Yukon Kuskokwim Health Corporation *and* International Brotherhood of Teamsters, Local 959, AFL–CIO, CLC. Case 19–CA–26663

May 28, 2004

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On October 29, 1999, the National Labor Relations Board issued a Decision and Order in the above-captioned proceeding[1] finding that Yukon Kuskokwim Health Corporation (the Respondent) had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), and ordering the Respondent to cease and desist and take certain affirmative action to remedy such unfair labor practices, including**,** on request**,** bargaining with the Charging Party, International Brotherhood of Teamsters, Local 959, AFL–CIO, CLC (the Union).

Thereafter, the Respondent filed a petition with the United States Court of Appeals for the District of Columbia Circuit for review, and the Board filed a cross-application for enforcement of its Order. On December 19, 2000, the court denied enforcement of the Board's Order,[2] and remanded the case to the Board for further consideration of the Respondent's argument that it is entitled to exemption under Section 2(2) of the Act because the Indian Self-Determination Act (ISDA), 25 U.S.C. § 450, et seq., authorizes it to act as an arm of, and thus to share in the exemption of, the United States. The court instructed the Board to consider what allowance, if any, the Act must make in order to accommodate Federal Indian law, as reflected in the ISDA.

On March 20, 2001, the Board advised the parties that it had decided to accept the court's remand, and invited them to file statements of position with respect to the issues raised by the court's remand. The General Counsel, the Respondent, and amici curiae[3] filed statements of position addressing the merits of the case in light of the court's remand.[4] The Board has considered the decision and the record in light of the court's remand and the parties' statements of position. For reasons explained more fully in *San Manuel Indian Bingo & Casino*, 341 NLRB No. 138 (2004), a companion case issued today, we have adopted a new approach for determining the Board's jurisdiction over enterprises associated with Indian tribes. Pursuant to this new approach, we overrule our previous decision and, exercising our discretion, decline to assert jurisdiction in this case.

Background

The facts are articulated in greater detail in our initial decision in this case. See 328 NLRB at 761–762. Most pertinent for present purposes is that the Respondent is a regional nonprofit corporation formed in 1969 to provide a comprehensive health services program for Southwestern Alaska. It is governed by a 20-member board of directors whose members are elected by the membership of the tribal governments of 58 Alaskan Native tribes located in the Yukon-Kuskokwim Delta area. In 1991, the Respondent took over the operation of the hospital at issue here, under the ISDA. Only 1 or 2 members of the approximately 40 employees in the petitioned-for bargaining unit are Native Alaskans. Ninety-five percent of the patients of the Respondent's hospital are Native Alaskans. The Respondent does not charge Native Alaskans for the services they receive at the hospital. Those services are covered by the annual Federal funding the Respondent receives from the Federal Government to operate the hospital, pursuant to Federal Government's trust responsibility to provide health care for Indians.

Analysis

In *San Manuel Indian Bingo & Casino*, decided today, we concluded that the Board's statutory jurisdiction generally extends to Indian tribes and tribal enterprises, regardless of whether they are located on or off reservation land. In determining whether or not Federal Indian policy nevertheless required the Board to decline jurisdiction in a specific case, we adopted the test articulated by the U.S. Court of Appeals for the Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985), and derived from the broad principle of *Federal Power Commission v. Tuscarora Indian Nation*,

[1] 329 NLRB No. 86 (not reported in Board volumes). Previously, the Board issued a Decision and Order finding that the Board had jurisdiction over the Respondent and, therefore, that the Regional Director's decision to conduct an election was appropriate. 328 NLRB 761 (1999). The Union subsequently won the election. The Respondent's refusal to recognize and bargain with the Union gave rise to the complaint that is the subject of the 1999 and the instant decisions.

[2] 234 F.3d 714.

[3] The Alaska Native Health Board, Bristol Bay Area Health Corporation, Norton Sound Health Corporation, and Southeast Regional Health Corporation filed a brief in support of the Respondent.

[4] The Respondent also filed a motion to remand the case to the Regional Director for the limited development of supplemental facts relating to the issue on remand and a motion for oral argument. The General Counsel opposed the motion to reopen the record. Finding the record and the pleadings sufficient to address the issues posed, we deny both motions.

The Respondent has asked the Board to include in the record a statement of position from the director of the Indian Health Service. In view of our conclusion in this case, we do not pass on this request.

362 U.S. 99, 116 (1960). Finally, we announced the policy considerations that will govern the Board's exercise of discretionary jurisdiction over Indian tribal enterprises, in cases where application of the *Tuscarora—Coeur d'Alene* standard permitted the Board to exercise jurisdiction.

The remand in this case requires us to address whether, by nature of its status as a tribal compactor under the ISDA, the Respondent is exempt under Section 2(2) of the National Labor Relations Act as an arm of the Federal Government. We accept the remand on this issue and reaffirm our finding at our initial decision that the Respondent is *not* exempt on this basis. We then follow the approach announced in *San Manuel* to conclude that while the Board is free to assert jurisdiction here, policy considerations weigh against doing so.

1. The Respondent is not a component of the Federal Government. The ISDA treats tribal compactors as entities distinct from the Federal Government. The ISDA, in particular in the 2000 amendments to the statute, emphasizes the government-to-government nature of the relationship between ISDA compactors and the Federal Government. See, e.g., "Tribal Self-Governance Amendments of 2000," P.L. 106–260, 114 Stat. 711, § 2(2), (4), and (6)(A), and § 3(2)(E); 25 U.S.C. § 458aaa–3(a) and (b), –4(a), –16(c). Indeed, the Respondent itself and its amici repeatedly argue in their position statements on remand that the Respondent under the ISDA is in a government-to-government relationship with the Federal Government. Such an emphasis makes clear that the ISDA contemplates that tribal compactors, such as the Respondent, are entities separate from the Federal Government. As a separate entity, the Respondent cannot be an arm of the Federal Government.

Other provisions of the ISDA further support the finding that a tribal compactor is not an arm of the Federal Government. For example, the ISDA provides that the Contracts Dispute Act applies to ISDA tribal compactors. 25 U.S.C. § 450m–1(d). In addition, tribal compactors' records are not considered Federal records under the ISDA. See 25 U.S.C. § 458aaa–5(d)(1). If the tribal compactors stood in the shoes of the Federal Government, presumably their records would be Federal records, just like the records of other Federal actors. Most significantly, Congress delineated several "inherently federal functions" that could not be delegated to ISDA compactors because they are not Federal governmental entities. See 25 U.S.C. § 458aaa(a)(4). This provision directly contradicts the Respondent's assertion that the ISDA accords tribal compactors the status of a Federal actor. Accordingly, we reaffirm our finding that the Respondent is not excluded from the Act's jurisdiction under the Section 2(2) exemption for the United States.[5] Further, for the reasons set forth in *San Manuel*, the Respondent is not exempt as a State or political subdivision of a State.

2. Consistent with *San Manuel*, our next step is to assess whether the assertion of the Board's jurisdiction is appropriate under the *Tuscarora—Coeur d'Alene* analysis. In our initial decision in this case, we concluded that application of the *Tuscarora—Coeur d'Alene* analysis established no barrier to the Board's assertion of jurisdiction. 328 NLRB at 764. We find no reason to revisit that determination now. See *NLRB v. Chapa De Indian Health Program*, 316 F.3d 995, 1001–1002 (9th Cir. 2003) (finding that under the *Tuscarora—Coeur d'Alene* analysis Board jurisdiction is not plainly lacking).[6]

3. Finally, *San Manuel* requires that we consider whether policy considerations favor the assertion of the Board's discretionary jurisdiction. In making this determination, we balance the Board's interest in effectuating the policies of the Act with the need to accommodate the unique status of Indians in our society and legal culture.

We find that policy considerations weigh against the Board asserting its discretionary jurisdiction in this case. As articulated in *San Manuel*, when an Indian tribe is fulfilling a traditionally tribal or governmental function that is unique to its status, the Board's interest in asserting jurisdiction is lower than when the tribe is acting in a typically commercial manner. Here, the Respondent is fulfilling just such a unique governmental function. The Respondent, as an ISDA compactor, is fulfilling the Federal Government's trust responsibility to provide free health care to Indians. As the Respondent pointed out in its position statement on remand, under the Indian Health Care Improvement Act (25 U.S.C. § 1601) (IHCIA), Congress recognized that "it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligation to the American Indian people, to assure the highest possible health status for Indians and to provide all resources necessary to effect that policy." 25 U.S.C. § 1602(a); see also *White v. Califano*, 437 F. Supp. 543, 557 (D.S.D. 1977) ("Congress has unambiguously de-

[5] As stated above, in *San Manuel*, we overruled our precedent to the extent that it provided that the quasi-governmental nature of Indian tribes compelled an exemption by analogy to the governmental entities that are expressly excepted in Sec. 2(2). That Congress describes the tribes in the ISDA as participating in a government-to-government relationship with the Federal Government does not undermine that conclusion. As explained in *San Manuel*, the legislative history of the ISDA demonstrates that Congress did not intend the ISDA to create an exemption to the NLRA for ISDA compactors.

[6] Our concurring colleague disagrees that the *Tuscarora—Coeur d'Alene* analysis is appropriate. For the reasons articulated in our decision in *San Manuel*, we adhere to the application of that analysis here.

clared that the federal government has a legal responsibility to provide health care to Indians."). As discussed in *San Manuel*, Federal Indian law discourages interference in the affairs of Indians when they act in a manner consistent with their unique status.

Moreover, although the Respondent's level of interstate commerce is sufficient to meet the Board's monetary jurisdictional limits, the Respondent's impact on interstate commerce is relatively limited. Ninety-five percent of the Respondent's hospital's patients are Native Alaskans from the Yukon-Kuskokwim Delta area. Indeed, the Respondent, as the primary health care provider in the area, does not compete with other hospitals that are within the purview of the Act's jurisdiction.

Accordingly, we find that the character of the Respondent's enterprise and its principal patient base militate against the Board's assertion of jurisdiction. In addition, we find that the impact of those factors that might favor asserting jurisdiction is mitigated by the particular facts of this case. For example, the fact that the Respondent is not operating on a reservation could be considered by the Board as a factor favoring the assertion of jurisdiction. Here, however, the Respondent's off-reservation location is given less weight because *no* reservations exist in Alaska. Thus, Native Alaskans have no choice but to operate off reservation.

That the Respondent employs mostly non-Native Alaskans also may be considered a factor weighing in favor of asserting jurisdiction. We accord less weight to that fact here, however, because the makeup of the workforce is likely to change. One purpose of the ISDA and the IHCIA is to increase the number of Native Americans in the health care professions and both acts include mechanisms to accomplish that goal. See 25 U.S.C. § 450e(b); 25 U.S.C. § 1612–1614.

Our decision to decline to assert jurisdiction here is the product of a careful balancing of the Board's interests in advancing the Act's statutory goals and in respecting Federal Indian law and policy.[7] As such, we believe we have met the D.C. Circuit's mandate on remand to consider how best to accommodate Federal Indian law.[8]

Therefore, under these circumstances, we find that jurisdiction is not appropriate. Accordingly, we overrule our previous decision and dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER SCHAUMBER, concurring.

Relying on a balancing of competing policy interests, the majority declines to assert jurisdiction over the Respondent, a nonprofit corporation established by Native Alaskan Tribes to provide free health care services to their members. I agree with my colleagues that the Board does not have jurisdiction over the Respondent, and I join in dismissing the complaint in this case. I do not, however, subscribe to the majority's reasoning, and I therefore write separately to explain my views.

The Respondent was formed in 1969 by 58 Alaskan Native Tribes located in the Yukon-Kuskokwim Delta area in Southwestern Alaska to provide health services to their members.[1] It is controlled by a board of directors elected by the 58 tribes' governing councils. With the passage of the Indian Self-Determination Act of 1975 (ISDA), 25 U.S.C. § 450 et seq., the Respondent assumed responsibility from the Federal Indian Health Service for the operation of a network of clinics located in native villages within its service area and, in 1991, the Respondent assumed control of an Indian Health Service hospital located in Bethel, Alaska. All this was pursuant to the mandate of the ISDA, which calls for the transfer to Indian tribes of the "planning, conduct, and administration" of programs and services provided to Indians and Native Alaskans by the Federal Government. The Federal Government has recognized the Respondent as an "Indian tribe" for ISDA purposes.[2]

The majority today concludes that, for policy reasons, it is not "appropriate" for the Board to assert jurisdiction over the Respondent. The majority cites the following factors in support of its decision: (1) the Respondent is performing a traditionally tribal or governmental function; and (2) the Respondent's impact on interstate commerce is relatively limited, in that 95 percent of the Respondent's hospital patients are Native Alaskans and it has no competitors who are subject to NLRB jurisdiction. My colleagues assert that they might reach a different result if the percentage of non-native patients treated by the Respondent were higher or if it competed directly

[7] In declining to assert jurisdiction we place no reliance on the Respondent's contention that jurisdiction would be inappropriate because, as an ISDA compactor, its labor-relations decision making is constrained by congressional appropriations and is based on governmental, rather than commercial, considerations. The Board rejected such concerns in *Management Training Corp.*, 317 NLRB 1355 (1995), when it asserted jurisdiction over a Federal contractor even though the contractor could not bargain over those terms and conditions of employment established by the Federal Government.

[8] We emphasize that our decision does not represent a categorical exclusion for all ISDA compactors. Rather, we will engage in the same balancing test in each case. Where the factors are different—for example, because the percentage of non-native patients is higher or because the compactor competes directly with a hospital covered by the Act—the Board's decision regarding the assertion of its discretionary jurisdiction may be different.

[1] In practice, 95 percent of the Respondent's hospital patients are Native Alaskans.

[2] *Yukon-Kuskokwim Health Corp.*, 234 F.3d 714, 715 (D.C. Cir. 2000).

with a hospital covered by the Act. I agree with the result reached by my colleagues, but for quite different reasons.

As stated in my dissenting opinion in *San Manuel Indian Bingo & Casino*, 341 NLRB No. 138 (2004), settled principles of Federal Indian law establish that "infringements on a tribe's sovereign authority are impermissible absent express statutory language or a clear indication to that effect in the statute's legislative history." For the reasons that follow, tribal sovereignty would be infringed if the Board asserted jurisdiction over the Respondent. Because no expression of Congressional intent to abrogate that sovereignty is to be found in the Act, the Board is without statutory authority to assert jurisdiction over the labor relations of the Respondent.

The Board's assertion of jurisdiction in this case would infringe upon tribal sovereignty in two important respects. First, it plainly would negate the authority of the Respondent's 58-member tribes to determine their own form of government based on the "unique political, cultural, and economic needs of tribal governments."[3] The Respondent is not a commercial enterprise, but rather an instrumentality of its 58-member tribes. It performs the governmental function of providing free health care to Native Alaskans, fulfilling the Federal Government's trust responsibility to these Native Americans.[4] Application of the Act would infringe on tribal sovereignty by limiting the Respondent's discretion in determining how, where, and by whom this governmental service is to be provided. Under the provisions of the Act, those decisions would be subject to bargaining obligations and to review by the Board to determine whether any provision of the Act had been violated, all to the detriment of the discretion the Respondent would otherwise enjoy.

Second, application of the Act would implicate principles of sovereign immunity by subjecting the Respondent to potential awards for backpay damages and unpaid benefits, thereby depleting resources necessary for the provision of governmental services, including health care, in the future. While Indian tribes do not enjoy sovereign immunity against the United States, the imposition of liability represented by the Board's assertion of jurisdiction effects, in essence, a forced waiver of sovereign immunity. Congress can, of course, waive tribal immunity, but as the Supreme Court has made clear, any such waiver must be "unequivocally expressed."[5] No such expression of Congressional intent is present here.

In finding that assertion of jurisdiction by the Board would impair tribal sovereignty, I am mindful of the fact that the Respondent is not located within any federally recognized reservation.[6] This fact is of significance and would point towards asserting jurisdiction in the typical case. But this is not a typical case. As the majority notes, there are no reservations in Alaska. Thus, Alaskan Tribes have no choice but to operate outside of reservation boundaries. Moreover, as noted above, this case does not involve a commercial enterprise but the provision of a governmental service, health care, without charge to Native Alaskans who receive it. Under these circumstances, asserting jurisdiction would impair tribal sovereignty even though the Respondent is not located on a reservation.

The majority and I rely on some of the same factors as support for our decision not to assert jurisdiction over the Respondent.[7] We differ, however, on the significance to be attached to them. For my colleagues, these factors support their decision to *choose* not to assert jurisdiction over the Respondent as a matter of policy. In my view, evidence that asserting jurisdiction would impair tribal sovereignty demonstrates that Congress has not given the Board the statutory authority to assert jurisdiction here. Nevertheless, the majority reaches the correct result in their decision in this case today, and I therefore concur in it.

[3] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62–63 (1978).

[4] Congress has made the policy choice, through the ISDA, to encourage tribes to assume from agencies of the Federal Government the responsibility for providing trust services, but the quintessentially governmental nature of those services remains.

[5] *Santa Clara Pueblo v. Martinez*, supra, 436 U.S. at 58. See also *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.").

[6] Compare my dissenting opinion in *San Manuel*, supra (finding Board lacks jurisdiction over enterprise located on federally recognized tribal reservation). See also *Yukon-Kuskokwim Health Corp.*, supra, 234 F.3d at 717 (recognizing that tribal sovereignty "typically" is limited to its geographical jurisdiction).

[7] Unlike my colleagues, I do not rely on the absence of nonexempt competition, because that fact has no bearing on whether application of the Act would impair tribal sovereignty.