Labor Law - Presumption against Rules Prohibiting Solicitation during Nonworking Time - NLRB's Application of Presumption in Hospital Patient Access Areas, Except for Immediate Patient Care Areas, Upheld as Valid

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LABOR LAW—PRESUMPTION AGAINST RULES PROHIBITING SOLICITATION DURING NONWORKING TIME—NLRB’S APPLICATION OF PRESUMPTION IN HOSPITAL PATIENT ACCESS AREAS, EXCEPT FOR IMMEDIATE PATIENT CARE AREAS, UPHELD AS VALID.

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

Motivated in part by union organizational activity, Baptist Hospital (Hospital), a private, nonprofit institution, promulgated a rule prohibiting solicitation by employees in areas of the Hospital "accessible to or utilized by the public," such as lobbies, gift shops and cafeterias on the first floor, as well as corridors and sitting rooms adjacent to patient rooms on upper floors. A local chapter of the Service Employees International Union (Union) filed unfair labor practice charges with the National Labor Relations Board (NLRB or Board), claiming that the Hospital’s rule violated section 8(a)(1) of the National Labor Relations Act (Act).


2. 442 U.S. at 775-76. The Hospital’s rule governing solicitation read: No solicitations of any kind, including solicitations for memberships or subscriptions, will be permitted by employees at any time, including work time and non-work time in any area of the Hospital which is accessible to or utilized by the public. Anyone who does so will be subject to disciplinary action. In those work areas of the Hospital not accessible to or utilized by the public, no solicitation of any kind, including solicitations for memberships or subscriptions will be permitted at any time by employees who are supposed to be working, or in such a way as to interfere with the work of other employees who are supposed to be working. Anyone who does so and thereby neglects his work or interferes with the work of others will likewise be subject to disciplinary action. No distributions of any kind, including circulars or other printed materials, shall be permitted in any work area at any time.

Id. at 776 n.2.

3. Id. at 776. The chapter involved was Local 150-T, Service Employees International Union, AFL-CIO, the intervenor in the instant suit. Id. at 775.


Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [section 8(a)(3) of the Act].

Id. § 157.

Section 8(a)(3) provides in pertinent part: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." Id. § 158(a)(3).

(583)
The Hospital and the NLRB presented evidence to an administrative law judge\(^5\) who concluded that the Hospital's "no-solicitation" rule violated section 8(a)(1) and was therefore invalid.\(^6\) Agreeing with the administrative law judge, the NLRB\(^7\) ordered the Hospital to cease enforcing any rule prohibiting solicitation by its employees during nonworking time in any areas other than "immediate patient care areas."\(^8\) On appeal, the United States Court of Appeals for the Sixth Circuit denied enforcement of the NLRB's order, holding that the Hospital had presented sufficient evidence of disruption of patient care to justify its broad proscription of solicitation by employees.\(^9\)

On writ of certiorari, the Supreme Court affirmed in part and vacated and remanded in part, holding that, while the Sixth Circuit was correct in denying enforcement of the NLRB order as applied to corridors and sitting rooms on patients' floors, it had erred in also denying enforcement of the order as applied to the first-floor cafeteria, gift shop, and lobbies. \textit{NLRB v. Baptist Hospital, Inc.}, 442 U.S. 773 (1979).

Employees of private, nonprofit hospitals have only recently received the express protection of the National Labor Relations Act\(^10\) which, as originally enacted, appeared to exclude such hospitals from its coverage.\(^11\) Despite the NLRB's determination in \textit{Matter of Central Dispensary and

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5. 442 U.S. at 776-77. The Hospital presented extensive evidence by physicians and hospital administrators that the no-solicitation rule was necessary to prevent disruption of patient care, especially in such areas as corridors and sitting rooms on upper floors of the hospital. \textit{Id.} at 782-84.

6. \textit{Id.} at 777.

7. 223 N.L.R.B. at 346. Underlying the NLRB decision was a rebuttable presumption that an employer's rule prohibiting union solicitation by employees on company property during nonworking time is invalid except as applied to immediate patient care areas. \textit{Id.} at 344 n.2. The NLRB accepted the findings of the administrative law judge, who had concluded that the Hospital had failed to show special circumstances necessary to rebut the presumption. \textit{Id.} at 344, 355-58. For a discussion of the NLRB's presumptions concerning no-solicitation rules, see notes 17-46 and accompanying text infra.

8. 223 N.L.R.B. at 346. The NLRB's order stated that the Hospital must cease and desist from "[p]romulgating, maintaining in effect, enforcing, or applying any rule or regulation prohibiting its employees from soliciting on behalf of any labor organization during their nonworking time in any areas of its hospital other than immediate patient care areas." \textit{Id.} In another part of its order, the NLRB instructed the Hospital to withdraw its existing no-solicitation rule "to the extent that it prohibits its employees from soliciting on behalf of a labor organization during their nonworking time in any nonworking area of the Hospital including those areas open to the public." \textit{Id.} at 361.

9. NLRB v. Baptist Hosp., Inc., 576 F.2d 107, 111 (6th Cir. 1978), aff'd in part and vacated and remanded in part, 442 U.S. 773 (1979). The Sixth Circuit did enforce the Board's order insofar as it related to a finding of discrimination by the Hospital against an individual employee. 576 F.2d at 111. For a discussion of the Sixth Circuit's reasoning in \textit{Baptist Hospital} see note 40 infra.

10. See note 16 and accompanying text infra.

Emergency Hospital that a private, nonprofit hospital’s activities were governed by the Act, the Taft-Hartley Amendments of 1947 made it clear that such hospitals were exempt. In response to numerous strikes and work stoppages by employees of such facilities, Congress amended the Act in 1974 to cover employees of private, nonprofit hospitals.

Before the Act was amended in 1974 to include nonprofit hospitals, the NLRB had considered the right of employers to control the time and manner in which their employees solicited for, and were solicited by, a union on business premises. In an effort to provide a greater degree of certainty and stability in union organizational activities, the NLRB developed presumptions that restricted the employers’ freedom to make rules regulating the solicitation of union membership and the distribution of union literature. In its 1943 ruling in Matter of Peyton Packing, for example, the NLRB announced a rebuttable presumption that employer rules prohibiting

17. Although nonprofit hospitals were not expressly covered by the Act until 1974, proprietary hospitals which otherwise met jurisdictional standards were consistently covered under the Act prior to that time. ABA LABOR RELATIONS SECTION, THE DEVELOPING LABOR LAW 4 (1976). For a discussion of the application of no-solicitation presumptions in proprietary hospitals, see note 26 infra.
18. See Feheley, supra note 16, at 291. These NLRB presumptions are based on factual distinctions underlying the organizational activity in question: e.g., the time and place of the activity, the identity of organizers (employees or outside organizers), the degree of interference with production, plant discipline or cleanliness, and the nature of the activity (oral solicitation or distribution of written material). Id. It should be noted that company rules concerning the distribution of written material (as opposed to oral solicitation) have been upheld for the following reasons: 1) the distribution of leaflets could create litter and become a safety hazard; and 2) the locus of distribution of written material is not as important as it is in the case of oral
union solicitation on company property during nonworking time are invalid, absent evidence from the employer that special circumstances make the rule necessary to maintain production or discipline. The validity of this presumption concerning employers’ “broad” no-solicitation rules was soon upheld by the Supreme Court in Republic Aviation Corp. v. NLRB, where the Court stated that the adoption of such a presumption was within the NLRB’s authority under the Act.

The NLRB’s presumption against broad no-solicitation rules evolved in the industrial setting as the Board attempted to balance the interests of employers and employees. When confronted with such rules in the context of retail establishments and public restaurants, the NLRB recognized that the interests of these employers in preventing employee solicitation


19. 49 N.L.R.B. 828 (1943). In Peyton Packing, the management of a meat-packing plant promulgated a rule prohibiting solicitation of any kind by employees while on company property or during working hours. Id. at 832.

20. Id. at 843-44. The NLRB stated that, although an employee is on company property, he is free to use his nonworking time as he wishes without unreasonable restraint. Id. at 843. To insure this freedom, the NLRB held that an employer’s rule prohibiting solicitation during nonworking time is presumed to be an unreasonable impediment to the employee’s right of self-organization. Id. at 843-44. In permitting the presumption to be rebutted by evidence of special circumstances, the NLRB has recognized that some situations present unique needs and considerations. Feheley, supra note 16, at 291. The presumption has been overcome by specific proof of a necessity for efficiency, safety, or discipline. B. GORMAN, supra note 17, at 181, citing McDonnell Douglas Corp. v. NLRB, 472 F.2d 539, 547 (8th Cir. 1973) (national security justifies restricting off-duty employees to parking lots and other nonworking areas when employer is engaged in production of military and classified aircraft and spacecraft).

21. 324 U.S. 793 (1945). In Republic Aviation, the employer, a large military aircraft manufacturer, had adopted a rule prohibiting solicitation in its factory. Id. at 794-95. An employee who persisted in soliciting union membership during lunch breaks was terminated after being warned to stop. Id. at 795. The NLRB determined that the employer’s no-solicitation rule violated § 8(a)(1) because it interfered with, restrained, and coerced employees in violation of § 7 of the Act, and discriminated against the discharged employee in violation of § 8(a)(3). Id. at 795-96. For the pertinent parts of §§ 7, 8(a)(1), and 8(a)(3), see note 4 supra.

The Supreme Court affirmed the judgment of the Second Circuit which had upheld the decision of the NLRB. 324 U.S. at 805. In so doing, the Court stressed that the employee’s right to organize must be balanced against the property rights of the employer. Id. at 797-98. The Court stated:

[The NLRB has the responsibility of adjusting] the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.

Id.

22. 324 U.S. at 804. The Court stressed that the validity of an NLRB presumption, like a statutory presumption or one established by regulation, depends upon the “rationality between what is proved and what is inferred.” Id. at 804-05. Since broad no-solicitation rules impermissibly interfere with employees’ organizational rights under the Act, the Court found that the NLRB’s presumption against such rules was rationally based and therefore valid. Id. at 802-03.

were different from those of industrial employers and, thus, the Board re-
frained from mechanically applying its presumption. Rather, the NLRB
concluded that no-solicitation rules in these establishments were reasonable
in view of 1) the extent of the public's presence in such settings; 2) the
relationship between the public and the employees; and 3) the fact that the
primary business of these employers (direct sales to customers) would be
disrupted by solicitation.

After private, nonprofit hospitals were brought within the Act's jurisdic-
tion, the issue arose whether the NLRB's presumption against the validity
of broad no-solicitation rules should be extended to cover these hospitals.
In St. John's Hospital and School of Nursing, Inc., the NLRB announced
that the presumption would apply to nonprofit hospitals but carved out a
limited exception allowing employers to ban solicitation in "strictly patient care
areas." Distinguishing "strictly patient care areas" from "patient access
areas," the Board reasoned that since solicitation in the former areas might be
"unsettling" to patients, a rule prohibiting solicitation in those areas

24. Id. at 493; id. at 511 (Powell, J., concurring). See Marriott Corp. (Children's Inn), 223
N.L.R.B. 978 (1976); May Dept Stores, 59 N.L.R.B. 976 (1944), modified, 154 F.2d 533 (8th
Cir.), cert. denied, 329 U.S. 725 (1946).
25. 437 U.S. at 512 (Powell, J., concurring). Justice Powell explained that rather than view-
ing cases involving retail establishments as situations where the NLRB chose not to apply the
no-solicitation presumption at all, they might be viewed alternatively as instances in which the
NLRB presumption had been applied but was rebutted by the employer's showing of special
circumstances. Id. at 512 n.3 (Powell, J., concurring). Nonetheless, Justice Powell stressed that
the result under either view would be the same because, after special circumstances are shown,
the NLRB will balance the employees' rights against the employer's interests and the outcome,
besides deciding the case at bar, will serve as precedent for all cases involving retail establish-
ments thereafter. Id.
26. Feheley, supra note 16, at 295-96. It should be noted that, in the context of proprietary
hospitals, the NLRB had applied its presumption against the validity of no-solicitation rules. See
107, 111 (1972); Summit Nursing and Convalescent Home, Inc., 196 N.L.R.B. 769, 769-70
(1972), enforcement denied, 472 F.2d 1390 (6th Cir. 1973). In Summit, the NLRB concluded
that the facility had failed to show special circumstances to rebut the presumption. 196
N.L.R.B. at 769-70. In Guyan Valley, the Board held that the presumption against the validity
of no-solicitation rules was overcome because the rule applied to patient access areas where the
potential for disruption to patients made the hospital's right to ban solicitation "akin to that of
retail department stores." 198 N.L.R.B. at 111. For a discussion of the presumption as applied
in the context of retail stores, see notes 24-25 and accompanying text supra.

In Bellaire, the NLRB did not directly mention the presumption, but affirmed the
administrative law judge's order that the hospital revoke its existing broad no-solicitation rule to
permit solicitation, except in those areas where the hospital could establish necessity for the
rule to maintain production, discipline, or security. 203 N.L.R.B. at 1111.
27. 222 N.L.R.B. 1150 (1976), enforcement granted in part and denied in part, 557 F.2d
1368 (10th Cir. 1977). The hospital in St. John's had promulgated a broad no-solicitation rule
prohibiting, inter alia, solicitation by employees except during nonworking time and in non-
working areas to which patients and visitors did not have access. 222 N.L.R.B. at 1150.
28. 222 N.L.R.B. at 1150-51. Recognizing that a tranquil atmosphere is necessary for quality
patient care, the Board found that hospitals have a special interest which may justify more
stringent control of employee solicitation. Id. at 1150. The NLRB defined "strictly patient care
areas" to include "the patients' rooms, operating rooms, and places where patients receive
treatment, such as x-ray and therapy areas." Id.
29. Id. at 1151. The NLRB defined "patient access areas" to include "cafeterias, lounges,
and the like." Id.
would not be presumed illegal. The NLRB found, however, that because solicitation in "patient access areas" would not have an adverse effect on patients, a no-solicitation rule pertaining to those areas would be presumed unlawful. The Board thus balanced the interests of patients well enough to frequent the patient access areas against those of the hospital employees and concluded that the interests of patients in a tranquil environment did not outweigh the interests of employees in soliciting union representation.

The United States Courts of Appeals which considered the validity of the NLRB's presumption as it concerned patient access areas in hospitals applied varied rationales and achieved conflicting results, with some courts questioning whether the presumption was applicable to the hospital setting at all. In analyzing the applicability and validity of the presumption, the courts divided the patient access areas into two subdivisions: 1) patient access areas adjacent to strictly patient care areas, such as corridors and sitting rooms on patient floors; and 2) all other patient access areas including cafeterias, gift shops, and coffee shops. The Seventh Circuit enforced an NLRB order which protected solicitation both in patient access areas adjacent to patient rooms as well as in cafeterias and lounges. The First Circuit enforced an NLRB order which focused solely on cafeterias and coffee shops and protected solicitation in those areas only. On the other hand,
the Tenth, and Sixth Circuits denied enforcement to similar NLRB orders which attempted to protect solicitation both in areas adjacent to patient rooms and in cafeterias and shops.

Prompted by the divergent views among the circuits, the Supreme Court granted certiorari in *Beth Israel Hospital v. NLRB.* The hospital in that case challenged the extension of the no-solicitation presumption to hos-

the Board’s presumption against the validity of no-solicitation rules. 554 F.2d at 480. The court cautioned, however, that the NLRB should revise its presumption as applied to hospitals if future experience shows that patient well-being is jeopardized by solicitation in these areas. Id. at 481.

38. St. John’s Hosp. and School of Nursing, Inc. v. NLRB, 557 F.2d 1368 (10th Cir. 1977). For a discussion of the NLRB’s decision in this case, see notes 27-32 and accompanying text supra. The Tenth Circuit criticized the NLRB’s application of the presumption against no-solicitation rules to nonprofit hospitals for the following reasons: 1) the distinction between strictly patient care areas and other areas was unsupported by the record; 2) the NLRB based its conclusion on findings outside its area of expertise; 3) the application of the presumption was unreasonable; and 4) the application of the presumption was contrary to the intent of Congress. 557 F.2d at 1372-75. Although not expressly holding that the presumption should be inapplicable to all patient access areas, the Tenth Circuit appeared to favor this position, stating that recognition of the unsettling effects of solicitation on patients established a special circumstance making at least some restrictions by hospitals on solicitation necessary to maintain efficient and orderly operations. Id. at 1375.

The court further noted that even if the presumption is applicable in the hospital setting, the NLRB’s definition of strictly patient care areas must be interpreted to include such areas as halls, stairways, elevators, and waiting rooms accessible to hospital patients. Id. at 1375.

In an alternative holding, the court held that with respect to gift shops and cafeterias, the hospital maintains the same commercial interest as the management of a retail store or restaurant and thus retains the right to prohibit solicitation in those areas. Id. The court stated that since the hospital unquestionably could ban solicitation in such areas if they were located outside the hospital, it did not lose that right simply because they were part of a hospital rather than a shopping center. Id.

39. Baylor Univ. Medical Center v. NLRB, 578 F.2d 351 (D.C. Cir.), vacated in part and remanded. 439 U.S. 9 (1978). In denying enforcement to the NLRB order which permitted solicitation in the cafeteria and vending rooms, the court agreed with the alternative holding of the Tenth Circuit in *St. John’s,* see note 38 supra, and found these areas to be similar to other commercial restaurants and shops where the no-solicitation presumption was considered by the NLRB to be inapplicable. 578 F.2d at 357. For a discussion of the presumption’s inapplicability to retail shops and restaurants, see notes 24-26 and accompanying text supra. Concerning the hospital’s corridors, the court concluded that there was no substantial evidence supporting the NLRB’s conclusion that corridors were not entitled to the same protection as strictly patient care areas. 578 F.2d at 356. The court viewed the hospital as having special interests which justify a broad no-solicitation rule in corridors as well as strictly patient care areas. Id.

40. NLRB v. Baptist Hosp., Inc., 576 F.2d 107 (6th Cir. 1978), aff’d in part and vacated and remanded in part, 442 U.S. 773 (1979). The Sixth Circuit in *Baptist Hospital* concluded that the Hospital had met its burden of showing that special circumstances justified its broad prohibition against solicitation in all patient access areas. 576 F.2d at 110. For the text of the rule promulgated by the Hospital in *Baptist Hospital,* see note 2 supra. Three witnesses (two physicians and a hospital administrator) had emphasized that many seriously ill patients are permitted to move through the public areas of the Hospital, including lobbies, lounges, and the cafeteria. 576 F.2d at 109. The witnesses repeatedly stressed the necessity for a tranquil atmosphere throughout the hospital, drawing no distinction between strictly patient care areas and other patient access areas. Id. at 109-10. In reaching its conclusion, the Sixth Circuit also relied upon congressional concern for the special circumstances of hospitals, as shown by the legislative history to the 1974 health care amendments to the Act. Id. at 110. See S. Rep. No. 93-766, 93d Cong., 2d Sess. 3, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 3946, 3951.

41. 437 U.S. 483, 489 (1978). For a brief discussion of the decision of the court of appeals in *Beth Israel,* see note 37 and accompanying text supra.
hospitals on four grounds: 1) that the NLRB's decision to extend the presumption to nonprofit hospitals conflicts with the congressional policy of insuring that organizational activity does not disrupt patient care; 2) that the application of the principle of limited judicial review of NLRB action is inapposite in the hospital context because the Board is acting outside its area of expertise; 3) that the NLRB's decision to apply the presumption to nonprofit hospitals is unsupported by evidence and is irrational; and 4) that it is irrational to apply the presumption to a hospital cafeteria while refusing to apply it to public restaurants.\footnote{42} The Court rejected these arguments,\footnote{43} holding that the Act is not violated by the NLRB's approach of requiring a health-care facility to permit employee solicitation where the facility has not justified a prohibition as necessary to avoid disruption of health-care operations or disturbance of patients.\footnote{44} In addition, the Court upheld the appellate court's decision that the NLRB had properly applied the presumption to this hospital's cafeteria.\footnote{45}

Although the dispute in \textit{Beth Israel} centered on prohibitions concerning facilities used almost entirely by staff—as opposed to other patient access areas such as corridors and lounges on patient floors—concurring opinions expressed fear that \textit{Beth Israel} might provide an example which would lead

\footnote{42. 437 U.S. at 495-96.}
\footnote{43. \textit{Id.} at 496-508. Concerning the petitioner-hospital's first argument, the Court stated that nothing in the legislative history to the 1974 amendments conflicts with the NLRB's general approach to enforcement of the employees' right to organize under the Act. \textit{Id.} at 496. In light of the express findings of Congress that the right to organize would improve health care and that unionism was necessary to overcome poor working conditions which retard the delivery of quality health care, the Court could not say that the NLRB presumption as applied to hospitals was an impermissible construction of the Act. \textit{Id.} at 499-500.}

\footnote{44. \textit{Id.} at 507.}

\footnote{45. \textit{Id.}
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which the Sixth Circuit concluded that the NLRB's presumption as applied to nonprofit hospitals "does no more than place on the hospital the burden of proving, with respect to . . . [all areas other than immediate patient care areas], that union solicitation may adversely affect patients." 47 The Court then reviewed the holding of the Sixth Circuit that the Hospital had presented sufficient evidence of the ill effects of solicitation to fully justify its broad no-solicitation rule. 48

46. Id. at 509 (Blackmun, J., concurring). In another concurring opinion, Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, insisted that the presumption against no-solicitation rules is inapplicable in the hospital context. Id. at 510 (Powell, J., concurring). Justice Powell distinguished the hospital setting in which patients are present from the traditional industrial setting in which the presumption was formulated and where third parties unconnected with labor or management are generally not involved. Id. According to Justice Powell, the validity of the presumption in traditional settings cannot automatically be transferred to other work settings, for to do so would be to sever the connection between the inference contained in the presumption and its underlying basis. Id. at 511. (Powell, J., concurring). In addition, Justice Powell analogized the hospital setting to that of the retail establishment in which the NLRB has determined that the presumption against no-solicitation rules is invalid. Id. at 512-13 (Powell, J., concurring). For a discussion of the NLRB's rationale in removing retail establishments from the scope of the presumption, see notes 24-25 and accompanying text supra. In Justice Powell's view, as articulated in this concurring opinion, the presence of patients and the public in a hospital cafeteria should remove such a case from the scope of the presumption, just as the presence of customers renders the presumption inapplicable in retail establishment cases. Id. at 513 (Powell, J., concurring). Justice Powell found the hospital's function in serving patients and their families to be analogous to the retail establishment's function of serving customers and did not distinguish between the two settings on the basis of the presence or absence of a profit motive. Id.

It was Justice Powell who later delivered the majority opinion in Baptist Hospital, where he withdrew from the strong stance taken in Beth Israel against application of the Board's no-solicitation presumption. 442 U.S. at 775-91. In Baptist Hospital, Justice Powell never mentioned the analogy he had drawn in Beth Israel between the hospital setting and retail establishments for no-solicitation purposes. See id; note 84 infra.

47. 442 U.S. at 781. The Court explained that in applying the presumption to hospitals, the definition of "immediate patient care areas" is crucial because, outside those areas, the employer has the burden of proof in proving that solicitation adversely affects patient care. Id. at 780. It should be noted that the phrase "immediate patient care areas" is used synonymously with "strictly patient care areas" by the courts. For a discussion of these areas, see notes 27-31 and accompanying text supra.) In the present case, neither the administrative law judge nor the NLRB defined the phrase "immediate patient care areas." 442 U.S. at 780. The Board did, however, expressly base its ruling on the analysis in St. John's. 223 N.L.R.B. at 344 n.2. For a discussion of St. John's, see notes 27-32 and accompanying text supra. Since St. John's set forth the NLRB's standard of application for the no-solicitation presumption as applied to hospitals and enumerated patient rooms, operating rooms, and treatment rooms as areas in which the employer would be allowed to ban solicitation, the Supreme Court concluded that this definition was the one utilized by the NLRB in Baptist Hospital. 442 U.S. at 780, citing St. John's Hosp. and School of Nursing, Inc., 222 N.L.R.B. at 1150. The NLRB has never published a more inclusive list of "strictly" or "immediate" patient care areas, but nothing in NLRB opinions after St. John's indicates that the Board views areas other than those enumerated to be included within the scope of these terms. 442 U.S. at 781 n.10.

48. 442 U.S. at 782-91. The Court considered the evidentiary support in the record from which the Sixth Circuit concluded that the NLRB lacked a basis for its sweeping protection of solicitation outside immediate patient care areas. Id. The Sixth Circuit had given great weight to the testimony of witnesses as to the necessity for a tranquil atmosphere throughout the
Affirming the portion of the Sixth Circuit's opinion which considered the corridors and sitting rooms on patient floors, the Supreme Court found "that there was no substantial evidence of record to support the Board's holding." The Court emphasized the high degree of mobility of even critically ill patients in modern hospitals and the availability of alternate locations where solicitation is permitted.

On the other hand, the Court disagreed with the Sixth Circuit's appraisal of the evidence concerning the cafeteria, gift shops, and lobbies located on the first floor, concluding that the evidence presented by the Hospital was insufficient to rebut the NLRB's presumption that the needs of essential patient care do not require the banning of solicitation in those areas. The Court pointed to an absence of evidence concerning the frequency of patient use of such places and to testimony by Hospital witnesses who speculated that at least some kinds of solicitation in those areas would be unlikely to have a significant impact on patient care. The portion of the Sixth Circuit's opinion concerning the cafeteria, gift shops, and lobbies on the first floor was therefore vacated and remanded.

The Court then turned its attention to the more general issue of whether the NLRB's presumption should be applied in the hospital setting at all. The Sixth Circuit had, in effect, concluded that the NLRB's presumption was irrational as applied to hospitals and that the Board should be required to prove that solicitation in any given patient access area will not interfere with patient care. After reviewing the necessity for a sound fac-

hospital in order to protect the well-being of patients, and had applied this testimony to all patient access areas. Id. at 783.

49. Id. at 785-86. The Court noted that patients often move through corridors adjacent to their rooms on route to treatment or as part of their convalescence. Id. at 784. The Court further observed that the sitting rooms allow for patients to visit with family and friends, and often are used by physicians in conferring with the families of patients—frequently in times of crisis. Id. For further discussion of the testimony of the Hospital's witnesses, see note 78 infra.

50. 442 U.S. at 784-85. The Hospital had presented evidence that other areas were available for solicitation under the Hospital's rule, including twenty-six nurses' stations and adjoining utility rooms, two employee lounges, and the maintenance and laundry buildings. Id. The Court explained that the availability of alternative locations for solicitation was not dispositive, although such a fact did lend support for the Hospital's ban on solicitation in other areas. Id. at 785, citing Beth Israel Hosp. v. NLRB, 437 U.S. at 505.

51. 442 U.S. at 786-87.

52. Id. at 786. The Court observed that a patient in Baptist Hospital must have special permission to leave the floor on which his room is located and to eat meals in the cafeteria. Id. It thus appeared to the Court that the first floor is only visited by some patients and then only occasionally. Id. The Court concluded that patients who do visit the first floor are judged fit to withstand the activities in those areas. Id.

53. Id.

54. Id. at 790-91.

55. Id. at 787-90.

56. Id. at 787. The Sixth Circuit never rejected the application of the presumption expressly, but stated that there was no evidence in the case to justify an "immediate patient care" area limitation on the no-solicitation rule and that "in the setting of a modern general hospital it is difficult to define the areas of immediate patient care." 576 F.2d at 110. The Supreme Court characterized this analysis as a rejection of the presumption as applied to hospitals on the ground of irrationality. 442 U.S. at 787.
tual connection between proven and inferred facts in order for a Board presumption to be valid, the Supreme Court nevertheless could not conclude that application of the presumption to hospitals was irrational in all respects, since experience in *Beth Israel Hospital* and *Baptist Hospital* made clear that solicitation in at least some public areas of a hospital will not adversely affect patients or patient care. The Court pointed out, however, that the evidence of record on this and similar cases "casts serious doubt on a presumption as to hospitals so sweeping that it embraces solicitation in the corridors and sitting rooms on floors occupied by patients," especially since every hospital making the attempt has overcome the Board's presumption as applied to such corridors and sitting rooms. Because the evidence presented by the Hospital in *Baptist Hospital* was sufficient to rebut the presumption as applied to these areas, the Court did not need to decide the rationality of this portion of the presumption nor to frame the limits of an appropriate presumption as applied to hospitals.

The Court did nevertheless express doubts over whether the NLRB's interpretation of its present presumption adequately takes into account the medical practices and methods of treatment incident to the delivery of patient care in a modern hospital. Thus, the Court repeated its admonition

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57. 442 U.S. at 787, citing Republic Aviation Corp. v. NLRB, 324 U.S. at 804-05. For a discussion of *Republic Aviation*, see notes 21-22 and accompanying text supra.

58. 442 U.S. at 787-88.

59. Id. at 788.

60. Id. The Court noted the evidence in the present case and cited the extensive evidence presented in Baylor Univ. Medical Center v. NLRB, 578 F.2d 351 (D.C. Cir.), vacated in part and remanded, 439 U.S. 9 (1978). The Court noted that congestion in corridors impedes the operation of medical staff and equipment which often need to be moved quickly in response to emergencies. 442 U.S. at 788, citing 578 F.2d at 355-56. The corridors also serve as storage areas for emergency equipment, viewing rooms for the hospital nursery, locations for physical therapy, and, in many departments, as the only "waiting room" available. 442 U.S. at 788. For a brief discussion of *Baylor*, see note 39 supra.

The Court also cited the opinion of the Tenth Circuit in *St. John's*, where the court concluded that the NLRB presumption (first adapted to the hospital setting in *St. John's*) was unsupported by evidence that solicitation in such areas would not adversely affect patient care. 442 U.S. at 788-89, citing St. John's Hosp. and School of Nursing, Inc., 557 F.2d at 1375. The Tenth Circuit concluded that in order to preserve the NLRB's presumption in the hospital context, the Board's definition of "immediate" or "strictly" patient care areas must be interpreted to include halls, stairways, elevators, and waiting rooms accessible to patients. 557 F.2d at 1375. For a discussion of *St. John's*, see notes 27-32 & 38 and accompanying text supra.

61. 442 U.S. at 789. The Court pointed out that the development of such presumptions is normally the function of the NLRB. Id. See notes 21-22 and accompanying text supra; notes 72-73 and accompanying text infra.

62. 442 U.S. at 789. The Court noted that, in reviewing the scope and application of its presumption, the NLRB should take into account that modern hospitals house "a complex array of facilities and techniques for patient care and therapy that defy simple classification." Id. at 789-90 n.16. Since patients are cared for in a variety of settings including sitting rooms and corridors, the use and physical layout of such areas in different hospitals may necessitate varying resolutions of questions concerning solicitation prohibitions. Id. Similarly, the NLRB should recognize that some cafeterias and coffee-shops may be primarily patient and patient-relative oriented, despite the presence of employees. Id. The Court pointed out that even the Union, and other labor organizations in cases similar to *Baptist Hospital*, had urged the NLRB to
in *Beth Israel* that hospitals carry on a public function of utmost seriousness and importance and that the NLRB should stand ready to revise its rulings if future experience shows that the well-being of patients is in fact jeopardized.\(^6\)

In a brief concurring opinion, Justice Blackmun emphasized that due to the substantial factual differences which exist among hospitals, "what may be true of one hospital’s gift shop and cafeteria may not be true of another’s."\(^{64}\) Justice Blackmun also noted his difficulty in reconciling the Board’s ruling that solicitation is inappropriate in a retail establishment with its contrary presumption concerning hospital cafeterias and gift shops.\(^{65}\)

Justice Burger concurred only in the judgment, finding that “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.”\(^{66}\) Presenting an alternative rationale for the majority’s conclusion, the Chief Justice stated that he would decide such cases on the following grounds: "(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 presumption it must be scrutinized to determine if it is supported by independent substantial evidence.”\(^{67}\) Utilizing this approach to consider the evidence on the record, Chief Justice Burger concluded that the decision of the NLRB was not supported by substantial evidence with respect to public areas above the first floor.\(^{68}\) The Chief Justice, however, upheld the Board’s order as applied to the first floor gift shop and cafeteria because evidence showed that these areas were not primarily patient care areas.\(^{69}\)

Justice Brennan, joined by Justices White and Marshall, concurred in the judgment, asserting that the Sixth Circuit had “‘misapprehended or grossly misapplied’ the substantial evidence rule with respect to the cafeteria, gift shop, and first floor lobbies of Baptist Hospital.”\(^{70}\) Justice Brennan disagreed, however, with the majority’s more general discussion concerning application of the Board’s presumption to corridors and sitting

\(^{63}\). Id. at 790, citing Beth Israel Hosp. v. NLRB, 437 U.S. at 508.

\(^{64}\). 442 U.S. at 791 (Blackmun, J., concurring).

\(^{65}\). Id.

\(^{66}\). Id. at 791-92 (Burger, C.J., concurring).

\(^{67}\). Id. at 792 (Burger, C.J., concurring). Chief Justice Burger cited *Beth Israel* as consistent with this approach since the Court in that case stressed the necessity for a continuing development and possible revision of the NLRB’s approach to hospital solicitation. Id., citing Beth Israel Hosp. v. NLRB, 437 U.S. at 507-08. Moreover, the Chief Justice stressed that in *Beth Israel*, the majority had explained that the cafeteria in question was not primarily a patient care area. 442 U.S. at 792 (Burger, C.J., concurring).

\(^{68}\). 442 U.S. at 792-93 (Burger, C.J., concurring).

\(^{69}\). Id. at 793 (Burger, C.J., concurring).

\(^{70}\). Id. at 795 (Brennan, J., concurring), quoting Beth Israel Hosp. v. NLRB, 437 U.S. at 507.
rooms on patient floors. He stressed that decisions in the health-care area are no exception to the rule that the development of presumptions is normally a function of the NLRB, and that its conclusions on these matters are traditionally given considerable deference by the courts. Since Justice Brennan believed that the NLRB has shown itself to be sensitive to differences between the hospital and the industrial work place, he saw no need to second-guess the Board's handling of this delicate area of labor-management relations.

In considering the Baptist Hospital decision, it is submitted that the Court was correct in supporting that portion of the Sixth Circuit's opinion concerning corridors and sitting rooms which held that the NLRB had erred in assessing the Hospital's evidence as insufficient to rebut the presumption. The evidence provided "detailed illustration" of the need for a no-solicitation rule in those areas. Moreover, nothing in the evidence provided any basis for the NLRB to doubt the accuracy of the Hospital's witnesses who testified that union solicitation within the presence or hearing of patients may have adverse effects on their recovery.

Reviewing the Sixth Circuit's determination that the NLRB had also erred in finding that the Hospital had not rebutted the presumption for the first floor cafeteria, gift shop, and lobbies, it is suggested that the evidence was more difficult to evaluate and some weaknesses in the Supreme Court's reasoning are discernible. The Hospital's witnesses, in their testimony of the need for a tranquil atmosphere, did not distinguish between the areas on upper floors and those on the first floor. Upon viewing the evidence as a whole, however, the Court found this testimony insufficient to rebut the presumption for first floor areas, and suggested that specific evidence concerning the extent of patient use of cafeterias, gift shops, and lobbies might

71. 442 U.S. at 796 (Brennan, J., concurring). Justice Brennan emphasized that neither he nor the majority rejected the legality of the presumption applied by the NLRB. Id.

72. Id.

73. Id. at 797 (Brennan, J., concurring).

74. See id. at 785-86.

75. Id. at 784. The Court focused on that part of the evidence which explained the movement of critically ill patients through the corridors, the increased emphasis in modern hospitals on patient mobility as an aspect of therapy, and the role of sitting rooms and corridors as places for patients to visit with family and friends and for physicians to confer with patients' families during times of crisis. Id. See note 49 supra.

76. 442 U.S. at 784. The witnesses testified that if a discussion in the course of solicitation were to become volatile or hostile, it could "definitely have the potential for adversely affecting the patient and the patient's family." 223 N.L.R.B. at 356.

77. See 442 U.S. at 786-87.

78. 576 F.2d at 109-10. One witness testified, however, that many patients, especially those who are ambulatory and whose small children are not permitted to visit them in their rooms, frequently travel to public places of the Hospital such as the corridors, the gift shop, and the cafeteria. 223 N.L.R.B. at 356. Two of the Hospital's surgeons stressed that the psychological factor involved in the recovery process makes it necessary to keep patients and their families as calm as possible. Id. This necessity for tranquility in the hospital setting extends even to the presurgery period during which a trauma to patients, who are ambulatory and given free access to all public areas of the hospital, may have a marked effect on the success of the surgery and the patients' recovery thereafter. Id.
be helpful in rebutting the presumption.\textsuperscript{79} It is submitted that, while such evidence would not be unduly burdensome for a hospital to produce, the Court has provided no clue as to how high the percentage of patient use must be in order to rebut the presumption, nor has it indicated whether a high percentage of patient use would be enough, without more, to rebut.\textsuperscript{80}

Furthermore, when considering the Sixth Circuit's decision concerning corridors and sitting rooms on patient floors, the Court found that the availability of alternative locations for union solicitation lent validity to the Hospital's ban on solicitation.\textsuperscript{81} The Court, however, did not mention this factor in its consideration of the ban with respect to first floor areas.\textsuperscript{82} It is suggested that the availability of alternative nonpatient areas for union solicitation which would allow access to 100\% of the employees should be of substantial significance in assessing the validity of a hospital's ban on solicitation in all patient access areas, not just on patient floors. It is contended that in applying the presumption and balancing the needs of the parties involved in the hospital setting—patient, employer, and employee—the NLRB should recognize that, while the ability of the employee to communicate with union organizers in other areas decreases the need for such communication in patient access areas, the need of both the patient and the hospital for tranquility in such places remains strong.\textsuperscript{83} Thus, it is submitted that evidence of adequate alternative areas for employee solicitation should tip the balance of interests in favor of the patients' need for tranquility and the hospital's need for a broad no-solicitation rule in all patient access areas, thereby rebutting the no-solicitation presumption.

It is further submitted that the Court's more general analysis upholding the authority of the NLRB to apply its presumption against the validity of no-solicitation rules to hospitals\textsuperscript{84} paid too little attention to some important

\textsuperscript{79} 442 U.S. at 786.
\textsuperscript{80} See id.
\textsuperscript{81} Id. at 785. For a list of the available alternative locations, see note 50 supra.
\textsuperscript{82} See 442 U.S. at 786-87.
\textsuperscript{83} For testimony of expert witnesses concerning the patients' need for tranquility, see NLRB v. Baptist Hosp., Inc., 576 F.2d at 108-10.
\textsuperscript{84} 442 U.S. at 787-88. It should be noted that the majority opinion in Baptist Hospital, written by Justice Powell, never addressed the issue of the Board's inconsistent application of the presumption when dealing with retail establishments as opposed to hospital cafeterias and gift shops. See id. at 775-91. For a discussion of the disparate treatment accorded retail establishments by the NLRB, see notes 24-25 and accompanying text supra. This unexplained omission is especially troublesome because Justice Powell, concurring in Beth Israel, had termed this disparate application "unrealistic." 437 U.S. at 517 (Powell, J., concurring). See also note 46 supra. In Beth Israel, the NLRB explained the distinction in application of its presumption as being based on the different primary purposes of retail establishment employees versus hospital employees, and the Supreme Court accepted this explanation as "not irrational." 437 U.S. at 506-07. Justice Blackmun, concurring in Baptist Hospital, explained that he continues to have difficulty perceiving a meaningful distinction which would justify treating the retail and hospital cafeteria or gift shop situations differently. 442 U.S. at 791 (Blackmun, J., concurring). See text accompanying note 65 supra. It is submitted that the issue of disparate treatment in these analogous settings, which was not entirely disposed of in Beth Israel, has been further clouded by the Supreme Court's failure to address the question in Baptist Hospital. For a discussion of Beth Israel, see notes 41-46 and accompanying text supra.
weaknesses in the Board's present position. NLRB presumptions are valid only if there is "rationality between what is proved and what is inferred." It is suggested that the presumption as applied in the hospital context lacks the underlying degree of rationality necessary for its support. The presumption infers that only those patients in "immediate patient care areas" need protection from the disruptive effects of union solicitation. It is submitted that such an inference ignores the realities of modern health care in that today's hospital patients are not usually confined to their rooms or treatment areas and therefore are in need of a tranquil atmosphere throughout their entire milieu, which includes the halls, stairways, elevators, and waiting rooms. Moreover, the related inference that any patient given permission to frequent first floor areas has been adjudged able to withstand union solicitation also lacks factual support, since a patient's physical and emotional well-being are not always related to his or her capacity for ambulation and diversion in first floor areas.

It is further suggested that the irrationality of the presumption is evidenced in part by the ease with which it has been rebutted in the instant suit and in other cases dealing with corridors and sitting rooms. The

85. Republic Aviation Corp. v. NLRB, 324 U.S. at 804-05. For a discussion of Republic Aviation, see notes 21-22 and accompanying text supra.

86. See St. John's Hosp. and School of Nursing, Inc., 557 F.2d at 1372. The court in St. John's recognized the weakness in the NLRB's narrow definition of strictly patient care areas concluding that, in order to preserve the application of the Board's presumption with respect to hospitals, the definition of strictly patient care areas must be interpreted to include such places as halls, stairways, elevators, and waiting rooms accessible to patients. Id. at 1375. See note 38 supra.

The Baptist Hospital Court noted the importance of the definition of "immediate patient care areas" in determining the scope of the Board's presumption. 442 U.S. at 780. For an explanation of the definition used by the Baptist Hospital Court, see note 47 supra. Nevertheless, the Court explained that the variety of facilities and techniques for patient care which exists among hospitals makes any classification by definition difficult. 442 U.S. at 789-90 n.16. Moreover, the Court pointed out that the "immediate patient care" criterion has been criticized by the Union and other labor organizations as "simplistic." Id.

87. See St. John's Hosp. and School of Nursing, Inc., 557 F.2d at 1375. The St. John's court noted that the emphasis in modern hospitals is on enabling the patient to become ambulatory as soon as possible. Id.

88. For example, a terminally ill patient may be given privileges to visit the first floor areas in order to improve morale, while a patient with a minor bone fracture, who is otherwise fit, may be confined to bed. The Tenth Circuit in St. John's was also skeptical of any distinction drawn on the basis of the physical condition of patients frequenting certain areas. 557 F.2d at 1372.

In support of its position that patients in first floor areas are better able to cope with disturbance, the Baptist Hospital Court noted that two Hospital witnesses had testified that at least some types of solicitation in public areas, such as the cafeteria, would be unlikely to affect those patients present. 442 U.S. at 786. The Court, however, failed to explain, or to give any examples of, the kinds of solicitation which could be considered innocuous. See id. It is submitted that such speculative evidence is insufficient to overcome the weight of the testimony which stressed that any disturbance to patients, even pre-operative patients, could adversely affect patient care. For a discussion of this testimony, see notes 76-78 and accompanying text supra.

89. See 442 U.S. at 788.

90. See, e.g., Baylor Univ. Medical Center v. NLRB, 578 F.2d 351 (D.C. Cir.), vacated in part and remanded, 439 U.S. 9 (1978); St. John's Hosp. and School of Nursing, Inc. v. NLRB, 557 F.2d 1368 (10th Cir. 1977). For a discussion of Baylor, see note 39 supra. For a discussion of St. John's, see notes 27-32 & 38 and accompanying text supra.
Baptist Hospital Court recognized this weakness, yet countered the arguments challenging the rationality of the presumption as applied to all patient access areas only by pointing to the evidence in the instant case and in Beth Israel which supported the proposition that solicitation in at least some areas will not adversely affect patient care. It is submitted that such evidence is insufficient to support the presumption's rationality because in Baptist Hospital a no-solicitation ban had been in effect and, therefore, any testimony offered was merely speculative as to what effect solicitation might have on hospital patients. In Beth Israel, the hospital had seen limited solicitation in its cafeteria which was used almost exclusively by staff. However, it is contended that this experience, standing alone, is insufficient to support the Baptist Hospital Court's conclusion that the NLRB presumption is rationally based, since solicitation in patient access areas frequented by a substantial percentage of patients had never been attempted.

The weakness in the rationality of the Board's presumption is, it is submitted, strong support for the view that the presumption is wholly invalid in any patient access area. It is suggested that the NLRB has been too eager to apply the principles and presumptions which evolved in an industrial setting to hospitals. While the health care industry in this country has been characterized as "big business," a nonprofit hospital's primary concern, unlike that of a profit-oriented industry, is the care of patients. The presence of the patient as a key third party in the labor-management relationship interjects unique concerns not present in the industrial setting. It is submitted that hospital patients, unlike employers and employees, are not entirely voluntary participants in labor-management struggles and, moreover, are ill, often in pain, and unquestionably vulnerable. Thus, it is suggested that their needs must be given greater weight than those of employees or employers in balancing the rights of all concerned.

91. 442 U.S. at 788.
92. Id. at 787-88.
93. Id. at 786.
94. 437 U.S. at 502.
95. For a discussion of the Baptist Hospital Court's analysis of the presumption's rationality in the hospital setting, see notes 55-63 and accompanying text supra.
96. See 442 U.S. at 792-93 (Burger, C.J., concurring); note 23 and accompanying text supra.
97. As one author noted nearly 10 years ago: "The health industry is big business, profitable business, and booming business." Health Policy Advisory Center, The American Health Empire: Power, Profits and Politics 95 (1971). In the fiscal year 1974-1975, total national health expenditures were over $118 billion. Falk, Financing and Cost Controls in Medical Care, in Medicine in a Changing Society 188 (L. Corey, M. Epstein & S. Saltman eds. 1977).
98. See 442 U.S. at 791 (Burger, C.J., concurring).
99. See Beth Israel Hosp. v. NLRB, 437 U.S. at 509 (Blackmun, J., concurring).
100. Patients in need of hospitalization must either go to the hospital where their physicians have admitting privileges or else forego hospital treatment by those physicians. Telephone interview with Ms. Frances Serno, Director of Admissions, Hospital of the University of Pennsylvania, Philadelphia, Pennsylvania (May 23, 1980).
101. See 442 U.S. at 793 (Burger, C.J., concurring). Chief Justice Burger reasoned that because the primary objective of every hospital is patient care, no evidence is needed to establish that anything tending to interfere with this objective cannot be tolerated. Id. at 791 (Burger, C.J., concurring). A religious choir singing in a hospital chapel may well be desirable (as is
It is contended that Chief Justice Burger's approach of eliminating the Board’s presumption in all areas “devoted primarily to patient care” provides a framework that is supported by the realities of patient care in modern hospitals and strikes an appropriate balance between the needs of patients and employees. Removing the presumption from any area devoted primarily to patient care does not, it is suggested, mean that a hospital will be allowed to promulgate a broad no-solicitation rule in all instances, but only that the NLRB will bear the burden of proving the invalidity of a hospital's rule applicable to those areas. In view of the tenuous support underlying the present presumption, it is submitted that this allocation of the burden of proof is better supported by the realities of modern health care.

In considering the impact of Baptist Hospital, it is submitted that the Court's decision did little to clarify the issues surrounding the rights of hospitals to promulgate broad no-solicitation rules in patient access areas. Although the Court indicated that the task of framing a presumption regarding no-solicitation rules will continue to lie with the NLRB, it once again expressed doubts whether the Board's interpretation of the present presumption, with its narrow definition of immediate patient care areas, adequately takes into account the realities of modern hospital care. Such an admonition may influence the NLRB to expand the definition of “immediate patient care areas” to include areas adjacent to patient and treat-

access by employees to union solicitation] but if that interferes with patient care, it cannot be allowed.”

102. See id. at 792 (Burger, C.J., concurring). For an explanation of this approach, see note 62 and accompanying text supra. The phrase “areas devoted primarily to patient care” includes all areas frequented by patients. 442 U.S. at 792 (Burger, C.J., concurring).

103. See 442 U.S. at 792-93 (Burger, C.J., concurring). Under such an approach, gift shops and cafeterias like those in Beth Israel and Baptist Hospital would normally not qualify as patient care areas, since a substantial level of patient usage of such facilities would probably not be demonstrable. See id. at 786; Beth Israel Hosp. v. NLRB, 437 U.S. at 502. If, however, a given percentage of patient usage is found to exist in this type of facility, then it should be deemed a “primary patient care area.” Such a clear-cut criterion would, it is suggested, provide notice to a hospital as to whether solicitation could be banned in these places. Moreover, it is submitted that when an area achieves a substantial percentage of patient usage, it becomes in effect a part of the overall patient milieu within which tranquility is essential. For a discussion of the necessity for tranquility in the patient's overall environment, see notes 75-78 and accompanying text supra.

104. For criticism of the basis of the present presumption, see notes 84-101 and accompanying text supra.

105. See notes 87-88 and accompanying text supra.

106. 447 U.S. at 789.

107. Id.
ment rooms, or even to adopt the more expansive position suggested by the St. John's court.108

Furthermore, it appears that the issue of the disparate treatment by the NLRB of retail establishments as distinct from hospital cafeterias and shops,109 although not specifically addressed by the Baptist Hospital Court,110 may as yet be unresolved. Because the Beth Israel Court emphasized the facts of that case in resolving this issue,111 and because some justices have questioned this inconsistency,112 it is suggested that the Board’s approach may be successfully challenged in the future on facts different from those in Beth Israel.

In conclusion, it is submitted that Baptist Hospital illustrates the complexities of labor-management issues in the nonprofit hospital setting where union organizational activity is now permitted by the National Labor Relations Act. In addition to highlighting the tension between the NLRB—which must carry out the mandate of the amended Act—and the courts—which are limited in their scope of review of NLRB decisions—the Baptist Hospital decision points out the unique issues inherent in the hospital context which may make application of traditional labor rules and presumptions inappropriate. This decision, unfortunately, resolves few of these issues and provides little explicit guidance to either unions or employers regarding permissible solicitation in patient access areas. Thus, further labor-management conflict, with resultant disruption to patients, appears inevitable in hospital facilities undergoing a union organizational campaign.

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108. See note 38 supra. The Supreme Court appears to be showing extreme deference to the NLRB in its formulation of rules and presumptions under the Act. See 442 U.S. at 775-91. An expansion of the definition of “immediate patient care areas” may serve to “save” the presumption against no-solicitation bans as applied to the hospital setting. Id.

109. For a discussion of this inconsistent application of the Board’s presumption, see notes 24-25 and accompanying text supra.

110. See notes 46 & 84 supra.

111. See 437 U.S. at 517 (Powell, J., concurring).

112. See 447 U.S. at 791 (Blackmun, J., concurring); Beth Israel Hosp. v. NLRB, 437 U.S. at 517 (Powell, J., concurring). It should be recalled that Justice Powell was joined in his concurrence in Beth Israel by Chief Justice Burger and Justice Rehnquist. See note 46 supra.