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"As We See It" - The NLRB and the Courts Accommodate Union Solicitation Rights and Hospital Patient-Care Responsibilities: Beth Israel Hospital v. The National Labor Relations Board

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COMMENT

"AS WE SEE IT"—THE NLRB AND THE COURTS ACCOMMODATE UNION SOLICITATION RIGHTS AND HOSPITAL PATIENT-CARE RESPONSIBILITIES: *BETH ISRAEL HOSPITAL V. THE NATIONAL LABOR RELATIONS BOARD*

The general rule governing an employer's ability to curtail its employees' activities in union solicitation on nonworking time in nonworking areas has been settled for over thirty years:¹ any restriction on such activity is presumptively invalid as a violation of rights guaranteed by the National Labor Relations Act (NLRA).² It is recognized universally that the primary concern of a hospital is to provide the best possible care for its patients. Conflict occurs, however, when the employer-hospital feels it must restrict employees' rights in order to further the hospital's own patient-care responsibilities. This conflict presents a classic accommodation problem that must be resolved in many labor-relations disputes: employer rights and responsibilities must be balanced against employee privileges and duties. Conceivably, the National Labor Relations Board (NLRB), each federal court of appeals, and the United States Supreme Court could all strike this balance between employer and employee differently.

A solution to this accommodation problem in the health-care field

1. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), is the seminal case deciding this issue.

2. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491-92 (1978) (citing *Republic Aviation*, 324 U.S. at 798, as articulating a broad legal principle encompassed by § 7 of the NLRA).

The Wagner Act, 49 Stat. 449 (1935), as amended by the Taft-Hartley Act, 61 Stat. 136 (1947), 65 Stat. 601 (1951), 72 Stat. 945 (1958), and the Landrum-Griffin Act, 73 Stat. 541 (1959), constitute the National Labor Relations Act, 29 U.S.C. §§ 151-168 (1970).

Section 7 of the NLRA concerns the general rights of all employees and is the basis for the unfair labor practice charges that are defined specifically by § 8(a) of the Act. Section 7 states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3).

29 U.S.C. § 157 (1970).

had not been developed because, until the 1974 amendments,³ non-profit hospitals were not covered by the NLRA, and the Board had not decided the issue conclusively with respect to hospitals for profit. The opportunity came, however, with *Beth Israel Hospital v. The National Labor Relations Board*;⁴ the administrative law judge, the panel of three board members, the panel of three judges for the First Circuit Court of Appeals, and five Supreme Court Justices, with the other four Justices concurring,⁵ all decided that the no-solicitation rule, as it applied to the hospital's cafeteria,⁶ was an unlawful infringement of rights guaranteed to workers by the NLRA.⁷ The Supreme Court concluded that "based on its experience in enforcing the Act, the Board developed legal rules applying the principle of accommodation"⁸ and applied them correctly in this case.⁹ Such unified rulings would seem to support two propositions: first, the most rational accommodation had been found; and, second, *Beth Israel* would provide an employer-hospital with useful guidelines to establish solicitation rules. Due to the myriad of peculiar fact patterns, however, such assumptions are not justified. *Beth Israel* rested upon a set of circumstances so unique as to be useless, at best, or misleading, at worst, should a more typical hospital-solicitation case arise for adjudication.

In the cafeteria of Beth Israel Hospital a medical technician in the Department of Medicine was distributing the union newsletter entitled "As We See It" to employees of the hospital.¹⁰ This type of

3. Coverage was achieved by deleting from the definition of employer, in § 2(2) of the Act, the provision that an employer shall not include "any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual." 29 U.S.C. § 152(2) (Supp. V 1975).

4. For the complete prior history of this case, see 223 N.L.R.B. 1193 (1976); 554 F.2d 477 (1st Cir. 1977).

5. The decisional history is as follows: the Administrative Law Judge—Ivar H. Peterson; the panel of three Board Members—Chairman Murphy, Members Fanning and Jenkins; the panel of three Court of Appeals Judges for the First Circuit—Chief Judge Coffin, Circuit Judge Campbell, and District Judge Bownes (of the District of New Hampshire, sitting by designation); and the five Supreme Court Justices—Justice Brennan (author of the opinion), Justices Stewart, White, Marshall, and Stevens (Justices Blackmun and Powell each filed concurring opinions; Chief Justice Burger and Justice Rehnquist joined in both concurring opinions).

6. For a discussion of the "area limitation" in the Court's holding, see note 52 *infra* & accompanying text.

7. 437 U.S. at 507.

8. *Id.* at 492.

9. *Id.* at 501.

10. *Id.* at 491.

situation is found in the usual solicitation case. Upon further examination, however, the facts of *Beth Israel* quickly become atypical. What these facts are, how the courts dealt with them, and the possible consequence of such a decision in the health-care field will be the focus of this Comment after the case's background has been set forth.

SOLICITATION-DISTRIBUTION PRECEDENT

The Boundaries Outside The Health-Care Field

Both solicitation and distribution issues¹¹ were presented to the Board within the same year and were resolved in two seminal cases. In *Peyton Packing Co.*,¹² the Board articulated its solicitation rule for the first time: during work time, an employee could be prohibited from solicitation by his employer, absent an antiunion motive, because "working time is for work";¹³ but during nonworking time, solicitation must be allowed, even if on company property.¹⁴ Federal labor policy recognizes that union organization can be effective only if employees are given the opportunity to discuss freely among their peers the advantages and disadvantages of unionization in an uninhibiting and convenient environment. In implementing this policy in *Peyton Packing*, the Board emphasized the time element as the focal point of the case; working and nonworking hours were distinguished.

This line of reasoning was reaffirmed in *Republic Aviation*.¹⁵ Long

11. Though these terms are often used interchangeably, or one term is used for both activities, solicitation and distribution are technically distinct; solicitation involves oral contact, whereas distribution is associated with the handing out of printed material. In most instances these activities occur simultaneously. This distinction is discussed further with reference to Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615 (1962). See note 42 *infra* & accompanying text.

12. 49 N.L.R.B. 828 (1943). Subsequently, the Fifth Circuit enforced the Board's order. 142 F.2d 1009 (5th Cir.), *cert. denied*, 323 U.S. 730 (1944).

13. 49 N.L.R.B. at 843.

14. *Id.* at 843-44. The Board allowed a different presumption with each time frame. A no-solicitation rule covering working hours "must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose;" whereas a no-solicitation rule covering nonworking hours "must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." *Id.*

15. 324 U.S. 793 (1945). Although *Peyton Packing* was decided first, *Republic Aviation* is the case most often cited for the Board's basic position, before refinements, concerning the solicitation doctrine.

before any union activity among employees took place, Republic, a manufacturer of military aircraft, had a broad but simple policy: "[s]oliciting of any type cannot be permitted in the factory or offices."¹⁶ The activities that resulted in the unfair labor practice complaint¹⁷ were the handing out of membership application cards by a union organizer on his lunch hour¹⁸ and the wearing of union steward buttons by workers.¹⁹ The company dismissed the employees for this union activity. The employer argued that its solicitation rule was long-standing and had been followed consistently; furthermore, with respect to the display of union buttons, permitting such behavior at the plant would indicate company support for the particular union in violation of the NLRA.²⁰ Although the NLRB had found no antiunion animus, it ruled that employee solicitation rights must prevail, and the Supreme Court agreed with the Board's rationale.²¹

The second seminal case demonstrating the Board's interpreta-

16. *Id.* at 795.

17. Solicitation and distribution cases involve § 8(a)(i) and, usually, § 8(a)(3) violations if disciplinary action was taken. All of § 8 deals with unfair labor practices. Subsection (a) defines violations of employers. These provisions state:

Section 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157;

...

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

29 U.S.C. §§ 158(a)(1), (3) (1970).

18. 324 U.S. at 795. The Board considers such card activity as solicitation. *See also* Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615 (1962).

The significance of authorization cards to union organizational activity is that a duty for the employer to recognize the union for collective bargaining purposes can arise, notwithstanding the fact that no election has been held, if the union can demonstrate a majority of the employees support the union evidenced by these signature cards. Such a procedure is referred to as "having a card majority." *See* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

19. 324 U.S. at 795.

20. *Id.* Employers have been found guilty of a § 8(a)(2) violation for *supporting* union organization. Section 8(a)(2) states that it shall be an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." 29 U.S.C. § 158(a)(2) (1970) (emphasis supplied); *see, e.g.,* Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) (outside or international union); NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941) ("company or local union). Allowing employees to wear union buttons, however, does not constitute "support." Republic Aviation Corp. v. NLRB, 324 U.S. at 802 n.7.

21. 324 U.S. at 803-04. For a more recent case supporting this holding, *see* D'Youville Manor v. NLRB, 526 F.2d 3 (1st Cir. 1975).

tion of permissible union organizational activity under the NLRA is *Le Tourneau Co. of Georgia*.²² The focal point of this decision was the place of the activity. Two employees were dismissed for distributing union circulars in the company parking lot in violation of the employer's no-distribution rule.²³ Although the company justified its rule by stating that it was "to control littering and petty pilfering from parked autos by distributors,"²⁴ and although the Board also found that there was no union bias or discrimination in the rule's enforcement,²⁵ the Board held that the employer's policy violated the NLRA.²⁶

In so ruling, the Board analyzed the geographic area. *Le Tourneau* was a manufacturer of earth-moving machinery and was located on 6,000 acres in a rural area. The plant was bounded by two public highways and was enclosed by a high fence. If outdoor distribution did not occur in the parking lot, automobiles and buses would have to be stopped on their approach to the plant, while still on public roads, for employees to receive the union communications.²⁷ Given these physical circumstances, employer interests had to accommodate employee solicitation rights.²⁸

22. 54 N.L.R.B. 1253 (1943). The court of appeals denied enforcement of the Board's order striking down the employer's no-solicitation rule, 143 F.2d 67 (5th Cir. 1944), but the Supreme Court reversed the lower court and upheld the Board in the companion case of *Republic Aviation*, 324 U.S. at 801-02.

23. 324 U.S. at 796. The rule in *Le Tourneau* was less vague than the one in *Republic Aviation* and, on its face, appeared neutral as a possibility of company permission was included:

[N]o Merchants, Concern, Company or Individual or Individuals will be permitted to distribute, post or otherwise circulate handbills or posters or any literature of any description on Company property without first securing permission from the Personnel Department.

Id. at 796-97. This rule also failed to meet Board requirements for adequate employee-organizational protection, however. *Id.*

24. *Id.* at 797.

25. *Id.*

26. *Id.* at 803.

27. *Id.* at 797. It was further noted that the homes of the workers were widely scattered. *Id.*

28. Further cases developed over time involving the relation of the area to the solicitation right. *E.g.*, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) (an employer may prohibit distribution of literature on his property when other channels of communication will enable the union to reach the employee without unreasonable efforts as long as the rule is not applied with discrimination); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972) (solicitation in a company parking lot although located in an urban area and "open to the public" must be considered in light of *Babcock*); *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974) (limiting solicitation to notices on a union bulletin board, even if agreed to by the union in a collective

Furthermore, another factor, that of the status of the distributor, must be considered in addition to the variables of time and place. In *Babcock & Wilcox*,²⁹ the company's parking lot was the scene of the union's activity; however, the union organizers were not employed at the manufacturing company but were "outsiders." The Board ruled that the company must allow the activity.³⁰ The Fifth Circuit denied enforcement of the Board's order, holding that it would not impose a servitude on the employer's property when no employee was involved.³¹ The Supreme Court granted certiorari because the Board was applying the rule of *Le Tourneau* consistently, whether the individuals involved were employees or nonemployees, and because the circuits were split on their enforcements of these orders.³²

The Supreme Court stated that accommodation between organizational rights and property rights "must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization."³³ The Court, in refining the Board's analysis, reversed the Board's decision and affirmed the court of appeals. The Court's holding was based on the nonemployee status of the organizers and the alternate channels of communication available to them.³⁴ The opinion noted that the distinction between employee and nonemployee status was one of substance and that nonemployee access to company property was governed by a different standard.³⁵

After these four cases were decided—*Peyton Packing*,³⁶ *Republic*

bargaining contract, may be a violation of § 7 rights which cannot be waived.

For additional recent cases discussing the significance of the distinction between nonwork and working areas in general, see *Food Store Employees Local 347 v. NLRB*, 418 F.2d 1177 (D.C. Cir. 1969); *International Ass'n. of Mach. & Aerospace Workers Dist. 9 v. NLRB*, 415 F.2d 113 (8th Cir. 1969); *NLRB v. Orleans Mfg. Co.*, 412 F.2d 94 (2d Cir. 1969); *Winchester Spinning Corp. v. NLRB*, 402 F.2d 299 (4th Cir. 1968).

29. 351 U.S. 105 (1956).

30. 109 N.L.R.B. 485, 486 (1954).

31. 222 F.2d 316, 318-19 (5th Cir. 1955).

32. The circuit denying enforcement, as had the Fifth Circuit in *Babcock*, was the Tenth Circuit in *NLRB v. Seamprufe, Inc.*, 222 F.2d 858 (10th Cir. 1955); the circuit granting enforcement was the Sixth Circuit in *NLRB v. Ranco, Inc.*, 222 F.2d 543 (6th Cir. 1955).

33. 351 U.S. at 112.

34. *Id.* at 113-14. Those means that were suggested included use of the mail, telephone, and home visits. *Id.* at 107.

35. *Id.* at 113 (dictum).

36. 142 F.2d 1009 (5th Cir.), *cert. denied*, 323 U.S. 730 (1944).

Aviation,³⁷ *Le Tourneau*,³⁸ and *Babcock & Wilcox*³⁹—the basic approaches of the Board to solicitation-distribution issues were established. Further cases only refined these general rules in different circumstances deemed significant. One such circumstance was the nature of the employer's business. Two types of businesses provide contrasts to the initial, basic line of cases in which the courts dealt primarily with manufacturing concerns. The first is the situation of the "isolated" employer, which alters the application of *Babcock*. In remote areas, such as in lumber camps or on board tankers, nonemployees have expanded rights. It has been held that in such situations, if solicitation off company property is impractical because of location, the employer must allow his premises to be used for union organization under reasonable conditions.⁴⁰ The second special situation is that of the retail merchant. Because of the possible adverse effect that union solicitation could have on customers, and thus on the employer's profit which insures his very existence, union activity may be restricted in light of a justifiable business purpose.⁴¹

Another circumstance that required later refinement was the means used to disseminate information during the organizational phase of union activity; oral solicitation and printed distributions

37. 324 U.S. 793 (1945).

38. *Id.* (companion case to *Republic Aviation*).

39. 351 U.S. 105 (1956).

40. See *Sabine Towing & Transp. Co.*, 205 N.L.R.B. 423 (1973); *Alaska Barite Co.*, 197 N.L.R.B. 1023 (1972); *NLRB v. S. & H. Grossinger's Inc.*, 372 F.2d 26 (2d Cir. 1967); *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147 (6th Cir. 1948). *But cf.* *Hudgens v. NLRB*, 424 U.S. 507 (1976) (constitutional protection of freedom of speech given by the first and fourteenth amendments was available against private landowners only when their property assumed all of the attributes of a municipality; the question of the scope of the statutory protection under the NLRA was not reached; the Supreme Court, in applying this stricter test, put greater emphasis on an employer's control of its private property albeit in the context of picketing in this case).

41. See, e.g., *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953); *Marshall Field & Co. v. NLRB*, 200 F.2d 375 (7th Cir. 1952); *Goldblatt Bros.*, 77 N.L.R.B. 1262 (1948); *NLRB v. May Dep't Stores Co.*, 154 F.2d 533 (8th Cir. 1946). *But cf.* *May Dep't Stores Co.*, 136 N.L.R.B. 797 (1962); *Bonwit Teller, Inc. v. NLRB*, 197 F.2d 640 (2d Cir. 1952), *cert. denied*, 345 U.S. 905 (1953) (a retail employer may not use solicitation techniques denied its employees by its privileged no-solicitation rule; for doing so, in *May*, the Board set aside an election and ordered the regional director to conduct a new election so the employees could have a "free choice" in deciding on union representation).

Retail restaurants have received separate but similar consideration, being allowed privileged no-solicitation rules in areas where customers are likely to be. See, e.g., *Marriott Corp. (Children's Inn)*, 223 N.L.R.B. 978 (1976); *McDonald's Corp.*, 205 N.L.R.B. 404 (1973).

require different considerations. When written material is distributed, the purpose is satisfied as soon as it is received because it is in a durable form. Even though the union does not know if its information will be read or accepted at the time, influence may be possible later because of the relatively permanent nature of printed matter; however, distribution requires infringement on the rights of the property owner. In contrast, the effectiveness of oral solicitation can be judged immediately through direct conversation and yet does not infringe on the property rights of an employer. The Board has ruled that with regard to oral solicitation "the right of employees to solicit on plant premises must be afforded subject only to the restriction that it be on nonworking time."⁴² When the distribution of literature is involved, however, employee access to nonworking areas of the plant premises is all that is required.⁴³ This distinction recognizes that solicitation is less intrusive and thus is subject to less restriction.

The Boundaries Within The Health-Care Field

From *Peyton Packing* in 1943 to the present the Board had developed slowly its solicitation philosophy with reference to the NLRA, modifying precedent when necessary for the principle of accommo-

42. Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615, 621 (1962). Solicitation and distribution issues are significant because they often arise in the context of initial efforts to unionize an employer and eventually have an effect on the result of the forthcoming election. In such an election the union's goal is to show a majority for bargaining purposes. During this process, ancillary issues of free speech and property rights are important. These issues are beyond the scope of this paper; however, for background material on these considerations in general, see Aaron, *Employer Free Speech: The Search for a Policy*, PUBLIC POLICY AND COLLECTIVE BARGAINING (1962); R. WILLIAMS, P. JANUS, & K. HUHN, NLRB REGULATION OF ELECTION CONDUCT (1974); Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964); Christensen, *Free Speech, Propaganda and the National Labor Relations Act*, 38 N.Y.U. L. REV. 243 (1963); Daykin, *Employees' Right to Organize on Company Time and Company Property*, 42 ILL. L. REV. 301 (1947); Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735 (1965); Getman & Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentation: An Empirical Evaluation*, 28 STAN. L. REV. 263 (1976); Getman, Goldberg & Herman, *NLRB Regulation of Campaign Tactics: The Behavioral Assumptions on Which the Board Regulates*, 27 STAN. L. REV. 1465 (1975); Gould, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73 (1964); Vanderheyden, *Employee Solicitation and Distribution—A Second Look*, 14 LAB. L.J. 781 (1963); Note, *Collectively Bargained Waiver of Plant-Site Solicitation and Distribution*, 56 IOWA L. REV. 152 (1970).

43. Stoddard-Quirk Mfg. Co., 138 N.L.R.B. at 621.

dation. Recently, a different type of employer, the hospital-employer, has come before the Board with increased frequency for adjudication of its labor-solicitation disputes;⁴⁴ when the "company" is a hospital, nursing home, or convalescent facility, factors that have never been present previously in labor cases may appear or, at least, become more significant.

A survey of the Board's few cases in the health-care field reveals a checkered pattern of decisions.⁴⁵ In *Summit Nursing*,⁴⁶ the Board held invalid a rule prohibiting solicitation by employees on hospital property during nonworking hours in nonworking areas. The decision noted these significant facts: the hospital had allowed solicitation in work areas for gifts for departing staff members; a worker

44. Hospitals for profit have always been covered by the NLRA; however, the NLRB, by its ability to withhold as discretionary its jurisdiction in some matters, had declined to hear such cases as being essentially local in character. By the latter part of 1960, the Board recognized the growth of these institutions and their effect on interstate commerce. It announced it would take jurisdiction over private proprietary hospitals in *Butte Medical Properties*, 168 N.L.R.B. 266 (1967), and over private proprietary nursing homes in *University Nursing Home, Inc.*, 168 N.L.R.B. 263 (1967).

Jurisdiction over nonprofit, health-care institutions came through a congressional amendment in 1974. Act of July 26, 1974, Pub. L. No. 93-360, § 1(a), 88 Stat. 295. Until this enactment, such hospitals were specifically excluded from coverage under the NLRA. See note 3 *supra*. See generally Carroll, *Health Care Institution Coverage Under the National Labor Relations Act*, 38 TEX. B.J. 257 (1975); Vernon, *Labor Relations In the Health Care Field Under the 1974 Amendments To The National Labor Relations Act: An Overview and Analysis*, 70 NEV. U. L. REV. 202 (1975).

These two events, the Board's broadening its jurisdiction and the Congress' widening coverage of the NLRA, coming within seven years of each other after over thirty years of NLRB nonintervention in the area, caused an epidemic of health care cases to emerge from dormancy.

45. At the time *Beth Israel* was heard before the administrative law judge, the attorney for the general counsel summarized the Board's solicitation policy to that date as follows:

- (1) A rule forbidding distribution of union literature by employees in working areas is presumptively valid even when applied to working and non-working time.
- (2) A rule forbidding distribution in non-working areas during non-working time is presumptively invalid.
- (3) A rule forbidding union solicitation by employees during their non-working time, even though limited to working areas, is presumptively invalid.
- (4) A rule forbidding union solicitation during working time in any plant area is presumptively valid.
- (5) A presumption of validity may be overcome if it can be shown that the rule is discriminatory rather than attributable to the right of the employer to protect his legitimate property interests.

223 N.L.R.B. at 1197. These accommodations had each been determined, however, in cases outside of the health-care field.

46. *Summit Nursing and Convalescent Home*, 196 N.L.R.B. 769 (1972).

who has sold dishes in work areas had not upset hospital operations; and there was no evidence that the distribution in question had caused a litter problem or in any other way interfered with the efficiency of the institution.⁴⁷

In *Guyan Valley Hospital, Inc.*,⁴⁸ the Board addressed the issue of solicitation in the work area. The hospital maintained a policy which prohibited solicitation in work areas, and the Board upheld the policy. Although the entire extent of the areas lawfully subject to the prohibition was never defined, the administrative law judge included hallways, elevators, stairs, patients' rooms, and gift shops.⁴⁹

In *Bellaire General Hospital, Inc.*,⁵⁰ both solicitation and distribution were considered. The hospital had a rule forbidding solicitation on nonworking time and distribution both on nonworking time and in nonwork areas. The Board ordered the hospital to allow its employees "to engage in the distribution of union literature in nonwork areas of its premises during nonworking time, and to engage in union solicitation on its premises, during nonworking time."⁵¹

The most significant case that may affect the application of *Beth Israel*, however, is *St. John's Hospital*.⁵² Language in *St. John's* indicated that union activity was to be allowed throughout a wider area of the hospital than should be presumed in *Beth Israel*. An issue developed, therefore, regarding the area to which the Board's order applied in *Beth Israel*. Although only the cafeteria and coffee shop areas were the subject of the litigation before the Board and the only areas mentioned by the order which the administrative law judge issued and the Board initially approved,⁵³ confusion was caused by a footnote the Board later added to the Decision and Order written by the administrative law judge in *Beth Israel*. From this point on, the "holding" of footnote two was significant in the future development of the case:

Subsequent to the Administrative Law Judge's Decision in this case, the Board in *St. John's Hospital and School of Nursing*,

47. *Id.* at 770.

48. 198 N.L.R.B. 107 (1972).

49. *Id.* at 111.

50. 203 N.L.R.B. 1105 (1973).

51. *Id.* at 1111.

52. *St. John's Hosp. and School of Nursing, Inc.*, 222 N.L.R.B. 1150 (1976).

53. 223 N.L.R.B. at 1199.

Inc., held that restrictions on solicitation and distribution in patient access areas such as cafeterias violates Sec. 8(a)(1) of the Act. . . . [as did the] maintaining [of] an overly broad no-solicitation, no-distribution rule that prohibited all solicitation and distribution in *all areas* to which patients and visitors have access and employees have access during nonworking time *other than immediate patient care areas*.⁵⁴

The Board argued in the First Circuit that this added footnote required the court of appeals to enforce the order requiring rescission of the rule to *all areas other than immediate patient care areas*, but the court rejected this argument and emphasized that the Board's order required rescission only to "*that part* of its [the hospital's] written rule prohibiting distribution of union literature and union solicitation in its *cafeteria and coffee shop*."⁵⁵

When *Beth Israel* reached the Supreme Court, however, *St. John's* was relied on heavily by the Court, even though the Tenth Circuit⁵⁶ had refused to enforce the Board's order in *St. John's*, which required the broad rescission over such a wide area.⁵⁷ It will be the final interpretation of *St. John's* "immediate patient care area," or the clear rejection of that test altogether, that will give *meaning* to boundaries set by cases subsequent to *Beth Israel*.

THE BOUNDARIES SET BY BETH ISRAEL

In deciding *Beth Israel* the NLRB, the court of appeals, and the Supreme Court each paid deference to the peculiar situation presented by solicitation in a hospital. The attorney representing the NLRB's general counsel before the administrative law judge argued that striking the balance in this complaint "is made even more complex by the rights of a third party, the rights of the patient."⁵⁸ The court of appeals was much more specific in recognizing that there are considerations unique to hospital settings.⁵⁹

54. *Id.* at 1193 n.2 (citation omitted and emphasis supplied).

55. 554 F.2d at 482 (emphasis supplied). The coffee shop eventually became part of the cafeteria at Beth Israel. 437 U.S. at 490.

56. 557 F.2d 1368 (10th Cir. 1977).

57. 437 U.S. at 507.

58. 223 N.L.R.B. at 1196.

59. 554 F.2d at 481. This statement was in the context of a detailed caveat to the Board. After the court acknowledged that the Board had decided the case correctly, as much of the hospital's arguments were speculative, the opinion continued:

This is not to say that the Board does not bear a *heavy continuing responsibility*

Notably, the Supreme Court also referred repeatedly to a hospital's special situation. First, the opinion quoted at length from *St. John's*, a case the Court saw as comparable to *Beth Israel*; the Court noted "that the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of that function. In order to provide this atmosphere, hospitals may be justified in imposing somewhat more stringent prohibitions on solicitation than are generally permitted."⁶⁰ Moreover, the limited solicitation allowed by the hospital for drives such as the United Fund perhaps could not be "equated with union solicitation in terms of potential for generating controversy."⁶¹ The Court further recognized the special nature of a hospital's situation by admitting "in the context of health-care facilities, the importance of the employer's interest in protecting patients from disturbance cannot be gainsaid"; this interest may demand the use of a "more finely calibrated scale"; and the case analogies to retail operations may be "less than complete."⁶² Finally, the majority opinion concluded with the strong caveat issued by the court of appeals concerning the Board's continuing duty to review its policies in this particular area of its jurisdiction.⁶³

At each decisional level the deference to the status of a hospital

to review its policies concerning organizational activities in various parts of hospitals. Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar. The Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact jeopardized.

Id. (emphasis supplied).

60. 437 U.S. at 495 (citing *St. John's*, 222 N.L.R.B. 1150 (1976)). The Court continued by further quoting specific examples the Board set out in *St. John's*:

For example, a hospital may be warranted in prohibiting solicitation even on non-working time in *strictly patient care areas*, such as the patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas. Solicitation at any time in those areas might be unsettling to the patients—particularly those who are seriously ill and thus need quiet and peace of mind.

Id. (quoting *St. John's*) (emphasis supplied). This "strictly-patient-care-area" test had not been stated by the Board, however, when the administrative law judge issued his decision and order in *Beth Israel*.

61. *Id.* at 503. The Court made this observation with reference to the size of the cafeteria being "sufficiently commodious to admit solicitation and distribution without disruption."
Id.

62. *Id.* at 505.

63. *Id.* at 508; see note 59 *supra* & accompanying text.

in the labor-relations field was made clear; yet, at each level the correct decision was reached only by accident—the accident of the very peculiar *Beth Israel* facts. The opinions pay only parenthetical respect to the burden of responsibility a hospital carries in such a labor dispute; and furthermore, the primary rationale supporting each holding came from the nonhealth-care field.⁶⁴ No matter what the attitude toward its employees' organizational activities is, neutral or prohibitive, a hospital's first concern is the welfare of its patients, and this is the rationale that should have bolstered the holdings. If adequate patient care would not, or *could* not, be compromised, the solicitation holding in *Beth Israel* would be appropriate; but the inquiry should be made only under a patient-care test, rather than a factory-oriented, *Republic Aviation* test.⁶⁵

Read broadly, *Beth Israel* could permit union organizational activity over a wide range of hospital areas. The danger inherent in the *Beth Israel* decision, then, is in the possible application of this broader rule. Justice Blackmun in his concurring opinion expressed "fear that this unusual case will be deemed to be an example . . . and that the Board and the courts now will go further down the open-solicitation road than they would have done, had a more usual hospital case been the one first to come here."⁶⁶ The scope of *Beth Israel* as precedent thus depends upon the accuracy of Justice Blackmun's apprehension. The boundaries of *Beth Israel* can be analyzed by considering what facts were deemed significant and what results were deemed inconsequential; such analysis will suggest the probable impact of the case.

64. The Supreme Court's first citation was to *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), and this was followed immediately by a quotation from *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), as recognizing the Board's authority to "accommodate" employer-employee interests. 437 U.S. at 492. Both these cases involved an environment completely foreign to a hospital setting; a manufacturing plant in *Republic Aviation* and a hardware store's parking lot in *Babcock*, and, it may be argued, an environment impossibly analogous, also. The *Beth Israel* opinion concludes with the "hands-off" directive of *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951):

Whether on the record as a whole there is substantive evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.

437 U.S. at 505 (citing *Universal Camera*, 340 U.S. at 491).

65. 324 U.S. 793 (1945); see note 15 *supra* & accompanying text.

66. 437 U.S. at 509.

Recognized But Unemphasized Facts

Beth Israel is a large, nationally known, nonprofit urban hospital in Boston, Massachusetts. It employs approximately 2,200 regular employees⁶⁷ and provides over 1,190 lockers for employee use.⁶⁸ The hospital maintains a cafeteria for the benefit of its employees, patients, and the public.⁶⁹ In 1970, prior to any union activity, Beth Israel adopted a rule forbidding solicitation and distribution for any reason in any areas except in a few specific locker rooms and adjacent rest rooms.⁷⁰ In October, 1975, a medical technician distributed a union newspaper in the cafeteria by approaching individuals whom she thought were hospital employees, asking their status, and, if they were employees, handing them a copy of the paper.⁷¹ The technician received both an oral and a written warning that she had violated the hospital's no-distribution rule and that continuation of the activity would cause her dismissal.⁷²

67. "Regular employee" does not include house staff, attending physicians, students, and employees of Harvard University. *Id.* at 489 & n.6.

68. The lockers are scattered throughout the hospital in work and nonwork areas and are divided on the basis of sex. Some are in secured areas. Only 613 lockers met the requirements of the hospital's criteria for allowing solicitation and distribution. *Id.* at 489 & n.7.

69. A hospital survey showed the cafeteria was used by employees (77%), visitors (9%), and patients (1.56%). *Id.* at 490.

70. The hospital's rule read:

There is to be no soliciting of the general public (patients, visitors) on Hospital property. Soliciting and the distribution of literature to B. I. employees may be done by other B. I. employees, when neither individual is on his or her working time, in employee-only areas—employee locker rooms and certain adjacent rest rooms. Elsewhere within the Hospital including patient-care and all other work areas, and areas open to the public such as lobbies, cafeteria and coffee shop, corridors, elevators, gift shop, etc., there is to be no solicitation nor distribution of literature.

Solicitation or distribution of literature on Hospital property by non-employees is expressly prohibited at all times.

Consistent with our long-standing practices, the annual appeal campaigns of the United Fund and of the Combined Jewish Philanthropies for voluntary charitable gifts will continue to be carried out by the hospital.

Id. at 486-87. For eight months, from July, 1974, to March, 1975, the hospital had allowed solicitation on a person-to-person basis in its cafeteria. This is the period when the Massachusetts Labor Relations Commission was hearing a charge filed by the union against the hospital for its solicitation policy but before the NLRB had taken jurisdiction.

The organizational effort, solicitation, and distribution at Beth Israel were conducted by the Boston Hospital Workers Organizing Committee, Massachusetts Hospital Workers Union Local 880, Service Employees International Union, AFL-CIO. 223 N.L.R.B. at 1193-94.

71. 437 U.S. at 491. The content of the newsletter is discussed at note 102 *infra* & accompanying text.

72. *Id.* at 491.

The NLRB and the First Circuit Court of Appeals found the hospital's rule to be in violation of the NLRA. Because of a conflict among the circuits in similar cases, the Supreme Court granted certiorari.⁷³ The narrow question to be decided was whether "the Court of Appeals erred in enforcing the Board's order requiring petitioner to rescind the rules as applied to the hospital's eating facilities."⁷⁴ The Court held that the Board's general approach to the question of solicitation in health-care facilities was "consistent with the Act,"⁷⁵ and, with reference to Beth Israel in particular, that the Board was "appropriately sensitive to the importance of petitioner's interest in maintaining a tranquil environment for patients."⁷⁶

The most striking fact in the case was that the cafeteria was used almost exclusively by employees. The Supreme Court characterized it "more as an employee-service area than a patient-care area."⁷⁷ This fact alone was probably most decisive; yet, such an argument can be made only by inference. For example, if employee use were 45%, rather than 77%, the effect this reduced percentage would have on the decision is not clear; also unclear is what other factors might have altered the outcome.

Consider a hypothetical hospital, City General. Suppose this hospital's cafeteria is on the ground floor just off the main foyer, that it efficiently serves adequately prepared food and, therefore, that it is patronized by city shoppers and the local downtown work force, as well as by the hospital's staff. Further suppose that City General's employees do not wear distinguishing name tags, many do not wear uniforms, and many voluntary and auxiliary services are per-

73. *Id.* at 487-88. On the issue of the validity of restrictions upon solicitation and distribution in patient-access areas of the hospital, the circuits had divided thus: granting enforcement of the Board's order allowing the solicitation and distribution—the First Circuit in *NLRB v. Beth Israel Hosp.*, 554 F.2d 477 (1st Cir. 1977), and the Seventh Circuit in *Lutheran Hosp. v. NLRB*, 564 F.2d 208 (7th Cir. 1977); denying enforcement of the Board's order allowing the solicitation and distribution—the Sixth Circuit in *NLRB v. Baptist Hosp., Inc.*, 576 F.2d 107 (6th Cir. 1978), the D. C. Circuit in *Baylor Univ. Medical Center v. NLRB*, 578 F.2d 351 (D.C. Cir. 1978), and the Tenth Circuit in *St. John's Hosp. & School of Nursing, Inc. v. NLRB*, 557 F.2d 1368 (D.C. Cir. 1977).

74. 437 U.S. at 488-89.

75. *Id.* at 507. The approach to which the Court referred was "of requiring health-care facilities to permit employee solicitation and distribution during nonworking time in non-working areas, where the facility has not justified the prohibitions as necessary to avoid disruption of health-care operations or disturbance of patients." *Id.*

76. *Id.*

77. *Id.* at 506. The Court also noted that the 1.56% patient use was of "critical significance." *Id.* at 502.

formed within the hospital.⁷⁸ Also, the hospital has a school of nursing, and the students eat in the cafeteria. City General has very liberal visiting hours and encourages families and friends to be with the patients throughout the day. The hospital also encourages the patients to be ambulatory and self-sufficient as quickly as possible, in addition to having an entire wing devoted to "self-care," which requires that these patients eat in the cafeteria for all meals. The cafeteria in this hypothesized hospital is readily distinguishable from the one at Beth Israel. What considerations a more typical hospital cafeteria situation would reveal or how the court would respond in a case involving a hospital situation falling in between Beth Israel's cafeteria and the one just described cannot be inferred from *Beth Israel*.

The peculiarities of Beth Israel's cafeteria were compounded further by other physical factors of the hospital. There was no single employee gathering area such as an adequate lounge or meeting room. Instead, there were scattered locker rooms to which access was restricted by sex and security precautions. Those available for solicitation were small and inadequate for such purposes.⁷⁹ Moreover, the location of the hospital itself in a metropolitan area made contacting employees, other than on hospital property, difficult. Finally, the large number of employees made the individual, off-premises contacts, which are essential to effective union solicitation, burdensome.⁸⁰ These physical considerations—the cafeteria,

78. The issue of identity was important in *Beth Israel* because the few nonemployees who usually would be in the cafeteria were easily identifiable as most Beth Israel employees were required to wear name tags. 223 N.L.R.B. at 1196. Many employees in hospitals, moreover, are not required to wear uniforms such as those employed in administration, personnel, business, insurance, or accounting offices, nor are smaller departments with positions such as computer programming, public relations, cashiers, receptionists, maintenance, or telephone operators. With these employees it would be difficult, if not impossible, to distinguish them from many self-sufficient inpatients, family members of patients, outpatients, visitors, and the general public who may be in the cafeteria.

79. Some of the locker areas were so small that employees "could not receive literature there unless one of their members would distribute or solicit. . . . There [was] no bulletin board in one large female locker room." *Id.* at 1197.

80. That many doors were available for entrance or exit, that the employees could come and go without reaching public property for some distance, and that the employees lived in widely scattered areas made the cafeteria one of the few, if only, appropriate area for solicitation. *See id.* at 1197. Although *Babcock* established that consideration of alternative means of communication was not always a necessary inquiry in deciding a union's organizational solicitation rights, 351 U.S. at 112-13, the Supreme Court in *Beth Israel*, recognizing this rule "outside of the health-care context," stated "it may be that the importance of the employer's interest here demands use of a more finely calibrated scale." 437 U.S. at 505.

the locker rooms, the size and location of the hospital, and the size of the staff—were all mentioned in the opinion, but their relative weights, if any, on the holding were never clarified.

Besides the physical distinctions from a typical hospital that can be drawn, other less tangible, but equally powerful, arguments exist which indicate the uniqueness of Beth Israel. First, the hospital itself used the areas forbidden to the union for its own solicitation needs.⁸¹ Second, when confronted with a prior situation in the cafeteria that could have been detrimental to a patient's mental health, the hospital reacted with a general directive for discretion, not by an all-inclusive ban on the offensive behavior.⁸² In effect, then, the hospital put itself into an estoppel position with each of these actions. Also, there existed the intangible of possible antiunion animus. This feeling was shown in a special hospital newspaper, which stated that union activities were disruptive and that unions had no concern for their own members.⁸³ Such feeling could be inferred additionally from the refusal of the hospital to give the union a list of employees and their addresses unless ordered to do so by the NLRB.⁸⁴

Behavior that would give rise to an estoppel argument or to an inference of hostility to union activity has been significant in other cases in which the relation between employer and employee rights is critical. This behavior will support an inference of lack of good faith and tip the balance in favor of allowing the employees' activi-

81. The hospital used the cafeteria to publicize a cost reduction effort, the credit union, travel opportunities, car pool information, nutritional ideas, tennis camps, film processing, magazine subscriptions, insurance applications, and United Fund and Combined Jewish Philanthropies Fund drives. 223 N.L.R.B. at 1196. The Supreme Court noted that the cafeteria had been used for "solicitation and distribution to employees for purposes other than union activity." 437 U.S. at 490.

82. Members of the professional staff had discussed the condition of various patients, by name, in the cafeteria, and complaints were made to the hospital by other patients and visitors. While admitting that the effect of such conversation could be "devastating," the hospital simply warned its staff to make sure only the appropriate audience heard such conversations. *Id.* at 502 n.20.

83. The statements were made by the hospital's general director in a paper dated January 16, 1973. The paper stated that a union "has no place at Beth Israel Hospital," that the "disruptive activities of the union organizers demonstrate their lack of true concern for both B. I. patients and employees," and that "the Union's primary concern today is [with] . . . dues." 223 N.L.R.B. at 1198. The Supreme Court alluded to these hospital statements, also. 437 U.S. at 491.

84. 437 U.S. at 491.

ties.⁸⁵ If this balancing process were used in *Beth Israel*, it was not identified as such in any of the three opinions; yet, it may have been crucial.

Along with the unique physical situation of the hospital and the intangible, inferential characteristics present, behavior of the litigants affected their case; the hospital argued its case poorly, and the union acted impeccably. The basic thrust of the hospital's argument was to attack the Board as having ignored congressional policy, as having exceeded its area of expertise, and as having made its decision irrationally without sufficient evidence.⁸⁶ Repeatedly, the courts referred to the poor quality of the hospital-petitioner's contentions. The court of appeals characterized the hospital's argument concerning possible patient anxiety as "unduly speculative."⁸⁷ The majority opinion of the Supreme Court noted that the record before the Board was devoid of any evidence that would contradict the Board's decision⁸⁸ and further commented on the lack of presentation of evidence by the hospital, which was in a most favorable position to provide it.⁸⁹ Even the concurring opinion of Justice Powell, which was especially sensitive to the hospital's position, noted the general nature of its arguments.⁹⁰ If the hospital had been more diligent in supporting its legitimate concern for patient anxiety during a union organizational period with objective data and substan-

85. In *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), an employer changed his seniority rules extending a 20 year seniority credit to working employees while some of his other employees were on strike. The Supreme Court ruled that proof of an antiunion motivation, by specific evidence or by inferences drawn from employer conduct, may make unlawful certain employer conduct which would in other circumstances be lawful. Even if all things are essentially equal then, which they were not in *Beth Israel*, an employer's motivation, which can be inferred from his conduct, can be the decisive element.

86. 437 U.S. at 498-501.

87. 554 F.2d at 481.

88. 437 U.S. at 495.

89. *Id.* at 502.

Especially telling is the fact that petitioner, under compulsion of the Massachusetts Labor Commission, permitted limited union solicitation in the cafeteria for a significant period, apparently without untoward effects, and that petitioner, who logically is in the best position to offer evidence on point, was unable to introduce any evidence to show that solicitation or distribution was or would be harmful.

Id.

90. "[The hospital] relied primarily on arguments with respect to hospitals in general. . . . A further weakness in petitioner's case is that it introduced no medical testimony that related such practices and needs to its cafeteria." *Id.* at 517.

tial proof, such criticism could not have been made.⁹¹ Also, the hospital's strongest argument, that determination of a patient's well-being is one for a medical doctor to make, should have been presented more forcefully and without a direct attack on the Board's expertise. Surely much voluntary testimony by doctors on this issue would have been available to the hospital.

In contrast to the inadequate presentation made by the petitioner is the excellent presentation by the union of its evidence and of its exemplary behavior throughout the organizational campaign. Only one individual was involved in the cafeteria distribution, a lab technician employed by the hospital for over one year. She asked each potential distributee whether he was an employee when not sure of his status and personally handed the literature to him, rather than leaving it at several locations while circulating among employees. She did not discuss the literature, and, when asked by nonemployees, she said she was distributing information for hospital workers. Finally, she reacted calmly and rationally to her oral and written rebukes.⁹² The unique circumstances that were present and the possible arguments that could be inferred, coupled with the experience of the union regarding conduct during initial campaigns, were no match for Beth Israel's weak attempt to argue patient-care responsibilities. Although these facts were before each decision-making body, they were only catalogued rather than given the significant emphasis they deserved.

Ignored or Misinterpreted Effects

That specific facts were not distinguished consistently at any decisional level may indicate that other critical factors will go unrefined in the special circumstances presented by health-care labor disputes. Effects that were not interpreted adequately, but that should have been refined in *Beth Israel* include the effect of allowing solicitation only, the effect of applying a precise definition of patient-care area, the effect of rejecting a property or economic

91. Counsel before the administrative law judge called the petitioner's concern "a sham." 223 N.L.R.B. at 1198.

Some proof certainly would have been available if the hospital had used the eight months in which its solicitation ban was lifted to gather data methodically on the issue. Some data was already available that patients became disturbed when Viet Nam sentiments were demonstrated in the cafeterias during those years of conflict. See *id.* at 1194.

92. *Id.* at 1195-96.

based rationale, and the effect of paying more respect to a totally new area of labor law.

First, the distinction between oral solicitation and distribution of printed matter could be vital for a concerned hospital. Solicitation leaves no "residue"; there is nothing in print to be left for an unintended audience to stumble upon, allowing reevaluation by an uninformed participant. The chance of an emotional discussion or provocation leading to something more serious is greater, however, because the contact made concerning the union is uniquely personal and on a one-to-one basis. If the person approached has just as strong and as vocal antiunion sentiments as the union solicitor has prounion feelings, then the potential for a verbal explosion and escalating confrontation is present.⁹³ Conversely, distribution of printed union literature occurs in a less direct manner, and the location can be more effectively controlled because the employer may limit such activity to an employee parking lot, an adequate lounge, or the time-clock area. The problem with distributed material, though, is that it often contains critical comments about the employer, and, if a union flyer is left on hospital property, it may be read by one not involved in the heat of the labor dispute—one without an opportunity to see the full range of charges and countercharges and thus unable to put the statements into proper perspective or to evaluate possible exaggeration. In this situation, the hospital's concern over "patient anxiety" is not just "speculative."

The court of appeals, in rejecting this very argument by the hospital, also rejected the inference that union solicitors may behave irresponsibly.⁹⁴ Rejection of this inference ingores that what is normal in day-to-day conversations is *not* the norm in a typical union organizational campaign. Although the courts have recognized this distinction, they have approved more extreme behavior on the part of the union than is normally allowed either because of the strong feeling for labor's rights in organizational efforts, as provided for in the NLRA, or because of simple necessity.⁹⁵ The law must take into

93. This possibility has been recognized often by decision makers. See, e.g., *McDonald's Corp.*, 205 N.L.R.B. 404 (solicitation might lead to the exchange of insults or worse).

94. 554 F.2d at 481.

95. See, e.g., *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962). This case involved statements made during an election campaign, which is usually the next phase in union activity after the organizational effort but very similar to it. The Supreme Court has further authorized the Board's approach in allowing wide latitude in behavior and in recognizing "repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth." *Linn v.*

account, then, that "absolute precision of statement and complete honesty are not always attainable . . . , nor are they expected by the employees."⁹⁶ What a court has come to see as normal, responsible behavior, given the circumstances, may not be what a hospital can tolerate.

Whether both solicitation and distribution are allowed, then, may make a significant difference to a hospital. If a court will use the "more finely calibrated scale" suggested by the majority in *Beth Israel* as necessary in the health-care field⁹⁷ and accommodate employer-employee rights with a more restrictive rule than *Beth Israel* details, then the concern of a hospital for its patients can be more easily alleviated. If the hospital could argue successfully for solicitation only and restrict the allowance of this activity by strict disciplinary rules for *any* disruptive behavior, the employer, the employee, and the patient should all benefit. This effect was overlooked by the Court, however, because, by treating solicitation and distribution identically, the best interests of the patient were not compared in each situation.

A second misconception by the Court concerns the effect of the interpretation of what constitutes a patient-care area. A hospital is a total environment, a place in which patients and their visitors and families should have freedom to move. A patient's room should not be his cell. In recognition of this possible confinement a hospital often provides areas for a coffee shop, a gift shop, a florist, a chapel, a library, vending machines, hair salons, and waiting-visting lounges. This type of an environment does not lend itself, as does a commercial store or an industrial plant, to a division into work and nonwork areas; a hospital is always "at work" where the mental and physical health of a patient is concerned.⁹⁸ Hospitals serve patients and relatives who "are under emotional strain and worry . . .

United Plant Guard Workers, 383 U.S. 53, 63 (1966). The defamation test is the strict standard of actual malice as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974).

96. 140 N.L.R.B. at 223.

97. 437 U.S. at 505. This concept was elaborated in *Hudgens v. NLRB*, 424 U.S. 507 (1976). "The locus of [that] accommodation [between the legitimate interests of both employer and employee] may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." *Id.* at 522. The degree of calibration should depend on the nature of the employer's business.

98. That a hospital's environment should not be so divided was noted in both concurring opinions. 437 U.S. at 508, 513.

[and]—irrespective of whether that patient and that family are labor or management oriented—need a . . . helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.”⁹⁹ This respect for the emotional well-being of the patient, his family, and other visitors must extend throughout the hospital to be meaningful.

Another significant factor overlooked completely was that “emotional well-being” is neither a consideration of percentages nor an argument of economics. Human injury, not profit loss, is involved. Justice Blackmun refers to the irony that the sensitivities of Hot Shoppe cafeteria patrons receive more deference than do those of the patients of Beth Israel.¹⁰⁰ That only 1.56% of the cafeteria’s patrons are patients is not significant. If one patient suffers emotional harm from one incident of irresponsible union activity or from one unreliable union report of “facts,” a restrictive solicitation-distribution ban is justified. The decisions not only looked at the wrong balance sheet (employer v. employee, rather than employer and employee v. patient), but also used incorrect accounting principles (economic rather than personal) in accommodating the interest.

What will and will not upset patients in general, and to what extent, is outside Board expertise. This decision, if one has to be made, is ultimately one for doctors to make. Just as a court will not substitute its opinions for the business judgment of a board of directors of a corporation, neither should a court make such a medical determination. By failing to recognize that a hospital cannot be divided simply into patient and nonpatient-care areas and by further analyzing the problem as one of percentages, the Court in *Beth Israel* failed to realize the gravity of the possible effect, an effect on an already troubled person, not on an economic, managerial interest.

An extension of this argument regarding the special circumstances present in the health-care field, which was also misinterpreted by the Court, concerns the very nature of a hospital itself. In its most general aspects, a hospital is an institution established for the control of disease and for the relief of the sick, which makes a hospital, whether proprietary or nonproprietary, a charitable institution. It promotes the general good, the patients’ welfare; needs of third

99. *Id.* at 509 (concurring opinion).

parties are the hospital's whole reason for existence. In this respect, what is a "managerial" interest takes on a different connotation, that of the patients' well-being. The Court dealt with the principle of accommodation, but accommodation of a property interest only. Although the opinion voiced concern for the welfare of patients and stated that this was a particularly "weighty" managerial interest,¹⁰⁰ its final analysis was based on the extent of the employer interest in controlling his property at the expense of the employee interest in union organization. Therefore, in dealing with the principle of accommodation between the employer-employees and with the concern for the patients' welfare in the hospital setting, the Court in *Beth Israel* focused only on the property interest of the employer.

This property rationale has no relevance to a charitable-purpose institution. Any analogy to rules in an industrial or commercial setting fails because the difference is one in kind. What *might* happen within a hospital is, in itself, significant, and not defectively speculative.

Counsel for the hospital, in his brief, lists "a sampling of the content of the union monthly leaflet," including, among other things, a complaint that there was so little linen that patients had to do without, allegations that the chest physical therapy department was understaffed during Sundays and evenings, that patients went without adequate nursing care for several months early in 1974, an article in the July edition alleging that an employee claimed she was totally ignored during her stay at the hospital as a patient giving birth, an item in the September issue commenting favorably upon an employee work stoppage in the main kitchen which included an inquiry as to whether the hospital administration really cared about patients and, if so, why were not good signs provided to direct patients out of the hospital and containing also the statement that "when weekend comes as far as dietary bosses are concerned, the patients can go to hell."¹⁰²

Decision-making bodies often must draw inferences. The Court easily could have inferred the impact of such seemingly authoritative

100. *Id.* at 508 (concurring opinion).

101. *Id.* at 492 (concurring opinion).

102. 223 N.L.R.B. at 1196. The statements were not commented upon by the administrative law judge; they were merely reported in a separate paragraph under "Discussion and Conclusions." They were never mentioned specifically by either the court of appeals or by the Supreme Court.

printed statements, critical of the hospital, on the emotions of a sick patient and his anxious friends and relatives. A patient is an especially vulnerable person; it is unlikely that he can be objective or rational, or that he should have to be, about statements attacking the environment upon which his life depends. Furthermore, to say that a particularly sensitive patient can avoid "the situation" by staying in his room¹⁰³ ignores the purpose of a hospital as well as the effect of such confinement on a patient. When statements cause harm to patients, discipline of the employees responsible is not an adequate remedy. Health considerations make prevention of the harm in the first instance critical.¹⁰⁴

Solicitation-distribution issues bring into focus differing levels of concern that exist for every hospital. It is clear what a hospital *should* accomplish: maintaining minimum standards of patient care. What it *wishes* to do may surpass these minimum requirements. For instance, a hospital may consider the majority of its employees as professionals and expect inhouse disputes to be kept completely within a professional realm of conduct. A liberal solicitation-distribution policy makes this unlikely. Also, what a hospital *must* do should be kept in mind; it has legal responsibilities to its patients while they are under its care. A hospital can be held liable for negligence; it is not immune from a patient's suit in tort for emotional harm. A liberal solicitation-distribution policy makes such litigation a constant concern.

Finally, the effect of the Board's quickness to apply precedent and the courts' acquiescence in that approach have not been fully realized. Hospital solicitation is a new area for the Board, and it should have considered carefully whether a need existed for new distinctions not required in other fields. One possible result of the Board's decision was best expressed by Justice Blackmun when he admitted

103. 437 U.S. at 502.

104. The court of appeals pointed out the "discipline" remedy: "[i]f . . . employee organizers deliberately distribute 'scurrilous' literature to patients or visitors, the hospital may well have cause to discipline such employees." 554 F.2d at 481 (citing as authority for this approach *NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953)). The "discipline" in that case was "firing". Such a solution ignores the facts that the harm has already been done, that the hospital may not want to dismiss a valuable employee, that what is "scurrilous" and what is "deliberate" behavior must be determined, and that this is a subjective inquiry. See note 97 *supra* & accompanying text for a discussion of the acceptance of this approach coupled with a narrow solicitation-only rule, in preference to a broad, *Beth Israel* solicitation-distribution allowance.

that the courts could now take health-care facilities "further down the open-solicitation road" on the authority of *Beth Israel*.¹⁰⁵ When the Board was first faced with problems of union elections, preemption, or retail merchants' work areas, it went slowly, making narrow holdings, identifying their scope, and establishing precedent over time.¹⁰⁶ Board expertise in labor relations could cause a blindness to other, equally significant, nonlabor-relations facts, which makes a "go slow" approach necessary when initial decisions are made in any new area. Such a "go slow" approach should have been followed in regard to labor disputes in the health-care field.

The ironic result of each of these effects being ignored or misinterpreted by the Board and the courts is that the buttressing rationale for all labor law decisions—that the purpose of the act or the purpose of the amendment be effectuated—is frustrated. The Supreme Court gave the purpose of the 1974 Health Care Amendments¹⁰⁷ as a basis for the *Beth Israel* decision; but by affirming the Board's decision, the Court thwarted what the amendments were trying to accomplish: the extension of protection of the NLRA to nonprofit hospitals so that union organization there could be nondisruptive.¹⁰⁸

BETH ISRAEL: AFTERTHOUGHTS

Because of the peculiar facts, the behavior of the participants, and the presentation of the case, the holding of *Beth Israel* could not have been otherwise unless each decision-making body had stepped outside of its role as the neutral enforcer of federal labor law policy and adopted the role of an advocate for the employer. The same decision, however, could have been cast in different language and supported by a more appropriate rationale. Alternatively, the Court could have given no explanation at all, which is what it has done in the past when confronted with a correct decision inappro-

105. 437 U.S. at 509 (concurring opinion).

106. Election precedent was built up in cases as *NLRB v. Tower Co.*, 329 U.S. 324 (1946); *General Elec. Co.*, 106 N.L.R.B. 364 (1953); *Goodyear Tire & Rubber Co.*, 138 N.L.R.B. 453 (1962); and *Bekins Moving & Storage Co.*, 211 N.L.R.B. 138 (1974).

Preemption precedent includes *Thornhill v. Alabama*, 310 U.S. 88 (1940); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53 (1966); and *Hudgens v. NLRB*, 424 U.S. 507 (1976).

For precedent in the area of retail merchandising, see note 41 *supra* & accompanying text.

107. 437 U.S. at 496-97.

108. See, e.g., Pointer, 1974 *Health Care Amendments to the National Labor Relations Act*, 26 LAB. L. J. 350 (1975).

priately reached. In such cases the Court has, in effect, authored a "concurring opinion" to the previous decision by stating, for example, "[w]e affirm the judgment below, but, with respect to [a certain] question . . . [we affirm] on grounds which may differ from those of the Court of Appeals."¹⁰⁹ This should have been the approach taken by the Supreme Court in *Beth Israel*, rather than leaving intact the inappropriate rationale of the case.

If the Court later objects to the path that subsequent hospital-solicitation cases are taking following the precedent of *Beth Israel*, it can note distinguishing facts or reverse itself. If simply noting distinguishing facts is deemed insufficient,¹¹⁰ the Court can model its decision on the technically perfect "reversal opinion" written by Justice Brennan in *Boys Market*.¹¹¹ Had Justice Brennan's opinion in *Beth Israel* been this lucid when that case was before the Court, he could have avoided having the Court "decide the case twice," as it inevitably will have to.

One commentator at a labor law convention held shortly after *Beth Israel* was decided described the Court as "uneasy with its decision."¹¹² For this reason, the Supreme Court built an element of

109. See, e.g., language from *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 544 (1964) (defining successor-employer's duty to arbitrate under the collective bargaining agreement between the original employer and the union).

110. For example, the importance of distinguishing facts was noted in *NLRB v. Burns Int'l Security Serv.*, 406 U.S. 272, 274 (1972) (successor-employer's duty to bargain based on the two specific facts that it had voluntarily inherited a bargaining unit that was largely intact and one that had been certified within the past year; these facts were identified, discussed as relevant, and then singled out as being clearly the basis for the holding).

111. *Boys Mkts., Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), *rev'g* *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962) (holding that the Norris-LaGuardia Act does *not* bar a federal district court from issuing injunctive relief against a strike called in violation of an arbitration clause in a collective bargaining agreement). The opinion begins with a definite statement of what has been wrong with the decision it is now overruling, proceeds with why and how the problems developed, concludes with a holding spelling out what it is saying, "[o]ur holding . . . is narrow," and what it is not, "[n]or does it follow from what we have said that . . .," and gives concrete examples, "the following principles [are for] the guidance of the district courts." 398 U.S. at 253-54 (Justice Brennan was the author of both the *Boys Markets* and the *Beth Israel* decisions).

112. Address by Stephen S. Rappoport, Eighth Annual Labor Law Conference of the Virginia Bar Association (October 9, 1978). Mr. Rappoport is an editor of the *Labor Relations Reporter*, Bureau of National Affairs, in Washington, D. C.. He spoke at the conference held in Virginia Beach, Virginia, giving an analysis of the Supreme Court's 1978 labor law decisions. *Beth Israel* was the lead case of his address, and his initial comment on the case was that one could not "see the law through the facts." He concluded his cogent examination with, "While the Court's decision endorses the Board's *Republic Aviation* approach, that is about all one can say in terms of the law—until the Court decides the next hospital case."

flexibility into its opinion: it repeated the "continuing-responsibility" warning the court of appeals directed to the Board; it cited *Universal Camera's* test for court intervention, which is only for "gross misapplication" of standards; and it concluded with a reference to two recent cases in which the Supreme Court again recognized "the authority of the Board to modify its construction of the Act in light of its cumulative experience."¹¹³

Moreover, the Board itself, with time, should become more sensitive to hospitals' special problems as its decisions grow from the infancy of its recently acquired jurisdiction.¹¹⁴ Likewise, hospitals will become more sophisticated in the techniques of dealing with unions and more adept at arguing administrative law cases before a national board. Accordingly, the rationale of *Beth Israel* will have to be modified, clarified, or distinguished, as deemed necessary under the changing circumstances.

CONCLUSION

The boundaries set by *Beth Israel* for health-care, solicitation-distribution precedent rested on unemphasized facts and their misinterpreted results. The impact of *Beth Israel* is thus unclear; it will depend upon whether the flaws in this decision are rectified. One is reminded of the law school maxim, "easy cases make bad law," as this unique case may have made "bad law." The Court might have been more successful with a difficult case. *Beth Israel* presented a combination of circumstances whose cumulative effect could not have supported a different result. This was so obvious, so "easy," that the numerous distinctions and many special facts, when not emphasized or, worse, when misinterpreted, produced "bad law" or, equally serious, the possibility for bad application of "good law."

The Court failed to see the significance of *Beth Israel* when deciding the case. The solution will have to come in a subsequent hospital-solicitation case in which the Court can make clear how unique *Beth Israel* was. Although *Beth Israel* does lend itself to a distinction based on the precise facts involved and easily can be distinguished from a more typical hospital-solicitation case, the concern is that it will not be so distinguished. Meanwhile, *Beth Israel* stands "As We See It."

F.H.R.

113. 437 U.S. at 508.

114. See note 3 *supra* & accompanying text.