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National Labor Relations Board Advisory Opinions and Their Effects Upon State Jurisdiction

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NATIONAL LABOR RELATIONS BOARD ADVISORY OPINIONS AND THEIR EFFECTS UPON STATE JURISDICTION

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The National Labor Relations Board has issued approximately seventy advisory opinions pursuant to section 102.98 of its regulations.[1] This procedure was promulgated in 1959 "to eliminate the 'no-man's land' between state and federal jurisdiction by permitting the expeditious resolution of doubts arising from the applicability of the Board's . . . 'discretionary standards to the "commerce operations" of an employer.' "[2]

An advisory opinion will only be delivered when an employer and a labor union are parties to a pending action before either a state court or a state administrative agency. If in court, the employer is usually seeking injunctive relief or damages because of certain union conduct. The defendant union will file a petition for advisory opinion in support of a claim that the state court is without jurisdiction over it or over the subject matter of the dispute because of federal pre-emption.[3] In some cases the court itself has petitioned for an advisory opinion. The employer is usually interested in resisting a challenge to the jurisdiction of the state court. In the situation where the employer is before a state administrative agency, perhaps because a union has charged it with unfair labor practices or because a union is seeking certification under state law as collective-bargaining representative, the employer will argue against the state's assertion of jurisdiction and will attempt to implement its argument with a petition for an advisory opinion. State agencies, also, have at times assumed the initiative in seeking an advisory opinion.

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1. The section reads as follows:

§ 102.98 *Petition for advisory opinion; who may file; where to file.*

(a) Whenever a party to a proceeding before any agency or any court of any State or Territory is in doubt whether the Board would assert jurisdiction on the basis of its current jurisdictional standards, he may file a petition with the Board for an advisory opinion on whether it would assert jurisdiction on the basis of its current standards.

(b) 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 on the basis of its current standards.

29 C.F.R. § 102.98 (1963).

2. Interlake S.S. Co., 138 N.L.R.B. 576 (1962).

3. *E.g.*, Local 438 Constr. Union v. Curry, 83 Sup. Ct. 531 (1963).

The procedure to secure an advisory opinion is relatively simple. Section 102.99 of the NLRB's regulations sets forth the information required;[4] this varies slightly, depending on whether the petitioner is an official state agency, or a state court, or a private party. The time interval between filing of the petition and ruling by the Board appears to be considerably shorter than that required for a full unfair labor practice proceeding; the time interval is no shorter than that for contested representation proceedings (where review of the regional director's decision and order is not granted). There has been no Board delegation of the advisory opinion process to its regional directors, although section 3(b) of the National Labor Relations Act conceivably sanctions such delegation.[5] The advisory opinion petition when submitted by a private party must state whether there are any other proceedings before the NLRB in reference to the dispute at hand. It appears that this information is intended for purposes of avoiding a duplicate or possibly conflicting jurisdictional determination by the Board.[6]

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4. *Contents of petition for an advisory opinion.*

(a) A petition for an advisory opinion, when filed by a party to a proceeding before an agency or court of a State or Territory, shall allege the following:

(1) The name of the petitioner.
(2) The names of all other parties to the proceeding.
(3) The name of the agency or court.
(4) The docket number and nature of the proceeding.
(5) The general nature of the business involved in the proceeding.
(6) The commerce data relating to the operations of such business.
(7) Whether the commerce data described in this section are admitted or denied by other parties to the proceeding.
(8) The findings, if any, of the agency or court respecting the commerce data described in this section.
(9) Whether a representation or unfair labor practice proceeding involving the same labor dispute is pending before the Board, and, if so, the case number thereof.

Petitions under this subsection shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief.

(b) A petition for an advisory opinion, when filed by an agency or court of a State or Territory, shall allege the following:

(1) The name of the agency or court.
(2) The names of the parties to the proceeding.
(3) The docket number and nature of the proceeding.
(4) The general nature of the business involved in the proceeding.
(5) The findings of the agency or court, or in the absence of findings, a statement of the evidence relating to the commerce operations of such business.

29 C.F.R. § 102.99 (1963).

5. The Board is . . . authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists . . . except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

73 Stat. 542 (1959), 29 U.S.C. 153(b) (Supp. IV, 1963).

6. 29 C.F.R. § 102.99(a)(9) (1963). If there has been a prior dispute before the

Classified according to their effect, the roughly seventy opinions handed down to date fall into three categories:

1. Advisory opinions which state that under the submitted facts the Board would or would not assert jurisdiction over the employer.
2. Advisory opinions which state that the subject matter of the petition is beyond the scope of the advisory opinion procedure.
3. Advisory opinions which dismiss the petition because it presents insufficient commerce information.

The availability of the proceeding was recognized by the Pennsylvania supreme court in the July, 1963, decision, *Pennsylvania Labor Relations Bd. v. Butz.*[7] An employer contended that certain letters from the Regional Director relating to the withdrawal of an election petition previously filed with the NLRB could not constitute a declination of jurisdiction[8] which would under a provision of the NLRA[9] permit the state agency to assume jurisdiction. The court pointed out that if the employer had doubted that the NLRB would deny jurisdiction, he could have asked for an advisory opinion.[10] "Until the employer so acted," the court concluded, "the determination of the Director is the final determination of the National Board's jurisdiction."[11]

This Article considers the effects of advisory opinions on the jurisdiction of state tribunals. Confronting these tribunals will be the question of whether they may take jurisdiction under the Landrum-Griffin amendment to the NLRA[12] or whether they cannot take jurisdiction because of the doctrine of federal pre-emption.[13]

Prior to the amendment to the NLRA in 1959, state agencies and courts were deprived of jurisdiction over employers who were subject to the act even though the NLRB declined to exercise its jurisdiction, unless the Board had specifically ceded jurisdiction pursuant to section 10(a) of the act.[14] Thus, the "no-man's land" earlier alluded to was created.

Board, the jurisdictional issue will have already been decided, absent changes in relevant jurisdictional facts.

7. 411 Pa. 360, 192 A.2d 707 (1963).

8. The letters had said that although a petition had been before the NLRB, the petition was withdrawn because the Board was of the view that it could not properly exercise jurisdiction. *Id.* at 367, 192 A.2d at 711-12. For the procedure through which the petition was "withdrawn," see 29 C.F.R. § 101.18 (1963).

9. § 14(c)(2), added by 73 Stat. 541 (1959), 29 U.S.C. 164(c)(2) (Supp. IV, 1963).

10. 411 Pa. at 371 n.8, 192 A.2d at 713-14 n.8.

11. *Ibid.*

12. 73 Stat. 541 (1959), 29 U.S.C. 164(c)(2) (Supp. IV, 1963).

13. A leading case on this point is Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957).

14. [T]he Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial

NLRB jurisdiction extends to labor disputes which tend to burden, obstruct, or affect commerce. The NLRA contains appropriate definitions for the terms "labor dispute,"[15] "commerce,"[16] and "affecting commerce."[17] Included under Board jurisdiction are both representation proceedings and unfair labor practices proceedings. Historically, the Board limited its assertion of jurisdiction to cases which had in its opinion a substantial effect on commerce.[18] To guide the exercise of its discretion, the Board adopted jurisdictional standards of a monetary nature, relating either to the gross volume of business or to purchases or sales across state lines. The first standards were adopted in 1950 and were modified in 1954.[19] Four years later, in response to the Supreme Court opinion in *Guss v. Utah Labor Relations Bd.*[20] and because of the receipt of additional appropriations, the NLRB announced "new specific standards to guide it in asserting jurisdiction."[21] The two major standards were labeled "retail" and "nonretail."[22] Most employers were judged by one of these general standards, although certain industries, including public utilities, transit systems, newspapers, and communications systems, were accorded individual jurisdictional standards.[23] If an employer fitted into the nonretail category, only a monetary standard had to be met to show "statutory" or "legal" jurisdiction in the Board.[24] Where the employer was characterized as retail, the Board would consider the nature

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statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

§ 10(a), as amended, 63 Stat. 107 (1949), 29 U.S.C. § 160(a) (1958).

15. The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

§ 2(9), as amended, 61 Stat. 137 (1947), 29 U.S.C. § 152(9) (1958).

16. The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

§ 2(6), as amended, 61 Stat. 137 (1947), 29 U.S.C. § 152(6) (1958).

17. "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." § 2(7), 61 Stat. 137 (1947), 29 U.S.C. § 152(7) (1958).

18. See Guss v. Utah Labor Relations Bd., 353 U.S. 1, 3 (1957).

19. 23 NLRB ANN. REP. 7 (1958).

20. 353 U.S. 1 (1957).

21. 23 NLRB ANN. REP. 8 (1958).

22. *Ibid;* see Siemon's Mailing Serv., 122 N.L.R.B. 81 (1958).

23. 23 NLRB ANN. REP. 8 (1958).

24. 25 NLRB ANN. REP. 19-20 (1960).

of the employer's business and the impact of a labor dispute therein upon commerce before asserting jurisdiction.[25]

THE 1959 AMENDMENT

Two principal lines of attack on the no-man's land were considered by the Eighty-Sixth Congress at their Second Session in working out the section 14 amendment to the NLRA.[26] The first attack directed itself at finding some means of providing for state jurisdiction over disputes declined by the Board. The second line of attack proposed would have required the NLRB to assert jurisdiction over all employers covered by the act, but this scheme never materialized. Congressmen Elliott and Shelley introduced H.R. 8342[27] and 8490,[28] respectively. These bills supported the latter concept, requiring the Board to "assert jurisdiction over all labor disputes arising under the Act."

The alternative device of placing jurisdiction into state hands began with Senator Kennedy's S. 505, establishing a new section 14(c) which permitted the Board to cede jurisdiction to the state "by agreement with any agency of any state or territory."[29] Senator Goldwater's S. 748 would have amended section 6 of the act by adding a new section 6(b)(1) providing the Board "at its discretion, may, by rule or otherwise, decline to assert jurisdiction. . . ."[30] S. 1386, proposed by Senator McClellan, included a new section 14(c)(1) requiring the Board within 30 days after enactment to "clearly establish and publish by rule or otherwise such limitations on its exercise of jurisdiction as it proposes to observe."[31] Bill S. 1555 as originally proposed permitted the Board to enter into "agreement with any agency of any state."[32] As passed on April 25, 1959, S. 1555 gave jurisdiction to the states in cases over which the Board has jurisdiction but *"by rule or otherwise, has declined to assert jurisdiction."*[33] H.R. 7265, introduced by Congressman Kearns, also authorized the Board to decline jurisdiction *"by rule or otherwise."*[34] Congressman Landrum introduced H.R. 8400 which contained the present language of section 14(c).[35] The House Managers' Conference Report stated in reference to the act as passed:

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25. *Id.* at 20.
26. § 15(c), added by 73 Stat. 541 (1959), 29 U.S.C. 164(c) (Supp. IV. 1963). Section 14(c)(1) is quoted in note 37 *infra.*
27. 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 687 (1959).
28. *Id.* at 865.
29. *Id.* at 29.
30. *Id.* at 84.
31. *Id.* at 332.
32. *Id.* at 338.
33. *Ibid.*
34. *Id.* at 586.
35. *Id.* at 619.

> The House amendment contains a provision which authorizes the Board, in its discretion, *by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act* to 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 labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. The House amendment provides further that nothing in the National Labor Relations Act, as amended, shall be deemed to prevent or bar any agency or the courts of any State or territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands) *from assuming and asserting jurisdiction over labor disputes over which the Board, in its discretion, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act declines to assert jurisdiction.*[36]

In light of the legislative history, section 14(c)(1) does not give unlimited freedom to decline jurisdiction but instead specifies that the Board must follow certain means.[37]

The Jurisdiction Granted State Tribunals

The NLRB issued regulation 102.98[38] (advisory opinions on board jurisdiction) for the purpose of providing a means of declining jurisdiction so that state tribunals could take jurisdiction under the new section 14(c).[39] Thus, in *Meadow Stud, Inc.*,[40] an early advisory opinion, the Board stated, "[W]e have determined to decline jurisdiction . . . thereby leaving the states free to assert their jurisdiction." And in the companion case of *William H. Dixon*,[41] the following language appears:

> We do not believe that State "labor relations acts" are the only means of regulation, nor do we regard State labor relations boards as the only State tribunals through which a State may assert jurisdiction over labor disputes, especially in view of the congressional policy of ceding to any State agency or any State court jurisdiction in those areas where we decline. Since our declination of jurisdiction . . .

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36. *Id.* at 934. (Emphasis added.)

37. The section reads as follows:

The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure 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 labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

73 Stat. 541 (1959), 29 U.S.C. § 164(c)(1) (Supp. IV, 1963).

38. 29 C.F.R. § 102.98 (1963).

39. 25 NLRB Ann. Rep. 19 (1960).

40. 130 N.L.R.B. 1202, 1204 (1961).

41. 130 N.L.R.B. 1204, 1207-08 (1961).

> leaves the States free to assert jurisdiction, . . . our declination . . . will not defeat the purposes of our Act.

In both cases the Board determined that it had statutory or legal jurisdiction but elected to decline to exercise that jurisdiction on the ground that the activities involved were essentially local in nature.

Shortly thereafter, two regional directors dismissed section 9(c) representation and certification proceedings[42] involving similar employer activities. Sustaining the directors' dismissals the Board relied upon its *Meadow Stud, Inc.* and *William H. Dixon* advisory opinions. The District Court for the District of Columbia ruled in favor of the Board when one of the employers party to the section 9(c)(1) petition sought to compel the Board to assert jurisdiction. However, upon review the court of appeals reversed the district court and remanded the case to the NLRB.[43] In reference to the earlier advisory opinions, Judge Danaher reasoned as follows:

> The Board . . . would have us accept those two advisory opinions as "rules of decision." We decline to do so.
>
> We are firmly of the view that Congress did not intend as to an entire class or category that states are to control conduct which is the subject of national regulation upon the mere *ipse dixit* of the Board. We are persuaded rather that Congress intended that jurisdiction as to such class or category might be declined either (1) by rule-making as provided in sections 6 and 14(c) of the Act, or (2) as the result of hearings (which might culminate in a rule of decision, to be sure) but hearings as an essential of due process, nevertheless.
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> . . . .
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> If . . . there be a hearing, the rights of the appellants and other parties may be defined, and the determination shall become a decision

42. Section 9(c) reads thus:

> (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
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> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

61 Stat. 144 (1951), 29 U.S.C. § 159(c)(1) (1958).

43. Hirsch v. McCulloch, 303 F.2d 208 (D.C. Cir. 1962).

> with respect to the issues raised and considered and settled in that proceeding. The *ad hoc* rule so established by that decision under section 9(c) may in a later case satisfy the requirements of section 14(c) that jurisdiction as to a *class or category of employers* thereafter may be declined. Meanwhile, however, to meet the essentials of due process, there will have become available the findings and conclusions of the Board subject to judicial review.[44]

The Board in October, 1962, issued its decision and order dealing with the remanded case.[45] The Board stated:

> The court noted that our advisory opinions in *Meadow Stud* and *William H. Dixon* were not based on hearings and these opinions, therefore, were not "rules of decision" within the meaning of Section 14(c)(1) of the Act, under which the Board could decline to assert jurisdiction over a representation dispute involving an entire "class or category of employers." The court therefore held that the Board has not yet determined in a proper manner . . . whether to assert jurisdiction over the activities engaged in by these Employers.[46]

The Board conducted hearings, considered the evidence, and concluded that "although the operations of the racing industry affect commerce, the effect of labor disputes involving these employers 'is not sufficiently substantial to warrant the exercise of . . . jurisdiction.' "[47]

Whether this means that the NLRB accepts the circuit court's reasoning is not clear. Some indication that it does not or at least some indication that it narrowly construes the circuit court's findings is found in the Board's language in a later advisory opinion, *Chartiers Country Club:*[48]

> The Board also rejects the Employer's second contention that the Board cannot act herein because under Section 14(c) of the Act, the Board can take jurisdictional action over "any class or category of employers" only "by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act" and that an Advisory Opinion is neither of these statutory alternatives. As the Board has applied its current retail and nonretail standards *only* to the specific Employer herein, and not to the class of employers to which it belongs, the Board finds that, aside from any other considerations, the statutory limitations of Section 14(c) are inapplicable because no "class or category of employers" is involved.

In the *Chartiers* case, as in the *Kelley*[49] case, the Board admitted the absence of any specific jurisdictional standards for the employer's type of

44. *Id.* at 213.
45. Walter A. Kelley, 139 N.L.R.B. 744 (1962).
46. *Id.* at 744-45.
47. *Id.* at 746.
48. 139 N.L.R.B. 741, 743 (1962). (Footnote omitted.)
49. 139 N.L.R.B. 744 (1962).

operation. Whether the Board would or should by this device avoid Judge Danaher's ruling is subject to severe doubt.

This attempted application of jurisdictional standards without due process was repeated in *Muskegon Country Club*.[50] The Board finally decided upon which jurisdictional standard to apply to country club employers as a class in accordance with the requirements of due process in *Walnut Hills Country Club*.[51] In so doing the Board stated: "We therefore decide the question left open in the El Paso and Chartiers Country Club *decisions* . . . ."[52] Due process was obtained through the statutory investigation and hearing provisions of section 9(c)(1) of the NLRA. The Board's characterization of its earlier *Chartiers Country Club* advisory opinion as a "decision" would seem to indicate that Judge Danaher's admonition has fallen upon deaf ears.

Very recently the Board has taken another position with regard to its advisory opinion procedure. In *City Line Open Hearth, Inc.*,[53] the Board states:

> The rendering of advisory services to state tribunals and to the parties to proceedings before such tribunals flows from the Board's statutory authority to administer the Act and is an incident of the Board's responsibilities under the Act even in the absence of pending Board proceedings. Furthermore, the Board's Advisory Opinion procedures are sanctioned under Section 6 of the Act, wherein the Board is authorized "to make . . . such rules and regulations as may be necessary to carry out the provisions of this Act."

Nothing contained in section 6 of the act[54] sanctions avoidance by the Board of the specific legislative requirements of section 14(c)(1) and (2).[55]

Objections have been raised to the advisory opinion procedure. In *Jemcon Broadcasting Co.*,[56] the Board attempted to answer an objection based on due process:

> Nor is there any merit to the contention that the Board's Advisory Opinion procedure deprives the Employer of due process. By their very nature, such procedures do not contemplate holding a hearing as they were devised merely to give advice to parties in a State proceeding and to the State court or agency before whom the proceeding

50. 144 N.L.R.B. No. 4 (1963).
51. 145 N.L.R.B. No. 9 (1963).
52. Emphasis supplied.
53. 141 N.L.R.B. No. 74 (1963).
54. National Labor Relations Act § 6, as amended, 61 Stat. 140 (1947), 29 U.S.C. § 156 (1958).
55. In *City Line* the Board applied its retail standard to the employer. Thus, this employer fell into a category as to which standards had been properly established. See in this connection p. 35 *infra*.
56. 135 N.L.R.B. 362 (1962).

> may be pending as to whether, *on the facts submitted*, the Board would or would not assert jurisdiction.[57]

And a little later in *Terrizzi Beverage Co.*[58] the Board concluded, "[T]he fact that neither [of the employers] are parties to the . . . proceeding herein would not prevent the Board from asserting jurisdiction . . . ."[59]

Judge Danaher's decision in *Hirsch v. McCulloch*[60] appeared to say that advisory opinions could not be employed for purposes of giving a state tribunal jurisdiction where there has been no commerce standard determined earlier for the class of employers involved in the petition for advisory opinion. Even if the Board seeks to apply one of its "general" standards (retail or nonretail), does not procedural due process have to be observed in determining its applicability?

The description of the Board's proceeding as an "advisory opinion" is an unfortunate use of terminology as far as the Board's use of their opinions as "rules of decision" is concerned. As the court points out in *Hirsch*[61] the expression "rules of decision" is used not only in section 14(c) but in sections 9(c)(2) and 9(c)(4)[62] of the national act. The Judge also refers to another federal statute where, as he puts it, "Congress has given status to 'rules of decision.' "[63] He cites *Carroll v. Lessee of Carroll*[64] as distinguishing between decisions and opinions.

The term rules of decision received distinguished use in the classic case of *Erie R.R. v. Tompkins*[65] where the Supreme Court said that "federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written." In the earlier Vermont case of *E.B. & A.C. Whiting Co. v. City of Burlington*[66] the Vermont Court reasoned:

> By "a rule of decision" as the term is used . . . is meant that the common law adopted in this state is the law of this state, and is to be administered as such by our courts. It is the foundation of our jurisprudence, and, except as modified or repealed by statute, its rules and principles determine the rights of, and prescribe rules of

57. *Id.* at 367.
58. 137 N.L.R.B. 495 (1962).
59. *Id.* at 498. Nor did the Board agree with the argument that it should not assert jurisdiction because possibly an unfair labor practice did not exist. "Advisory opinions are rendered only on the jurisdictional issue presented by the facts submitted, and the Board will not presume to render an opinion on whether the subjecet matter of the dispute is governed by the Act." *Ibid.*
60. 303 F.2d 208 (D.C. Cir. 1962).
61. *Id.* at 213.
62. As amended, 65 Stat. 601 (1951), 29 U.S.C. § 159(c)(2) & (4) (1958).
63. 303 F.2d at 213.
64. 57 U.S. 275, 286 (1853).
65. 304 U.S. 64, 73 (1938).
66. 175 Atl. 35, 42 (Vt. 1934).

> conduct for, all persons, and such rules and principles are to be followed and applied by our courts in all cases to which they are applicable.

The effect given a rule of decision suggests the basis of the requirement that there be a hearing for its formulation. Once the essentials of due process have been observed in an initial hearing leading to the formulation of a rule, subsequent application of this rule does not require a full hearing. This was recognized by Judge Danaher in *Hirsch.*

A logical interpretation of section 14(c)(1) warrants the conclusion that where there is a standard already established by rule of decision or published rule pursuant to the Administrative Procedure Act, some device such as section 102.98 could be employed by which the already existing standard would be applied by the Board to the submitted commerce data. One would expect, however, the Board to dismiss a petition which involves considerations other than the routine application of pre-existing monetary standards. Usually the Board has, either for lack of information or for lack of appropriateness of the subject matter. Thus, in *Puerto Rico Labor Relations Bd.*[67] the Board dismissed the petition after concluding that the issue presented was really one of appropriate unit determination. And in *Interlake S.S. Co.*[68] the Board stated:

> The issues posed herein by the Petitioner relate to whether the Union is a "labor organization" within the meaning of the Act and whether the Union's picketing activities constitute violations of the Act. As these issues do not concern questions of the applicability of the Board's discretionary *commerce* standards, they do not fall within the intendment of the Board's advisory opinion rules.

Earlier, in *Upper Lakes Shipping Ltd.*,[69] the Board had remarked:

> The Board's informal Advisory Opinion procedures generally do not lend themselves to the development of the full and complete record essential to enable the Board to make an informed judgment on . . . important jurisdictional issues . . . like the instant one. Determination of such jurisdictional issues requires an adequate presentation based upon a full and complete record, not present here . . . .

Notwithstanding those observations, the Board seems willing to stretch for jurisdiction on occasion. Consider the case of *Central Electric Supplies Co.*[70] The Board asserted jurisdiction under its nonretail standard after "assuming" that the Employer's annual inflow, both direct and indirect, constituted inflow within the meaning of the Board's standard. The Board

67. 138 N.L.R.B. 1451 (1962).
68. 138 N.L.R.B. 576, 576-77 (1962).
69. 138 N.L.R.B. 221, 222 (1962).
70. 139 N.L.R.B. 1208 (1962).

commented that its assumption "appears to be reasonable."[71] Consider also the case of *Spears-Dehner, Inc.*,[72] in which the Board predicated assertion of jurisdiction upon a "reasonable assumption" that the employer had the requisite amount of nonretail inflow. In a footnote the Board remarked that it did not therefore have to rely upon another "reasonable assumption" which would have established jurisdiction.[73] The employer argued that no jurisdiction should be asserted because there was no unfair labor practice pending in reference to the conduct complained of. This argument was rejected, the Board "assuming, without deciding,"[74] such a practice existed in order to restrict the advisory opinion to the commerce aspect of jurisdiction.

In several cases the Board has declined to make such assumptions, instead noting that the commerce data is insufficient for purposes of asserting jurisdiction and dismissing the petition. This was the procedure in *H. W. Woody.*[75] Similarly, the *Better Elec. Co.*[76] opinion dismissed the petition because the evidence on direct inflow was not clear. And in *Hoisting & Portable Engineers Local 101*[77] the petition was dismissed since the Board could not tell from the facts furnished whether the union conduct affected other secondary employers so as to combine with the primary employer for purposes of meeting the nonretail jurisdictional standard. For some reason in the case of *Chartiers Country Club*[78] the Board did not dismiss the petition after determining that there was insufficient information concerning the direct and indirect inflow of the employer. Instead the Board declined jurisdiction.

Pre-emption

Whether pre-emption will occur is fairly clear in certain kinds of cases. If the issue before a state tribunal is one of representation and certification rights under a state statute, a *proper*[79] assertion of jurisdiction by the Board will pre-empt the state tribunal,[80] and it must dismiss the proceeding. The result is the same when the subject matter of the state tribunal's proceeding relates to the question of whether certain union conduct is prohibited by the state's labor relations act, and a problem arises as to whether the state labor relations board may handle the claim. If the National Board properly asserts

71. *Id.* at 1209.
72. 139 N.L.R.B. 922 (1962).
73. *Id.* at 924 n.3.
74. *Id.* at 924.
75. 125 N.L.R.B. 1172 (1959).
76. 129 N.L.R.B. 1012 (1960).
77. 137 N.L.R.B. 1788 (1962).
78. 139 N.L.R.B. 741 (1962).
79. The terms "proper" and "properly" as used in this discussion connote a Board proceeding which observes the elements of due process mentioned by Judge Danaher in *Hirsch.*
80. Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957).

jurisdiction over the employer, then the union's conduct with reference to this employer, although violative of the state act, is within the exclusive jurisdiction of the NLRB, and again the state is pre-empted.[81]

But the pre-emption doctrine may not apply when the state tribunal is a court of law, and the issue is the legality of certain conduct under state law other than a local labor relations act. The NLRB has uniformly held that its jurisdictional determination through an advisory opinion does not deal with the question of whether the matter in dispute is subject to the NLRA. In *Spears-Dehner, Inc.*, the Board said,[82]

> The Board does not presume to render an Advisory Opinion on the merits of any case or on the question of whether the subject matter of the controversy is governed by the Act. (see Section 101.40(e) of the Board's Statements of Procedure).... Advisory Opinions are limited to . . . whether the commerce operations of the Employer are such that the Board would assert jurisdiction over them . . . .

This self-imposed limitation would seem to leave the state court faced with the question of whether the conduct alleged is "arguably subject to"[83] the protections of section 7[84] or the prohibitions of section 8[85] of the NLRA. Thus the advisory opinion would only determine for the court whether it needed to apply the arguably-subject-to test before it could apply the statutory common law of the state to the conduct involved. If the board declines jurisdiction the test would not have to be applied.

Terrizzi Beverage Co. v. Local No. 830[86] is a good example of what has been discussed. Prior to the Pennsylvania supreme court decision, while the matter was before the lower court with the employer seeking an injunction, the union petitioned for an advisory opinion. Therein the Labor Board ruled that it would assert jurisdiction based upon the commerce data of the secondary employer.[87] The supreme court's opinion stated:

> It is our considered conclusion that the activities complained of . . . are "arguably" within the purview of Section 8(b)(4)(i)(ii)(B) of the Federal statute . . . and that the Pennsylvania courts must, therefore, yield jurisdiction.
>
> We consider it significant, but not conclusive, that the National Labor Relations Board has issued an advisory opinion . . . wherein it asserts it will assume jurisdiction.[88]

81. *Ibid.*
82. 139 N.L.R.B. 922, 924 (1962).
83. See Terrizzi Beverage Co. v. Local 830, 408 Pa. 380, 184 A.2d 243 (1962).
84. As amended, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958).
85. As amended, 61 Stat. 140 (1947), 29 U.S.C. § 158 (1958).
86. 408 Pa. 830, 184 A.2d 243 (1962).
87. 137 N.L.R.B. 495 (1962).
88. 408 Pa. at 385, 184 A.2d at 245.

In this case the Board asserted jurisdiction. Of course, if instead the Board had declined jurisdiction then the Pennsylvania state court could have applied state law as if the NLRB had asserted jurisdiction, but the state court had concluded that the arguably-subject-to test did not deprive it of jurisdiction. Any dismissal of an advisory opinion petition because of insufficient information or because of improper scope of question would in no way be determinative of the state court's jurisdiction.

There are also a few specific types of labor controversies in which pre-emption is not a problem because the doctrine does not apply. If the case concerns itself with picket line violence, for example, the state court can proceed to grant relief regardless of NLRB jurisdiction over the employer.[89]

Conclusions

Advisory opinions are not rules of decision. Due process of law requires a hearing by the NLRB before establishment of any jurisdictional standard. Procedures similar to those called for in section 9(c)(1) of the NLRA leading to a Board "decision" would be proper, as would published rules adopted pursuant to the provisions of the Administrative Procedure Act.

When the Board's advisory opinion applies an already established and applicable jurisdictional standard to the commerce data submitted, the extent to which jurisdiction is thereby ceded under section 14(c)(1) and (2) of the NLRA depends on whether the issue before the state is one of representation rights or illegal conduct. If it involves representation rights then the Board's decision to assert jurisdiction will be determinative of the state's jurisdiction; it is pre-empted. Where the Board declines jurisdiction then the state has jurisdiction pursuant to section 14(c)(1) and (2). If the issue before the state concerns illegal conduct then the Board's advisory opinion is determinative inasmuch as state administrative agency action is concerned. If the Board declines jurisdiction, then presumably the employer is subject to the state's jurisdiction under applicable state statutes. If the Board asserts jurisdiction then the state administrative agency is pre-empted.

In the case of state court action the issuance of an advisory opinion has the effect of determining the applicability of state law. The advisory opinion will serve to tell the state court whether or not it must apply the arguably-subject-to test before local law can be brought to bear on the litigation.

89. Westinghouse Elec. Corp. v. United Elec. Workers, 353 Pa. 446, 46 A.2d 16 (1946).