

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

BETHANY COLLEGE)		
)		
and)	Case No.	14-CA-201546
)	and	14-CA-210584
THOMAS JORSCH, an Individual)		
)		
and)		
)		
LISA GUINN, an Individual)		

RESPONDENT BETHANY COLLEGE'S REPLY BRIEF TO CHARGING PARTIES'
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

With the General Counsel's change in position regarding the application of Pacific Lutheran, Charging Parties have now submitted their own Answering Brief to Respondent's Exceptions. Respondent objects to the Charging Parties' filings and suggests that those filings be disregarded or stricken. The General Counsel pursues unfair labor practice proceedings under the National Labor Relations Act, which specifically protects public, not private, rights. The Charging Parties' assertion of their private interests is improper for these proceedings. Charging Parties' counsel did not enter appearance or actively participate in these proceedings until after Respondent submitted its exceptions. Regardless, Charging Parties' assertion of its own cross-exceptions is improper¹ as are their arguments that the ALJ somehow correctly asserted jurisdiction under the applicable and controlling U.S. Supreme Court precedent, NLRB v. Catholic Bishop, 440 U.S. 490 (1979), or that the ALJ somehow correctly found that the Respondent engaged in unfair labor practices. As expressed in its Exceptions and as now conceded by the NLRB's General Counsel, Respondent submits that the Board lacks jurisdiction over the Respondent because it is undisputed that Respondent holds itself out as a religious

¹ Respondent has separately sought an extension of time to respond to Charging Parties' Cross-Exceptions and intend to more fully respond to the same.

educational institution and is organized as a non-profit. Respondent further submits that, again as expressed in its Exceptions and prior briefing, the ALJ was incorrect in concluding that Respondent engaged in unfair labor practices.

A. Respondent Objects to Charging Parties' Entry and Filing of Briefs and Exceptions. As an initial matter, Respondent objects to the Charging Parties' entry into these proceedings and submits that it would be improper for the Board to consider the rights or arguments of private litigants at this stage. The National Labor Relations Act ("NLRA") protects only public rights, and precludes consideration of any private interests. NLRA, 29 U.S.C. §§ 151-68. "The Labor Board is said to be the custodian of the 'public interest,' to the exclusion of the so-called 'private interests' at stake." Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. AFL-CIO, Local 283 v. Scofield, 382 U.S. 205, 218, 86 S. Ct. 373, 381-82, 15 L. Ed. 2d 272 (1965). Thus, to date it is the General Counsel, or his designee, who has pursued the complaints of Charging Parties pursuant to the authority delegated to him under the Act as well as the Rules and Regulations of the NLRA. Under Sec. 3(d) of the Act, the General Counsel possesses "final authority, on behalf of the Board, in respect of the investigation of charges." Moreover, regional directors "may exercise discretion to dispense with any portion of the investigation." (R & R Sec. 101.4). The Act explicitly grants procedural protections to the Respondent, but is less clear regarding the right of the charging party. 29 U.S.C. § 160(b). Private parties have no due process rights during the administrative investigative stage. To allow Charging Parties to intervene at this stage would contravene the public interest emphasis of the NLRA. Moreover, it denies Respondent of its due process rights and it would impermissibly allow the Charging Party to insert issues and arguments not presented to the ALJ. Thus,

Respondent objects to Charging Parties' filing of their Answering Brief to Respondent's Exceptions, and requests that the Board disregard the same.

B. The Board Lacks Jurisdiction Over Respondent, and the ALJ was Incorrect to Assert Jurisdiction. It is now plainly apparent that the Board's Pacific Lutheran test is improper on constitutional grounds, and that, under Catholic Bishop and its progeny, the Board should decline to exercise jurisdiction over Respondent. Charging Parties suggest that the ALJ correctly ruled that the Respondent had not established that they were exempt from the protection of the NLRA under Catholic Bishop. Answering Brief, pp. 8-9. However, that was not the ALJ's ruling nor the question which she took up. Instead, the ALJ based her ruling upon the Board's test set forth in Pacific Lutheran, ultimately finding that Respondent failed to demonstrate it holds out its petitioned-for faculty members as performing a specific role in creating and maintaining that environment—the second prong of the Pacific Lutheran test requiring a fact intensive analysis. Decision, JD-72-18 at 9.

Further obfuscating matters, Charging Parties put misplaced reliance on several cases in support of their incorrect position that the ALJ correctly found that the Respondent was not exempt under Catholic Bishop. First, they reply upon NLRB v. St. Louis Christian Home which involved discussion of nonprofit religious organizations other than schools, as well as over nonteaching employees at religious institutions that have an educational component as part of their mission. In particular, “the actual business of the Home and its employees does not involve a religious enterprise comparable to a church-operated school.” NLRB v. St. Louis Christian Home, 663 F.2d at 64. In fact, Pacific Lutheran itself distinguishes that case on that basis. Pacific Lutheran Univ. & Serv. Employees Int'l Union, Local 925, 361 NLRB 1404, 1428 (2014).

Second, they rely on Tilton v. Richardson, 403 U.S. 672, 673, 91 S. Ct. 2091, 2093, 29 L. Ed. 2d 790 (1971) which did not involve application of the NLRA in any way. Instead, it involved application and interpretation of Title I of the Higher Education Facilities Act of 1963. Id. That case in particular dealt with excessive entanglement in the context of government aid under that educational legislation. Charging Parties rely heavily on the reference to the 1940 Statement of Principles on Academic Freedom and Tenure, but ignore that even this case, due to its differences from the present situation, delves further into the nature of an institutions religious mission and function than Catholic Bishop and its more recent progeny would permit. Charging Parties similarly put misplaced reliance on Roemer, which also is a case dealing with entanglement in the context of federal aid. 426 U.S. 736 (1976).

Although Charging Parties spend much time discussing the 1940 Statement, they provide no evidence concerning this Statement in connection with the present situation or how application of this Statement to the present situation would permit the NLRB to exercise jurisdiction under Catholic Bishop. As Charging Parties note, where colleges hold themselves out as requiring faculty to abide by religious codes of conduct and faith, the faculty is exempt under Catholic Bishop. Such is the case here as acknowledged by Counsel for the General Counsel in its Response and, therefore, the ALJ should have determined that the Board lacks jurisdiction over Respondent. The Board should overturn the ALJ's decision and find it lacks jurisdiction.

C. **The ALJ was Incorrect in Concluding that the Respondent Engaged in Unfair Labor Practices.** Charging Parties incorrectly assert that the Board should disregard certain of Respondent's exceptions (Brief in Support of Exceptions at p. 23-24) because they fail to comply with the rules and regulations. Again, Charging Parties lack standing to make such

objections. Regardless, and to the contrary of Charging Parties' expressed concerns, Respondent's Exceptions and Brief in Support provide precisely what the Rules require: (A) Specify the questions of procedure, fact, law, or policy to which exception is taken; (B) Identify that part of the Administrative Law Judge's decision to which exception is taken; (C) Provide precise citations of the portions of the record relied on; and (D) Concisely state the grounds for the exception. 29 CFR 102.46(a)(1)(i). The referenced section of Respondent's Brief specifically includes an assertion of inadmissible hearsay, denial of due process, misapplication of applicable precedent, and a lack of any actual evidence supporting aspects of the decision. Further, Respondent clearly articulated that all of those decisions excepted ultimately stemmed from the predicament Respondent was placed in when it was denied the opportunity to have its jurisdictional and constitutional concerns heard fully. Again, the ALJ reached her conclusions regarding the confidentiality rule, disclosure of confidential information, termination of Jorsch in violation of Section 8(a)(3), and termination of Guinn without a full presentation of the evidence and based upon adverse inferences drawn without any specificity such that Respondent was denied its due process rights. The ALJ was incorrect in concluding that the Respondent committed unfair labor practices.

Conclusion.

Respondent made its position on jurisdiction and the constitutional concerns associated with the ALJ's application of Pacific Lutheran abundantly clear. Respondent reasserts herein its Exceptions and Brief and Support previously filed. The Charging Parties' concerns and arguments should be rejected. The Board can and should overturn the ALJ's Decision and find that it lacks jurisdiction over Respondent. Should it decline to do so, the Board should, at a minimum, reopen the hearing to allow Respondent to make a full presentation of evidence

following a formal jurisdictional determination by the Board, as the ALJ made her decision without a complete evidentiary picture based upon improper inferences.

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 20th day of February, 2019 with:

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and that I served the same upon the following representatives via electronic mail on the same date:

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