

## National Labor Relations Board v. Catholic Bishop of Chicago

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# **NATIONAL LABOR RELATIONS BOARD V. CATHOLIC BISHOP OF CHICAGO**

JAMES E. SERRITELLA, ESQUIRE

As you know, prior to 1970 the National Labor Relations Board, very rarely asserted its jurisdiction over nonprofit, charitable and educational entities. Between 1970 and the present, the Board asserted jurisdiction over a variety of such employers—private universities, private secondary schools, private social service agencies, and church operated schools.<sup>1</sup> Throughout this period the Board rarely discussed the religious character of some of these entities, and never really discussed the religious issue in depth.<sup>2</sup> In fact, in 1975 when it asserted jurisdiction over the Quigleys, the Board failed even to cite a single constitutional precedent.<sup>3</sup> It was against this backdrop of utter insensitivity to the religious issue that *NLRB v. Catholic Bishop of Chicago*<sup>4</sup> was litigated. I believe that it was to this insensitivity that the U.S. Supreme Court was responding in its March 21 decision. I will briefly report on the case and its implications.

## SUMMARY OF CASE

The case dealt with two classes of employers: 1) Quigley North and Quigley South, the high school department of the Chicago minor seminary system; 2) five Catholic high schools in the Diocese of Fort Wayne-South Bend. The NLRB ignored the special religious character of these institutions, asserted jurisdiction over them, and ordered them to conduct representation elections. When the respective unions won the representation elections, the NLRB ordered the Catholic Bishop of Chicago and the

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<sup>1</sup> Heney M. Hald High School Ass'n, 213 N.L.R.B. 415 (1974); Shattuck School, 189 N.L.R.B. 896 (1971); Cornell Univ., 183 N.L.R.B. 329 (1970).

<sup>2</sup> *E.g.*, Cardinal Timothy Manning, 223 N.L.R.B. 1218 (1976); Roman Catholic Archbishop of Baltimore, 216 N.L.R.B. 249 (1975).

<sup>3</sup> Catholic Bishop of Chicago, 220 N.L.R.B. 359 (1975).

<sup>4</sup> 440 U.S. 490 (1979).

Diocese of Fort Wayne-South Bend to collectively bargain with the unions. The employers contested the legitimacy of these orders in the courts<sup>5</sup> and the U.S. Supreme Court ultimately set the orders aside. In setting aside the orders, the Court reasoned that it would not construe the National Labor Relations Act<sup>6</sup> (NLRA) to cover teachers at church-related schools because such coverage would entail inescapable conflicts and "serious First Amendment questions".<sup>7</sup> The clear implication is that, were the Court to have considered the matter, it would have found the NLRB's action unconstitutional.

#### DECIDED AND UNDECIDED ISSUES

The Court's narrow holding was that since the NLRB's assertion of jurisdiction raises serious constitutional issues, the Court must find a clear expression of affirmative intent by Congress to have teachers in non-public schools covered by the NLRA. The Court held such affirmative congressional intent was lacking and NLRA does not apply to teachers at church-operated schools. The question that immediately presents itself is whether the NLRA applies to nonteaching personnel at such institutions. The answer to this question is somewhat ambiguous. But exclusions in the NLRA are on the basis of employers, not employees,<sup>8</sup> and the Court's ruling was based on its construction of the NLRA. Thus, it appears that all personnel of church-related schools should be excluded.

Not surprisingly, the Court's opinion is entirely silent on the other classes of religious employers, such as social service agencies and child care institutions. They were not part of the case and their status under the NLRA is not affected.

Needless to say, since the Court's decision was based principally on its construction of the NLRA rather than the Constitution, the decision is not dispositive of the jurisdiction of state labor boards over church-operated schools. About fifteen states<sup>9</sup> have labor laws that require collective bargaining, at least to some extent.

Finally, while NLRB jurisdiction over church-operated schools has been defeated, all other labor issues, including collective bargaining itself, remain. Great legal skill will be necessary to carry out the directives of church management on these issues.

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<sup>5</sup> The U.S. Court of Appeals for the Seventh Circuit set aside the orders on Aug. 3, 1977. See 559 F.2d 1112 (7th Cir. 1977).

<sup>6</sup> 29 U.S.C. §§ 151-168 (1976).

<sup>7</sup> 440 U.S. 490 (1979).

<sup>8</sup> 29 U.S.C. § 152(2) (1976).

<sup>9</sup> States that have their own labor relations laws include: Colorado, Connecticut, Hawaii, Kansas, Massachusetts, Michigan, Minnesota, North Dakota, New York, Oregon, Pennsylvania, Puerto Rico, Utah, Vermont and Wisconsin. See 4 & 4A LAB. REL. REP.

*NLRB v. Catholic Bishop of Chicago*  
AND OTHER GOVERNMENT REGULATION

Perhaps the most significant aspect of the Court's treatment of the entanglement doctrine is that it did not really treat it at all. The doctrine was readily available, and the Court could have used it in such a way as to block any subsequent aid whatsoever to church schools. Indeed, the Court could have so extended the doctrine as to prohibit virtually all government contracting with church entities. The result could have disposed of many troublesome questions once and for all; yet, the Court chose virtually to ignore entanglement.

One of our strategies to avoid this kind of potentially adverse opinion, was to try to force the Court to distinguish between permissible and impermissible entanglement. In this connection we attempted to formulate the entanglement doctrine as we saw it: *The government may not interfere with religious institutions in such a way as to direct or influence religious matters.* Under this formulation fire inspections and most fiscal audits would be permissible, but adjudicating teacher labor disputes would not, because it would necessarily involve directing or influencing religious matters.

We added a corollary to this formulation: *Some impermissible entanglements are of such a quantity and quality as to warrant prohibition of the proposed relationship between church and state, while other impermissible entanglements are not of such a quantity or quality and could be dealt with or neutralized on a case by case basis.*<sup>10</sup> For example, the quantity and quality of entanglements involved in court adjudication of church property disputes could be dealt with and neutralized by prophylactic rules and case by case adjudication rather than entirely prohibiting courts from exercising jurisdiction.

The Court, of course, entirely bypassed all of this. Instead, it latched upon a second device we built into our case to avoid an opinion which could be subsequently utilized to reject aid to nonpublic schools—the statutory construction argument. The argument is well presented in the Court's opinion, and you can evaluate its strengths and weaknesses for yourselves. In a sense, this is almost a *sui generis* argument and will be difficult to extend to other cases. But, the Court's message to the legislative and executive branches seems clear: *Do not ignore the special character of religious institutions in attempting to regulate them.* I think this is the fundamental teaching of *NLRB v. Catholic Bishop of Chicago*. Parenthetically, the message for diocesan lawyers might be that we ought not be too anxious to jump to constitutional principles, but instead care-

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<sup>10</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971); *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1967).

fully review all other alternatives in approaching the legal problems affecting churches.

In sum, I cannot say that this is a great precedent in the struggle to preserve religious freedom. With the passage of time the case may well sink into legal obscurity. But the result is nonetheless quite satisfactory. Our clients' objectives were achieved. NLRB jurisdiction over church-operated schools has been defeated and no other legal interest has been sacrificed.