National Labor Relations Act

The National Labor Relations Act and the Role of the N.L.R.B.

by

John H. Fanning
Chairman
National Labor Relations Board

[Address]

before
27th Annual Conference
Association of Labor Mediation Agencies
1978 Meeting

Copley Plaza Hotel
Boston, Massachusetts

Monday
July 24, 1978

[Washington, National Labor Relations Board] 1978.

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I am pleased to have this opportunity to address the 1978 conference of your Association. As some of you may know, the Board has given serious consideration, on more than one occasion in the past few years, to joining ALMA. That, for a variety of reasons, the Board reluctantly concluded it could not, must not be taken, by anyone, to mean that we considered such an association less than advantageous. One of the fundamental aims of ALMA is shared by the National Labor Relations Act - namely the peaceful resolution of industrial disputes. ALMA's dedication to that goal is, we know, a sincere one, and anyone remotely familiar with the history of the National Labor Relations Act cannot help but appreciate not only the importance of this goal but, equally, how difficult a goal it is that ALMA and the NLRB have set for themselves.

All of us can be proud, I think, of the degree of success that has accompanied the governmental effort, at both the federal and state level, to contain industrial disputes. The process of regulation, conciliation, mediation and adjudication has helped fashion not only order where chaos reigned so long, but it has

also introduced a degree of economic justice to the Nation's affairs sufficient to make our free society more enduring. So that the system of industrial democracy and free collective bargaining, in which we play a fundamental role, has had incalculable beneficial consequences for the Nation in so many areas.

What success we have achieved is attributable, in a large part, to the commendable degree to which the labor-management community has accepted the procedures and practice of collective bargaining. That acceptance is partially the result of the simple fact that government has decreed collective bargaining to be beneficial to labor, management, and the Nation and has sought, as a matter of policy, to actively further the practice. But equally, the practice has been generally accepted because it has been demonstrated that it works - and we have helped to make it work.

The relative success of the system of industrial democracy envisioned by the Wagner Act and refined by Taft-Hartley and Landrum-Griffin is reflected in the expansion of jurisdiction the Board has experienced in the past several years. Because there is what might be called a proportional relationship between the extent of Board jurisdiction and the jurisdiction of state labor relations agencies, I think it may be worthwhile today to consider, briefly, both the extent and nature of the jurisdictional expansion the Board has witnessed

in the past several years.

In terms of the Board's impact on state labor relations agencies, the momentous cases, in my judgment, are our decisions in Butte Medical Properties,[1/] asserting jurisdiction over proprietary hospitals, and Cornell University,[2/] in which the Board, overruling a policy established almost 20 years earlier, asserted jurisdiction over private universities.

Butte, was, I emphasize, a proprietary facility. Although the Board had, in exceptional circumstances,[3/] asserted jurisdiction over certain medical institutions, organizational activity at medical facilities was a relatively uncommon experience in the early days of the Act, so much so that the first broad-based policy decision involving proprietary hospitals did not arise until 1960, in the Flatbush Hospital[4/] decision. There, the Board announced that the impact on commerce of such profitmaking institutions was essentially local in character, and therefore, did not affect commerce substantially enough to warrant the exercise of Board jurisdiction. It should be noted that the refusal, in Flatbush, to assert jurisdiction over proprietary hospitals was a discretionary one. For those of you who may be unfamiliar with Board jurisdictional policy, the Act extends to all private enterprises that affect commerce to more than a minimal degree. The legal or statutory jurisdiction of the Act is coextensive

with the reach of the Commerce Clause of the Constitution. For administrative reasons, however, the Board, in its own discretion, has superimposed on the jurisdictional reach of the statute additional jurisdictional limitations, designed to produce an effective impact within the limitations of its budget. For the most part, Board-imposed jurisdictional limitations are embodied in our discretionary monetary standards which set out a minimum dollar amount of activity an enterprise must generate before the Board will take a case involving that enterprise. The dollar standards are not, however, the only basis upon which the Board can rest a refusal to assert jurisdiction. In addition to the size of the enterprise, its character can be such as to lead the Board to conclude that an exercise of jurisdiction is unwarranted. For two reasons that will become apparent later, such discretionary refusals to assert jurisdiction because of the character of an enterprise are, today, uncommon. But in the Flatbush era, and for a long time thereafter, the Board would decline to assert jurisdiction over enterprises which met the legal or statutory test for assertion but which, in the Board's opinion, were engaged either in an essentially local activity, or in a charitable or eleemosynary activity, which was considered by the Board to be a noncommercial activity.

The discretionary refusal to assert jurisdiction in Flatbush was premised on the so-called "local" character of a hospital's activity.

However, the growth of medical insurance, its increased costs and the enactment of Medicare legislation in the mid-sixties all served to call into question the continuing viability of the Flatbush policy, and, in 1967, the Board, in Butte, concluded that the designation of proprietary hospitals as essentially local enterprises could no longer be justified. The same day Butte was decided, the Board decided University Nursing Home,[5/] in which jurisdiction was asserted over proprietary nursing homes, and with Butte and University Nursing as the foundation, the growth of Board jurisdiction over healthcare facilities had begun.

Of course, the vast bulk of employers and employees in the healthcare industry were to be found in nonprofit hospitals, excluded from Board jurisdiction by the Taft-Hartley amendments of 1947, so that the immediate impact of Butte and University Nursing was not that pronounced. But they did have important, long-term, consequences. First, the regulation that followed in their path dispelled the notion that the organization of employees in the healthcare field was hazardous. The state of labor-management relations in the proprietary healthcare field became, in a brief period, demonstrably less volatile than it was in the nonprofit hospital sector of the industry. Second, Board jurisdiction in the proprietary sector created an obvious imbalance, which suggested a need to reexamine the nonprofit hospital exemption

itself. The legislative history of the 1974 healthcare amendments has, in many contexts, meant different things to different people. But no one could doubt, I think, that the experience of the proprietary sector of the industry during NLRA coverage went a long way in providing the rationale underlying the 1974 healthcare amendments.

You will note that in discussing Flatbush and Butte I did not discuss the relationship between those holdings and the nonprofit hospital exemption. That is because, ironically, there was none. Nonprofit hospitals were not exempted from the Act's coverage because such institutions were considered, by the Congress, to have an "essentially local" impact on commerce. The exemption was, instead, founded on the belief that nonprofit, charitable institutions, because they were not profit-motivated, were not commercial institutions. That they were thought to be noncommercial suggested, I suppose, that they could not affect commerce, at least to a degree justifying Board involvement. The irony in Flatbush and Butte being hospital cases but never mentioning the nonprofit hospital exemption is compounded by the fact that the Board's policy towards educational institutions, prior to Cornell, was directly related to that exemption. The legislative history of that exemption seemed to indicate that the more sweeping exemption for all nonprofit institutions contained in the bill passed by the House was dropped in conference solely because the Taft-Hartley Congress believed the Board

did not take jurisdiction over nonprofit employers in any event. That legislative perception was the sole basis for the Board's 1951 decision in Columbia University[6/] not to assert jurisdiction over private universities and colleges.

A fundamental distinction between statutory and discretionary jurisdiction is that, as far as the Board's authority is concerned, the former is fixed while the latter is susceptible to reevaluation. Even assuming Congress was accurate in its description of the Board's jurisdictional stance on nonprofit institutions and assuming Columbia was a necessary result of that legislative judgment, the important point to remember is that times change and discretionary jurisdiction postures can and should accommodate that. By 1970, the conclusion that nonprofit educational employers were engaged in noncommercial activity became, if not wholly untenable, at least sufficiently suspect to demand reanalysis. Cornell was where that reanalysis took place.

In it, the Board concluded that its statutory jurisdiction over nonprofit colleges and universities should be exercised because of the massive impact such institutions, as a class, can exert on the flow of interstate commerce. That conclusion was greatly aided by the Supreme Court's observation, two years earlier in Maryland v. Wirtz,[7/] that

> [it] is clear that labor conditions in schools . . . can affect commerce . . . Strikes and work stoppages involving employees of schools . . . obviously interrupt and burden this flow of goods across state lines.

Cornell, as well as the rule the Board established in its aftermath, setting forth a $1,000,000 monetary standard, involved only one particular kind of nonprofit institution -- the private university. But Cornell did much more than establish a Board policy of no longer refusing to assert jurisdiction over universities. It demolished the notion that employers engaged in a purportedly non-commercial enterprise, by virtue of that fact alone, somehow exerted less than enough of an impact on commerce to warrant application of the statute. Syracuse University, one of the institutions involved in the Cornell case, employed 3,500 employees, had 5,000 out-of-state students, had facilities in South America, Holland, Italy and France, made $5,000,000 in out-of-state purchases. Its book store made $2,000,000 in out-of-state purchases, its theater $300,000. Syracuse realized 3/4 of a million dollars from football alone. Cornell had even more employees, out-of-state students and facilities. Cornell spent over $140,000,000 a year and had assets of double that.

That Cornell involved relatively major academic institutions might initially suggest caution. But it should be remembered that what constituted noncommercial activity had, for the most part, tended to be equated with no more than nonprofit activity. Profit is, of course, not commerce, as Cornell demonstrated. If an institution historically considered noncommercial could generate the kind of interstate commerce that Cornell depicted, that other institutions might be smaller did not compel the conclusion Cornell was no more

than a case about colleges. It at least suggested the possibility that the correlation between no profit and little impact had become more dubious.

Shortly after Cornell, in Corcoran Gallery,[8/] the Board made it clear that Cornell was intended to indicate that the Board would no longer decline to assert jurisdiction over all educational institutions, not merely universities or colleges. Jurisdiction was next asserted over secondary and elementary schools in Shattuck School,[9/] The Windsor School[10/] and The Judson School.[11/]

The jurisdictional impact of Cornell extended beyond educational institutions. In Children's Village, Inc.,[12/] and Jewish Orphans Home[13/] jurisdiction was asserted over nonprofit institutions engaged in the treatment of emotionally disturbed children, in Rosewood Inc.,[14/] over extended care facilities, and in Visiting Nurse Association,[15/] over home nursing services.

Many of these cases involved what we now consider to be "healthcare institutions" within the meaning of the 1974 amendments to the Act. And a substantial part of the growth in Board jurisdiction over the healthcare sector prior to the amendments, to the extent it encompassed nonprofit healthcare institutions which were not hospitals, was attributable to Cornell. Earlier I indicated that the number of employers and employees in nonprofit hospitals was far greater than those in the entire proprietary healthcare field. But even excluding

nonprofit hospitals, other nonprofit healthcare institutions and their employees outnumbered those in the proprietary sector. Cornell, because it examined the relationship between nonprofit activity and impact on commerce, predictably exerted a significant impact on certain healthcare institutions.

Unfortunately, the jurisdictional growth that Cornell spurred was retarded somewhat at precisely the time that the legislative movement towards the healthcare amendments was at its height. In a line of cases commencing with the Board's decision in Ming-Quong Children's Center,[16/] the Board attempted to circumsribe the impact of Cornell on a host of nonprofit enterprises by interpreting it as a decision restricted to universities and colleges only.

The retreat from Cornell - which, I should add, I did not join - was a very brief one. Shortly after Ming-Quong, and several important cases which followed in its line, the healthcare amendments were passed. By their terms, of course, the healthcare amendments were a legislative mandate to the Board to assert jurisdiction over healthcare institutions. But the Ming-Quong rationale applied, no less, to nonprofit institutions that were not healthcare facilities. You will recall that the legislative history of the nonprofit hospital exemption had formed the basis, up until Cornell, for a Board policy of refusing to assert jurisdiction over nonprofit, charitable institutions in general. It was readily apparent that enactment of the healthcare

amendments or, put another way, repeal of the legislative history of the exemption, might have the additional effect of overruling not only certain healthcare cases that had emanated from Ming-Quong but, additionally, those nonhealthcare cases in which jurisdiction was declined based upon Ming-Quong's limitation of Cornell.

Ultimately, in Rhode Island Catholic Orphan Asylum,[17/] a Board majority held just that. An institution's charitable or nonprofit character, it was found, "no longer afforded[ed] a rational basis upon which to decline jurisdiction."[18/]

How far the Board has come in this regard may be gleaned from our recent decisions - issued a little over 3 months ago - in the so-called Model Cities/day care center cases,[19/] Catholic Bishop of Chicago and Hull House Association. For the most part those cases involved quite a different jurisdictional inquiry -- whether such centers were so related to an exempt entity, the city of Chicago, that application of the Act to them would be precluded or undesirable. But they, were nonetheless, about nonprofit, charitable day care centers. And how far we have come may be exemplified by the Board's brief response in both cases, to the contention that jurisdiction should be declined over such centers because of those characteristics -- "[t]he fact that the Employer is a nonprofit, noncommercial, charitable, organization provides no basis for declining jurisdiction."[20/]

That the Model Cities/day care center cases involve a different

jurisdictional inquiry doesn't mean, however, that they were any less important in assessing the impact of the NLRB on many of ALMA's members. The Board has, as some of you know, struggled for a long time, to define the jurisdictional tests applicable to situations in which a governmental entity, exempt under the Act, decides to contract out some of its functions to the private sector - the issue thus becoming whether to assert over the nonexempt private employer. I think the critical inquiry is whether the private employer retains sufficient control over the employment conditions of its employees so that meaningful collective bargaining can take place.

For several years, however, my colleagues often applied an amorphous "intimate connection" test to these cases. To some, intimate connection may hinge on the distinction of whether the particular function contracted out is required by statute, or merely authorized - the so-called mandatory-permissive distinction.. To others, intimate connection will turn on an assessment of the function itself. Is it essential governmental function so that the private employer should also be exempt from the Act? Or can the function be termed nonessential?

As I have viewed the matter, for an entity to fall within the statutory exemption for a State or its political subdivision, it must either be created directly by the state or administered by individuals who are responsible to public officials, or to the general public.[21/] If an employer retains the capability of exercising

effective control over the working conditions of its employees, the private sector employees should not be deprived of the benefits of the Act. Nor should the employer and, moreover, the governmental body involved be deprived of the Act's protection.

This control of "labor relations" test has two distinct advantages, in my judgment, over the "intimate connection" test. First, it is simpler. It should be noted that "intimate connection" is not a test limited to establishing the "connection." Determining who is in "control" is, if less exciting, certainly less distracting than determining not only the connection but how "intimate" that connection is. Second, the ease of application that the control test fosters produces greater predictability for employers, employees and unions, who are entitled to clear and comparatively forthright standards which will furnish guidance. Moreover, parties frequently resort to litigation not so much because they doubt the consequences of their conduct but, rather, because they question whether the rules of conduct are applicable to them in the first place. Clearer jurisdictional boundaries tend, therefore, to reduce somewhat caseload burdens.

The greatest number of cases in this area are school bus cases, in which a private employer contracts with municipal school districts to provide transportation services. If that employer retains the right to hire, fire, set wages and hours, and discipline its employees, including those providing the school bus services, I see little justification

for failing to assert over that employer's entire operations, including the school bus operations. At times, however, a majority of the Board has distinguished between the employer's school bus operations and nonschool related operations - choosing to assert only over the latter.

Frequently, the employer's drivers will shift between both the school and the private transportation services, so that the Board may, on the basis of the dual function, be asserting jurisdiction over precisely the same employees as those who are employed in the school operations found to be exempt.

Hopefully, the Model Cities/day care center cases, in which a Board majority rejected the contention that an intimate connection existed between the center and the federal government, will mark the beginning of a uniform Board approach to jurisdictional issues of this kind.

The expansion in our jurisdiction that has taken place in the past decade has served, I admit, to limit state regulation of labor relations activity, by virtue of the preemption doctrine. That does not mean, as I am sure you know, that state involvement in labor-management relations has been considered, at the federal level, to be less valuable than hoped for. There are, however, important considerations behind the perceived need for a high degree of national uniformity in labor policy. One of the reasons for my dissatisfaction with the intimate

connection test, for example, is that it too often is the vehicle by which Board jurisdiction is defeated. I would much prefer not to eliminate experience under federal regulation which can serve as a useful model for state legislatures contemplating a regulatory scheme in areas the Board does not occupy - for example, enterprises below our monetary standards - and areas the Board cannot occupy - such as public employees dispute resolution. In this respect, one beneficial aspect of the Board's expansion of jurisdiction into areas previously covered by state labor agencies may be to leave those agencies with a greater capacity to handle problems in the rapidly growing public employee sector. In addition, the federal scheme often seeks to accommodate the great value of complementary state regulation, as evidenced by the mandatory state mediation provisions contained in the healthcare amendments.

In all, I see the process of government involvement in the realm of labor-management relations as a cooperative venture at all levels of government, federal, state and municipal. If the history of the relationship between worker and owner demonstrates anything, it is that there is not only a need for that cooperation but ample room in which it can take place. I am confident that in such an approach lies the continuing capacity to resolve labor relations problems for the benefit of the Nation.

F O O T N O T E S

* Mr. Fanning is a Member of the Rhode Island and U.S. Supreme Court Bars and a graduate of Providence College (A.B.) and the Catholic University School of Law (LL.B.). He has been a Member of the National Labor Relations Board since 1957, and Chairman of the Board since April 1977. He began his fifth 5 year term on the Board on December 17,1977

1. 168 NLRB 266 (1967).
2. 183 NLRB 329 (1970).
3. See, e.g. Central Dispensary and Emergency Hospital, 44 NLRB 533 (1942); Kadlec Hospital, 89 NLRB 1247 (1950); Kennecott Copper Corp., 99 NLRB 748 (1952); Hospital Hato Tejas, Inc., 111 NLRB 155 (1955).
4. 126 NLRB 144 (1960).
5. 168 NLRB 263 (1967).
6. 97 NLRB 424 (1951).
7. 392 U.S. 183, 194-195 (1968).
8. 186 NLRB 565 (1970).
9. 189 NLRB 886 (1971).
10. 200 NLRB 991 (1972).
11. 209 NLRB 677 (1974).
12. 186 NLRB 953 (1970).
13. 191 NLRB 32 (1971).
14. 185 NLRB 193 (1970).
15. 188 NLRB 155 (1971).

16. 210 NLRB 899 (1974).

17. 224 NLRB 1344 (1976).

18. Id. at 1345, n. 4.

19. 235 NLRB No. 105; 235 NLRB No. 108 (decided April 7, 1978).

20. 235 NLRB No. 105, slip op. at 12; 235 NLRB No. 108, slip op. at 9.

21. The National Gas Utility District of Hawkins County, Tennessee, 167 NLRB 691, enfd. 427 F.2d 312 (C.A. 6, 1970), affd. only as to applicable standard 402 U.S. 600 (1971).