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THE HORIZONS OF JURISDICTION

*John H. Fanning**

In March 1977, the National Labor Relations Board celebrated the symbolic casting of the thirty millionth vote in a Board conducted representation election. As with all milestones, it was a time for reflection. More than forty years had passed since President Franklin D. Roosevelt signed the National Labor Relations Act¹ into law. Enacted at a time when American labor-management relations were rocked by turbulence, the Act sought to replace industrial strife with the rule of law.

Through that law, a national policy was initiated to protect the right of workers to organize or to refrain from organizing, and to promote their opportunity to bargain collectively with their employer. From the Act's inception, through its reaffirmation and extension by the Taft-Hartley² and the Landrum-Griffin amendments,³ as well as the 1974 Health Care amendments,⁴ the Board has seen the concepts of majority rule and free collective bargaining take root in our industrial system. Employers, employees, and unions have accepted the often difficult process of shared participation, through collective bargaining, in the mutual adjustment of wages, hours, and working conditions. Today, with its central policies virtually unchanged, the Act has contributed to the development of what President Carter has characterized as "peaceful industrial relations that [are] the envy of the world."⁵

* Chairman of the NLRB since April 1977, member of the NLRB since 1957. A.B., Providence College; LL.B. the Catholic University of America School of Law, 1941. Mr. Fanning is grateful to Mr. Ernest W. DuBester, a lawyer on his staff, for assistance in the preparation of this article. This article was delivered as a speech to the Fourth Annual Institute on Current Problems and Issues in Labor Law and Labor Relations on Nov. 10, 1977 in New York. An earlier discussion by Chairman Fanning on the jurisdictional bounds of the NLRB is contained in 8 CATH. U.L. REV. 1 (1959).

1. Wagner Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151 through 168 (1976)).

2. Ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. § 141 (1976)).

3. Labor-Management Reporting and Disclosure Act, 73 Stat. 519 (1959) (current version at 29 U.S.C. §§ 401 through 531 (1976)).

4. 29 U.S.C. §§ 152(2), (14) (1976).

5. Letter from President Carter to then-Chairman of the NLRB, Betty Southard Murphy, Feb. 14, 1977 (on the occasion of the NLRB's 30 millionth vote celebration).

Having devoted almost one-third of my life to administering the Act—a period spanning nearly one-half of the life of the Act itself—I am proud of the contribution our national policy of collective bargaining has made to the quality of life in the United States. But if the validity of the policies embodied in the Act, and their demonstrated contribution to the national welfare are to continue, Board decisions must recognize and reflect the ever-changing realities of economic and industrial life. It is one aspect of this problem that I wish to discuss in this article.

The national policy, as set forth in the Act, is that it is desirable that labor-management disputes be settled by resort to collective bargaining.⁶ The implementation of this policy requires a mechanism. That mechanism is the Board and it is the Board's responsibility to ensure the full realization of the rights guaranteed in section 7 of the Act⁷ and implemented by sections 8 and 9.⁸ It is also the Board's responsibility to make its processes available in as unrestrained a fashion as is practically feasible and legally supportable. The Supreme Court, speaking through Mr. Justice Frankfurter, has stated that when Congress enacted the National Labor Relations Act, it intended to exercise to the fullest extent its power under the commerce clause of the Constitution.⁹ The Board's jurisdiction, therefore, extends broadly to all enterprises that "affect commerce."¹⁰ Its jurisdictional horizons, however, must be found not merely in the words of the statute, but also in the statute's deep-rooted policies, and it is doubtful whether a restrictive view of the Board's jurisdiction is in furtherance of the Act's purpose.

For this reason, I am often concerned by Board decisions which leave substantial segments of our industrial society uncovered by the Act. Despite the breadth of its jurisdictional authority, the Board, in its discretion, may decline to assert jurisdiction if the employer's activities do not have a substantial impact on commerce or if asserting jurisdiction would not effectuate the policies of the Act.¹¹ Acting within this authority, the Board,

6. 29 U.S.C. § 151 (1976).

7. 29 U.S.C. § 157 (1976).

8. 29 U.S.C. §§ 158, 159 (1976).

9. *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 648 (1944) (upholding the Board's assertion of jurisdiction over a fraternal benefit society which operated in 27 states, and whose business and labor relations affected interstate commerce).

10. *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1962) (per curiam) (the total representative effect of the situation rather than a mere quantitative analysis of the dispute before the Board is the proper test).

11. The Board was given statutory jurisdiction over labor disputes affecting commerce, as defined in 29 U.S.C. §§ 152(7), (9) (1976). However, the Board may, at its discretion, refuse to assert jurisdiction in a particular case when it finds that an employer does not significantly operate in interstate commerce. 29 U.S.C. § 164(c)(1) (1976).

in 1950, established jurisdictional standards under which it declined to assert jurisdiction over a given business unless the employer's operations satisfied minimum annual dollar inflow or outflow amounts.¹² Paul Herzog, Chairman of the Board at the time, stated that budgetary limitations, as well as the need to avoid diffusion of the Board's time and energy, justified the Board's refusal to exercise its full statutory jurisdiction.¹³

Two features of those inflow-outflow standards are of interest. First, they were codifications of existing practice and policies regarding jurisdiction. Second, the standard for assertion over some industries was that expressed in the Act itself.¹⁴ Thus, the Board would assert jurisdiction over industries whose operations were "in commerce," including instrumentalities or channels of commerce such as transportation enterprises, communications systems, and public utilities.¹⁵

In 1954, however, the Board reexamined its jurisdictional standards and established new, substantially more restrictive guidelines under which a greater number of enterprises, previously subject to the Board's processes and the provisions of the Act, were administratively exempted.¹⁶ This action, as is not unusual in the case of a major change of policy, led to litigation in the courts. While this litigation did not overturn the principle that the Board has discretionary authority to decline to exercise jurisdiction, it did establish two important principles which have had a major impact on Board actions since that time. The first, established in *Guss v. Utah Labor Relations Board*,¹⁷ was that the Board's declination of jurisdiction did not

12. The Board would assert jurisdiction over employers with a direct inflow of \$500,000 a year, Federal Dairy Co., 91 N.L.R.B. 638 (1950), an indirect inflow valued at \$1,000,000 a year, Dorn's House of Miracles, 91 N.L.R.B. 632 (1950), a direct outflow of \$25,000 a year in interstate commerce, Stanislaus Implement & Hardware Co., 91 N.L.R.B. 618 (1950), or a combination of inflow and outflow which totaled at least 100% of either the inflow or outflow standards, Rutledge Paper Prods., Inc., 91 N.L.R.B. 625 (1950).

13. *Hearings on S. Res. 248*, 81st Cong., 2d Sess. 120 (1950).

14. 29 U.S.C. § 164 (1976).

15. *See* Local Transit Lines, 91 N.L.R.B. 623, 624 (1950). *See also* WBSR, Inc., 91 N.L.R.B. 630, 631 (1950).

16. The 1954 jurisdictional standards were announced in an NLRB press release issued July 15, 1954. This press release is reprinted in 34 L.R.R.M. 75-78 (1954). *See, e.g.*, Breeding Transfer Co., 110 N.L.R.B. 493 (1954).

17. 353 U.S. 1 (1957). The Board properly declined to assert jurisdiction over a small Utah business which had not met the 1954 jurisdictional amount. The Utah State Board of Labor Relations, pursuant to state law, UTAH CODE ANN. §§ 34-1-1 through 34-1-15 (1953), asserted jurisdiction over the employer since the NLRB had refused to do so. The Supreme Court held that the states could not assert jurisdiction over employers which the Board had refused to cover, finding that Congress had preempted the field in giving jurisdictional discretion to the Board. The Court noted that this result was required even if it meant that certain employers and, therefore, employees were not protected by any labor relations legislation, and indicated that a solution to this "no-man's land" problem could be reached by the Board's revising its jurisdictional requirements so as to include such employers. *Id.* at

operate to give jurisdiction to the states. The second, derived from the *Office Employees* and *Hotel Employees* decisions,¹⁸ was that the Board's discretionary authority to decline jurisdiction over the smaller employers in an industry did not permit the Board to decline jurisdiction over an entire industry.

In direct response to these Supreme Court decisions, the Board again reviewed its jurisdictional standards and substantially lowered the annual dollar amount of inflow, outflow, or gross revenues which would lead it to assert jurisdiction. These standards were promulgated in a series of decisions issued in 1958 in which the Board recognized that "its primary function is to extend the national labor policies embodied in the Act as close to the legal limits of its jurisdiction established by Congress as its resources permit."¹⁹

Passage of the Landrum-Griffin amendments in 1959 reflected that Congress had also considered the impact of the Supreme Court decisions. Recognizing the problems created by a "no-man's land" in which the Board declined to act and states could not, Congress authorized the states to assert jurisdiction over labor disputes over which the Board had properly declined to assert jurisdiction. At the same time, Congress limited somewhat the Board's discretionary authority to decline jurisdiction by declaring that, "the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959,"²⁰ that is to say, the 1958 standards. Congress again dealt with jurisdiction in the 1974 Health Care amendments, which extended jurisdiction to enterprises previously exempted by statute or Board administrative action.²¹ It would appear that Congress has had a more expansive view of Board jurisdiction than has the Board.

It is against this perspective, as well as the fact that in 1947 and 1959 Congress substantially expanded the Board's substantive jurisdiction, that I wish to explore some of the more recent developments in the Board's

11. For a more complete discussion of *Guss*, see Fanning, *The "No-Man's Land" and the National Labor Relations Board's Jurisdictional Policies*, 8 CATH. U.L. REV. 1 (1959).

18. *Office Employees Int'l Union Local 11 v. NLRB*, 353 U.S. 313 (1957); *Hotel Employees Local 255 v. Leedom*, 358 U.S. 99 (1958). In *Office Employees*, the Court held that the Board could not deny jurisdiction over labor unions, as a class, when acting as employers, although the Board retained the power to deny jurisdiction over any particular employer in the class which failed to meet the jurisdictional amount requirements. 353 U.S. at 318-20. The Court similarly ruled in *Hotel Employees* regarding the hotel industry as a class.

19. *Siemons Mailing Service*, 122 N.L.R.B. 81, 84 (1958). See also *Sioux Valley Empire Elec. Ass'n*, 122 N.L.R.B. 92 (1958); *Raritan Valley Broadcasting Co.*, 122 N.L.R.B. 90 (1958); *Carolina Supplies & Cement Co.*, 122 N.L.R.B. 88 (1958).

20. Labor-Management Reporting and Disclosure Act, § 701(a), 73 Stat. 541 (1959) (codified at 29 U.S.C. § 164(c)(1) (1976)).

21. 29 U.S.C. §§ 152(2), (14) (1976).

jurisdiction. That perspective is one which, I believe, demonstrates the constant congressional intention that the policies of the Act and the processes of the Board be brought to bear upon as broad an area as is consistent with the Board's resources.

Perhaps the jurisdictional issue which continues to give the Board the most difficulty is that arising when a governmental entity,²² exempt under the Act, decides to contract out some of its functions to the private sector—the issue thus becoming whether to assert jurisdiction over the nonexempt private employer. I have long maintained in these situations that the critical inquiry is whether the private employer retains sufficient control over the employment conditions of its employees so that meaningful collective bargaining can take place.²³

Over the last several years, however, my colleagues have often applied an amorphous "intimate connection" test to these cases.²⁴ To some, intimate connection may hinge on the distinction between whether the particular function contracted out is required by statute or merely authorized—the so-called mandatory-permissive distinction.²⁵ To others, intimate connection turns on an assessment of the function itself, analyzing whether it is so essential a governmental function as to require the private employer to also be exempt from the Act.²⁶

The only statutory exemptions germane to these issues are those for the United States, any wholly owned Government corporation, any Federal

22. See note 28 & accompanying text *infra*.

23. See, e.g., *Grey Nuns of the Sacred Heart*, 221 N.L.R.B. 1215 n.2 (1975); *Rural Fire Protection Co.*, 216 N.L.R.B. 584, 587 (1975) (Fanning, dissenting); *Current Construction Corp.*, 209 N.L.R.B. 718, 719 (1974) (Fanning, dissenting). See also *Nichols Sanitation, Inc.*, 230 N.L.R.B. 834, 835 n.6 (1977); *We Transport, Inc. & Town Bus Corp.*, 215 N.L.R.B. 497 (1974); *Sis-Q Flying Service, Inc.*, 197 N.L.R.B. 195 (1972).

24. My colleagues' application of the intimate connection test usually involves an analysis to determine if the service performed by the private employer is so closely related to the function of the government entity as to be considered part of the entity's obligations, and therefore exempt from coverage just as though it were the entity. If the services performed by the private employer are not essential to the purpose and function of the exempt governmental entity, jurisdiction may be asserted over the private employer. See *Rural Fire Protection*, 216 N.L.R.B. 584 (1975).

For members using this test, the question of degree of control is important only when the exempt governmental unit retains so great a degree of control as to preclude the assertion of jurisdiction on that ground alone, thereby avoiding the necessity of applying the intimate connection test. See *Rural Fire Protection*, 216 N.L.R.B. 584 (1975).

25. Under this approach, a distinction is made as to whether the governmental entity is required or merely authorized, at its discretion, to provide the service in question. See *Nichols Sanitation, Inc.*, 230 N.L.R.B. 834 (1977) for a discussion of the different approaches applicable to the mandatory-permissive distinction. Compare *Transit Sys., Inc.*, 221 N.L.R.B. 299 (1975) with *California Inspection Rating Bureau*, 231 N.L.R.B. No. 75, 96 L.R.R.M. 1127, 1128 n.3 (Aug. 22, 1977).

26. See note 24, *supra*.

Reserve Bank, or any state or political subdivision of a state.²⁷ For an entity to fall within the statutory exemption provided for a state or its political subdivision, it must either be created directly by the state or administered by individuals who are responsible either to public officials, or to the general public.²⁸ Except in these limited circumstances, when a private employer retains the capability of exercising effective control over the working conditions of its employees, the private sector employees should not be deprived of the benefits of the Act. Nor should the employer and governmental body be deprived of the Act's protection.

This "control of labor relations" test commends itself in its simplicity and predictability. Employers, employees, and unions are entitled to clear and easily applicable standards that will not only facilitate decisions but also furnish guidance. Having a better idea of whether they are covered by the Act, the parties may decide that resort to litigation is not appropriate. Application of the intimate connection standard, on the other hand, is uncertain and produces little predictability.

Illustrative of the application of both these tests is the recent decision in *California Inspection Rating Bureau*.²⁹ In deciding to assert jurisdiction, the Board found that an insurance rating bureau was not intimately connected with the State of California merely because its creation was mandated by the California legislature even though it was the only organization of its kind performing work that otherwise would have been performed by the state.³⁰ The Board has also recently asserted jurisdiction over a corporation providing garbage and trash removal services to several communities in Florida, again finding no intimate connection with the state.³¹ These decisions demonstrate the need for a clear-cut standard because they reflect that, even when in agreement as to the proper result, Board members take different roads to get there. Other cases reflect that occasionally Board members will simply have differing perceptions as to both tests' proper application. This was evidenced by the series of cases in

27. See 29 U.S.C. § 152(2) (1976).

28. For the Board's standard of analysis, see the *Natural Gas Util. Dist.*, 167 N.L.R.B. 691 (1967), *enforcement denied*, 427 F.2d 312 (6th Cir. 1970), *aff'd*, 402 U.S. 600 (1971) (as to applicable standard only).

29. 231 N.L.R.B. No. 75, 96 L.R.R.M. 1127 (Aug. 22, 1977).

30. The Board majority based its decision to assert jurisdiction on an analysis of the following factors: the nature of the services, their connection with the function of the state, and the degree of control over labor relations retained by the state. *Id.* at 1128. I relied only on the degree of control which the employer possessed over labor relations as the grounds for asserting jurisdiction. *Id.* n.3.

31. *Nichols Sanitation, Inc.*, 230 N.L.R.B. 834 (1977). The Board members again looked to a variety of factors in deciding to assert jurisdiction, but each Board member found a different factor persuasive. I again relied solely on the labor relations test.

which the Board asserted jurisdiction over "Head Start" and day care centers that are substantially funded by Model Cities-Chicago Committee on Urban Opportunity, a city agency.³²

The greatest number of cases in this area, however, are school bus cases, in which a private employer contracts with municipal school districts to provide transportation services. If that employer retains the right to hire, fire, set wages and hours, and discipline its employees, including those providing the school bus services, then there is no justification for failing to assert jurisdiction over that employer's entire operations, *including* the school bus operations. In recent decisions, however, a majority of the Board has distinguished between the employer's school bus operations and nonschool related operations, choosing to assert jurisdiction *only* over the latter.³³ These cases place form over substance. One negative offshoot is often the serious fragmentation of the bargaining unit sought, with some employees covered by the Act while others (those driving school buses) not covered. Another is the anomalous situation that may result when the employer's drivers devote considerable time to providing private transportation as well as transporting public school children. In such cases, the Board majority, although technically declining to assert jurisdiction over the employer's school operations, may, practically speaking, end up asserting it over the same employees because of their dual function.

A more serious problem exists when the Board fails to assert jurisdiction at all because the affected employees and employers are then denied the protections of the Act.³⁴ The failure to assert jurisdiction may also mean that experiences under the National Labor Relations Act with disputes of this type will not be available as a useful model to legislatures which may be working to establish dispute settlement procedures for public employees.

A context similar to that of the government-related employer involves nonprofit, charitable institutions. Over three years ago in the *Ming Quong*

32. See Catholic Bishop of Chicago, A Corporation Sole, Department of Federal Programs, 235 N.L.R.B. No. 105, 98 L.R.R.M. 1037 (April 7, 1978); Hull House Ass'n, 235 N.L.R.B. No. 108, 98 L.R.R.M. 1048 (April 7, 1978); The Chase House, Inc., 235 N.L.R.B. No. 107, 98 L.R.R.M. 1052 (April 7, 1978); Young Men's Christian Ass'n of Metropolitan Chicago, 235 N.L.R.B. No. 106, 98 L.R.R.M. 1056 (April 7, 1978).

33. National Trans. Serv., Inc., 231 N.L.R.B. No. 162, 96 L.R.R.M. 1102 (Aug. 31, 1977); Columbia Transit Corp., 226 N.L.R.B. 812 (1976) (Fanning, dissenting). These cases involved bus companies that provided public or private service as well as school bus transportation. The Board asserted jurisdiction over these companies only to the extent of the public or private service, and declined to assert jurisdiction over that aspect related to public school transportation, as this was deemed to be intimately related to public education, an exempt governmental function. See Roesch Lines, Inc., 224 N.L.R.B. 203 (1976).

34. See Rural Fire Protection Co., 216 N.L.R.B. 584, 588 (1975) (Fanning, dissenting).

decision,³⁵ a Board majority declined to exercise jurisdiction over an employer providing professional treatment to emotionally disturbed children. In so doing, the Board stated that it was reasserting the practice of declining jurisdiction over "religious, educational, and eleemosynary employers" unless the particular type of charitable institution had a massive impact on interstate commerce.³⁶ In my dissent in that case, I set forth reasons why the refusal to apply the Act to nonprofit charitable institutions was wrong as a matter of general policy.³⁷

With the subsequent enactment of the Health Care amendments, which deleted the nonprofit hospital exemption, the *Ming Quong* majority decided that the underpinning of its position was removed. Overruling *Ming Quong* in the case of *St. Aloysius Home*,³⁸ the Board stated that in applying its discretionary jurisdictional standards, a distinction would no longer be made between charitable and noncharitable institutions. While this was a welcome development, its impact on charitable institutions outside the health care field was considerably diminished by the Board's announcement that a tentative jurisdictional standard of \$250,000 annual revenues would be applied to most institutions of this type.³⁹ Application of the \$250,000 standard to institutions involved in specialized care of children and to day care centers, renders the Board's decision almost academic;⁴⁰ a \$100,000 standard for day care centers would be economically more meaningful.

Equally disturbing was the Board's decision to apply the \$250,000 standard to health care clinics and related facilities covered by the Health Care

35. *Ming Quong Childrens Center*, 210 N.L.R.B. 899 (1974) (Fanning, dissenting). The Childrens Center was a nonprofit child care facility which the Board found did not have a substantial impact on interstate commerce. Jurisdiction was, therefore, denied. *Cf.* *Cornell Univ.* 183 N.L.R.B. 329 (1970).

36. 210 N.L.R.B. at 900.

37. *Id.* at 902 (Fanning, dissenting). I noted the association that child care facilities have with the health care industry, over which the Board had asserted jurisdiction, and argued that it was unwise for the Board to distinguish facilities such as *Ming Quong* solely on the grounds of its nonprofit and eleemosynary character.

38. *St. Aloysius Home*, 224 N.L.R.B. 1344 (1976). Noting that the 1974 Health Care amendments left no distinction between health care facilities eleemosynary in nature and those which are not, the Board found that the only basis for deciding whether or not to assert jurisdiction could be the impact on interstate commerce, and that the same test applied to all health care facilities, eleemosynary or not. *Id.* at 1345.

39. *Salt & Pepper Nursery School & Kindergarten No. 2*, 222 N.L.R.B. 1295 (1976). The Board established a tentative jurisdictional amount of \$250,000 for charitable institutions outside the health care field, while leaving the nursing home amount fixed at \$100,000. The majority did not fully explain the rationale for such a distinction. *See id.* at 1296.

40. HEW statistics available to the Board in *Salt & Pepper* indicated that, of 600 representative day care centers, less than 2% could meet the \$250,000 standard whereas 25% to 35% would meet the \$100,000 standard. *Id.* at 1296 n.2 (Fanning, dissenting).

amendments.⁴¹ It is difficult to see why nursing homes and related facilities with \$100,000 gross annual revenues exert a substantial impact on commerce while other health care institutions do not. By restricting Board jurisdiction to such a small segment of the health care industry, little meaningful impact will be felt on the labor relations of that industry as a whole. This standard may also invite litigation on the issue of whether or not a particular health care institution is subject to the nursing home standard, thereby contributing to a poor utilization of Board funds and energies.

Another health-care related area which has received attention is the "continuing saga of *Cedars-Sinai*."⁴² In this case, a Board majority found that a hospital housestaff, consisting of interns, residents, and clinical fellows, were students, not employees, and therefore not entitled to representation for purposes of collective bargaining, at least not under the provisions of the National Labor Relations Act. While the Board had technically asserted jurisdiction over that hospital,⁴³ the decision resulted in exclusion of the housestaff from the Act's coverage.

The *Cedars-Sinai* decision sparked a great deal of litigation and legislative reaction. In New York, the Committee of Interns and Residents sought to have the New York State Labor Relations Board resume the coverage of housestaff it had exercised prior to passage of the 1974 Health Care amendments to the National Labor Relations Act, but the United States Court of Appeals for the Second Circuit recently ruled that the Board had not ceded its jurisdiction to the state and that state power was ousted.⁴⁴ There are also bills presently being considered in both houses of

41. East Oakland Community Health Alliance, Inc., 218 N.L.R.B. 1270 (1975).

42. *Cedars-Sinai Medical Center*, 223 N.L.R.B. 251 (1976) (Fanning, dissenting), *injunction denied sub nom. NLRB v. Committee of Interns & Residents*, 426 F. Supp. 438 (S.D.N.Y.), *rev'd*, 566 F.2d 810 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 1449 (1978).

43. Finding that these persons are primarily students "and, therefore, not employees" the Board decided that housestaff were not entitled to coverage under the National Labor Relations Act and that the organization which sought to represent them in collective bargaining was, therefore, not a "labor organization" as defined in § 2(5) of the statute. In a lengthy dissent, I characterized the relationship between housestaff and the hospital as a "classic" employment relationship inasmuch as housestaff perform a service for the hospital, subject to its control, and are compensated for that service. I also alluded to the legislative history of § 2(12) of the Act, which defines a "professional employee," and discerned there a specific legislative intent to include housestaff within the definition. Finally, I considered the Board majority's action to be at odds with the legislative intent and purpose of the Health Care amendments, a view which, subsequently, has received considerable legislative affirmation. *Id.* at 254-59. See H.R. REP. 95-980, 95th Cong., 2d Sess. (1978).

44. *NLRB v. Committee of Interns & Residents*, 566 F.2d 810 (2d Cir. 1977), *rev'g* 426 F. Supp. 438 (S.D.N.Y. 1977). The court found that through the 1974 Health Care amendments, Congress had completely ousted state jurisdiction over all nonprofit health care facil-

Congress to overrule the effect of *Cedars-Sinai*.⁴⁵ Again Congress may be ahead of the Board in broadening the scope of the Act's jurisdiction.⁴⁶

Perhaps the most controversial jurisdictional action of the Board in recent months involves the assertion, without dissent, of jurisdiction over Catholic elementary schools and high schools in Philadelphia, Chicago, and Los Angeles.⁴⁷ The process of bringing private educational institutions within the Act's ambit began in 1970 with the Board's decision in *Cornell University*,⁴⁸ in which the Board decided to assert jurisdiction over those nonprofit educational institutions whose operations have a substantial impact on interstate commerce. While the Board has declined to assert jurisdiction over those schools whose educational objectives were found to be limited essentially to furthering religious beliefs,⁴⁹ the parochial school cases reflect the Board's recognition of the considerable secular function of those schools. It is particularly significant, at least to me, that these decisions involve only the employment relationships that exist between the Catholic schools and their lay teachers. None of the cases involve attempts to organize religious teachers. There are currently more than 98,000 lay teachers in parochial schools, one third of whom teach in high schools and two thirds in elementary schools.⁵⁰ Extension of the Act's coverage to these teachers, in my judgment, does not constitute a governmental intrusion into religious conduct. The Act's provisions are not designed or intended to support or interfere with religious beliefs.

ities. *Id.* at 815. The housestaff thus receives no statutory protection for labor related activities, leaving them in a "no-man's land."

45. S. 1884, 95th Cong., 1st Sess. (1977), sponsored by Senators Riegle and Cranston and H.R. 2222, 95th Cong., 1st Sess. (1977).

46. See text accompanying notes 20-21 *supra*. For a detailed argument against the Board's position, see *Cedars-Sinai*, 223 N.L.R.B. at 254-59 (Fanning, dissenting).

47. Archdiocese of Philadelphia, 227 N.L.R.B. 1178 (1977). Catholic Bishop of Chicago, 224 N.L.R.B. 1221 (1976) *enforcement denied*, 559 F.2d 1112 (7th Cir. 1977), *cert. granted*, 98 S. Ct. 1231 (1978); Cardinal Timothy Manning, Roman Catholic Archbishop of the Archdiocese of Los Angeles, A Corporation Sole, 223 N.L.R.B. 1218 (1976). The Ninth Circuit is currently reviewing the *Los Angeles* case on appeal. Docket No. 77-1286 (Filed January 31, 1977). In each of these decisions, the Board found that the religious schools in question were not "completely religious" in that they did provide secular education in addition to religious instruction. The Board noted that its policy is to refuse to assert jurisdiction over institutions which are completely religious, and not merely religiously associated. See Archdiocese of Baltimore, 216 N.L.R.B. 249 (1975).

48. 183 N.L.R.B. 329 (1970). The assertion of the Board's jurisdiction over nonprofit educational institutions was upheld in *NLRB v. Wentworth Inst.*, 515 F.2d 550 (1st Cir. 1975).

49. Association of Hebrew Teachers, 210 N.L.R.B. 1053 (1974); Board of Jewish Educ., 210 N.L.R.B. 1037 (1974).

50. Statistics (1976-77 school year) supplied by the United States Catholic Conference, 1312 Massachusetts Avenue, N.W., Washington, D.C.

They simply reflect the congressional intent to stabilize labor relations by the creation of a uniform federal labor policy.⁵¹

To date, however, the Board's position has not fared well in the courts. In *Caulfield v. Hirsch*,⁵² a Pennsylvania federal district court permanently enjoined the Board's assertion of jurisdiction over the Philadelphia Archdiocese's elementary schools, finding that the Board's assertion violated both the exercise and establishment clauses of the first amendment. In *Catholic Bishop of Chicago v. NLRB*,⁵³ the Seventh Circuit similarly found that the Board's assertion of jurisdiction over the diocesan high schools violated the first amendment, and litigation is now pending in the Ninth Circuit in *Archdiocese of Los Angeles*.⁵⁴

Another controversial issue has been the Board's continuing policy of refusing to assert jurisdiction over the horseracing industry. In a recent Board advisory opinion concerning a leading national trainer,⁵⁵ I reaffirmed my belief, expressed in earlier dissents,⁵⁶ that the Board's refusal to assert jurisdiction over the horseracing industry is no longer justifiable. Although the Board determined fifteen years ago to decline jurisdiction over the industry because of extensive state and local regulation,⁵⁷ much has happened since to undercut that rationale. The Board has asserted jurisdiction over the gambling industry,⁵⁸ jai alai,⁵⁹ private hospitals and nursing homes,⁶⁰ nonprofit colleges and universities,⁶¹ and even professional football,⁶² baseball,⁶³ basketball,⁶⁴ and soccer⁶⁵ despite the fact that states retain extensive control over some of these industries.

The Board's rules and regulations, which express the Board's policy not to assert jurisdiction over the horseracing and dogracing industries, are not

51. Cardinal Timothy Manning, Roman Catholic Archbishop of the Archdiocese of Los Angeles, A Corporation Sole, 223 N.L.R.B. 1218, 1218 (1976).

52. 410 F. Supp. 618 (E.D. Pa. 1977).

53. 224 N.L.R.B. 1221 (1976), *enforcement denied*, 559 F.2d 1112 (7th Cir. 1977), *cert. granted*, 98 S. Ct. 1231 (1978).

54. Docket No. 77-1286 (Filed January 31, 1977).

55. Elliott Burch, 230 N.L.R.B. 1161 (1977).

56. Centennial Turf Club, Inc., 192 N.L.R.B. 698, 699 (1971) (Fanning, dissenting).

57. Walter A. Kelly, 139 N.L.R.B. 744 (1962). The Board also pointed out their belief that a labor dispute in this industry was unlikely to affect interstate commerce seriously.

58. *See* El Dorado, Inc., 151 N.L.R.B. 579 (1965).

59. *See* Grand Resorts, Inc., 221 N.L.R.B. 539 (1975); Volusia Jai Alai, Inc., 221 N.L.R.B. 1280 (1975).

60. *See* Medical Center Hosp., 168 N.L.R.B. 266 (1967).

61. *See* Cornell Univ., 183 N.L.R.B. 329 (1970).

62. *See* National Football League Management Council, 203 N.L.R.B. 958 (1973).

63. *See* American League of Professional Baseball Clubs, 180 N.L.R.B. 190 (1969).

64. *See* American Basketball Players Ass'n, 215 N.L.R.B. 280 (1974).

65. The North American Soccer League and Its Constituent Member Clubs, 236 N.L.R.B. No. 181, 98 L.R.R.M. 1445 (June 30, 1978).

related to the realities of economic life.⁶⁶ In 1976, for example, over 581 million dollars in thoroughbred horseracing revenues were turned over to the states. The total pari-mutuel turnover was close to five billion dollars. The total purse distribution exceeded 237 million dollars, and the total attendance exceeded forty-three million people.⁶⁷ It is almost inconceivable, on the basis of these figures alone, that the Board continues to decline jurisdiction over the horseracing industry.

Nor can justification be found in the assertion that there are relatively few labor disputes in that industry. Belmont and Aqueduct racetracks in New York have been hit by labor disputes this year, as have the Maryland tracks of Bowie and Pimlico. The impact that such disputes can have on the food, beverage, or transportation industries cannot be overlooked.

Finally, the attempted justification that the industry has only sporadic employment is of little practical validity today. The trend toward year round racing in most states, such as New York, New Jersey, and Maryland, has produced, even among employees who work directly for the track, stable work forces—no pun intended—which move from track to track.⁶⁸

Recently, there have been two changes in the Board's jurisdictional policies which I view as constructive. One is the *Foley-Hoag*⁶⁹ decision in which the Board unanimously expanded its discretionary jurisdiction to encompass law firms. Through that decision, many law firms are now covered under the Act as statutory employers.

Foley-Hoag overruled the earlier *Bodle-Fogel*⁷⁰ decision, in which the Board had determined that the legal profession's impact on interstate commerce is only incidental. *Foley-Hoag* represents a more realistic view of the vital role of the legal profession and, in the Supreme Court's words, the important part that the activities of lawyers play in commercial intercourse.⁷¹ In decisions subsequent to *Foley-Hoag*, the Board has also announced that it will assert jurisdiction over nonprofit legal services corporations, as well as over law firms, and that it will apply a \$250,000 gross annual revenue standard to both employer classifications.⁷² It is as-

66. 29 C.F.R. § 103.3 (1976), enacted Apr. 17, 1973. The reasons behind the regulations include: past history of declination of jurisdiction, the extensive state control over the industries, the sporadic nature of the industries which encourages part time employment, the instability of the work force, and the relatively few labor disputes in these industries. See Elliott Burch, 230 N.L.R.B. 1161, 1162 (1977) (Fanning, concurring).

67. *Id.* at 1163.

68. *Id.* at 1162.

69. *Foley, Hoag & Eliot*, 229 N.L.R.B. 456 (1977).

70. *Bodle, Fogel, Julber, Reinhardt & Rothschild*, 206 N.L.R.B. 512 (1973).

71. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975).

72. *Camden Regional Legal Serv., Inc.*, 231 N.L.R.B. No. 47, 95 L.R.R.M. 1545 (Aug.

sumed that the assertion of jurisdiction over law firms will not add considerably to the Board's unfair labor practice caseload, and that it will undoubtedly go a long way toward improving the representation elections which the Board conducts.

The other welcome development is reflected by two decisions in which the Board asserted jurisdiction over a foreign corporation operating in the United States and over an American corporation with foreign government control. For over ten years, the Board had adhered to a policy of declining to assert jurisdiction over employers operating within United States territorial limits when they had a "close relationship" with an "agency" or "instrumentality" of a foreign government.⁷³

This policy ignored the realities of the modern world in which foreign state enterprises participate in competitive commercial activities within this country every day. It was abandoned in the *State Bank of India*⁷⁴ case, in which the Board asserted jurisdiction over the bank's Chicago branch office. Although the bank was organized under the laws of India and overall policy was made by its central office overseas, the day-to-day operations and labor relations decisions were made by local branch officers in Chicago, and the Bank was authorized to, and did, engage in interstate commerce. In the other case of note, *SK Products Corp.*,⁷⁵ the Board asserted jurisdiction over an American corporation, licensed to do business in several states, which served as the distribution arm of a Yugoslav company alleged to be an integral part of the Yugoslav government. Again, though overall policy was made overseas, the day-to-day operations and labor relations decisions were the responsibility of officials at the various American locations. The decisions in these two cases are in accord with the generally accepted rules of international law,⁷⁶ and they recognize the Board's responsibility to administer the Act on behalf of all workers in this country.

Another issue related to the Board's assertion of jurisdiction is the Board's policy of deferring action on cases subject to arbitration agree-

8, 1977); *Legal Serv. for N.W. Pennsylvania*, 230 N.L.R.B. 688 (1977); *Wayne County Neighborhood Legal Serv., Inc.*, 229 N.L.R.B. 1023 (1977).

73. See *British Rail-Int'l, Inc.*, 163 N.L.R.B. 721 (1967) (employer was merely the United States representative of an agency of the British government); *AGIP, USA, Inc.*, 196 N.L.R.B. 1144 (1972) (employer was merely the agent of a company wholly owned by the Italian government). In both cases, the Board refused to assert jurisdiction solely because of the employer's close ties to a foreign government.

74. 229 N.L.R.B. 838 (1977) (overruling *British Rail-Int'l, Inc.*, 163 N.L.R.B. 721 (1967) and *AGIP, USA, Inc.*, 196 N.L.R.B. 1144 (1972)).

75. 230 N.L.R.B. 1211 (1977).

76. *Id.* at 1214 n.17.

ments under the rule of *Collyer Insulation Wire*.⁷⁷ Under this rule, the Board will refuse to assert jurisdiction over an issue, rather than an employer, because the parties to a collective bargaining agreement have provided a mechanism—arbitration—through which to settle their contract disputes.⁷⁸ The Board will defer to arbitration when it appears that the issue in question is subject to the contractual grievance-arbitration procedure and that the procedure will afford both parties a fair and just opportunity to argue their case. The effect of this policy is to deny the parties access to the Board for the adjudication of alleged unfair labor practices, since the Board will order the parties to commence the grievance-arbitration procedure, even though the Board has a statutory duty, which in my judgment cannot be abdicated or avoided, to hear and to dispose of unfair labor practice cases. The *Collyer* policy provides a dramatic example of the ease with which the main thrust of the Act can be blunted or diverted by the Board's failure to keep the basic statutory policies in the forefront of consciousness.

In a positive vein, the Board's *Collyer* policy was recently curtailed somewhat by the *General American Transportation Corp.*⁷⁹ case, in which a Board majority ruled that the Board will no longer defer to arbitration in cases involving alleged unlawful discharges or other unlawful interference with employees' rights under the Act. On the same day, however, in *Roy Robinson Chevrolet*,⁸⁰ a different majority stated that the Board will continue to defer to arbitration in refusal-to-bargain cases.

77. 192 N.L.R.B. 837 (1971).

78. In a similar context, the Board will defer to the arbitration process when the parties have already initiated that procedure, *Dubo Mfg. Co.*, 142 N.L.R.B. 431 (1963), and will also defer to the decision of an arbitrator when the parties have completed the arbitration process, if the parties have litigated the unfair labor practice issue before the arbitrator and his decision is not repugnant to the policies of the Act. *Speilberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).

79. 228 N.L.R.B. 808 (1977). When the issue concerns an individual right enunciated in the Act, such as the right to engage in protected activity without fear of reprisal, the contractual grievance procedure should not be allowed to supersede a statutory remedy, for the individual did not waive his statutory protection by entering into the collective bargaining agreement. With regard to discharge cases, an arbitrator might properly find that an employee was discharged "for cause" according to the contract, but the crucial issue is whether an underlying factor for the discharge was the employee's support for, or activities on behalf of, a union.

80. 228 N.L.R.B. 828, 828-29 (1977). When the dispute concerns a refusal to bargain, the issue involves the rights of the union, as an organization, and not the rights of an individual employee. When there is a question of contract interpretation as to whether or not the union retains the right to bargain over a specific item, this question should be resolved through arbitration, as it is possible that the union contractually waived its bargaining rights over a particular issue. *Id.*

Only by extending its processes as close to the legal limits as resources permit can the Board achieve its full potential as an instrument of public service. This is a legacy which I would be gratified to leave with the Board. I believe it is in keeping with the congressional purpose which the Act embodies, and it is of vital necessity if the agency is to remain a constructive force despite the complex and ever changing realities we must face.

