

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DUQUESNE UNIVERSITY OF THE HOLY SPIRIT,

Employer,

v.

No. 06-RC-080933

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO, CLC,

Petitioner.

**EMPLOYER'S REQUEST FOR SPECIAL PERMISSION TO APPEAL FROM THE
REGIONAL DIRECTOR'S ORDER DENYING EMPLOYER'S MOTION TO
WITHDRAW FROM STIPULATED ELECTION AGREEMENT AND REQUEST FOR
EXPEDITED REVIEW**

COMES NOW the Employer, Duquesne University of the Holy Spirit (hereinafter referred to as "Duquesne" or the "University"), pursuant to 29 C.F.R. § 102.26, and files its Request for Special Permission to Appeal to the National Labor Relations Board (hereinafter referred to as the "Board") from the Regional Director's Order Denying Duquesne's Motion to Withdraw from Stipulated Election Agreement and Request for Expedited Review. In support of its Request, Duquesne will show as follows:

I. Introduction and Factual Background

Duquesne requests that the Board grant its Request for Special Permission to Appeal in order to resolve whether the Board can properly exercise jurisdiction over Duquesne in light of the religious exemption from Board jurisdiction recognized by the Supreme Court in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). The Regional Director, in its Order Denying

Duquesne's Motion to Withdraw from a Stipulated Election Agreement, essentially ignored Supreme Court precedent and relied on Duquesne's failure to challenge jurisdiction before the Board on prior occasions in support of its ruling. Because jurisdiction cannot be waived, the Regional Director's failure to address the merits of Duquesne's arguments regarding jurisdiction constituted reversible error.

On May 14, 2012, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (hereinafter referred to as the "Petitioner"), filed a petition in the above-captioned case, seeking to represent non-tenure track adjunct faculty in the McAnulty College and Graduate School of Liberal Arts. On May 25, 2012, the Regional Director approved a Stipulated Election Agreement executed by Duquesne and the Petitioner in a unit of "[a]ll part-time faculty employed by [Duquesne] in the McAnulty College and Graduate School of Liberal Arts located in Pittsburgh, Pennsylvania; excluding all full-time faculty, graduate students, staff and administrators, office clerical employees and guards, other professional employees and supervisors as defined in the Act, and all other employees." The election in this matter is currently scheduled for a mail ballot with voting commencing on June 22, 2012 and ending on July 9, 2012.¹ On June 14, 2012, Duquesne filed its Motion to Withdraw from the Stipulated Election Agreement and Request for Expedited Review² with the Regional Director.

On June 18, 2012, the Regional Director denied Duquesne's Motion, finding that the Board could exercise jurisdiction over Duquesne because it had done so on occasions in the

¹ Pending the resolution of this Request, Duquesne requests that the Board cancel the election, or allow the election to occur but impound the ballots.

² Duquesne's Motion to Withdraw from Stipulated Election Agreement and Request for Expedited Review is attached hereto as Exhibit "A." Duquesne sought expedited review from the Regional Director in order to have time to pursue a special review to the Board if the Regional Director ruled adverse to Duquesne, which it did.

past.³ The Regional Director did not address the fact that Duquesne never contested jurisdiction in those cases.⁴

II. Argument

A. **Jurisdiction Cannot Be Waived.**

In its Order Denying Duquesne's Motion to Withdraw from the Stipulated Election Agreement, the Regional Director ruled that the Board can exercise jurisdiction over Duquesne because it exercised jurisdiction over Duquesne in *Duquesne University of the Holy Ghost*, 261 NLRB 587 (1982), as well as three other representation cases, including the instant case. The Regional Director has failed to acknowledge that jurisdiction before the Board cannot be waived. In light of Duquesne properly contesting jurisdiction in this case, the Regional Director was obligated to address Duquesne's jurisdiction arguments rather than simply relying on "precedent" in which the issue of jurisdiction was not before the Board.

The Board has a well-established rule that "once an election agreement has been approved, a party may withdraw therefore only upon an affirmative showing of unusual circumstances or by agreement of the parties." *First FM Joint Ventures, LLC*, 331 NLRB 238, 239 (2000) (citing *Sunnyvale Medical Center*, 241 NLRB 1156 (1979)). The Petitioner opposed Duquesne's requested withdrawal from the Stipulated Election Agreement. In its Motion, Duquesne argued that the "unusual circumstances" that should allow Duquesne to withdraw from the Stipulated Election Agreement is the inability of the Board to exercise jurisdiction over Duquesne pursuant to *Catholic Bishop*. Even the Petitioner would be forced to concede that a

³ The Regional Director's Order Denying Duquesne's Motion to Withdraw from Stipulated Election Agreement is attached hereto as Exhibit "B."

⁴ In *Duquesne University of the Holy Ghost*, 261 NLRB 587 (1982), Duquesne initially challenged the jurisdiction of the Board but later withdrew its challenge.

Stipulated Election Agreement between Petitioner and Duquesne is irrelevant and of no regard if the Board does not have jurisdiction.

The question of whether Duquesne is exempt from the National Labor Relations Act under *Catholic Bishop* is the type of jurisdictional issue that is not subject to waiver. See *NLRB v. Cheney Cal. Lumber Co.*, 327 U.S. 385 (1946); *Local 900, Int'l Union of Elec., Radio & Machine Workers v. NLRB*, 727 F.2d 1184, 1191 n.5 (D.C. 1984) (“A court can always invalidate Board action that is patently beyond the Board’s jurisdiction, even if the jurisdictional challenge was never presented to the Board”). For instance, in *Carroll College, Inc. v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009), the United States Court of Appeals for the District of Columbia Circuit held that the Board lacked jurisdiction over the employer pursuant to *Catholic Bishop* even though the employer raised the issue for the very first time on appeal, and did not raise the issue before the Board. *Id.* at 574. The *Carroll College* court opined that the Board had no authority to order the employer to bargain with the union, and invalidated the Board’s order. *Id.*

The Regional Director’s Order should have addressed, on the merits, Duquesne’s arguments regarding jurisdiction. Even though Duquesne stipulated to the election agreement, it did not thereby waive any right to assert that the Board lacked jurisdiction. It would be efficient and economical for the Board to address the issue of jurisdiction now rather than allowing the election to proceed and later determining that the effort put forth to hold the election and potentially certifying a bargaining unit was for naught because the Board does not have jurisdiction to order Duquesne to bargain.

B. The Board has Not Addressed the Issue of Jurisdiction over Duquesne under current Board and Case Precedent.

Contrary to the Regional Director’s statements in the Order Denying Duquesne’s Motion to Withdraw from Stipulated Election, the Board has never ruled that it can exercise jurisdiction

over Duquesne under current precedent. The Regional Director cited *Duquesne University of the Holy Ghost*, 261 NLRB 587 (1982), in support of its ruling. In *Duquesne University*, Duquesne initially filed a motion to dismiss based on *Catholic Bishop* and asserted that the Board lacked jurisdiction. *Id.* at 587. Thereafter, Duquesne withdrew its motion to dismiss and indicated that it had no objection to the Board's assertion of jurisdiction in that proceeding. *Id.* The Board, in its Decision and Order, noted that Duquesne had withdrawn its contention that *Catholic Bishop* was a bar to the Board's jurisdiction. *Id.* The Board further opined in *Duquesne University* that the Board was not precluded from exercising jurisdiction over Duquesne pursuant to *Barber-Scotia College, Inc.*, 245 NLRB 406 (1979), which held that *Catholic Bishop* applied only to parochial elementary and secondary schools. *Id.*

As the Board is well-aware, the Board has since overruled *Barber-Scotia* and now considers the application of *Catholic Bishop* to educational institutions on all levels of education "on a case-by-case basis." *St. Joseph's College*, 282 NLRB 65, 68 (1986) (emphasis supplied). The Regional Director also places significant emphasis on Duquesne not contesting jurisdiction in prior representation cases involving Duquesne. Such emphasis is grossly misplaced. Simply because Duquesne has not contested jurisdiction in previous cases does not preclude it from raising the issue in this case. As the Board knows, the Board's precedent regarding *Catholic Bishop* has developed significantly over the years. As noted by the D.C. Circuit, the Board currently utilizes the "substantial religious character" test to determine whether it can exercise jurisdiction over colleges and universities. *Carroll College, Inc. v. NLRB*, 558 F.3d 568, 571 (D.C. Cir. 2009). Duquesne submits, as is explained in depth in its Motion to Withdraw from Stipulated Election Agreement, that it can satisfy the substantial religious character test. Additionally, Duquesne urged the Regional Director to adopt and apply the bright-line test from

University of Great Falls v. NLRB, 278 F.3d 1335 (D.C. Cir. 2002). Under the *Great Falls* test, a university is exempt from the Board's jurisdiction if it: (1) holds itself out to students, faculty and the community as providing a religious educational environment, even if its principal academic focus is on "secular" subjects; (2) is organized as a nonprofit; and (3) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion. *Id.* at 1341-42. Duquesne also satisfies the *Great Falls* test.

Significantly, there are two other cases pending before the Board that raise the very same issues under *Catholic Bishop*. In *Saint Xavier University*, Case No. 13-RC-22025 and *Manhattan College*, Case No. 2-RC-23543, the Board has granted the employers' Requests for Review to determine whether the Board can exercise jurisdiction in light of *Catholic Bishop*. Saint Xavier and Manhattan College are both Catholic institutions.

In these circumstances, it is compelling that the Board should grant Duquesne's Request for Special Permission to Appeal.

III. Conclusion

For the reasons stated above, Duquesne respectfully requests that the Board grant its Request for Special Permission to Appeal from the Regional Director's Order Denying Duquesne's Motion to Withdraw from Stipulated Election Agreement and Request for Expedited Review. Duquesne further requests that the Board remand this matter to the Regional Director for Region Six for a hearing to develop a full and complete record, and thereafter transfer this matter to the Board for review. Meanwhile, it is requested that if the election proceeds beginning June 22, 2012, that the ballots be impounded pending review by the Board.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certified that a true and correct copy of the foregoing was served via FedEx on the following on this 19th day of June, 2012:

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