UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

GALLUP INDIAN MEDICAL CENTER GALLUP, NEW MEXICO Respondent	
and	Case No. 76-CA-00977
NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1749 Charging Party	
and	
LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, NAVAJO AREA HEALTH CARE EMPLOYEES, LOCAL UNION 1376 Intervenor[1/]	

Matthew L. Jarvinen, Esquire
For the General Counsel

Jay Coffman, Labor Relations Specialist
For the Respondent

Henry U. Mesa, National Representative
For the Charging Party

Robert D. Purcell, Esquire
For the Intervenor

Before: JESSE ETELSON
Administrative Law Judge

1/ Its motion to intervene was granted at the hearing.

DECISION

The Respondent is charged with unlawfully assisting the Intervenor, a labor organization not having "equivalent status" with the Charging Party, the incumbent exclusive representative of certain employees of the Respondent. This alleged assistance was the permitting of organizing efforts by the Intervenor (the Laborers) at the Respondent's hospital. The factual allegations of the complaint are not disputed, nor is the allegation that at the time of these events the Laborers did not have "equivalent status" within the meaning of section 7116(a)(3) of the Federal Service Labor-Management Relations Statute (the Statute). The Respondent defends on the basis of circumstances purporting to justify its treatment of the Laborers.

A hearing was held on May 17, 1991, in Gallup, New Mexico. Counsel for the General Counsel and for the Respondent filed post-hearing briefs. Counsel for the General Counsel also filed an unopposed motion to make minor corrections to the transcript. That motion is granted.

Findings of Fact

The Respondent is a hospital, one of eight medical facilities serving the Navajo Reservation in the vicinity of Gallup, New Mexico. A unit of its employees has for some years been represented by the Charging Party Union. In May 1990, the Laborers sought to obtain the right to challenge the Charging Party Union in a representation election by obtaining sufficient unit employee signatures to support a representation petition.

During the week of May 21, one or more representatives of the Laborers (at least one being an employee of another area hospital of the Indian Health Service, of which the Respondent is apparently a part) occupied a conference room at the hospital until their presence was discovered by members and representatives of the Charging Party Union. National Representative Henry Mesa, of the National Federation of Federal Employees, the parent organization of the Charging Party, went to see Dr. Timothy Fleming, the Respondent's Service Unit Director (chief executive officer) about this. Dr. Fleming testified credibly that only shortly before Mesa's visit had he learned of this presence, and that he had told the Laborers' representative to leave.

After some discussion, Dr. Fleming, over Mr. Mesa's protest, decided that the Laborers' representative who had

been in the conference room could occupy a table in an area on the ground floor next to the elevators, near some vending machines outside the employee cafeteria. There, with Dr. Fleming's knowledge, representatives of the Laborers continued to solicit employees about once a week into the summer. The Laborers filed a representation petition on July 12, 1990.

The area in which the Laborers organizational activity was permitted is frequented by employees during off-duty hours and is part of a main passageway which some employees use while on duty. Tables and chairs are apparently kept in this area permanently, and are used by vendors of all kinds of items that employees or visitors might be interested in purchasing. The Respondent maintains a policy of permitting anyone whose conduct does not disrupt the hospital environment to use the area. It is, in Dr. Fleming's phrase, designated as a "public use area." As far as anyone could remember, however, it had never before been used by a union for organizational purposes.

Discussion and Conclusions

The unfair labor practice alleged here is described in section 7116(a)(3) of the Statute. (The violation of section 7116(a)(1), also alleged in the complaint, is derivative.) Since there is no issue here as to "equivalent status," this case involves only the first part of section 7116(a)(3), establishing certain agency action as an unfair labor practice: "to sponsor, control, or otherwise assist any labor organization. . . ." The issue breaks down, on the facts presented here, to the narrower question of whether this (admitted) agency "otherwise assist[ed]" the Laborers, which, although not specifically alleged as such, is undisputably a labor organization.

Under section 7116(a)(3), as under its predecessor, section 19(a)(3) of Executive Order 11491, one kind of agency action that is deemed to be unlawful assistance is a grant of access (to a rival union without "equivalent status") to the agency's facilities for the purpose of organizing employees. See Department of Commerce, Bureau of the Census, 24 FLRA 943, 946 n.2 (1986); AFGE v. FLRA, 793 F.2d 333, 337 n.9 (D.C. Cir. 1986). The Respondent seeks to remove itself from the application of this general principle for various reasons it presented in two categories of argument. One is an exception to the general principle. The other is a series of related policy arguments.

The assertedly applicable exception is based on an authoritative decision issued under Executive Order 11491 which, not having been superseded, remains in full force and effect. See section 7135(b) of the Statute. That decision was rendered in the case of Department of the Army, U.S. Army Natick Laboratories, Natick, Massachusetts, 3 A/SLMR 193 (1973) (Natick). In Natick, the Assistant Secretary carved out an exception to section 19(a)(3)'s prohibition of granting access to a rival union, for situations where the employees whom the rival union is attempting to organize are "inaccessible to reasonable attempts by the labor organization to communicate with them outside the agency's or activity's premises." Id. at 196. However, the Assistant Secretary placed a significant procedural burden on an agency seeking to avail itself of this exception:

> It should be noted, however, that before an agency or activity grants access to its facility by nonemployee representative in these circumstances, it must ascertain that the labor organization involved has made a diligent, but unsuccessful effort to contact the employees away from the agency or activity premises and that its failure to communicate with the employees was based on their inaccessibility.

Id. There was no showing on the record in the instant case that the Respondent ascertained any such effort by the Laborers. The Natick exception, therefore, is not available to this Respondent.2/

The Respondent's main line of argument, however, is that it had established a practice of not exercising control over the use to which the area in question was put, at least not with respect to the identity of the users or the content of their nondisruptive communications. This practice, the Respondent asserts, made it a "public use area" outside the Respondent's control. The answer to that contention is that the Respondent's hands-off policy regarding the use of that area, which in any event was not a complete abdication of

---

2/ There is no evidence that any of the representatives of the Intervenor who used the Respondent's facilities were employees of the Respondent, and the Respondent does not argue that their status is different from the "nonemployee representatives" mentioned in Natick.

control, was a voluntary restraint on its part. The Respondent never really abandoned its dominion over this part of its hospital; it merely permitted its general use for non-hospital purposes. The Statute does not concern itself with an agency's decision to open its facilities to public uses. It does concern itself with the circumstances under which labor organizations are permitted to use agency facilities, and section 7116(a)(3), interpreted in light of the authorities cited above, prohibits the specific use that the Respondent allowed here.

I must also reject the Respondent's argument for application here of the principle, applied in such private sector cases as Montgomery Ward & Co v. NLRB, 692 F.2d 1115 (7th Cir. 1982), that forbids discrimination between the access given to members of the public and that given to nonemployee union organizers. Id. at 1125-28. That line of cases deals with the balancing of employee interests in receiving information about union organization against the property rights of the owner. The instant case, on the other hand, deals with a statutory line drawn between permissible and impermissible exposures of employees to employer-sanctioned contacts, a line designed to prevent any infringement of employee free choice between competing unions. See Natick, supra, at 196. Again, here, the Statute itself imposes the restriction and, if it be regarded as such, the discrimination.

Finally, the Respondent has asserted that its opening of the area to commercial uses, and its expressed intention that the area be equally open to non-commercial messages, establishes the area as a public forum to which First Amendment considerations apply, thereby precluding any discrimination with respect to the content of the message. This does raise an interesting point. While First Amendment protection no longer reaches speech, including union organizing, in privately owned public areas such as shopping centers (Hudgens v. NLRB, 424 U.S. 507 (1976)), organizing "speech" is presumably still protected from abridgement by government. Id. at 513. However, the Respondent's contention, if it is to affect the resolution of this case, must be that section 7116(a)(3), to the extent that it prohibits the Respondent's granting access to the Laborers, is unconstitutional. I lack the authority to pass on this. Moreover, if there is a real constitutional problem here, I see no ambiguity in the Statute that would permit its interpretation in a manner that avoids the problem. Cf. the Natick exception, supra, based on an "overall policy" of the Executive Order. Id. at 196. Whether the Respondent has

standing to raise the constitutional issue is another question.

For all of these reasons, I conclude that the Respondent violated section 7116(a)(3) of the Statute by assisting the Laborers. Although Natick did not specifically hold that such conduct also interfered with, restrained, or coerced employees in the free exercise of their right to select their bargaining representative, that decision clearly implied that such a tendency was part of the basis for the result reached. Therefore, I conclude that the Respondent's conduct here also violated section 7116(a)(1) of the Statute. I recommend that the Authority issue the following order.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Gallup Indian Medical Center, Gallup, New Mexico shall:

1. Cease and desist from:

(a) Providing assistance to the Navajo Nation Health Care Employees Local Union 1376, Laborers International Union of North America (LIU) by permitting nonemployee representatives of LIU access to its premises, including access to tables outside the employee cafeteria on the ground floor, for purposes of conducting an organizational campaign among its employees at a time when its employees are represented exclusively by the National Federation of Federal Employees, Local 1749 and at a time when the LIU is not party to a pending representation proceeding raising a question concerning representation.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Post at its Gallup Indian Medical Center, Gallup, New Mexico, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the

Service Unit Director of the Gallup Indian Medical Center, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Denver Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, July 12, 1991

Jesse Etelson
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT provide assistance to the Navajo Nation Health Care Employees Local Union 1376, Laborers International Union of North America (LIU) by permitting nonemployee representatives of LIU access to our premises, including access to tables outside the employee cafeteria on the ground floor, for purposes of conducting an organizational campaign among our employees at a time when our employees are represented exclusively by the National Federation of Federal Employees, Local 1749 and at a time when the LIU is not party to a pending representation proceeding raising a question concerning representation.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

_____
(Activity)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Denver Regional Office, whose address is: 1244 Speer Boulevard, Suite 100, Denver, CO 80204, and whose telephone number is: (303) 844-5224.