In the

Supreme Court of the United States

BETH ISRAEL HOSPITAL,

PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT.

No. 77-152

Washington, D. C.
April 24, 1978

Pages 1 thru 47

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

ER

IN THE SUPREME COURT OF THE UNITED STATES

BETH ISRAEL HOSPITAL,

Petitioner,

v. No. 77-152

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Washington, D. C.

Monday, April 24, 1978

The above-entitled matter came on for argument at 11:10 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

ROBERT CHANDLER, Esq., Stoneman, Chandler & Miller, 99 High Street, Boston, Massachusetts 02110, for the Petitioner.

NORTON J. COME, Esq., Deputy Associate General Counsel, National Labor Relations Board, Washington, D. C. 20570, for the Respondent.

LAWRENCE GOLD, Esq., 815 16th Street, N.W., Washington, D. C. 20006, for Intervenor Union.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 77-152, Beth Israel Hospital against National Labor Relations Board.

Mr. Chandler, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT CHANDLER ON BEHALF OF PETITIONER

MR. CHANDLER: Mr. Chief Justice, and may it please the Court: This case involves the validity of a no-solicitation, no-distribution rule as it applies to a nonprofit hospital's cafeteria which is used by patients, their families, and employees.

The primary function of a hospital is to provide patient care, and critical to that function is providing an atmosphere as free from stress and strain as possible. The hospital's rule banning solicitation and distribution of literature which can be disruptive to the care of patients in all patient and family access areas, including the cafeteria, is clearly in furtherance of that concern.

Congress, in amending the National Labor Relations Act of 1974 to include coverage of nonprofit hospitals, explicitly stated that hospitals are unique and expressed its concern for the well-being of hospital patients and a need to avoid disruption wherever possible. This concern was

recognized by the D.C. Circuit Court of Appeals in NLRB v. Baylor cited in the brief and the Tenth Circuit Court and the NLRB v. St. John's Hospital also cited, both of which denied enforcement of Board orders and upheld no-solicitation rules in patient access areas of those hospitals.

The need and justification of Beth Israel's rule is graphically demonstrated in this case where union literature was passed out in the cafeteria, viciously disparaging the quality of health care provided by the hospital.

Let us consider the effect on an ambulatory patient visiting with his family in the cafeteria. He picks up a union leaflet left on a table with statements such as the following, and I quote:

"They totally ignored me while I was a patient. My experience was bewildering, painful and ugly. I was lucky it wasn't a complicated delivery. Don't ever have a baby here unless you have a private doctor."

"Reports and films have become backed up. Doctors can't get their films and reports on time. Patient care is suffering."

QUESTION: Who is speaking in this material you are reading?

MR. CHANDLER: This is union literature distributed by employees in the cafeteria at Beth Israel Hospital in an area where patients and their families can see them.

QUESTION: Mr. Chandler, the coffee shop is closed now, is it?

MR. CHANDLER: Yes, it is.

QUESTION: Why was it closed?

MR. CHANDLER: There was a renovation, and the space of the cafeteria was expanded to include the coffee shop area. So now there is a greater seating capacity in the cafeteria than when the case first arose.

QUESTION: Was the coffee shop run by the hospital per se or by some women's organization, as so many do, or how?

MR. CHANDLER: The coffee shop was also run by the hospital personnel with employees. There were vending machines in this area and seating areas for patients and employees and visitors of patients.

There are other remarks contained in the record appendix in union propaganda: "Due to understaffing." "Lab specimens sit on countertops for hours, therefore results are misleading or altogether wrong." "Much of the hospital is not maintained in a sanitary manner." "Respiratory treatments ordered by doctors are not always performed." "Patients who need treatments to stay alive get them, but those who need them to get better don't get them." "The ratio of patients to nurses presents a hazardous environment and precludes the delivery of optimal health care."

The record appendix is replete with such examples.

QUESTION: Mr. Chandler, I don't claim to be an expert on union organizing tactics, but this does not strike me as the ordinary union organizing literature which would be urging claims for added benefits or criticizing in some other way than this. Is there something in the record that suggests why this sort of criticism was resorted to?

MR. CHANDLER: Your Honor, the National Labor Relations Board has recognized in numerous cases that union solicitation -- forget about scurrilous propaganda -- but the normal union solicitation as a part of an organizational campaign is potentially disruptive, and in the retail store industry, in restaurants, they find that this is enough to warrant a broad ban on such activity, union solicitation and distribution, wherever customers are present or likely to be present.

What the hospital is asserting is the same interest that applied to an employer who operates a restaurant or a retail store. The patients who are sick and their families who come into a hospital setting and understandably anxious and vulnerable, as the Board itself has recognized, should be entitled to at least the same treatment as customers who come into a retail store. It's a matter of common sense.

QUESTION: Is one of the claims of the union,based on what you read of their literature, that the hospital is understaffed and that's part of the union organizing that if

they get a union, they will see that it's properly staffed?

MR. CHANDLER: Yes, your Honor. The tenor of this literature is geared towards complaints about working conditions, as most union campaigns are.

QUESTION: They don't always, in their organizing stage, emphasize so much the need for more employees as this literature would appear to.

MR. CHANDLER: Not in other kinds of situations, but here we are dealing with a hospital, and they are raising concerns that are concerns to patients, and here every hospital has areas that are set aside for employees to engage in this activity. There are employee-only areas within the hospital, and they may organize, they may distribute literature in those areas without interfering with patients or their families. So the hospital feels that in order to protect patients, to insulate them from the potential disruption of this kind of literature or any kind of disruptive literature, and especially union literature because the Board itself has given its stamp of approval to banning that kind of distribution because that in and of itself is inherently disruptive according to the Board, controversial remarks such as this.

QUESTION: Has the hospital allowed political candidates to come in the restaurant and distribute literature?

MR. CHANDLER: No, they do not. As a matter of fact, the hospital rule was promulgated initially during the

Vietnam War to avoid demonstrations in the hospital throughout patient access areas.

Now, the rule has been amended since then a number of times. However, the present rule involves a total ban on solicitation and distribution in patient access areas.

QUESTION: Mr. Chandler, does the record tell us how often this material actually fell into the hands of patients or visitors?

MR. CHANDLER: There is no evidence in the record, your Honor, to indicate that it fell into patients' hands at all. However, the Board in its other case precedent recognizes that leaflets may be left in customer access areas and may be discarded and picked up by a customer. And we feel there is a logical inference that that could happen in this setting as well.

Rather than being sensitive to the unique conditions found in a hospital and to the declared intent of Congress to recognize the special needs of patients, the Board has mechanically applied rules that suit a factory environment where no patients, customers, or third parties are involved.

I have already alluded to the special circumstances present in a hospital environment involving patient care considerations. Inherent in the nature of a hospital operation, the treatment of patients, is the fact that patients are understandably anxious and vulnerable and likely to be upset

by union solicitation and distribution in patient access areas.

The Board itself recognized this principle prior to the 1974 amendments in the Guyan Valley Hospital case, which is cited in the brief.

QUESTION: Mr. Chandler, do you think it necessarily follows that patients would be upset by a leaflet that said, "Beth Israel employees get only so much an hour; Peter Bent Brigham employees get 10 percent more"? Do you think that would upset a patient?

MR. CHANDLER: I think, your Honor, there is a question of degrees, and if the hospital were to allow some union solicitation on a selective basis, it would create problems of deciding which to allow and which not to allow. In that particular case, I would think there could be a problem from a patient's point of view, feeling that there is some undercurrent within the hospital that employees are dissatisfied with the hospital and they may not be able to go about their duties properly.

As I was saying earlier, the Board in Guyan Valley affirmed an administrative law judge's decision. The administrative law judge found that the hospital services ill individuals who in their weakened condition may readily be upset if they overhear anti-union, pro-union arguments among employees while they, the patients, are in their rooms or in the halls or elevators, and taking into consideration the

nature of the institution and the necessity for protecting patients, any presumption of illegality is overcome.

QUESTION: Does this case involve patients' rooms?

MR. CHANDLER: This case does not, your Honor.

QUESTION: I thought you said rooms.

MR. CHANDLER: The Guyan Valley case that I am citing now involved patient access areas. This was a rule that was in effect prior to the amendments. The Board recognized that a hospital creates a special circumstance, and they allow, just like they did with retail stores, they allowed an exception to the normal presumptions and said that in patient access areas -- and they defined them as the gift shop, elevators, stairways, corridors, patient rooms, and so forth. This was in the administrative law judge's decision affirmed by the Board. They recognized that solicitation could be prohibited.

However, after the amendments were enacted in 1974, a year and a half later, despite the fact that the Board conceded before the Tenth Circuit in the St. John's case that Guyan Valley represented an accurate state of the law at the time the amendments went into effect, a year and a half later in the St. John's decision, the Board St. John's decision, the Board, without articulating any reason for departing from the Guyan Valley analysis, without medical evidence, without any medical expertise, reversed its position. And they ruled

that although special conditions exist in a hospital, that although a tranquil atmosphere is essential to a hospital's primary function of providing patient care, and that although solicitation might be upsetting, unsettling, to patients in strictly patient care areas, that solicitation could have no adverse effect on patients in other areas, such as cafeterias, lounges, and the like.

QUESTION: Did the Board have jurisdiction over Guyan Valley because it was a for-profit hospital?

MR. CHANDLER: Yes. The Guyan Valley was a for-profit hospital and was covered by the Act. And Congress in amending the Act to include nonprofit hospitals said that at least the same treatment should be afforded to employees and hospitals as under the prior legislation. And what has happened here is the Congress added safeguards because of the taking of jurisdiction over nonproprietary hospitals involving specific amendments to statutes involving getting Federal mediation involved earlier, strike notices, and so forth. But they didn't give recognition to the already existing state of the law. Congress realized that the same conditions should apply, and they stated as much. In the Congressional Record there is ample support for the proposition that at least the same rights for proprietary hospitals should continue in effect plus additional safeguards.

QUESTION: Are you suggesting that the Board has

the wrong standard in these kinds of cases? Or are you just challenging the application of an accepted standard in this context?

MR. CHANDLER: I am challenging the notion of not applying at least the same standard that is applied in a customer access area of a retail store to a hospital setting where patients are involved and where Congress in amending the Act to include nonprofit hospitals specifically stated that the Board in treating the situation should give special attention to the needs of patients. So it seems to be more necessary to look at patients' needs in a hospital environment than to look at customers' needs in a retail store.

QUESTION: You are really then challenging the application of a rule that has evolved to the hospital.

MR. CHANDLER: That's correct. I am challenging this disparate treatment of the Board in a retail context and a hospital context. In a hospital context we have specific guidance from Congress that patients should be treated special.

QUESTION: I suppose it depends on how high a level of abstraction you want to reach in answering my brother White's question. If you complain that the Board isn't applying the same standard to hospitals as it is to retail stores, you are in effect complaining about the standard the Board has adopted, aren't you?

MR. CHANDLER: Yes, your Honor, I would agree with

that.

QUESTION: When you say "retail," do you include restaurants open to the public?

MR. CHANDLER: Yes, I do, your Honor. And this is a case which involves the hospital cafeteria with a substantial number of patients and visitors that use that cafeteria. And they are just as much customers of this cafeteria.

QUESTION: Is it necessary for uniform application that there be any patients or any family in the restaurant if it's a restaurant that just happens to be in a hospital? In other words, if they can't go into the Rive Gauche and distribute literature, is it your position they can't go into any other restaurant just because it happens to be in a hospital?

MR. CHANDLER: Yes, sir.

QUESTION: Then it doesn't make any difference whether patients are nervous or their families are nervous.

MR. CHANDLER: That is a second position that the hospital asserts, your Honor. First we feel that the retail store precedent should be applied in this case because patients are involved. A hospital is a special circumstance in and of itself and that interest should be protected to insulate patients from potentially disruptive influences.

Secondly, this is a cafeteria and cafeterias outside of hospital settings have been given this kind of protection

against union solicitation.

QUESTION: Generally in an ordinary cafeteria, the employees of the cafeteria are not sitting around at the tables, are they?

MR. CHANDLER: They may sit around at tables. They may intermingle with patients and --

QUESTION: No, no, in an ordinary, in a non-hospital cafeteria is it the usual thing to find employees sitting around at the table having lunch or dinner or breakfast?

MR. CHANDLER: I think we have to distinguish between employee-only cafeterias and public cafeterias.

QUESTION: No. I am talking about a public cafeteria. Is it normal in such a cafeteria to find employees of the cafeteria patronizing it as customers?

MR. CHANDLER: Yes, your Honor. In fact, in the Goldblatt case, which is a Board decision dating back to 1948, involving a department store, the Board applied its retail store precedent to the department store's cafeteria which was used by employees and customers, and there is no indication --

QUESTION: That was a department store rule.

MR. CHANDLER: That was a department store rule.

QUESTION: And that's your first point. Your second point is the eating place rule, right?

MR. CHANDLER: No. The department store has a cafeteria --

QUESTION: I understand, in the Goldblatt case. I knew that.

MR.CHANDLER: -- on the premises, and that's used by employees as well as customers. And the Board in that case said that not only is the selling function of the department store at stake, but the rapport of customers who happen to eat --

QUESTION: Mr. Chandler, why don't you give a very simple answer to my brother Stewart that most employees that handle the food in the cafeteria know better than to eat there.

(Laughter.)

MR. CHANDLER: I wish I had thought of that, your Honor.

The Board's McDonalds' Restaurant case, which is cited in the brief, the Board has said they affirm the administrative law judge's decision.

QUESTION: But in this case, they were not passing out this literature to the employees of the cafeteria, were they?

MR. CHANDLER: They were employees --

QUESTION: They were employees of the hospital, but not the ones in the cafeteria. That's my brother Stewart's point.

MR. CHANDLER: There are employees of the hospital

however, your Honor, that work in that cafeteria that could be distracted. This is a work area as well as a --

QUESTION: How many employees do you have in the cafeteria?

MR. CHANDLER: I don't have any --

QUESTION: A very small number. And you have about fifty times as many seats. So it is obviously not for them. It's for the employees that don't work in the cafeteria.

MR. CHANDLER: It's for the employees that don't work in the cafeteria. It's also for the patients and visitors of the hospital.

QUESTION: That's right, who also don't work in the cafeteria.

MR. CHANDLER: That's correct.

QUESTION: That's a little different. That's a little different, isn't it?

MR. CHANDLER: It's no more different than the Goldblatt case which is also a cafeteria where there are fewer employees working and there are off-duty employees and there are customers that share that facility. And the Board in that situation has applied the rule that we would ask them to apply in this case.

QUESTION: Was Goldblatt a restaurant or a department store which had a restaurant?

MR. CHANDLER: It was a department store that had

a restaurant, your Honor.

QUESTION: I presume there would be some employees from other branches of the store than the cafeteria who ate in the cafeteria?

MR. CHANDLER: Yes, your Honor.

QUESTION: I suppose, if it's like any other cafeteria, there are employees circulating around constantly taking away the trays and the plates of the customers who have departed.

MR. CHANDLER: Yes, your Honor. And that's why I indicated that this is also a work area. There are employees at the hospital that work in the cafeteria.

The Board in St. John's moved away from this Guyan Valley principle, and they said that only non-ambulatory patients or patients who are confined to their rooms and to immediate care areas or treatment rooms are entitled to the protection from union solicitation and distribution, that other patients who are ambulatory are better able to endure the unsettling effects which the Board recognizes might be the case in the immediate patient care areas.

The Board apparently has rendered its expert judgment that the unsettling effects of such solicitation and distribution for some reason are suspended while a psychiatric patient is in a cafeteria with his family awaiting psychiatric

treatment or a cancer operation.

QUESTION: Mr. Chandler, I have been trying to figure out where do you recommend the solicitation should take place?

MR. CHANDLER: We recommend that the solicitation be allowed in employee-only areas of the hospital.

QUESTION: Which are what?

MR. CHANDLER: There are locker rooms and adjacent rest rooms in the hospital, and outside of the hospital --

QUESTION: Outside the hospital?

MR. CHANDLER: Outside of the hospital --

QUESTION: Front steps? Isn't there the same danger on the front steps that maybe a leaflet will be handed to a patient not knowing he is a patient?

MR. CHANDLER: Yes, your Honor. Outside the hospital on public grounds that the hospital has no control over.

QUESTION: It could direct its employees not to solicit out in front because it might have this same adverse effect, couldn't it?

MR. CHANDLER: But the hospital has no control over what may happen on public property.

QUESTION: It has control over its employees, doesn't it? Why couldn't it apply the same rule, say you will get fired because this may jeopardize the health of a

psychiatric patient walking in the front door? Wouldn't it be precisely the same risk as in the coffee shop where one percent of the people are patients, as I understand it, or 2 percent, something like that.

MR. CHANDLER: I think there is less of a risk involved because --

QUESTION: There is a risk.

MR. CHANDLER: There is some risk. But there is a balance that has to be made, your Honor.

QUESTION: Whereas in the coffee shop, of course, they can at least ask the person whether they are a patient or not. But I suppose out in front it may be a little more difficult. People are walking along, you sort of stick a leaflet in front of them.

You just figure that risk is outweighed by the need to organize in that particular context, is that right?

MR. CHANDLER: I believe so in that context, yes, your Honor. In the cafeteria, no, because there are patients who, regardless of whether they are able to walk to the cafeteria, may be quite ill and are in need of protection and insulation and in need of an environment to help them cope.

QUESTION: Every patient, I suppose, has to walk in the front door, but every one doesn't eat in the cafeteria. Most patients, I assume, get most of their meals in their rooms.

MR. CHANDLER: Most in-patients, your Honor. There are eight times as many outpatients as in-patients in a hospital according to the record evidence. There are 400 beds in the hospital. So there are substantially more out-patients who may come in off the street for treatment.

QUESTION: You mean outpatients go to the hospital cafeteria to eat?

MR. CHANDLER: Yes, your Honor.

QUESTION: When they're not ill they are there for psychiatric treatment?

(Laughter.)

MR. CHANDLER: The Board has held that it is disruptive to organize in public areas in other cases, non-hospital cases. They have held it in the Guyan Valley case. Our position is they should hold it in this case as well. They have patients involved, they are patient access areas. Their rule there is a distinction between ambulatory and non-ambulatory is not supported.

QUESTION: What if the use of the cafeteria was only minimal by patients? And I take it here that it's not a very high percentage of patients who use it, at least not a very high percentage of the customers are patients.

MR. CHANDLER: There are a substantial number of customers, however. Based upon the figures that are in the evidence on an annual basis, there are over 54,000 patients

and their families, visitors, who use that cafeteria just to purchase meals. And in the decision of the administrative law judge, which is appended to the brief of the petitioner in a related case, he found that patients use the cafeteria for visiting and not necessarily to purchase meals. So there could be a substantially greater number than 54,000.

QUESTION: Mr. Chandler, you keep saying that the Board did not follow its own precedents. Is that your complete argument?

MR. CHANDLER: No, your Honor. I think that we have here a situation where Congress has spoken. Congress has said that special attention must be given to the needs of patients. And our position is that the Board has not recognized the special needs, not only because of the retail store exception, but because the hospital is a special circumstance. It's a unique environment and should be given special attention.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Come.

ORAL ARGUMENT OF NORTON J. COME ON BEHALF OF RESPONDENT

MR. COME: Mr. Chief Justice, and may it please the Court: I think that much of my brother's argument proceeds on the assumption that when Congress enacted the Health Care Amendments of 1974 and brought nonprofit hospitals under the National Labor Relations Act, it somehow mandated the Board to

restrict solicitation and distribution by employees in an organizational context.

We submit that the legislative history of that statute, those amendments, shows quite to the contrary that Congress intended to leave it to the Board's discretion to continue to exercise its pre-existing responsibility to accommodate employee organizational rights and the employer's management interests, which in the case of a hospital is to maintain patient care.

QUESTION: Do you challenge the findings that a significant number of nonemployees use that cafeteria over a period of a year?

MR. COME: The findings of the Board, which were sustained by the court of appeals and which are based upon a survey which the hospital conducted, that appear at record appendix 124, shows that employees purchased 77 percent of the meals served in this cafeteria, visitors 9 percent, and patients only 1.56 percent. The remainder of the meals were purchased by students, volunteers, doctors, nurses, and others. There is no employee-only facility in this hospital. The hospital's employees' handbook states, "A modern cafeteria is provided for all employees where nutritious, well-prepared meals may be purchased at reasonable prices." In short, the point that I am making is that this hospital cafeteria is primarily an employee eating facility. The hospital held it

out to its employees as such. And indeed, it has used the cafeteria area to communicate with employees concerning hospital programs and has permitted employees to obtain literature there concerning a variety of commercial matters.

QUESTION: Are these always controversial matters, these communications?

MR. COME: Well, they were not union organizational matters.

QUESTION: Were they controversial in any respect? Red Cross, for example.

MR. COME: Well, the trial examiner,at petitioner's appendix 33, indicates the nature of them: Posters publicizing the hospital's "Buck a Day," a cost reduction program; travel brochure rack; car pool board; literature concerning nutritional ideas; commercial literature relating to tennis camps, film processing, magazine subscriptions; United Fund and Combined Jewish Philanthropy's drive, and things of that sort.

The point is, though, that where the hospital drew the line was at solicitation and literature relating to union activities.

QUESTION: Mr. Come, following up a little bit on the Chief Justice's question, the leaflets described by Mr. Chandler and his opening arguments with this case is to depend on facts that are, and perhaps it shouldn't, seem to present the very worst possible situation for the union's position and

the Board's position a good deal worse than I would think normal organizing tactics would present. Is there anything in the Board's records that suggests why the union resorted to this type of statements in its organizing campaign?

MR. COME: I submit, your Honor, that although some of this literature perhaps get to the outer fringes, it still protests working conditions and often union literature on that subject is not exactly the language of the parlor.

The court of appeals found -- I am reading from petitioner's appendix 55 -- "Beth Israel argues that its no-distribution rule will prevent the union's 'scurrilous attacks' on the hospital's health care from falling into the hands of patients. There was no evidence, however, that literature offensive or otherwise was distributed to patients or visitors. Employee Schunior testified that she took care to distribute only to employees.

QUESTION: Well, the emphasis is on "distribute." Doesn't the record show that these were left on the tables and available to anybody?

MR. COME: I think that all that the record shows was what employee Schunior distributed and what she was disciplined for. I think the rest of it is speculation as the court of appeals so finds here. And as the court goes on, they add that if in the future in fact scurrilous or offensive literature is distributed, the remedy is to ban that kind of

literature and to discipline employees for distributing that kind of literature, not to ban all of it. And that is what the hospital has got here. They have got a total ban on the distribution of any union literature, even the most innocuous or any union solicitation in any area of the hospital other than the employee-only areas. And the only employee-only areas here were the locker rooms which on the findings of the Board --

QUESTION: And the rest rooms. You left out the rest rooms.

MR. COME: And the rest rooms.

QUESTION: I can conceive of them passing them out --

MR. COME: The rest rooms were adjoining the locker rooms, as I understand it.

On the findings of the Board and affirmed by the court of appeals, these locker rooms were not open to all employees, and they were segregated by sex. As a matter of fact, not even the hospital used the locker rooms or the bulletin boards in some of the locker rooms when it found it necessary to communicate with the employees. It either did so by posting bulletins in the cafeteria or by giving them fliers in conjunction with their paychecks.

So that the long and short of it is that if the employee organizers -- we are not talking about outside organizers, we are talking about employees of the hospital --

are not free to engage in orderly solicitation of their fellow employees who are off duty and distribute literature to them at that time in the cafeteria, there is no other place in this hospital setting where these employees' organizers can get their message across.

QUESTION: What about the locker rooms you have just spoken to us about? Why isn't that a perfectly adequate place where no one has access except employees?

MR. COME: Those locker rooms are not open to all employees.

QUESTION: Any employee that's interested can carry literature in there if he wants to, can't he?

MR. COME: Not every employee can get access to those locker rooms.

QUESTION: What about the entrance to the hospital?

MR. COME: As a matter of fact.

QUESTION: Every employee doesn't have to go to the cafeteria, but every employee does have to come in the door.

MR. COME: Well, the hospital's rule, as I understand it, would also preclude distribution of literature in front of the hospital. As a matter of fact, in the second Board case involving the Beth Israel Hospital, which is still pending before the Board, three employees were disciplined for handing out literature right in front of the entrance to the hospital.

QUESTION: Do employees of this hospital use the

same front entrance that the patients and the visitors do? If so, it's the first hospital I have ever heard of that did. Don't they have an employees' entrance that is special access?

MR. COME: So far as the records show --

QUESTION: A 400-bed hospital.

MR. COME: -- there is no such restriction.

QUESTION: Well, I wouldn't believe it unless you could demonstrate it affirmatively on the record. It is just incredible to suggest that they don't have an employees' entrance.

MR. COME: There may be an employees' entrance. But insofar as the record shows, there is no indication that they are confined to entering the hospital through that entrance.

QUESTION: The place for distribution to employees is at the employees' entrance, is it not? That's where you are going to get the best traffic for the purposes of the union.

MR. COME: That is certainly not the rule with respect to other establishments. The Board is entrusted with the duty of balancing the employees' organizational rights against the employers' property rights. This Court has recognized that the place of work is the place that is uniquely appropriate for the employees to obtain such information. Going as far back as Republic Aviation, the Court approved of the Board's presumptions that working time is for work and therefore a rule barring employees' solicitation and distribution during working time is

presumptively invalid. But by the same token, nonworking time is the employees' own time and therefore a rule barring solicitation and distribution during that time is presumptively invalid absent this rule.

QUESTION: Even when it is only 77 percent employees and the balance is someone other than employees? That's the figure you gave us, as I understood. Why should the balance of the people have to be exposed to this kind of activity any more than people walking into the Rive Gauche or the Mayflower Hotel restaurant?

MR. COME: Well, an accommodation has to be made between the organizational rights of the employees and those of the hospital.

QUESTION: Do you think there is some consideration needs to be given to the patients and the purpose of running a hospital?

MR. COME: Yes, your Honor. And the Board's St. John's principle, in which the Board attempted to accommodate the general Republic Aviation principles to the special needs of the hospital, is an effort to make such an accommodation.

QUESTION: Are we reviewing that case or this one?

MR. COME: We are reviewing this case, your Honor.

QUESTION: Where do you find any real discussion of that in the Board's order in this case, or the administrative law

judge's decision, by the way?

MR. COME: Well, I think that the line that St. John's draws is between patient care areas and other areas of the hospital to which patients may have access.

Now, I think the only issue that we have in this case is the cafeteria. That is admittedly not a patient care area, but it is an area to which patients have access. And the question is whether balancing the needs of the employees for obtaining information concerning union activity in the cafeteria against the possible harm to a patient care function of the hospital, the Board was reasonable in drawing the accommodation in favor of the employee rights.

QUESTION: Where do you find any discussion by the Board or the administrative law judge about such a balance as that in this case?

MR. COME: The administrative law judge's decision is replete with such discussion, your Honor, beginning on pages --

QUESTION: He recites the contentions of the parties, but that's about -- just tell me where he comes to a real finding except on page 42?

MR. COME: Well, I think that 42 is his ultimate conclusion, but --

QUESTION: Why would you treat this cafeteria different than a cafeteria in a retail store?

MR. COME: All right, I think we come down to that.

QUESTION: The administrative law judge and the Board certainly didn't discuss the matter.

MR. COME: The Board discussed it in the St. John's decision, which the Board referred to in a footnote in this case in affirming the administrative law judge.

QUESTION: So we should really look at that decision and incorporate that discussion in this case, is that it?

MR. COME: Insofar as the distinction between a retail cafeteria and a hospital cafeteria is concerned.

The essence of the distinction is this: The Board has got to obviously, in the exercise of this discretion that it has, make this accommodation in the light of the different situations that you have in different industries. This is a difficult problem that requires a lot of fine tuning. That is one of the reasons why Congress left it to the Board, subject, of course, to judicial review.

Now, the Board has always had the view that in an employee cafeteria in an industrial plant, for example, there was a right to solicit and distribute on non-working time.

On the other hand, the Board, with respect to a commercial restaurant, has found that --

QUESTION: In a retail store, or just a separate --

MR. COME: That is correct. To permit solicitation, distribution there involved too great a likelihood of disrupting

the main function of the commercial enterprise, which was to serve customers.

QUESTION: Even though in a department store restaurant presumably a number of employees of the various departments would eat?

MR. COME: That is correct, your Honor. That is correct.

QUESTION: So all cafeterias except those in hospitals are under one roof.

MR. COME: Well, not cafeterias in industrial plants.

QUESTION: Cafeterias in retail establishments all other than hospitals are covered, but hospitals are not.

MR. COME: Hospitals are not covered because the Board believes that to permit solicitation by fellow employees and distribution in such facilities is not likely to interfere with the function of the hospital. It is not likely to interfere with patient care.

QUESTION: And the function of the hospital is to get people well.

MR. COME: That is correct.

QUESTION: And to participate in a labor controversy helps people to get well?

MR. COME: Well, as Judge Swygert pointed out in the Lutheran Hospital case, which did sustain the Board, in this day and age patients are not likely to be upset by

overhearing a discussion of union activities any more than they would be by overhearing doctors and nurses who talk in a cafeteria about operations or diseases or the normal things --

QUESTION: The same thing that was in those conflicts.

MR. COME: That is correct, your Honor.

QUESTION: Did Judge Swygert cite any evidence to support this conclusion? Or was that just some generalization that occurred to him?

MR. COME: He did not cite any evidence, but there, your Honor, I think we get back to the point that this Court made in Republic Aviation, namely, that the Board is entitled,in drawing up these rules as to the proper balance between employee and management rights, to draw reasonable inferences based on its experience in this area, and that it is not necessary for a Board rule to be sustained to have evidenced that would establish the results of the particular rules. I mean, they have to be reasonable.

MR. CHIEF JUSTICE BURGER: Your time has expired, Mr. Come.

MR. COME: Yes, sir.

MR. CHIEF JUSTICE BURGER: Mr. Gold.

ORAL ARGUMENT OF LAURENCE GOLD ON BEHALF OF INTERVENOR UNION

MR. GOLD: Mr. Chief Justice, and may it please

the Court: Continuing with the point that Mr. Come was making, I think it is important to stress that this case brings to this Court a question concerning the validity of certain basic rules' presumptions that the Board has stated. One of those presumptions is that employee solicitation and distribution of union literature in non-working areas and during non-working times is presumptively lawful. It's a presumption. The hospital in any case can seek to overcome that presumption.

In this case, the hospital did not seek to overcome that presumption with any facts. What it did was say that the rules here should be presumptively lawful.

QUESTION: Mr. Gold, do you view this primarily as a review of a rule-making proceeding or as an adjudication?

MR. GOLD: I would believe that it is of an adjudication. We have --

QUESTION: Substantial evidence considered on the --

MR. GOLD: That's right. In other words, the Board has at least since the Republic Aviation case followed the approach of stating a presumption and then litigating the applicability of the presumption in particular cases.

MR. CHIEF JUSTICE BURGER: We will resume there at 1 o'clock.

(Whereupon, at 12 noon, the oral arguments in the above-entitled matter were recessed until 1 p.m. the same day.)

AFTERNOON SESSION

(1:01 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Gold, you may continue.

ORAL ARGUMENT OF LAURENCE GOLD ON BEHALF OF INTERVENOR UNION (Resumed)

MR. GOLD: Thank you, Mr. Chief Justice.

At the break for lunch I was making the point that the basic Board rule here is in the form of a presumption. Restrictions on union solicitation and union distribution in a cafeteria like this, says the Board, is presumptively unlawful.

QUESTION: It's "like this", in quotation marks, if I may quote you, that perhaps creates the problem. Can you have a presumption which is applied to factories and other places and have that apply with the same force to the restaurant in a hospital?

MR. GOLD: Well, what the Board has done is say that in certain areas rules are presumptively lawful and in others are presumptively unlawful and the burden --

QUESTION: In a factory, as you know and I know, we all know, except for a rare exception of visiting firemen, the only people lunching are the employees and perhaps officers of the company.

Here you have something that is open to 20-some

percent, 23 percent I think it was, of people other than employees and the considerations of the tranquility of the establishment.

MR. GOLD: Mr. Chief Justice, the figures are that employees and other staff comprise 89 percent of the customers.

QUESTION: Customers and doctors.

MR. GOLD: I don't think the doctors would be disturbed, nor does the hospital argue it. So the question is whether the 1.5 percent patients and 10 percent guests argue for a different presumption. And I think that the Board proceeded perfectly rationally in the following sense. There are two lines of cases as we have developed, contrary to the impression created by the petitioner that there is one.

Line 1 says that where you have an employee-only cafeteria a restriction of this type is presumptively unlawful.

Presumption No. 2 says that where the facility is primarily for the general public, such rules are presumptively lawful.

And what the Board did here was to say that to begin this process as a working hypothesis, we will say that this rule is presumptively unlawful and put the burden on the hospital which, after all, claims to have the medical expertise to show that there are special circumstances which make the rule lawful.

The hospital didn't accept that invitation.

Instead they argue that the Board's presumption is arbitrary and capricious. And we think that that places a very heavy burden on them under this Court's general law regarding the review of administrative agency determinations and that they haven't begun to carry.

First of all, as we have been discussing --

QUESTION: It isn't a substantial evidence problem put that way, is it? It's a statutory construction problem.

MR. GOLD: There are two steps, that's right. First, did the Board proceed properly in stating this presumption?

QUESTION: That's the legal question.

MR. GOLD: Yes.

And then, if it did --

QUESTION: There are two, aren't there? Does it proceed within its statutory authority to state any presumption? And, secondly, if it may state one, there is also a second legal question, whether this was a proper one as they created it here.

MR. GOLD: Right.

QUESTION: And those are legal questions, aren't they?

MR. GOLD: Yes.

QUESTION: We don't get into Universal Camera types of inquiry of judicial review in this case.

MR. GOLD: No. I think that the problem here is exactly the same as the problem for factories and other

facilities, as in Republic Aviation, where this Court answerd the first question you posed, "Yes, the Board --

QUESTION: Tell me, Mr. Gold, if we agree that the presumption was proper, then we still have to determine, do we, whether its application on the factual record here was proper?

MR. GOLD: Yes.

QUESTION: So we do have to that extent, we have judicial review of factual determinations.

MR. GOLD: That's right.

QUESTION: I know you don't have too much time. But if you do, I hope you will be able to give a few seconds to telling me where are the factual findings here?

MR. GOLD: OK.

QUESTION: Particularly with relation to this St. John's, what Judge Campbell calls it, puzzling footnote?

MR. GOLD: Well, the footnote is in our view basically -- the puzzling aspect of the footnote is basically out of the case because the court of appeals said that except as to the cafeteria there hasn't been a sufficient articulation of the Board's theory. He sent all other aspects of the case back and the Board accepted the remand.

So what we have here is the application of the Board's presumption to this cafeteria and the administrative --

QUESTION: Are there findings as to that?

MR. GOLD: The administrative law judge's findings --

I apologize, I don't have the petition; I have the decision -- are set forth at length at 220 --

QUESTION: At length? He has a long discussion. I have a tough time identifying any findings except on page 42. Will you get to that summary, Mr. Gold?

MR. GOLD: Yes.

QUESTION: Is that where we find the findings based on the --

MR. GOLD: No. I would say that beginning at the portion of the decision at 223 NLRB 1197 and continuing through the end of 1198, the administrative law judge considers each of the factors which were argued, namely, the effect on patients , the discrimination point that I would like to stress, the availability of access to people elsewhere. He reviews each aspect of the record and says that in this situation the presumption was not overcome.

As to the discrimination point, which I guess will be the only thing, if I can have even one minute on that. We do want to make the point that the administrative law judge found,the Board accepted the finding, and the court of appeals affirmed it as well, that the employer put a greater restraint on communications concerning union activity than on any other type of communication. And one of the best settled rules here, and we think one which is plainly derived from the Act itself, which protects discussion of union

activity and other matters concerning mutual aid and protection, but doesn't protect charity drives or discussions of sporting events or public affairs, is in itself sufficient to sustain the finding here. This is not a normal cafeteria, it is not like Rive Gauche. I would point the Court to the pictures at pages 111 through 114.

QUESTION: But, Mr. Gold, if we should agree with you, how do we explain away the retail store?

MR. GOLD: This was my point, Mr. Justice Marshall, in the retail store the basic function of the cafeteria of the store is to serve the general public. Here the basic function of this cafeteria was to serve the employees. You wouldn't walk into a general public facility and find slogans addressed to the employees. BAD means "Save a buck a day." You wouldn't find bulletin boards, tables set up for the employees. The employer's actions here demonstrate that this was basically a place used by employees and other staff and was the place at which employees spoke to each other. After all, union solicitation and distribution sound like archaic terms, but what they are is people talking to each other, people reading literature, exchanging literature.

QUESTION: But they can do that in the locker rooms.

MR. GOLD: Well, as Mr. Come endeavored to indicate, Mr. Chief Justice, only a third of the locker rooms are open to employees generally. The other locker rooms are open only

to the employees who have a locker in that particular facility. And what the employer's rule does in this instance is to close off communication between somewhere around two-thirds of the employees. Because what he wants to do is say that any place you ever find a patient it's improper for employees to be discussing unionization, whether or not they are working.

MR. CHIEF JUSTICE BURGER: Your enlarged time is gone.

MR. GOLD: I apologize, Mr. Chief Justice.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Chandler.

REBUTTAL ARGUMENT OF ROBERT CHANDLER

ON BEHALF OF PETITIONER

MR. CHANDLER: Yes, your Honor.

MR. CHIEF JUSTICE BURGER: We have enlarged your time to compensate for your friends' overrun.

MR. CHANDLER: Thank you.

There are several points in reply.

The record appendix verifies that there are approximately 700 lockers in just four locker areas to which all of Beth Israel employees have access.

Secondly, brother counsel stated that the Board's rule is that a rule prohibiting solicitation during work time is presumptively valid. What he neglected to say was that

the Board rule also says it is presumptively valid to prohibit solicitation in work areas and public or customer access areas. And here the Beth Israel cafeteria, apart from being a place where employees are working, is a customer access area. The customers here happen to be patients and their families. At the very least the hospital is entitled to the same consideration.

The question of numbers has been raised. The Board has never raised the question of how many customers are in a particular area, in an elevator of a department store or in a cafeteria in a department store. We see no reason to apply it in a cafeteria setting, especially here where there are substantial numbers.

The primary functions that brother counsel mentioned that apply in a retail store, I cite again the Goldblatt case because in that case the primary function was selling merchandise. The cafeteria in that case was not for selling merchandise; it was for selling food, an adjunct to that operation.

In the remand that brother counsel referred to in the related Beth Israel case, the administrative law judge made certain findings of fact, and I would read from the addendum in the brief: "Solicitation and distribution --

QUESTION: What page?

MR. CHANDLER: This is on page 49.

"Solicitation and distribution in patient access areas can interfere with patient care functions. Such activity can be disturbing to patients and their families, persons who are particularly susceptible to being disturbed. Such disturbance can interfere with Beth Israel's primary function of curing illness."

However, he goes on to say that he was bound by the Board's rule in St. John's, not by the Tenth Circuit court, which reversed the Board's rule.

Curiously, the Board in the McDonald's Hamburger case applied the restaurant rule by saying, and I quote from the decision of the Board: "Union solicitation can lead to heated verbal exchanges among solicitors and those solicited. Indeed, it is certainly not unknown for violent physical exchanges to occur in such circumstances. Should such there be in the presence of customers, as would not be unlikely, the employer could well perceive the destruction of the rapport which this employer and any normal employer would like to have with its customers."

QUESTION: Wouldn't that be a crime?

MR. CHANDLER: Excuse me, your Honor?

QUESTION: Wouldn't it be a crime to fight?

MR. CHANDLER: Would it be a crime?

QUESTION: Yes. It would be a crime. You could take care of that very simply. Call in the police and arrest

the man.

MR. CHANDLER: You're right, your Honor.

QUESTION: That solves that problem. You don't have to solve it with an NLRB case.

MR. CHANDLER: No, we don't, your Honor. But the Board has recognized in a retail store setting, in a restaurant setting, that solicitation can be disruptive. And if they give that kind of consideration in a McDonald's hamburger place, we would expect to be able to apply that same logic to a hospital setting.

QUESTION: Your only complaint, I would say, as a lawyer, you complain about the NLRB being consistent, and there is nothing we have been able to do so far to compel them to do that. So if you expect us to do it on this case --

MR. CHANDLER: I hope that this case, where there is express congressional intent to give the needs of the patients special attention, that this would be the case where the Board has acted contrary to that congressional intent and where the Court should strike them down, as did the Tenth Circuit and the D.C. Circuit Court in the St. John's and Baylor cases. And I would ask that this Court reverse the First Circuit's decision,as did those circuit courts,on the same reasoning.

Thank you.

QUESTION: Mr. Chandler, may I ask you one question?

MR. CHANDLER: Yes.

QUESTION: Was the rule against solicitation applied to all solicitation or just to union solicitation?

MR. CHANDLER: The rule was applied to controversial solicitation, your Honor.

QUESTION: How was that defined?

MR. CHANDLER: Pardon me?

QUESTION: How was that defined?

MR. CHANDLER: As I indicated earlier, the rule originated when certain political activity was occurring in the hospital involving Vietnam War and demonstrations. That was one reason for banning that kind of activity. The hospital, talking about medical people who make a determination as to what may be detrimental to patients in a hospital setting, made a determination consistent with the Board's own case law that union solicitation is potentially disruptive. They have indicated to doctors, the hospital has indicated to its staff not to discuss concerns in patient access areas that could affect patients. And this is a consistent concern. The Baylor court and the D.C. Circuit has recognized that this is controversial material that should be banned as opposed to innocuous things. And unless the Board shows that the hospital's administration has made a bad medical judgment, then we see no basis for the Board to insist upon a new rule.

As this Court determined recently in the University

of Missouri case against Horowitz, that involved the academic field, but there they recognized that academic people are better able to make determinations as to academic problems and subject matter than the courts or administrative agencies. Here we would suggest that the same principle applies in the medical field, especially where there was no medical evidence or medical testimony other than the Board's own medical perceptions that support its distinction for ambulatory as against non-ambulatory.

QUESTION: Did you submit any evidence about it?

MR. CHANDLER: Your Honor, at the time the hearing arose, the Board's case precedent was established, as I indicated earlier. It was the Guyan Valley precedent. We presented evidence that patients and visitors were present and that solicitation activity occurred.

QUESTION: But this medical judgment that you think ought to left to doctors, we have nothing in the record about it.

MR. CHANDLER: I don't believe you need to pass on that, your Honor, because of the mere presence of the customers in a patient access area just as in the retail store. This presents a special circumstance.

QUESTION: Mr. Chandler.

MR. CHANDLER: Yes, your Honor.

QUESTION: My brother Powell's question, evidently

you and I didn't understand it, so let me try again.

In this case, limited to this hospital, was any other solicitation other than unions barred?

MR. CHANDLER: In the cafeteria there was solicitation allowed. There were pledge cards that were distributed for United Fund --

QUESTION: I haven't said a word about what was allowed. I am asking what else was prohibited other than union solicitation.

MR. CHANDLER: I have already indicated, and the record supports it, that there were numerous letters sent to staff directing them not to discuss potentially upsetting things in the presence of customers.

QUESTION: But no signs of "no solicitation."

MR. CHANDLER: There were no signs.

QUESTION: What did you say, "No solicitation"? What did you mean?

MR. CHANDLER: We said there are patients --

QUESTION: What did you mean. Who did you mean should not solicit?

MR. CHANDLER: I am not sure I follow your question, your Honor.

QUESTION: Who was included in the phrase "no solicitation"? Who was "no"?

MR. CHANDLER: All employees may not solicit.

QUESTION: Anything?

MR. CHANDLER: Anything.

QUESTION: Including to solicit to repay the money that's owed them?

MR. CHANDLER: That's right.

QUESTION: Mr. Chandler.

MR. CHANDLER: In a work area we are talking about.

QUESTION: Mr. Chandler.

MR. CHANDLER: Yes.

QUESTION: On the medical judgment point, can we tell from the record whether the rule was drafted by doctors and people concerned with medical problems as opposed to the possibility that it might simply have been drafted by the labor relations director?

MR. CHANDLER: On the face of the rule, no, your Honor, you cannot.

QUESTION: The record just doesn't tell us, does it?

MR. CHANDLER: I believe the record does indicate that Dr. Rabkin, who was the General Director of the hospital, was responsible for drafting the rule.

QUESTION: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:21 p.m., the oral arguments in the above-entitled matter were concluded.)