

National Labor Relations Board



Weekly Summary of NLRB Cases

Division of Information

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CASES SUMMARIZED

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Administrative

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Albany Medical Center (3-CA-24094, 24162; 341 NLRB No. 145) Albany, NY May 28, 2004. The Board affirmed the administrative law judge's finding that by telling its nursing employees that they would have to renegotiate for a \$2 raise that was promised to them before the Union's (AMC Registered Professional Nurses) petition was filed, the Respondent unlawfully coerced employees with regard to their membership in, sympathy for, and support of the Union prior to the election in violation of Section 8(a)(1) of the Act. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by John Michael Vitale, an Individual and AMC Registered Professional Nurses; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Albany on Sept. 16, 2003. Adm. Law Judge Wallace H. Nations issued his decision Dec. 10, 2003.

Allied Mechanical Services, Inc. (7-CA-40907, 41390; 341 NLRB No. 141) Kalamazoo, MI May 28, 2004. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate economic strikers Jim Bronkhorst, Ken Falk, Ted Fuller, Jon Kinney, Grant Maichele, Marty Preston, Tobin Rees, Max Roggow, Brian Rowden, and Steve Titus who made unconditional offers to return to work on March 2, 1998 and by refusing to consider for employment and to hire union members Scott Calhoun, Terri Jo Conroy, Harold Hill, and Jeff Kiss. Contrary to the judge, it found that the Respondent did not violate the Act when it refused to consider and hire applicants Eric Englehart, Marty Hampton, Rod Newcomb, and Todd West. [\[HTML\]](#) [\[PDF\]](#)

The Board agreed with the judge's dismissal of complaint allegations that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from Plumbers Local 357 on July 22, 1998, and thereafter making unilateral changes and refusing to furnish Local 357 with information. In adopting the judge's finding that the Respondent's withdrawal of recognition was lawful, the Board relied solely on his finding that Local 357 did not succeed to the bargaining rights of Local 337. The Board wrote that the merger of Locals 337 and 513 did not satisfy the Board's standard, because Local 337's members were not given an opportunity to vote on the merger and, therefore, the Respondent had no duty to bargain with Local 357.

Pursuant to a settlement agreement, the Respondent agreed to recognize and bargain with Plumbers Local 337 in 1991. Although the parties engaged in contract negotiations, they never reached an agreement. On March 1, 1998, Local 337 merged with Plumbers Local 513 to create a new local, Plumbers Local 357. On July 22, the Respondent withdrew recognition from Charging Party Local 357 and announced that it would not bargain with it.

(Chairman Battista and Members Schaumber and Meisburg participated.)

Charges filed by Plumbers Local 357; complaint alleged violation of Section 8(a)(1), (3) and (5). Hearing at Kalamazoo, on eight dates between June 30-July 16, 1999. Adm. Law Judge David L. Evans issued his decision Feb. 8, 2000.

Cobb Mechanical Contractors, Inc. (16-CA-16483; 341 NLRB No. 136) Amarillo, TX May 26, 2004. This supplemental decision follows a remand by the U.S. Court of Appeals for District of Columbia of the Board's decision reported at 333 NLRB 1168 (2001), which affirmed the administrative law judge's findings that 19 discriminatees (union applicants/journeyman plumbers) were entitled to backpay as a result of the Respondent's unlawful refusal to hire them as plumber's helpers. The court remanded the case to the Board for consideration of two issues: (1) has the Respondent established that it had a longstanding policy of not hiring a journeyman plumber for a plumber's helper position and (2) has the Respondent satisfied its burden of showing that only two union applicants would have transferred to a new Cobb project after the completion of the projects in issue. [\[HTML\]](#) [\[PDF\]](#)

Regarding the first issue, Chairman Battista and Member Schaumber found, based on the uncontradicted testimony of two high-level management officials, Controller Paula McKinney and Vice President for Operations Jerry Bitner, that Cobb had a policy against hiring plumbers as plumbers' helpers. They concluded that the only positions the union plumber applicants would have been hired for were plumber positions and that the General Counsel's formula for computing backpay results in compensating the discriminatees for employment for which they were not eligible. Chairman Battista and Member Schaumber held that there were only 13 positions available for the discriminatees and only 13 discriminatees are entitled to a remedy. Determining that the Board's prior backpay award must be modified accordingly, they remanded the case to the Regional Director to prepare an amended compliance specification.

Member Walsh dissented from his colleagues' opinion insofar as they reversed the Board's prior decision and find that the Respondent established the existence of a longstanding policy of not hiring plumbers to be plumbers' helpers. He wrote:

If the Respondent truly had a long-standing policy of not hiring plumbers as plumbers' helpers, then one would reasonably expect this policy to be reflected in its offers of reinstatement and the forms provided for accepting or declining the offers. Instead, in clear violation of its alleged policy, the Respondent sent the discriminatees, who were plumbers, offers of "*reinstatement to either the position of Plumber or Plumber helper.*" (Emphasis added.) How can these offers be reconciled with a "strict" and "longstanding" "policy" against hiring plumbers as plumbers' helpers?

With regard to issue (2), Member Walsh joined his colleagues and reaffirmed the Board's prior finding that, absent the unlawful refusal to hire, the union applicants who would have been hired would have transferred to subsequent Cobb jobsites on the completion of the Amarillo and Dalhart projects.

(Chairman Battista and Members Schaumber and Walsh participated.)

Food & Commercial Workers Locals 951, 7, and 1036 (Meijer, Inc.) (16-CB-3850, et al.; 341 NLRB No. 133) Grand Rapids, MI May 25, 2004. On remand from the U.S. Court of Appeals for the Ninth Circuit, the Board reaffirmed its original Order reported at 329 NLRB 730 (1999) and modified the remedy to make clear that the reimbursement remedy is limited to employees who received the Respondent's "welcoming" letter, which notified new members that they were required to become full members of Local 1036 as a condition of employment. [\[HTML\]](#) [\[PDF\]](#)

The court issued a panel decision that upheld the Board's findings that the Respondent violated Section 8(b)(1)(A) of the Act, but found that the Board's remedy was overbroad. Regarding the remedy, the court stated:

[T]he Board's remedial order goes too far. The offending letter was not sent to all employees. Reimbursement is due only those employees who received the letter and object. The remedy designed by the Board must be modified.

The Ninth Circuit thereafter reconsidered the case en banc and found that the panel opinion was correct concerning the allegations against Local 1036 and reinstated that part of the opinion. It remanded the Board's Order with respect to Local 1036 "to modify [the] remedy as it was overbroad."

In the prior decision, the Board found that the Respondent violated Section 8(b)(1)(A) by notifying new employees in its welcoming letter that they were required to become full members as a condition of employment and failing to notify such employees of their *General Motors* (NLRB v. *General Motors Corp.*, 373 U.S. 734 (1963)) right to remain nonmembers of the Union and of nonmembers' *Beck* (*Communications Workers v. Beck*, 487 U.S. 735 (1998)) rights, including the right to object to paying for nonrepresentational activities and to obtain a reduction in fees for such activities. The Board's decision also addressed certain alleged violations regarding Respondent UFCW Local 7 and Respondent UFCW Local 951. Those allegations are not presently before the Board.

(Chairman Battista and Members Liebman and Walsh participated.)

Gold Kist, Inc. (12-CA-21196, 21213, 12-RC-8553; 341 NLRB No. 135) Douglas, GA May 27, 2004. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by soliciting grievances and promising to remedy them in order to dissuade employees from supporting Food and Commercial Workers Local 1996, by threatening the loss of benefits and the inevitability of strikes and strike violence if employees selected the Union as their collective-bargaining representative, by more closely monitoring and restricting the movement of prounion employees, by threatening that other employers would refuse to hire employees because of their union activities, and by threatening the withdrawal of an existing condition of employment if the employees selected the Union as their bargaining representative. Further, the Respondent violated Section 8(a)(1) and (3) by depriving employee

Brenda Preston of overtime work. The Board adopted the judge's order to set aside the election held in Case 12-RC-8663, severed said case from the unfair labor practice cases, and remanded Case 12-RC-8663 to the Regional Director to conduct a second election. [\[HTML\]](#) [\[PDF\]](#)

(Members Liebman, Schaumber, and Walsh participated.)

Charges filed by Food & Commercial Workers Local 1996; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Douglas, July 23-25 and Aug. 14-16, 2001. Adm. Law Judge George Carson II issued his decision Oct. 15, 2001.

Health Care Workers (SEIU) Local 250 (Trinity House) (32-CB-5562; 341 NLRB No. 137) Sacramento, CA May 26, 2004. The administrative law judge found, and the Board agreed, that by refusing to execute an agreed-upon collective-bargaining agreement with Employer Trinity House, the Respondent violated Section 8(b)(3) of the Act. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Trinity House; complaint alleged violation of Section 8(b)(3). Hearing at Sacramento, Aug. 19 and 20, 2003. Adm. Law Judge John J. McCarrick issued his decision Nov. 13, 2003.

Kansas AFL-CIO (17-CA-22178; 341 NLRB No. 131) Topeka, KS May 26, 2004. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(5) and (1) of the Act by eliminating a bargaining unit position, the Volunteers in Politics director, and terminating the employee who held that position, Connie Stewart, without providing the Union (Office Employees Local 320) prior notice and an opportunity to bargain. Contrary to the Respondent's contention, the Board held that the record established that the Union represented the unit employees at the time that Stewart's position was eliminated, and therefore, the Respondent was obligated to bargain with the Union concerning the elimination of Stewart's position and her termination. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Office Employees Local 320; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Overland Park, Sept. 4 and 5, 2003. Adm. Law Judge Burton Litvack issued his decision Feb. 23, 2004.

Laboratory Corp. of America Holdings (4-RC-20624; 341 NLRB No. 140) Burlington, NC May 28, 2004. After consideration of the Employer's request for review, the Board reversed the Regional Director's Decision and Direction of Election, in which she found appropriate the

multifacility unit of employees working at seven of the Employer's 29 Patient Service Centers (PSCs) petitioned for by Food and Commercial Workers Local 1358, and remanded the case to the Regional Director for further appropriate action. [\[HTML\]](#) [\[PDF\]](#)

The Regional Director found appropriate the petitioned-for multifacility unit of phlebotomists, administrative team leaders, technical team leaders, and reference tests clerks employed by the Employer at seven PSCs located in southeastern New Jersey under the supervision of Phlebotomist Supervisor Lana Gray. By Order dated May 28, 2003, the Board granted the Employer's request for review solely with respect to whether the petitioned-for unit of seven PSCs, excluding the Employer's remaining 22 PSCs in its Southern New Jersey Region, is an appropriate unit.

In this decision on review, the Board agreed with the Employer that the petitioned-for facilities do not constitute an appropriate unit for collective bargaining because the employees of the seven petitioned-for PSCs as a group do not share a community of interest distinct from that shared with employees for other PSCs in the Southern New Jersey Region.

(Chairman Battista and Members Walsh and Meisburg participated.)

Precoat Metals and Steelworkers Local 3911-09 (13-CA-37256, et al., 13-CB-15838, et al.; 341 NLRB No. 143) Chicago, IL May 28, 2004. Chairman Battista and Member Schaumber affirmed the administrative law judge's finding that the Respondent Employer violated Section 8(a)(4) and (1) of the Act by placing employee Jack Focht on paid leave of absence, offering Focht a last chance agreement, and discharging him for talking to and giving an affidavit to a Board agent. They also agreed with the judge's recommendation that the Respondent Employer not be ordered to offer Focht reinstatement to his former position with backpay, finding that Focht is not entitled to reinstatement and backpay based on his false testimony in his pretrial affidavit and at the hearing and misconduct during the course of his employment with the Respondent Employer. [\[HTML\]](#) [\[PDF\]](#)

Member Walsh, dissenting in part, disagreed with the refusal to grant Focht the traditional remedies of reinstatement and backpay. He found that by denying Focht the traditional remedies his colleagues are "allowing the Respondent Employer to effectively escape the consequences of its violation of Section 8(b)(4) of the Act, and are undermining, rather than effectuating, the policies of the Act."

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Jim White, Jack Focht, Chester Florian, and Kenneth Rolfe, Individuals; complaint alleged violation of Section 8(a)(1), (3), and (4) and Section 8(b)(1)(A) and (2). Hearing at Chicago, May 17-19, Aug. 10-13 and 16-18, 2000. Adm. Law Judge William J. Pannier III issued his decision Jan. 31, 2001.

San Manuel Indian Bingo and Casino (31-CA-23673, 23803; 341 NLRB No. 138) San Bernardino County, CA May 28, 2004. Chairman Battista and Members Liebman and Walsh, with Member Schaumber dissenting, established a new standard for determining the circumstances under which the Board will assert jurisdiction over a commercial enterprise that is wholly owned and operated by an Indian tribe, concluding 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. [\[HTML\]](#) [\[PDF\]](#)

In fashioning a new standard, the majority reconsidered two premises that can be discerned from current Board precedent. First, that location is the determinative factor in assessing whether a tribal enterprise is excluded from the Act's jurisdiction. Second, that the text of Section 2(2) of the Act supported the geographically based distinctions made by the Board. Finding both premises to be "faulty," the majority said its new approach better accommodates the need to balance the Board's interest in furthering Federal labor policy with its responsibility to respect Federal Indian policy.

The majority decided that Section 2(2) of the Act does not expressly exclude Indian tribes from the Act's jurisdiction. They noted that the tribes are not a corporation of the Government and are not a Federal Reserve Bank. Nor do Indian tribes meet the Board's or reviewing courts' traditional definition of a State or political subdivision thereof. *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604-605 (1971). The majority pointed out that the Indian tribes and their commercial enterprises are not created directly by the States, or departments, or administrative arms of State government. Moreover, neither public officials nor the general electorate are at all involved in the selection of an Indian tribe or its enterprises.

In deciding whether or not Federal Indian policy required the Board to decline to assert jurisdiction, the majority decided to adopt the test articulated by the Ninth Circuit in *Donovan v. Coeur d'Alene Trial Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985), and derived from the broad principle of *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). They concluded that the Board was correct in *Sac & Fox Industries, Inc., Ltd.*, 307 NLRB 241, to apply the *Tuscarora-Coeur d'Alene* analysis in asserting jurisdiction over tribal enterprises located away from Indian reservations. The majority decided however that nothing in *Tuscarora Indian Nation* or *Coeur d'Alene* suggests that the location of the enterprise at issue is determinative. Accordingly, they overruled *Fort Apache Timber Co.*, 226 NLRB 503 (1976) and *Southern Indian Health Council*, 290 NLRB 436 (1988), and modified *Sac & Fox*, to the extent that they hold otherwise.

In *Tuscarora Indian Nation*, the Court held that land owned by an Indian tribe could be taken for a hydroelectric power project, pursuant to the Federal Power Act, under the same terms as applied to non-Indian-owned land, because the FPA provided no express exemptions for Indians. Citing a number of decisions in which Federal courts of appeals have applied widely the *Tuscarora* principle to a number of civil rights and employment-related statutes, the majority concluded that the rationale behind those decisions supports the proposition that because

Congress intended the Act to have the broadest possible breadth permitted under the Constitution, the Act is a statute of general application. See *Navajo Tribe v. NLRB*, 288 F.2d 162, 164-465 (D.C. Cir. 1961); *Sac & Fox*, 307 NLRB at 243.

The Ninth Circuit in *Coeur d'Alene* enumerated several exceptions that have been recognized by Federal courts to limit jurisdiction over Indian tribes. The court held that statutes of general applicability should not be applied to the conduct of Indian tribes if: (1) the law "touches exclusive rights of self-government in purely intramural matters"; (2) the application of the law would abrogate treaty rights; or (3) there is "proof" in the statutory language or legislative history that Congress did not intend the law to apply to Indian tribes. *Coeur d'Alene*, 751 F.2d at 1115; see also *Mashantucket Sand & Gravel*, 95 F.3d at 177; *Smart*, 868 F.2d at 932-933.

The majority held that the Board has been inadequate in striking a satisfactory balance between the competing goals of Federal labor policy and the special status of Indian tribes in our society and legal culture. They took the opportunity in this case and its companion case, *Yukon Kuskokwin Health Care Corp.*, 341 NLRB No. 139 (2004), to adopt an approach that "gives due recognition to those competing interests." The majority acknowledged the difficulty of its task because Indian tribes occupy a unique position in the Nation's political and legal history. They noted however that during the 30 years that the Board has considered whether the Act applies to the employment practices of the Nation's Indian tribes, the Indian tribes and their commercial enterprises have played an increasingly important role in the Nation's economy. The majority wrote: "As tribal businesses have grown and prospered, they have become significant employers of non-Indians and serious competitors with non-Indian owned businesses."

Applying the new approach to this case, the majority asserted jurisdiction over the Respondent's commercial activities on the San Manuel Indian Reservation in San Bernardino County, California and denied the Respondent's motion to dismiss the complaint for lack of jurisdiction. The complaint alleges that the Respondent violated Section 8(a)(2) and (1) of the Act by rendering assistance, and support to the Communications Workers International (CWA) by allowing CWA agents access to the Respondent's facility for organizing purposes, while denying similar access to agents of the Hotel Employees & Restaurant Employees International.

The majority found that the Respondent is an employer pursuant to Section 2(2). Further, pursuant to the *Tuscarora-Coeur d'Alene* analysis, they decided that none of the *Coeur D'Alene* exceptions apply. The majority noted, among others, that the tribe's operation of the casino is not an exercise of self-governance, that the Respondent does not allege the existence of any treaties covering the tribe; thus, application of the Act would not abrogate any treaty rights; and neither the language of the Act, nor its legislative history provides any evidence that Congress intended to exclude Indians or their commercial enterprises from the Act's jurisdiction. Finally, the majority concluded that policy considerations favor the assertion of the Board's jurisdiction.

Dissenting Member Schaumber, unlike his colleagues, concluded that the issue is not whether the Board should assert jurisdiction over a commercial enterprise wholly owned and operated by an Indian tribe and located on that tribe's reservation, but whether Congress has authorized the Board to do so. He noted that the *Tuscarora Indian Nation* dictum on which the majority relies, is distinguishable on its facts, lacks a basis in precedent, and has been criticized by scholars and rejected by other courts. Member Schaumber noted also that subsequent Supreme Court decisions have abandoned, if not implicitly overruled, the *Tuscarora* principle embraced by the majority. He wrote:

Thus, the majority, which claims to 'embark on a new approach' to jurisdiction over tribal enterprises, does so upon a leaky vessel. In my view, the rebalancing of competing policy interests involving Indian sovereignty is a task for Congress to undertake. Well-established principles of Federal Indian law and statutory construction compel to the Board to determine, in the first instance, whether Congress has affirmatively addressed the potential effects of legislation on tribal rights and to err in favor of Federal noninterference where regulatory statutes, such as the Act, are silent or ambiguous as to coverage of Indian tribes. Because the assertion of jurisdiction in this case would offend those principles and conflict with both Board and Supreme Court precedent, I respectfully dissent.

(Chairman Battista and Members Liebman, Schaumber, and Walsh participated.)

Scepter Ingot Castings, Inc. (26-CA-17345 341 NLRB No. 134) Johnsonville, TN May 24, 2004. Members Schaumber and Walsh, in this backpay proceeding, adopted the recommendations of the administrative law judge and ordered that the Respondent make whole the individuals named in the supplemental decision by paying the amounts following their names. [\[HTML\]](#) [\[PDF\]](#)

In dissent, Chairman Battista said he disagreed with the judge's and his colleagues' failure to offset, from the amount the Respondent must reimburse employees for unilaterally imposed health insurance contributions, the wage increase it granted to those employees precisely for the purpose of funding those contributions. In his view, denying this offset creates a windfall for the employees and punishes the Respondent.

In 1995, the Respondent announced that employees covered by its Group Health Care Plan would have to begin contributing to their health care coverage and, "[t]o help offset this new employee contribution" announced a wage increase of 15 cents per hour. Previously, the employees had made no contribution toward their health insurance. The changes took effect immediately, without notice to or any effort to bargain with the employees' bargaining representative.

In the prior decision reported at 331 NLRB 1509 (2000), the Board ordered the Respondent to cease and desist from unilaterally granting wage increases and changing health insurance or rates, and to make employees whole for any expenses resulting from its unilateral changes in health insurance coverage and contributions. It also ordered the Respondent to rescind either or both of its unilateral changes concerning wage rates and medical insurance coverage. The Board's Order was enforced in its entirety by the U.S. Court of Appeals for the D.C. Circuit. In April 2003, the Regional Director issued a Compliance Specification alleging a backpay period beginning October 1995 and continuing until at least September 2002.

The Respondent argued that it has already discharged its obligation. According to the Respondent, the wage increase more than offset the health insurance premiums paid by employees and no further payment was necessary to make employees whole. In affirming the judge's denial of the offset, the majority noted that it lacked jurisdiction to modify an Order that had been enforced by a court of appeals.

(Chairman Battista and Members Schaumber and Walsh participated.)

Adm. Law Judge George Carson II issued his supplemental decision Oct. 15, 2003.

Alandco Development Corp. d/b/a Senior Care at the Fountains (4-CA-31269, 31502, 4-RC-20185; 341 NLRB No. 130) Pennsauken, NJ May 25, 2004. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) and (3) of the Act by questioning employees about their union activities; telling employees it will fire them if they vote for the Food and Commercial Workers Local 56; restricting employees from entering its facility more than 10 minutes before their scheduled starting time because they support the Union; and telling employees that it wants to terminate them because they support the Union. The Board also set aside the election held in Case 4-RC-20185 on April 8, 2002 and remanded the case to the Regional Director to conduct a third election. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Meisburg participated.)

Charges filed by Food & Commercial Workers Local 56; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Philadelphia, July 29 and 30, 2003. Adm. Law Judge Benjamin Schlesinger issued his decision Nov. 21, 2003.

U.S. Generating Co. (1-CA-36858; 341 NLRB No. 142) Somerset, MA May 28, 2004. The Board adopted the administrative law judge's finding and dismissed the complaint allegation that the Respondent violated Section 8(a)(1) and (5) of the Act when it assumed the collective-bargaining agreement between its predecessor, New England Power Company, and the Union (Utility Workers Local 464); unilaterally modified the collective-bargaining agreement between

it and the Union by implementing a management-rights clause under the guise of a work rule; and unilaterally modified the collective-bargaining agreement between it and the Union by discontinuing a defined benefit pension plan and replacing it with a defined contribution plan. [\[HTML\]](#) [\[PDF\]](#)

The Board agreed with the judge's finding that *Burns (NLRB v. Burns International Security Services*, 406 U.S. 272, 294-295 (1972)), specifically accords the successor employer the right to reject the predecessor's collective-bargaining agreement and because the successor has no prior agreement with the Union, it cannot violate Section 8(d) by implementing terms and conditions of employment that vary from the predecessor's collective-bargaining agreement.

(Chairman Battista and Members Schaumber and Meisburg participated.)

Charge filed by Utility Workers Local 464; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Boston, June 20-22, 2000. Adm. Law Judge Wallace H. Nations issued his decision Aug. 30, 2001.

Yukon Kuskokwin Health Corp. (19-CA-26663; 341 NLRB No. 139) Bethel, AK May 28, 2004. Citing *San Manuel Indian Bingo & Casino*, 341 NLRB No. 138 (2004), which set forth a new approach for determining the Board's jurisdiction over enterprises associated with Indian tribes, Chairman Battista and Members Liebman and Walsh declined to assert jurisdiction in this case, overruled the Board's prior decision (329 NLRB No. 86 (1999)), and dismissed the complaint. The Board found in its 1999 decision that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with Teamsters Local 959, following its certification as exclusive representative. [\[HTML\]](#) [\[PDF\]](#)

Member Schaumber, concurring, noted his agreement that the Board does not have jurisdiction over the Respondent and with the complaint's dismissal. He does not subscribe however to the majority's reasoning and wrote separately to explain his views. Member Schaumber held that 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," he explained.

On December 19, 2000, the U.S. Court of Appeals for the District of Columbia Circuit denied enforcement of the Board's Order, 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. 234 F.3d 714.

The Respondent is a regional nonprofit corporation that provides a comprehensive health services program for Southwestern Alaska. It is governed by a board of directors whose 20 members are elected by 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.

On remand, the majority decided that the Respondent is not exempt under Section 2(2) based on the nature of its status as a tribal compactor under the ISDA. Further, for the reasons set forth in *San Manuel*, they decided that the Respondent is not exempt as a State or political subdivision of the State. Consistent with *San Manuel*, the majority then decided that application of the *Tuscarora-Coeur d'Alene* analysis established no barrier to the Board's assertion of jurisdiction. Finally, they decided that policy considerations weigh against the Board asserting its discretionary jurisdiction in this case, noting that the Respondent, as an ISDA compactor, is fulfilling the Federal Government's trust responsibility to provide free health care to Indians and therefore, the character of the Respondent's enterprise and its principal patient base militate against the assertion of jurisdiction.

(Chairman Battista and Members Liebman, Schaumber, and Walsh participated.)

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Frontier Telephone of Rochester, Inc. and Rochester Telephone Workers Association (Commercial Workers and an Individual) Rochester, NY May 25, 2004. 3-CA-23502, et al.; JD-43-04, Judge Earl E. Shamwell.

Schwickert's of Rochester, Inc. (Roofers Local 96) Mankato, MN May 25, 2004. 18-CA-16899, et al.; JD-50-04, Judge Mark D. Rubin.

Vulcan Materials Co. (Operating Engineers Local 841) St. Louis, MO May 25, 2004. 14-CA-27555; JD-28-04, Judge Paul Buxbaum.

Diversicare Leasing Corp. d/b/a Wurtland Nursing & Rehabilitation Center (Health Care and Social Service District 1199, SEIU) Wurtland, KY May 26, 2004. 9-CA-40471; JD-53-04, Judge Karl H. Buschmann.

Gaetano & Associates Inc., aka Gaetano, Diplacidi & Associates Inc. (Laborers Local 79 and an Individual) New York, NY May 27, 2004. 2-CA-35437, et al., 2-RC-22717; JD(NY)-23-04, Judge Raymond P. Green.

TEST OF CERTIFICATION

(In the following cases, the Board granted the General Counsel's motion for summary judgment on the grounds that the Respondent has not raised any representation issue that is litigable in this unfair labor practice proceeding.)

APL Logistics, Inc. (Chemical Workers Union Council of the UFCW) (9-CA-40905; 341 NLRB No. 132) Shepherdsville, KY May 24, 2004. [\[HTML\]](#) [\[PDF\]](#)

St. Claire Die Casting, L.L.C. (AutoWorkers) (14-CA-27716, 27786; 341 NLRB No. 144) St. Clair, MO May 28, 2004. [\[HTML\]](#) [\[PDF\]](#)

LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Kaiser Foundation Health Plan, Inc., Alameda, CA, 32-RC-05191, May 24, 2004
Nstar Electric & Gas Corporation, Westwood, MA, 1-UC-815, May 25, 2004
Bergen County Community Action Program, Inc., Hackensack, NJ, 22-RC-12431,
May 26, 2004

Bon Harbor Nursing & Rehabilitation Center, Owensboro, KY, 25-RC-10230,
May 26, 2004

Food 4 Less, Visalia, CA, 32-RC-4968, May 27, 2004

TAB Leasing, Inc., Galion, OH, 8-RC-16605, May 27, 2004

The Sun, Bremerton, WA, 19-RC-14503, May 27, 2004

United Cerebral Palsy of New York Inc., Brooklyn, NY, 29-RC-9578, May 28, 2004

Catalina Concrete, Azusa, CA, 21-RD-2722, May 26, 2004

(In the following cases, the Board granted requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

The Children's Museum Seattle, Seattle, WA, 19-RC-14504, May 26, 2004

Miscellaneous Board Orders

**ORDER REMANDING[to Regional Director for
further appropriate action]**

Comcast of CA, Ohio, PA Utah & Washington, Inc., Pittsburgh, PA, 6-RD-1495,
May 26, 2004
