UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

NATIONAL LABOR RELATIONS BOARD Applicant and FORTUNE BAY RESORT CASINO Respondent	Case No. 08MC65 JRT/JJG

MEMORANDUM IN SUPPORT OF APPLICATION FOR AN ORDER REQUIRING OBEDIENCE TO SUBPOENA DUCES TECUM

I. Jurisdiction

Congress has authorized the National Labor Relations Board (the Board), by its General Counsel, to conduct unfair labor practice investigations upon the filing of a charge. Sections 3(c) and 10(a) of the National Labor Relations Act (NLRA), 29 U.S.C. Secs. 153(c) and 160(a). The United Steelworkers (hereafter "the Union") filed a charge against Fortune Bay Resort Casino (Respondent), alleging in relevant part that Respondent violated Section 8(a)(4), (3), and (1) of the NLRA by refusing to reinstate its employee, Rorie Farr, in retaliation for having participated in a previous Board case and for engaging in union and protected concerted activities (Exh. 1). During the course of this investigation, the Board, at the request of the General Counsel, issued a subpoena duces tecum to Respondent (Exh. 2). This subpoena seeks information relevant to

Respondent's effects on commerce, to establish federal jurisdiction, and to attributes of tribal sovereignty, to establish whether the Board will consider Respondent an "employer" within the meaning of the NLRA.

Section 11(1) of the NLRA, 29 U.S.C. Sec. 161(1), grants the Board power to subpoena any evidence "that relates to any matter under investigation or in questions." See NLRB v. Dutch Boy, Inc., 606 F.2d 929, 932 (10th Cir. 1979). This broad grant of power enables the Board "to get information from those who best can give it an who are most interested in not doing so." United States v. Morton Salt Co., 338 U.S. 632, 642 (1950).

Although the Board has broad authority to issue subpoenas, it has no independent authority to enforce them. Section 11(2) of the NLRA, 29 U.S.C. Sec. 161(2), grants the federal district courts jurisdiction to enforce the Board's subpoenas:

> In case of contumacy or refusal to obey a subpoena to any person, any District Court of the United States or the United States Courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent or agency there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question, and any failure to obey such order of the Court may be punished by said Court as contempt thereof.

Since Respondent transacts business within this district, from its place of business located at 1430 Bois Forte Road, Tower, Minnesota, this Court has personal jurisdiction over Respondent and subject matter jurisdiction over this subpoena enforcement proceeding.

II. Venue

Venue is also proper in the District of Minnesota. The courts have generally concluded that statutory provisions authorizing subpoena enforcement for administrative agencies apply to both jurisdiction and venue. See NLRB v. Rony Line, 50 F.3d 311 (5th Cir. 1995). Moreover, since the allegations of unlawful conduct in connection with business Respondent transacts in the District of Minnesota serve as the underlying basis for the subpoenas issued to Respondent, venue in Minnesota is proper in any event. See NLRB v. Guanaca, 230 F.2d 542, 543 (7th Cir. 1956) (concluding that Congress authorized process to run throughout the United States, thereby making jurisdiction and venue available in multiple jurisdictions in the same case). See also Nelson v. Bekins Van Lines Co., 747 F.Supp. 532 (D. Minn. 1990) (describing general factors for determining appropriateness of venue).

III. Subpoena Enforcement

A. Summary of Facts

Respondent operates a hotel, resort, and casino on the Bois Forte Band of the Chippewa Reservation near Tower, Minnesota. It employs both members of the Bois Forte Band as well as nonmembers. Its customer base includes members and nonmembers. The Union commenced efforts to organize employees of the Casino in the fall of 2007, and these efforts are ongoing.

On about August 4, Rorie Farr was discharged for allegedly failing to show up for work as scheduled without giving advance notice as required by Respondent's personnel

policy. Farr orally appealed her discharge to the Tribal Chairman, Kevin Leecey. On August 18, the Union filed an unfair labor practice charge alleging that Farr's discharge was motivated by the Union's organizing activities (NLRB Case No. 18-CA-18823).[1] On August 23, Leecey told Farr she could have her job back, and she should go to the Casino to talk to CEO Gary Gotchnik. Gotchnik rebuffed her, and shortly thereafter, Leecey told her he changed his mind because she chose to go "a different route."

The Union filed a charge, Case No. 18-CA-18884 (Exh. 1) on October 14. It alleges that Respondent withdrew Farr's reinstatement offer because the Union filed the charge in Case No. 18-CA-18823.

Pursuant to standard operating procedures, the General Counsel has commenced an investigation into these charges, including confidential interviews with witnesses presented by the Union in support of the charge allegations. The General Counsel also requested a response and evidence from Respondent. Respondent did not reply to that request.

The General Counsel issued a subpoena duces tecum to Respondent on October 31, 2008, seeking documents relevant to the Board's jurisdiction over the Casino (Exh. 2). Respondent replied to the subpoena with a letter from counsel objecting to the Board's jurisdiction over it as an arm of the Bois Forte Band tribal government and declining to answer the subpoena (Exh 3).

[1] This charge was withdrawn by the Union on October 9, 2008 before the General Counsel completed an investigation.

B. The Applicable Law

The Supreme Court has held that a subpoena issued by an administrative agency such as the Board may be enforced where the investigation is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant to the agency's inquiry. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950); Endicott Johnson v. Perkins, 317 U.S. 501, 503 (1943). See also EEOC v. Peat, Marwick, Mitchell and Co., 775 F.2d 928, 930 (8th Cir. 1985) (administrative agency's subpoena duces tecum should be enforced if district court is satisfied that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents are relevant to the inquiry). The role of a district court in deciding whether to enforce such a subpoena is extremely limited. NLRB v. G.H.R. Energy Corp., 707 F.2d 110, 113 (5th Cir. 1982); NLRB v. Frederick Cowan & Co., 522 F.2d 26, 28 (2d Cir. 1975). To hold otherwise presents the danger that "the enforcement proceeding may become a means for thwarting the expeditious discharge of the agency's responsibilities." NLRB v. Interstate Dress Carriers, Inc., 610 F.2d 99, 112 (3d Cir. 1979).

The narrow role of a district court in a subpoena enforcement proceeding is further demonstrated by cases holding that the court should not consider arguments as to the merits of an underlying proceeding in determining whether enforcement should be granted. See, e.g., NLRB v. Dutch Boy, Inc., 606 F.2d 929, 932-933 (10th Cir. 1979). As the Seventh Circuit noted in an analogous context, "if every possible defense, procedural or substantive, were litigated at the subpoena enforcement stage,

administrative investigations obviously would be subject to great delay." EEOC v. Tempel Steel Co., 814 F.2d 482, 485 (7th Cir. 1987). Rather, such defenses should be presented to and be considered by the Board, with ultimate review by the courts of appeals under Sections 10(e) and (f) of the NLRA.

C. The Issues In This Case

The subpoenaed information is clearly relevant and necessary to the Board's investigation of this case. There are two jurisdictional questions in play in this case. First, although the Board is authorized to assert jurisdiction over all conduct that might constitutionally be regulated under the commerce clause, NLRB v. Fainblatt, 305 U.S. 601, 604-607 (1939), it has discretionarily established limitations based on the size of a business to concentrate on employers with a "substantial" effect on interstate commerce. This jurisdictional question arises in every case, not just cases involving Indian tribes. For either gaming industries or hotels and motels, the discretionary jurisdictional standard requires evidence that the business earns gross revenues in excess of $500,000 annually and engages in more than a "de minimis" volume of business with customers or suppliers across state lines. E.g., Penn-Keystone Realty Corp., 191 NLRB 800 (1971); El Dorado Club, 151 NLRB 579 (1965). Paragraphs 4, 5, and 6 of the subpoena relate directly to this commerce issue.[2]

[2] Paragraph 3 of the subpoena relates to any business the Respondent does with state and county governments, an indirect measure of effect on commerce.

The second jurisdictional issue, and the only issue raised by the Respondent in its resistance to the subpoena, is whether it may be deemed an "employer" covered by the National Labor Relations Act (29 U.S.C. 152(2) (definitions)). That is a question best left alone in this subpoena enforcement proceeding. As the Eighth Circuit has held in a subpoena enforcement proceeding brought by EEOC:

> The authority to investigate violations includes the authority to investigate coverage under the statute. Donovan v. Shaw, 668 F.2d 985, 989 (8th Cir. 1982). It can no longer be disputed that "a subpoena enforcement proceeding is not the proper forum in which to litigate the question of coverage under a particular federal statute." Id. at 989. See Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 214 (1946); Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943); EEOC v. Roadway Express, Inc., 750 F.2d 40, 42 (6th Cir. 1984); EEOC v. Quick Shop Markets, Inc., 526 F.2d 802, 803 (8th Cir.1975). The initial determination of the coverage question is left to the administrative agency seeking enforcement of the subpoena. Oklahoma Press, 327 U.S. at 214; Endicott, 317 U.S. at 509; Donovan, 668 F.2d at 989; Quick Shop Markets, Inc., 526 F.2d at 803. Often a coverage question cannot be resolved until the administrative agency has had an opportunity to examine the subpoenaed records. Endicott, 317 U.S. at 508-09; Donovan, 668 F.2d at 989.

E.E.O.C. v. Peat, Marwick, Mitchell and Co., 775 F.2d 928, 930 (8th Cir. 1985).

For many years, the Board held as a matter of statutory interpretation that it did not consider Indian tribes acting on reservation lands to be "employers." See, e.g., Yukon Kuskokwim Health Corp., 328 NLRB 761 (1999); Sac & Fox, 307 NLRB 241 (1992). In two relatively recent cases, however, the Board reassessed this position and held that the Act literally applies to Indian tribes as employers, but that it would nevertheless exercise discretion and decline to exercise its jurisdiction in particular cases if 1) the employer in question did not substantially impact interstate commerce; or 2) the assertion of

jurisdiction would unreasonably impinge on attributes of Indian sovereignty. San Manuel Indian Bingo, 341 NLRB 1055 (2004), enfd. 475 F.3d 1306 (D.C. Cir. 2007), and Yukon Kuskokwim Health Corp., 341 NLRB 1075 (2004).

When Indian tribes participate in the national economy in commercial enterprises, when they employ substantial number of non-Indians, and when their business caters to non-Indian clients and customers, the tribes affect interstate commerce in a significant way, and the special attributes of their sovereignty are not implicated. San Manuel Indian Bingo, 341 NLRB at 1062. On the other hand, when a tribe acts in a manner consistent with its mantle of uniqueness by fulfilling traditionally tribal or governmental functions that are unique to its status as an Indian tribe (often on a reservation), it is less likely to affect interstate commerce. Id. at 1063.

In San Manuel, the Board asserted jurisdiction over a casino, and noted that casinos do not touch on self-governance in purely intra-tribal matters. Casinos are typical commercial enterprises that affect interstate commerce. In addition, the tribe did not allege the existence of any treaties covering the tribe or the operation. Finally, the casino employed non-Indians, and catered to non-Indian customers. Consistent with the Board's analysis in San Manuel, paragraphs 1, 2, 4, and 6-9 of the subpeona seek information about the tribal affiliation of customers and employees, treaties, and other information directly related to the discretionary issues regarding Indian tribes.

The Board recognizes that the Eighth Circuit held in EEOC v. Fond du Lac Heavy Equip. Co., 986 F.2d 246 (8th Cir. 1993), that the Age Discrimination in Employment Act

does not apply to a tribal-owned and –operated construction company. The Eighth Circuit stated that the "when the interest sought to be affected is a specific right reserved to the Indians, . . . [s]pecific Indian rights will not be deemed to have been abrogated or limited absent 'clear and plain' congressional intent." Among other cases, the Eighth Circuit relied on Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), and deemed FPC v. Tuscarora Indian Nation, 362 U.S. 99 (1960), inapplicable.

The Board in its San Manuel decision relied on Tuscarora for the proposition that statutes of general applicability (such as the National Labor Relations Act) apply to Indian tribes absent positive evidence in the statute or legislative history that they were not meant to apply. Respondent may argue that the Board's assertion of jurisdiction depends on application of Tuscarora; the Eighth Circuit would reject Tuscarora; and therefore this court should find the Board lacks jurisdiction over Indian tribes.

EEOC v. Fond du Lac Heavy Equip. Co. is obviously not directly controlling on the application of the National Labor Relations Act to Indian tribes. Even more important, it is not a subpoena enforcement case, but rather a decision on the merits with a fully-developed record appropriate for its case posture.

The only circuit court that has directly addressed the applicability of the National Labor Relations Act to Indian tribes as employers has approved the Board's analysis and application, on a petition for review and cross-application for enforcement of the San Manuel case already cited. San Manuel Indian Bingo v. NLRB, 475 F.3d 1306 (D.C. Cir. 2007). The D.C. Circuit held that it

> need not choose between Tuscarora 's statement that laws of general applicability apply also to Indian tribes and Santa Clara Pueblo's [436 U.S. 49 (1978)] statement that courts may not construe laws in a way that impinges upon tribal sovereignty absent a clear indication of Congressional intent. Even applying the more restrictive rule of Santa Clara Pueblo, the NLRA does not impinge on the Tribe's sovereignty enough to indicate a need to construe the statute narrowly against application to employment at the Casino.

475 F.3d at 1314-1315.

Whether or not San Manuel and Fond du Lac Heavy Equip. are in any conflict should not concern the court in this subpoena enforcement matter. The factors and evidence that are considered by the Board in its discretionary determination are the same or at least parallel to the factors and evidence that the Eighth Circuit considered in Fond du Lac Heavy Equip. – i.e., where the business in located, whether employees affected are tribal members or not, and whether this is purely an internal tribal matter. As noted above, the Board should be allowed to investigate coverage with the subpoenaed materials. EEOC v. Peat, Marwick, Mitchell and Co., 775 F.2d 928, 930 (8th Cir. 1985). The tribe will have ample opportunity to contest the Board's decision to assert jurisdiction, assuming it does so, by filing a petition for review with an appropriate United States Court of Appeals pursuant to Section 10(f) of the NLRA, with a full evidentiary record developed by the Board.

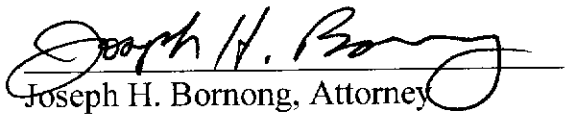
D. This Application Should not be Referred to a Magistrate

This case is not a discovery dispute corollary to any other action that will remain pending in the United States District Court once this Application is decided. Rather, it is a dispositive motion that will determine with finality the rights of the parties to this

dispute. NLRB v. Frazier, 966 F.2d 812, 816-817 (3d Cir. 1992). In addition, pursuant to the standard of review for subpoena enforcement proceedings, an evidentiary hearing on the jurisdictional question is not appropriate. See EEOC v. Peat, Marwick, Mitchell and Co., 775 F.2d 928, 930 (8th Cir. 1985). While the Court may still retain discretion to refer this case to a Magistrate under 28 U.S.C. Sec. 636(b)(3), doing so is only likely to add an additional layer of proceeding subject to de novo review by the Court. Therefore, the undersigned requests that this application be ruled on directly by a District Judge rather than a Magistrate.

Accordingly, it is respectfully submitted that this Court should order enforcement of the subpoena.

Signed at Minneapolis, Minnesota, this 9th day of December, 2008.



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