

VERMONT LABOR RELATIONS BOARD

LOCAL 1369, AFSCME,)	
AFL-CIO)	
)	
and)	DOCKET NO. 91-63
)	
KELLOGG-HUBBARD LIBRARY)	

MEMORANDUM AND ORDER

At issue is whether the Vermont Labor Relations Board should assert jurisdiction over this election petition filed by Local 1369, AFSCME to represent employees of Kellogg-Hubbard Library, a private non-profit library. The Library contends that the Board cannot take jurisdiction because the following provision of the State Labor Relations Act, 21 VSA §1505, has not been met:

This chapter shall not apply to any employer or any labor dispute which affects commerce within the meaning of the national labor relations act, as amended, unless the national labor relations board shall have ceded jurisdiction thereof to the board pursuant to section 10(a) of said act or shall have declined to assert jurisdiction thereof pursuant to section 14(c) of said act.

Section 10(a) of the National Labor Relations Act ("NLRA") provides that the National Labor Relations Board ("NLRB") is empowered by agreement with any agency of any state... to cede to such agency jurisdiction over any cases in any industry... even though such cases may involve labor disputes affecting commerce". Section 10(a) is not applicable to this case since our Board has entered into no agreement with the NLRB with respect to such cases.

Section 14(c) of the NLRA provides:

The Board in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedures Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers where, in the opinion of the Board, the effect of such dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction.

At issue is whether the National Board has declined to assert jurisdiction over the "class or category of employers" to which Kellogg-Hubbard Library belongs pursuant to Section 14(c) of the NLRA. In an Advisory Opinion of the NLRB issued on August 22, 1990, the NLRB indicated that it would not assert jurisdiction over the Rutland Free Library, a private non-profit library, because the library's gross annual revenues were less than \$1 million. Rutland Free Library and Local 1201, AFSCME and Vermont Labor Relations Board, 299 NLRB No. 90 (1990). Pursuant to this Advisory Opinion, our Board asserted jurisdiction over the Rutland Free Library (VLRB Docket No. 89-57).

Kellogg-Hubbard Library belongs in the same "class or category of employers" as the Rutland Free Library pursuant to Section 14(c) of the NLRA, since it too is a private non-profit library with gross annual revenues less than \$1 million, as Kellogg-Hubbard Library admits. Thus, assuming the Rutland Free Library opinion of the NLRB may be considered precedent, then it is evident the NLRB would not take jurisdiction over Kellogg-Hubbard library. Nonetheless, Kellogg-Hubbard Library maintains the advisory opinion is and was merely advisory, and does not establish any precedent which would allow our Board to

proceed to take jurisdiction. Thus, we must decide whether the Rutland advisory opinion constitutes precedent allowing the Board to assume jurisdiction over Kellogg-Hubbard Library.

In University of Vermont v. State of Vermont, 748 F.Supp. 235 (D. Vt. 1990), Federal District Judge Coffrin discussed the NLRB advisory opinion process in detail. In that case, subsequent to an Act by the Vermont General Assembly placing the University of Vermont ("UVM") within the coverage of the Vermont State Employees' Labor Relations Act, our Board petitioned the NLRB for an advisory opinion concerning whether the NLRB would assert jurisdiction over UVM. On November 21, 1989, the NLRB issued an advisory opinion, holding that UVM was a political subdivision of the State and was not an employer within the meaning of the NLRA. 297 NLRB No. 42.

UVM brought an action for a declaratory judgment against the State of Vermont, in Federal district court, seeking an order that the legislative act placing UVM within the coverage of the Vermont State Employees' Labor Relations Act was in violation of the Supremacy Clause of the US Constitution and was preempted by the NLRA. UVM v. State of Vermont, 748 F.Supp. at 236. The NLRB moved to dismiss UVM's complaint, contending that the district court lacked subject matter jurisdiction to review the Board's decision, expressed in the advisory opinion, that UVM was not an employer within the meaning of the NLRA and that the Vermont legislative act was not pre-empted by the NLRA. Id. at 238.

The NLRB advisory opinion was issued pursuant to an NLRB regulation, promulgated pursuant to the Administrative Procedure Act, reported at 29 C.F.R. 102.98 (b), which reads as follows:

Whenever an agency or court of any State or territory is in doubt whether the Board would assert jurisdiction over the parties in a proceeding pending before such agency or court, the agency or court may file a petition with the Board for an advisory opinion on whether the Board would decline to assert jurisdiction over the parties before the agency or the court 1) on the basis of its current standards, or 2) because the employing enterprise is not within the jurisdiction of the National Labor Relations Act.

The NLRB asserted that under this regulation it is empowered to determine its own jurisdiction without hearing and without review by the district courts. UVM v. State of Vermont, 748 F. Supp. at 242. Judge Coffrin concurred, and granted the NLRB's Motion to Dismiss. Judge Coffrin stated in pertinent part:

The agency's interpretation of its own regulations is binding on the court unless it is plainly erroneous or inconsistent with the text of the regulation itself... We cannot say that the Board's interpretation of its regulation is inconsistent or erroneous in this case...

Nor does the Board's promulgation of advisory opinion rules to decide its jurisdiction exceed its rule making authority...

...(T)he advisory opinion process comports with Congressional intent as expressed in the Act and its legislative history. Just as Board orders in representation proceedings are generally unreviewable in district courts - including those regarding whether an entity is or is not an employer, or should or should not get a hearing - so too should advisory opinions on such subjects be immune from review in the district courts.

...Thus, we accept the Board's interpretation that this court lacks subject matter jurisdiction to review the advisory opinion. Id. at 242-243.

Judge Coffrin further rejected UVM's constitutional claims that granting the Board's motion to dismiss on the basis of the advisory opinion violates UVM's due process rights to a hearing before the NLRB and to judicial review of the NLRB opinion. Id. at 244-247.

Thus, the NLRB is empowered to determine its own jurisdiction through the advisory opinion process. The UVM decision by Judge Coffrin makes it clear that an NLRB advisory opinion has more authority than Kellogg-Hubbard Library contends. However, there is a distinction between the UVM case and the Kellogg-Hubbard situation. In the UVM case, the advisory opinion was issued with respect to the specific parties before the Court. In the situation involving Kellogg-Hubbard Library, an advisory opinion has been issued in a comparable case (i.e. Rutland Free Library), but not specifically with respect to Kellogg-Hubbard Library.

Nonetheless, we conclude that a review of the NLRB opinion in Rutland Free Library necessarily leads to the conclusion that the NLRB intended to establish a standard declining jurisdiction over all private non-profit libraries whose gross annual revenues are less than \$1 million. This is made clear by footnote 2 of the opinion:

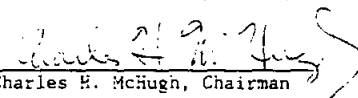
...Based on data obtained by the Board, it appears that the adoption of this standard will bring approximately 15 percent of the private non-profit library establishments and 43 percent of the employees within the coverage of the Act - percentages roughly equal to the overall percentages of other types of private non-profit establishments and employees that are covered under the "cultural/educational-adjunct" standard.

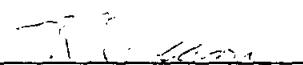
Thus, it is clear to us that the NLRB, by the Rutland opinion issued through the advisory opinion process, has declined to assert jurisdiction over the "class and category of employers" to which Kellogg-Hubbard Library belongs, pursuant to Section 14(c) of the NLRA. Since we are not "in doubt" as to whether the NLRB would assert jurisdiction, there is no need for our Board to petition the NLRB for an advisory opinion on the matter pursuant to 29 C.F.R. 102.98(b).

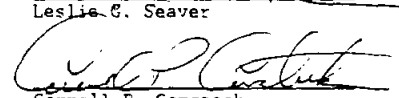
Now therefore, based on the foregoing reasons, it is hereby ORDERED that the Vermont Labor Relations Board will take jurisdiction in this matter under the Vermont State Labor Relations Act, 21 VSA §1501, et seq.

Dated this 10th day of February, 1992. at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD


Charles H. McHugh, Chairman


Leslie G. Seaver


Carroll P. Comstock