

ORIGINAL

In the
Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
ET AL.,

Petitioners,

v.

BAPTIST HOSPITAL, INC.,

Respondent.

No. 78-223

Washington, D. C.
April 23, 1979

Pages 1 thru 37

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Respondent.

No. 78-223

Monday, April 23, 1979

The above-entitled matter came on for argument at
2:24 o'clock p.m.

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 PAUL STEVENS, Associate Justice

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Intervenor-Petitioner, Local 150-T, Service
Employees International Union

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Georgia 30303; on behalf of the Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in National Labor Relations Board v. Baptist Hospital.

Mr. Come, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF NORTON J. COME, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on certiorari to the Sixth Circuit and it involves the application and the principles for determining the validity under the National Labor Relations Act of rules barring **employee union** solicitation and literature distribution in hospitals which were enunciated by this Court's decision in Beth Israel Hospital last term.

The facts are briefly these: Baptist Hospital is a nonprofit hospital located in Nashville. It has 600 patient beds and more than 1,800 employees. For a number of years prior to October 1974, the hospital maintained a rule which prohibited anyone to solicit patients or visitors while on hospital premises without written approval of the administration.

In August of 1974, Congress enacted the Health Care Amendments to the National Labor Relations Act,

bringing nonprofit hospitals under the Act's coverage. In response to these amendments and to the fact that the union had begun a campaign to organize the hospital's employees, the hospital, after consulting with its lawyers but not with any doctors, issued in October 1974 a revised rule. The rule provided in pertinent part that no solicitations of any kind, including solicitations for union membership, will be permitted by employees at any time, including work time and non-work time, in any area of the hospital which is accessible to or utilized by the public. Solicitation was barred in other areas by employees who are supposed to be working or when conducted in such a way as to interfere with employees who are working.

The effect of this rule is to bar employee solicitation and literature distribution in such public areas as the hospital's cafeteria, gift shop, lobbies, public rest rooms, entrances, and even the parking lot across the street from the hospital, and to confine such activity to non-public areas which were not or where not all of the employees were accessible.

The board, upon charges filed by the union, concluded that the revised rule violated section 8(a)(1) of the Act to the extent that it prohibited employees from soliciting the union during their non-work time in areas of the hospital other than immediate patient care areas.

The board, in short, followed its decision in St. John's Hospital that held that while a hospital could lawfully bar employee solicitation or literature distribution in immediate patient care areas, such as the patients' rooms, operating rooms and therapy rooms, a bar on that activity in other areas was presumptively invalid absent a showing by the hospital that it was necessary to avoid disruption of patient care.

And the board adopting the findings of the Administrative Law Judge, concluded that the hospital had not made that showing of special need here. The Sixth Circuit in a decision rendered before this Court's decision in Beth Israel denied enforcement of the board's order. The Sixth Circuit found that the testimony by the hospital and two doctors as to the necessity for creating and maintaining a tranquil atmosphere throughout the hospital for patients and visitors was sufficient to establish special circumstances that warranted the hospital's **restriction** of employee solicitation and distribution in these public areas.

We submit that the Court of Appeals erred in not applying the principles that this Court enunciated in the Beth Israel case. In Beth Israel, the Court held that the Board's general approach of requiring health care facilities to permit employee solicitation and distribution during

non-working time in non-working areas, that the hospital had not justified the prohibitions as necessary to avoid disruption of health care operations was consistent with the Act. And the Court went on to find that the Board had reasonably applied that principle in concluding that the hospital had over-stepped the line in prohibiting the employee solicitation in its cafeteria which was used primarily by employees, but also by patients and visitors.

Now, this case differs from Beth Israel in that it involves not only the hospital cafeteria but other public areas accessible to the patients and their families. In addition, as I indicated, there was testimony by the hospital administrator and two of its doctors in an effort to justify the rule.

Now, let's look at the facts here. The hospital cafeteria here is essentially similar to that in Beth Israel. The hospital's study of cafeteria usage is not as detailed as it was in Beth Israel, however, it shows that the employee usage was nonetheless substantial -- 68 percent on weekdays and at least 47 percent on weekends, at least those that went through the line.

The percentage of patients in the remaining 32 or 53 percent of the cafeteria's patrons is not shown by the hospital's study, but there is testimony in the record to indicate that only a small percentage of the patients

use the cafeteria. Most of them obtain their meals in their rooms and they only go down to the cafeteria if they receive special permission to go down there.

QUESTION: Mr. Come, what significance is your reference to special permission? Of course, that is routine in a hospital.

MR. COME: Well ---

QUESTION: I just wonder why you are emphasizing that.

MR. COME: Well, I am emphasizing it to show that there is nothing in this record to indicate that the use of the cafeteria was a predominant part of the hospital's therapeutic treatment, that the cafeteria, the testimony shows, was primarily a place of the employees, where they took their breaks and went to relax.

QUESTION: Wouldn't the special permission be relevant to the question of whether the patients who went to the cafeteria were at least thought to be well enough to associate with the public as opposed to the sicker people?

MR. COME: That's correct. And here, as in Beth Israel, the same fact is present. Similarly, the other public areas in which employee solicitation and distribution was barred are areas which the hospital did not consider to be patient care or work areas. There is testimony by

the hospital administrator, Dr. Victory, to the effect that none of these areas were regarded as a work area or an area of patient care or treatment.

QUESTION: You are using the Labor Board's definition of patient care, aren't you, Mr. Come?

MR. COME: Well --

QUESTION: The doctor's testimony quite explicitly associated patient care with some if not all of these public areas and that testimony was undisputed.

MR. COME: Well, in going by the testimony of the hospital administrator --

QUESTION: He talked about work areas.

MR. COME: Well, he defined a work area as an area where a patient received care or treatment.

QUESTION: You are not suggesting that the corridors of the hospital are not associated with patient care?

MR. COME: If it --

QUESTION: Are you?

MR. COME: No, I'm not, but we do not have the corridors of the hospital involved in this case. We have here the cafeteria, two lobbies and the gift shop and the parking lot and the entrances which except for the emergency room were conceded by the hospital administrator not to be patient care areas.

QUESTION: Does the Board apply its rule to the

hospital corridors?

MR. COME: The Court of Appeals in the Baylor Hospital found that it had and the Board was reversed on that because it was on the ground that the hospital had shown enough facts to indicate that those hospitals -- that those corridors were associated with patient care. We do not have that in this case.

QUESTION: Does the Board apply its rules to nurse's stations?

MR. COME: The hospital in this case permitted solicitation in the --

QUESTION: I am going to ask your opposition why? But does the Board apply its rules to nurse's stations?

MR. COME: I think it would depend upon whether or not you could -- the hospital could show that those were patient care areas, and I think in most hospitals it would be easy to show that. What you have here is just a blanket rule that bars solicitation in any, in every public area of the hospital.

QUESTION: Well, what is the Board's attitude about nurse's stations, if any?

MR. COME: I think that it would depend upon whether it could be shown that that was a work area or a patient care area. That has not been litigated, to my knowledge, in any of these cases so far. I have no doubt

that it will be as we get into these cases more fully.

QUESTION: I take it, in the constant care area, which is becoming more and more popular, probably the Board will be fairly lenient there?

MR. COME: I would think so.

QUESTION: Mr. Come, is the Board still applying its rule to corridors in any hospitals after the reversal in the Baylor case or will it try it out in some other circuits, or do you know?

MR. COME: I do not know, Your Honor. What the Board has done is to take back some of the other hospital cases and --

QUESTION: How about the general counsel?

MR. COME: What's that?

QUESTION: What about the general counsel?

MR. COME: I know of no specific case involving the corridors.

QUESTION: Mr. Come, doesn't this case -- I know you said it doesn't, but doesn't this case involve the corridor at least to this extent, even though the solicitation was not in the corridor, the Board's order, if one reads it one way, does prohibit solicitation in the corridor, if one reads it another way, it doesn't. And I read it frankly to prohibit solicitation in the corridor because I thought the Board didn't treat corridors

as patient care areas. I think that is what Mr. Justice Powell is asking you, too.

MR. COME: Well, I think what the Board order says is that the hospital just cannot have a blanket ban in these public areas. What they have to do is to define with more precision what are their patient care areas and even with respect to non-patient care areas, what are areas where it is likely that this sort of activity would interfere with patient care. They have not done any of that in this case.

QUESTION: There is very substantial testimony in this case, Mr. Come, about the corridors and the use to which they were put.

MR. COME: Well, I would like to get to that testimony, but I will --

QUESTION: In light of that testimony, what happened to it? You say it is out of the case.

MR. COME: No, that testimony in short merely indicated that -- it was given after the rule was promulgated, it was essential to keep a tranquil atmosphere throughout the hospital. When the doctors were asked about union solicitation, as my brother, Mr. Gold, will indicate in more detail, they indicated that what they were concerned about was loud or hostile or volatile union solicitation and that peaceful solicitation, one on one,

they did not think would affect patient care.

QUESTION: One on one when a patient may need the attention of the nurse, for example, one on one solicitation at a time when patients are ringing for nurses or orderlies?

MR. COME: Well, this is not in a patient care area, it is not -- it when the employees are off duty.

QUESTION: To get back to your statement about these corridors not being used for treatment, I think the record shows that the first thing doctors now try to do following surgery is to get that patient out into the corridors and into the rooms, the sitting rooms, waiting rooms where they can visit with families and friends, and then they move up and down, if the record clearly shows, in wheelchairs, on stretchers to and from treatment rooms, and nobody can tell in advance when a patient will be so postured.

But coming back to the original point, I would like to know whether corridors are in this case or out of it. I thought they were in it.

MR. COME: I think that they are in unless the hospital is able to demonstrate that they are patient care areas or that activity there would interfere with patient care. They are--

QUESTION: Must they demonstrate both, that they

were patient care areas and that activities --

MR. COME: No, either.

QUESTION: Didn't this Court earlier this term in Baylor University Hospital differentiate between the cafeteria and the corridors in its disposition of the case summarily?

MR. COME: They did because they found that the hospital there had introduced evidence which showed that the corridors were not -- were patient care areas. There was enough evidence put in there to show that the corridors were --

QUESTION: What has happened to that case?

MR. COME: Baylor Hospital.

QUESTION: What has happened to it? It was remanded to the Court of Appeals.

MR. COME: Well, only the cafeteria was remanded to the Court of Appeals and the Court of Appeals in turn remanded the cafeteria issue back to the Board.

QUESTION: But the corridor --

MR. COME: The corridor issue --

QUESTION: -- we denied certiorari?

MR. COME: Yes, you did, Your Honor.

QUESTION: And it was held in that case by the Court of Appeals, they refused to enforce the Board's order with respect to the corridors, is that it?

MR. COME: Right, but the reason for denying cert was that the Court viewed it as a substantial evidence question in that case.

QUESTION: You are telling us that is why we denied cert?

MR. COME: That is what the opinion of the Court said.

I would like to save the balance of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Gold.

ORAL ARGUMENT OF LAURENCE GOLD, ESQ.,

ON BEHALF OF THE INTERVENOR-PETITIONER

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

To continue with the point that Mr. Come was discussing, it is our understanding that under the Board's present approach, the first inquiry is whether a particular area is an immediate patient care area or not. There are factual and legal problems in making that determination, just as there are in making any other determination, and the Board has not yet articulated its approach to solving all of the questions and arriving at the lines of demarcation. As an appendix to our brief, the blue brief, we print our submission to the Board on a series of cases

which have come back to the Board after Beth Israel, where we discuss an approach to the different rules that could be applied, at page 40 through 42, that could be applied in the different functional areas of the hospital, if that is the Board's view as to the proper approach.

At any rate, corridors are in the case, this case, but they are treated under the Board's order only by a distinction between patient care and non-patient care areas and that has to be made more concrete, depending on what happens in this Court in handling the basic question of whether the overall Board approach is right or at least right with regard to areas other than cafeterias.

I would like to spend the remainder of my time making three basic points. The first is that the overall presumption here seems to us to be a common sense way of developing the law. It rests on two basic premises of the Act. One is that stated by this Court in the *Magnavox* case, 415 U.S., that the working place or at least non-working areas of the working place are uniquely appropriate for employee communication, that they are presumptively saved to the employees for distribution and solicitation. And secondly, a point made in numerous labor law cases, more specifically I would think in the *Allen* case, 373 U.S., that the party with the facts and the knowledge is the one who ought to have the burden of proof of demonstrating

its position. And here, of course, the hospital position is that patient care would suffer at least in certain regards if solicitation and distribution is allowed. The hospital claims to have the expertise with regard to these medical questions, and it is appropriate it seems to us to put the burden on the hospital. This is a rebuttable presumption, this is not a rule of law that we are discussing here. The Board's position is that a broad ban on employee discussion is presumptively unlawful and the hospital can --

QUESTION: These cases you refer to are not hospital cases, are they?

MR. GOLD: No. No.

QUESTION: Don't you think there is quite a difference between a factory or something of that kind and a hospital or a hotel? Do you suggest that the appropriate solicitations take place in the lobby of a hotel?

MR. GOLD: It would seem to me that there would be occasions where it might.

QUESTION: To visit the bellboys when they are there to take care of the customers?

MR. GOLD: Well, Mr. Chief Justice, I think the best way I can answer that question is to turn to A-66 of the record. At that point, Mr. French, who did the soliciting here for the union, stated what solicitation

was, and we are talking about an abstraction here, and I think it helps to make it more concrete. He said he solicited in the cafeteria, and he said I asked if I could join people, other employees who were sitting down taking a break and eating, and sat down and talked with them. That is what solicitation is. It is not something that is unusual for people to do on their breaks. People, whether they are bellboys, whether they are hospital personnel --

QUESTION: You will get into the cafeteria? You are talking about the public areas of a hospital that would correspond somewhat to the public areas of a hotel.

MR. GOLD: Well, I --

QUESTION: And they can then just solicit without any interference with the working functions?

MR. GOLD: I think it would depend on whether it was a non-working area for them and whether they were on non-working time. The reason I responded as I did was that it depends I would think on what they do. If you have two bellboys, to use your example, who are taking a break which is permitted to them in the corner of a hospital, and one says to the other, "We don't have a union here, it would be good if we had one," and they had a quiet conversation and the person to whom that subject is broached says, "That is a good idea" or "a bad idea," I don't see what employer interest, what hospital interest, what hotel interest

ought to say that that is inappropriate.

On the other hand, if they are standing at the front desk holding a customer's suitcase and having that conversation with a customer standing there when they are on working time, that is a very different case. So all I was trying to say is that solicitation is the task normally of discussing, and if it happens in an area where such discussions are common, where there is conversation, people walking around, conversing on many different subjects, it is difficult for us to see why off-duty employees in a non-working area should not be permitted to engage in that activity.

QUESTION: Mr. Gold, you restrict it to the non-working area and non-working time?

MR. GOLD: Yes, sir.

QUESTION: Both?

MR. GOLD: Right. In the non-hospital context, at least the factory context may be a better word, solicitation has been permitted in working areas during non-working time but not distribution. That is a rule that I doubt the Board would follow in areas where the public is present. And the reason that I have taken your time to stress the point I've made is that the medical testimony in this case seems to us to suffer from a basic defect. It is that the doctors didn't know what solicitation was. Again,

I would like to direct you to page 61 of the record, Dr. Rickson, after testifying for a length of time that is reflected in pages 51 through 60 of the record, is cross-examined and the question is, union solicitation, do you know what effect it would have. Answer: First, may I ask the question to be sure you and I understand what is union solicitation, what does it consist of.

The medical testimony here by and large assumes that union solicitation involves turmoil, confusion, loud noises, speeches and so on. We think, no matter what the basic legal rule is, that whether there is a presumption for or against solicitation, the ultimate question ought to be that whatever the ultimate basic point ought to be, that whatever standard the employer adopts, if it bears more heavily on union solicitation of the kind that I have indicated goes on in this case than on cognate non-union activities, discussion of other issues which may have just as great an effect on somebody, may be just as likely to result in an argument. My working experience is that the most likely areas for argument are questions of who is going to win the World Series and foreign policy, and so on.

If you have general discussion, union discussion ought to be permitted. That is the basic point we see.

QUESTION: Mr. Gold, you refer to testimony on pages 60 and 61, but if you keep reading -- I don't suggest

you do it now, you may take my word for it, and if I am wrong then you can speak -- at the top of page 62, the same doctor, when asked about the effect on patients, he said there doesn't have to be a fight or argument or heated discussion if the patients get the idea that people who are supposed to be taking care of them have their mind on something else, they are not very happy about it.

MR. GOLD: Yes. May I respond to that, Mr. Justice?

QUESTION: Of course.

QUESTION: If he is willing to give you his time.

MR. GOLD: If I had time, I had planned to go on to that. But the reason that we think the Board could disregard that testimony is the reason I concluded with. Certainly if the hospital goes to the point of saying that employees in the cafeteria, employees on breaks, wherever members of the public may be, can't talk to each other about anything, then perhaps that rationale makes some sense. But that isn't the way this hospital works. This is just like Beth Israel, where they tell the people who work at the hospital that if they discuss patient care, they should be careful not to be overheard. There isn't a scintilla of evidence here that anybody censors

employee conversations on any issue other than union issues, and we think that that is the first point. That testimony is testimony that has nothing to do with the real world. The hospital permits TV, it permits radio, patients talk to each other, visitors talk to each other.

QUESTION: You have covered those points before.

MR. GOLD: That is the test.

MR. CHIEF JUSTICE BURGER: Mr. Elarbee.

ORAL ARGUMENT OF FRED W. ELARBEE, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

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

With the Court's indulgence, I would like to visit with the Court for a moment before I start my argument, and particularly with Justice Stewart. Some 24 years ago, in 1955, I argued my very first case in the Court of Appeals in Cincinnati. At that time, I was representing the Iron Workers International Union. Since that time I have gone to the other side. I want to say that Justice Stewart was on that panel, and it is a pleasure to see you again, Justice Stewart. I might say in passing that I hope I have better luck here today than I had that day 24 years ago.

(Laughter)

QUESTION: Well, it is a fact that you are

familiar with both sides of the problem.

MR. ELARBEE: I hope so.

QUESTION: As you see, I am a defector, too. I am not longer on that court.

MR. ELARBEE: I think, if the Court please, what we have here is an attempt by the Board to establish a rule that arises out of an industrial setting to a hospital situation which simply does not fit. It is quite one thing when you talk about a manufacturing plant where all the employees are involved, and another when you talk about a situation where third parties' rights and interests are involved.

Of course, the Board got into that in the retail store cases. But here you have even a further more direct and important interest involved, it seems to me, and that is the right of the patient or what the patient can expect when he goes to the hospital, sometimes quite ill, and what the patient's attitude is with respect to what is happening to him and those around him in the hospital.

So I think the Board, in establishing a rule that simply says immediate patient care area and speaks of such areas such as the operating room, the patient's room, and perhaps the x-ray room, is making a far too limited rule, given a modern day hospital when, as this record shows, as in Baptist Hospital, patients are likely to be

all over the hospital, patients who are ambulatory, patients who are transported to different places in the hospital. The rule simply doesn't fit in lighth of the testimony in this record.

In Beth Israel, Justice Blackmun expressed this concern in his concurring opinion: "I fear that this unusual case will be deemed to be an example for all hospital eating facility cases, and that the Board or the courts now will go further down the open solicitation road than they would have done had a more usual hospital case been the first one to come here."

Justice Brennan, in writing the majority opinion, admonished the Board to follow the cases, the hospital cases as they came before them, not to take Beth Israel as a standard that necessarily was to be applied in all cases.

And I think what we have is the Board taking its rule as enunciated in St. John's Hospital and which formed the foundation for Beth Israel, which this Court decided earlier on a completely and vastly different record, it is taking its rule in St. John's and has applied it again in this case without even a discussion of the record evidence in its decision. It did it on the basis of a footnote, we are following St. John's in the footnote.

So what we have, first of all, it seems to me, is a Board establishing a rule that rises primarily out of an industrial situation, a manufacturing plant, attempting to transpose it with some minor modification to a hospital with immediate patient care areas, and it simply will not fit in a hospital such as Baptist.

First of all, I would like to point out that there were substantial differences in the record evidence in this case that was presented to this Court in the Beth Israel Hospital case. Justice Blackmun anticipated, as did Justice Powell in his concurring opinion, anticipated that this might very well arise.

Some of the things that are substantially different, it seems to me, is that there is a much greater showing in this case that there was public use by visitors and relatives in the Baptist Hospital cafeteria, and I suppose along with that, non-employees or perhaps patients, it doesn't show, but it does show that about 32 percent of the patrons in the cafeteria during weekdays were visitors or were non-employees. It could have been patients and visitors, I suppose. About 53 percent or a majority on the weekends were non-employees in the cafeteria.

And the medical testimony, the unrefuted, uncontradicted testimony was that if there is anything unsettling that occurs or circumstances that occur to a relative of

the patient, it invariably rubs off on the patient and could certainly affect the recovery or the progress of the patient with respect to the treatment he was receiving at the hospital.

So you have contrasted, as one of the members of the Court said, I believe, in Beth Israel, what seems to be a typically employee oriented cafeteria. That is not the record in Baptist Hospital, when certainly on weekends a majority, at least according to the survey that was done, it was a limited survey according to the record, shows that a majority of the people visiting the cafeteria over the weekend were non-employees or visitors to the hospital.

One point I would like to make further, and if you read this record, all through it, the medical experts, the doctors treated the hospital as a whole, as a patient care area, those areas of the hospital where the patients were likely to be found. They did not distinguish between the operating room or the patient's room or the gift shop where patients visit to get a newspaper or perhaps cigarettes or some other reason. Those doctors did not distinguish between these areas and the immediate patient care areas, as the Board has done.

Another thing that was so vastly different about Beth Israel and is not true in this case is the record evidence in that case showed that the hospital itself,

apparently because only about 9 percent of the visitors to that cafeteria, 9 percent of them were visitors, had used it for -- had allowed individual, one on one solicitation prior to this case arising, it had used it for other types of solicitations, for charities, various types of charities, it had established a table and display rack for brochures and other employee information. That is not true in Baptist Hospital.

This record shows that this rule had been in force for many years. They had not allowed solicitation in the cafeteria. It even shows that Mr. Victory -- I believe it was his testimony -- that one employee attempted to sell Avon products in the cafeteria, was disallowed, prior, long before this case arose. There has been a consistent rule, consistently applied. I think --

QUESTION: Could an employee make an appointment with his insurance broker to meet him in the cafeteria to see if he needs more insurance, or not?

MR. ELARBEE: No, sir, not if they are going to apply the rule as they say they do. They say that solicitation is forbidden there. If they made it, they couldn't do that.

QUESTION: What about a sitting room, a place where -- the only place probably where a patient could talk to somebody outside. I suppose you could make an

appointment with your brother to visit with him and the next half hour you say you couldn't be chatting with your insurance agent?

MR. ELARBEE: According to the rule, Mr. Justice, the solicitation or selling, things of that sort are not permitted in the public access areas. I think the hospital demonstrated in this record with the testimony of the doctors that they had good reason for that. I suppose a patient might get away with something like that, but certainly it is not permitted under the rules.

QUESTION: If the patient wants to see his insurance agent, he can invite him to his room and see him in his room.

MR. ELARBEE: He could invite him to his room and I suppose that might be all right if only the patient and the insurance salesman was there. But certainly they would not --

QUESTION: I suppose if he is in a ward a fortiori he couldn't invite him in there.

MR. ELARBEE: No, sir, although people are permitted I think from time to time to visit wards, but I don't think they want anybody selling anybody anything in a hospital room.

QUESTION: Let's get closer to home. Can a lawyer go in and see his client?

MR. ELARBEE: Yes, sir.

QUESTION: And write a will?

MR. ELARBEE: I suppose he could talk to him about important matters such as a will, yes, sir.

QUESTION: I am trying to get closer to home.

MR. ELARBEE: Mr. Justice Marshall, I would like to get to a point here which I think may be somewhat misleading. There is no need for this Court or for any of us to assume that union solicitation is just another type of ordinary conversation carried on between two people in a quiet and unassuming manner. This Court long ago recognized in one of the early free speech cases, and I think the language was something like the language of the picket line is not the parlance of the parlor. I don't know if it was -- it was one of the old free speech cases a long time ago. Well, certainly this is not a picket line, but the Board has itself recognized that union solicitation can be unsettling. It said it in St. John's, it said admittedly that union solicitation would be unsettling, but they said in immediate patient care areas.

Now, how can you --

QUESTION: Do you suppose it makes any difference if it is 30 percent -- 10 percent patients in the cafeteria or 60 percent?

MR. ELARBEE: No, sir, I don't. I don't think --

QUESTION: So you would suggest that we were wrong in Beth Israel?

MR. ELARBEE: Well, I could go along with you a little bit on that, but --

QUESTION: Not very far though on this argument, could you?

MR. ELARBEE: Pardon, sir?

QUESTION: You couldn't go very far with us on Beth Israel, making this argument you are making now?

MR. ELARBEE: No, sir, I really couldn't. I say that the facts are completely distinguishable, however, from what occurred in Beth Israel. Now, I think that the question you raise is also applicable to the Board's standard of immediate patient care area. If something is unsettling, certainly it can be unsettling in the gift shop, in the cafeteria, in the corridor, as well as in the patient's room, for instance. I don't see how you can draw that kind of a line. First of all --

QUESTION: Can't you draw a line between the operating room and the parking lot?

MR. ELARBEE: Yes, sir, and the court below did, too.

QUESTION: I mean do you?

MR. ELARBEE: Yes, sir. Yes, sir.

QUESTION: You don't have any patients out in

the parking lot very often, do you?

MR. ELARBEE: No, sir.

QUESTION: Are you going to mention the nurse's station situation in the Baptist Hospital case?

MR. ELARBEE: Yes, sir. According to the record, this hospital allows people during non-work time, employees in the nursing stations to carry on solicitation at those locations. The record shows that it has occurred in those locations, and the hospital has not done anything about it or has not reprimanded employees for it.

Now, beyond that, where do you want me to go?

QUESTION: Well, I just wondered if you thought that was consistent with your position as to the cafeteria and other places.

MR. ELARBEE: Yes, sir. The record shows that employees take breaks in the nurse's stations. It also shows that the nurse's stations are rather large areas, they are I believe 20 by 40 feet, and I am sure most of us have been in a hospital and seen people sitting in a nurse's station drinking a Coca-Cola, drinking coffee and not at work.

QUESTION: Not I. Not I in the hospitals I know of.

MR. ELARBEE: Well, I can't --

QUESTION: I must confess, what is a nurse's

station?

MR. ELARBEE: At least the record -- pardon me, sir.

QUESTION: Is the nurse's station the area in which the nurses relax when they are not working, or is it like the desk clerk in a hotel, where she is giving orders and so forth, which is --

MR. ELARBEE: Primarily, as I understand it, sir, a work area but according to the evidence in this record at this hospital, it is used for employees for breaks also, and the utility rooms nextdoor. That is unrefuted in the testimony.

QUESTION: The patients don't use it, do they?

MR. ELARBEE: No, sir. It is a work area separated from the patients and the public by glass partitions, according to the record in this case. The question was asked, well, why would the hospital permit it. The only reason that I could assume is that it is a rather large area, they do take breaks in the area, and if they are not at work then I suppose the hospital says that the public or the patients are not involved --

QUESTION: At least it hasn't anything to do with this case or the rationale of this case because there aren't any patients involved.

MR. ELARBEE: That's right, sir, only to this

extent, that this Court considered the fact that in Beth Israel, and it has been considered in many other cases, there were not places or sufficient places for people to communicate with respect to section 7 rights and things of this sort. But in this case, the record shows that there are 26 nursing stations, 28 utility rooms that have coffee machines in some of them and are used for break areas, employee lounges, I believe two with vending machines, the laundry building, maintenance building, employee rest rooms and the parking lot which are available for solicitation in this case. So it is an entirely different record from what we had in Baptist Hospital.

QUESTION: Do you mean in Beth Israel?

MR. ELARBEE: Beth Israel, I'm sorry.

QUESTION: Is there a rule against employees talking with each other about whether or not to join a union, just to get away from this word "solicitation"?

MR. ELARBEE: Solicitation?

QUESTION: Yes. Can the employees talk about and get into an argument about -- neither of them is a solicitor for a union but they are just arguing pro and con union. Are they supposed to do that in the restaurant or not?

MR. ELARBEE: Your Honor, I would say not.

QUESTION: You would say not, does the rule

forbid that?

MR. ELARBEE: That particular set of facts have not been brought up. I can't answer you --

QUESTION: Can they get in a big argument in the cafeteria about whether there ought to be a united front or separate fund drives for Red Cross?

MR. ELARBEE: Your Honor, I view a discussion between two people as a little bit different from the way I view solicitation as such. Solicitation involves an individual going from one person to another soliciting them to take some action, in this case with respect to the union. But the record is clear, and the doctors do not distinguish between union solicitation or any other form of solicitation or conduct which would simply be non-professional in their view.

I would distinguish, if two people were sitting having a conversation, but in terms of distributing union cards, in terms of going around soliciting people to join up, let's go to the meeting tomorrow night, which could precipitate --

QUESTION: An employee couldn't circulate a petition in an election, not a union election but couldn't get signatures to put somebody on a ballot to run for city council?

MR. ELARBEE: Not in those areas accessible to

the public in the hospital, sir. There are other areas which would be available for that purpose, but not in those areas that are accesible to the public.

QUESTION: Which ones do you mean, the locker room and the parking lot?

MR. ELARBEE: No, sir, the nurse's --

QUESTION: Which ones?

MR. ELARBEE: The nurse's stations, the utility rooms, the two employee lounges. One is a cafeteriea type lounge, they have vending machines, and seats approximately fifty people; another one seats 25 to 30. Apparently in the entire maintenance building, at least that is the testimony, in the laundry building, is also the testimony, employee rest rooms and the parking lot. Now, there are some fifty-odd locations where these activities can take place that are not accessible to the public.

QUESTION: The laundry, can you hear anything in the laundry?

MR. ELARBEE: The laundry building is what the --

QUESTION: Can you hear anything -- have you ever been in one?

MR. ELARBEE: Yes, sir, I have.

QUESTION: Have you been able to hear anything other than the machines, the laundry room machines?

MR. ELARBEE: I recognize that it is not the ideal

place. But then again -- and I think this is an important point to this Court -- we are not here, I don't think the union is entitled to say we are entitled to ideal circumstances to carry on our activities.

QUESTION: That would be a good place for a heated discussion, I suppose.

MR. ELARBEE: That's right. I mean, there must be an accommodation. After all, we are talking about a hospital, we are talking about patients, and if you had a sick one in a hospital, I am sure you realize that if they are truly sick, if they just overhear two nurses talking about whether or not they are going to go to the beach the next day is irritating and upsetting to a person who is sitting and wondering if they are going to live or die or if something is seriously wrong with them.

QUESTION: But there are some people who have been in the hospital and heard nurses talking about whether they are going to get their promotion, which had nothing to do with the union, but that is all right.

MR. ELARBEE: Well, I think the testimony of the doctors was that any type of conduct, of conversation which was unprofessional or would show the patient or the patient might be led to believe that these people are more concerned with something other than patient care or me would be upsetting to the patient and they did not distinguish, Justice

Marshall, between a patient's family or the patient.

QUESTION: What I am worried about is if they decide is what is good conversation and what is not, and I think some people don't like other people deciding what they should talk about.

MR. ELARBEE: I suppose they could --

QUESTION: Isn't that right?

MR. ELARBEE: Well, yes and no. I suppose we could speculate here what kind of conversations would be permitted, with ordinary, average conversation between two people --

QUESTION: I wouldn't want to get involved in that.

MR. ELARBEE: All right. What we are talking about is the right to solicit union membership on the premises, and the Board recognizes the unsettling effects of union solicitation. It says that in St. John's. Given that, how can you say that if you are only limited to the operating room or the patient's room? I think that the Board is either saying one of two things: They are either saying that it would not have unsettling effects in other places, it is either saying that or it is saying it will only upset a few and therefore we should allow it. I don't think that is an acceptable standard.

I believe I have basically covered the points for

the Court. I urge the Court again that the court below reviewed the record and found that insofar as the Board had concluded that the hospital here showed special circumstances, that the Board limited those special circumstances to the immediate patient care area, the court below specifically found that is not the evidence in this record and said there was no justification for the Board concluding in the facts of this case that it should be limited to "immediate patient care area," and I ask this Court to affirm the decision of the court below which I believe to be correct.

Thank you.

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

(Whereupon, at 3:16 o'clock p.m., the case in the above-entitled matter was submitted.)

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