ORIGINAL

In the

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,

PETITIONER,

V.

THE CATHOLIC BISHOP OF CHICAGO, ET AL.,

RESPONDENTS.

No. 77-752

Washington, D. C.
October 30, 1978

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NATIONAL LABOR RELATIONS BOARD, Petitioner,	:	
v.	:	No. 77-752
THE CATHOLIC BISHOP OF CHICAGO, ET AL., Respondents.	:	

Washington, D. C.
Monday, October 30, 1978

The above-entitled matter came on for argument at 11:05 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, 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 PAUL STEVENS, Associate Justice

APPEARANCES:

WADE H. McCREE, JR., ESQ., Solicitor General, Department of Justice, Washington, D.C. 20530, on behalf of the Petitioner.

DON H. REUBEN, ESQ., Reuben & Proctor, 11 South LaSalle Street, Chicago, Illinois 60603, on behalf of the Respondents.

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. 77-752, National Labor Relations Board against the Catholic Bishop of Chicago.

Mr. McCree, you may proceed.

ORAL ARGUMENT OF WADE H. McCREE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. McCREE: Mr. Chief Justice, and may it please the Court:

This case presents the question whether application of the National Labor Relations Act to Roman Catholic operated secondary schools, where both secular and religious subjects are taught, violates the Establishment Clause or the Free Exercise Clause of the First Amendment.

Respondent suggests the additional question, whether the National Labor Relations Act applies to private religious schools at all. Our reply brief, incorrectly and inadvertently, stated in Footnote 1 of page 2 that the employers did not present this issue before the Court of Appeals. We were partly in error. Respondent, the Catholic Bishop of Chicago, did not present this argument, but the Respondent, Diocese of Fort Wayne-South Bend, Incorporated, has a statement in its brief that properly presented this issue to the court below.

We apologize and wish the record to show that that issue is still before the Court.

However, as we show in our reply brief --

QUESTION: It wasn't dealt with by the court?

MR. McCREE: It was not, Your Honor. That is our understanding, sir.

QUESTION: So, if we decided in your favor, on the constitutional issue, it might be appropriate to remand that to the Court of Appeals in a decision in the first instance.

MR. McCREE: We believe that that issue is not a substantial issue and, as we have endeavored to show in our reply brief, the Congress, in amending the Act in 1974 to eliminate the exemption in Section 2(2) for nonprofit hospitals, expressly approved the Board's policy of asserting jurisdiction over private, nonprofit organizations. We believe the consistent legislative history shows no congressional intention to exempt nonprofit or religiously affiliated employers from the scope of the Act.

In this respect, the Court of Appeals correctly concluded that the Act -- and I quote: - "Clear on its face could not be understood to preclude jurisdiction."

The facts may be briefly stated. Respondent, the Catholic Bishop of Chicago, a corporation sole, operates two secondary schools for boys, Quigley North and Quigley South, which we refer to as the Quigleys. These schools offer a secular curriculum in all respects indistinguishable from the high school curriculum afforded by the public schools, but

in addition it also offers special religious training along with its secular curriculum.

The admission requirements to the Quigleys are different from those of the public schools, however. The Quigleys, initially, admitted Catholic boys who were recommended by their pastors as having expressed a desire to pursue the priesthood. Subsequently, other Catholic boys also recommended by their pastors were allowed to matriculate, if their pastor believed that they had a potential for the priesthood, even though it had not been recognized or expressed.

The full-time teachers at the Quigleys have contracts with the Respondent and the operating budgets of the Quigleys come within the monetary jurisdictional standards that the Board has established, $1 million in a given year and more than $65,000 worth of goods in a given year bought directly from out of state.

The Quigleys operate primarily, as the Board found, as college preparatory schools. They are fully accredited by the state and by the North Central Accrediting Association. They send, however, a majority of their students to secular colleges. As a matter of fact, in their 1974 graduating class only 16% went on to the Diocesan seminary college, Niles College.

The other Respondent, the Diocese of Fort Wayne-South Bend, Incorporated, operates five high schools in

fourteen counties in Northeast Indiana. These schools, like the Quigleys, offer a full program of college preparatory high school subjects and also include religious subjects. They differ from the Quigleys in this respect. The South Bend-Fort Wayne schools admit Catholic boys who have not expressed a desire to pursue the priesthood or have the potential for the priesthood, and they also admit some non-Catholic students. The South Bend-Fort Wayne schools also satisfy the Board's self-imposed monetary jurisdictional standard.

The faculties of these schools are interesting. The Quigleys employ a total of 76 full-time faculty persons, of whom 46 are lay teachers. So a clear majority of the Quigleys' faculty is a lay faculty. The Fort Wayne-South Bend Diocese in 1974 employed a total faculty of 207 teachers, 182 of which were lay teachers, and, of course, only 25 affiliated with religious orders.

In September and October 1975, pursuant to separate representation petitions filed by the Quigley Educational Association and the Community Alliance for Teachers of Catholic High Schools -- it has the felicitous acronym CATCH -- elections were conducted in two units. Both Quigleys combined for a unit and the Fort Wayne-South Bend schools, five schools as a unit. The unit was composed of all lay faculty and the union won and were duly certified.

The employers refused to bargain and the Regional Director issued complaints charging violation of 8(a)(1) and (5). The employers admitted their refusal to bargain because, first, that their schools were completely religious, instead of religiously affiliated, which is a dichotomy that the Board has established to determine whether it will exercise its jurisdiction over private religious schools.

QUESTION: Mr. Solicitor General, I take it, the Board adheres to that dichotomy still?

MR. McCREE: The Board still adheres to that dichotomy.

QUESTION: As a matter of its discretion, rather than as a matter of its understanding of constitutional compulsion.

MR. McCREE: As a matter of its discretion, Mr. Justice Stewart. It believes that it has jurisdiction to consider all that come within -- that affect commerce -- but it has preferred to follow this --

QUESTION: Do you support it, Mr. Solicitor?

MR. McCREE: Do I support it, Mr. Justice Brennan?

QUESTION: Yes.

QUESTION: That was my next question, because I gathered a lukewarmness in your brief.

MR. McCREE: Well, the Board is not required, as I understand it, to exercise its full jurisdiction. For a number of years, the Board refrained from exercising

jurisdiction at all over private schools, not just religious schools.

QUESTION: Does this not involve the Board in a determination of what is completely religious versus what is merely religiously associated? And if it does, doesn't that get beyond the limit, constitutionally, of what --

MR. McCREE: Mr. Justice Brennan, it might from the phraseology employed, but that is not the way it has applied this test. It has applied --

QUESTION: Whether it is or not the way it has applied it, it may involve the Board in examining into religious principles that --

MR. McCREE: It might, except the Board looked solely to secular aspects of the schools in making this dichotomy. For example, if the school is the functional equivalent of a public school, if it offers a full secular course and then has religious courses --

QUESTION: But that would not qualify the -- If it did, that would not qualify the school, would it, for aid to parochial schools?

MR. McCREE: No, that certainly would not.

QUESTION: And yet you say that distinction would be enough to bring it within the Board's jurisdiction, notwithstanding the examination of --

MR. McCREE: No, they suggest that the Board has

statutory jurisdiction to consider --

QUESTION: I don't understand why at least the Solicitor General doesn't take the position that even completely religious schools would be subject to the Board's jurisdiction.

MR. McCREE: It is our position that the Board has jurisdiction over completely religious schools.

QUESTION: Then why defend this dichotomy?

QUESTION: This dichotomy is not an issue here.

MR. McCREE: I don't feel I have to defend the dichotomy - -

QUESTION: That's not an issue in this case, is it?

MR. McCREE: -- except to suggest that I think the Board has jurisdiction to -- has the discretion to decide whether it will exercise its jurisdiction. But we contend that it has jurisdiction over both.

QUESTION: Do you not agree that this dichotomy sheds some light upon the problem of whether there is an interference or an impact on religion?

MR. McCREE: That is not the reason the Board has adopted it, because --

QUESTION: Perhaps not, but my question is: Would you agree that it sheds some light on the problem?

MR. McCREE: I think probably not. The Board is looking to see whether -- what is its impact on commerce. And it has determined that the completely religious schools, which

have been schools in its experience that afforded after school religious instruction, and were not the functional equivalent of the public schools, didn't have the requisite impact.

QUESTION: By the "completely religious" do you mean the seminary that trains priests, among other things?

MR. McCREE: They have not applied it in that fashion. They have applied it -- If the seminary that trains priests is the functional equivalent of the regular high school --

QUESTION: Or grade school.

MR. McCREE: -- or grade school, they have applied it. They have refrained from doing so only with the after school, strictly religious, program.

QUESTION: Has it not been a tenet of the Catholic Faith and of some other faiths that operate schools that if the children are inculcated with the principles of the faith and of religion and morals in the first dozen years of their lives then they are adherents to that faith?

MR. McCREE: I have heard that expressed.

QUESTION: Doesn't that permeate the literature on the subject?

MR. McCREE: I believe it does, Mr. Chief Justice.

QUESTION: The contrary of that is some of the anti-religious countries, Communist, for example, who make it a felony to teach religion to a child under 12 or under 15.

There is some relationship there, is there not?

MR. McCREE: There is, but fortunately we do not think that is involved here in this case. We think that what we have here is a question whether the exercise of its statutory authority over these schools that are, in fact, the functional equivalent of high schools but also teach religious subjects, is forbidden because of conflict either with the Establishment Clause or the Equal Protections Clause.

QUESTION: General McCree, you apparently feel that the statutory issue is clear simply because of the general language, and yet an exception was found in McCulloch v. Sociedad, where the general language was equally clear.

MR. McCREE: Well, Mr. Justice Rehnquist, we concede that the general language was equally clear, but the McCulloch case, if memory serves, is a case involving seamen on foreign vessels, whether they would be within the jurisdiction of the Labor Board. And there it was felt because of the international aspects -- or because of the possible international repercussions of asserting jurisdiction over foreign seamen, over foreign flag vessels, would require an expressed statement of Congress' intention to bring them under this rule.

QUESTION: But isn't it just as permissible an inference, in the light of the reasoning in McCulloch, to say that assertion of Congressional jurisdiction over a parochial school and the Bishop of Chicago, would require an express

statement because of a possible First Amendment implication?

MR. McCREE: We submit that it is not because other regulatory measures have been held applicable to religiously affiliated schools, fire regulations, attendance laws, health and safety provisions.

QUESTION: But none of those affect the kind of teaching, do they, that goes on?

MR. McCREE: Nor does --

QUESTION: They are all neutral, are they not?

MR. McCREE: -- Nor does the order in question here affect the kind of teaching. It should be borne in mind that the only order here is an order to bargain about rates of pay, wages, conditions of employment, and if an agreement is reached, to embody it in an order. They are not told what to teach, but merely to bargain on the items that I have just referred to.

QUESTION: From that, I take it, it is your position that the bargaining process, the total bargaining process, would have no impact whatever on methods of teaching or --

MR. McCREE: We submit it would have no impact at all on methods of teaching or content of teaching, if limited to these aspects that I have mentioned, wages, hours, conditions of employment.

QUESTION: Would you suggest that that is true of the public schools, that the process has not had any impact on how teaching has been conducted, even though there it is

limited to wages, hours and working conditions?

MR. McCREE: I am not aware that any curriculum content or pedagogical techniques have been made mandatory subjects of bargaining in the public schools.

QUESTION: Neither directly nor indirectly?

MR. McCREE: Well, there may be some indirect impact, but that's not before us today. In 1936, this Court considered the case of the Associated Press v. National Labor Relations Board, and there it was suggested that there might come a time when the First Amendment guarantee of freedom of speech might be implicated if the Labor Board took cognizance or extended its jurisdiction over employees of newspapers, or in this case the Associated Press, which is a coalition of them. And this Court stated then that it would not decide hypothetical situations that might not ever be presented to it for its decision. And it is interesting that in the 42 years since Associated Press was decided this Court has never had to decide whether affording recognition to the rights of journalists to collectively bargain has ever implicated a First Amendment violation.

We suggest that this is what we have here. And we suggest that the Court of Appeals was in error when it decided, based upon these hypothetical problems, that this would be, somehow, a violation of both the Establishment Clause and the Equal Protection Clause. We think the Court of Appeals was

in error in blurring the distinction between these two clauses. We think this case presents primarily a question under the Free Exercise Clause and that it does not constitute an establishment of religion, but if anything at all, as I would suggest, a violation of the Free Exercise Clause.

QUESTION: In the sense of a burden on free exercise?

MR. McCREE: If the Court please, yes.

And, there, of course --

QUESTION: What kind of a burden, Mr. Solicitor General?

MR. McCREE: Well, the Court of Appeals below suggested that somehow it would inhibit the exercise of freedom of religion. And we suggest, in this respect, that the Free Exercise Clause is absolute, insofar as it applies to belief, and that it is clear that the Congress cannot legislate to control a person's belief. But it is not absolute insofar as it impinges upon conduct believed to be mandated by or consistent with belief. And this is the distinction that this Court has made.

So, we suggest that the threshold question when one approaches a claim of violation of the Free Exercise Clause is, first, whether the conduct complained of is, indeed, mandated or directed by religious belief.

QUESTION: Now, that leads me to ask you, Mr. Solicitor General, about the hypothetical case -- and, according to

one of the amicus briefs here, it is not a hypothetical case, it might be a real case -- of a religious group whose religious tenets taught that the organization of labor unions was wrong. I am talking about the Seventh Day Adventists brief. That's what it says, as I understand it.

MR. McCREE: I understand it to say that, too, but I suggest here that to bargain collectively with labor unions is not inconsistent with the religious beliefs of these Respondents, and they don't say so either.

QUESTION: What if it were? What if this were a Seventh Day Adventists school?

MR. McCREE: Well, we would have a different problem then. We would have a problem such as this Court confronted in Yoder, where the Amish children were --

QUESTION: Just didn't believe in education beyond the elementary level.

MR. McCREE: -- didn't believe in education beyond the ninth grade or the eighth grade. And that was clearly a religious belief of theirs and this Court determined that it was possible to allow this free exercise, because there was no showing of an overriding governmental interest. But it did engage in a balancing test.

But here, we suggest that this isn't the Seventh Day Adventist appeal or case, this is a case involving the Catholic parochial schools. We suggest that the Catholic

position, as far as labor unions is concerned, is one of support. We would refer the Court to an encyclical of Pope Leo XIII, Rerum Novarium, which recognized the right of employees to organize and bargain collectively, and more recently Mater et Magistra, which is an encyclical of Pope John XXIII, I believe in 1961, which also took the same position.

QUESTION: In any event, despite those encyclicals that you or I might read to say that, and perhaps they do, we know in this case that these Respondents say that to be ordered to bargain with the unions would violate their rights under the First Amendment, whatever those encyclicals might say.

MR. McCREE: We understand them not to say that to have to bargain does that. They are supposing consequences subsequent to the --

QUESTION: Which they say would inevitably follow if there was imposed upon them a duty to bargain with these labor unions.

MR. McCREE: But this is the same approach, the same argument that was made in Associated Press that was decided in 1936. This Court said, "We will decide that when it becomes necessary." And it is interesting, as I indicated, it has not become necessary in this other First Amendment area.

QUESTION: Would you concede that there is perhaps

some difference between the free press free expression, on the one hand, and the two religion clauses on the other?

MR. McCREE: I certainly would, and I find, as this Court has found, it difficult at times to reconcile the Establishment Clause with the Free Exercise Clause.

QUESTION: We have said in some opinions that there is a tension between the two.

MR. McCREE: In Walz, I believe, this Court said that there has to be some giving in the joints where they come together. And, as a matter of fact, the Free Exercise Clause, philosophically, creates some problems under the Establishment Clause, because it allows a person who professes religion as motivating his behavior to present arguments that a person who does not profess religion to present. And in that respect it impinges somewhat on the Establishment Clause. That's what makes these cases extraordinarily difficult.

We believe what this case demonstrates is that with these Respondents the order, which is merely an order to bargain with a duly elected representative, does not contravene any religious belief that is asserted. And, therefore, under the Free Exercise Clause, we don't have to pursue it any further.

QUESTION: General McCree, may I ask a factual question that perhaps you know?

Is the bargaining unit, say, in the Quigleys where there are 30 religious members of the faculty and 46 lay

members, are any of the religious persons members of the bargaining unit?

MR. McCREE: They are not. The definition of the unit that was made consisted just of the lay teachers, none of the members of a religious order.

QUESTION: Would it be an unfair labor practice for the Bishop to prefer in hiring and discharge, and the like, clerics over lay persons?

MR. McCREE: That's a difficult question to answer. I would think probably not, unless it had an anti-union animus. I would think it would be appropriately within his power to prefer to have a member of a religious order added to the faculty for a specific purpose in preference to a lay person, who might not even be a member of his faith. But if it was done for anti-labor reasons, with anti-labor animus, then it might be an unfair labor practice.

QUESTION: Would it be the same if the hiring authority preferred members of the faith over members of other faiths or persons who had none?

MR. McCREE: My answer would be the same, Mr. Chief Justice, because there you would focus whether there was an anti-union animus. If I may just answer it a little further. There is a case that we cite that has arisen in which it was asserted that the principal of the school read a particular Scripture passage that contained a threat against union

activity, and the Board heard that and decided in favor of the bishop who was the employer in this case, finding that it did not, which didn't require it to do anything except determine whether this attitude was threatening and which, again, is a secular reference.

QUESTION: What do we do with a situation where an individual is discharged for two reasons, one, heresy, and the other, in the eyes of the employer, over-aggressive unionism?

MR. McCREE: I think in that case the Board would have a problem that is not dissimilar from problems that it entertains every day, when an employee is discharged for being a poor worker, but for being a union activist. There the Board makes a determination what was the real reason. And if it is satisfied that the real reason was one prohibited by the Act, then it will hold for the employee, otherwise it will uphold the employer.

QUESTION: Would the Board be bound by the bishop's determination as to the issue of heresy in Mr. Justice Blackmun's question?

MR. McCREE: I would think so. I would think the Board could not look into whether the alleged conduct was, in fact, heretical. I think this Court has made it very clear that we are not to look into the validity of religious doctrine.

QUESTION: What if a teacher, a lay teacher, assume either a member of the same faith or not, assigned the reading

of books which were condemned by the hiring authority. These books are not on the reading list and the teacher said, "Yes, they are." Who is going to ultimately decide the content of that course?

MR. McCREE: I suppose a reference to the reading list would be a secular reference. If there was, in fact --

QUESTION: I am assuming that it was declared by the authority of the Church that it impinged on the faith.

MR. McCREE: I would think if a teacher went beyond -- even a lay teacher -- went beyond a prescribed reading list, this would give a ground for disciplinary action that wouldn't at all constitute an unfair labor practice. A teacher hasn't a right to use his own or her own judgment about what should be taught.

QUESTION: Do you suggest that bargaining agents have never both suggested and supported the power of a teacher in a public school to do just that?

MR. McCREE: I am certain they have and they will.

QUESTION: And maintained it with strikes and threats of strikes, have they not?

MR. McCREE: I wouldn't be surprised if they had and do, but we are suggesting what should the law be on the subject.

QUESTION: Mr. Solicitor General, this case only involves lay members, and the only problems involved are working conditions?

MR. McCREE: This is what we endeavor to say, Mr. Justice Marshall.

If I might just conclude by suggesting that when a religiously affiliated organization chooses to enter into an enterprise that affects commerce, it must accept the same obligations to respect laws enacted for the protection of societal interests that are imposed on similar enterprises not having a religious organization.

QUESTION: Could that not also be true of the operations of a church, itself? Does not every church purchase something that is moving in interstate commerce? And the pastors are moved from one place to another in some faiths. Isn't that possible that that would -- the church, itself --

MR. McCREE: If the church functions as an employer, it would present a very difficult question. I suppose if a church ran a business, an industrial business, I am not at all aware that that business would be exempt from the thrust of the National Labor Relations Act. Just because of its religious nature it couldn't deny its employees the benefits that the Congress has decided --

QUESTION: A book publishing company might be an example.

MR. McCREE: It might very well be and I would have no difficulty with that.

QUESTION: General McCree, doesn't every church

function as an employer in a sense, and if they hire a pastor --

MR. McCREE: A church might --

QUESTION: They would have a hard time getting along without one.

MR. McCREE: I don't know. I am advised, if the Court please, that there are religions that have no clergy whatsoever and that any person is eligible.

QUESTION: They are all clergy.

MR. McCREE: They are all clergy. We used to encounter that during the war.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Reuben.

ORAL ARGUMENT OF DON REUBEN, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. REUBEN: Mr. Chief Justice, and may it please the Court:

We rely not only upon a violation of the Free Exercise Clause, but believe that this case is also governed by the entangle of principles that were enunciated in Lemon and Meek.

The schools that are before this Court are the same schools that have numerous times been described by opinions of this Court as schools that are created to perpetuate the faith and to propagate the faith. These are the typical parochial

schools where the mission is to bring religion to the children. If there is a difference here, the Quigley Seminary is designed and created to bring people, young men, into the priesthood, which we describe in our brief as "the lifeblood of the Church." Without priests, the Catholic Church could not prevail or continue.

Now, because of the religious mission involved -- and the Court has noted this in many of its cases -- the bishop has complete and absolute authority over what is taught in the schools. The bishop is the arbiter of what is taught in the schools, subject only to the usual state regulations in order to allow --

QUESTION: He is subject to the state regulations?

MR. REUBEN: Only the neutral state regulations of compulsory attendance and minimum subjects that are necessary to obtain accreditation. But if the bishop wants, for example, in a mathematics class to have religion taught, as examples have been given in the Court's opinions, he may do so. He is the supreme authority of what --

QUESTION: And the state can also take away the accreditation --

MR. REUBEN: Yes, they can --

QUESTION: And then the school cannot operate.

MR. REUBEN: Oh, the school may operate.

QUESTION: Without accreditation?

MR. REUBEN: That's correct.

QUESTION: Do you have a compulsory attendance law in Illinois?

MR. REUBEN: We do, but --

QUESTION: Would your clients be subject to that law?

MR. REUBEN: They would, indeed, except that, Your Honor, in Yoder, Your Honors decided that after eighth grade the State's interest in compulsory attendance was not as great as the religious principles involved.

And so, I think, if you look at all of the parochiaid cases that have been decided up here, in each instance what has been noted is that the lay teacher is subject to the authority and to the jurisdiction and to the command of the bishop.

Now, the NLRB Act, I submit to the Court, is the antithesis of what is the religious belief that the religious school should be composed of, because the stated purpose of the NLRB Act is to have a greater parity between the employer and the employee. That's the initial statement in the purposes of the Act. It is because of the inequality of bargaining power between the employees and their employers that the Act was created.

On its face, the NLRB incursion into the religious schools is just an absolute collision of the First Amendment.

For example, the Board has the power to conduct elections and then to require bargaining, and bargaining in good faith, which means give and take. It has the right to order reinstatement, especially if it determines that the motive is mixed, that is, there is an anti-union motive and another motive. It has the right to take action against an employer who acts in a way that frustrates unionism or affects it, even though there is not an anti-union intention. And the Board, when it finds a violation, receives reports, or may order receiving reports from the employer as to compliance, and what have you.

We do not believe that this type of power can square with the deep-rooted religious conviction that the bishop is the final and absolute authority over his schools.

QUESTION: How about state safety regulations, fire regulations and that sort of thing? I take it that you concede the state may apply those?

MR. REUBEN: Absolutely.

QUESTION: Well, to that extent, the bishop isn't the absolute authority over his schools.

MR. REUBEN: That, Mr. Justice Rehnquist, does not involve teaching. My remarks are really addressed to the milieu of the teaching within the school. And there is no question that the state can subject the school to zoning regulations and health regulations, and what have you.

We are talking about bargaining over teaching.

QUESTION: What about minimum wage regulations, the Fair Labor Standards Act?

MR. REUBEN: Well, Your Honors held -- the Court has held in the Usury case that the states have that power reserved. I do not believe that the minimum wage problem is the same problem, because you do not have, as you have in the typical bargaining history of collective bargaining with teachers, the dialogue that starts with wages and ends up with curriculum, textbooks, and what have you.

QUESTION: But don't you have the problem that some of the Catholic schools pay a lesser wage scale, I suppose, for lay teachers, who are, perhaps, dedicated persons, willing to donate their services, something like that? And raising the wage level might deny them the opportunity to get the faculty they need.

MR. REUBEN: That's correct. Pushed to it, I would say that the Minimum Wage Law should not apply to the lay school teacher in the religious school.

QUESTION: How about the janitors and the people who run the building?

MR. REUBEN: I have no problem and think the janitors have every right to have the NLRB intrude. That does not involve bargaining over teaching.

QUESTION: You mean the bishop doesn't have anything

to do with labor?

MR. REUBEN: I didn't hear you, Your Honor.

QUESTION: You mean the bishop doesn't have any jurisdiction over the laborer? Your whole point was that the bishop was the boss. Isn't that your whole point?

MR. REUBEN: No, sir. I am saying the bishop is the supreme arbiter when it comes to the teaching function. The bishop is the boss of the janitor, Your Honor, but the janitor does not involve himself in the teaching function.

QUESTION: I know that, but why is he subject to the NLRB and the teacher is not?

MR. REUBEN: Because, in connection with the janitor, you do not have an incursion onto religious beliefs. You will not have, as I perceive it, an unfair labor practice challenging the bishop as to whether or not his discharge was caused for religious grounds or because of an anti-union animus. With a janitor, you will not have an unfair labor practice over the composition of the faculty.

QUESTION: I would agree with you, if you could -- and I know you can't -- name me one non-Catholic janitor in a Chicago Catholic school. I don't think we need to get the janitors in here.

QUESTION: They hire non-Catholic attorneys, I think.

MR. REUBEN: I think that is a perfect answer to the question, and I'll stop when I am ahead.

QUESTION: If you want to put attorneys and janitors together, that's all right with me. Just don't count me in.

MR. REUBEN: Many have, Your Honor.

QUESTION: Don't count me in.

MR. REUBEN: There can be an unfair labor practice proceeding over the composition of the faculty. When the Labor Relations Act began, 88 percent of the faculty was clergy. Now it is far less. If the bishop elected to increase had he had the opportunity to do so, that's something that would have to be bargained.

The admissions policy, because that has to go to the workload, the textbooks, the method of teaching, all manner of things -- and look at what happens. It is very clear that the necessary consequence of this is first, that the bishop is chilled. He will try to avoid the zone of regulation if he can.

Second, I suggest to you the kind of inquiries that will be made in this context are far greater in terms of entanglement than the kind of activity that was condemned in Meek, the public employee going into the Catholic school to teach remedial reading, or the Wolman case, where the Court found that field trips were an unnecessary entanglement.

The Labor Board will never be neutral when it comes to a controversy of this kind. We don't have to have a parade of horribles in this case. We have fine examples of what will happen. The Solicitor General referred to one where the Bishop of Gary was cited for an unfair labor practice because of a prayer that he gave, citing from the Scriptures. He ultimately was sustained by the NLRB, but it took 531 pages of proceedings to do so.

The Bishop of Fort Wayne was cited for an unfair labor practice because he disapproved of a teacher teaching Johnson and Masters in the classroom. He also was cited for an unfair labor practice because he wanted to terminate an employee who had married a divorced Catholic. He also was cited for an unfair labor practice because of an argument between a lay teacher and the bishop over religious instruction and how it will be given.

If Your Honors look at what happened in Brooklyn, where since '74 there has just been enormous litigation and the church school was forced to employ somebody that it regarded as a person teaching heresy.

The Board is just not equipped to avoid entangling itself in this area. It is an industrial milieu that it deals in. It has started out on a very strange path which everybody tries to avoid between completely religious and religious associated. A path or a test of unconstition -- a test that the AFL in filing its amicus brief here flatly admits is an unconstitutional test.

The way it handled this profound problem that is now here in very summary fashion, the questions that were asked -- If you read the proceedings that occurred in this very case: "Is the Bishop doing a good job? What is a liturgy," and what have you. That is an entanglement that pales into insignificance the entanglement that the Court has

found unconstitutional in past cases. It is impermissible entanglement.

What is the interest that is being served to bring on this pandora's box, this parade of horribles? Ninety-seven percent of the teachers in the United States, by law, are not allowed to have the NLRB or collective bargaining. They are public school teachers.

The commerce involved in connection with parochial schools and seminaries is very limited, and indeed it is intertwined with subsidies. I wonder if some day we won't see bargaining between the bishop and the faculty of the school, if the Government's position is sustained here, as to the amount of subsidy that the bishop should put forth.

Both of these schools have to be subsidized. Quigley, I think, it is $600,000 a year and it is $750,000 in Fort Wayne.

The schools before Your Honors do have a grievance procedure, in both instances, so that the teachers are not left helpless or just at the whim of the bishop. Furthermore, there is a very, very important governing factor here on all of these schools, and it is called the market place. When these schools come and compete for lay teachers, they are competing with the public schools.

And that's why I answered, Mr. Justice Stevens, your question concerning minimum wage an hour. They are competing

-- they are a 3% employer competing with a 97% employer and if they do not do right and proper by their teachers they will not employ them and they will not have teachers to staff their schools.

QUESTION: I suppose that can be said, too, of the private secular school, can't it?

MR. REUBEN: That's correct. The difference is that in the private sector you do not have the First Amendment consideration. So, it is an entirely different question. You do not have --

QUESTION: You were talking about competition and I merely am saying that the private school has the competition angle to bargain.

MR. REUBEN: I concede that.

In the parochiaid cases, the Court has made a point of the political strife that can occur, the dialogue that will occur in a legislature every time an annual appropriation is requested. It is perfectly obvious from what has occurred here since '74, when the Board took jurisdiction, that there will be constant litigation over the bishop's authority, because now he must share it with the NLRB and the union. I can foresee efforts in the Congress to undo what the NLRB might do. And I am sure that if one went into the precincts of Brooklyn they would discover that raw emotion and great religious dialogue and bitterness has occurred because of what happened

in the Brooklyn school.

QUESTION: Why is there constant litigation over the NLRB's assumption of jurisdiction here, when there isn't over, say, zoning of churches? Or is there a constant litigation over zoning of churches?

MR. REUBEN: Because, Mr. Justice Rehnquist, as I guess was said in Walz, it is a matter of degree. The zoning case is decided once in court. The interaction between the school teacher and the bishop is a day by day occurrence. Conditions change constantly. We are dealing with the dynamics of education. We are dealing with something that is not a constant. Once the building is built, we are done with the zoning. Once you comply with the fire code, we are done. That's not true in terms of what happens in the classroom or the kinds of things that can be collectively bargained about by teachers.

In our brief, we discuss the fact that those who have studied the history of collective bargaining in educational institutions have discovered that what starts out to be -- as the Solicitor General suggested -- wages and hours is, I think, a very simplistic notion of what happens. Because it isn't very long before the whole warp and woof of the school and the way it is run is a matter of collective bargaining.

QUESTION: Mr. Reuben, what about certification of schools? In the State Law, how about getting them certificated

as the kinds of places that will be acceptable for public education?

MR. REUBEN: I think -- there again, it is a matter of degree. That, like the tax exemption, is something that has occurred for years. It is a fairly -- almost mechanical test. There is no religious inquiry. There is no preclusion or incursion into the beliefs of anybody or the faith of anybody. It is just: Are these subjects taught and taught in a manner that is acceptable? And they are all secular --

QUESTION: That is almost a contradiction in terms, isn't it? You said one thing and then another. You say it is almost mechanical. It is mechanical as long as they don't fill the mathematics room with religion.

MR. REUBEN: No, I think, the Court has said --

QUESTION: Well, let's assume a mathematics class teaches nothing but religion. It's not going to get certificated, is it?

MR. REUBEN: It depends whether after the mathematics class --

QUESTION: Just accept what I said. I doesn't teach anything but religion in the mathematics class.

MR. REUBEN: Then it is really not a mathematics class.

QUESTION: Exactly, and they have not met the qualifications required.

QUESTION: How about half the class? Half every day, mathematics?

MR. REUBEN: I take it that in a subject like mathematics -- and I think it was Justice Douglas gave the example that in a mathematics class you can inject religion and have 40,000 nuns and does it equal 40,000 priests, and what have you? I take it that the test -- when one is through -- is whether the --

QUESTION: Whether they have covered the ground.

MR. REUBEN: More than that, whether the student, by an objective test, can divide, understands his fractions, knows the multiplication tables. There is no inquiry as to his religious beliefs. And certification is, I think -- and I am not suggesting this as a field of absolutes. God knows the Court's opinions suggest otherwise. It is a matter of degree.

QUESTION: What about teacher qualifications, in that process of certification?

MR. REUBEN: Well, the certification -- as I understand it, the state certifies teachers regardless of race, religion, or what have you, and there really isn't an incursion into the ability --

QUESTION: Yes, but I am just curious. I don't know what the answer is. In Illinois, must the Catholic schools employ certified teachers if they want to be a

certified school?

MR. REUBEN: I don't know the answer, but I do know --

QUESTION: What if they did?

MR. REUBEN: Well, I think that I would have no trouble with that, because that would be, in effect, a licensing before the person began to teach. However, if you go back into the history of parochial schools, when the parochial schools were 88% staffed by nuns and priests and brothers, I suspect there was no certification. And so long as the end product resulted in an acceptable primary or secondary education, the result was acceptable and the certification authority was satisfied.

QUESTION: Mr. Reuben, isn't it true that in most large cities they don't ride herd on the parochial schools? They have been running for years and they just let them go. I don't think it matters in this case at all, but isn't that true?

MR. REUBEN: I wish it were so. The parochial school must comply with all of the fire regulations, all of the certification regulations and there is a great policing authority --

QUESTION: I know they do, but, I mean, does the fire commissioner walk in there?

MR. REUBEN: There are fire inspections and there

is an even greater policing authority. It is called parents. They will react very quickly if their children are not being educated properly.

QUESTION: Where does the parent go? He goes to the bishop.

MR. REUBEN: That is correct.

Now, in the last analysis, I'd like to conclude by suggesting to Your Honors that the Court in the Seventh Circuit properly described the situation of these parties here as in a no-win situation. In this case, we are religious associated and the Government would have the NLRB being able to come into the school and cause bargaining that would necessarily raise the cost. Costs of parochial school education, as the Court knows, has gone up over the years, so that the states have strived very, very hard to find ways to get money to the parochial schools. And the Court has found that this, in most instances, is impermissible entanglement. And now to have these same schools be treated as secular and not eligible for money but eligible for regulation, not only to me strikes at the core of the First Amendment, but offends at least my notions of fundamental fairness.

Thank you.

QUESTION: One question before you sit down.

I suppose when the state withdraws, if it did withdraw, the certification of an Amish school or a Lutheran

school or a Catholic school, because they are spending the arithmetic time on religion, it isn't because they are teaching religion, but because they are not teaching mathematics?

MR. REUBEN: That's correct. The state's only concern is secular. The state does not entangle itself by that kind of inquiry.

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

(Whereupon, at 12:00 o'clock, noon, the case was submitted.)