*t. Elizabeth Community Hospital*, supra, 708 F.2d 1436; *NLRB v. Hanna Boys Center,* supra, 940 F.2d at 1305. Thus, as stated by the Ninth Circuit in *St. Elizabeth Community Hospital,* 708 F.2d at 1442:

> the government has a compelling interest in regulating labor relations so as to minimize industrial strife and disputes that would disrupt the national economy. Congress considered labor peace among nonprofit health care institutions important enough to apply the Act to hospitals such as St. Elizabeth's.

As the Supreme Court noted years ago in *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 at 42 (1937):

> Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace.

In the instant case, the Employer operates the only hospital in Ukiah. It is open to the general public and it employs many non-Adventist employees, including mostly non-Adventists as registered nurses. In addition, on a nationwide basis, the Seventh Day Adventist Church, through its health care network, operates a substantial number of health care institutions employing thousands of employees. In the States of California, Hawaii, Oregon and Washington alone Adventist Health operates 19 hospitals and annually generates approximately $1 billion in revenue. In sum, the Seventh Day Adventist Church operates a substantial network in the health care industry and in doing so, impacts many employees as well as the general public which utilizes its services.

Thus, the determination as to whether to assert jurisdiction over the Employer in the instant case, does not require the mere balancing of a governmental regulatory scheme against the burden imposed on the right of the Employer and its officials to freely exercise their religion. Rather, we must balance the First Amendment rights of employees (who are not members of the Employer's Church) to associate with other employees in organizing a union for collective-bargaining purposes. See *Thomas v. Collins*, 323 U.S. 516 at 532 (1944); *Shelton v. Tucker*, 364 U.S. 479 at 485–487 (1960); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968*); State County Employees AFSCME v. Woodward,* 406 F.2d 137 (8th Cir. 1969). See also *St. Elizabeth Community Hospital,* 259 NLRB at 1138. Moreover, we must also balance the Employer's First Amendment rights against the public interest in having health care services protected from disruption from industrial strife and disputes. In these circumstances, despite the burden to the Employer's First Amendment free exercise rights, I find that the balance weighs in favor of the application of the Act to the Employer.

Under the RFRA analysis, the last test under the free exercise clause of the First Amendment requires a determination of whether the assertion of Board jurisdiction is the least restrictive means of furthering the compelling state interests at stake. I find that there is no less restrictive means available to the assertion of Board jurisdiction herein. Thus, the Employer and the other health care institutions owned and operated by the Seventh Day Adventist Church comprise a sizable number of the institutions delivering health care to the general public nationwide. Collectively, these institutions employ thousands of health care workers across the country, many of whom are apparently not church members. Under such circumstances, to grant an exemption to the Employer and to such other church-operated health care institutions would potentially impact a significant segment of the workforce in the health care industry and "permit labor disagreements to threaten delivery of vital medical services." See *St. Elizabeth Community Hospital v. NLRB*, supra at 1441. For such reasons, I find that declining to assert jurisdiction over the Employer would "interfere with the fulfillment of the government's compelling interest in promoting national labor peace." Further, this conclusion is consistent with the Congressional mandate supporting the Board's assertion of jurisdiction over institutions such as the Employer. Accordingly, I find that the assertion of the Board's jurisdiction is the least restrictive means of furthering the compelling state interests at stake here.

In sum, I find subjecting the Employer to the Board's jurisdiction would not violate the free exercise clause of the First Amendment under standards enunciated in *Smith* and the RFRA.

### Whether the Assertion of Jurisdiction By the Board Over the Employer Violates the Establishment Clause of the First Amendment to the Constitution

As the Ninth Circuit noted in *NLRB v. Hanna Boys Center,* supra*,* 940 F.2d at 1303:

> The establishment clause of the First Amendment requires government neutrality with respect to religion. It was intended to protect against 'sponsorship, financial support, and active involvement of the sovereign in religious activity. To pass constitutional muster, the Board's application of the NLRA to [an employer's employees] (1) must have a secular purpose, (2) must have a primary effect that neither advances nor inhibits religion, and (3)

[27] In *Cap Santa Vue, Inc. v. NLRB*, supra, the D.C. Circuit affirmed the Board's finding that two employers who were practicing members of the Seventh Day Adventist Church and who had religious beliefs in accord with the Church, including that they were not permitted to have anything to do with labor unions, had violated the Act by refusing to bargain with a union certified by the Board as the exclusive representative of certain employees at the two convalescent centers operated by the employers.

> must not foster excessive state entanglement with religion. [Citations omitted.]

In *Hanna Boys Center*, the court concluded that Congress' purpose in enacting the Act was secular—to minimize industrial strife by protecting employees' rights to organize and bargain collectively. The court further concluded that the Act's primary effect "is to require collective bargaining and to reduce labor disruptions, rather than to promote or deter the acceptance or perpetuation of any religion." 940 F.2d at 1303. As in *Hanna Boys Center*, there is nothing in the instant case to suggest that the Board's assertion of jurisdiction over the Employer will deviate from this secular purpose of primary effect.

Here, as in *Hanna Boys Center,* the only potential violation of the establishment clause is in the "entanglement prong." See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The Supreme Court in *Lemon* articulated three factors that are to be weighed in determining whether there is excessive entanglement: "the character and purpose of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between government and the religious authority." *Lemon*, 403 U.S. at 615. See also *Hanna Boys Center,* supra.

With regard to the first factor in *Lemon* (the character and purpose of the institutions that are benefited), the Employer has presented evidence to substantiate that its primary mission is to carry out the mission of the Church. However, the record also substantiates that as a practical matter, the Employer provides health care services similar to those provided by any other acute care hospital. Indeed, it is the only hospital in Ukiah. While it appears that the members of the Employer's boards of directors and its CEO are church members and are obligated to abide by the teachings of the Church, the record shows that the Employer's employees are not required to be members of the Church or to be inculcated into that religion beyond being made familiar with it in order to work for the Employer. Nor are the employees required to expound the faith to the Employer's or to disseminate church literature. Indeed, the record reflects that only about 20 of the 170 registered nurses employed at the Employer's facility are members of the Employer's Church. In sum, as in *Hanna Boys Center*, while the record reflects that the Church's mission and faith is "woven thoroughly into the institution," it also establishes that the Employer's primary purpose is secular—to provide health care services to the general public.

With regard to the nature of the Government activity being mandated, Board jurisdiction, there is ample evidence herein as in *Hanna Boys Center* that the Employer's religious character and mission are furthered by persons other than the employees petitioned for herein. Thus, most of the employees in the petitioned-for unit are not members of the Employer's Church. Second, the employees in the petitioned-for unit are not involved in teaching the tenets of the Employer's religion to patients but, rather, in the provision of nursing services to patients within the Employer's facility. Further, those persons who are responsible for disseminating the Church's beliefs, such as the Employer's chaplains, would be excluded from the unit.

Finally, with regard to the relationship between the Government and the religious authority, Board jurisdiction over the employment relations between the employees in the petitioned-for bargaining unit and the Employer will be confined to overseeing those issues arising in the area of collective bargaining and labor relations. Because the unit employees' duties are overwhelmingly secular in nature, arbitration of grievances arising out of that employment should not involve the Board in issues of theology. Nor will it render any benefit to the Church or any other religion or advance nonreligion over religion generally. Board jurisdiction will require governmental involvement only with regard to specific charges that may be filed on behalf of these employees. As stated by the court in *Hanna Boys Center*, supra at 1304:

> It will not involve the Board in continuing or systematic monitoring of Church activities and should not involve monitoring the religious aspects of [the Employer's] activities at all. Board involvement will not create the reality or appearance of the government's supervising or collaborating with the Church.

On the other hand, it is acknowledged that the assertion of jurisdiction by the Board over the Employer will affront the Employer's religious tenet against joining or recognizing unions if the Petitioner is ultimately certified by the Board. However, as the Court recognized in *Lemon*, "total separation between church and state . . . is not possible in an absolute sense. Some relationship between government and religious organization is inevitable." Id. at 614.

In the instant case, where the Employer is engaged in a secular activity such as providing health care services; employs nonchurch member employees who are not involved in propounding its religion; and where the Board's involvement will produce only an incidental intrusion in the limited area of collective bargaining and labor relations, I find that the resulting entanglement of the Board with the Employer is not sufficient to create active involvement of the sovereign in religious activity." *Lemon*, supra at 612.

In these circumstances, I find that it would not violate the establishment clause of the First Amendment to the Constitution for the Board to assert jurisdiction over the Employer. As the record reflects that the Employer meets the Board's standards for the assertion of jurisdiction over health care institutions, I find that the Employer is engaged in commerce and that it will effectuate the purposes of the Act to assert jurisdiction over the Employer. In these circumstances, the Employer's motion to transfer this proceeding to the Board is denied and the record in this matter will be reopened for the purpose of receiving evidence on all remaining issues.