UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

NATIONAL LABOR RELATIONS BOARD Applicant and FORTUNE BAY RESORT CASINO Respondent	Case No. 08-mc-65 JRT-JJG

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

On December 12, 2008, the National Labor Relations Board (the NLRB or the Board) filed an Application for an Order Requiring Obedience to Subpoena Duces Tecum in this Court against Fortune Bay Resort Casino (Respondent). Respondent filed its Response on February 5, 2009.[1] This Memorandum is submitted in Reply to that Response on two points. First, sovereign immunity is no foundational barrier to the NLRB's investigation. Second, Respondent fails to justify its request for a detailed jurisdictional investigation into legislation, history, and the very facts subject to this subpoena. With sovereign immunity out of the way, this is a run-of-the-mill subpoena case that should be immediately enforced so the Board can conduct its investigation.

[1] References to Respondent's main brief in support of that response will be cited throughout as Response Br. __. References to the NLRB's opening Memorandum in Support of the Application for an Order Requiring Obedience to Subpoena Duces Tecum will be cited as Memo Br. __.

1. Sovereign Immunity is no Bar to the NLRB's investigation

Respondent takes umbrage at being "called before the Board in unconsented private proceedings" (Response Br. 7). Although Respondent possesses attributes of sovereignty that protect it from the indignity of facing suit by private parties, its immunity is insufficient to protect it from investigation by the NLRB because this is an action by the federal government.

Respondent fundamentally misunderstands the National Labor Relations Act, which creates no private cause of action. E.g., Evans Sheet Metal, 337 NLRB 1200, 1211 (2002), enfd. 92 Fed.Appx. 844 (3d Cir. 2003). In a case raising the issue of whether the NLRB has authority to interpret or nullify contract provisions without joinder of all affected parties, the Supreme Court held that

> The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights. . . . It has few of the indicia of a private litigation and makes no requirement for the presence in it of any private party other than the employer charged with an unfair labor practice. The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining and by protecting the "exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment."

National Licorice Co. v. NLRB, 309 U.S. 350, 362 (1940) (citations omitted).

In the cases relied on by Respondent, the federal agencies involved were merely the forums for adjudication of private rights, and the courts' point was that the nature of the forum (administrative agency v. Article III court) was irrelevant to the claim of sovereign immunity. For example, in Federal Maritime Comm'n v. South Carolina State

Ports Auth., 535 U.S. 743 (2002), the Supreme Court repeatedly called the Shipping Act action before the FMC a "private" suit. Unlike the National Labor Relations Act, the Shipping Act provides that "any person may file . . . a sworn complaint . . . and may seek reparation," id. at 748 fn. 1; FMC rules permit counterclaims and intervention, id. at 757; private parties may conduct discovery on each other, id. at 758; and the injured private party has the right to enforce an FMC reparation order in federal district court, id. at 762 fn. 14. Most important,

> a complaint filed by a private party with the FMC is plainly not controlled by the United States, but rather is controlled by that private party; the only duty assumed by the FMC, and hence the United States, in conjunction with a private complaint is to assess it merits in an impartial manner. Indeed, the FMC does not even have the discretion to refuse to adjudicate complaints brought by private parties.

Id. at 764. By contrast, the Court recognized that an enforcement proceeding brought and controlled by the Commission would be a suit brought by the United States, against which "a State's sovereign immunity would not extend." Id. at 763.

The NLRB, on the other hand, does not adjudicate private claims. Any proceeding under the Act is a prosecution by the General Counsel to enforce the Act in the public interest. Vaca v. Sipes, 386 U.S. 171, 182-183 & fn.8 (1967). The General Counsel has unreviewable prosecutorial discretion to dismiss a charge. E.g., Beverly Health Servs., Inc. v. Feinstein, 103 F.3d 151, 152-153 (D.C. Cir. 1996), cert. denied, 522 U.S. 816 (1997). The General Counsel has absolute control over the scope of any complaint, "and the Charging Parties cannot enlarge upon or change the General Counsel's theory of the case." Woodbury Partners LLC, 352 NLRB 1072, 1074 fn.7

(2008). Accord Teamsters Local Union No. 358 v. NLRB, 381 F.3d 767, 769 (8th Cir. 2004). There is no procedure for discovery in an NLRB proceeding, least of all by private charging parties. Metro Transport, LLC, 351 NLRB 657, 670 (2007). Backpay remedies are payable to the NLRB, not directly to affected parties, and no offsets for private claims are permitted. Lenz v. NLRB, 915 F.2d 388, 390 (8th Cir. 1990).

The Regional Director is entitled to continue investigation of a charge, and the General Counsel is entitled to continue a prosecution, even if the charging party requests withdrawal of it, and even if the charging party contractually settles its dispute with the respondent, if the public interest is better served by a formal proceeding. NLRB v. Union Nacional de Trabajadores, 611 F.2d 926, 932-933 (1st. Cir. 1979); Gulf States Mfrs., Inc. v. NLRB, 598 F.2d 896, 901 (5th Cir. 1979). Only the NLRB, not any interested private party, can enforce an NLRB decision. Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261 (1940).

Since this is a proceeding by the United States, sovereign immunity is no bar. See, e.g., US v. Red Lake Band of Chippewa Indians, 827 F.2d 380, 382-383 (8th Cir. 1987) ("We conclude that just as a state may not assert sovereign immunity as against the federal government, . . . neither may an Indian tribe, as a dependent nation, do so.") (citations omitted), cert. denied, 485 U.S. 935 (1988). Tribal sovereignty will be an issue in this case – it is relevant to application of the NLRA to Respondent and to the NLRB's discretionary jurisdictional analysis – but the argument that the Tribe should not even be subject to the indignity of an investigation is rebutted by the superior sovereignty of the

moving party. See, e.g., EEOC v. Karuk Tribe Housing Authority, 260 F.3d 1071 (9th Cir. 2001), in which the Ninth Circuit gave short shrift to the tribe's "attempts to circumvent the clear rule that Indian tribes do not enjoy sovereign immunity against suits brought by the federal government." Id. at 1075.

2. Detailed Investigation of the NLRB's Jurisdiction is not Appropriate in this Case

As fully explained in the Board's Memorandum in Support of this application, "'a subpoena enforcement proceeding is not the proper forum in which to litigate the question of coverage under a particular federal statute.'" EEOC v. Peat, Marwick, Mitchell and Co., 775 F.2d 928, 930 (8th Cir. 1985). Respondent really pays lip service to the deferential standard for reviewing an administrative subpoena. Instead, it seeks to try the ultimate jurisdictional issue in this case. The fact that Respondent finds it necessary to argue for 22 pages and file a slew of exhibits including expert testimonial review of its treaties in itself suggests that the answer it propounds is not "plain."

Respondent claims that its issue is not the NLRA's "coverage" at all but "jurisdiction." As the Supreme Court has recognized, "jurisdiction is a word of many, too many, meanings." Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 90 (1998).

The only really jurisdictional question in this case is answered by Article I, Section 8 of the Constitution: "The Congress shall have the power to . . . regulate

commerce . . . among the several states, and with the Indian Tribes." There can be no substantial dispute that the NLRA *can* apply to Indian tribes.

Despite its opening protest, Respondent ultimately recognizes that the real issue is whether the NLRA *does* apply to Indian tribes – count how many times it uses the word "apply" or one of its variations between pages 14 and 29. It just doesn't explain how "application" differs from "coverage." In fact, it doesn't – regardless of the canon of construction used to determine applicability, if the NLRA "applies" to Indian tribes, then it "covers" Indian tribes, and vice versa, and in either event, Congress has abrogated Indian sovereignty in the NLRA and the NLRB has "jurisdiction."

Some circuits distinguish the issue of coverage vel non from other challenges to the ultimate merits of an agency investigation in a subpoena challenge, and they call the former "jurisdictional." E.g., EEOC v. Karuk Tribe Housing Authority, 260 F.3d 1071, 1077 (9th Cir. 2001). Some explicitly reject the difference as purely semantic. E.g., EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 700 (7th Cir. 2002) (issue was whether plaintiffs were "employees," protected by the act, or "employers," not protected; court deferred to agency subpoena to find out).

Although the Eighth Circuit has apparently never been explicit, it has never recognized the distinction, either. On the contrary, the Eighth Circuit appears to implicitly equate coverage with jurisdiction when used in this sense (that is, applicability of a statute vel non). Donovan v. Shaw, 668 F.2d 985, 989 (8th Cir. 1982) (using jurisdiction and coverage interchangeably to describe party's argument); Blue Ribbon

Quality Meats, Inc. v. FTC, 560 F.2d 874, 876-877 (8th Cir. 1977) ("question of jurisdiction must be determined in the first instance by the agency itself").

Suppose a "jurisdictional" challenge means something other than a "coverage" challenge – where does that get Respondent? In the Ninth Circuit, it would earn Respondent a different standard of review from that exemplified in Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943), and followed by this Circuit in EEOC v. Peat Marwick Mitchell & Co., 775 F.2d 928, 930 (8th Cir. 1985). See Karuk Tribe Housing Authority:

> Judicial intervention prior to an agency's initial determination of its jurisdiction is appropriate only where: (1) there is clear evidence that exhaustion of administrative remedies will result in irreparable injury; (2) the agency's jurisdiction is plainly lacking; *and* (3) the agency's special expertise will be of no help on the question of its jurisdiction.

260 F.3d at 1077 (9th Cir. 2001) (emphasis added).[2]

Hard to say whether that is substantially any more intrusive than the Peat Marwick standard. In any event, it is easily met in this case.

The Ninth Circuit in Karuk had two Courts of Appeals cases on point on the jurisdictional issue. Both had found the ADEA did not apply to Indian tribal employers, and therefore EEOC lacked jurisdiction over the disputes. Id. at 1079. Those cases were EEOC v. Fond du Lac Heavy Equip. Co., 986 F.2d 246 (8th Cir. 1993), and EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989). In this case, by contrast, there is only

[2] The third factor, the value of the agency's expertise, is also sufficient to justify enforcement under this conjunctive test. The jurisdictional analysis does not rest solely on interpretation of treaties and laws regulating Indian affairs, but on interpretation of the NLRA as well. San Manuel, 475 F.3d at 1315-1316. On the latter issue, the NLRB's expertise is beyond question.

one Court of Appeals case on point, based on a full record, as to whether the NLRA applies to an Indian Tribe, and it supports NLRB jurisdiction. San Manuel Indian Bingo v. NLRB, 475 F.3d 1306 (D.C. Cir. 2007). There is also one case addressing an NLRB subpoena directed at an Indian tribe, and it, too supports jurisdiction, finding it not "plainly lacking," even before San Manuel was decided in the D.C. Circuit. NLRB v. Chapa De Indian Health Program, Inc., 316 F.3d 995, 1002 (9th Cir. 2003).

The state of precedent facing the Ninth Circuit in Karuk made its task easy. There was no reason to suspect that EEOC's evidentiary or legal inquiry into the statutes and treaties or the tribal business involved would support EEOC jurisdiction. In this case, the opposite applies – there is no "plain" precedential basis for rejecting NLRB jurisdiction at the subpoena enforcement stage.

Respondent argues (Response Br. 29-33) at length that San Manuel is a "Tuscarora" case, FPC v. Tuscarora Indian Nation, 362 U.S. 99 (1960), which makes it inconsistent with Fond du Lac Heavy Equip., a "Dion" case, US v. Dion, 476 U.S. 734 (1986), and therefore San Manuel would not fly in the Eighth Circuit. Contrary to Respondent's argument, Tuscarora is not dead in this jurisdiction. This Court has applied it in harmonious distinction to Fond du Lac Heavy Equip. as recently as 2003 to find ERISA applies to Indian tribal employers. Prescott v. Little Six, Inc., 284 F.Supp.2d 1224 (D. Minn. 2003), rev'd on other grounds, 387 F. 3d 753 (8th Cir. 2004) (Eighth

Circuit found it unnecessary to pass on sovereign immunity or statutory coverage issues in light of finding that no "benefit plan" existed), cert. denied, 544 U.S. 1032 (2005).[3]

Moreover, the San Manuel decision affirmed NLRB jurisdiction by applying (in the alternative) the same standard followed by the Eighth Circuit in Fond du Lac Heavy Equip. 475 F.3d at 444. San Manuel is not, as Respondent argues (Response Br. 34-35), out of step with the Eighth Circuit case on EEOC jurisdiction – it is distinguishable on solid grounds.

As the Eighth Circuit itself noted, "we find that the ADEA does not apply to the narrow facts of this case." Fond du Lac Heavy Equip., 986 F.2d at 251. This is no place to try the facts, but suffice to say that the NLRA is not the ADEA, and a casino staffed and patronized primarily by non-Indians is not a construction company owned and operated by the tribe on reservation (and other) projects. Fond du Lac Heavy Equip. does not establish that the NLRB has no jurisdiction in this case, much less that its jurisdiction is "plainly lacking."

Respondent erroneously argues with the uniqueness of San Manuel and claims "the circuits are split on this issue" (Response Br. at 29 & fn. 119). It cites only NLRB v. Pueblo of San Juan, 280 F.3d 1278 (10th Cir. 2000) in support of this split. On the

[3] In the event Respondent proposes something must be wrong with the District Court's reasoning in Prescott, it should be noted that although the Eighth Circuit declined to pass on ERISA's applicability to Indian tribes, applicability was ahead two decisions to none (Lumber Industry Pension Fund v. Warm Springs Forest Prods. Ind., 939 F.2d 683 (9th Cir. 1991); Smart v. State Farm Ins. Co., 868 F.2d 929 (7th Cir. 1989)) before Congress passed an amendment to ERISA explicitly applying it to Indian tribes, Dobbs v. Anthem Blue Cross, 475 F.3d 1176, 1177-1178 (10th Cir. 2007).

contrary, applicability of the NLRA generally to Indian tribes as employers was not an issue in Pueblo of San Juan. The issue was "whether the NLRA preempts an Indian tribe from adopting a right-to-work ordinance applicable to employees of a non-Tribal company engaged in business activities on a reservation." Id. at 1282. The court concluded,

> [T]he Pueblo has an inherent right to adopt an ordinance which regulates the commercial activities of a non-Indian company on tribal land operating under a lease with the tribe, absent express statutory language to the contrary. . . . We hold that the NLRA does not preempt a tribal government from the enactment and enforcement of a right-to-work tribal ordinance applicable to employees of a non-Indian company who enters into a consensual agreement with the tribe to engage in commercial activities on a reservation.

Id. at 1286. Nowhere does that case hold that the NLRA does not apply to Indian tribes acting as employers or that Indian tribes are completely exempt from the NLRB's jurisdiction. [4]

San Manuel was based on a full administrative record, as well as amici briefs of a number of Indian tribes. As explained more fully in the NLRB opening brief, "'a subpoena enforcement proceeding is not the proper forum in which to litigate the question of coverage under a particular federal statute.'" EEOC v. Peat Marwick, Mitchell & Co., 775 F.2d at 930. Accordingly, Respondent's exhibits should be ignored, not because they are irrelevant, but because this is not the place for an evidentiary hearing.

[4] Similarly on rehearing en banc, "We begin by noting what the district court also took pains to point out, namely, that the general applicability of federal labor law is not at issue." NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1191 (10th Cir. 2002).

In sum, the only precedent directly on point on NLRA coverage of Indian tribal employers (San Manuel and Chapa De) supports finding jurisdiction. Respondent's best analogy on coverage (Fond du Lac Heavy Equip.) is clearly distinguishable. Those indisputable facts alone preclude finding the NLRB's jurisdiction is so "plainly lacking" that it has no authority to conduct this investigation.

Respondent is entitled to make a record on the nature of its casino business and on its history based on treaties and traditions. Those factors are relevant both to the issue of statutory coverage and jurisdiction, as well as the Board's additional discretionary judgment regarding whether it would effectuate the purposes of the NLRA to assert jurisdiction over a tribal employer. With no serious sovereign immunity bar to the investigation itself, the record for that jurisdictional inquiry should be made at the NLRB, not here. As demonstrated by San Manuel, the Board's eventual determination concerning its jurisdiction is subject to judicial review pursuant to Section 10(e) or (f) of the Act (29 U.S.C. Sec. 160(e), (f)).

CONCLUSION

The NLRB reiterates its request in its opening Memorandum (Memo 10-11) to have this issue decided by the District Court rather than the Magistrate, in that this is a dispositive motion and a discretionary referral to a magistrate is only likely to further delay the Board's investigation. In addition, the NLRB considers oral argument unnecessary in light of the nature of the proceeding. With no serious issue of sovereign immunity at stake, subpoena enforcement should not require such an extensive inquiry.

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

Signed at Minneapolis, Minnesota, this 26th day of February, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2009, I caused the foregoing document:

Reply Memorandum in Support of Application for an Order Requiring Obedience to Subpoena Duces Tecum

to be filed electronically with the Clerk of Court through ECF, and that ECF will send an e-notice of the electronic filing to the following:

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All with the firm of Jackson, Buffalo, Magnuson, Anderson & Hogen, P.C., 1360 Energy Park Drive, Suite 210, St. Paul, MN 55108.

I further certify that there are no non-ECF participants listed in the case that require service by U.S. mail.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

NATIONAL LABOR RELATIONS BOARD

Applicant

v.

FORTUNE BAY RESORT CASINO

Respondent

LR 7.1(c) WORD COUNT COMPLIANCE CERTIFICATE REGARDING APPLICANT'S REPLY MEMORANDUM IN SUPPORT OF APPLICATION FOR AN ORDER REQUIRING OBEDIENCE TO A SUBPOENA DUCES TECUM

Case Number: 08-mc-00065 JRT-JJG

I, Joseph Bornong, certify that Applicant's Memorandum in Support of Application for an Order Requiring Obedience to a Subpoena Duces Tecum complies with Local Rule 7.1(c).

I further certify that, in preparation of this memorandum, I used Microsoft Office Word 2003, SP 2, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above referenced memorandum contains 2908 words, which makes the total of this reply memorandum and applicant's original memorandum in support 5681 words.

Date: February 26, 2009

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