

The NLRB Rethinks Its Position on When It May Assert Jurisdiction Over Religious Schools in Labor Matters Involving Faculty Members

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On June 10, the National Labor Relations Board (NLRB or Board) issued [*Bethany College*](#), 369 NLRB No. 98, in which it held that it does not have jurisdiction over matters concerning teachers or faculty at bona fide religious educational institutions. Bona fide religious educational institutions are those who (1) hold themselves out to students, faculty and the community as providing a religious educational environment; (2) are nonprofit organizations; and (3) are affiliated with, or owned, operated or controlled by a recognized religious organization or with an entity, membership of which is determined, at least in part, with reference to religion. In *Bethany College*, the Board also overruled its decision in [*Pacific Lutheran University*](#), 361 NLRB 1404 (2014), where the Board had concluded it could assert jurisdiction over a religious school and its teachers if the teachers were not held out as performing a specific role in creating or maintaining the school's religious educational environment. In overruling *Pacific Lutheran* on constitutional grounds, the *Bethany College* Board found that its *Pacific Lutheran* decision could not be squared with the First Amendment and Supreme Court precedent.

Bethany College is an important decision because it ends a debate that began back in the 1970s as to whether the NLRB can constitutionally assert jurisdiction over religious schools and their teachers. Indeed, the First Amendment to the United States Constitution prohibits Congress from enacting any law "respecting an establishment of religion or prohibiting the free exercise thereof." The National Labor Relations Act (NLRA or Act) is such a law. Accordingly, the Board, charged with enforcement of the NLRA, is constitutionally constrained from applying the Act in such a way as to interfere with the free exercise of religion.

In *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Supreme Court observed that if the Board were to exercise jurisdiction over matters involving teachers at religious schools, it could be drawn into religious controversies and called upon to impinge on religious rights. The Court cautioned the NLRB against taking on such substantial constitutional risks and, in the absence of a clear expression of Congress' intent to bring teachers at church-operated schools within the NLRB's

jurisdiction, refused to enforce Board orders compelling religious schools to bargain with unions representing their teachers based on its “prudential policy” of constitutional avoidance. Since then, the Board has tried, but failed, to devise an adequate legal test for determining whether and when it could assert jurisdiction in such cases, often finding appellate courts unreceptive and unwilling to enforce its decisions asserting jurisdiction over religious schools for the reasons cited by the Court in *Chicago Bishop*.

During the Obama administration, the Board issued its decision in *Pacific Lutheran*, in which it crafted a new standard for testing the limits of *Chicago Bishop* by concluding that, in addition to having to create a religious educational environment, a school claiming a First Amendment exemption from organizing had to hold out to the public that its faculty members seeking to organize performed specific roles in creating or maintaining the school’s religious educational environment such that the school’s religious nature affected the faculty’s job duties or requirements and the religious nature of the school impacted their employment. In the *Pacific Lutheran* Board’s view, these secular teachers teaching at a religious school were no different from faculty who teach at schools that do not identify themselves as religious institutions and who are indisputably subject to the Board’s jurisdiction.

Unfortunately, as noted by *Pacific Lutheran* dissenters, this new formulation not only failed to avoid the First Amendment questions raised by *Chicago Bishop*, but plowed right into them full tilt and that such decisional line drawing as to what was religious and what was secular forced the Board to make a jurisdictional decision based on its assessment of the religiosity of the functions that the faculty performed. Accordingly, when it came time for an appellate court to pass judgment on the *Pacific Lutheran* standard application in a subsequent Board case, the *Pacific Lutheran* standard flunked judicial review and was denied enforcement because it too ran afoul of the concerns found in *Chicago Bishop*. It is for these same reasons that the *Bethany College* Board also scraped the *Pacific Lutheran* standard.

IMPORTANT TAKEAWAYS:

- The issue finally decided in *Bethany College* was decided by the Supreme Court in 1979. The Board does not have jurisdiction over religious schools and their faculties because the assertion of jurisdiction will compel the Board to conduct inquiries that differentiate between what are secular and what are religious duties and because such inquiries cannot be conducted without the risk of interfering with the religious rights enshrined in the First Amendment.
- The Board’s jurisdiction will no longer depend upon the religiosity of a teacher’s duties, responsibilities or functions. If the school meets the *Bethany College* objective standards for a bona fide religious institution, then the Board will not assert jurisdiction over the school and its faculty – even though the work, duties and functions performed by those teachers are like those performed by faculties at secular schools.
- Based on *Bethany College*, union organizing and union representation of teachers at religious institutions are likely to decline.

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