

membership in, voluntary affiliation with, or voluntary financial support of a labor organization; (ii) become or remain a member of a labor organization; (iii) pay dues, fees, assessments or other charges of any kind or amount to a labor organization; (iv) pay to any charity or other third party, in lieu of such payments any amount equivalent to or a pro-rata portion of dues, fees, assessments or other charges regularly required of members of a labor organization; or (v) be recommended, approved, referred or cleared through a labor organization.

Should the tribal law be considered preempted by the National Labor Relations Act, or should the tribal council be recognized as a sovereign government body outside the reach of the NLRA? What policy reasons can you think of that favor one or the other of these outcomes? [See *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002).]

10. During August to October 2002, Cianbro Corporation applied to the United States Department of Labor and the Maine Department of Labor for H-2B temporary labor certifications for as many as 120 foreign workers to be employed as structural and pipe welders on two giant oil rigs known as the Amethyst 4 and 5 that were under construction in the harbor of Portland, Maine. To make their determinations, the DOL and the Maine DOL were required to calculate prevailing wages and working conditions for the jobs for which Cianbro sought temporary labor certifications pursuant to a DOL regulation, 20 C.F.R. § 656.40. Federal regulations (8 C.F.R. § 214.2(h)(6)(iii)(A)) provided that before filing a petition with the INS (now USCIS) director in whose jurisdiction a petitioning employer intends to employ an H-2B nonagricultural temporary worker, the employer must apply for a temporary labor certification with the Secretary of Labor. The Secretary of Labor's temporary labor certification provided advice to the INS director on "whether or not United States workers capable of performing the temporary services or labor are available and whether the alien's employment will adversely affect the wages and working conditions of similarly employed United States workers." Many qualified and available U.S. workers applied for positions with Cianbro

as structural and pipe welders during the period when the DOL was supposed to be reevaluating the matter after receipt of the relevant union's letter, opposing the company's application; however, none was offered employment by Cianbro. Meanwhile the federal and state agencies proposed to issue more than 50 H-2B visas. On March 21, 2003 the relevant unions filed an application for a temporary restraining order.

Should the court grant this TRO, blocking the issuance of the H-2B visas, pending resolution of the unions' objections? What policy considerations should the judge take into account on both sides of the controversy when making this decision? [See *Maine State Building and Construction Council v. Chao*, 265 F. Supp.2d 105 (D. Maine 2003).]

11. JAL was a Japanese commercial air carrier based in Tokyo. HACS, a Hawaii corporation with its principal place of business in Honolulu, provided contract flight crews to JAL. Plaintiffs Ventress and Crawford were employed by HACS to perform services for JAL flights. The plaintiffs' employment agreements with HACS contained mandatory arbitration provisions. In December 2002, Ventress and Crawford jointly filed a complaint against JAL and HACS in the U.S. District Court for the Central District of California, alleging that JAL required a seriously ill pilot to fly in June 2001, in violation of American and Japanese aviation laws as well as JAL's own operations manual. Crawford expressed his concern to a JAL official in Honolulu in July 2001. Afterward, he experienced harassment from his superiors, including repeated performance checks, questions, and homework assignments. In December 2001, HACS informed Crawford that his assignment to JAL was canceled because of unsatisfactory performance. That same month, Ventress submitted reports on the June incidents to JAL, HACS, and aviation regulators. Ventress claimed repeated harassment from JAL thereafter, including demands to undergo psychiatric evaluations. Ventress was not allowed to fly after September 2001.

The complaint sought recovery for violation of California's whistleblower statute, wrongful termination in violation of the public policy protecting