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Labor Law—Extension of the Discretionary Jurisdiction of the National Labor Relations Board

The Labor Management Relations Act of 1947 gives to the National Labor Relations Board power to assert jurisdiction over any question of representation or any unfair labor practice "affecting [interstate] commerce."¹ The Act further provides:

[t]he Board, in its discretion, may . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, *the effect of such labor dispute on commerce* is not sufficiently substantial to warrant the exercise of its jurisdiction²

The Board in *Flatbush General Hospital*,³ decided in 1960, declined to assert jurisdiction over private hospitals. Had it been so inclined the Board could have properly done so, but it felt that the operation was "essentially local in nature and therefore, the effect on commerce . . . is not substantial enough to warrant the exercise of . . . jurisdiction."⁴ The Board also felt that if labor disputes arose in private hospitals the states would step in and regulate such disputes.

In *Butte Medical Properties*⁵ the Board reexamined its position with respect to private hospitals and overruled *Flatbush*. It adopted a new standard by which jurisdiction will be asserted over private hospitals which receive at least 250,000 dollars in annual gross revenue. The Board found

that the considerations bearing on . . . the jurisdictional determination in this industry have markedly changed since the Flat-

¹ Labor Management Relations Act §§ 9(c)(1)(B), 10(a), 29 U.S.C. §§ 159(c)(1)(B), 160(a) (1964) [hereinafter cited as Taft-Hartley].

² Taft-Hartley § 14(c)(1), 29 U.S.C. § 164(c)(1) (1964) (emphasis added). The term "labor dispute" includes questions of representation as well as unfair labor practices. Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1093 (1960).

³ 126 N.L.R.B. 144 (1960).

⁴ *Id.* at 145. Until 1960 the Board had asserted jurisdiction over private hospitals in only three situations:

where the hospital was located in the District of Columbia, where the operations of the hospital vitally affected national defense, and where the hospital was an integral part of the establishment whose operations met the Board's jurisdictional standards.

Id.

⁵ 168 N.L.R.B. No. 52, 66 L.R.R.M. 1259 (1967).

bush decision and that it will effect the policies of the Act to assert . . . discretionary jurisdiction over . . . [this] Employer as well as over proprietary hospitals generally.⁶

In refusing to follow *Flatbush* the Board considered several factors which indicate the impact of the operation of private hospitals on interstate commerce. The Board pointed out that there are about 970 private hospitals in 44 states in the United States and they constitute one of the country's largest industries; that personnel such as nurses, dieticians and therapists often must be recruited from other areas; that "there has been a substantial increase in the number of beds, admissions, census, personnel, payroll, assets and gross revenues" ⁷ The Board enumerated the purchase of supplies and equipment by all private hospitals and noted the resulting significant effect on commerce. Impressive also were the billions of dollars spent by 79.2 percent of Americans for health insurance which results in substantial payments to hospitals, as well as expenditures by the federal government on behalf of recipients of public health and welfare benefits. Similar factors were involved in the simultaneous assertion of jurisdiction by the Board over private nursing homes where the employer receives at least 100,000 dollars in annual gross revenue.⁸

While the effect of an employer's operations on interstate commerce is a prime consideration in deciding whether or not to assert jurisdiction in most cases, there is an area of the Board's discretionary jurisdiction where it is apparently of no consequence. Even though an employer's operations may affect commerce and may measure up to the Board's applicable jurisdictional dollar standards,⁹ the Board has not taken jurisdiction over nonprofit educational, research and charitable organizations "where the activities involved are non-commercial in nature and intimately connected with the . . . purposes and . . . activities of the institution."¹⁰ This idea is conceptually known as the *Columbia University* doctrine¹¹ and has been applied in a long line of cases.¹² However, if the

⁶ 66 L.R.R.M. at 1261.

⁷ *Id.* at 1260.

⁸ University Nursing Home, Inc., 168 N.L.R.B. No. 53, 66 L.R.R.M. 1263 (1967).

⁹ The standards can be found in 23 NLRB ANN. REP. 8 (1958).

¹⁰ Trustees of Columbia Univ., 97 N.L.R.B. 424, 427 (1951).

¹¹ 29 NLRB ANN. REP. 34 (1964).

¹² Horn & Hardart Co., 154 N.L.R.B. 1368 (1965) (employer was cor-

enterprise, even though a nonprofit educational, charitable or research organization, has activities commercial in nature jurisdiction will be asserted.¹³

There is a considerable doubt as to the propriety of the Board's view in this matter. In so holding, the Board very early in the course of its opinions in this area pointed to the Conference Report on the Labor Management Relations Act of 1947 wherein it is stated:

[t]he nonprofit organizations [other than nonprofit hospitals] excluded under the House bill are not specifically excluded in the conference agreement, for only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations

poration operating food service facilities in a hospital); Massachusetts Institute of Tech., 152 N.L.R.B. 598 (1965) (employer was data processing research laboratory operated by a university); Prophet Co., 150 N.L.R.B. 1559 (1965) (employer was nationwide food service enterprise operating University dining facilities); Iowa State Memorial Union, N.L.R.B. Admin. Decis., 1964, 55 L.R.R.M. 1362 (1964) (employer was student union at a college); University of Miami, 146 N.L.R.B. 1448 (1964) (employer was a university division operating three ocean-going vessels for courses and research); Crotty Bros., N.Y., Inc., 146 N.L.R.B. 755 (1964) (employer managed food service facilities on a college campus); Young Men's Christian Ass'n, 146 N.L.R.B. 20 (1964) (employer was community service organization); Sheltered Workshops, 126 N.L.R.B. 961 (1960) (employer provided work rehabilitation for handicapped persons); Lutheran Church, Mo. Synod, 109 N.L.R.B. 859 (1954) (employer was a radio station operated by religious organization); Armour Research Foundation, 107 N.L.R.B. 1052 (1954) (employer was engaged in research in conjunction with a university); Trustees of Columbia Univ., 97 N.L.R.B. 424 (1952) (employer was university; union was seeking to represent clerical employees in library).

¹³ Bay Ran Maint. Corp., 161 N.L.R.B. No. 74, 63 L.R.R.M. 1345 (1966) (employer provided cleaning and maintenance services for hospital); Maritime Advancement Programs, 152 N.L.R.B. 348 (1965) (employer created to administer trust fund for training unlicensed seamen); Woods Hole Oceanographic Inst., 143 N.L.R.B. 568 (1963) (employer operated ocean-going vessels to conduct marine research and teach oceanography); South Bend Broadcasting Corp., 116 N.L.R.B. 1166 (1956) (employer a university-owned corporation operating a radio and television station); Massachusetts Institute of Tech. (Lincoln Laboratory), 110 N.L.R.B. 1611 (1954) (employer operated research facility in connection with university and federal government); California Institute of Tech., 102 N.L.R.B. 1402 (1953) (employer operated research facilities under university auspices in conjunction with private industries); Kennecott Copper Corp., 99 N.L.R.B. 748 (1952) (employer was hospital and dispensary maintained by copper company for employees); Sunday School Board of S. Baptist Conv., 92 N.L.R.B. 801 (1950) (employer published and distributed religious literature); Port Arthur College, 92 N.L.R.B. 152 (1950) (employer was a radio station operated by a college); General Elec. Co., 89 N.L.R.B. 1247 (1950) (employer was hospital operated by G.E. for employees and families); Illinois Institute of Tech., 81 N.L.R.B. 201 (1949) (employer was college-operated research foundation for industry and government).

or their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act.¹⁴

The Board takes this language as providing a "guide," if not a "mandate," and as approval of the Board's practice prior to the legislation in 1947.¹⁵ The language of the Conference Report seems only to indicate approval of the Board's practice of not taking jurisdiction when the activities of the organization are not considered to affect commerce. It is not at all clear from the language that the Board should refuse to assert jurisdiction if the activities of educational, charitable and research organizations do in fact affect commerce. Whether or not the Board has properly interpreted the Conference Report, the questionability as to the nonassertion of jurisdiction over these organizations remains.

It is freely admitted by the Board that activities of educational, charitable or research organizations may and do affect commerce.¹⁶ This being so, it is difficult to ascertain why jurisdiction should not be asserted in light of the purpose and policy of the Act "to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, . . . and to protect the rights of the public in connection with labor disputes affecting commerce."¹⁷ These organizations buy goods and services and often sell services;¹⁸ they hire employees as well. Any of these would be difficult to accomplish today without affecting interstate commerce. The sheer number of cases where the Board refused to assert jurisdiction indicates the substantial impact on commerce resulting from the activities over which the Board will not assert jurisdiction.¹⁹

¹⁴ H. R. REP. No. 510, 80th Cong., 1st Sess. 32 (1947), cited in 1 N.L.R.B., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 505, 536 (1948).

¹⁵ Trustees of Columbia Univ., 97 N.L.R.B. 424, 427 (1951).

¹⁶ University of Miami, 146 N.L.R.B. 1448, 1450 (1964).

¹⁷ Taft-Hartley § 1(b), 29 U.S.C. § 141(b) (1964).

¹⁸ Crotty Bros., N.Y., Inc., 146 N.L.R.B. 755 (1964). In this case a non-profit educational institution hired a corporation to manage its food service facilities. The corporation was in the business of providing food service management for educational, hospital and business establishments in several states. Jurisdiction was not taken. The case was followed in Prophet Co., 150 N.L.R.B. 1559 (1965).

¹⁹ Note 12 *supra*. Twelve cases are cited. Further implications as to the effect on interstate commerce can be drawn from the application of these cases to organizations similar to those in the cited cases. For instance there are many organizations in the United States associated with the Young

It might be argued that these nonprofit charitable, educational and research organizations with primarily noncommercial activities perform functions that may otherwise have to be performed by the government, either local, state or national, and that, therefore, they should not be subjected to the regulation in labor disputes since government activities are not. However, recent labor strife concerning teachers, nurses and sanitation workers illustrate the very definite need in these areas for regulation of labor disputes. Work stoppages in the governmental sector jumped from 42 involving 12,000 workers in 1965 to 142 involving 105,000 workers in 1966.²⁰ Further, there is some question as to whether the governments should or even would operate some of the activities engaged in by some of the organizations over which the Board refused to assert jurisdiction.

It is submitted that the Board should take jurisdiction over these organizations, and, that, despite the Board's interpretation of the Conference Report, it is perfectly free to do so. If necessary the Congress should consider empowering the Board to do so.

PENDER R. McELROY

Pleadings—Limitations on the Reply

In *Davis v. North Carolina State Highway Commission*,¹ the North Carolina Supreme Court echoed a long standing notion about the nature of the reply, which merits examination in light of the proposed changes in the state's rules of civil procedure, as well as present practice. The complaint in *Davis* stated that the state highway commission had taken plaintiff's property on January 14, 1965, when in fact it was not needed at that time. It was further alleged that the taking was accomplished by means of false representations, with intent to deceive plaintiffs and force them out before their departure was necessary. Included was a prayer for 50,000 dollars actual and 1,000,000 dollars punitive damages.²

Defendants moved to strike the portions of the complaint alleg-

Men's Christian Association; there are many nonprofit research foundations associated with colleges and universities.

²⁰ U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 249 (88th Ed. 1967).

¹ 271 N.C. 405, 156 S.E.2d 685 (1967).

² *Id.* at 406-07, 156 S.E.2d at 686-87.