

# The Burger Court Opinion Writing Database

*NLRB v. Baptist Hospital, Inc.*  
442 U.S. 773 (1979)

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

December 29, 1978

Re: No. 78-223 - N.L.R.B. v. Baptist Hospital, Inc.

MEMORANDUM TO:

Mr. Justice Powell  
Mr. Justice Blackmun  
Mr. Justice Rehnquist

I had given up "to fight another day" but I will now  
join three to make a grant.

Regards,

W.B.

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

CHAMBERS OF  
THE CHIEF JUSTICE

May 2, 1979

MEMORANDUM TO THE CONFERENCE:

Re: 78-223 NLRB v. Baptist Hospital Inc.

To produce a "Court" I am prepared to "fall back" to allowing union solicitation in the cafeteria and gift shop.

Regards,

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

From: The Chief Justice

Circulated: JUN 14 1979

Recirculated: \_\_\_\_\_

No. 78-223, NLRB v. BAPTIST HOSPITAL, INC.

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I concur only in the judgment because I do not agree with the basis of the Court's opinion. The Court accepts as valid the Board's presumption that hospital rules prohibiting solicitation during non-working time outside of "immediate patient care areas" violate employees' right to organize. The Court denies enforcement to the Board's order in part on the ground that its finding that the hospital failed to overcome this presumption was not supported by substantial evidence.

I would think no "evidence" is needed to establish the proposition that the primary mission of every hospital is care and concern for the patients and that anything which

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

**STYLISTIC CHANGES AS MARKED:**

From: The Chief Justice

Circulated: \_\_\_\_\_

1st PRINTED DRAFT

Recirculated: JUN 18 1979

**SUPREME COURT OF THE UNITED STATES**

No. 78-223

National Labor Relations Board  
et al., Petitioner,  
v.  
Baptist Hospital, Inc. } On Writ of Certiorari to the  
United States Court of Appeals for the Sixth Circuit.

[June —, 1979]

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I concur only in the judgment because I do not agree with the basis of the Court's opinion. The Court accepts as valid the Board's presumption that hospital rules prohibiting solicitation during nonworking time outside of "immediate patient care areas" violate employees' right to organize. The Court denies enforcement to the Board's order in part on the ground that its finding that the hospital failed to overcome this presumption was not supported by substantial evidence.

I would think no "evidence" is needed to establish the proposition that the primary mission of every hospital is care and concern for the patients and that anything which tends to interfere with that objective cannot be tolerated. A religious choir singing in a hospital chapel may well be desirable but if that interferes with patient care, it cannot be allowed.

To be supportable a presumption cannot rest on grounds which are irrational. *Beth Israel Hospital v. NLRB*, 437 U. S. 483, 501 (1978). For me it is wholly irrational for the Board to create a presumption that removes from the hospital absolute authority to control all activity in areas devoted primarily to patient care, including all areas frequented by patients. I would place the decision on the basis that: (1) The Board's presumption is wholly invalid as applied to areas of a hospital devoted primarily to the care of patients; (2) Once the Board's order is deprived of the support of the presump-

## STYLISTIC CHANGES AS MARKED:

2nd DRAFT

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

## SUPREME COURT OF THE UNITED STATES

Re: The Chief Justice

No. 78-223

Circulated: \_\_\_\_\_

Recirculated: JUN 19 197

National Labor Relations Board  
 et al., Petitioner,  
 v.  
 Baptist Hospital, Inc.

} On Writ of Certiorari to the  
 United States Court of Ap-  
 peals for the Sixth Circuit.

[June —, 1979]

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

CHAMBERS OF  
JUSTICE W. J. BRENNAN, JR.

May 1, 1979

RE: No. 78-223 N.L.R.B. v. Baptist Hospital

Dear Potter:

Now that Lewis and the Chief have joined John, it looks like a reversal 9-0 on the cafeteria and gift shop areas but an affirmance 5-4 on the corridors, etc. The four in dissent, if I'm right, are you, Byron, Thurgood and I. Would you be willing to take that dissent?

Sincerely,

*Bill*

Mr. Justice Stewart

cc: Mr. Justice White  
Mr. Justice Marshall

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

CHAMBERS OF  
JUSTICE W. J. BRENNAN, JR.

May 30, 1979

RE: No. 78-223 N.L.R.B. v. Baptist Hospital, Inc.

Dear Lewis:

I shall, as soon as possible, circulate something  
in the above.

Sincerely,



Mr. Justice Powell

cc: The Conference

100-1000-1000-1000  
SUPREME COURT OF THE UNITED STATES  
No. 78-223

National Labor Relations Board et al v. Mr. Justice BRENNAN

v.

Circulated: 11 JUN 1979

Baptist Hospital, Inc.

Recirculated: \_\_\_\_\_

[June 1, 1979]

BRENNAN, J., concurring in the judgment.

In this case, the Court of Appeals for the Sixth Circuit found that respondent had demonstrated the special circumstances necessary to overcome the NLRB's presumption against bans on solicitation, and that there was no substantial evidence to support the Board's holding to the contrary. The scope of our review of such a Circuit Court finding is narrowly circumscribed:

"Whether on the record as a whole there is substantial 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." Beth Israel Hospital v. NLRB, 437 U.S. 483, 507 (1978), quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951).

Because I believe that the Court of Appeals "misapprehended or grossly misapplied" the substantial evidence rule with respect to the cafeteria, gift shop, and first floor lobbies of Baptist Hospital, but that the same cannot be said for the patient floor corridors and sitting rooms, I concur in the judgment of

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

From: Mr. Justice BRENNAN

Circulated

Recirculated, 12/1/79

**1st DRAFT**

**SUPREME COURT OF THE UNITED STATES**

No. 78-223

National Labor Relations Board | On Writ of Certiorari to the  
 et al., Petitioner, | United States Court of  
 v. | Appeals for the Sixth  
 Baptist Hospital, Inc. | Circuit.

[June —, 1979]

MR. JUSTICE BRENNAN, concurring in the judgment.

In this case, the Court of Appeals for the Sixth Circuit found that respondent had demonstrated the special circumstances necessary to overcome the NLRB's presumption against bans on solicitation, and that there was no substantial evidence to support the Board's holding to the contrary. The scope of our review of such a Circuit Court finding is narrowly circumscribed:

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Because I believe that the Court of Appeals "misapprehended or grossly misapplied" the substantial evidence rule with respect to the cafeteria, gift shop, and first floor lobbies of Baptist Hospital, but that the same cannot be said for the patient floor corridors and sitting rooms, I concur in the judgment of the Court.

I

As the Court notes, "[t]he Hospital presented no clear evi-

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: 13 JUN 19

136  
2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-223

National Labor Relations Board | On Writ of Certiorari to the  
et al., Petitioner, | United States Court of  
v. | Appeals for the Sixth  
Baptist Hospital, Inc. | Circuit.

[June —, 1979]

MR. JUSTICE BRENNAN, with whom Mr. JUSTICE WHITE and Mr. JUSTICE MARSHALL join, concurring in the judgment.

In this case, the Court of Appeals for the Sixth Circuit found that respondent had demonstrated the special circumstances necessary to overcome the NLRB's presumption against bans on solicitation, and that there was no substantial evidence to support the Board's holding to the contrary. The scope of our review of such a Circuit Court finding is narrowly circumscribed:

"Whether on the record as a whole there is substantial 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." *Beth Israel Hospital v. NLRB*, 437 U. S. 483, 507 (1978), quoting *Universal Camera Corp. v. NLRB*, 340 U. S. 474, 491 (1951).

Because I believe that the Court of Appeals "misapprehended or grossly misapplied" the substantial evidence rule with respect to the cafeteria, gift shop, and first floor lobbies of Baptist Hospital, but that the same cannot be said for the patient floor corridors and sitting rooms, I concur in the judgment of the Court.

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

CHAMBERS OF  
JUSTICE POTTER STEWART

May 30, 1979

Re: 78-223 - NLRB v. Baptist Hospital, Inc.

Dear Lewis:

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.  
1

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 30, 1979

Re: No. 78-223 - NLRB v. Baptist Hospital, Inc.

---

Dear Lewis,

I'll wait for the dissent.

Sincerely yours,



Mr. Justice Powell

Copies to the Conference

cmc

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 11, 1979

Re: No. 78-223 - National Labor Relations Board  
v. Baptist Hospital, Inc.

---

Dear Bill,

Please add my name to your dissent.

Sincerely yours,



Mr. Justice Brennan

Copies to the Conference

cmc

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 12, 1979

Re: No. 78-223 - National Labor Relations Board v.  
Baptist Hospital, Inc.

Dear Bill:

Please join me in your concurrence.

Sincerely,

T.M.

T.M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 12, 1979

Re: No. 78-223 - National Labor Relations Board  
v. Baptist Hospital, Inc.

Dear Bill:

Please join me in your opinion in this case:

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 2, 1979

Re: No. 78-223, - NLRB v. Baptist Hospital, Inc.

Dear Lewis:

I, too, am ready to grant certiorari in this case. I therefore join your dissent.

Sincerely,



Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 1, 1979

Re: No. 78-223 - NLRB v. Baptist Hospital, Inc.

Dear Lewis:

Please join me.

Sincerely,

*H. A. B.*

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 1, 1979

✓

Re: No. 78-223 - NLRB v. Baptist Hospital, Inc.

Dear Lewis:

Please join me.

Sincerely,

*H. A. B.*

Mr. Justice Powell

cc: The Conference

[note to Justice Powell only] Two very minor matters:

1. On page 10, in the text, sixth line from the bottom, should the "Id." be "App." because of the intervening citation to 576 F.2d?
2. The presence of the word "our" in the seventh line of the paragraph beginning on page 11 seems wrong. Should it be "the"?

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: 1 JUN

Recirculated: \_\_\_\_\_

No. 78-223 - NLRB v. Baptist Hospital, Inc.

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion and its judgment. I write only to underline what is plainly said in the opinion, ante, at 15-16 and n. 16, that these hospital cases so often turn on the proof presented. What may be true of one hospital's gift shop and cafeteria may not be true of another's. And I continue to have difficulty perceiving any rational distinction between the Board's affording protection to the department store, see Beth Israel Hospital v. NLRB, 437 U.S. 483, 511-512 and nn. 2 and 3 (1978) (Powell, J., concurring opinion); id., at 508 (concurring

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

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Mr. Justice Blackmun

No. 78-223

Circulated: \_\_\_\_\_

Recirculated: *4 JUN 19*

National Labor Relations Board  
et al., Petitioner,  
v.  
Baptist Hospital, Inc.

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

[June —, 1979]

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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: \_\_\_\_\_

2nd DRAFT

Recirculated: 11 JUN 1979

## SUPREME COURT OF THE UNITED STATES

No. 78-223

National Labor Relations Board  
et al., Petitioner,  
v.  
Baptist Hospital, Inc. } On Writ of Certiorari to the  
United States Court of Appeals  
for the Sixth Circuit.

[June —, 1979]

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion and its judgment. I write only to underline what is plainly said in the opinion, *ante*, at 15-16, and n. 16, that these hospital cases so often turn on the proof presented. What may be true of one hospital's gift shop and cafeteria may not be true of another's. And I continue to have difficulty perceiving any rational distinction between the Board's recognition that solicitation is inappropriate in a department store, see *Beth Israel Hospital v. NLRB*, 437 U. S. 483, 511-512, and nn. 2 and 3 (1978) (POWELL, J., concurring opinion); *id.*, at 508 (concurring opinion), and its contrary presumption with respect to the retail shop (usually operated on a not-for-profit basis) and cafeteria in the hospital. The admonition contained in the last paragraph of n. 16 of the Court's opinion, *ante*, at 16, cannot be overemphasized.

December 29, 1978

No. 78-223 NLRB v. Baptist Hospital, Inc.

Dear Chief, Harry and Bill:

As you will recall, this is the case from CA 6 in which that court refused to enforce an NLRB order that would have allowed union solicitation in all corridors, visitors' lounges and lobbies of a great hospital complex. The Board had applied its "patient-care area" rule - as it has in other cases - to encompass only patients' rooms, operating rooms and the like.

At our November 22, 1978 Conference, five Justices voted to grant, vacate and remand on Beth Isreal. The three of you and I voted to deny, believing that CA 6 had correctly decided this case. I requested that the case be relisted to enable me to write.

When I had an opportunity to study the case carefully, it became apparent to me that the petition for certiorari should be granted - not simply denied. The Board's perception of "patient-care areas" - that it uniformly applies - in my view is wholly insensitive to the atmosphere and needs of modern hospital care. Moreover, courts of appeals generally are in disagreement with the Board's interpretation of its rule. Thus, there is both confusion and conflict.

In Beth Isreal a majority of the Court approved the Board's rule, but there was no occasion there to consider its scope. This remains an open question of considerable importance.

Therefore, for the reasons more fully set forth in the enclosed dissenting opinion, I am changing my vote to a strong grant.

I send this letter to the three of you as we were in accord at Conference and I wanted you to know why I am changing my vote. I would not be displeased if you were similarly persuaded.

Sincerely,

The Chief Justice  
Mr. Justice Blackmun  
Mr. Justice Rehnquist

Enclosure

LFP/lab

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

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Mr. Justice Powell

Circulated: 29 DEC 1978

NATIONAL LABOR RELATIONS BOARD v. BAPTIST  
HOSPITAL, INC.

Recirculated: \_\_\_\_\_

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 78-223. Decided January —, 1979

MR. JUSTICE POWELL, dissenting.

The Court today grants the petition for certiorari of the National Labor Relations Board (the Board), vacates the judgment of the Court of Appeals, and remands this case for reconsideration in light of *Beth Israel Hospital v. NLRB*, 437 U. S. 483 (1978). Because I would grant certiorari and set the case for argument, I dissent from the action of the Court.

The remand on *Beth Israel* is unnecessary, for the Court of Appeals did not reject the Board's general rule, approved in *Beth Israel*, that no-solicitation rules adopted by hospitals are presumptively valid only in patient-care areas. Rather, the Court of Appeals determined on the facts of this case that the areas of patient care at the respondent's hospital were more extensive than the Board had recognized. Moreover, instead of remanding the case (or denying the petition), the Court should take the opportunity it affords to resolve the substantial doubt and confusion surrounding the Board's approach to identifying patient-care areas.

I

The Court had no opportunity in *Beth Israel* for a critical review of the Board's criteria for defining patient-care areas. Although in that case the Court did consider and approve the Board's general rule on the validity of no-solicitation rules adopted by hospitals,<sup>1</sup> the facts presented no question as to

<sup>1</sup> In *Beth Israel*, the Court said,

"[W]e therefore cannot say that the Board's policy—which requires that absent such a showing [of a substantial threat of harm to patients] solici-

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

April 26, 1979

Pls. to L.P.  
except for 1st copy.

Dear Chief:

8  
7/223 NLRB v. Baptist Hospital, Inc.

4/26/79  
1:05 pm

ht of the discussion and vote at the  
rday, I have given further thought to this

Hann -

Please call  
me about this  
draft at  
your convenience

Levus

made the valid point that the primary issue - I understood prompted us to take this case from denial of cert, circulated December 29, validity of the Board's "immediate patient as interpreted by the Board.

standard has been expressed either as "care areas" or as "strictly patient care by the Board to be "such as patients' rooms, and the places where patients receive x-ray and therapy rooms". St. John's of Nursing, Inc., 222 NLRB 1150 (1976), ed in part and denied in part, 557 F.2d 1368

It is clear from the cases we have seen application of this standard excludes all hospital quite without regard to whether necessary patient care. Thus, corridors, and where patients' families sit and where ts visit with family and friends) are viewed the same manner as cafeterias and gift shops.

read Beth Israel again this morning, and do can be said fairly that it is controlling here. It did hold (erroneously I think) that the Republic Aviation rule is applicable to hospitals as well as industrial and commercial settings. But that rule is only the beginning of analysis under the Court's Beth Israel opinion. The actual holding was as follows:

We therefore hold that the Board's general approach of requiring health-care facilities to permit

employee solicitation and distribution during nonworking time in nonworking areas, where the facility has not justified the prohibitions as necessary to avoid disruption of health-care operations or disturbance of patients, is consistent with the Act. 437 U.S. 483, 507 (emphasis added).

The Court thus made clear that solicitation, even "during nonworking time and in nonworking areas" is not justified if it "disrupt[s] . . . health care operations or disturb[s] patients". Id.

It is fair to say that Beth Israel places the burden of proof on a hospital to show, with respect to any particular area, that solicitation may disrupt the health care operations of the hospital or disturb the patients. Beth Israel itself was an easy case, with extremely limited facts. Only the cafeteria was at issue; 89% of its users were employees; as the Court noted, it was of "critical significance that only 1.56%" were patients; other solicitation was allowed in the cafeteria; and the alternative places in the hospital where the union could convey its message were inadequate. The hospital presented no medical evidence whatever in support of its position with respect to the cafeteria. This default in proof prompted me to concur in the result.

The record made by Baptist Hospital is quite different. The testimony of the two doctors, one of them the chief of the medical staff, clearly carried the hospital's burden of showing that medical reasons -- the care of patients -- made "necessary" the nonsolicitation rule at least with respect to all areas in the hospital regularly used by patients and staff. Although their testimony also tended to support the hospital's position with respect to the cafeteria and gift shop, other evidence -- indicating the extent of patient and family use of these two facilities -- presents a closer case. For example, there was no proof of the percentage of patients (as distinguished from the public and visitors) who used the cafeteria and gift shop. But the professional opinions of the doctors with respect to the other areas regularly used by patients, sometimes alone and at other times with medical staff personnel, is entirely uncontradicted. This is true with respect to corridors and waiting room areas.

It is in an attempt to meet this uncontradicted evidence that the Board invokes its "immediate patient care area" rule. In so doing the Board simply refused to accept uncontradicted medical testimony that necessary "patient care" encompasses more than the Board's perception of "immediate" care.

I have burdened you with this overly long preamble as it is relevant to what I am now going to say: In the interest of obtaining a Court opinion as to the proper scope for the Board's "immediate care area" standard, I am prepared to agree with John that the hospital has carried its burden with respect to corridors and waiting rooms, but not with respect to the cafeteria and the gift shop. I do not have to "swallow hard" to agree with John on the gift shop. The cafeteria does give me some trouble, as it seems to be different from the one before us in Beth Israel. But the hospital's evidence as to the use of the cafeteria was not unequivocal and I think it far less clear that patients would be annoyed by the solicitation likely to occur in a cafeteria.

In sum, I can join an opinion affirming as to the corridors and waiting rooms and reversing as to the cafeteria and gift shop. The opinion should address and broaden the Board's receptiveness to evidence that particular areas of a given hospital are important to the provision of patient care. This can be done consistently with Beth Israel.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

April 27, 1979

78-223 NLRB v. Baptist Hospital, Inc.

Dear Chief:

In light of the discussion and vote at the Conference yesterday, I have given further thought to this case.

John made the valid point that the primary issue - and the one that I understood prompted us to take this case (see my dissent from denial of cert, circulated December 29, 1978) - is the validity of the Board's "immediate patient care" standard, as interpreted by the Board.

This standard has been expressed either as "immediate patient care areas" or as "strictly patient care areas", defined by the Board to be "such as patients' rooms, operating rooms, and the places where patients receive treatment, such as x-ray and therapy rooms". St. John's Hospital & School of Nursing, Inc., 222 NLRB 1150 (1976), enforcement granted in part and denied in part, 557 F.2d 1368 (10th Cir. 1977). It is clear from the cases we have seen that the Board's application of this standard excludes all other areas in a hospital quite without regard to whether they encompass necessary patient care. Thus, corridors, and waiting rooms (where patients' families sit and where ambulatory patients visit with family and friends) are viewed by the Board in the same manner as cafeterias and gift shops.

I have read Beth Israel again this morning, and do not think it can be said fairly that it is controlling here. It did hold (erroneously I think) that the Republic Aviation rule is applicable to hospitals as well as industrial and commercial settings. But that rule is only the beginning of analysis under the Court's Beth Israel opinion. The actual holding was as follows:

We therefore hold that the Board's general approach of requiring health-care facilities to permit

employee solicitation and distribution during nonworking time in nonworking areas, where the facility has not justified the prohibitions as necessary to avoid disruption of health-care operations or disturbance of patients, is consistent with the Act. 437 U.S. 483, 507 (emphasis added).

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It is fair to say that Beth Israel places the burden of proof on a hospital to show, with respect to any particular area, that solicitation may disrupt the health care operations of the hospital or disturb the patients. Beth Israel itself was an easy case, with extremely limited facts. Only the cafeteria was at issue; 89% of its users were employees; as the Court noted, it was of "critical significance that only 1.56%" were patients; other solicitation was allowed in the cafeteria; and the alternative places in the hospital where the union could convey its message were inadequate. The hospital presented no medical evidence whatever in support of its position with respect to the cafeteria. This default in proof prompted me to concur in the result.

The record made by Baptist Hospital is quite different. The testimony of the two doctors, one of them the chief of the medical staff, clearly carried the hospital's burden of showing that medical reasons -- the care of patients -- made "necessary" the nonsolicitation rule at least with respect to all areas in the hospital regularly used by patients and staff. Although their testimony also tended to support the hospital's position with respect to the cafeteria and gift shop, other evidence -- indicating the extent of patient and family use of these two facilities -- presents a closer case. For example, there was no proof of the percentage of patients (as distinguished from the public and visitors) who used the cafeteria and gift shop. But the professional opinions of the doctors with respect to the other areas regularly used by patients, sometimes alone and at other times with medical staff personnel, is entirely uncontradicted. This is true with respect to corridors and waiting room areas.

It is in an attempt to meet this uncontradicted evidence that the Board invokes its "immediate patient care area" rule. In so doing the Board simply refused to accept uncontradicted medical testimony that necessary "patient care" encompasses more than the Board's perception of "immediate" care.

I have burdened you with this overly long preamble as it is relevant to what I am now going to say: In the interest of obtaining a Court opinion as to the proper scope for the Board's "immediate care area" standard, I am prepared to agree with John that the hospital has carried its burden with respect to corridors and waiting rooms, but not with respect to the cafeteria and the gift shop. I do not have to "swallow hard" to agree with John on the gift shop. The cafeteria does give me some trouble, as it seems to be different from the one before us in Beth Israel. But the hospital's evidence as to the use of the cafeteria was not unequivocal and I think it far less clear that patients would be annoyed by the solicitation likely to occur in a cafeteria.

In sum, I can join an opinion affirming as to the corridors and waiting rooms and reversing as to the cafeteria and gift shop. The opinion should address and broaden the Board's receptiveness to evidence that particular areas of a given hospital are important to the provision of patient care. This can be done consistently with Beth Israel.

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

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: 29 MAY 1979

1st DRAFT

Recirculated: \_\_\_\_\_

## SUPREME COURT OF THE UNITED STATES

No. 78-223

National Labor Relations Board  
 et al., Petitioner, } On Writ of Certiorari to the  
 v. } United States Court of Ap-  
 Baptist Hospital, Inc. } peals for the Sixth Circuit.

[May —, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question of the validity of an order of the National Labor Relations Board (Board) prohibiting respondent, Baptist Hospital (Hospital), from enforcing any rule against solicitation by employees "on behalf of any labor organization during their nonworking time in any area of its hospital other than immediate patient care areas."

### I

The Hospital is a nonprofit general hospital with 600 beds and 1800 employees. For several years prior to 1974, the Hospital enforced a rule against solicitation anywhere on its premises.<sup>1</sup> The intervenor, Local 150-T, Service Em-

<sup>1</sup> The rule read:

"In order to protect employees from any form of solicitation, raffle, charity drives, etc., it is strictly prohibited for anyone to solicit patients or visitors while on hospital premises without written approval of the Administrator. Violation of this policy will subject employee to disciplinary action. Employees who discover persons making unauthorized solicitation should report this immediately to their supervisor."

This rule was adopted primarily to keep salesmen out of the Hospital. *Baptist Hospital, Inc.*, 223 N. L. R. B. 344, 348, 357 (1976), enforcement granted in part and denied in part, 576 F. 2d 107 (CA6 1978), cert. granted, — U. S. — (1979).

Stylistic Changes Throughout.

3, 4, 10, 13, 17

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-223

National Labor Relations Board  
et al., Petitioner,  
v.  
Baptist Hospital, Inc. } On Writ of Certiorari to the  
United States Court of Appeals for the Sixth Circuit.

[May —, 1979]

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June 20, 1979

MEMORANDUM TO THE CONFERENCE

Case Held for No. 78-223, National Labor Relations Board v.  
Baptist Hospital, Inc.

National Jewish Hospital and Research Center v. National  
Labor Relations Board, No. 78-1273

The petr in this case operates a specialized hospital for the treatment of asthmatic patients. The petr posted an amended no-solicitation rule providing that "[b]ecause of the disruption to health care services of the hospital, no material shall be distributed to and no solicitation shall be made of, any hospital patient or employee in any public area within the hospital premises. Any solicitation must be confined to non-work and non-public areas and during non-working time."

The National Labor Relations Board (Board) applied its presumption that prohibitions of solicitation outside of immediate patient-care areas are invalid. Upon reviewing the petr's evidence in light of this presumption, the Board concluded that the petr had not justified a proscription of solicitation in areas other than "areas set aside specifically for treatment of patients under controlled conditions and ... patients' rooms". More specifically, the Board noted the petr's evidence that 90 to 95 percent of petr's patients are ambulatory, taking their meals in the cafeteria; that asthma is a psychophysiological affliction in which the avoidance of stress is an important part of treatment; and that witnessing an argument can be a stressful situation for the petr's patients. But it also found that in areas such as the cafeteria, charitable solicitations are allowed, other potentially disturbing activities are not excluded, and the object of treatment is to teach patients to cope with "ordinary everyday occurrences and relationships." The Board ordered the petr to refrain from prohibiting solicitation on non-work time except in immediate patient-care areas.

The CA 10 granted the Board's petition for enforcement of its order. It read Beth Israel Hospital v.

NLRB, 437 U.S. 483 (1978), as approving the Board's use of a presumption in reviewing no-solicitation rules in the hospital context. It also stated, however, "that the Supreme Court in Beth Israel made it plain that the burden was on the employer to bring forward positive evidence showing that solicitation activities had a disrupting effect upon patients' health." (Emphasis added.) In a similar vein, it remarked that under that decision, "the hospital could show the presence of special circumstances to establish that patient care was affected by solicitation and that actual patient disruption resulted from it." (Emphasis added.) Consistently with this characterization of Beth Israel, the CA reviewed the record for evidence that the petr's patients "suffered upset or experienced disruption of tranquility as a result of union solicitation". (Emphasis added.)

In fact, in Beth Israel the Court described the hospital's burden as the production of "evidence of a substantial threat of harm to patients", and the Board's policy as favoring solicitation "except in areas where patient care is likely to be disrupted." 437 U.S., at 499-500 (emphasis added). Similarly, in NLRB v. Baptist Hospital, the Court's opinion states that the Board's presumption "does no more than place on the hospital the burden of proving ... that union solicitation may adversely affect patients." Slip op., at 7 (emphasis added). And the hospital there met its burden with respect to certain areas without adducing evidence of any actual disruption of patient care or disturbance of patients by union solicitation. Id., at 7-12.

The discussion and application of the Board's presumption in Baptist Hospital thus make it clear that the hospital need not offer proof of actual disruption in patient care or disturbance of patients to justify a no-solicitation rule. In light of Baptist Hospital, the CA 10 now might well take a different view of the petr's strong evidence supporting its no-solicitation rule in at least some of the areas other than those identified by the Board as immediate patient-care areas. If so, it might decide to refuse enforcement to the Board's sweeping order, or to enforce it only in part, as ordered in Baptist Hospital. Accordingly, I recommend that we grant the petition, vacate the judgment, and remand for reconsideration in light of Baptist Hospital.

L.F.P., Jr.

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

January 2, 1979

Re: No. 78-223 NLRB v. Baptist Hospital

Dear Lewis:

Please join me in your dissent in this case.

Sincerely,

*WR*

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

April 27, 1979

Re: No. 78-223 - NLRB v. Baptist Hospital

Dear Chief:

I now vote to substantially affirm the judgment of the *(on)*  
Court of Appeals for the Sixth Circuit.

Sincerely,

*WR*

The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 30, 1979

Re: No. 78-223 - NLRB v. Baptist Hospital

Dear Lewis:

Please join me.

Sincerely,



Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 29, 1979

Re: 78-223 - NLRB v. Baptist Hospital, Inc.

Dear Lewis:

Please join me. Although I have some question about whether Part IV is necessary to the decision, and therefore would not object if you ultimately decide to omit it, I am happy to join your fine opinion in its present form as well.

Respectfully,



Mr. Justice Powell

Copies to the Conference