The Burger Court Opinion Writing Database

Beth Israel Hospital v. NLRB

437 U.S. 483 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 12, 1978

Dear Lewis:

Re: 77-152 Beth Israel Hospital v. NLRB

Your dissent of today's date (to the denial of cert) persuades me to change from "Join 3" to a grant.

Regards,

WEB

Mr. Justice Powell

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 26, 1978

PERSONAL

Dear Lewis:

Re: 77-152 - Beth Israel Hospital v. NLRB

Would you be willing to undertake the dissent? We may have a chance to "capture" this case.

Regards,

WEB

Mr. Justice Powell

See my letter.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

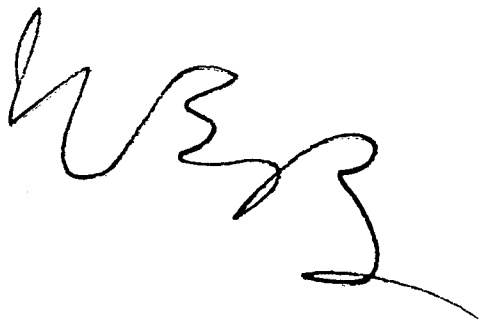
May 26, 1978

MEMORANDUM TO THE CONFERENCE

Re: 77-152 - Beth Israel Hospital v. NLRB

A dissent will be forthcoming in due course.

Regards,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 7, 1978

Dear Lewis:

Re: 77-152 Beth Israel Hospital v. NLRB

I will await your concurrence since you have mo[illegible] away from a dissenting position.

I agree the record is miserable, but for me if only one percent--or even less--of the patients and families used the restaurant that would be enough. A hospital is for patients, not union organizers. It is absurd to say the union is limited. The union can u[illegible] locker rooms, employee entrances, and other places to h[illegible] out literature. If their actions disturb one patient, I repeat, it is enough to exclude them.

I will write to this effect if your opinion is not "hard" enough and if Harry doesn't write.

Regards,

W E B.

jc

Mr. Justice Powell

cc: Mr. Justice Blackmun
Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 14, 1978

RE: 77-152 - Beth Israel Hospital v. NLRB

Dear Harry and Lewis:

Please show me as joining both (each) of you.

Regards,

WEB

Mr. Justice Blackmun

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 14, 1978

RE: 77-152 - Beth Israel Hospital v. NLRB

Dear Harry and Lewis:

Please show me as joining both (each) of you.

Regards,

WEB

Mr. Justice Blackmun

Mr. Justice Powell

Copies to the Conference

P.S. (to HAB only)

I would be happy if at your line 7 you would consider something along these lines: (preceding the sentence beginning "Nevertheless, on this record...") "Patients and their concerned families are not to be treated as impersonal categories or classes. They are individuals with problems that ought not be subject to aggravation."

Also, why pick on the Burger clan? Why not Hot Shoppes and Howard Johnson's? I don't need advertising "plugs."

FIRST DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-152

Beth Israel Hospital, Petitioner,
v.
National Labor Relations Board

On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[May--, 1978]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The National Labor Relations Act, as amended, 61 Stat. 140, 29 U.S.C. § 151 to 168, was further amended in 1974 to extend its coverage and protection to employees of nonprofit health care institutions.1/ Act of July 26, 1974, P.L. No. 93-360, 88 Stat. 395, 29 U.S.C. § 152(14) (Supp. V 1975). Petitioner is a Boston nonprofit hospital whose employees are covered by the amended Act. This case presents the question whether the Court of Appeals for the First Circuit erred in

1. 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 . . . ." Act of June 23, 1947, ch. 120, 61 Stat. 136.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 31, 1978

Re: 77-152- Beth Israel Hospital v. NLRB

Dear Byron:

This is just formally to respond to your note of May 30. I will, of course, make the corrections which you suggested in your last paragraph. With respect to your suggestion regarding the relevance of the availability of employee-only areas in the hospital suitable for solicitation and distribution, however, I prefer not to eliminate that discussion.

First, I do think that the Board ought at least to consider whether employees' § 7 interests adequately are served by the availability of convenient, employee-only areas within the hospital when it considers whether such rights also must be permitted in patient access areas. On page 33, I do not say that this is an essential element, nor do I think that mention of it there, in effect, sustains the Board's conclusion on a ground not considered by it. I only say there that no challenge to the Board's conclusion can be raised in this case for failing to consider that factor in light of the administrative law judge's finding that there are no other areas in which employees' § 7 rights effectively could be exercised. The effect of the discussion is to leave open whether the Board is required to consider that factor, while suggesting to the Board that it ought to consider whether or not it should. Second, in light of the sensitivity of the issue, and of Potter and Thurgood's reluctance to uphold the Board here, I am inclined to avoid an unqualified endorsement of St. John's, to avoid any possibility that I might lose one of the "joins" to Lewis.

Sincerely,

Mr. Justice White

Brennan 077

STYLISTIC CHANGES

See pp. 4-8
10, 12, 14-15, 22

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 8 JUN 1978

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-152

Beth Israel Hospital, Petitioner, *v.* National Labor Relations Board. } On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[June —, 1978]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The National Labor Relations Act, as amended, 61 Stat. 140, 29 U. S. C. § 151 to 168, was further amended in 1974 to extend its coverage and protection to employees of nonprofit health care institutions.[1] Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395. Petitioner is a Boston nonprofit hospital whose employees are covered by the amended Act. This case presents the question whether the Court of Appeals for the First Circuit erred in ordering enforcement of that part of an order of the National Labor Relations Board based on the Board's finding that petitioner, in violation of §§ 8 (a)(1) and (3), 29 U. S. C. §§ 158 (a)(1) and (3) (1970 ed.), interfered with its employees' rights guaranteed by § 7 of the Act by issuing and enforcing a rule that prohibits employees from soliciting union support and distributing union literature during nonworking time in the hospital cafeteria and coffee shop used primarily by employees but also used by patients and visitors.

In 1970, prior to the advent of any union organizational

[1] Coverage was achieved by deleting from the definition of "employer" in § 2 (2) of the Act, 29 U. S. C. § 152 (2), 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 . . ." Act of June 23, 1947, ch. 120, 61 Stat. 136.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 21, 1978

MEMORANDUM TO THE CONFERENCE

Re: Case held for No. 77-152, Beth Israel Hosp. v. NLRB

The only hold is No. 77-1289, Lutheran Hospital v. NLRB. Petitioner maintained a nondiscriminatory no-solicitation, no-distribution rule forbidding union activities in all areas of the hospital to which patients or visitors have access. Relying on its decision in St. John's, the Board held the rule invalid as applied to areas other than immediate patient care areas because petitioner had not shown special circumstances which would have resulted in disruption to patient care in other areas to which the rule applied. The Seventh Circuit affirmed the Board's St. John's rule.

The issue presented differs from that decided in Beth Israel since in that case we considered the St. John's rule only as applied to a hosptial cafeteria rather than to all non-immediate patient care areas. In Beth Israel,

W Brennan 077

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 30, 1978

Re: No. 77-152, Beth Israel Hospital v. NLRB

Dear Bill,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 30, 1978

Re: 77-152 - Beth Israel Hospital v.
National Labor Relations Board

Dear Bill,

I expect to join your opinion but at this point raise a question about one aspect of it. On page 16, you describe the Board's rule announced in the St. John's case as striking the balance "against the prohibition in areas other than immediate patient-care areas such as lounges and cafeterias absent a showing that disruption to patient care would necessarily result if solicitation and distribution were permitted in those areas." It seems to me that where, as here, evidence of disruption or interference with patient care is absent, the availability of areas other than the cafeteria for contacting employees is irrelevant. That factor played no part in St. John's, and it does not appear to me that either the administrative law judge or the Board would require a finding of unavailability of other areas before striking down a rule against cafeteria solicitation. When I put together pages 6 and 7 of your opinion, pages 32 and 33 and finally the discussion on page 35, I have the impression that you either make unavailability an essential element in the balance or put much more weight on it than would appear consistent with the Board's St. John's rule. Perhaps I misapprehend, but should we sustain the Board by relying importantly upon a ground not critical to the Board's conclusion?

One or two flyspecks, also: the word "protecting" might replace "requiring" in the 4th line of footnote 5 on page 6. Similarly, the 3d sentence of the paragraph beginning on page 35 might need some revision.

Sincerely yours,

Mr. Justice Brennan

Brenner 077

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 13, 1978

Re: 77-152 - Beth Israel Hospital v. NLRB

Dear Bill,

Please join me.

Sincerely yours,

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 30, 1978

Re: No. 77-152 - Beth Israel Hospital v. NLRB

Dear Bill:

Please join me.

Sincerely,

T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 12, 1978

Re: No. 77-152 - Beth Israel Hospital v. NLRB

Dear Lewis:

Please join me in your dissent.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 13, 1978

Re: No. 77-152 - Beth Israel Hospital v. NLRB

Dear Chief:

I have spent a good deal of time now on this case, and, like Lewis, I have concluded that I must concur in the judgment. I am writing separately. The Beth Israel situation is a poor and unusual one, and I regret that we took the case. It would have been better to wait for one with much more favorable hospital facts.

My concurrence will be around, I hope, before the day is over.

Sincerely,

The Chief Justice

cc: Mr. Justice Powell

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: JUN 13 1978

Recirculated: _____

No. 77-152 - Beth Israel Hospital v. NLRB

MR. JUSTICE BLACKMUN, concurring in the judgment.

I concur only in the result the Court reaches here, for I, too, agree with much that Mr. Justice Powell says in his separate opinion.

There is, of course, a certain irony when the Board grants protection from solicitation to the retail store and to the Burger Chef and Marriott cafeteria, but at the same time denies it to the hospital restaurant facility where far more than mere commercial interests are at stake. Nevertheless, on this record, as the Court's opinion reveals, it would have been difficult for the Board to reach a different result, when it utilized, questionably in my view, the rule of Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), even as perhaps modified for application in the hospital setting.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

No. 77-152 - Beth Israel Hospital v. NLRB

Circulated: _____

Recirculated: JUN 15

MR. JUSTICE BLACKMUN, with whom the Chief Justice and Mr. Justice Rehnquist join, concurring in the judgment.

I concur only in the result the Court reaches here, for I, too, agree with much that Mr. Justice Powell says in his separate opinion.

There is, of course, a certain irony when the Board grants protection from solicitation to the retail store and to the Burger Chef a Hot Shoppe cafeteria, but at the same time denies it to the hospital restaurant facility where far more than mere commercial interests are at stake. Patients and their concerned families are not to be treated as impersonal categories or classes. They are individuals with problem that ought not be subject to aggravation. Nevertheless, on this record the Court's opinion reveals, it would have been difficult for the Board reach a different result, when it utilized, questionably in my view, the of Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), even as pernaps modified for application in the hospital setting.

Wm Brennan 077

p. 2

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

1st DRAFT Recirculated: JUN 16 1978

SUPREME COURT OF THE UNITED STATES

No. 77-152

Beth Israel Hospital, Petitioner, v. National Labor Relations Board. } On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[June —, 1978]

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in the judgment.

I concur only in the result the Court reaches here, for I, too, agree with much that MR. JUSTICE POWELL says in his separate opinion.

There is, of course, a certain irony when the Board grants protection from solicitation to the retail store and to the Burger Chef and Hot Shoppe cafeteria, but at the same time denies it to the hospital restaurant facility where far more than mere commercial interests are at stake. Patients and their concerned families are not to be treated as impersonal categories or classes. They are individuals with problems that ought not be subject to aggravation. Nevertheless, on this record, as the Court's opinion reveals, it would have been difficult for the Board to reach a different result, when it utilized, questionably in my view, the rule of *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793 (1945), even as perhaps modified for application in the hospital setting.

The tenor of the Court's opinion and of the Board's approach concerns me. There are many hospital coffeeshops and cafeterias that are primarily patient and patient-relative oriented, despite the presence of employee-patrons, far more so than this very restricted Beth Israel operation, that seems akin to a manufacturing plant's emloyees' cafeteria. I fear that this unusual case will be deemed to be an example for all hospital eating-facility cases, and that the Board and the

lfp/ss 1/12/78

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: JAN 12 1978

Recirculated: _____

No. 77-152 Beth Israel Hospital v. NLRB

MR. JUSTICE POWELL, dissenting.

This petition presents the question whether the expertise of the National Labor Relations Board extends to judgments as to the likely effects on hospital patients of union solicitation and literature distribution in a hospital cafeteria and coffee shop open to patients and the public, as well as to employees. Because there is a conflict among the Courts of Appeals, and because the issue is not inconsequential, I would grant certiorari.

Petitioner Beth Israel Hospital first promulgated a rule allowing union solicitation in the cafeteria, coffee shop and employee locker rooms, but not in other areas of the hospital. The cafeteria and coffee shop are used regularly by ambulatory patients, including psychiatric outpatients, as well as by the public and employees. In the locker rooms, union literature also could be distributed. Solicitation in the cafeteria and coffee shop was limited, however, to conversations "on a one-to-one basis." After petitioner reprimanded an employee for

May 30, 1978

No. 77-152 Beth Israel Hospital

Dear Chief:

Over the weekend, I took a close look at this case and have concluded - at least tentatively - to concur in the judgment.

The hospital simply "blew it" in its failure to introduce the kind of testimony you and Harry, in particular, know that doctors would have given. In addition, the case that this hospital could have presented was weaker than that of hospitals with which I am familiar. Only 1.5% of the patronage of the cafeteria came from patients, and only about 9% came from the "public" - without a showing as to what percentage of these were family and friends of patients.

I plan, however, to write a strong opinion concurring only in the judgment, and disagreeing sharply with Bill Brennan's support of the Board's distinction between hospitals and retail stores.

I will concur in the judgment because I find it difficult to say that the Board's conclusion is not supported by substantial evidence in this case. Even if there were a presumption in favor of the validity of a hospital's no solicitation rule, as I think would be proper, the Board - on the evidence in this case - could have held that this presumption was rebutted.

If there is any chance of saving a majority for our view, I think it is furthered more by concurring in the judgment, with a strong supporting opinion, than by a flat out dissent.

Sincerely,

The Chief Justice

lfp/ss
cc: Mr. Justice Blackmun
Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 30, 1978

Re: No. 77-152 Beth Israel Hospital v. NLRB

Dear Bill:

Although I voted at the Conference to reverse, I am persuaded by your opinion that - on the facts in this case - the Court of Appeals correctly found that the Board's decision was supported by substantial evidence.

We do differ substantially, however, as to the appropriateness of the Board's rule with respect to hospitals, and particularly with the Board's distinction between a hospital cafeteria and a retail merchandising store cafeteria. I will address these matters in my concurring opinion.

Sincerely,

Lewis

Mr. Justice Brennan

Copies to the Conference

LFP/lab

lfp/lab 6/8/78

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 12 JUN 1978

Recirculated: _____

No. 77-152 Beth Israel Hospital v. NLRB

MR. JUSTICE POWELL, concurring in the judgment:

In Republic Aviation Corp. v. NLRB, 324 U. S. 793 (1945), this Court approved the reasoning of the National Labor Relations Board in Peyton Packing Co., 49 N.L.R.B. 828 (1943), enforced, 142 F.2d 1009 (CA5), cert. denied, 323 U.S. 730 (1944) and the balance it struck in adjusting the respective rights of industrial employers and employees. The Court also endorsed the Board's formulation: Because working time is for work, a rule prohibiting union solicitation during working hours "must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose"; but during nonworking hours, when an employee's time is his own even though he is on company property, a rule prohibiting union solicitation "must be presumed to be an unreasonable impediment to self-organization and therefore

1

1, 5-8

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 16 JUN 1978

Recirculated: _____

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-152

Beth Israel Hospital, Petitioner, *v.* National Labor Relations Board. } On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[June —, 1978]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in the judgment.

In *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793 (1945), this Court approved the reasoning of the National Labor Relations Board in *Peyton Packing Co.*, 49 N. L. R. B. 828 (1943), enforced, 142 F. 2d 1009 (CA5), cert. denied, 323 U. S. 730 (1944), and the balance it struck in adjusting the respective rights of industrial employers and employees. The Court also endorsed the Board's formulation: Because working time is for work, a rule prohibiting union soliciation during working time "must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose"; but during nonworking time, when an employee's time is his own even though he is on company property, a rule prohibiting union solicitation "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." 324 U. S., at 803 n. 10 (quoting *Peyton Packing Co., supra,* at 843–844).

The *Republic Aviation* rule is inapplicable in the instant case, which arises from a setting entirely different from the one in which the rule was formulated. I concur in the judgment of the Court, however, because I regard the Board's decision

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
WILLIAM H. REHNQUIST

January 12, 1978

Re: No. 77-152 - Beth Israel Hospital v. NLRB

Dear Lewis:

Please join me in your dissent.

Sincerely,

WHR

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 14, 1978

Re: No. 77-152 Beth Israel Hospital v. NLRB

Dear Lewis:

Please join me in your separate concurring opinion.

Sincerely,

WHR

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 14, 1978

Re: No. 77-152 Beth Israel Hospital v. NLRB

Dear Harry:

Please join me in your separate concurring opinion.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 30, 1978

Re: 77-152 - Beth Israel Hospital v. NLRB

Dear Bill:

Please join me.

Respectfully,

JL

Mr. Justice Brennan

Copies to the Conference