

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**SAINT XAVIER UNIVERSITY** )  
)  
          **Employer** )  
)  
**and** )  
)  
**SERVICE EMPLOYEES** )  
**INTERNATIONAL UNION, LOCAL 1** )  
)  
          **Petitioner** )

**Case No. 13-RC-092296**

**SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1’S BRIEF IN SUPPORT  
OF THE REGIONAL DIRECTOR’S DECISION AND DIRECTION OF ELECTION**

**BACKGROUND**

SEIU Local 1 (“Local 1”) seeks to represent a unit of all full-time and regular part-time housekeepers employed by Saint Xavier University (“the University”). On November 28, 2012, Region 13 issued its Decision and Direction of Election regarding Local 1’s petition, finding that the petitioned-for unit was subject to the Board’s jurisdiction. The University seeks to overturn the Regional Director’s decision in this case solely on the grounds that the University is a religious institution not subject to the Board’s jurisdiction. To that end, the University urges the Board to abandon the well-established “substantial religious character” test it developed based on the Supreme Court’s decision in NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) and instead adopt the three-part test articulated by the D.C. Circuit in Univ. of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002). The University’s argument in this regard both misapplies the standard set forth in Catholic Bishop and ignores the more relevant Board law addressing the Board’s jurisdiction over non-teaching employees. The Board should continue to adhere to its

established substantial religious character test, which properly applies the Supreme Court's ruling in Catholic Bishop and uphold the Regional Director's decision.

## **FACTS**

### **A. Duties of the employees in the petitioned-for unit**

Local 1's petition seeking an election to represent the housekeepers at the University is not the first petition at the University to be the subject of a jurisdictional dispute. On May 26, 2011, the Region issued a Decision and Direction of Election in case 13-RC-22025, involving the University's adjunct faculty. The parties in the instant case have stipulated to all of the underlying factual issues, including the transcripts, exhibits and post-hearing briefs in case 13-RC-22025. In addition, the parties stipulated to additional facts related to the nature of the work performed by housekeepers at the University, the petitioned-for employees. Specifically, the parties stipulated that 1) offers of employment to housekeepers do not mention the Sisters of Mercy, Catholicism, God, or religion; 2) there is no requirement that housekeepers be Catholic or adhere to any specific religion; 3) in the course of their duties, housekeepers are not required to abide by any specific tenets of the Sisters of Mercy, Catholicism, or any religion, but, as with all employees, are invited to attend and participate in any programs or activities that recognize or celebrate the Employer's Catholic and Mercy heritage; 4) the job evaluations of housekeepers contain no reference to the Sisters of Mercy, Catholicism, or religion; and 5) housekeepers have never been instructed to disseminate the Catholic faith.

The Job Classification Description for the University's housekeepers, to which the parties also stipulated, indicates that the employees' basic job responsibilities include "performing the full range of basic tasks in the cleaning and maintenance of buildings." (Jt. Ex. 1) The "Essential Functions" of the job are entirely related to standard janitorial and housekeeping tasks and the

employees' involvement with students is limited to the possibility of "overseeing work of students assigned to assist in custodial duties." (Id.). The job description is void of any reference to Catholicism or religion. In short, a housekeeper's job has absolutely nothing to do with Catholicism or religion at all, let alone any purported Catholic aspect of the University.

## **B. St. Xavier's institutional function**

St. Xavier is an institution of higher learning, offering undergraduate and graduate degrees with a main campus in Chicago, Illinois and an auxiliary campus in Orland Park, Illinois. The University is organized as a not-for-profit corporation for education purposes and is granted federal tax exempt status as an educational institution. (P. Ex. 10 at pg 16). The University is made up of four schools and one college: the School of Education, the Graham School of Management, the School of Nursing, the School for Continuing and Professional Studies and the College of Arts and Sciences. (Tr. 98<sup>1</sup>). It is overseen by a President, Provost, two Assistant Provosts and five Deans. (P. Exs. 1, 4).

The University's Articles of Incorporation set forth the rules governing the organization. (Er. Ex. 7). These Articles of Incorporation set forth the University's "object" and reveal a purely secular educational environment. (Id.). Specifically, the Articles establish the following object for the University:

The object for which it is formed is: to provide and furnish opportunities for all branches of higher education; to establish, maintain and conduct one or more colleges and provide in all, collegiate studies; to establish, maintain and conduct a university in which may be taught all branches of higher learning and which may compromise and embrace separate departments for literature, pedagogy, commerce, music, the various branches of science, the cultivation of the fine arts, and all other branches of professional or technical education which may be included within the purposes and objects of a college or university; to provide and maintain courses of instruction in any and all of said college and university

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<sup>1</sup> All citations to the transcript, petitioner exhibits and employer exhibits refer to the record kept in Case 13-RC-22025.

departments; to prescribe the courses of study and employ professors, instructors and teachers; to maintain and control the discipline in each of said several colleges and university departments; to fix the rates of tuition and the qualification for admission to the said colleges and university and to each of the institutions subordinate thereto; to receive, hold, invest and dispose all moneys and property or the income thereof which may be vested in or entrusted to the care of said corporation, whether by gift, grant, bequest, devise or otherwise, for educational purposes; to act as trustee for persons desiring to give or provide money or property or income thereof for any one or more of the colleges or for any educational purpose; and generally to pursue or promote all of any of the objects above named, and to do all and every one of the things necessary or pertaining to the accomplishments of said objects or any of them.

Er. Ex 7, pg 5. Since 1912, the Articles of Incorporation have provided that “No religious test or particular religious provision shall ever be held as a requisite to said colleges or university or to any institution subordinate thereto.” (Id. at pg 50).

The University is governed by a Board of Trustees, pursuant to the terms of its Articles of Incorporation. (Er. Ex. 7 at pg 5). This Board of Trustees is currently made up of 24 members, 5 of whom are members of the Sisters of Mercy of the Americas (“Sisters of Mercy”). The Sisters of Mercy are a Catholic religious order founded in Ireland in 1831. (Er. Ex. 14). The corporate arm of the Sisters of Mercy, the Council for Mercy Higher Education (“CMHE”) is the corporate member that links the University to the Church and makes it an officially recognized member of the Church. (Tr. at 49-50). Although the Board of Trustees includes some members of the Sisters of Mercy, as the University’s Vice President of the Office for University Mission and Secretary of the Corporation Sister Susan Sanders testified, the Board is an independent body. (Tr. at 50). In fact, despite the fact that the CMHE reserves the power to approve certain actions by the Board, Sanders was unable to think of a single instance in which a decision made by the Board of Trustees was ever rejected. (Tr. at 203-04).

There is no requirement that a member of the Board of Trustees or any individual in a position of authority at the University be Catholic. Tr. at 213, 217-18, 466. Nor are Board

members or employees, including administrators, required to sign any document affirming a commitment to Catholicism. (Tr. at 340-41). Moreover, as thoroughly discussed in the SXU Adjunct Faculty Organization, IEA-NEA’s Brief in Support of Regional Director’s Decision filed in case 13-CA-22025, academic instructors at the University have no obligation to participate in any religious activities and have no obligation to impart directly or indirectly any part of the Catholic faith – faculty members are never required to “instill a specific religious faith in the students” that they teach. (Tr. at 492-93, 509, 515, 521, 525).

### **ARGUMENT**

The University seeks to have the Board abandon its longstanding standard for assessing jurisdiction over religious institutions and instead apply the three part test established by the D.C. Circuit. This argument is predicated on the assertion that the Board’s test improperly engages in excessive entanglement prohibited by the Establishment Clause. However, as discussed below, it is clear that the Board’s established test does not “troll” through the beliefs of schools, but focuses instead upon the stated purpose and function of the organization in question and how the employees in question function in the organization. Not only does the D.C. Circuit’s test misconstrue the Supreme Court’s decision on the issue, it entirely ignores the employees’ First Amendment right of freedom to associate by unionizing.

Under the D.C. Circuit’s test, a school is exempted from the Board’s jurisdiction if it:

1) holds itself out to students, faculty and the community as providing a religious education al environment; 2) is organized as a nonprofit; at 3) is affiliated with, or owned, operated or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.

Carroll College, Inc. V. NLRB, 558 F.3d 569, 572 (D.C. Cir. 2009) (citations omitted).

The University would have the Board interpret the Supreme Court's ruling in Catholic Bishop as excluding *any* "church-related" school from the Board's jurisdiction. See Carroll College 558 F.3d at 571. However, this assertion is based on the D.C. Circuit's misreading of the Supreme Court's ruling in Catholic Bishop, and the Board should continue to reject the D.C. Circuit's three part test.

**I. The Board Should Continue to Apply its Jurisdictional Test.**

**A. The D.C. Circuit's Test Misconstrues the Supreme Court's Decision in Catholic Bishop.**

The Supreme Court's decision in Catholic Bishop focused solely on the question of whether the Board could exercise jurisdiction over *teachers* at a parochial school. 440 U.S. at 501. The Court noted the Constitutional issues involved in the jurisdictional question, but narrowed its analysis to focus on the specific role teachers played within a parochial school. Id. The Court looked to whether or not the teachers performed a religious function within the organization; it did not simply look at the institution's affiliation. Id. at 491. In reaching the conclusion that parochial school teachers were excluded from the Board's jurisdiction, the Court specifically relied upon the fact that those teachers were "under religious control and discipline" and that it would therefore be impossible to separate the teachers' religious functions from their secular functions without "excessive governmental entanglement." Id. at 500-01.

Thus, contrary to the D.C. Circuit's holding in Carroll College, the Supreme Court in Catholic Bishop did not establish a broad exemption for *all* church-operated schools, but rather analyzed the issue by looking at two main factors: whether the institution in question has a secular or religious purpose and whether the function performed by the employees in question is religious or secular. See, NLRB v. Hanna Boys Center, 940 F.2d 1295, 1301-02 (9th Cir. 1991); See also, The Salvation Army, 345 NLRB 550, 550 (2005); Jewish Day School, 283 NLRB 757,

761 n. 48 (1987). In fact, as the Second Circuit has held, the Supreme Court’s decision does not extend even to all teachers at a religiously affiliated institution, but was instead limited to teachers who are under an “obligation . . . to imbue and indoctrinate the student body with the tenets of a religious faith.” NLRB v. Bishop Ford Cent. Catholic High School, 623 F.2d 818, 822 (2d Cir. 1980). The D.C. Circuit incorrectly looks solely to the nature of the institution involved, rather than examining the both the institution and the function of the employees. The Board must continue to reject the D.C. Circuit’s misinterpretation of the ruling in Catholic Bishop.

**B. The Board’s longstanding test for determining jurisdiction properly applies Catholic Bishop.**

The Board’s well-established practice in determining whether to assert jurisdiction takes into account a variety of factors rather than focusing solely on the employer’s religious affiliation. See, e.g., University of Great Falls, 331 NLRB 1663, 1664-65 (2000). A review of the Board’s decisions on this issue reveals that the Board has repeatedly and consistently considered both the function of the organization as well as the function of the petitioned-for employees in that organization. See, e.g., Harborcreek School for Boys, 249 NLRB 1226, (1980) (jurisdiction found based on nondenominational basis of services provided *and* no requirement that employees teach religious philosophy); St. Joseph’s College, 282 NLRB 65, 68 (1986) (no jurisdiction where faculty had to conform to Catholic doctrine *and* influence of Sisters of Mercy of Maine Order was “pervasive”). Thus, the Board has long applied the rationale followed by the Supreme Court in Catholic Bishop by considering the functions of *both* the organization and employees involved, rather than applying an overly broad test that merely looks at whether the employer has a religious affiliation.

The University contends that the Board has abandoned its long-established test in recent decisions. This is simply not the case. The recent decisions make clear that the Board has continued to apply its test rather than the three part D.C. Circuit test. For example, in Catholic Social Services, the Board looked to the function of the employees at issue, residential treatment specialists and aides, and determined that they did not teach or imbue religious values when teaching children at the facility. Catholic Social Services, 355 NLRB No. 167 (2010). Thus, the Board determined that jurisdiction was proper. Id. Had the Board abandoned its traditional approach in favor of the D.C. Circuit's test, its inquiry would have begun and ended with the determination that Catholic Social Services was religiously affiliated. Instead, it looked to both the organization's function and the employees function and determined both to be secular. Id. The Board had not abandoned its test and should continue to follow its longstanding precedent in making jurisdictional determinations.

**II. The Regional Director Properly Asserted Jurisdiction over the University's Housekeepers.**

**A. The University does not function as a religious institution.**

Applying the Board's test to the instant case, it is clear that the Regional Director properly determined that the Board has jurisdiction over the University's housekeepers. While the University spends significant time in its brief addressing the history of the University and delving into all the ways in which the University embraces the tenants of Catholicism (which is precisely the type of analysis the University argues should not take place), it is undisputed that the purpose of the University is to provide a secular education. As discussed above, the University's Articles of Incorporation and tax status plainly state the purpose of the institution is educational, not religious. There is no requirement that students, faculty, staff, administrators or even the members of the Board of Trustees be Catholic. (Er. Ex. 7, Tr. at 213, 217-18, 466).

Moreover, there is no requirement that faculty accord their curriculum to the Catholic faith, or that students take courses in Catholicism. (Tr. at 492-93, 509, 515, 521, 525). There is no record evidence to support a finding that religion has a “pervasive” influence on the University. As one faculty member put it, the only thing “Catholic” about St. Xavier University is the “St.” that the University puts before the word “Xavier.” (Tr. at 526). Absent a religious function of the University, the Board should uphold the Regional Director’s assertion of jurisdiction.

**B. The Housekeepers have no religious function whatsoever.**

Even if Petitioner were to concede that the University had a religious function, which it does not, the second part of the Board’s established analysis clearly supports the Regional Directors determination. While the University attempts to focus the Board’s analysis on cases involving jurisdiction over teachers at religiously affiliated institutions, there is a clear functional difference between the teaching faculty involved in the Board’s cases addressing religiously affiliated educational facilities and the housekeepers at issue in the instant case. There is no question that the housekeepers employed by the University serve absolutely no religious functions within the organization.

The University appears to concede this point, based on the stipulation reached between the parties at hearing and described above establishing, among other things, that there is no requirement that housekeepers be Catholic or adhere to any specific religion and that in the course of their duties, housekeepers are not required to abide by any specific tenets of the Sisters of Mercy, Catholicism, or any religion. Even in a situation involving an educational organization, the completely secular nature of the housekeepers’ work certainly allows the Board to avoid "the sensitive first amendment issues surrounding the assertion of jurisdiction over

teachers noted by the Court in Catholic Bishop.” Hanna Boys Center, 284 NLRB 1080, 1083 (1987), enfd. 940 F.2d 1295 (9th Cir. 1991), cert. denied 504 U.S. 985 (1992).

**CONCLUSION**

WHEREFORE, based on the reasons outlined above, the Regional Director’s Decision and Direction of an Election is fully supported by the Board’s test for jurisdiction. Therefore, SEIU Local 1 respectfully requests that the Board affirm the Regional Director’s Decision and Direction of Election in its entirety.

Respectfully submitted,

    /s Leslie J. Ward    

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## CERTIFICATE OF SERVICE

The undersigned attorney certifies that she cause a copy of the foregoing **Brief in Support of the Regional Director's Decision and Direction of Election** to be served upon the following via electronic filing and e-mail this 20th day of March, 2013:

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