

**Ecclesiastical Maintenance Services, Inc., Employer-Petitioner and Local 74, Service Employees International Union, AFL-CIO.** Case 2-UC-521

April 10, 1998

ORDER DENYING REVIEW

BY CHAIRMAN GOULD AND MEMBERS FOX,  
LIEBMAN, HURTGEN, AND BRAME

The National Labor Relations Board has considered the Union's request for review of the Regional Director's Decision and Order Dismissing Petition (relevant portions are attached as an appendix). The request for review is denied as it fails to raise substantial issues warranting review.<sup>1</sup>

<sup>1</sup> The only issue raised in the request for review is whether the Regional Director erred in asserting jurisdiction over the Employer.

The Board notes that the Regional Director apparently inadvertently dismissed the petition, although he specifically clarified the unit to exclude superintendents. The Board corrects this oversight, and reinstates the petition. In so doing, the Board further notes that the parties stipulated that superintendents working at specific locations were statutory supervisors. Therefore, the Board corrects the Regional Director's clarification of the unit, and excludes superintendents employed at Monsignor Farrell High School, Cardinal Spellman High School, Moore Catholic High School, Stepinach High School, Kennedy High School, Lady of Lourdes High School, Coleman High School, St. Patrick's Cathedral, Saint Joseph Seminary, and New York Catholic Center.

Chairman Gould and Member Fox agree with the Regional Director's assertion of jurisdiction over the Employer. They do not agree, however, that the distinction made by the Regional Director between the facts in *Riverside Church*, 309 NLRB 806 (1992), and the facts in this case is of legal significance under the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). Consequently, rather than distinguishing *Riverside* from this case, they would overrule the Board's decision in that case.

APPENDIX

REGIONAL DIRECTOR'S DECISION AND ORDER  
DISMISSING PETITION

. . . .

2. The parties stipulated<sup>2</sup> and the record reflects that Ecclesiastical Maintenance Services, Inc., herein the Employer, a non-profit corporation formed by the Roman Catholic Archdiocese of New York under the Membership Corporation Law of the State of New York, is engaged in the business of providing cleaning and maintenance services on a contract fee basis exclusively for facilities including churches, schools, and seminaries in the Archdiocese of New York. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of \$3.5 million dollars and purchases materials valued in excess of

<sup>2</sup> The parties stipulated that the commerce facts regarding this Employer which were relied on by the Board in its Advisory Opinion reported at 320 NLRB No. 6 (1995) [320 NLRB 70] have not changed.

\$50,000 directly from suppliers located outside the State of New York.

Local 74, Service Employees International Union, AFL-CIO, herein the Union, argues that the Board should not exercise jurisdiction here because the Employer is a religiously affiliated entity whose operations are intrinsically part of the mission of the Roman Catholic Archdiocese of New York. The Employer disagrees with the Union and contends that the Board has jurisdiction over it.

The record reveals that the Employer is a nonprofit corporation formed by the Roman Catholic Archdiocese of New York in July 1969 pursuant to the Membership Corporation Law of the State of New York. Paragraph 2 of the Employer's Certificate of Incorporation provides that,

the purpose for which the Corporation is formed is to assist in the fulfillment of the religious, educational and other charitable purposes of the Roman Catholic Archdiocese of New York which are carried out by the churches, schools, hospitals, and other institutions owned, operated, supervised or controlled by or in connection with the Roman Catholic Church within the Archdiocese.

Paragraph 2(a) of the Certificate of Incorporation provides, in pertinent part, that in order to carry out its purpose, the Corporation shall have the power,

to furnish and supervise the furnishing of cleaning, maintenance, painting and repairing services and otherwise provide for the maintenance of the interior and exterior . . . of such churches, schools, hospitals and other institutions situated within the Archdiocese and owned, operated, supervised or controlled by or in connection with the Roman Catholic Church.

John Cardinal O'Connor is the Employer's President and one of its directors. Bishop Patrick Sheridan, Bishop Henry Mansell, and Monsignor Robert Brucato are the Employer's Vice President, Treasurer, and Secretary, respectively, and directors. William Daly and Dan Poling, employees of the Archdiocese of New York, also serve as the Employer's directors. Edward Woods, an employee and general manager of the Employer, also serves as director and Assistant Secretary. The record establishes that Woods sets the Employer's policies and procedures, subject to the approval and direction of the Employer's other officers and directors.

The purpose and function of the Employer is to perform cleaning and maintenance services for churches, schools, seminaries, and other facilities in the Archdiocese of New York.<sup>3</sup> The Employer performs its maintenance services on a contract fee basis. The record establishes that while the Employer performs such services exclusively for facilities in the Archdiocese of New York; however, no facility in the Archdiocese is compelled to use the Employer as its cleaning contractor. In fact, the record discloses that since the time of

<sup>3</sup> The record reflects that the Employer is the cleaning contractor for 12 high schools, 1 seminary, 1 seminary prep school, St. Patrick's Cathedral, and the Catholic Center, located throughout the Archdiocese, which facilities exist for the purpose of advancing the ideals of the Roman Catholic Church.

the Employer's inception, the number of facilities who contracted with the Employer dropped from 45 to 16.<sup>4</sup>

The Employer and the Union have had a collective-bargaining relationship since 1970, embodied in successive collective-bargaining agreements. The most recent agreement, effective by its terms from March 20, 1991, to March 19, 1993, covered all hourly paid employees at all locations under contract with the Employer. The bargaining unit employees are all lay employees and are primarily employed in the custodial and maintenance job classifications, along with engineers, painters, watchpersons, and mechanics.

All of the Employer's employees are paid by check issued by the Employer. The record establishes that there is no requirement that any of the Employer's employees be affiliated with any particular religion. The record further establishes that the Employer's employees perform duties related solely to the Employer's function as a cleaning and maintenance contractor. Its employees do not perform any teaching duties, nor are they employees of the facilities that have contracted for maintenance services with the Employer.

As noted earlier, the Union contests the assertion of jurisdiction, arguing that the Employer is a religiously affiliated entity whose operations are closely linked to the mission of the Roman Catholic Archdiocese of New York.

In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Supreme Court held that the NLRB cannot assert jurisdiction over schools operated by a church to teach both religious and secular subjects without implicating guarantees of the Religion Clauses of the First Amendment. In reaching its decision, the Court specifically focused on the "critical and unique role of the teacher in fulfilling the mission of a church-operated school,"<sup>5</sup> and noted that if the Board were to exercise jurisdiction over parochial schools and its teachers, there is a potential for government entanglement with the religious mission of the school.

In several later cases, the Board interpreted and applied the Supreme Court's decision in *Catholic Bishop* regarding its ability to assert jurisdiction over religiously affiliated employers. In *Jewish Day School of Greater Washington, Inc.*,<sup>6</sup> the union sought to represent a unit of teachers at a grade school whose philosophy is to "promote an intense Jewish religious education . . . and to inculcate Jewish ideas."<sup>7</sup> The Board did not rely solely on the employer's direct affiliation with a religious organization, but rather evaluated the purpose of the employer's operations, the role of the unit employee in effectuating that purpose and the potential effects of the Board's exercise of jurisdiction over the employer.<sup>8</sup> Applying these factors, the Board concluded that it was inappropriate to assert jurisdiction over a school and its employees whose purpose and function is the propagation of a religious faith. The Board noted the substantial religious character of a parochial school and the key role the teacher has in effectuating that religious purpose.<sup>9</sup> On the other hand, in

*Hanna Boys Center*,<sup>10</sup> the Board asserted jurisdiction over a religiously affiliated employer which operated a day care center. There, the unit consisted of office clerical employees and a unit of service and maintenance employees including child-care workers at a residential facility for boys affiliated with the Catholic faith. The Board concluded that the employees in both units had a minor role, if any, in the religious inculcation of the residents. In *St. Elizabeth Community Hospital*,<sup>11</sup> the Board asserted jurisdiction over a hospital owned and operated by a religious order of the Roman Catholic Church, noting that the employer's primary purpose was the provision of medical care, that there was little, if any, sectarian mission outwardly manifested in the hospital's purpose, and that the exercise of jurisdiction would not create "excessive entanglement" with or interfere with the exercise of religion.<sup>12</sup>

In support of its position, the Union relies on *Riverside Church in the City of New York*.<sup>13</sup> In *Riverside Church*, the union sought to represent a unit of service and maintenance employees employed by the Church, which was undisputedly a religious institution. To fulfill the Church's stated mission that "worships, witnesses and works for the advancement of the ideals of the gospel," the Church provided regular worship services, religious education for adults and children, and performed certain religious ceremonies, including weddings, funerals, and baptisms.<sup>14</sup> The Church also engaged in the commercial activity of leasing out building and garage space. In deciding that it was inappropriate to assert jurisdiction, the Board upheld the Regional Director's conclusion that the petitioned-for service and maintenance employees engage in secular tasks without which the employer would not be able to accomplish its religious mission.<sup>15</sup> The Board also noted that the union did not establish that the unit employees spend a substantial amount of their work time in activities related to the commercial portions, as opposed to the religious aspects, of the employer's operations.

The instant case is readily distinguishable from *Riverside Church*. Here, unlike in *Riverside Church*, the Employer is not itself a religious institution. It does not provide worship services or religious education to promote the Employer's religious mission. Ecclesiastical Maintenance's purpose is to provide routine commercial cleaning and maintenance services to various schools, churches, hospitals, seminaries, and other facilities within the Archdiocese of New York. The record does not demonstrate that the unit employees participate in the religious aspects or promote the religious mission of the Employer.

Even assuming, arguendo, that the Employer has a religious mission, the record fails to establish that the unit em-

<sup>4</sup>The 29 facilities that ceased using the Employer's maintenance services have either performed their own maintenance work or contracted out such services to commercial cleaning contractors.

<sup>5</sup>*Catholic Bishop* at 1319.

<sup>6</sup>283 NLRB 757 (1987).

<sup>7</sup>*Id.* at 758.

<sup>8</sup>*Id.* at 761.

<sup>9</sup>*Id.* at 761.

<sup>10</sup>284 NLRB 1080 (1987), *affd.* 853 F.2d 682, 129 LRRM 2082 (9th Cir. 1988).

<sup>11</sup>259 NLRB 1135 (1982), *enfd.* 708 F.2d 1436, 113 LRRM 3157 (9th Cir. 1983).

<sup>12</sup>*Id.* at 1139.

<sup>13</sup>309 NLRB 806 (1992).

<sup>14</sup>*Id.* at 806.

<sup>15</sup>In its brief, the Union misstates the test articulated in *Riverside Church* when it argues that Ecclesiastical Maintenance's work is so interwoven with the mission of the Church that it would not exist but for the Church's activities. The test articulated in *Riverside Church* is whether the Church would be unable to accomplish its religious mission without the Employer.

ployees perform secular tasks without which the Employer would be unable to accomplish its religious mission. The record demonstrates that the Archdiocesan facilities are not required to contract with the Employer for its cleaning and maintenance services, but are free to perform such services themselves or engage any other commercial cleaning contractor, as many of them have done. The Employer competes with other commercial cleaning contractors to perform cleaning and maintenance services at the Archdiocesan facilities. Thus, it cannot be contended, as in *Riverside Church*, that the petitioned-for employees perform secular tasks without which the Employer could not accomplish its religious mission.

Upon examination of the record, it does not appear that any of the First Amendment concerns addressed by the Board in the above-cited cases arise in this case. Although the Employer is affiliated with the Roman Catholic Archdiocese of New York, it is clear that its primary purpose is to provide routine cleaning and maintenance services on a

contract basis to various Archdiocesan facilities and that the unit employees' tasks are secular in nature. While the unit employees' function may, in an indirect way, assist in the performance of a religious mission of the Archdiocese, it cannot, in my opinion, be concluded that the National Labor Relations Board's jurisdiction over collective bargaining in this unit has the potential of implicating the guarantees of the Religion Clauses of the First Amendment. The critical inquiry addressed by the Court in *Catholic Bishop* is the employees' role in the participation of religious activities, not in merely making them possible. The record establishes that the cleaning and maintenance employees employed by the Employer, while perhaps assisting in the Church's religious activities, do not participate in them.

Based on the foregoing, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.