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THE NATIONAL LABOR RELATIONS BOARD AND NONPROFIT CHARITABLE, EDUCATIONAL, AND RELIGIOUS INSTITUTIONS

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INTRODUCTION

This paper will not present or argue a position for or against unionization of employees of church-related institutions. The decision on whether the church in America should encourage, discourage, or remain neutral regarding the unionization of its employees is essentially a management one and must be rendered by the church's managers, not its legal counsel. Rather, this paper will present some of the legal principles which govern unionization in American society. For whatever decisions church management may reach with respect to unionization, we as lawyers will be called upon to implement them. This is a task which is largely new to Diocesan attorneys. Indeed, it is largely new to the law itself because until recently church-related institutions have only infrequently been the object of union interest and thus, there is very little learning on the matter.

The National Labor Relations Board is the single most important institution governing labor relations in the United States. Many states, such as Illinois, do not even have a state labor law. Therefore, I will discuss the history of the National Labor Relations Board's policies regarding church-related institutions. I will then touch on some of the recent experiences which we in Chicago have had with the NLRB and attempt to draw some conclusions.

THE NATIONAL LABOR RELATIONS BOARD

In 1935, the U.S. Congress enacted the National Labor Relations

Act—popularly known as the “Wagner Act.” This Act with one major amendment in 1947 known as the “Taft-Hartley Act” has set the pattern for the federal regulation of collective bargaining. Some salient features of the Wagner and Taft-Hartley Acts are worth noting by way of introduction.

First, a three-man National Labor Relations Board was established to administer the new law. The Board’s membership was increased to five in 1947.

Second, section 9 of the Act established procedures whereby the Board would conduct elections among groups of employees to ascertain whether or not they wished to be represented by a union for collective bargaining purposes, and if so, to determine whom they wished to represent them. In order to invoke these election procedures, a labor organization has to demonstrate to the NLRB that at least thirty per cent of the employees in the proposed bargaining unit wish to be organized. This demonstration is commonly referred to as a “showing of interest.”

If at least 30 percent of the employees in the proposed unit show interest in having a union, the Board will entertain a petition for election. The employer can then either consent to the Board’s jurisdiction or challenge it. If the employer consents to jurisdiction, there will be a determination—including, if necessary, a hearing—as to what constitutes an appropriate unit or units for collective bargaining. If the employer does not consent to an election, there will be a determination—including, if necessary, a hearing—on whether or not the National Labor Relations Act has granted the NLRB jurisdiction over the employer in question; and if the Board has statutory jurisdiction, whether or not as a matter of policy, it will exercise that jurisdiction over this particular employer.

After it has been established that the NLRB will exercise jurisdiction over a given employer and after the appropriate collective bargaining unit has been defined, the Board will supervise an election among employees in that unit to ascertain their desires on unionization.

The National Labor Relations Act exempts certain employers from the NLRB’s jurisdiction—for example, all units of government. In addition, within the context of the Act, the Board has established certain standards of its own to guide its assertion of jurisdiction (or refusal to do so) among those classes of employers which are not statutorily exempt. The majority of these standards relate to the gross revenues of the employer and the level of its purchases and sales from out of state. Certain of these standards relate to the nonprofit or other special status of the employer. We will further discuss some of these standards in this paper. At this point, however, we should note that the overall jurisdiction of the Board is circumscribed by the constitutional restrictions on the federal government’s power to regulate commerce.

Third, section 8 of the Wagner Act defined certain employer activity

as being "unfair labor practices." In 1947 the Taft-Hartley Act went a step further and defined certain union activity as unfair labor practices. Section 10 of the Act lays down the procedure for adjudicating disputes over unfair labor practices.

In sum, the NLRB is a quasi-judicial body which administers the NLRA principally by adjudicating disputes between employers and employees. On rare occasions, the Board also promulgates rules on related issues. Since the NLRB is a quasi-judicial body and not a court, it is not strictly bound by court doctrines, such as *stare decisis* and *res judicata* which to some extent ensure the consistency of court decisions. And while the Board is subject to limited judicial review pursuant to section 10 of the Act, it is cumbersome to obtain such review and it seldom results in the overturning of Board decisions.

THE NLRB AND NONPROFIT CHARITABLE, EDUCATIONAL, AND RELIGIOUS ORGANIZATIONS

We now turn to a discussion of the NLRB's role vis-a-vis charitable, educational and religious organizations. As I noted earlier, the statutory grant of jurisdiction to the NLRB relates to all disputes "affecting commerce."¹ Nonetheless, the Board has never exercised the full breadth of its jurisdiction. One of the classes of employers over which it has traditionally declined jurisdiction is that of nonprofit charitable, religious, and educational organizations.

In justifying this policy regarding such employers, the Board has cited the legislative history of the 1947 amendments to section 2(2) of the Act. This history warrants a brief word.

Prior to 1947 there was no statutory exemption whatsoever for nonprofit employers. In 1947 there was a move to grant a legislative exemption for:

[A]ny corporation, community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation.²

This move ultimately failed and instead an exemption from NLRB jurisdiction was granted only to nonprofit hospitals. The House Minority Report regarding this exemption has been used by the Board as a justification for its declining jurisdiction over other nonprofit entities. The relevant portion of this Report reads:

¹ National Labor Relations Act §§ 9(c)(1), 10(a), 29 U.S.C. §§ 159(c)(1), 160(a) (1970).

² H.R. REP. NO. 245, 80th Cong., 1st Sess. 47 (1947).

The other nonprofit organizations excluded under the House Bill are not specifically excluded in the Conference agreement, for only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act.³

Although the accuracy of the Minority Report's description of Board action prior to 1947 is subject to substantial doubt,⁴ since that time the Board has used the Report as authority for declining jurisdiction over a number of nonprofit charitable, religious, and educational institutions. Thus, in a landmark decision handed down in 1951, the Board declined jurisdiction over private universities (*Columbia University*, 97 N.L.R.B. 424, 427 (1951)); in doing so, the Board said:

Under all the circumstances, we do not believe that it would effectuate the policies of the Act for the Board to assert its jurisdiction over a nonprofit, educational institution where the activities involved are noncommercial in nature and intimately connected with the charitable purposes and educational activities of the institution.

Following *Columbia*, it declined jurisdiction over a church operated radio station in 1954 (*Lutheran Church, Missouri Synod*, 109 NLRB 859 (1954)); over the YMCA (*YMCA of Portland*, 146 N.L.R.B. 20 (1964)) and a research institute in 1964 (*University of Miami, Institute of Marine Science Division*, 146 N.L.R.B. 1448 (1964)); and over a nonprofit book exchange in 1967 (*U.S. Book Exchange*, 167 N.L.R.B. 1028 (1967)).

During the same period the Board did assert jurisdiction over some nonprofit organizations.⁵ The distinguishing principle purportedly was that the activities of these organizations were commercial in character, whereas the activities of the entities over which it declined jurisdiction were not. That line, however, is very difficult to perceive.

This history was disrupted in 1971 when the Board reversed its decision in *Columbia University* and asserted jurisdiction over Cornell and Syracuse Universities. (*Cornell University*, 183 N.L.R.B. 324 (1970)); subsequently, the Board adopted a rule, pursuant to which it would assert jurisdiction over private universities that had annual gross revenues in excess of \$1 million. (29 C.F.R. § 103.1). This \$1 million standard was also applied to private secondary schools by Board decision. (*Shattuck School*, 189 N.L.R.B. 886 (1971); *Windsor School Inc.*, 200 N.L.R.B. No. 163 (1972)).

³ H. CONF. REP. No. 510, 80th Cong., 1st Sess. 32 (1947).

⁴ Sherman & Black, *The Labor Board and the Private Nonprofit Employer: A Critical Examination of the Board's Worthy Cause Exemption*, 83 HARV. L. REV. 1323 (1970).

⁵ See, e.g., *Sunday School Board of the Southern Baptist Convention*, 92 N.L.R.B. 801 (1950); *Woods Hole Oceanographic Institution*, 143 N.L.R.B. 568 (1963).

After *Cornell* the Board's relatively consistent prior policy of declining jurisdiction over nonprofit entities began to fade. A few of the post-*Cornell* cases warrant special mention.

In 1971 the Board asserted jurisdiction over two childrens' homes. These homes were not orphanages in the classical sense, but institutions for emotionally disturbed children. At least some of the children had parents who could pay for part of the services they received; the majority of the children were supported by public funds. (*The Children's Village, Inc.*, 186 N.L.R.B. 953 (1970); *Jewish Orphan's Home of Southern California*, (191 N.L.R.B. 32 (1971)). The Board held that notwithstanding the fact that these institutions were nonprofit, their revenues were substantial and to effectuate the purposes of the NLRA it had to assert jurisdiction over them.

Three years later the Board expressly overruled these cases and declined jurisdiction over a substantially similar institution (*Ming Quong Children's Center*, 210 N.L.R.B. No. 125 (1974)). In this case the Board confessed:

Upon further reflection, therefore, we have concluded that we erroneously departed, in *Children's Village* and *Jewish Orphans Home*, from our congressionally approved general practice of declining jurisdiction over nonprofit charitable organizations without having had the special kind of justification relied upon in *Cornell*. Applying the Frankfurterian philosophy to which we have had previous occasion to refer that "Wisdom too often never comes, and so one ought not to reject it merely because it comes late," we recognize the error in this departure from previous practices and shall act to correct it herein.

Thus, on May 24, 1974 the matter appeared to be definitively settled once again—the NLRB would not assert jurisdiction over nonprofit organizations unless they had a massive impact on commerce similar to that of large private universities. Indeed, the Board repeatedly reaffirmed this return to its former consistent policy in the days and months following *Ming Quong*.

On May 29, 1974, five days after *Ming Quong*, the Board declined jurisdiction over two Jewish religious schools. (*Board of Jewish Education of Greater Washington, D.C.*, 210 N.L.R.B. No. 150 (1974); *Association of Hebrew Teachers of Metropolitan Detroit*, 210 N.L.R.B. No. 132 (1974)). On June 19, it declined jurisdiction over a nonprofit institution for treatment of emotionally disturbed children. (*West Oakland Home, Inc.*, 211 N.L.R.B. No. 118 (1974)). On July 11, it declined jurisdiction over a nonprofit institution for treatment of multi-handicapped children. (*Crotched Mountain Foundation*, 212 N.L.R.B. No. 58 (1974)). On August 13, it declined jurisdiction over a nonprofit orphanage. (*Mission of Our Lady of Mercy*, 212 N.L.R.B. No. 131 (1974)). On September 25, it declined jurisdiction over a nonprofit school for the deaf and blind. (*Overbrook School for the Blind*, 213 N.L.R.B. No. 82 (1974)).

At the same time the Board also seemed to be reevaluating its decisions in *Cornell*, *Shattuck School*, and *Windsor School* with respect to private educational institutions generally, for on June 10 it declined jurisdiction over Howard University. (*Howard University*, 211 N.L.R.B. No. 11 (1974)). Howard University received at least half its funds from the federal government (the Department of Health, Education and Welfare), which also exercised general control over the University's labor relations. The Board reasoned that, as a result, Howard's employees were very much like government employees who were exempt from its jurisdiction; and this made it virtually impossible for the Board to control Howard's labor relations without coming into conflict with the Department of Health, Education and Welfare.

Later, on September 23, the Board promulgated a proposed rule which would have exempted all private secondary elementary and preschools from its jurisdiction.⁶ Astute observers of Board activity opined that the rule would certainly be adopted because the Board seldom adopted rules apart from the decision of cases and would not have promulgated the rule had it not already decided to adopt it.

As we all know, on December 13, 1964, the Board declined to adopt the rule exempting private schools from its jurisdiction and there began an inexplicable reversal in the trend which sprang from *Ming Quong*. Thirty-nine comments were filed on the proposed rule. Organized labor was against it, the private schools were for it; but that could not have come as a surprise to the Board. Among the private schools, the Catholics' comments were most strongly in evidence. But that could not have come as a surprise because the Catholic schools' statistical majority and financial plight were also well known. The Board gave no reason for its not adopting the rule.

Then, on February 10, 1975, the Board asserted jurisdiction over the Headstart and day care centers operated by the Lutheran Welfare Services of Illinois, (*Lutheran Welfare Services of Illinois*, 216 N.L.R.B. No. 96 (1975)). This was a perfect case for application of the governmental nexus rule enunciated in *Howard University*, for the Headstart and day care centers were fully funded by the federal government. The Lutheran Welfare Services was reimbursed by the government in accordance with strictly prescribed rates and the program was operated in accordance with detailed federal guidelines. The Lutheran Welfare Services merely contributed its expertise and voluntary assistance. As a matter of law, it could not turn a profit; and this was enforced by periodic audits. Signally, while the NLRB could exercise some control over the Lutheran Welfare Services, it could not control the congressional appropriation which funded the program or HEW's guidelines. Thus, increased labor costs generated by union

⁶ 39 Fed. Reg. 185 (1974).

activity would result in either an unexpected financial burden to the non-profit employer or discontinuance of the program if that burden could not be shouldered. In addition, conflict over HEW guidelines seems inevitable.

It is noteworthy that in reaching its decision in *Lutheran Welfare Services* the Board brushed aside an "all fours" February 21, 1974 decision in which it declined jurisdiction over day care centers for preschool children operated by the Urban League in Pittsburgh. (*Pennsylvania Labor Relations Board*, 209 N.L.R.B. No. 33 (1974)). It is also noteworthy that within days of the *Lutheran Welfare Services* decision petitions were filed requesting that the Board assert jurisdiction and conduct elections among the employees of virtually every other Headstart and day care center operated by a nonprofit entity in the Chicago area.

Future NLRB action regarding private schools and nonprofit entities that operate government programs was signaled in two decisions which followed on the heels of *Lutheran Welfare Services*. The first of these cases is well known to all of us—*Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools*, 216 N.L.R.B. No. 54 (1975)—in which the Board asserted jurisdiction over church-affiliated parochial high schools.

The second case was *The Catholic Bishop of Chicago, a corporation sole (Archdiocese of Chicago school lunch program)*, Case Nos. 13-RC-13574 and 13-RC-13587, in which Region 13 asserted jurisdiction over a lunch program administered by the Archdiocese of Chicago under the National School Lunch Act. As in *Lutheran Welfare Services*, the lunch program is virtually fully funded from governmental sources, is subject to rigid guidelines promulgated by the Department of Agriculture and various state education agencies and is by law forbidden to turn a profit.

At approximately the same time the Board applied the governmental nexus rule enunciated in *Howard*—and which would have snugly fit the facts in *Lutheran Welfare Services* and *Archdiocese of Chicago school lunch program*—to decline jurisdiction in two other cases.

The first of these cases is *Rural Fire Protection Company*, 216 N.L.R.B. No. 95 (1975), which was handed down four days after *Lutheran Welfare Services*. In *Rural Fire Protection Company*, the city of Scottsdale, Arizona, contracted with an outside firm which provided "fire suppression, fire prevention, fire investigation, security, first aid, rescue and ambulance services" to municipalities, fire districts, businesses, and individual subscribers in the state of Arizona. The Board declined jurisdiction because of the close relation between the city of Scottsdale—an exempt employer—and the outside contractor. Less than a month later, the Board also declined jurisdiction over a nonprofit nursing service organization for similar reasons. (*Toledo District Nurse Association*, 216 N.L.R.B. No. 130 (1975)).

It is difficult to explain the different treatment the Board has accorded *Lutheran Welfare Services* on the one hand and *Rural Fire Protection*

Company and *Toledo District Nurse Association* on the other. It is not even clear whether *Rural Fire Protection Company* is a profit or nonprofit entity. These last two cases, however, raise an important question.

On August 25, 1974, the statutory exemption for nonprofit hospitals was eliminated.⁷ As I noted earlier, the statutory history for the nonprofit hospital exemption is one of the chief authorities used by the Board to decline jurisdiction over nonprofit entities. Now that this statutory exemption has been eliminated, one might ask whether the impact of this authority has also been eliminated. For the present, *Toledo District Nurse Association* seems to have answered this question in the negative.

THE RELIGIOUS FACTOR

As was the case with nonprofit employers generally, prior to the 1970's the Board asserted jurisdiction only over those portions of church activities which were commercial in character. (*Sunday School Board of the Southern Baptist Convention*, 92 N.L.R.B. 801 (1950)). In *Southern Baptist*, for example, the Board asserted jurisdiction over bookstores operated by the Southern Baptist Church.

Later, in *First Church of Christ Scientist*, 194 N.L.R.B. No. 174 (1972), the Board asserted jurisdiction over that portion of the Christian Science Church which operated the *Christian Science Monitor*. The Church had contended that the assertion of jurisdiction would violate first amendment proscriptions against entanglement between the government and religion. The Board brushed aside this contention and reverted to Board doctrine—as opposed to court made constitutional doctrine—as authority for its assertion of jurisdiction:

Although it is the Board's general practice to decline jurisdiction over nonprofit religious organizations, the Board does assert jurisdiction over those operations of such organizations which are, in the generally accepted sense, commercial in nature. . . . [W]e conclude that the Employer is engaged in substantial enterprises which are in the normally accepted sense commercial and that these operations are in commerce and affect commerce.

Thus, the Board has yet to recognize the entanglement tests of *Walz*⁸ and *Lemon*.⁹

The history of the Board's treatment of church activities has reflected the same turmoil in more recent years as that of its treatment of nonprofit institutions generally. For example, the Lutheran Welfare Services is a religious organization and the Headstart and day care centers operated by it were nonprofit and noncommercial in character, yet the Board asserted

⁷ Pub. L. No. 93-360 (July 26, 1974).

⁸ *Walz v. Tax Commission*, 397 U.S. 664 (1970).

⁹ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

its jurisdiction over them invoking the often forgotten *nostrum* that if the Board asserts jurisdiction over employers involved in a certain activity,¹⁰ it will not discriminate among those employers on the basis of whether or not they are nonprofit. (*Drexel Home, Inc.*, 182 N.L.R.B. 1045 (1970)).

The *Archdiocese of Baltimore* case raises this and a far more important question in the religion area. In response to the Archdiocese's contention that its high schools were religious in character and therefore should not be subject to the Board's jurisdiction, the Board responded:

[T]he Board's policy in the past has been to decline jurisdiction over similar institutions only when they are completely religious, not just religiously associated and the Archdiocese concedes that instruction is not limited to religious subjects. That the Archdiocese seeks to provide an education based on Christian principles does not lead to a contrary conclusion. Most religiously associated institutions seek to operate in conformity with their religious tenets.

This characterization, of course, is a bit inconsistent with Supreme Court holdings that parochial schools are too religious to be the recipients of public assistance.

The holding that religious institutions must be "completely religious" to be exempt is likewise inconsistent with Board precedent.

The two most recent Board decisions to which it could have been referring as authority for this rather casual approach to the religion issue are *Board of Jewish Education of Greater Washington, D.C.*, 210 N.L.R.B. No. 150 (1974) and *Association of Hebrew Teachers of Metropolitan Detroit*, 210 N.L.R.B. No. 132 (1974). Both of these organizations were involved in Jewish studies, but they taught Jewish language and culture as well as religion. Thus, the Board was really breaking new ground and departing from earlier precedents in *Archdiocese of Baltimore*. This in turn casts doubt on the current vitality of the line of cases in which the Board has declined jurisdiction over the noncommercial aspects of religious organizations.

There is one area in which the NLRB may retain some consistency in its treatment of the religious factor—the religious cemetery. Only one religious cemetery case has come to the Board's attention in the recent past. (*First Congregational Church of Los Angeles*, 189 N.L.R.B. No. 117 (1971)). In that case, the Board asserted jurisdiction because the church-affiliated cemetery in question was open to the general public and thus was commercial in character. Nonetheless, in *Catholic Cemeteries, Archdiocese of Los Angeles*, 21-RC-11683, and *Catholic Cemeteries, Diocese of Erie*, at least two regions have declined jurisdiction over Catholic cemeteries because they are not open to the general public, and thus are not commercial in nature.

¹⁰ See *Young World*, 216 N.L.R.B. No. 97 (1975).

The Board has been subject to stiff criticism for the heavy handed way in which it has applied industrial labor criteria to secular educational institutions.¹¹ Indeed, it has been contended that Board action with respect to such institutions is significantly altering their internal structures.¹² It remains to be seen what effect NLRB jurisdiction will have on religious education and religious institutions generally.

CONCLUSIONS

First, as a result of the *Archdiocese of Baltimore* case, we can expect an increased effort to unionize church-affiliated schools and school systems.

Second, churches are deeply involved in administering government funded social and educational programs. This involvement has cost churches the use of buildings and organizational expertise, but as yet, has not in general required substantial outlays of funds. As a result of the policies enunciated in the *Lutheran Welfare Services* case, substantial unanticipated financial obligations as well as governmental and political entanglements over appropriations and program guidelines may be now imposed on churches.

Third, whatever disposition the NLRB makes of the jurisdictional issues I have discussed today, the legal problems attendant to unionization under the labor law of certain states, or in the absence of any labor law at all, will also have to be considered by Diocesan attorneys.

Finally, these jurisdictional problems are only threshold questions in the vast body of federal labor law which is being invoked regarding church-affiliated institutions. Thoughtful and informed legal planning regarding this entire body of law is necessary if we are going to marshal it to maintain the religious character of these institutions and achieve the goals established by church management.

¹¹ Kahn, *The NLRB and Higher Education; The Failure of Policymaking through Adjudication*, 21 U.C.L.A.L. REV. 63 (1973); cf. Finkin, *The NLRB in Higher Education*, 5 TOLEDO L. REV. 608 (1974).

¹² Kahn, *The NLRB and Higher Education: The Failure of Policymaking through Adjudication*, 21 U.C.L.A.L. REV. 63 (1973); cf. Finkin, *The NLRB in Higher Education*, 5 TOLEDO L. REV. 608 (1974).