

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM 79-76

October 5, 1979

TO: All Regional Directors, Officers-In-Charge,
and Resident Officers

FROM: John S. Irving, General Counsel

SUBJECT: Guidelines for Handling No-Solicitation,
No-Distribution Rules in Health-Care Facilities

I. Introduction

In August 1979, the Board remanded to the various Regional Directors a series of cases involving no-solicitation rules in health-care facilities. 1/ The remand orders authorized each of the Regional Directors to issue notices of further hearings in each case so that Administrative Law Judges could receive evidence consistent with the Supreme Court's decision in N.L.R.B. v. Baptist Hospital, Inc., ___ U.S. ___, 101 LRRM 2556 (1979). Because of the unsettled character of the law in this area and because the governing legal principles so far developed by the Board and the Courts are less than clear, I have prepared this memorandum to assist in the litigation or settlement of the remanded cases. 2/ In addition, this memorandum should be used as a guide in investigating and processing future charges that deal with these issues and in re-evaluating cases that may already be in various stages of litigation, as discussed more fully, infra, Section V.

II. Current State of the Law

In St. John's Hospital & School of Nursing, Inc. 3/ the Board formulated a set of presumptions that it has continued to apply to cases involving allegedly invalid no-solicitation, no-distribution rules promulgated and enforced by health care institutions. Under St. John's, a health care institution's no-solicitation, no-distribution rule is presumptively unlawful insofar as it prohibits solicitation by employees, during their nonworking time, of other nonworking employees

1/ St. Joseph Hospital, Case 28-CA-3866 (August 10, 1979); Baptist Memorial Hospital, Cases 26-CA-5929, et al. (August 10, 1979); Beth Israel Hospital, Cases 1-CA-11469, et al. (August 13, 1979); Lutheran Hospital of Milwaukee, Inc., Cases 30-CA-3082, et al. (August 13, 1979); George Washington University Hospital, Case 5-CA-7138 (August 14, 1979); see also Baylor University Medical Center, Cases 16-CA-5888, et al., on remand to the Board.

2/ As I previously indicated to the Regions to which the above-cited cases have been remanded, efforts to settle the cases should be pursued so long as settlement negotiations do not unduly delay reconsideration of the cases.

3/ 222 NLRB 1150 (1976), enf. den. 557 F. 2d 1368 (10th Cir., 1977).

on the Employer's premises other than in "immediate patient care areas"; or insofar as it prohibits distribution of union literature by employees during their nonwork time in nonworking areas. Thus, under the St. John's formula, a ban on solicitation is presumptively lawful in "immediate patient care areas," described in St. John's as encompassing "the patients' rooms, operating rooms, and places where patients receive treatment, such as X-ray and therapy areas." ^{4/} The Board has applied the St. John's presumptions to invalidate overly broad rules in a variety of cases involving health care institutions, including nursing homes. ^{5/} The Circuit Courts, however, denied enforcement in some of the cases on the ground that the Board lacked sufficient expertise to formulate presumptions in this area. ^{6/}

In Beth Israel Hospital v. N.L.R.B., ^{7/} a five-member majority of the Supreme Court held that the Board had been justified in fashioning and applying generalized rules with regard to solicitation and distribution in hospitals and that the Board had appropriately applied the St. John's standards to find that a ban on solicitation in the hospital cafeteria, a "natural gathering area for employees," was unlawful. In particular, the Beth Israel Court stated:

We therefore hold that the Board's general approach of requiring health-care facilities to permit employee solicitation and distribution during nonworking time in nonworking areas, where the facility has not justified the prohibitions as necessary to avoid disruption of health-care operations or disturbance of patients, is consistent with the Act. ^{8/}

^{4/} Id. at 1151.

^{5/} Baptist Hospital, Inc., 223 NLRB 344 (1976); St. Peters Medical Center, 223 NLRB 1022 (1976); Beth Israel Hospital, 223 NLRB 1195 (1976); Lutheran Hospital of Milwaukee, supra; Baylor University Medical Center, supra; Lenox Hill Hospital, 225 NLRB 1237 (1976); Rock Hill Convalescent Home, 226 NLRB 881 (1976); National Jewish Hospital, 226 NLRB 1291 (1976); The Presbyterian Medical Center, 227 NLRB 904 (1977); Florida Medical Center, Inc., d/b/a Lauderdale Lakes General Hospital, 227 NLRB 1412 (1977); George Washington University Hospital, supra; St. Joseph Hospital, supra; Beth Israel Hospital, supra; Baptist Memorial Hospital, supra; Mead Nursing Home, Inc., 229 NLRB 620 (1977); Lafayette Home Hospital, Inc., 231 NLRB 830 (1977); A.T. & S.F. Memorial Hospitals, Inc., 234 NLRB No. 65 (1978); Holly Manor Nursing Home, 235 NLRB No. 56 (1978); Devon Gables Nursing Home, 237 NLRB No. 107 (1978); Yale-New Haven Hospital, 242 NLRB 100 (1979).

^{6/} See, e.g., St. John's Hospital v. N.L.R.B., 557 F. 2d 1368 (10th Cir., 1977); Baylor University Medical Center v. N.L.R.B., 578 F. 2d 351 (D.C. Cir., 1978) remanded in part, 99 LRRM 2953 (1978); on remand, 100 LRRM 2340 (D.C. Cir., 1979).

^{7/} 437 U.S. 483 (1978).

^{8/} Id. at 507.

The Court cautioned, however, that in the health-care context the importance of the employer's interest in protecting patients from disturbance may demand the "use of a more finely calibrated scale" in the application of the rules. As an example, the Court noted that "the availability of one part of a health-care facility for organizational activity might be regarded as a factor required to be considered in evaluating the permissibility of restrictions in other areas of the same facility." ^{9/} As Beth Israel involved only the cafeteria area of a hospital, the Court did not discuss the St. John's presumptions as they apply to "immediate patient care areas."

In N.L.R.B. v. Baptist Hospital, *supra*, the Supreme Court, by an 8-1 majority, reiterated its approval of the Board's formulation and use of presumptions regarding the validity of no-solicitation, no-distribution rules in health care institutions. In Baptist Hospital, the rule barred solicitation in all areas of the hospital open to patients or visitors. The Board, applying its St. John's formula, had found that the rule was overbroad and that the Employer had not overcome the presumption of invalidity that attached to the rule insofar as it regulated solicitation outside immediate patient-care areas. The Court of Appeals for the 6th Circuit denied enforcement to the Board's order, finding that the employer had presented sufficient evidence of the ill effects of solicitation on patient care to justify a broad prohibition of solicitation in all areas of the hospital. The Supreme Court agreed with the 6th Circuit that, with respect to corridors and sitting rooms adjoining or accessible to patient rooms, there was no substantial record evidence to support the Board's holding that the hospital had failed to justify its ban on solicitation in those areas. In addition to noting the evidence showing that those areas were involved in patient care and therapy in Baptist Hospital, the Court specifically noted that:

solicitation on nonwork time is allowed in other areas even under the no-solicitation rule at issue here . . . the availability of these alternative locations for solicitation, though not dispositive, lends support to the validity of the Hospitals' ban on such activity in other areas of the Hospital. ^{10/}

^{9/} Id. at 505.

^{10/} 101 LRRM at 2560.

On the other hand, with regard to the application of the hospital's rule to the cafeteria, gift shop and lobbies on the first floor, the Baptist Hospital Court held that the evidence supplied by the employer had been insufficient to rebut the presumption of the ban's invalidity in those areas.

Inasmuch as the Court was able to decide Baptist Hospital under a substantial evidence analysis, it found it unnecessary to pass upon the rationality of the St. John's presumption insofar as it embraced solicitation in corridors and sitting rooms on patient floors and explicitly declined the task of attempting to frame the limits of an appropriate presumption regarding union solicitation in a modern hospital. Although the Court acknowledged that the development of presumptions is normally the function of the Board, it did suggest to the Board that it review "the scope and application of its presumption." 11/ In this regard, it is significant that the Court pointed out that "[t]he evidence of record in this case and other similar cases does . . . cast 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." 12/ The Court noted that in each case where an employer had attempted to overcome the presumption as applied to these areas, it had been successful. 13/ In order to overcome the Board's presumption that a ban is invalid as applied to those or any other areas characterized as non-immediate patient care areas, the Court pointed out that the Employer need only show that solicitation is likely either to disrupt patient care or disturb patients. 14/

11/ Id. at 2562, n. 16. In fact, the Court instructed the Board to undertake a "continuous review of the usefulness of its presumption." Id. at 2562.

12/ Id. at 2561. In a concurring opinion, Justices Brennan, White and Marshall disagreed with the view of the majority on this point. Id. at 2564.

13/ Id. at 2561. See Baylor University Medical Center v. N.L.R.B., 578 F. 2d 351 (D.C. Cir., 1978), vacated in part and remanded, 99 LRRM 2953 (1978). See also N.L.R.B. v. St. Joseph Hospital, 587 F. 2d 1060 (10th Cir., 1978), which was remanded, inter alia, for further findings on this issue.

14/ 101 LRRM at 2559, n. 11. The Court went on to note that "[t]he distinction is an important one. Solicitation may disrupt patient care if it interferes with the health-care activities of doctors, nurses, and staff even though not conducted in the presence of patients. And solicitation that does not impede the efforts of those charged with the responsibility of caring for patients nonetheless may disturb patients exposed to it."

The Court further noted that "the experience to date raises serious doubts as to whether the Board's interpretation of its present presumption adequately takes into account the medical practices and methods of treatment incident to the delivery of patient-care services in a modern hospital," 15/ and admonished the Board to "take into account that a modern hospital houses a complex array of facilities and techniques for patient care and therapy that defy simple classification." 16/ Thus, the Court appears to have called for a reappraisal by the Board of its St. John's formula.

III. Re-Examination of the St. John's Rule

In the remanded cases, the Regions should seek to introduce or permit the introduction into the record of all evidence of the type the Court discussed in Baptist Hospital bearing on the effect of solicitation and/or distribution on patient care in those areas of the hospitals (each area is specifically enumerated hereinafter) where the ban is in effect. Some of the factors that should be considered include the nature of the services rendered in each area; 17/ problems caused by the movement of patients or emergency equipment; 18/ physical separation of the area in question from patient-oriented areas; 19/ and whether an area of predominantly public or employee use also has an important patient-care function. 20/

The Regions should also suggest that the Board re-examine its definition of immediate patient care areas in the context of applying the St. John's no-solicitation - no-distribution rules in health-care facilities. In view of the historical success hospitals have had in overcoming the Board's presumption in this regard, the Regions should not argue that the St. John's areas are the only ones

15/ 101 LRRM at 2562.

16/ Id. at n. 16. St. Joseph Hospital, supra, currently on remand to Region 28, was originally remanded to the Board by the 10th Circuit for a redefinition of "immediate patient care areas." 587 F. 2d 1060, 1065 (1978). Similarly, in Lutheran Hospital of Milwaukee, Inc., 564 F. 2d 208 (7th Cir. 1977), the court looked to future litigation to flesh out a definition of "immediate patient care areas." 564 F. 2d at 216.

17/ See, e.g., N.L.R.B. v. Baptist Hospital, Inc., 101 LRRM at 2562, n. 16.

18/ See, e.g., Id. at 2560 and 2562, n. 16; Baylor University Medical Center v. N.L.R.B., 578 F. 2d at 355.

19/ See, e.g., N.L.R.B. v. Baptist Hospital, Inc., 101 LRRM at 2560, n. 14; Los Angeles New Hospital, 244 NLRB No. 157 (1979).

20/ See, e.g., Baylor University Medical Center, supra, 100 LRRM at 2343-44; National Jewish Hospital, 226 NLRB at 1243-44.

that can be treated as patient care areas. 21/ Rather, the Regions should suggest that patient care areas can also include such places as corridors adjacent to patients' rooms, operating rooms and treatment areas; sitting rooms on patient floors accessible to or used by patients; and elevators or stairways used substantially to transport patients. 22/ The evidence adduced at the remanded hearings should relate to these additional areas so as to insure that the Board will have at its disposal all of the information necessary to make an informed judgment as to whether, consistent with the view expressed here, these areas should also be included in the definition of immediate patient care areas.

The presumption of validity with respect to a ban on union solicitation during employees' nonwork time in immediate patient care areas would place on the General Counsel the burden of proving that union solicitation in those areas would not adversely affect patients or disrupt patient care. 23/ As to all other areas, i.e., employee-only areas, 24/ public access areas and patient access areas other than immediate patient care areas, the burden would be on the hospital to

21/ The Board has never published a more definite list of "immediate patient-care areas" than that mentioned in its St. John's opinion, which comprises areas such as "patients' rooms, operating rooms, and places where patients receive treatment, such as X-ray and therapy areas."

22/ There may be some cases in which it can nonetheless be argued that there is a violation even as to these areas, notwithstanding a presumption of validity, if the General Counsel can overcome that presumption. In such cases, the Region should seek authorization from the Division of Advice.

23/ With respect to distribution of union literature, a ban on such distribution during nonworking hours would continue to be presumptively lawful in all working areas as well as in immediate patient care areas. For these purposes, the Region should argue that the St. John's listing of patient care areas need not be expanded. The ban would be presumptively unlawful in all other areas.

24/ See Los Angeles New Hospital, supra, wherein the Board dealt with a room that was predominantly used by employees, and only occasionally by others.

show that solicitation in those areas would adversely affect patients or disrupt patient care, and the Board should be urged to consider all evidence bearing on these factors. In considering the evidence, special attention should be given to the availability of alternative channels of communication. The greater the number of alternative channels, the lesser the need to narrow the scope of the ban, and vice-versa.

Since the Board has not had an opportunity to address the concerns raised by the Supreme Court in Beth Israel and Baptist Hospital, it is essential that the record made in the remanded cases be as complete as possible so as to enable an Administrative Law Judge and the Board to make findings based on record evidence regarding the possible effect of union activity on patients and patient care in all areas of the hospital. 25/ Any one of these cases could provide the vehicle for the Board's eventual formulation of a new policy. Moreover, the Board could decide to adopt a far different approach from that proposed herein. Therefore, we cannot overemphasize the importance of compiling a record in each of these cases that will be sufficiently extensive to support the Board's position on judicial review on whatever theory the Board ultimately endorses. 26/

- 25/ If the Region believes that the introduction or expert testimony as to the effects of solicitation in a given area would strengthen the General Counsel's case, permission should be sought from your AGC to use such expert witnesses.
- 26/ At least until such time as the Board has had the opportunity to re-examine its own thinking in light of the Court's Beth Israel and Baptist Hospital decisions, Regions should, when investigating future unfair labor practice charges involving bans on union solicitation and distribution in hospitals, consider all of the evidence discussed above in determining whether, and to what extent, issuance of complaint may or may not be warranted.

IV. Application of the New Policy Suggested Herein

Following is an outline of the effect a new policy consonant with the changes proposed in these guidelines would have on specific areas within health-care facilities that may be in issue in remanded or future cases.

A. Patient Rooms, Operating Rooms and Treatment Rooms

A ban on solicitation in these areas would continue to be treated as presumptively valid, as under St. John's. 27/ It is probable that the definition of treatment room will result in future litigation if hospitals attempt to encompass, as "patient-care areas", offices and laboratories in which personnel have only indirect contact with patients and yet can be said to be involved with patient care. For example, if employees are engaged in analyzing blood or urine samples or reading EKG charts or X-ray pictures, all activities which could involve critical determinations affecting health care, it could be argued that the area in which they work qualifies as an immediate patient-care area. 28/

If patients generally are not present in the offices or laboratories in which the work is done, Regions should continue to argue that a ban on solicitation between nonworking employees in those areas would fall within the presumptively invalid category. The employer would then have the burden of showing that solicitation would have a deleterious effect on procedures critical to patient care. In assessing the probative value of such rebuttal evidence, relevant inquiries would include the existence and enforcement of similar prohibitions on other nonwork related activity or conversation in the area in issue. 29/

27/ It should be noted that under current Board law, it is no defense to an allegation based on an overly broad rule that the rule was enforced only in an area where a ban otherwise would be lawful. George J. London Memorial Hospital, 238 NLRB No. 96 (1978); A.T. & S.F. Memorial Hospitals, Inc., 234 NLRB No. 65 (1978).

28/ See note 14, supra.

29/ The argument that an otherwise valid rule has been disparately applied to union activity alone is, of course, always available. In addition, evidence that other potentially disruptive or disquieting activity has been tolerated in a particular area will further support the position that a rule banning union solicitation in that area is overly broad. Beth Israel Hospital v. N.L.R.B., supra, 437 U.S. at 502-503, n. 20. It will not be sufficient for either of these arguments, however, merely to show that the employer permitted a "small number of beneficent acts" to be carried on in the area, such as occasional solicitations for the United Fund. Servair, Inc., 175 NLRB 801 (1969). See St. Joseph Hospital, supra, 228 NLRB at 161; Lutheran Hospital of Milwaukee, supra, 224 NLRB at 181. Cf. Rochester General Hospital, 234 NLRB No. 44 (1978).

B. Corridor and Patient-Sitting Rooms

Under the proposed reformulation of the St. John's rule, "patient care areas" would be redefined to include corridors adjacent to any of the three categories listed in subparagraph A above as well as sitting rooms on patient floors that are accessible to and used by patients. In view of the fact that, as noted by the Court in Baptist Hospital, hospitals have uniformly been successful when they have attempted to substantiate the inclusion of these areas within the area where solicitation can be prohibited, 30/ it would appear that agency resources could be more effectively used if the Board were to view a ban on solicitation in these additional areas as presumptively valid. The presumption of validity as to these or any other specific area could be rebutted, or course, by a showing that the presence of patients or critical medical personnel in the area is so minimal, or the physical layout of the area in issue is such, that it is unlikely that solicitation therein would either adversely affect patients or disrupt health-care services.

C. Elevators and Stairways

If an elevator or stairway is used frequently to transport patients, a ban on solicitation would be presumptively valid as applied to that particular elevator or stairway. In other cases, a prohibition that extends to elevators, stairways and stairwells should normally be viewed as presumptively invalid. Evidence should be adduced as to the amount of patient use, the type and incidence of machinery and equipment being moved in each elevator or stairway and the frequency of use in crowded conditions or emergency situations. In cases where all of the elevators are used to transport patients and equipment as well as visitors and employees, the employer may be able to rebut the presumption of invalidity with relative ease. In cases where some elevators or stairways are reserved exclusively for employee use, a blanket prohibition covering these areas would be exceedingly difficult to defend and it is, therefore, unlikely that the presumption could be rebutted.

30/ 101 LRRM at 2561.

D. Nurses' Stations

Detailed evidence regarding the physical layout and use of nurses' stations will be extremely important in determining whether these areas fall within the patient-care category. In Baptist Hospital the stations were partitioned from surrounding patient-care areas and had been exempted from the ban on solicitation. The Baptist Hospital Court noted, however, that "[i]t may well be that in other hospitals, solicitation in these critical areas would threaten to disturb patients or disrupt patient care, since there are always some employees on duty there." ^{31/} Consequently, Regions should inquire into such factors as the extent to which patient treatment is given in the nurses' stations; the proximity of the stations to patient rooms or sitting areas; the physical separation of the stations from surrounding patient care areas; whether there are interior partitions that separate working from nonworking areas within the station; whether employees take their breaks in the stations; and whether other types of nonwork related activities are permitted there.

E. Public Access Areas

Areas in which employees may mingle with patients as well as visitors and the general public -- e.g., cafeterias, vending machine areas, pharmacies, gift shops, lobbies, entranceways, exterior grounds and walkways -- would continue to be places in which solicitation is presumed to be protected. It is important to note that, although Beth Israel upheld the invalidity of the ban insofar as it covered the cafeteria in that case, it did not establish the broad principle that a solicitation ban in cafeterias or similar public places would ipso facto be unprivileged. ^{32/} On the contrary, with the benefit of the guidance provided by the Baptist Hospital opinion, courts will undoubtedly take a closer look, on a case-by-case basis, at the evidence and arguments relied upon by hospitals to justify solicitation bans in each of these areas. It is imperative, therefore, that a complete investigation be conducted and a full record be established in the remanded cases as to the relative use of each public access area by employees, as compared to the use by patients and/or their visitors; the time periods when employees would be most likely to congregate in each area; the physical layout of each area and its relationship to other areas; whether the area in question is a "natural gathering place" for employees; and the physical and/or mental and emotional condition of patients who would be likely to use the area.

^{31/} 101 LRRM at 2560, n. 14.

^{32/} N.L.R.B. v. Baptist Hospital, Inc., supra, 101 LRRM at 2562, n. 16.

It is entirely possible that hospitals will attempt to show that patients frequent these areas as part of their therapy or that a patient who is able to visit that part of the facility is, nonetheless, in too delicate a condition to tolerate any form of disturbance. 33/ Charged parties and Respondents may also argue that a ban extending to these areas, as well as those discussed supra, is justified because of the existence of alternative channels of communications afforded employees in other parts of the facility. If this kind of rebuttal evidence is to be overcome, counsel for the General Counsel should be ready to establish either that, at least at certain times of the day, the areas are "natural gathering places" for employees, or that, due to the physical layout, 34/ the type of patient who frequents the area, 35/ or the hospital's past and present toleration of other nonwork related uses in the area, union solicitation would neither tend to unduly harm the patients nor interfere with their care. Moreover, although the existence of alternative means of communication is now a relevant inquiry and should be examined with particularity, especially when negotiating settlements, the fact that solicitation is permitted in some few other areas should not necessarily, without more, be dispositive of the validity of a ban in all so-called "public" areas that may also be conducive to employee interchanges. 36/

33/ See, e.g., McLean Hospital, (1-CA-13,753 et al., settled). National Jewish Hospital, 99 LRRM 3141 (10th Cir. 1978), vacated and remanded, vacated and remanded for reconsideration in light of Baptist Hospital, ___ U.S. ___, 101 LRRM 2628 (1979).

34/ For example, in National Jewish Hospital, supra, the evidence indicated that, although all patients took their meals in the same cafeteria as did the employees, the cafeteria can be partitioned off and, in fact, usually is divided during lunch when employee use is at its peak. Almost all employees eat on one side of the partition which completely screens noise from the other side.

35/ The Beth Israel Court noted that in that hospital a patient could not use the cafeteria unless a doctor certified that he was well enough to do so and that, therefore, patients "would not expect to receive special attention or primary care there" 437 U.S. at 502. See also Baptist Hospital, supra, 101 LRRM at 2561.

36/ Accordingly, in Baylor Hospital, supra, which has been remanded to the Board on the issue of the validity of a ban in the cafeteria and possibly in vending machine areas, additional evidence should be adduced with regard to the use of the exterior grounds for organizational and other purposes so as to enable the Board to consider the suggestion of the D. C. Circuit that the availability of these alternative facilities may warrant broad prohibition of solicitation in most other areas of the hospital, including the cafeteria, at least at certain peak periods of patient use. Baylor University Medical Center v. N.L.R.B., 100 LRRM 2341, 2345. On the current record, it would appear that in that hospital which employs over 3700 employees, the alternative means of communication, although covering an extensive area, are inadequate for solicitation purposes.

The foregoing paragraph is written on the assumption that the Board will remand Baylor to the Regional Director.

F. Working Areas to Which Only Employees Have General Access

There are some working areas in every health-care institution (with the possible exception of some short-term or emergency care facilities) to which only employees normally have access. These would include such areas as kitchen, laundry, supply rooms, housekeeping, bookkeeping and medical records. In these areas a ban on solicitation between nonworking employees would continue to be presumptively unlawful. It is possible, however, that an employer will attempt to show that solicitation in certain of these areas will disrupt critical patient care. It will be important in such cases to develop an understanding of the physical layout of the various locations involved and the type of work normally performed in each area, as well as the space available for off-duty conversations, and the places where many employees currently congregate.

G. Nonworking Areas to Which Only Employees Have Access

In areas such as employee locker rooms, lounges, rest rooms and parking lots, the employer should have few defenses to a policy that limits employee union solicitation and distribution activity. ^{37/} In many health-care facilities, however, these areas may be either inadequate or used by only a relatively small proportion of employees. ^{38/} In such situations, the employer should not be able successfully to argue that provision of such locations for solicitation obviates the need to provide the employees with other areas in which they can exercise their statutory rights. On the other hand, if there are employee lounges and locker rooms on patient floors that are routinely used by employees and where, for example, employee notices are posted, allowance of solicitation in such areas might justify its prohibition in other patient-oriented areas on the same floors. Thus, it is important, even in locations where the presumptive unlawfulness of a solicitation ban could seem clearest, to establish on the record a description of the size, location and use of these areas.

^{37/} In Los Angeles New Hospital, supra, the room was predominantly used as a break area and the employer's justification for a ban on solicitation was rejected.

^{38/} For example, in Baylor Hospital, supra, evidence showed that there were only 350 lockers provided in a separate employee-only locker room for 3700 employees. In Beth Israel Hospital, supra, 437 U.S. at 489-90, the Court noted that, in addition to being inadequate, most of the locker facilities were divided and restricted on the basis of sex and were not generally used to communicate messages to employees.

IV. Recommended Orders in the Remanded Cases

The orders sought by the General Counsel in these cases and the rules established through settlement negotiations should be sufficiently specific to avoid enforcement problems in the courts and to provide employees with clear guidelines as to where they can exercise their Section 7 rights. Accordingly, in addition to seeking an affirmative order that would require a respondent to rescind its unlawful no-solicitation - no-distribution rule, the proposed order should, wherever possible, delineate with precision those areas of the hospital where union solicitation and distribution will be permissible and where such activity will not be allowed.

V. General Approach to Pending and Future Cases

With regard to hospital solicitation cases that have already been investigated and in which a hearing is scheduled, the Region should ask for a continuance, if possible and where necessary, in order to reassess the case and assure a full presentation at the hearing concerning all the factors discussed herein. In cases that have been heard by an ALJ and in which briefs to the ALJ or the Board are due, the Regions should present arguments based on the views expressed herein, insofar as record evidence will permit. With regard to those cases before the ALJ in which the Region does not believe the record was sufficiently extensive to support findings based on the redefinition proposed herein, the Region should move before the ALJ to reopen the record to adduce additional evidence. As to cases already decided by an ALJ in which the Region believes the record should be reopened, those cases should be referred to the Division of Advice.

With regard to new charges, the Regions should investigate and consider fully all the factors discussed herein before deciding whether complaint is warranted. If the Region concludes that the charge involves a prohibition of solicitation in an immediate patient care area, as defined herein, such prohibition would be presumptively lawful. If the General Counsel could not successfully rebut the presumption, that charge or portion thereof should be dismissed even though there might have been a violation under the existing St. John's definition.

Moreover, the Region should investigate each charge carefully to determine whether the employer might successfully rebut the presumption of unlawfulness as to other areas. As discussed more fully, supra, this consideration should take into account the actual use and the physical layout of each area of the health care facility

in order to determine to what extent solicitation might tend to disturb patients or disrupt their care in the area at issue or in immediately contiguous areas. Most importantly, the Regions should assess the extent to which the employer has provided its employees with alternative locations and means by which they can communicate with each other and where organizational activity could be meaningfully conducted. Thus, where the employer permits solicitation in many areas of the hospital, particularly those that are "natural gathering places" for employees during their nonworking time, the balance is to be struck between the employees' needs for additional places in which to solicit, the employer's need for additional restrictions in patient-oriented areas, and the public concern for the conservation of government resources. If the Region concludes that an employer has provided sufficient locations where employees may exercise their Section 7 rights, charges can be dismissed even as to restrictions in areas where a ban would be presumptively invalid where, for instance, the employer establishes that considerations of patient care outweigh the need for additional solicitation areas.

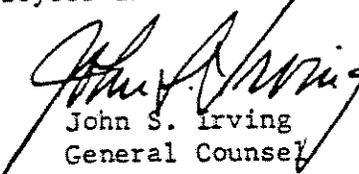
An example of this approach would be a case where an employer allows solicitation in the following areas: the cafeteria where most employees take their breaks; vending machine areas; major portions of the main lobby; exterior grounds; and all areas of the facility where only employees normally have access (including such working areas as laundry and supply rooms and such nonworking areas as employee lounges on patient floors). Even if the employer has prohibited solicitation in locations such as offices and laboratories where a ban would otherwise be presumptively unlawful, it would appear that the employer has adequately accommodated the employees' rights.

This balancing process should also be used in fashioning settlement agreements. For example, one recent case involved a psychiatric hospital. The employer argued persuasively that patients could be found throughout the institution and that, due to the type of illness for which they were being treated, any unusual activity conducted in their presence might have had a deleterious effect on their care. ^{39/} In this case, I approved a settlement agreement contemplating the formulation of a new rule that would restrict solicitation and distribution to times and locations when and where patients are not present. Solicitation and distribution were to be permitted in all exterior areas of the facility, but only where no patient could overhear the conversation or read the literature.

^{39/} Similar arguments might be made by an institution providing highly specialized care, such as a residential pediatric facility. Cf. National Jewish Hospital, supra.

In contrast, in a case where the prohibition or solicitation extends to areas that employees normally use during their nonworking time but which patients do not frequent, such as a coffee shop, vending machine area or a partitioned area within a nurses' station, and the employer cannot justify this broad ban on the basis of critical patient needs, the balance would be tipped in favor of the employees. Complaint should issue in such a case, even if solicitation is permitted in other areas, such as exterior grounds, which may be extensive but where employees do not normally congregate.

Until the Board provides further guidance in this area, our aim will be to deal sensitively, comprehensively and practically with these cases, with due regard for the Supreme Court's directive to take into consideration both the complexity of the modern hospital and the statutory rights of the employees in the health care industry. 40/


John S. Irving
General Counsel

40/ If Regions are unsure as to whether the factors have been adequately balanced in a given case, that case should be submitted to the Division of Advice. If Regions wish telephonic advice in this regard, they may wish to call attorney Barbara Franklin (254-9049) of the Division of Advice, who played an important role in the preparation of this memorandum.

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