

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

ST. EDMUND'S ROMAN CATHOLIC CHURCH, BROOKLYN,
THE DENNIS MALONEY INSTITUTE, D/B/A ST. EDMUND'S
HIGH SCHOOL, AND ST. EDMUND'S ROMAN CATHOLIC CHURCH,
BROOKLYN, D/B/A ST. EDMUND'S ELEMENTARY SCHOOL,
A SINGLE EMPLOYER

Employer

and

Case No. 29-RC-9666

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 74, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Scott Kardel, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.
2. St. Edmund's Roman Catholic Church, Brooklyn, the Dennis Maloney Institute, d/b/a St. Edmund's High School, and St. Edmund's Roman Catholic

Church, Brooklyn, d/b/a St. Edmund's Elementary School, referred to during the hearing as "a single employer or joint employers,"¹ herein collectively called the Employer, took the position that the Board lacks jurisdiction under *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 99 S.Ct. 1313 100 LRRM 2913, (1979), which held that the Board does not have jurisdiction over teachers employed by church-operated schools. In addition, the Employer objected to "the nomenclature, 'St. Edmund's Roman Catholic Church d/b/a St. Edmund's Elementary School,'" claiming that they are "one and the same entity." As its witness, the Employer called Father Edward Brophy, a Roman Catholic priest who is Pastor of the parish.

The Service Employees International Union, Local 74, AFL-CIO, herein called the Petitioner, took the position that the Board has jurisdiction over the Employer, because the employees it seeks to represent perform "cleaning and maintenance work, that has nothing to do with religious faith or religious practices." As its witnesses, the Petitioner called Dwain Johnson, a maintenance worker at Dennis Maloney Institute d/b/a St. Edmund's High School, herein called the high school or the institute; John Malone, a maintenance worker at St. Edmund's Elementary School, herein called the elementary school; William Struthers, who is alleged by the Employer to be a Section 2(11) supervisor; and Barry White, Business Agent for the Petitioner, who testified briefly regarding the Petitioner's representation of maintenance employees at other facilities owned and operated by the Catholic Church.

¹ Neither party took a position at the hearing as to whether the Employer is a single employer or joint employers. In its brief, the Employer contended for the first time that the Employer is a single integrated enterprise. For the reasons discussed *infra* p. 22-24, I agree with the Employer and find that the Employer is a single employer.

The parties stipulated that the Employer's gross annual revenues, with or without contributions and donations, are over one million dollars, and that it purchases and receives goods, products and materials valued in excess of \$5,000 annually directly from firms located outside the State of New York.

The Employer argues that the instant case falls under the holding in *NLRB v. Catholic Bishop of Chicago*, 100 LRRM 2913, 440 U.S. 490, 99 S.Ct. 1313 (1979), where the United Supreme Court determined that the exercise of the Board's jurisdiction over lay faculty members employed by Catholic secondary schools could present a "significant risk that the First Amendment will be infringed." *Catholic Bishop*, 100 LRRM at 2918-2919. In light of "the critical and unique role of the teacher in fulfilling the [religious] mission of a church-operated school," the Supreme Court was concerned that by requiring church-operated schools to bargain with unions representing teachers, and by delineating mandatory bargaining subjects with respect to teachers, the Board might encroach upon the schools' right to exercise control over their religious function. *Catholic Bishop*, 100 LRRM at 2916, 2918. In addition, the Court was fearful that religious schools accused of unfair labor practices might assert that their "challenged actions were mandated by their religious creeds," necessitating a Board inquiry into the good faith of the schools' defenses. *Catholic Bishop*, 100 LRRM at 2918. In order to avoid the possibility of having to invalidate a portion of the NLRA on First Amendment grounds, the Court decided the case on an alternative theory, concluding that the Board could not exercise jurisdiction over parochial school teachers in the absence of a "clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act." *Catholic Bishop*, 100 LRRM at 2919-2920.

One of the concerns expressed in *Catholic Bishop* was later resolved against a church-operated school which argued that the First Amendment precluded government inquiry into an alleged discriminatory discharge that the school claimed to be religiously motivated. *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 106 S.Ct. 2718 (1986). The Supreme Court ruled that the Ohio Civil Rights Commission “violate[d] no constitutional rights by merely investigating the circumstances of the discharge...if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge.” *Dayton Christian Schools*, 106 S.Ct. at 2723. The Court noted that “[e]ven religious schools cannot claim to be wholly free from some state regulation.” *Dayton Christian Schools*, 106 S.Ct. at 2723. In several of its more recent cases, the Supreme Court has placed its imprimatur on government aid to religious schools entailing at least as much church-state entanglement as would the assertion of Board jurisdiction. For example, the Court reinstated a program previously found unconstitutional, in which public school teachers, monitored by the New York City Board of Education, provide remedial education in religious schools. *Agostini v. Felton, Chancellor, Board of Education of the City of New York*, 521 U.S. 213, 117 S.Ct. 1997, 2015 (1997), *overruling Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232 (1985); *School District of Grand Rapids v. Ball*, 473 US. 373, 105 S.Ct. 3216 (1985). Last year, the Court held that a government program which loans educational materials and equipment to religious schools does not violate the Establishment Clause, even though government monitoring was insufficient to prevent the diversion of materials and equipment for religious purposes. *Mitchell v. Helms*, 530 U.S. 793, 120 S.Ct. 2530 (2000), *overruling Meek v. Pittenger*, 95 S.Ct. 1753 (1975); *Wolman v. Walter*, 97 S.Ct. 2593 (1977).² The

² The Employer’s brief relies on a portion of *Catholic Bishop* in which the Supreme Court’s discussion of

Court has also held that supplying a publicly paid sign-language interpreter to a deaf student attending a Roman Catholic high school, to facilitate the understanding of everything from mathematics to Mass, does not violate the Establishment Clause. *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 113 S.Ct. 2462 (1993). In *Agostini v. Felton*, the Court observed that “[i]nteraction between church and state is inevitable, and we have always tolerated some level of involvement between the two.” 117 S.Ct. at 2015 (1997).

In the late 1970s, one of the first Board cases to apply *Catholic Bishop* interpreted it as permitting Board jurisdiction over lay faculty members employed by a Catholic secondary school which was deemed not to be “church-operated,” because it was administered by an independent lay board of trustees. *Bishop Ford Central Catholic High School*, 243 NLRB 49 (1979), *enf. den.* 623 F.2d 818 (2d Cir. 1980). The Board overruled *Bishop Ford* in *Jewish Day School of Greater Washington*, 283 NLRB 757 (1987), pointing out that the Supreme Court’s analysis in *Catholic Bishop* “did not focus on the schools’ direct affiliation with religious organizations...[but on] the purpose of the school, the role of the teacher in effectuating that purpose, and the potential effects of the Board’s exercise of jurisdiction.” *Jewish Day School*, 283 NLRB at 760. Accordingly, the Board construed *Catholic Bishop* to preclude it from asserting its jurisdiction “where a union seeks to represent a unit of teachers in a school whose purpose and function in substantial part are to propagate a religious faith,” regardless of whether the school is “church-operated.” *Jewish Day School* 283 NLRB at 761; *accord*, *Nazareth Regional High School*, 283 NLRB 763 (1987).

the church-state entanglement problem was based on its holdings in *Meek* and *Wolman*, which are no longer good law. Brief of Employer, p. 14.

Conversely, the Board has found it appropriate under *Catholic Bishop* to exercise its jurisdiction over employers which are church-operated, but whose purpose and function, and the tasks performed by their employees, are primarily secular. For example, *Ecclesiastical Maintenance Services*, 325 NLRB 629 (1998)(herein “EMS”)³ involved an employer owned and operated by the Roman Catholic Archdiocese of New York for the purpose of “assist[ing] in the fulfillment of the religious, educational and other charitable purposes of the...Archdiocese...which are carried out by the churches, schools, hospitals, and other institutions owned, operated, supervised or controlled by...the Roman Catholic Church within the Archdiocese,” by providing “cleaning, maintenance, painting and repairing services for these institutions.” *EMS*, 325 NLRB at 629. In exercising jurisdiction over EMS’s service and maintenance employees (whose functions were similar to those of the unit employees in the instant case), the Board reasoned that “the critical inquiry addressed by the Court in *Catholic Bishop* is the employees’ role in the participation of religious activities, not in merely making them possible...[T]he cleaning and maintenance employees employed by the Employer, while perhaps assisting in the Church’s religious activities, do not participate in them.” *EMS*, 325 NLRB at 631. The Board has exercised jurisdiction over a wide range of church-operated employers whose employees are not directly involved in effectuating their religious missions. *See, e.g., University of Great Falls*, 331 NLRB No. 188 (2000)(faculty of university founded by a Catholic religious order); *Upstate Home for*

³ In *EMS*, two Board members indicated that they were in favor of overruling *The Riverside Church in the City of New York*, 309 NLRB 806 (1992), in which the Board declined to exercise jurisdiction over the church’s maintenance workers. The *Riverside* case, relied on by the Employer herein, is anomalous in that it does not cite or discuss *Catholic Bishop*, but employs the Board’s pre-*Catholic Bishop* analytic framework.

Children, Inc., 309 NLRB 986 (1992)(nurses employed by residential school for mentally retarded children, affiliated with the American Baptist Church); *The Salvation Army Williams Memorial Residence*, 293 NLRB 944 (1989), *enf'd w/o opinion*, *Salvation Army*, 923 F.2d 846 (2nd Cir. 1990)(kitchen and maintenance workers at a residential facility for mature adults, under the direction and control of a Salvation Army minister); *The Salvation Army of Massachusetts Dorchester Day Care Center*, 271 NLRB 195, *enf'd*, 763 F.2d 1, 119 LRRM 2587 (1st Cir. 1985)(teachers, janitor, cook and social worker at child care center operated by the Salvation Army); *Volunteers of America, Los Angeles*, 272 NLRB 173 (1984), 777 F.2d 1386 (9th Cir.1985)(alcoholism specialists, cooks and janitors employed by an alcoholism program operated by Volunteers of America (held to be a bona fide Christian church)); *St Louis Christian Home*, 251 NLRB 1477 (1980), *enf'd*, 663 F.2d 60 (8th Cir. 1981)(child-care workers, maintenance employee and storeroom clerk employed by emergency residential treatment center for battered, abused, and neglected children, operated by the Christian Church Disciples of Christ); *Harborcreek School for Boys*, 249 NLRB 1226 (1980)(child care workers, teachers, teachers aides, nurses, kitchen workers, laundry workers, and maintenance workers employed by a school for troubled boys owned and operated by a Catholic diocese).

Particularly instructive in resolving the instant case is *Hanna Boys Center*, 284 NLRB 1080 (1987), *enf'd*, 940 F.2d 1295, 1302 (9th Cir. 1991), *cert. den.*, 504 U.S. 985, 112 S.Ct. 2965 (1992), involving two bargaining units of non-teachers at a Catholic residential facility for boys. One of these bargaining units included “child care workers, recreation assistants, cooks, cooks helpers, and maintenance employees including

plumbers, electricians, gardeners, and custodians...excluding...professional employees, priests, nuns, and religious brothers, guards and supervisors as defined in the Act.”

Hanna Boys Center, 284 NLRB at 1080 n. 1. The duties of child care workers included bringing the children to chapel to say their morning prayers, “select[ing] a boy to say the evening prayer,” and “[t]eaching values: ethical principles, religious observances.”

Hanna Boys Center, 284 NLRB at 1081, 1082. However, since the child care workers and other unit employees were not teachers, and did not have a crucial role in fostering the Center’s religious mission, the Board found that “[t]he sensitive First Amendment issues surrounding the assertion of jurisdiction over teachers noted by the Court in *Catholic Bishop* are not involved in the assertion of jurisdiction over the child-care workers and other unit members in the present case.” *Hanna Boys Center*, 284 NLRB at 1083. Ultimately, pursuant to an election conducted prior to the Board’s decision, a union was certified to represent the above-described unit, and the Board issued a bargaining order after the Center “tested cert.” *Hanna Boys Center*, 293 NLRB 359 (1989).

In enforcing the Board’s bargaining order, the 9th Circuit declared that the Board’s exercise of jurisdiction was “clearly constitutional.” *Hanna Boys Center*, 940 F.2d 1295, 1302, 138 LRRM 2733 (9th Cir. 1991). The Court’s discussion of the First Amendment implications of Board jurisdiction is summarized here, in order to clarify the potential constitutional issues at stake. The 9th Circuit’s analysis began with the observation that the Establishment Clause was intended to protect against “sponsorship, financial support, and active involvement of the sovereign in religious activity.” *Hanna Boys Center*, 940 F.2d at 1303 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S.Ct. 2105, 2111

(1971)). The Court then applied the three-part test articulated by the Supreme Court in *Lemon v. Kurtzman*: to avoid an Establishment Clause violation, “the Board’s application of the NLRA to Hanna’s non-teaching employees (1) must have a secular purpose, (2) must have a primary effect that neither advances nor inhibits religion, and (3) must not foster excessive state entanglement with religion.” *Hanna Boys Center*, 940 F.2d at 1303 (citing *Lemon*, 403 U.S. at 612-13, 91 S.Ct. at 2111). Since the purpose and primary effect of extending the Act’s protection to employees are “clearly secular,” the 9th Circuit’s analysis focused on “*Lemon*’s third, ‘entanglement’ prong.” *Hanna Boys Center*, 940 F.2d at 1303.

Under *Lemon*, there are “three factors to be weighed in determining excessive entanglement: the character and purpose of the institution that [is] benefited, the nature of the aid that the State provides, and the resulting relationship between government and the religious authority.” *Hanna Boys Center*, 940 F.2d at 1304 (quoting *Lemon*, 403 U.S. at 615, 91 S.Ct. at 2112). With regard to the first of these factors, the 9th Circuit found that “the Catholic faith of [the Center’s] founders is woven thoroughly into the institution.” *Hanna*, 940 F.2d at 1304. However, as for the second factor, the “nature of the aid the State provides” (or in *Hanna*, the “nature of the activity the government mandates”), the Court found that the employees at issue did not conduct religious services, teach religion, or further Hanna’s religious mission. *Hanna*, 940 F.2d at 1304. Accordingly, any labor relations issues which would arise with respect to these employees “should not involve the Board in issues of theology...and should involve the Board minimally, if at all, in Hanna’s religious mission.” *Hanna*, 940 F.2d at 1304. The Court pointed out that Board jurisdiction would not “render any benefit to the Catholic religion or any other religion,

or advance non-religion or religion generally.” *Hanna*, 940 F.2d at 1304. Furthermore, there was no evidence that the religious beliefs of either Hanna or the Roman Catholic Church “would be affronted by unionization or collective bargaining.” *Hanna*, 940 F.2d at 1304.

Turning to the third factor, the “resulting relationship between government and the religious authority,” the Court noted that Board jurisdiction would “require governmental involvement only with respect to specific charges which may be filed on behalf of these employees. It will not involve the Board in continuing or systematic monitoring of the Church’s activities and should not involve monitoring the religious aspects of Hanna’s activities at all. Board involvement will not create the reality or the appearance of the government’s supervising or collaborating with the Church.” *Hanna*, 940 F.2d at 1304. When the Court weighed these three factors, it concluded that “Board jurisdiction here does nothing to ‘establish’ religion. Nor does Board jurisdiction here present a threat to government neutrality with respect to religion...[or] create ‘active involvement of the sovereign in religious activity’...or continuing government surveillance of the type the Supreme Court condemned in *Lemon*...” *Hanna*, 940 F.2d at 1305.

With respect to Hanna’s Free Exercise argument, the 9th Circuit applied the traditional test set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790 (1963), which “requires the weighing of three factors: (1) how much Board jurisdiction will interfere with the exercise of religious beliefs; (2) the existence of a compelling or overriding state interest justifying a burden on religious beliefs; and (3) whether accommodating those beliefs would unduly interfere with the fulfillment of the government interest.” The

Court held that “Board jurisdiction here will not interfere with the free exercise of religious beliefs of anyone at Hanna. Catholic doctrine has no objection to unionization or collective bargaining. The pervasively secular nature of these employees’ duties ensures that Board involvement in labor disputes will be confined to the secular aspects of Hanna’s operations.” *Hanna*, 940 F.2d at 1306. The Court then balanced the “minimal showing of any impact on religious belief or practice” against “the compelling governmental interest in ‘promo[ting] the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation.” *Hanna*, 940 F.2d at 1306 (quoting *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 211, 85 S.Ct. 398, 403 (1964)). Accordingly, the 9th Circuit found that extending the Act’s protection to the disputed employees would not violate the Free Exercise Clause. *Hanna*, 940 F.2d at 1306.

In a recent case, the Board found that even where a hospital was operated by the Seventh Day Adventist Church, whose teachings “prohibit its members from participating in labor unions, paying dues to labor unions, or operating with the presence of labor unions,” the government interest in preventing labor strife and extending the NLRA’s protections to employees was sufficiently compelling to justify the Board’s exercise of jurisdiction over the hospital’s registered nurses. *Ukiah Adventist Hospital d/b/a Ukiah Valley Medical Center*, 332 NLRB No. 59 (2000).

The record reflects that St. Edmund’s Parish includes the church and elementary school, which occupy the same building, the high school, a rectory and two convents. There is no evidence regarding the location of the two convents; the other buildings are all on the same block in Brooklyn. The church and elementary school share the same

front entranceway and entrance corridor, although the schoolchildren usually enter through a side door. The Employer emphasized that when the elementary school custodians clean the sidewalk in front of the school, shovel the snow, or clean the entrance corridor, they are *de facto* performing the same service for the church. Photographs of the church/elementary school and high school, which were offered into evidence by the Employer, reveal the prominence of imagery associated with Roman Catholicism.

Father Edward Brophy testified that as Pastor of St. Edmund's Parish since December, 2000,⁴ he is its administrator and spiritual leader. He is ultimately responsible for the operation of the elementary school, the rectory, and the church. The Pastor is one of the five trustees of the St. Edmund's Parish Corporation, the others being the Bishop and Vicar General of the Brooklyn Diocese and two lay parishioners selected by the Pastor.⁵ In addition, Pastor Brophy is the Chairman of the Board of Trustees and sole Member⁶ of the Dennis Maloney Institute d/b/a St. Edmund Preparatory High School. Father Brophy is in charge of hiring the principals of both the high school and elementary school, and his signature appears on employment contracts with the two principals. Pastor Brophy has to approve all hiring and firing decisions concerning all elementary school personnel, including the teachers. At the high school, by contrast, the principal

⁴ Father Brophy testified that he became the administrator of the parish on December 1, 2000, and was canonically installed as the pastor on January 14, 2001. The Bishop of Brooklyn appointed him as pastor on October 31, 2000. He was ordained a Catholic priest in 1993, having previously served as a librarian and English teacher at two Catholic high schools.

⁵ The church's certificate of incorporation reflects that its original trustees held the same titles, in 1925.

⁶ The institute's corporate bylaws provide that the trustees are the governing body of the Corporation, charged with its administration, the effectuation of its corporate purposes, and the stewardship of its property, and that the Member's exclusive powers include appointing trustees and officers, approving the trustees' long-range strategic plans, reviewing financial statements submitted by the trustees, and approving any change in the philosophy and mission of the Corporation.

hires the teachers and staff. Father Brophy leaves the day-to-day operation of the high school to the principal, the assistant principal or vice principal, and the teachers.

St. Edmund's Parish owns the land on which the schools and other buildings are located. It appears from the record that it also owns the buildings themselves. The parish permits the high school to use the building it occupies on condition that it be maintained properly and used for a Catholic high school. Pastor Brophy maintained that the parish does not charge rent to the school, but that there is "a transfer of funds from the school to the parish." The frequency and amount of this transfer of funds was not mentioned. The high school also purchases bookkeeping services from the parish; one bookkeeper manages the accounts for the high school, the elementary school, and "the rest of the church." In addition, the Pastor pays the utility bills for the church/elementary school, rectory, high school, and convents. Only the pastor can sign checks on the behalf of the church and the two schools, although these entities have three separate bank accounts. The tuition money charged by the high school is kept in its separate account and used to operate the school. The institute pays its teachers' salaries directly.

The custodians/janitors who work at the high school are on the payroll of St. Edmund's Roman Catholic Church, and the high school purchases the janitorial services from the parish. The Pastor, as Chairman of the institute, transfers an unspecified amount of money (which may or may not correspond with the janitors' wages) from the Institute's account to the church's account to pay for these janitorial services. In addition, William Struthers receives two paychecks each week, from both the church and the elementary school. John Malone testified that at various times, he has received paychecks drawn on the account of the church, the elementary school, and the high

school. Both he and Johnson have been transferred back and forth between the high school and elementary school, and have occasionally performed work in the parish's other buildings. Struthers performs work in all the buildings.

Father Brophy testified that the high school "exists, first of all, for the development and the formation and the spread of the Roman Catholic faith." Similarly, the primary purpose of the elementary school is "the transfer of the faith, and worship of the faith." These "ultimate purpose[s]" take precedence over the secondary goal of teaching secular subjects. With respect to religious studies, the elementary school prepares students to receive the sacraments of First Communion, Penance, and Confirmation, in the church contained within the same building. The elementary school also provides a religious education program for children who do not attend St. Edmund's. The students at both the elementary and high schools use the church for such purposes as Mass, Confession, prayer services, and the observance of Lent. Sometimes the parishioners use the schools' facilities.

Not all the students at the two schools are Roman Catholics, however, and the record does not disclose whether attendance is required at church or at the elementary school's religious training program. Father Brophy did not know whether classes such as mathematics, chemistry, biology, or history, contain a specific religious component, and he did not mention whether the high school provides a religion class or any religious training. The Pastor testified that he does not know of any faculty members who are not Catholics, but he did not indicate whether adherence to the faith is a requirement for teachers, or whether the faculty includes members of the clergy. Based on the record as a

whole, however, I find that the elementary and high schools have a predominant religious purpose and mission.

Nevertheless, there is no evidence that the custodial/maintenance employees and laborers are directly involved in effectuating the schools' religious mission. Unit employees Johnson and Malone testified that they clean the grounds at the two schools, pick up papers, sweep, mop, clean the cafeterias and bathrooms, change light bulbs, clean and empty garbage cans, shovel snow, unclog toilets, fix leaky sinks, and make other basic repairs. They are sometimes called upon to clean the parking area used by teachers, principals, and staff. In addition, they occasionally perform cleaning or light maintenance tasks at the rectory and convents. Before and after Christmas, Easter and Confirmation, they help to clean and maintain the church itself, to prepare the church and clean up afterwards. In addition, Father Brophy stated that the custodians maintain the heating system in the building occupied by both the church and the elementary school. Father Brophy indicated that the "custodial staff, sexton, whoever," clean the church regularly. However, it is not clear from Pastor Brophy's testimony whether the quoted phrase refers to members of the petitioned-for bargaining unit, which consists only of employees who regularly work at the elementary school and high school.

Father Brophy asserted that the custodial/maintenance employees and laborers assist him in fulfilling his obligation to ensure that the buildings of the parish are maintained in good order, so that they can be used by both the schoolchildren and parishioners in the service of the Roman Catholic faith. The Employer submits that under these circumstances, cleaning a corridor cannot be viewed as secular. However, unit employees have no role in the "development," "formation," "spread," "transfer" or

“worship” of the Roman Catholic faith. The custodial/maintenance employees and laborers who work at the two schools do not teach the children, or help to instill religious beliefs in them. Their interaction with students is nonexistent or minimal. Unit employees are not required to attend mass as part of their job duties. The Employer does not question them about their religious faith or affiliation, either at the time of hire or afterwards. Some are not Catholics.

Nevertheless, Father Brophy maintained that he “would expect that their behavior is not going to, in any manner, shape or form, contradict the Catholic faith.” Even when the unit employees are on their own time, he added, he “would expect that there would not be public scandalous behavior which would offer a direct confrontational contradiction to the teaching of the Church.” According to Pastor Brophy, such behavior could result in “discipline up to and including discharge.” In addition, Pastor Brophy professed himself unable to bargain over a number of hypothetical future bargaining proposals that could be made by Petitioner in its representation of the unit. These included any proposals affecting the scheduling of mass, proposals to resolve grievances through anything other than the Catholic Church’s internal dispute resolution procedures, and any proposals “that violated the Church’s faith and morals,” such as a hypothetical demand for a health and welfare plan which could theoretically include birth control, abortion coverage, benefits for significant others, and the inclusion of homosexuals in a family unit.

Under cross-examination, Pastor Brophy admitted that he has never communicated to the custodial/maintenance employees or laborers the expectation that they conform their behavior to the tenets of the Catholic Church. In addition, he

conceded that he has never asked custodial or other staff whether they have ever practiced birth control, undergone abortions, had homosexual relations, or had “significant others.” Pastor Brophy testified that the lay faculty members at the high school are represented by a union, and that his predecessors never told him of any problems with negotiations. He was aware that teachers at some other Catholic schools are unionized, but he did not know of any instances where unions representing them had demanded birth control and abortion funding, or holidays or vacations that interfered with the operations of the church.

Pastor Brophy will be participating in negotiations with the union representing the high school teachers.

In sum, the record evidence establishes that the employees in the petitioned-for unit, like those in *EMS* and *Hanna*, do not directly participate in the furtherance of the Employer’s religious mission. The concerns expressed by the Employer regarding possible bargaining proposals by Petitioner are purely hypothetical. Moreover, the Board cannot compel the Employer to agree to a proposal offensive to Roman Catholicism; it can only require the Employer to bargain in good faith. Accordingly, I find that the exercise of Board jurisdiction is not precluded by the *Catholic Bishop* line of cases.

Discussion of Single Employer Issue

The four operative criteria used to determine whether two separate employers constitute a single employer or single integrated enterprise are: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. *JMC Transport*, 283 NLRB 554, 555 (1987). However, no one of these factors is controlling, and it is not necessary for all four of these factors to be

present. *JMC*, 283 NLRB at 555; *Blumenfeld Theatres Circuit*, 240 NLRB 206 (1979), *enf'd*, 626 F.2d 865 (9th Cir. 1980). Single employer status depends on all the circumstances of the case. *Emsing's Supermarket*, 284 NLRB 302, 303, 304 (1987); *Blumenfeld*, 240 NLRB at 215. Accordingly, the Board has “on several occasions made a finding of single employer status in the absence of a common labor relations policy, and even when it had been affirmatively shown that each of two corporations held to be a single employer established its own labor relations policy.” *Blumenfeld*, 240 NLRB at 215 (citing *Radio Union v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1960)); see *Jerry's United Super*, 289 NLRB 125, 135 (1988). Similarly, a single employer finding may be made where there is “little or no employee interchange.” *Blumenfeld*, 240 NLRB at 215; see *Jerry's United Super*, 289 NLRB 125, 135 (1988); see also *Soule Glass and Glazing Co.*, 246 NLRB 792, 795 (1979).

In the instant case, the operations of the church, elementary school, and high school are interrelated. They share the same overall purpose: the propagation of Roman Catholicism. Students from both schools use the church, and parishioners sometimes use the school's facilities. The church and elementary school share the same building, and all three entities are on land owned by the St. Edmund's Parish, which is part of the Roman Catholic Diocese of Brooklyn. The schools and church share the same bookkeeper. Although custodians in the petitioned-for bargaining unit are primarily assigned to either the elementary or the high school, the record reflects that they are sometimes called upon to help out in other buildings, including the church. Most have received at least some of their paychecks directly from the church. In the past, at least two bargaining unit members have been transferred between the high school and elementary school.

In addition, Pastor Brophy has managerial duties with respect to all three entities, and it appears that he will have primary responsibility for labor relations policy. For example, the Pastor stated that he will be involved in labor negotiations with the union representing the lay high school teachers. He has to approve all hiring and firing decisions concerning the elementary school teachers and staff, as well as the custodial staff assigned to the church and the two schools. His testimony regarding hypothetical future bargaining proposals by Petitioner implies that if Petitioner prevails in a Board election, Pastor Brophy will also participate in labor negotiations regarding the custodial/maintenance employees and laborers who work in the high school and elementary school.

Based upon the stipulations of the parties, and the record as a whole, I find that the Employer is a single integrated enterprise, that it is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated that Service Employees International Union, Local 74, AFL-CIO, herein called the Petitioner, is a labor organization within the meaning of Section 2(5) of the Act. Based upon the stipulation of the parties, and the record as a whole, I find that the Petitioner is a labor organization within the meaning of the Act.

The labor organization involved herein claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner is seeking an election in a unit consisting of all full-time and regular part-time custodial/maintenance employees and laborers⁷ employed by the Employer at St. Edmund's High School, located at 2472 Ocean Avenue, Brooklyn, New York, and at St. Edmund's Elementary School, located at 1902 Avenue T, Brooklyn, New York, excluding all clerical employees, teachers, guards and supervisors as defined in the Act.

The Employer took the position that William Struthers is a Section 2(11) supervisor, and the Petitioner contended that he is a unit employee. As witnesses regarding the supervisory issue, the Employer called Father Brophy, and the Petitioner called Dwain Johnson, John Malone and William Struthers.

Supervisory Status of William Struthers

Pastor Brophy characterized William Struthers as the "head of maintenance...the one who is going to supervise the men... and...allocate them as necessary, depending upon what needs to be done." In addition, he testified that Struthers determines the employees' shifts, assigns overtime, prepares the vacation schedule and presents it to the Pastor for his approval. Although Father Brophy has not hired any custodial staff during his brief tenure, he plans to have Struthers interview any future applicants and recommend the best candidates. Struthers's recommendations will be treated "very, very seriously, because he's the man who knows maintenance." However, Father Brophy will make the ultimate hiring decision, after meeting the applicants to determine whether they "seem to fit into the situation of the parish."

John Malone, a six-year employee who is currently a maintenance worker at St. Edmund's Elementary School, testified that he receives direction in his daily work

⁷ During the hearing, the unit employees were also referred to as janitors.

assignments from both Struthers and the principal of the elementary school. Struthers occasionally assigns Malone to work in the rectory or in either of the two convents. In addition, it was Struthers who transferred Malone from the high school to the elementary school a year or two after he started working for the Employer. When Malone is out sick, he notifies the Employer by calling the custodian's office number, which is the telephone number in Struthers's two offices (one is in the elementary school, and the other in the high school). Malone also submits his written vacation time requests to Struthers, who then obtains the approval of the Pastor and the principal.

Similarly, Dwain Johnson, a custodial worker at the high school, referred to Struthers as "the chief custodian." According to Johnson, Struthers receives work requests from the principals, teachers and other staff members, and then he, in turn, assigns the work to Johnson and other custodial employees. When Johnson was first hired, he was "interviewed by Bill Struthers and hired by Pastor Noonan," Pastor Brophy's predecessor. Johnson stated that Struthers was responsible for transferring him back and forth several times between the elementary school and the high school, and between the day shift and the night shift. In addition, Struthers has occasionally assigned him to work in the convents or in the rectory. Johnson acknowledged that he did not know whether any custodial employee has ever been disciplined or warned, but he said he has seen Struthers provide "constructive criticism" to other employees. Johnson testified that he submits vacation time applications to Struthers, who then forwards them to the principal and the Pastor for approval. When Johnson is out sick, he leaves a voicemail message on the telephone in Struthers's private office.

William Struthers testified that he has worked for the Employer for approximately 23 years and is the most senior custodian. He denied that he is the “head custodian,” insisting that he performs the same maintenance, repair, and cleaning work as the other workers, and “show [s] them what [he] know[s].” According to Struthers, he has never discharged employees, recommended that they be discharged, or made decisions regarding employees’ rate of pay or monetary increases. Moreover, he maintained that the principals make decisions regarding the transfer of employees. When employees call in sick, they merely “call the custodians’ line” and Struthers notifies the principals of their absence. He denied having a private office.

However, Struthers conceded that his job includes interviewing job applicants and making recommendations to the Pastor regarding hiring decisions. Furthermore, he acknowledged that everyone currently employed as a janitor was recommended by him. He was unable to recall any janitor who had been hired on a permanent basis without his recommendation, and he could recall only one individual, a relative of a principal, who was hired for a temporary summer job without his recommendation. Conversely, Struthers could not recall any instance when a janitor he recommended was not hired.

Struthers testified that he is directed in his work by the Pastor, by the principals of both schools, and by his own judgment of what has to be done. Work requests are usually conveyed to him through the Pastor’s and principals’ secretaries, or by other members of the staff, and he assigns the work to the other custodians. In addition, he stated that he “walks through” the buildings in order to see whether any maintenance work is needed, and then obtains permission from either the principals or the Pastor to perform the needed work. In this regard, he stated that they sometimes disagree with his recommendations,

but the record is unclear as to how often. He conceded that most work assignments go through him⁸ and that “anything that has to be done they call me.” For example, when asked whom the Pastor would contact if he needed extra custodial services for a particular event, Struthers replied, “Nobody.⁹ I would just make sure it was done.” The record also reflects that in assigning work to unit members, Struthers is aware of the skill levels of different employees, which he discussed at length during his cross-examination. Despite these differing skill levels, however, he testified that “any man on my staff” could repair a leaky faucet, “with proper supervision.”

Section 2(11) of the Act provides:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The possession of any one of these indicia is sufficient to confer supervisory status, provided that the use of authority involves independent judgment. *Chicago Metallic*, 273 NLRB at 1689 (1985). The Board has held that “effective hiring recommendations...are alone sufficient to confer statutory supervisor status.” *Queen Mary*, 317 NLRB 1303 (1995).

The record evidence establishes that William Struthers possesses the authority to make effective recommendations regarding hiring decisions. Struthers conceded that he

⁸ Earlier in his testimony, Struthers claimed that the principals and their secretaries do *not* go through him when they need janitorial services. Rather, he alleged, they make an announcement to the entire staff over the radio, and whoever happens to hear it first is the one who performs the work. This description of the Employer’s procedures contradicts his own later testimony and the testimony of Petitioner’s other witnesses.

⁹ Since it is Struthers who makes sure the work is done, he is apparently contacted by someone other than the Pastor, such as the Pastor’s secretary.

interviews job applicants and makes recommendations to the Pastor. Everyone currently employed as a janitor was recommended by Struthers. He was unable to recall any janitor who had been hired on a permanent basis without his recommendation, or any instance when a janitor he recommended was not hired. Custodian Dwain Johnson confirmed that Struthers interviewed him when he was first hired. The new Pastor testified that he plans to continue the past practice of having Struthers interview prospective custodial/maintenance employees and make hiring recommendations, which will be taken “very, very seriously, because he’s the man who knows maintenance.” Since the Pastor’s areas of expertise are religion, English literature, and library science, not maintenance, he will have to rely on Struthers’ judgments with respect to the qualifications of prospective maintenance employees.

In addition, Struthers admitted under cross-examination that he assigns work to employees, after receiving work requests from the Pastor, principals, and staff members. He also stated that he takes the initiative to walk through the buildings to see whether any maintenance work is needed, and is guided in his actions, in part, by his own judgment of what has to be done. It appears that with regard to needed repairs, he is the only individual who is knowledgeable enough about maintenance to determine what has to be done, and which employees have the skills to perform required tasks. In addition, the fact that Struthers referred to the custodial staff as “my staff” reflects that he considers himself to be their supervisor. His statement that anyone on his staff could fix a leaky faucet “with proper supervision,” combined with his earlier statement that his job includes showing other employees what he knows, implies that he, Struthers, would be the source of the “proper supervision.”

In addition, Pastor Brophy testified that Struthers supervises the unit employees, allocates the maintenance work among them, and assigns overtime. Unit employees John Malone and Dwain Johnson both testified that Struthers has transferred them between the high school and the elementary school in the past, that Struthers currently directs them in their daily work assignments, and that he occasionally assigns them to work in the parish's other buildings. When they are out sick, both of these employees telephone Struthers. Both Malone and Johnson were called as witnesses by the party claiming Struthers is a unit employee.

In view of the above, it appears from the record that Struthers effectively recommends hiring of new employees and uses independent judgment in the assignment of work. Accordingly, I find that William Struthers is a supervisor as defined in Section 2(11) of the Act, and is ineligible to vote in the election directed below.

The parties agreed on the record that based on their distinct working conditions, hours of employment, benefits and salaries, that unit employees do not share a community of interest with any other employees of the Employer. In addition, it appears from the record that the employees in the petitioned-for unit perform the same maintenance related duties, are the only employees who perform such duties and share common supervision. In light thereof, it appears and I find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a)(1) of the Act:

All full-time and regular part-time custodial/maintenance employees and laborers employed by the Employer at St. Edmund's High School, located at 2472 Ocean Avenue, Brooklyn, New York, and at St. Edmund's Elementary School, located at 1902 Avenue T, Brooklyn, New York, excluding all clerical employees, teachers, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by the Service Employees International Union, Local 74, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of the election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before June 15, 2001. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to the commencement of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with

these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570.

This request must be received by June 22, 2001.

Dated at Brooklyn, New York, June 8, 2001.

/S/ ALVIN BLYER

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