

University of Great Falls and Montana Federation of Teachers, AFT, AFL-CIO. Case 19-CA-26031

August 31, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

This case presents issues of first impression before the Board: whether the Religious Freedom Restoration Act (RFRA)¹ applies to proceedings under the National Labor Relations Act, and if it does, whether the Board's assertion of jurisdiction over the Respondent would violate RFRA. For the reasons set forth below, we find that RFRA is applicable to Board proceedings and that the Board's assertion of jurisdiction over the Respondent does not conflict with RFRA.

The Respondent is a university that was founded in 1932 by the Catholic religious order of the Sisters of Providence, St. Ignatius Province (the Order). In this refusal-to-bargain proceeding, the Respondent challenges the Board's certification of the Union as the bargaining representative of a unit of the Respondent's faculty. Pursuant to a timely charge, the Acting General Counsel of the Board issued a complaint on July 21, 1998, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 19-RC-13114. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On August 31, 1998, the Acting General Counsel filed a Motion for Summary Judgment. On September 1, 1998, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

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

Ruling on Motion for Summary Judgment

In its answer to the complaint and its response to the General Counsel's motion, the Respondent admits its refusal to bargain, but attacks the validity of the certification, asserting that the Board's unit determination was erroneous and that the Board improperly asserted jurisdiction over the Respondent in the representation case. Specifically, the Respondent reiterates its contentions, raised and rejected in the underlying representation proceeding, that the unit is inappropriate both because the Respondent's faculty are not employees within the meaning of the Act, but rather are managers under *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), and because the

unit does not include the eight faculty members who serve as deans. Further, the Respondent renews its argument, rejected by the Regional Director and the Board in the representation proceeding, that the Board lacks jurisdiction over the Respondent because it is a religiously operated institution that is not subject to the Act, according to the principles of *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). The Respondent also renews its contention that, even assuming that *Catholic Bishop* is no bar to the assertion of jurisdiction, requiring it to engage in collective bargaining with the Union would violate its rights under RFRA.

A. Application of RFRA to Board Proceedings

In its Decision on Review and Order in the underlying representation case, the Board held that the question of whether assertion of jurisdiction over the Respondent would violate RFRA was moot, in light of the Supreme Court's opinion in *City of Boerne v. Flores*, 519 U.S. 1088 (1997). In *Flores*, the Court held that Congress lacked the authority under section 5 of the Fourteenth Amendment to impose RFRA on state and local governments, and therefore RFRA was unconstitutional as applied to state and local law. In its response to the Notice to Show Cause, the Respondent argues that the RFRA issue is not moot as it pertains to this proceeding because *Flores* did not address RFRA's applicability to the federal government and federal laws.

In view of the Respondent's assertions, the Board invited the parties to file briefs on the question of whether RFRA is applicable to Board proceedings. The General Counsel and the Respondent timely filed briefs.² Having duly considered the briefs and the record in this case, we find that we must assume that RFRA is constitutional as it applies to the National Labor Relations Act and Board proceedings. The Board has recognized that it is beyond its authority, as an administrative agency, to adjudicate the constitutionality of congressional enactments; that is a matter left to the courts.³ Further, we note that in *Christians v. Crystal Evangelical Free Church*, 141 F.3d 854 (8th Cir. 1998), cert. denied 525 U.S. 811 (1998), the Eighth Circuit held that *Flores* addressed only the constitutionality of RFRA as applied to state law, and that RFRA falls within Congress's broad, substantive power under Article I of the Constitution and therefore is constitutional as applied to federal statutes.⁴

² The Association of Southern Baptist Colleges and Schools and American Association of Presidents of Independent Colleges and Universities filed an amicus curiae brief in support of the Respondent, and Pacific Union Conference of Seventh-Day Adventists, North Pacific Union Conference of Seventh-Day Adventists, Church State Council, Adventist Health, Loma Linda University, and Loma Linda University Medical Center filed an amicus curiae brief in support of the Respondent.

³ See *Handy Andy*, 228 NLRB 447, 452 (1977); *Local 1149, Carpenters*, 221 NLRB 456, 461 (1975).

⁴ In addition, in *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826 (1999), the Ninth Circuit held that the Supreme Court's holding in *Flores* did not invalidate RFRA as applied to federal law. Two

¹ 42 U.S.C. Sec. 2000bb.

B. Legality under RFRA of the Assertion of Jurisdiction in this Case

RFRA provides that “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,” unless “it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. 2000bb-1. Thus, the threshold issue which we must address under RFRA is whether the assertion of jurisdiction over the Respondent here would result in a “substantial burden” on the Respondent’s free exercise of its religious tenets.

Congress enacted RFRA in response to the Supreme Court’s decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court had held that a state does not run afoul of the Free Exercise Clause of the First Amendment by enforcing a neutral law of general application against religiously motivated conduct. In particular, the Court rejected a contention that such an application of law was unconstitutional absent a showing of compelling governmental interest. In RFRA, Congress sought to restore the “compelling interest” standard which had been employed in pre-*Smith* First Amendment decisions, but it did not eliminate the rule that one who challenges a governmental action must show that it constitutes a “substantial burden” on religious practices in order to make out a free exercise claim. Instead, it is clear from the legislative history of RFRA that Congress intended that courts would “look to free exercise cases prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened.”⁵

The pre-*Smith* decision that guides the Board when free exercise claims are raised is the Supreme Court’s opinion in *Catholic Bishop*, supra. In *Catholic Bishop*, the Supreme Court held that the Board could not assert jurisdiction with respect to lay teachers in church-operated schools because to do so would create a “significant risk” that First Amendment rights would be infringed. 440 U.S. at 507. The Court found that Congress had not expressed an affirmative intention that teachers in church-operated schools should be covered by the Act, and, in the absence of such an affirmative intention, it was advisable to avoid the serious constitutional questions that would be posed by the Board’s assertion of jurisdiction over those schools. Id. at 501. *Catholic Bishop* involved schools directly operated by the Catho-

lic Bishop of Chicago and the Diocese of Fort Wayne-South Bend, Indiana, which, in addition to their secular purposes, had religious missions, including the religious instruction of students who had demonstrated a potential for the priesthood or for Christian leadership.

In finding that Board jurisdiction over lay teachers in schools directly operated by churches would necessarily involve a significant risk of infringement of First Amendment rights, the Court noted the “critical and unique role” of teachers in fulfilling the “religious mission” of church-operated schools. Id. at 501. The Court held that the Board’s assertion of jurisdiction over church-operated schools for a unit of lay teachers could impact on religious exercise in two ways. First, the Board might impinge on constitutional rights by inquiring into the good faith of assertions by clergy-administrators that actions alleged to be unfair labor practices were mandated by the school’s religious creed. Id. at 502. Second, the Board’s exercise of jurisdiction would require the Board to determine what are the terms and conditions of teachers’ employment, in order to define the scope of mandatory subjects of bargaining for the church-operated school. The Court reasoned that the resulting collective-bargaining obligation would necessarily encroach on the position of management regarding issues that, for a school of substantially religious character, inevitably implicate First Amendment concerns. Id. at 502–503. The Court noted its observation in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), that parochial schools involve “substantial religious activity and purpose” and that their religious character necessarily gives rise to religious entanglements of the type the Constitution seeks to avoid. *Catholic Bishop*, 440 U.S. at 503.

Accordingly, the Court in *Catholic Bishop* found that it was “not compelled to determine whether the entanglement [with religion] is excessive” under constitutional standards because, even if it was not, the Board should not exercise jurisdiction over a school with “substantial religious character” and thereby create a “serious risk that the First Amendment will be infringed” absent clear Congressional intent to regulate such schools.

Since *Catholic Bishop*, the Board has decided on a case-by-case basis whether a religion-affiliated school has a “substantial religious character” and therefore whether the exercise of the Board’s jurisdiction would present a significant risk of infringing on that employer’s First Amendment rights. The Board has not relied solely on the employer’s affiliation with a religious organization, but rather has evaluated the purpose of the employer’s operations, the role of the unit employees in effectuating that purpose, and the potential effects if the Board exercised jurisdiction. The Board considers such factors as the involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for the appointment

other federal Appeals Courts have assumed, without deciding, that RFRA is constitutional as applied to federal law. *Adams v. Commissioner of Internal Revenue*, 170 F.3d 173 (3d Cir. 1999) and *Alamo v. Clay*, 137 F.3d 1366 (D.C. Cir. 1998).

⁵ S. Rep. No. 111, 103d Cong., 1st Sess. at 8 (1993). The House Report echoes this intention: “This bill is not a codification of any prior free exercise [of religion] decision, but rather the restoration of the legal standard that was applied in those [court] decisions.” H.R. Rep. No. 88, 103d Cong., 1st Sess. fn. 11, at 7 (1993).

and evaluation of faculty. See *Ecclesiastical Maintenance Services*, 325 NLRB 629, 630 (1998).

For example, in *Jewish Day School of Greater Washington*, 283 NLRB 757 (1987), the Board applied these factors and concluded that it should not assert jurisdiction over a school for a unit of its teachers, where there was “abundant evidence” that the school’s purpose and function was the propagation of a religious faith. The Board stressed that the school effectuated its mission of promoting Jewish principles “by the substantial suffusion of religion into the curriculum.” *Supra*, at 761. The Board noted in *Jewish Day School* that the Court’s analysis in *Catholic Bishop* repeatedly emphasized a school’s religious purpose rather than its affiliation with a religious organization.

Similarly, in *St. Joseph’s College*, 282 NLRB 65 (1986), the Board found that it lacked jurisdiction over the employer, which was founded by the Catholic Sisters of Mercy, because it was church-operated within the meaning of *Catholic Bishop*. The evidence demonstrated that the Sisters of Mercy exercised administrative and financial control over the college, and that the college’s mission was inextricably interwoven with the indisputably religious mission of the Order. In addition, the Board pointed to the religious requirements that were imposed on the college’s faculty as another factor militating against the assertion of jurisdiction. Thus, the Board concluded that the nature of the college was likely to involve the Board in impermissible inquiries into religious beliefs.

On the other hand, in *Livingstone College*, 286 NLRB 1308 (1987), the Board found that assertion of jurisdiction over a college affiliated with the African Methodist Episcopal (AME) Zion Church would not create the same significant risk of entanglement between church and state as that envisioned by the Court in *Catholic Bishop*. The Board found that the purpose of the college was primarily secular, that the college was not financially dependent on the Church, and that the Church was not involved in the day-to-day administration of the college. The Board deemed it particularly significant that the college’s faculty members were not required to conform to Church doctrine or promote the Church’s ideals, nor were they prohibited from knowingly inculcating ideas that are contrary to the Church’s position on matters of faith and morals. In sum, the Board held that “[t]he absence of a religious mission, and the absence of a requirement that the faculty propagate or conform to a particular religious faith significantly diminishes any risk of impermissible constitutional infringement posed by asserting jurisdiction over the College.” *Supra*, at 1310.

Thus, in accord with the Supreme Court’s analysis, the Board’s *Catholic Bishop* test requires the avoidance of even a “substantial risk of infringement.” Necessarily, therefore the Board’s test avoids creating an *actual* “substantial burden” on religious rights as defined by free exercise cases prior to *Smith* and within the meaning of RFRA. In applying the *Catholic Bishop* test, the Board

avoids imposing a substantial burden on the free exercise of religion by asserting jurisdiction over religion-affiliated schools only where that would present no significant risk of infringement of religious rights. The fundamental policy interests underlying *Catholic Bishop* are the same as those underlying RFRA, and when the Board properly asserts jurisdiction under *Catholic Bishop*, it has acted consistently with the requirements of RFRA by insuring that the threshold level of “substantial burden” under RFRA is never approached.

Accordingly, RFRA does not require the Board to alter the analysis that it has consistently undertaken under *Catholic Bishop* in determining whether the Board’s assertion of jurisdiction over an employer would involve a significant risk of infringement of First Amendment rights. Inasmuch as RFRA prohibits only those governmental actions that “substantially burden” the free exercise of religion, it follows that when the Board applies *Catholic Bishop* and finds that the exercise of the Board’s jurisdiction over an employer involves no significant risk of infringement of religious rights, RFRA’s purposes have been considered and satisfied, as well.⁶

Here, in the underlying representation case, the Board upheld the Regional Director’s finding that the Respondent is not a church-operated institution within the meaning of *Catholic Bishop*. In making this finding, the Regional Director examined and relied on a number of factors. The Regional Director found that neither the Order nor the Catholic Church is involved directly in the day-to-day administration of the University, including such matters as hiring and firing of faculty, modifying the curriculum, and purchasing educational supplies and materials. In this regard, the Respondent’s board of trustees, which is overwhelmingly composed of lay persons,⁷ possesses the final approval authority on such personnel matters as faculty sabbaticals, tenure, and promotions, as well as on financial, academic, and student affairs issues. Further, the evidence shows that the Respondent is not financially dependent on the Order or the Church.

Most significantly, the Regional Director found that the propagation of a religious faith is not the primary purpose of the Respondent, but rather that the University’s purpose and function are primarily secular. In so finding, the Regional Director relied, among other things, on the following: (1) the curriculum does not require the Catholic faith to be emphasized, nor is there in fact a particular emphasis on Catholicism; (2) the Respondent’s board of trustees is not required to establish policies consistent with the Catholic religion; (3) the University’s president and other administrators are lay persons who

⁶ In fact, the Employer concedes that the Board’s *Catholic Bishop* standard is a stricter test than that required by RFRA: “[*Catholic Bishop* is] a doctrine requiring a higher evidentiary religious standard than that called for by RFRA.” (page 31 of its Memorandum of Law).

⁷ Sixteen of the 19 members of the board are lay persons, and board members are not required to be Catholic.

need not be members of the Catholic faith; (4) faculty members are not required to be Catholics, to teach Church doctrine, or to support the Church or its teachings; (5) students may come from any religious background, and no preference is given to applicants of the Catholic faith; of approximately 1450 students, only about 32 percent are Catholic; and (6) although undergraduate students are required to take one course in religious studies, the course does not have to be one involving Catholicism.

Accordingly, unlike the factual situations presented in *Jewish Day School* and *St. Joseph's College*, the Regional Director had ample grounds for his conclusion that the Respondent does not have a "substantial religious character" as did the schools involved in *Catholic Bishop*. The Board therefore agreed in the underlying representation proceeding with the Regional Director that, as in *Livingstone College*, the Respondent is not involved with a religious institution in such a way that the Board's exercise of jurisdiction would even create a significant risk that First Amendment rights will be infringed. As explained above, it logically follows from that finding that the Board's assertion of jurisdiction over the Respondent would not "substantially burden" the free exercise of religion, within the meaning of RFRA.

Accordingly, because the Respondent has not shown that the Board's certification of the Union as the exclusive bargaining representative of the Respondent's unit employees would substantially burden its exercise of religion, we need not address RFRA's additional requirements that any such burden further a compelling governmental interest and is the least restrictive means of furthering that interest. Thus, we find that RFRA does not bar the Board's assertion of jurisdiction over the Respondent and our ability to order the Respondent to bargain with the Union.

All other representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.⁸

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a State of Montana corporation, with an office and place of business in

Great Falls, Montana, is engaged in the operation of a private nonprofit university. During the 12-month period preceding issuance of the complaint, the Respondent in conducting its business operations described above, derived gross revenues in excess of \$1 million, and purchased and received at its Great Falls, Montana facility, products, goods, and materials valued in excess of \$50,000 directly from suppliers outside the State of Montana. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the mail ballot election held between March 8 and March 29, 1996, the Union was certified on January 8, 1998, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time faculty including professors, associate professors, assistant professors, instructors and associate faculty and all part-time associate faculty employed by University of Great Falls in Great Falls, Montana, but excluding part-time adjunct faculty, deans, non-professional employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since on about April 15, 1998, the Union has requested the Respondent to bargain, and, since April 15, 1998, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after April 15, 1998, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379

⁸ The Respondent's cross-Motion for Summary Judgment is denied.

U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enf. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, University of Great Falls, Great Falls, Montana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Montana Federation of Teachers, AFT, AFL–CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All full-time faculty including professors, associate professors, assistant professors, instructors and associate faculty and all part-time associate faculty employed by University of Great Falls in Great Falls, Montana, but excluding part-time adjunct faculty, deans, nonprofessional employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Great Falls, Montana, copies of the attached notice marked “Appendix.”⁹ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 15, 1998.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

MEMBER HURTGEN, concurring.

I do not agree with my colleagues that the Board has no authority to pass on the constitutionality of Congressional enactments. As a federal official in a quasi-judicial role, I believe that I have the authority, and indeed the obligation, to take cognizance of all law of the land. Clearly, the U.S. Constitution is a part of that law. Indeed, it is the supreme law of the land. Thus, I must consider that law.

In doing so, I will follow the prudent policy of seeking to construe Congressional legislation in a manner that will avoid a “significant risk” of conflict with the Constitution.¹⁰ However, in instances where that construction is not “fairly possible,” there is no way to avoid the constitutional issue.¹¹ In such cases, I must confront the constitutional issue. In doing so, I will presume that Congress acted in a constitutional manner, and thus I will place the burden on the party who challenges the constitutionality of the legislation.

In the instant case, I agree with my colleagues that assertion of jurisdiction over the Respondent will not create a “significant risk” of conflict with the Constitution. Thus, there is no need to construe the word “Employer” in Section 2(2) of the Act to exclude the Respondent. Phrased differently, Section 2(2) is constitutional as applied to the Respondent.

I also agree with my colleagues that RFRA is constitutional as applied to federal law, and that the Respondent has not met the threshold burden of showing that assertion of jurisdiction would “substantially burden” the Respondent’s First Amendment rights.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Montana Federation of Teachers, AFT, AFL–CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

¹⁰ *Edward J. DeBartolo v. NLRB*, 463 U.S. 147, 157 (1983); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-501 (1979).

¹¹ *Edward J. DeBartolo*, *ibid.*

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

All full-time faculty including professors, associate professors, assistant professors, instructors and associate faculty and all part-time associate faculty employed by us in Great Falls, Montana, but excluding part-time

adjunct faculty, deans, nonprofessional employees, guards, and supervisors as defined by the Act.

UNIVERSITY OF GREAT FALLS