

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 17

BETHANY COLLEGE)		
)		
and)	Case No.	14-CA-201546
)	and	14-CA-201584
THOMAS JORSCH, an Individual)		
)		
and)		
)		
LISA GUINN, an Individual)		

RESPONDENT BETHANY COLLEGE’S POST-HEARING BRIEF AND MOTION TO RE-OPEN HEARING

COMES NOW Respondent Bethany College and submits the following for its post-hearing brief and motion to re-open the hearing:

I. The NLRB Plainly Lacks Jurisdiction Over Respondent Bethany College.

Throughout the course of these proceedings, Respondent has raised its objection on the basis of jurisdiction, and ultimately filed its timely Motion to Dismiss or, in the Alternative, for Summary Judgment on November 8, 2017. Respondent submitted with its Motion to Dismiss or, in the Alternative, for Summary Judgment sufficient evidence by affidavit of the President of the College, much of which is publicly available, to demonstrate that it satisfies the test for exemption under Catholic Bishop, and subsequent circuit court cases more fully laid out in its Motion. Transcript of December 6, 2017 proceedings, 13:24 – 14:7. In response, the NLRB made no attempt to controvert or otherwise challenge any of this evidence.

In sum, Bethany College is a ministry of the Evangelical Lutheran Church in America (“ECLA”), owned and operated by the Central States Synod and the Arkansas/Oklahoma Synod

of the ELCA. See Respondent's Ex. 1, Affidavit of William Jones¹. Bethany College holds itself out to the public as providing a religious educational environment with its history, mission and values, is organized as a not-for-profit corporation, and is a college of the Evangelical Lutheran Church of America. See Respondent's Ex. 1 (Certificate of Amendment and Restatement of Articles of Incorporation dated June 16, 2010 (Exhibit A to Jones Affidavit), excerpts from the Student Handbook (Exhibit B to Jones Affidavit), information from the College's website (Exhibits C & D to Jones Affidavit) and the College's Amended and Restated Bylaws (Exhibit D to Jones Affidavit)). The crux of Respondent's jurisdictional argument is that the NLRB's standard for jurisdiction set forth in Pacific Lutheran is contrary to Supreme Court precedent and subjects Respondent as a religiously affiliated private college to a more fact-intensive inquiry than the constitution permits. Based upon the evidence submitted and forming a part of the record in this case, Bethany College is exempt from the National Labor relations Act as a religious institution under NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) and the court decisions that have followed.

Despite the lack of jurisdiction in this matter, it has continued on, culminating in a hearing on December 6, 2017 in front of NLRB Administrative Law Judge Christine Dribble. At the time of the hearing, no decision had been made on Respondent's pending Motion to Dismiss or, in the Alternative Summary Judgment that raised constitutional and due process concerns should the NLRB be permitted to subject the College to the very type of inquiry into its religious character and United States Supreme Court precedent expressly prohibits. Specifically, such inquiry would have required College employees to be improperly subjected to questioning on

¹ Respondent's Exhibit 1 submitted at the hearing in this matter consists of its Motion to Dismiss or, in the Alternative for Summary Judgment, Memorandum in Support, and its attached Exhibit 1, Affidavit of William Jones "Jones Affidavit") with exhibits. Tr. at 8:9 – 9:2. The Motion to Dismiss was ultimately made a part of the record, including the attachments. Tr. at 99:13-15.

virtually all aspects of a religious college's organization and operations. See St. Joseph's College, 282 NLRB 65 (1986). Subjecting Bethany College to this inquiry at the hearing absent any jurisdictional determination would allow the NLRB to troll through the substance and contours of the faith and mission of a religiously-affiliated institution, and making its own doctrinal analysis of the sufficiency of religious observance and motivation. This type of inquiry clearly risks infringing upon the guarantees of the First Amendment's Establishment and Free Exercise Clauses and forced Respondent to protect such interests.

At the time of the hearing, no finding of jurisdiction of any sort had been made. Ruling on the Motion to Dismiss, or in the alternative, Motion for Summary Judgment was reserved at the time of the hearing. Transcript, 21:8-10. It has remained Respondent's position throughout these proceedings that there must be ruling or determination of jurisdiction prior to the NLRB's proceeding to the merits of this matter in light of the First Amendment and due process concerns raised. Tr. At 9:7-12. General Counsel will be unable to carry its burden to establish jurisdiction in any enforcement proceedings arising out of this matter. Little River Band of Ottawa Indians v. Nat'l Labor Relations Bd., 747 F. Supp. 2d 872, 882 (W.D. Mich. 2010) (Plaintiff bears the jurisdictional burden enforcement action). No determination has been made nor has the General Counsel presented any evidence sufficient to establish jurisdiction.

On December 6, 2017 following the hearing in this matter, a three member panel of the NLRB summarily denied Respondent's Motion to Dismiss or, in the alternative, for Summary Judgment in a two-sentence order. See Order Denying Motion for Summary Judgment, attached hereto as Exhibit A. Notably, footnote 2 of the order specifies that two of the three members of the panel ruling on the motion, "Members Emanuel and Kaplan[,] join in the denial of the Respondent's motion but express no opinion on whether Pacific Lutheran University, 361 NLRB

1404 (2014), was correctly decided.” Ex. A, Order at 2. Thus, even after the hearing on this matter, no opinion or determination of jurisdiction has been made, and in fact two of the three members denying the summary judgment motion expressly declined to comment on the very question presented by Respondent.²

Further, just prior to the hearing on Friday December 1, 2017, the General Counsel for the NLRB issued Memorandum GC 18-02 which, *inter alia*, rescinded Memorandum GC 17-01. See Memorandum GC 18-02 attached to Respondent’s Motion to Reconsider as Exhibit 2³; Memorandum GC 17-01 attached to Respondent’s Motion to Reconsider as Exhibit 3. Pursuant to an email from Rebecca Proctor, Counsel for the Acting General Counsel in this matter, “The Region must follow the guidance in GC 17-01 and apply the jurisdictional tests set out in Pacific Lutheran” instead of the tests set forth by the U.S. Supreme Court in NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), and NLRB v. Yeshiva University, 444 U.S. 672 (1980). July 28, 2017 email from Rebecca Proctor, attached to Motion to Reconsider as Exhibit 4. Thus, General Counsel’s response in opposition to Respondent’s Motion relied extensively on the Pacific Lutheran as the basis for jurisdiction over Respondent in this matter, despite the existence of binding Supreme Court precedent which dictates that the Board does not have jurisdiction over Respondent, and now the Board’s comment that it has declined to comment on such test.

Memorandum GC 17-01 had previously adopted the Board’s test in Pacific Lutheran as the applicable test for jurisdiction over religiously affiliated universities in unfair labor practice

² In fact, in July 2017 the then Chairman of the Board advocated for the application of the test set forth in University of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002) which properly follows the Catholic Bishop precedent. Loyola Univ. Chicago Employer & Serv. Employees Int’l Union Local 73, Clc/ctw Petitioner, 13-RC-189548, 2017 WL 2963203, at *1 (DCNET July 6, 2017); see also Manhattan Coll. Employer & Manhattan Coll. Adjunct Faculty Union, New York State United Teachers Aft/nea/afl-Cio Petitioner, 02-RC-023543, 2017 WL 1434209, at *1 (DCNET Apr. 20, 2017).

³ Respondent’s Motion to Reconsider and its exhibits were submitted for at the hearing in this matter in addition to being filed on December 5, 2017. Tr. at 21:13-20.

complaints such as this one. Memorandum GC 18-02 has now unequivocally rescinded that guidance upon which the NLRB and its General Counsel have relied upon to assert jurisdiction over Respondent in this matter. Thus, the applicable test for jurisdiction of the Board, as Respondent has maintained throughout these proceedings, is the Supreme Court test laid out in Catholic Bishop of Chicago, 440 U.S. 490 (1979), NLRB v. Yeshiva University, 444 U.S. 672 (1980) and their progeny. See also Barry University, 31 NLRB AMR 53 (2003) (asserting jurisdiction would “would require the Board to engage in the type of inquiry the Supreme Court stated in Catholic Bishop would violate rights guaranteed by the Religion Clauses of the First Amendment.”); Nativity Preparatory School, 43 NLRB AMR 15 (2015) (advice memorandum finding that the Board should not exercise jurisdiction over school which holds itself out as providing a religious educational environment and holds out its employees as creating and maintaining such an environment); Subject: Nativity Preparatory Sch., 01-CA-144463, 2015 WL 7732613, at *10 (Nov. 3, 2015). The Board has disclaimed any reliance on Pacific Lutheran in its decision denying Respondent’s Motion to Dismiss, despite the lack of any facts presented by General Counsel sufficient to create any material issue. In fact, General Counsel’s response in opposition to the Motion to Dismiss did not specifically dispute, challenge or present contrary evidence to any of the facts presented by Respondent. General Counsel simply argued that additional facts were needed without presenting any facts of its own. Where General Counsel has failed to oppose or controvert those facts set forth by Respondent, General Counsel has in effect admitted those facts and they should be deemed the same in determining jurisdiction in these proceedings. Davis v. Simon Prop. Grp., 9 F. App’x 876, 881 (10th Cir. 2001) (failure to submit materials contradicting a moving party’s facts on summary judgment results in those facts being

deemed admitted). Accordingly, all claims in the Consolidated Complaint should be dismissed because the NLRB lacks jurisdiction over Bethany College and Mr. Jorsch and Ms. Guinn.

Although General Counsel responds that guidance has been sought on the questions presented by Respondent in light of the recent changes, no evidence or other authority has been presented suggesting that the NLRB has any jurisdiction over Respondent Bethany College. At the time of the hearing, Respondent sought to admit the uncontroverted evidence submitted with its Motion to Dismiss or, in the Alternative for Summary Judgment as a part of the records and exhibits in this case. That request was taken under advisement and ruling was reserved. If judge declines to admit those materials as evidence for consideration, then Respondent requests, in light of the Board's denial of the MSJ after the hearing, that the hearing be re-opened pursuant to Section 102.35 and 102.48 for the presentation of evidence on the jurisdictional arguments in light of the events occurring and newly available information both just prior to and after the hearing.

II. Respondent's Exhibits and Evidence Submitted during the December 6, 2017 Hearing should be Admitted as a Part of the Record.

During the proceedings before Judge Dribble on December 6, 2017, several matters regarding the admission of evidence submitted by Respondent were reserved for ruling. First, Respondent's exhibits and evidence attached to and submitted with Respondent's Motion to Reconsider Denial of the Petitions to Revoke should be admitted as a part of the record. Further, pursuant to Section 102.26 and 102.31(b) of the NLRB Rules, Respondent requests that the denial of the petitions to revoke be made a part of the record in these proceedings in light of the jurisdictional and constitutional arguments raised. The ruling on the Petitions to Revoke and Respondent's Motion to Reconsider must be made a part of the record because of Respondent's

jurisdictional objections to these proceedings which form the primary basis of Respondent's opposition to the subpoenas. The nature of the jurisdictional objections has forced Respondent to raise them to protect its constitutionally guaranteed rights that would otherwise be lost or waived upon a voluntary submission to the jurisdiction of the NLRB.

Second, at the hearing in this matter, Judge Dribble kept the hearing open for the purpose of Respondent's request that the evidence submitted as attachments with its Motion to Dismiss or, in the Alternative for Summary Judgment be considered. Tr. at 95:18 – 96:4. As articulated previously, Respondent was ultimately forced to attend the hearing for the purposes of raising its jurisdictional objections that had not been fully addressed or ruled upon. The same were also not addressed or ruled upon at the hearing, and ultimately the Board denied the Motion to Dismiss or, in the Alternative Summary Judgment without addressing the merits and expressly without commenting on the correctness of the authority supporting the General Counsels arguments for jurisdiction, Pacific Lutheran. Respondent requests that in light of the events immediately preceding, during and following the hearing which directly impact Respondent's jurisdictional arguments, that its submitted evidence (Respondent's Exhibit 1) be properly admitted and considered. In the alternative, as explained more fully below, Respondent requests that the record be reopened for the purpose of presenting jurisdictional evidence should the ALJ decline to consider the evidence as submitted and decline to make a finding that jurisdiction is lacking. Fitel/Lucent Technologies, Inc., 326 NLRB 46 n. 1 (1998).

III. Evidentiary Sanctions and/or an Adverse Inference are Improper and Should be Denied.

In the event Respondent's request for a finding that jurisdiction is lacking is denied, Respondent requests that, in the alternative, the ALJ reopen the record for the presentation of

evidence on the jurisdictional issue and deny the requests for sanctions and an adverse inference. During the hearing in this matter on December 6, 2017, General Counsel requested evidentiary sanctions as to the subpoenas *ad testificandum*, Numbers A-1-YXRB6Z, A-1-YXRNE1, and A-1-15 YXRPKR, General Counsel Exhibits 2(a) through 2(c). Specifically, General Counsel requested “evidentiary sanctions under Rogan Brothers Sanitation, Carpenters Local 405, and specifically, that Respondent be prohibited from calling or utilizing these individuals as witnesses, and that an adverse inference be drawn. Tr. at 27:24 – 28:4.

Similarly, General Counsel requested evidentiary sanctions as to the Subpoena Duces Tecum No. B-1-YXPU6N issued to the Custodian for Bethany College, General Counsel Exhibit 3. Specifically, General Counsel moved for “evidentiary sanctions on McAllister Towing & Transportation, San Luis Trucking, and Dannon Mills, specifically that an adverse inference be drawn, that Respondent be barred from presenting evidence about the subject matter sought by the subpoena, that Respondent be barred from cross examining General Counsel witnesses about the subject matter by the subpoena, that General Counsel be permitted to introduce secondary evidence, and that any Respondent witness testimony in sections of the Respondent’s Answer containing the same subject matter as the subpoenaed, specifically in the Answer, Paragraph No. 8, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, and Affirmative Defenses No. 1, 2, 3, 4, 5, 6, 10, 11, 12, 13, 14, and 15 be struck. Tr. at 29:16 – 30:6. Ruling on these Motions for Sanctions were reserved for after the hearing. Transcript, 31:1-3.

Respondent has clearly objected to these proceedings on the basis that the jurisdiction of the NLRB over it is plainly lacking. On the basis of such objection Judge Dribble granted to Respondent a standing objection to all evidence which General Counsel sought to admit at the hearing. Tr. at 32:4-7. Respondent has clearly articulated the constitutional and due process

concerns which were reiterated in response to General Counsel's requests for evidentiary sanctions and an adverse inference. Tr. at 32:4-7. To impose evidentiary sanctions and an adverse inference on Bethany College for asserting and protecting its constitutional rights would be an outright denial of due process at this stage of the proceedings. General Counsel has further failed to demonstrate how Respondent's actions to protect its constitutional rights and jurisdictional arguments result in an unfair evidentiary advantage sufficient to merit application of Bannon Mills sanctions. In fact, the Fourth, Sixth and Ninth Circuits have found against the imposition of such sanctions. NLRB v. International Medication Systems, 640 F.2d 1110 (9th Cir. 1981) (holding that only the federal district courts have authority to issue sanctions for subpoena noncompliance); NLRB v. Detroit Newspapers Agency, 185 F.3d 602, 605 (6th Cir. 1999) (holding that a district court may not delegate to the ALJ responsibility for reviewing documents in camera to determine whether they are privileged); and NLRB v. Interbake Foods, 637 F.3d 492, 499 (4th Cir. 2011) (holding that, while an ALJ has authority to order production of documents for in camera review to aid in evaluating the privilege, if the responding party refuses to obey, only an Article III court may resolve the impasse and enforce the subpoena). Further, an adverse inference is improper where a satisfactory explanation is provided for the failure to produce documents. See, e.g., Hansen Bros. Enterprises, 313 NLRB 599, 608 (1993); and Champ Corp., 291 NLRB 803 (1988). An adverse inference is likewise improper based upon the particular circumstances presented. CPS Chemical Co., 324 NLRB 1018, 1019 (1997) (no prejudice suffered by nonproduction), *enfd.* 160 F.3d 150 (3d Cir. 1998). Respondent has raised questions as to the Board's jurisdiction which impact the validity of the subpoenas issued. Here, explanation for noncompliance has been clearly presented in the form of Respondent's objections raised, and the circumstances dictate that an adverse inference would be improper.

Respondent has raised that jurisdiction is plainly lacking as a proper basis to revoke the subpoenas, and no determination on the merits of such argument has been made in these proceedings. See NLRB v. Chapa De Indian Health Program, Inc., 316 F.3d 995, 1002 (9th Cir. 2003). See also, with respect to investigative subpoenas, EEOC v. Kloster Cruise, Ltd., 939 F.2d 920, 924 (11th Cir. 1991); NLRB v. Fortune Bay Resort Casino, 688 F.Supp.2d 858 (D. Minn. 2010); and Eulen America, 12-CA26948, unpub. Board order issued July 16, 2011 (2011 WL 3098547, 2011 NLRB LEXIS 373). The jurisdictional question here is facially obvious from the publicly available records of the Respondent and the evidence which has been presented. CSG Workforce Partners, LLC v. Watson, 512 F. App'x 830, 837 (10th Cir. 2013). Requiring Respondent to respond to the overly broad subpoenas would subject it to the very type unconstitutional inquiry that the Supreme Court in Catholic Bishop has prohibited. The subpoenas were in no way directed specifically at jurisdictional evidence or otherwise narrowed in scope. To effect sanctions for asserting and protecting those rights absent any jurisdictional finding at this point would be prejudicial and a denial of due process to Respondent. To date, no express finding of jurisdiction has been made, despite the clear and express objections to the continuation of the proceedings on the basis of a lack of jurisdiction and necessity of a preliminary determination of the same. Tr. at 32:4-7.

Despite the fact that Respondent's jurisdictional objections were raised well in advance of the hearing in this matter, the NLRB and General Counsel made no effort to enforce the subpoenas in a federal district court. While Respondent is foreclosed from filing an independent motion in district court raising defenses to the subpoenas until such time as there is a final appealable order of the Board, the Board can only compel responses to its subpoenas through an action in federal district court. See Wilmot v. Doyle, 403 F.2d 811, 815 (9th Cir.1968) (holding

that, under 29 U.S.C. § 161, only the Board and not private litigants could apply to the district court for enforcement of subpoenas). This is the established mechanism through which the NLRB is permitted to compel compliance with its subpoenas, and NLRB counsel had ample notice to pursue enforcement prior to the hearing. It is evident that the NLRB chose not to initiate an enforcement action because of the binding U.S. Supreme Court precedent in Catholic Bishop and subsequent cases dictating that the NLRB has no jurisdiction over Respondent in this matter. See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979); NLRB v. Yeshiva University, 444 U.S. 672, 100 S.Ct. 856, 63 L.Ed.2d 115 (1980); University of Great Falls v. NLRB, 278 F.3d 1335 (D.C.Cir.2002); Carroll Coll., Inc. v. N.L.R.B., 558 F.3d 568, 570 (D.C. Cir. 2009).

Finally, at the hearing, Respondent expressly reserved the right to present any evidence to challenge any witnesses, or otherwise argue on the merits of the matter until, and if at such time, as a Court of competent jurisdiction determines that the NLRA applies to the College, and that the NLRB has jurisdiction over the College. Respondent requests that should such a determination be made, the hearing be reopened for the full presentation of evidence on the merits of this matter.

IV. Conclusion.

It is clear from the evidence submitted by Respondent with its Motion to Dismiss or, in the Alternative for Summary Judgment, which was not contradicted in any way by the NLRB in response, that Bethany College is exempt from the NLRA and the Board's jurisdiction over it is plainly lacking. Despite the same, no jurisdictional determination has been made to date in these proceedings nor any ruling on the merits of Respondent's position. Unless and until such time as a determination is made there is no jurisdiction over Respondent in these proceedings.

Accordingly, Respondent respectfully requests for its post-hearing briefing that the ALJ conclude, based upon the uncontroverted evidence submitted and in the record, that there is no jurisdiction over this matter to proceed. In the alternative, should the ALJ deny this request, Respondent requests that based upon recension of the General Counsel's memo in such close proximity to/after the hearing and the Board's ruling on the Motion to Dismiss or, in the Alternative Summary Judgment after the hearing, the ALJ grant Respondent's request to reopen the hearing to the extent necessary to present evidence on jurisdiction and find that the General Counsel's requests for evidentiary sanctions and adverse inference are improper and should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed using the National Labor Relations Board E-file system on this 10th day of January, 2018 and that I served the same upon the following representatives via electronic mail on the same date:

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EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BETHANY COLLEGE

and

Case 14-CA-201546

THOMAS JORSCH

and

Case 14-CA-201584

LISA GUINN

ORDER DENYING MOTION¹

The Respondent's Motion to Dismiss or, in the alternative, for Summary Judgment, is denied. The Respondent has failed to establish that there are no genuine issues of material fact warranting a hearing and that it is entitled to judgment as a matter of law.²

Dated, Washington, D.C., December 6, 2017.

LAUREN McFERRAN, MEMBER

MARVIN E. KAPLAN, MEMBER

WILLIAM J. EMANUEL, MEMBER

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

² Members Emanuel and Kaplan join in the denial of the Respondent's motion but express no opinion on whether *Pacific Lutheran University*, 361 NLRB 1404 (2014), was correctly decided.