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Recommended Citation

Gerald C. Tobin (1978) "NLRB and Parochial Schools," *The Catholic Lawyer*: Vol. 23 : No. 3 , Article 11.

Available at: <https://scholarship.law.stjohns.edu/tcl/vol23/iss3/11>

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NLRB AND PAROCHIAL SCHOOLS

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There can be no question that the problem of the relationship between the National Labor Relations Board and the Catholic Church's parochial schools is one of the most difficult ever faced by the Church even in this time of difficult problems. It encompasses many of the conflicts and controversies encountered by the Church in recent years: the role of the Church in social action, the place of the laity in the Church, and the involvement or "entanglement" by government in Church affairs. Because of the complexity of the problem, there are no simple solutions. Whatever the final outcome, some elements in the Church are going to be disappointed and discontented.

The purpose of this paper is twofold:

- (1) To explain why the National Labor Relations Board took jurisdiction over Catholic schools; and
- (2) To explore the problems that developed from this jurisdiction.

THE JURISDICTIONAL PROBLEM

On April 15, 1974, the Baltimore Archdiocesan Lay Teachers Organization filed a representation petition with the National Labor Relations Board for a unit of "all lay personnel faculty members" in five archdiocesan high schools in the Baltimore area. A hearing was held on the petition and, on January 21, 1975, the Board ordered that the parties proceed to an election. A month later an election was held which the union won 54 to 46, with one challenged ballot.

This case, *Roman Catholic Archdiocese of Baltimore*, 216 NLRB No. 54 (1975), was the first occasion for the Board to rule in a representation proceeding that it had jurisdiction over Catholic parochial schools. The Board found that the archdiocesan schools involved had an effect on commerce as their combined budgets were above \$3,000,000 and out-of-state purchases were greater than \$300,000. These totals easily met the discretionary guidelines for nonprofit educational institutions established by regulation.

The Archdiocese contended that the Board should not assert jurisdiction over these schools because of their religious nature. However, the Board ruled that its policy in the past had been to decline jurisdiction over similar institutions only when they were completely religious, not just religiously associated. The Board stated that the Archdiocese had con-

ceded that instruction in its schools is not limited to religious subjects. The fact that the Archdiocese seeks to provide an education based on Christian principles did not lead to a contrary conclusion since most religiously associated institutions seek to operate in conformity with their religious tenets.

To understand how the Board reached its decision in *Archdiocese of Baltimore*, the two elements of the Board's decision must be analyzed. The first element was that the diocesan schools were engaged in commerce. After the Taft-Hartley amendments of 1947 the Board refused jurisdiction over nonprofit enterprises because of the specific exception made in the law for nonprofit hospitals. *Columbia University*, 97 NLRB 424 (1951). However, the Board made it clear that this did not mean that they would not assume jurisdiction over commercial enterprises merely because they were conducted by a nonprofit corporation. *Sunday School Board of Southern Baptist Convention*, 92 NLRB 801 (1950).

Therefore, under the 1947 amendments the Board decided there was a difference between nonprofit organizations that were strictly nonprofit and nonprofit organizations that were engaged in commercial activities. The latter were engaged in commerce and the former were not.

However, in 1970, in *Cornell University*, 183 NLRB 329 (1970), the Board asserted jurisdiction over private universities and colleges and in the process overruled *Columbia*. The distinction between nonprofit and commercial enterprises became unclear since these universities, while large, did not perform commercial activities. The Board felt, however, that it could no longer ignore the impact on commerce of these large nonprofit institutions: "It is no longer sufficient to say that merely because employers are in a nonprofit sector of the economy, the operations of their employees do not substantially affect interstate commerce."

The most important aspect of the *Cornell* case was its rejection of the "commerciality" test. Thereafter, a nonprofit organization did not have to be engaged in commercial activities for the Board to take jurisdiction. The size and extent of its nonprofit activities alone were adequate. *Cornell* held that nonprofit institutions, while not commercial, are in commerce.

The Board recognized that such a broad theory would permit it to take jurisdiction over all nonprofit organizations. It therefore set out in 29 CFR 103.1 what it meant by its statement that the educational institutions had to have a "substantial effect on commerce." Such an institution was required to have a gross annual revenue of \$1,000,000.

The Board, however, did not restrict its jurisdiction, despite the wording of the regulation, solely to universities and colleges. Soon after *Cornell*, the Board assumed jurisdiction over nonprofit secondary schools. *Shattuck School*, 189 NLRB 886 (1971). It held that this type of school was sufficiently similar to a college to warrant assertion of jurisdiction under the *Cornell* standard. It also held that a similar school, which was profit-making, should be held to the same standard. *Windsor School*, 200 NLRB No. 163 (1972).

In subsequent cases the Board moved slowly away from the "substantial impact on commerce" it had found in *Cornell* and began to assume jurisdiction over all types and sizes of nonprofit institutions. The Board recognized jurisdiction over day care centers and institutions for troubled children that met the minimal requirements of the *Cornell* regulation.

By 1975 the Board was ready to assume jurisdiction over any nonprofit educational institution which met its standards, unless there was some other reason for declining jurisdiction. Such a reason was expressed in the second element of the Board's decision in *Archdiocese of Baltimore*. It was based on the religious nature of the educational institution.

In *Archdiocese of Baltimore*, the Board asserted that its policy was to reject jurisdiction only over completely religious institutions and not just those that were religiously associated. It is, however, not clear whether this was ever the policy of the Board. The Board's actual policy, even before *Cornell*, had been to ignore the fact of whether an employer is profit making or nonprofit. If it was to take jurisdiction, it would depend on the commercial nature of the employer and its total income, as explained above, not its charitable or religious nature. *Central Dispensary and Emergency Hospital*, 44 NLRB 533 (1942), *enforced*, 145 F.2d 852 (D.C. Cir. 1944), *cert. denied*, 324 U.S. 847 (1945). This view was repeated in *Drexel House*, 182 NLRB 1045 (1970), and again in *Carroll Manor Nursing Home*, 202 NLRB 67 (1972). In *Carroll Manor*, the employer was owned and operated by the Carmelite Sisters for the Aged and Infirm. It urged the Board to decline jurisdiction because it was a completely religious organization. The Board rejected this argument based on *Drexel House*, stating that an institution's effect on commerce is not measured by its "nonprofit status, its title, its religious affiliation or its occupants."

In *Board of Jewish Education of Greater Washington, D.C.*, 210 NLRB 1037 (1974), the Board was again faced with the question whether it should assume jurisdiction over a nonprofit, noncommercial religious organization. The employer provided after-school classes for the purpose of furthering Jewish education. The Board declined jurisdiction, stating:

We did not intend in *Cornell* to adopt a policy of asserting jurisdiction over institutions primarily religious and noncommercial in character and purpose, where educational endeavors are limited essentially to furthering and nurturing their religious beliefs.

Id.

In another case, *Association of Hebrew Teachers of Metropolitan Detroit*, 210 NLRB 132 (1974), the Board again declined jurisdiction as the employer was the operator of a nursery, an after-school elementary and a high school offering courses for college and graduate students for furthering an understanding of the Jewish religion and an appreciation of Jewish culture.

The distinction between the institutions in these cases and those in *Archdiocese of Baltimore* are abundant. They offered only after-school or

extra-school courses. They could not be said to constitute a system and their purpose was much more limited than the schools in Baltimore. But even in light of this, Member Fanning wrote a long dissent in *Association of Hebrew Teachers*, stating that the Board should take jurisdiction based on the monetary standards.

From these cases it appears that the Board will only reject jurisdiction over a religious institution where the operation of the institution is for strictly religious purposes and, more importantly, the effect on commerce is minimal. It is probably safe to say that arguing the nature or extent of religious atmosphere of an institution will have no effect on the Board if the institution meets the necessary monetary standards. The Board is simply uninterested in the religious aspect of an institution. It seems more likely that the Board will overrule its decision in cases such as *Board of Jewish Education* than reject jurisdiction over Catholic institutions that have at least some secular purpose and an impact on commerce.

THE CATHOLIC SCHOOL CASES

The lack of concern over the nature of religious institution schools is clear from the Board's decisions concerning parochial schools. In *Catholic Bishop of Chicago, a Corporation Sole*, 220 NLRB No. 63 (1975), the Board assumed jurisdiction over two minor seminaries in Chicago, granting a unit of all full-time and regular part-time lay teachers. In doing so, the Board declared that the schools were not seminaries but only college preparatory schools similar to those in *Shattuck*. The Board stated that only a portion of the senior class goes on to the major seminary and that the school has a substantial number of extracurricular activities similar to those conducted by other schools. In *Cardinal Timothy Manning, Roman Catholic Archbishop of Archdiocese of Los Angeles, a Corporation Sole*, 223 NLRB No. 198 (1976), the Board again stated that parochial high schools are not religious institutions intimately involved with the Catholic Church and that, since they are only concerned in part with religious instruction, it will not decline jurisdiction. It cited *Archdiocese of Baltimore*.

In *Archdiocese of Philadelphia*, 227 NLRB No. 177 (1977), this reasoning, which had previously only been applied to high schools (and minor seminaries), was extended to elementary schools. No distinction was made in the decision concerning the differences between these types of institutions. In the *Diocese of Fort Wayne-South Bend* case, 224 NLRB No. 165 (1976), the Board did not examine the religious argument at all, but merely repeated the earlier conclusions of *Archdiocese of Los Angeles*.

There are two other cases that deserve mention. In *Grutka v. Barbour*, 549 F.2d 5 (7th Cir. 1977), and *Caulfield v. Hirsch*, 410 F. Supp. 618 (E.D. Pa. 1976), the defendant dioceses attempted to attack the Board's jurisdiction before the administrative process was completed. In *Grutka*, the district court granted an injunction against the NLRB proceeding further in the matter until the Seventh Circuit had decided the *Catholic Bishop of Chicago* case. The election, however, was allowed to take place. The court

of appeals vacated the decision and ordered the district court to dismiss the action for lack of jurisdiction. The Supreme Court denied certiorari.

In the *Caulfield* case the defendant also received an injunction from the district court. In that case the appeals court refused to grant the NLRB's motion for summary dismissal. The intervention of Justice Brennan, however, allowed the Board to hold an election. The ballots were then impounded.

The full impact of these cases on the Board's claim to jurisdiction will not be clear for a number of months. What is evident now though is that the Board is prepared to make a serious effort to retain its jurisdiction over parochial schools.

THE UNIT QUESTION

Once the Board takes jurisdiction over an employer, it must then determine whether the unit sought by the petitioner is appropriate. The Board's policy is not that the unit has to be the most appropriate, only that it has to be an appropriate one. In all of the cases concerning parochial schools, the petitioning labor organization has requested a unit of lay teachers in a number of diocesan schools. The number of schools making up the unit has varied. In *Archdiocese of Baltimore*, the Board joined together five schools while in *Archdiocese of Los Angeles*, the Board joined twenty-six high schools for a unit. The only guiding principle appeared to be some nexus of control by the Archdiocese or Diocese.

The unit composition in the cases decided by the Board has usually been all full-time and regular part-time lay professional faculty members. In the *Archdiocese of Philadelphia*, regular part-time lay teachers, however, were excluded. In two other cases department chairmen were excluded and in two they were included. This also occurred with librarians and athletic directors. Head counselors have been excluded, as have been nurses, business managers and volunteers. Regular guidance counselors and physical education teachers will probably be included. In all the cases involving parochial schools, religious have been excluded from the unit.

THE STATEMENT OF PRINCIPLES

While the National Labor Relations Board has made its position concerning organization of parochial schools very clear, the Church is still wrestling with its stance. It has never taken a national position on the subject and each Ordinary has taken action as he sees fit.

At its February 1977 meeting, the Administrative Board of the United States Catholic Conference approved a statement of principle on Collective Bargaining that had been formulated by the Conference's Subcommittee on Teacher Organization. The purpose of the paper was to serve as a basis for consultation with interested parties. After the consultations, the Subcommittee has the hope of issuing either guidelines or guiding principles for administrators and other parties involved in collective bargaining.

The purpose of the Statement of Principles was not to form any conclusions but rather to open discussion on the Church's role in collective bargaining and its relationship with governmental agencies.

The statement is composed of two parts. One states that the Church strongly recognizes and has always recognized the self-determination rights of employees. This includes the right to bargain collectively and to pick the agency or organization to conduct such bargaining. The other states that the Church has the concomitant right and duty to protect the essential religious nature of its schools. Thus, if it feels governmental entanglement is harmful to this nature, then it must resist that governmental agency as far as the law allows.

As can be immediately seen, the real problem arises when these parts must be joined. At this time there is no clear indication of how this is going to be done. One important point to be made, though, is that these ideas are not mutually exclusive and that many effective collective bargaining arrangements are carried out without NLRB assistance. It is equally important to note that the Church should not be laid open to criticism because it conducts its labor management program in ways similar to other employers. If the Church is to be under the jurisdiction of the NLRB, it should be allowed to carry out its operation as other employers do. In many instances the unions want it both ways when they criticize the Church as an employer and then also decry its attempt to escape NLRB jurisdiction. The Church does not look upon itself as an ordinary employer and for these reasons rightfully seeks exception to the law. But if held to the same requirements as these employers, the Church has every right, even if not taken, to utilize the protections of law like every other employer.

CONCLUSION

It seems apparent that, unless there is a major reversal of thinking by the Board, and that possibility does not appear likely to be forthcoming, the Board will continue to assume jurisdiction over Catholic parochial schools. Arguments based on their religious nature will not have an effect on the Board. The only saving factor would be that a school or set of schools is too small to be considered in commerce.

The unit formation does not seem to be a major issue. The only area where decisions of the Board will require revision in structure of the Catholic school system is in the position of department chairmen. These individuals should be excluded. Of course, the question of religious in the unit still remains an issue.

As stated previously, we will have to wait to see the Court's reaction to this question. The denial of certiorari in the *Gary* case was not a major blow to this effort.

However, it is important to note that regardless of the decisions by courts on NLRB jurisdiction over Catholic schools, we are going to have to deal with unions and unionization. In one form or another they are going to be present in the Catholic school system. So it is essential that the

Church be prepared. In that regard, this organization has a special responsibility. With your help we would like to see a unified approach to collective bargaining. A model contract shall be written and made available for all schools. Contracts already in effect should be collected and made available to every Diocese. In addition, a corps of attorneys and experts in labor management relations who are also sympathetic with the needs of the Church and the teachers should be established to assist the various Dioceses in negotiating contracts and enforcing them.

With that, I close and I thank you for this opportunity to speak before you.

QUESTIONS AND ANSWERS

GEARY:

We will now entertain questions on the subject, if there are any.

QUESTION:

This is a more or less hypothetical question in that we do not actually have the problem at this time. You mentioned the inclusion of religious in the bargaining unit. Is that strictly at the option of the union or does the employer have something to say that it would not be appropriate without including them in there?

TOBIN:

Well, there are two ways to look at that. I was looking at it from the pragmatic level. It can also be seen legally. You can raise that point in a representational hearing. In other words, you have a hearing on the unit and you raise the question, "we don't think this is an appropriate unit without the religious in here." And then they have to decide that question. There is no question that you can raise that point. I was saying that I do not think the Board would grant such a unit where the union does not want it. If there is not a union which wants to represent them, they are not likely to place them in the unit as they feel that would effectively destroy the representation for everybody. You would have a unit that has dissention.

QUESTION:

I mean in the election itself. They may never win the election.

TOBIN:

Yes, that is true, and that is a strategy. If you can get them in the unit, you hope that they will vote for you. Now, I do not think they are going to vote for us. In the hospitals that has been true.

QUESTION:

The other thing is, if they are on a contract basis with a religious order, let us say for the Diocese, they would not be technically employees anyway, would they?

TOBIN:

Well, no, they would not. I have a problem myself from the theoretical point of view whether you would ever want them in a unit, even if you thought you could win with them in the unit. They are self-employed, so you have immediate tax problems. If you are saying they are in the unit, they become employees, and then what happens to their status as self-employed? I do not know, but I know that at a Health Care Facilities Conference at which Member Walthers was present, and this question came up on another issue, interns and residents are excluded from hospital units but are considered employees under the tax laws. The Board considered them students, but the Tax Code considered them employees and took taxes from them. Member Walthers said, "Well, that is IRS's problem, that is not the Board's problem." So they are not really concerned with the conflict, they will go ahead and do what they want to do.

WILLIAM J. O'CONNOR:

Well, gentlemen, I do not have a question of Mr. Tobin, but I do have a comment because I do not want any of you to leave here not knowing what the real issue is in this matter. Now, with due respect to Mr. Tobin, he has presented this as a labor case. I'm William J. O'Connor from the Diocese of Gary. I have been involved in this thing for two years, and I want to tell you what the issue is, and I think one way of doing it is to say to you that when the Lord said to the apostles, "Go ye therefore and teach ye all nations," he did not add and I repeat, "with the help or the assistance, or the supervision or the arbitration of the U.S. Government." Now, that is what the issue is here. The government has interfered with that God-given right of the Bishop and attempted to say when my Bishop Grutka can set the qualifications of teachers, or fire a teacher. The same thing has happened in Fort Wayne. Our priests have been subpoenaed, they have been cross-examined by attorneys and by people from the NLRB. Now, we think this is a terrible interference with our religious freedom under the First Amendment of the Constitution of the United States.

We do not think this is a labor case and in *Philadelphia* the judge of the district court has said that. We could not convince the Seventh Circuit Court of Appeals of that, but the judge in the *Philadelphia* case in the district court has said, "This is not a labor case, this is a constitutional law case." Now, Mr. Tobin has presented this outline here and I am not being critical, he did an excellent job on NLRB cases. But these are not what control this issue. What controls this issue are the cases of *Meek v.*

Pittenger, *Lemon v. Kurtzman*, and *Wisconsin v. Yoder*, constitutional law cases. That is what is going to determine whether the government can invade your church. And that is what is going on. Now, I've said my little piece and I've said it because I've been involved in this thing for so long, I did not want you to leave without knowing what the issue is. If you need any help or assistance in these matters, our briefs are on file, the *Philadelphia* briefs are on file, the *Chicago* briefs are on file, but I would urge each and every one of you as diocesan attorneys to make sure your Ordinaries know what the real issue is. It is not whether we ought to bargain with the teachers or things like that at all, there is no opposition in the Diocese of Gary to form a union among the teachers. The opposition is to the government coming in and telling us we have to hire and fire, we can do this and we can do that with a teacher or with a curriculum, or with a myriad number of things in our schools. That is what is at stake, there, gentlemen, and I think you for listening.

