

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DUQUESNE UNIVERSITY
OF THE HOLY SPIRIT
Employer

and

Case 06-RC-080933

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION, AFL-CIO, CLC
Petitioner

DECISION ON REVIEW AND ORDER

The Employer's Request for Review of the Regional Director's Decision and Recommendation to Overrule Objections to Election and Issue Certification is granted solely with regard to the Regional Director's inclusion of the Department of Theology adjunct faculty in the unit found appropriate. Applying the Board's recent decisions in *Seattle University*, 364 NLRB No. 84 (2016) and *Saint Xavier University*, 364 NLRB No. 85 (2016), we find that the University holds out the part-time adjunct faculty in the Department of Theology as performing a specific role in maintaining the University's religious educational environment.¹ As in those cases, a reasonable prospective applicant for a position in the University's Department of Theology would expect that the performance of their responsibilities would require furtherance of the University's religious mission. The record shows that the part-time adjunct faculty in the Department of Theology teach courses that are presented as having religious content; undergraduates may take these courses to fulfill core academic requirements; and the part-time adjunct faculty in the department have an expertise in Catholic theology, other faith-based traditions, or other aspects of the religious experience. *Id.*, slip op. at 3 in each decision.

¹ Our colleague advances arguments similar to those he made in his dissents in *Seattle University* and *St. Xavier University*. For the reasons given in those decisions, we are not persuaded by those arguments. In particular, we disagree with his view that *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), forbids the Board from making a distinction between faculty who teach religious and secular courses because this type of inquiry alone raises First Amendment concerns. To the contrary, excluding the part-time adjunct faculty in the Department of Theology does not mean that we have assessed the religious content of the courses they teach or otherwise compared the content of those courses to those taught by faculty in other departments. Rather, we have assessed only the University's presentation of those courses to the faculty, students, and public at large. *Seattle University*, 364 NLRB No. 84 (2016), slip op. at 2-3 fns. 4-6; *Saint Xavier University*, 364 NLRB 85 (2016), slip op. at 2-3 fns. 3-5.

Although Member Pearce did not participate in *Seattle University* and *Saint Xavier University* and expresses no view as to whether they were correctly decided, he agrees to apply them as precedent in this case.

Accordingly, the part-time adjunct faculty in the Department of Theology are excluded from the unit found appropriate,² and the University's Request for Review is denied in all other respects.³

ORDER

This case is remanded to the Regional Director for further appropriate action.

MARK GASTON PEARCE, MEMBER

LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., April 10, 2017.

Acting Chairman Miscimarra, dissenting.

Contrary to my colleagues, I would grant in its entirety Duquesne University of the Holy Spirit's Request for Review of the Regional Director's Decision and Recommendation to Overrule Objections to Election and Issue Certification, in which the Regional Director asserted jurisdiction over the University and recommended overruling the Employer's objection to the conduct of the election and issuing a Certification of Representative in a unit of all part-time adjunct faculty employed by the University in its McAnulty College and Graduate School of Liberal Arts. My colleagues deny review of the Regional Director's finding that the Board should exercise jurisdiction over most of the petitioned-for part-time adjunct faculty; however, they grant review, reverse the Regional Director's assertion of jurisdiction over the part-time adjunct faculty in the Department of Theology, which necessitates remanding the case to the Regional Director for further action in order to determine whether a certification of representative should issue. For three reasons, I believe there is a substantial issue regarding whether the Board lacks jurisdiction over the entire petitioned-for unit.

First, as I explained in my dissenting opinions in *Seattle University*, 364 NLRB No. 84, slip op. at 3–5 (2016) (Member Miscimarra, dissenting), and *Saint Xavier University*, 364 NLRB

² Because we have excluded the Department of Theology part-time adjunct faculty from the unit, the Petitioner should not be certified as the bargaining representative unless the Regional Director determines that it achieved a majority of countable ballots without those of the excluded employees. If she so determines, we direct the Regional Director to amend the certification to exclude those employees from the unit.

³ We also adopt the Regional Director's recommendation to overrule the Employer's objection to the assertion of jurisdiction, except as otherwise provided in this decision.

In its Response in Opposition to Employer's Request for Review, filed 21 days after the Regional Director's decision, the Petitioner also contends that the Regional Director erred in failing to find that the Employer waived its objection to the Board's jurisdiction when it initially entered into a stipulated election agreement prior to the election prior to withdrawing from the agreement and asserting that it was entitled to a religious exemption from the Board's jurisdiction. We find this contention to be an untimely request for review under Sec. 102.67(c) of the Board's Rules and Regulations, which requires filing within 14 days of the Regional Director's decision, and accordingly dismiss this argument.

No. 85, slip op. at 3–5 (2016) (Member Miscimarra, dissenting), the distinction my colleagues draw between part-time adjunct faculty who teach courses with “religious content” (who my colleagues find are exempt from the Board’s jurisdiction) and the other petitioned-for unit faculty (who my colleagues find are subject to the Board’s jurisdiction, presumably on the basis that those faculty teach courses with exclusively “secular” content) is forbidden by the main teaching of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where the Supreme Court emphasized that the “very process of inquiry” associated with this type of evaluation raises First Amendment concerns. *Id.* at 502.²

Second, as explained in my separate opinion in *Pacific Lutheran University*, 361 NLRB No. 157, slip op. at 26–27 (2014) (Member Miscimarra, concurring in part and dissenting in part), when determining whether a religious school or university is exempt from the Act’s coverage based on First Amendment considerations, I believe the Board should apply the three-part test articulated by the Court of Appeals for the District of Columbia Circuit in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). Under that test, the Board has no jurisdiction over faculty members at a school that (1) holds itself out to students, faculty and community as providing a religious educational environment; (2) is organized as a nonprofit; and (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. *Id.* at 1343. In my view, the University has clearly raised a substantial issue regarding whether it is exempt from the Act’s coverage under that three-part test. The Regional Director found that the University holds itself out to the public as providing a religious educational environment. Additionally, the University is organized as a nonprofit, and it is affiliated with the Catholic Church and the Congregation of the Holy Spirit, a Catholic religious order. Accordingly, I would grant the University’s request for review because substantial questions exist regarding (i) whether the Board lacks jurisdiction over the University as a religiously affiliated educational institution, and (ii) whether the *Pacific Lutheran* standard is unconstitutional under the First Amendment. I would consider these jurisdictional and constitutional issues on the merits.

Third, even if one applies *Pacific Lutheran*, I would grant review because I believe there is a substantial issue regarding whether the University is an exempt religiously affiliated educational institution on the basis that (1) it holds itself out as providing a religious educational environment (as found by the Regional Director), and (2) individuals in the petitioned-for unit play a specific role in creating or maintaining the University’s religious educational environment. As to this last question, I believe substantial questions exist with respect to the specific role played by part-time adjunct faculty, regardless of department, in providing students

¹My colleagues say that they have not assessed the religious content of the courses taught by part-time adjunct faculty in the University’s Department of Theology, but “only the University’s presentation of those courses to the faculty, students, and public at large.” However, whether the content of a course is examined by looking at a syllabus distributed only to students taking the course or at publicly available documents is beside the point. Either way, it is the content of the course that is being evaluated. Assessing the University’s “presentation” of a course means assessing the course’s content as set forth in that presentation. See *Seattle University*, above, at 5 fns. 16-17 (Member Miscimarra, dissenting); *Saint Xavier University*, above, at 5 fns. 17-18 (Member Miscimarra, dissenting).

exposure to diverse viewpoints, which is an important aspect of a Catholic education. See *Great Falls*, supra, 278 F.3d at 1346 (“That a secular university might share some goals and practices with a Catholic or other religious institution cannot render the actions of the latter any less religious.”); *Pacific Lutheran University*, supra, slip op. at 31 (Member Johnson, dissenting) (“The majority also errs fundamentally here by assuming a false dichotomy between ‘religious’ and ‘secular’ instruction.”).

For these reasons, I believe the Board should grant review of the Regional Director’s decision that the Board has jurisdiction over the petitioned-for part-time adjunct faculty members. Accordingly, I respectfully dissent.

PHILIP A. MISCIMARRA, ACTING CHAIRMAN