UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

THE KENNEDY CENTER FOR PERFORMING ARTS Respondent	
and	Case No. 3-CA-10050
REBECCA L. WOOD Charging Party	
and	
TREASURERS AND TICKET SELLERS UNION, LOCAL NO. 868, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO Respondent	
and	Case No. 3-CO-10004
REBECCA L. WOOD Charging Party	

Christopher M. Feldenzer, Esquire
For the General Counsel

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For Respondent Kennedy Center

Thomas P. Powers, Esquire
For Respondent Union

Before: JESSE ETELSON
Administrative Law Judge

DECISION ON MOTION TO DISMISS COMPLAINT

An unfair labor practice complaint alleges that the Respondents entered into a hiring hall agreement that resulted in discrimination, coercion, and other unlawful actions against the charging party in violation of various provisions of the Federal Service Labor-Management Relations Statute, 5 U.S.C. Chapter 71 (FSLMRS). Respondents Kennedy Center and the Union both filed motions to dismiss the complaint. Their dispositive contention is that the Kennedy Center is not an "agency" within the meaning of section 7103(a)(3) of the FSLMRS. If not, none of the pertinent provisions of the FSLMRS would apply to the Kennedy Center. It would also follow that the Kennedy Center does not employ anyone who is an "employee" within the meaning of section 7103(a)(2) of the FSLMRS (which defines "employee" as an individual "employed in an agency; . . .") and therefore that none of the alleged actions of the Union are unfair labor practices as defined in the provisions of the FSLMRS cited in the complaint.

The John F. Kennedy Center for the Performing Arts was established by Congress as a bureau of the Smithsonian Institution. 5 U.S.C. §§ 76 h-76 l. (Note that the latter section is 76, followed by the letter "l," not by the number "1.") The Kennedy Center is governed by its own Board of Trustees, established by Congress. However, the parties have tacitly acknowledged, if I understand their positions accurately, that the Center has the same jurisdictional status for purposes of the FSLMRS--that is, whether it is an "agency"--as the Smithsonian.

The term, "agency," is defined in relevant part in section 7103(a)(3) of the FSLMRS as meaning "an Executive agency." The term, "Executive agency," is, in turn, defined at 5 U.S.C. § 105:

> For the purpose of this title [which includes the FSLMRS], "Executive agency" means an Executive department, a Government corporation, and an independent establishment.

Counsel for the General Counsel argues that the Kennedy Center is an "independent establishment." That term is defined at 5 U.S.C. § 104. In relevant part, it is defined there as "an establishment in the executive branch . . .

which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment." It is the General Counsel's contention that the Kennedy Center is an "independent establishment" either in its own right or as part of the Smithsonian. (Still, the General Counsel has not contended that the Kennedy Center may be an "independent establishment" even if the Smithsonian is not.) The Respondents concede that the Center is a Government agency but deny that it is an "Executive agency."

The General Counsel argues that the Kennedy Center must be "in the executive branch" because it is not in either the legislative or the judicial branch. The Respondents contend that it occupies a unique niche outside of all of the major branches of the Government. I find the very interesting implications of this debate to be academic, however, because Congress has given us a rather clear indication of whether it believes the Smithsonian is an "Executive agency" within the meaning of 5 U.S.C. § 105.

The FSLMRS was enacted in October 1978. The following year, Congress passed the Panama Canal Act of 1979, 22 U.S.C. § 3601, et seq., with miscellaneous provisions codified in other "titles" of the Code (Canal Act). The Canal Act contains many references to "Executive agency." Because the Smithsonian Institution operates a substantial facility within the Canal Zone, the Canal Act also contains many references to the Smithsonian. Sometimes these references come together in illuminating ways.

The first and principal subchapter of the Canal Act is entitled "Administration and Regulations." Part 1 of this subchapter establishes and fleshes out a Panama Canal Commission which is to govern in the Canal Zone. Part 2 (22 U.S.C. §§ 3641-3701) is entitled "Employees." Section 3641 ("Definitions") provides, in pertinent part, that:

> As used in this part--
>
> (1) "Executive agency" has the meaning given that term in section 105 of Title 5;

The following two sections of the Canal Act, 22 U.S.C. §§ 3642 and 3643, refer, respectively, to "any Executive agency . . . or the Smithsonian Institution," and to "an Executive agency . . . and the Smithsonian Institution."

Section 3651 of Title 22 (Definitions for purposes of "Subpart II--Wages and Employment Practices") provides that:

> As used in this subpart [of Part 2--Employees]--
>
> (1) "agency" means--
>
> (A) the [Panama Canal] Commission, and
> (B) an Executive agency or the Smithsonian Institution. . . .

The final section in Part 2--Employees, 22 U.S.C. § 3701, is entitled "Labor-Management Relations." It has particular significance for the issue at hand because, among other things, it refers specifically to the applicability of the FSLMRS, at least in the Canal Zone. Thus, subsection (a) provides that:

> (a) Nothing in this chapter shall be construed to affect the applicability of chapter 71 of Title 5, relating to labor-management and employee relations, with respect to the [Panama Canal] Commission or the operations of any other Executive agency conducted in that area of the Republic of Panama which, on September 30, 1979, was the Canal Zone. . . .

Subsection (a) continues by clarifying the definition of "employee" with regard to nationality and citizenship and by the addition of a provision with regard to appropriate bargaining units. Subsection (b) exempts from the operation of Panamanian law the labor relations of United States agencies. The precise language used, as contrasted with the language of subsection (a) merits close attention:

> (b) Labor-management and employee relations of the Commission, other Executive agencies, and the Smithsonian Institution, their employees, and organizations of those employees, in connection with operations conducted in that area of the Republic of Panama which, on September 30, 1979, was the Canal Zone, shall be governed and regulated solely by the applicable laws, rules, and regulations of the United States.

One significant difference, of course, is that, like 22 U.S.C. §§ 3642, 3643, and 3651 (as well as other sections of the Canal Act) but unlike §3701(a), subsection (b) makes

an express distinction between Executive agencies and the Smithsonian. The fact that Congress distinguished the Smithsonian from Executive agencies is telling, especially where it made this distinction in sections immediately following § 3641, the section assigning "Executive agency" the meaning given in 5 U.S.C. § 105, the section that governs the term, "agency," as used in the FSLMRS.

When construing a Federal statute, one is obliged to give effect, if possible, to every word Congress used, United States v. Menasche, 348 U.S. 528, 538-39 (1955), as "a legislature is presumed to have used no superfluous words." Tabor v. Ulloa, 323 F.2d 823, 824 (9th Cir. 1963) (quoting Platt v. Union Pacific R. Co., 99 U.S. 48, 58 (1878)). The repeated use of the word "and" to introduce the Smithsonian Institution into sections of the Canal Act already made applicable to Executive agencies must therefore be presumed to have been thought necessary. Moreover, terms connected by a disjunctive ("or," in 22 U.S.C. §§ 3542, 3651, 3665, 3671, and 3672) are presumed to have separate meanings unless the context dictates otherwise. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979). Thus, absent a convincing explanation to the contrary, Congress must be presumed to have thought of the Smithsonian as something other than an Executive agency.1/

The fact that Congress omitted the Smithsonian from 22 U.S.C. § 3701(a), which deals with the applicability of the FSLMRS, makes it even more difficult to avoid the conclusion that it made specific reference to the Smithsonian only where (1) such specific reference was deemed necessary and (2) Congress intended the Smithsonian to be covered.

1/ In one section of the Canal Act in which Congress referred not to "Executive agencies" but to "agencies," it used the word "including," instead of "and" or "or" to specify coverage of the Smithsonian. Thus, in 22 U.S.C. § 3623, establishing an Office of Ombudsman for the Canal Zone, Congress provided that this office should receive complaints and grievances of "employees (and their dependents) of the Commission and other departments and agencies of the United States, including the Smithsonian Institution. . . ." This comports with a belief that the Smithsonian is an "agency" but not an "Executive" agency. See also 22 U.S.C. §3643(b): "For purposes of this section, the term 'agency' means an Executive agency, the United States Postal Service, and the Smithsonian Institution."

This omission thus suggests another compelling reason for concluding that Congress did not consider the Smithsonian to be an "agency" under the FSLMRS.

The Smithsonian's omission from subsection (a) of § 3701, stands starkly against its inclusion ("other Executive agencies, and the Smithsonian Institution") in subsection (b). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)). Common sense tells us that the Wong Kim Bo presumption is, if anything, even stronger where, as here, the inclusion and the omission occur in different subsections of the same section of the Act. The omission of the Smithsonian from §3701(a) should therefore be presumed to have been purposeful, and not the result of "a simple mistake in draftsmanship." Russello v. U.S., supra.

The immediate effect of this exclusion is to remove the Smithsonian's Canal Zone operations from subsection (a)'s protection against the possibility that the Canal Act preempted the FSLMRS. But if one were to assume that the FSLMRS applied to the Smithsonian's operations outside the Canal Zone, such preemption might leave the Canal Zone operations, and only the Canal Zone operations, excluded from the FSLMRS. I find it unnecessary to determine whether such preemption would otherwise have become a reality or whether it was only a possibility that the drafters of the Canal Act contemplated, because I see no reason why Congress would purposely leave open the possibility of such an exclusion limited to one locality. Therefore, its exclusion of the Smithsonian from the preemption prevention of subsection (a) seems inconsistent with a belief that the FSLMRS applied to the Smithsonian elsewhere.

If, then, these various provisions of the Canal Act show that Congress, in 1979, understood that the Smithsonian was not an "agency" within the meaning of the FSLMRS, what weight does such a conclusion carry? Counsel for the General Counsel asserts correctly that 22 U.S.C. § 3701 was not enacted for the purpose of excluding the Smithsonian from the FSLMRS. But, the understanding of subsequent Congresses about an earlier statute is entitled to significant weight, "and particularly so when the precise intent of the enacting

Congress is obscure." Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572 (1980). Moreover, although we deal here with a "subsequent" Congress, it is one that convened shortly after the term of the enacting Congress expired. Each of the 13 House Managers on the Conference Committee for the Canal Act was a Member of Congress when the FSLMRS was enacted, as were half (three) of the Senate Managers. 1979 U.S. Code Cong. & Admin. News 1147; 1978 U.S. Code Cong. & Admin. News LV-LXXXIV. I am not free to assume that they were all asleep at the wheel, along with all of their reelected and holdover colleagues, when the language in question became part of the Canal Act.

Finally, exclusive reliance on the understanding of the Smithsonian's FSLMRS status found in the Canal Act is warranted where, as here, none of the other arguments presented are particularly persuasive. I mention here only those most worthy of comment. The Equal Employment Opportunity Commission has determined that both the Kennedy Center and the Smithsonian are "executive agencies." EEOC Decisions Nos. 89-2 and 89-3, 50 FEP Cases 1881 and 1889 (1989). However, neither of these decisions discusses the impact of the Canal Act on these organizations' "agency" status under the FSLMRS, or its impact in any respect. The rationale is abstract and not so persuasive as to override what I consider to be the compelling force of the pertinent Canal Act provisions. Counsel for the General Counsel also proffers certain "Notices" issued by the General Services Administration (GSA) and published in the Federal Register on June 28, 1984, August 25, 1988, and November 26, 1990. They announce determinations by GSA that both the Kennedy Center and the Smithsonian are "executive agencies," or parts thereof, presumably as "independent establishments" as defined in 5 U.S.C. § 104. No rationale for these determinations is given. They give pause in only one respect: In the same "Notices," GSA announces that the National Gallery of Art (which one might have supposed bore the same relations to the Smithsonian as the Kennedy Center does), is not an "executive agency" but an "other eligible user."2/

2/ I find it unnecessary to pass on the Respondents' contention that even if the Kennedy Center is an FSLMRS "agency" it is, by virtue of 20 U.S.C. § 76 k, not subject to review of its labor-relations actions by any agency other than a court.

The General Counsel's policy arguments for asserting jurisdiction may not prevail because they cannot overcome the strong evidence of congressional intent to the contrary.

For all these reasons, I conclude that the Authority lacks jurisdiction in this proceeding and I recommend that the Authority adopt the following order.

ORDER

The complaint is dismissed.

Issued, October 8, 1991, Washington, DC

JESSE ETELSON
Administrative Law Judge