IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE CHICKASAW NATION, Plaintiff, v. NATIONAL LABOR RELATIONS BOARD, and in their official capacities as members of the Board, WILMA B. LIEBMAN, Chairman, CRAIG BECKER, MARK G. PEARCE, AND BRIAN HAYES, Defendants.	Case No. 5:11-cv-506-W

DEFENDANTS NATIONAL LABOR RELATIONS BOARD ET AL.'S REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION

Defendants National Labor Relations Board et al. ("NLRB" or "the Agency") respectfully submit this reply in support of their Motion to Dismiss the Chickasaw Nation's Complaint for a Preliminary Injunction and/or Temporary Restraining Order.[1]

Initially, we note that the Chickasaw Nation asserts both that the "threshold question" in this case is whether the NLRA applies to the Nation, *and* that this case "arises under a source of law independent of the NLRA." (Pl.'s Resp. at 17.) But the Nation's assertions cannot change the basic legal framework of this case. The proper threshold question is whether this Court has subject matter jurisdiction to enjoin NLRB

[1] In this pleading, "the Board" will refer solely to the Section 3(a) collegial body. 29 USC § 153(a). The "NLRB" or "the Agency" will refer to the entire agency including the Board and the independent Office of the General Counsel which supervises all Regional Offices in the investigation and prosecution of unfair labor practices.

proceedings and decide in the first instance whether the NLRA applies to the Nation. *See* NLRB Memorandum in support of Motion to Dismiss ("NLRB Mem.") at 9-16 (arguing that Supreme Court and federal appellate court precedent establishes that this Court lacks such jurisdiction). "Jurisdiction is a threshold question that a federal court must address before reaching the merits of a statutory question[.]" *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002).

In unfair labor practice cases like this, the role of the Board is to adjudicate issues brought before it on an administrative complaint issued by the General Counsel pursuant to his prosecutorial authority, but only after the matter has initially been presented to and decided by an administrative law judge. *See* 29 U.S.C. 160(b), (c), 153(d). The issue of whether the NLRA applies to the Nation's casino has not yet been brought before an administrative law judge or the Board. That is precisely what the Nation seeks to avoid by enjoining the NLRB proceeding. If and when the Board is permitted to make this determination, the Board will provide the proper respect and deference to the Nation's Treaty rights and inherent powers and will adjudicate whether the NLRA should apply to the Chickasaw Nation's casino. The Board's determination will be then be subject to judicial review pursuant to the NLRA's statutory procedures. *See* 29 U.S.C. § 160(f).

1. The Nation's reliance upon the IGRA, the Nation's Treaties, and federal common law to support its sovereign immunity arguments, in turn depends upon the general jurisdictional statutes of 28 U.S.C. §§ 1331 or 1362, neither of which supersedes Congress's grant of exclusive jurisdiction to the courts of appeals to review NLRB proceedings.

The Nation argues that "[n]othing more is needed[,]" beyond "Sections 1331 and 1362" to establish district court subject matter jurisdiction to enjoin the NLRB's unfair

labor practice proceeding. (Pl.'s Resp. at 17.) But Congress specifically foreclosed district court reliance on those sections to review or enjoin ongoing NLRB administrative proceedings in Section 10(e) and (f) the National Labor Relations Act. 29 U.S.C. § 160(e) and (f). As the NLRB has demonstrated, generalized jurisdictional provisions cannot override Section 10(f)'s specific grant of exclusive review to the courts of appeals (29 U.S.C. § 160(f)), and therefore the Nation cannot establish the existence of district court subject matter jurisdiction in this case. (NLRB Mem. at 16-19 (citing supporting case law from the Tenth, Ninth, D.C., Sixth, Fourth, and Third Circuits)); *see also San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959) ("It is essential to the administration of the Act that [jurisdictional] determinations be left in the first instance to the National Labor Relations Board.").[2]

The NLRB does not dispute that, in other contexts, 28 U.S.C. §§ 1331 and 1362 might provide subject matter jurisdiction for a Tribal claim for injury of specific rights granted by a provision of the IGRA, the Chickasaw Nation's Treaties, or federal common

[2] *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1201-04 (10th Cir. 2002), does not hold to the contrary, because crucially absent from that case was any statute like Section 10(f) of the NLRA, which: grants exclusive power to the United States Circuit Courts to review Agency proceedings, requires administrative exhaustion prior to judicial review, and precludes exercise of district court jurisdiction under the general jurisdictional statutes of 28 U.S.C. §1331 and 1362 to enjoin the Agency's proceedings.

National Farmers Union Insurance Co. v. Crow Tribe, 471 U.S. 845, 850-53 (1985), also fails to advance the Nation's reliance on federal common law. There, the district court was required to remand the case for consideration of the extent of the Tribal sovereign authority "in the first instance in the Tribal Court itself." *Id.* at 856. Because the Supreme Court found that the federal district court lacked subject matter jurisdiction to adjudicate in the first instance the limits of tribal sovereignty, this case *undermines* the Nation's claim that the district court has subject matter jurisdiction here to determine in the first instance whether the Board has jurisdiction over Tribal casinos.

law. (*Cf.* Pl.'s Resp. at 12 n.7.) But the only claim here is to enjoin the NLRB from continuing its administrative proceedings. ((Pl.'s Resp. at 13) ("the application of the NLRA to the regulation and management of [the Casino's] gaming operations would violate the Nation's Treaty rights and inherent sovereign authority.")) Plaintiff's demand for such review and for an injunction of the NLRB's unfair labor practice proceedings can not escape Section 10(f) of the NLRA, by which Congress divested the district courts of jurisdiction over the adjudication of unfair labor practice cases. In the face of this explicit Congressional choice, the Nation cannot rely solely on the generalized jurisdictional statutes of 28 U.S.C. §§ 1331 or 1362 to provide jurisdiction for this Court.

Contrary to the Nation's assertion, this case does not arise under "a source of law independent of the NLRA" that is, only under the IGRA,[3] the Nation's Treaties, and federal common law. (Pl.'s Resp. at 17.) Rather, as the Nation itself repeatedly states, this case concerns a claim to enjoin a federal agency proceeding being conducted pursuant to the NLRA, in order to protect asserted substantive rights of Tribal immunity. ((*E.g.*, Pl.'s Resp. at 1) ("the Chickasaw Nation seeks injunctive relief to protect its Treaty rights and inherent powers from the [NLRB's] assertion of authority.") That claim makes this case similar to and not distinguishable from the several cases where federal courts have applied the *Myers* exhaustion principle and rejected efforts to enjoin

[3] The IGRA contains no labor provision at all; it regulates tribal gaming activities on Indian land and does not address the force of the NLRA over such gaming enterprises, the only issue with which the NLRB is concerned. *See San Manuel Indian Bingo & Casino*, 475 F.3d 1306, 1317 (D.C. Cir. 2007) (Congress did not "enact[] a comprehensive scheme governing labor relations at Indian casinos" and there is "no indication that Congress intended to limit the scope of the NLRA when it enacted IGRA").

NLRB proceedings. In those cases, plaintiffs unsuccessfully argued (i) that other federal law, including the Constitution, barred the application of the NLRA to them, and (ii) that subjecting them to the NLRB's proceedings would itself cause irreparable harm. In one such case, the Catholic Church unsuccessfully argued that the First Amendment guarantee of freedom of religion barred application of the NLRA. *See Grutka v. Barbour,* 549 F.2d 5, 7-8 (7th Cir. 1977).[4] In another, the charged party claimed the sovereign immunity of the German government and relied upon the Foreign Sovereign Immunities Act. *See Goethe House New York, German Cultural Center v. NLRB*, 869 F.2d 75 (2d Cir. 1989). In a third, an Indian Tribe operating a casino on its tribal territory pursuant to the IGRA asserted that it was exempt from the NLRA by its tribal sovereignty. *See Little River Band of Ottawa Indians v. NLRB*, 747 F.Supp.2d 872, 890 (W.D. Mich. 2010).[5] The courts in these cases all rejected attempts to circumvent NLRA exhaustion requirements.

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[4] The Nation's attempt to distinguish *Grutka* is unavailing: The NLRB agrees that the Supreme Court's denial of certiorari does not constitute a ruling on the merits. But that truism does not alter the critical lesson of *Grutka* -- that even a meritorious constitutionally-based claim of jurisdictional overreach by the Agency does not alter the *Myers* exhaustion rule. The Nation's observations about the timing of the Seventh Circuit's consideration of that case are irrelevant. Nothing in the *Grutka* opinion suggests such timing was an element in the holding that "constitutional allegations of this complaint do not confer jurisdiction upon the district court because the [NLRA] statutory review procedures are fully adequate to protect the plaintiff's constitutional rights." 549 F.2d at 9.

[5] The Nation thus errs when it asserts that the previous failed attempts to enjoin Board proceedings *differ* from this one because those other plaintiffs declined to dispute the applicability of the NLRA. (*See* Pl.'s Resp. at 18.) Of course, the foundational opinion of *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49 (1938), was itself a case

To the extent the Nation relies upon Treaties, the IGRA, and federal common law, the Nation still must invoke Section 1331 or 1362, neither of which general jurisdictional statute provides jurisdiction here. By contrast, cases arising under the Freedom of Information Act ("FOIA") are distinguishable (Pl. Resp. at 17, 18, 20), as the FOIA contains an explicit provision that provides district courts with jurisdiction:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.

5 U.S.C. 552(a)(4)(B)(2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.[6] Accordingly, this case is not distinguishable from *Grutka*, *Goethe House*, or *Little River*. *See also Squillacote v. Int'l Bhd. of Teamsters, Local 344*, 561 F.2d 31, 36 (7th Cir. 1977) (concluding district court lacked jurisdiction to consider union's claims that Board's actions were unconstitutional where § 10(f) review was available).

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where the plaintiff asserted that the NLRA was not applicable, albeit on an argument interpreting the NLRA itself.

[6] FOIA cases relied on by the Nation provide no support for the further reason that they reaffirm the *Myers* principle firmly establishing that the Nation will suffer no irreparable harm merely by submitting to the Agency's unfair labor practice proceedings. *See Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.") (citing *Myers*, 303 U.S. at 51-52); *Sears, Roebuck and Co. v. NLRB*, 473 F.2d 91, 93 (D.C. Cir. 1972).

In sum, there is no merit to the Nation's argument that this Court can assert subject matter jurisdiction because Sections 1331 and 1362 cannot overcome Congress's specific divestment of jurisdiction from federal district courts to hear cases like this.

2. The Nation's Treaty Rights are not rendered "meaningless" because a federal district court lacks jurisdiction to adjudicate the Nation's claim.

There is no support in law or logic for the Nation's assertions that its treaty rights will be rendered "meaningless" if this Court lacks jurisdiction. (Pl's Resp. at i, 4, 19, 24, & 26.) The Nation's rights are not rendered meaningless simply because the Nation cannot override Congress' choice of federal forum for their adjudication. There is no dispute that the Chickasaw Nation is entitled to have its argument heard, if necessary, by a federal court; it will have such review available under the congressionally-mandated procedures in Section 10(f) of the NLRA. Of course, if the Board agrees with the Nation's arguments, such judicial review may never be needed. But it cannot be overstated that the legal obligations and duties of employers under the NLRA are not now and will not be imposed upon the Nation's casino unless the Board issues a final agency decision that rejects the Nations' sovereignty arguments *and* the Board's decision is reviewed and enforced by a federal circuit court.

Thus, the dispute here concerns whether a federal district court should grant the Nation's request to usurp a Circuit Court's review authority under over NLRB proceedings. The Nation's protestation that Section 10(f) "does not purport to provide a remedy for the violation of Indian treaty rights" misses the point: nothing can happen to

interfere with the Nation's operation of its casino unless and until a federal appellate court, upon review of an adverse Board decision, determines that the NLRA applies to it.

The Nation's similar assertion that "the absence of federal jurisdiction" permits the unlawful abrogation of treaty rights suffers from two fatal flaws. (Pl.'s Resp. at 26.) First, as just discussed, the NLRB does not contest all forms of federal jurisdiction. The NLRB's contention is that Section 10(f) (29 USC § 160(f)) grants exclusive review authority to the circuit courts and divests a federal *district* court of jurisdiction. Second, the Nation's argument flows from the erroneous premise that the NLRB's mere adjudication of the pending unfair labor practice complaint will somehow violate the Tribe's sovereignty. (Pl.'s Resp. at 11, 13, 14, 20, 24, 35.) The Nation equates its participation in an administrative proceeding before the NLRB with the application of the National Labor Relations Act to the Nation's casino. But a world of difference divides the two: participating in the administrative proceeding only requires the Nation to present its jurisdictional arguments to the Board. Participation in such proceeding causes no cognizable harm to the Nation warranting an injunction.[7] *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52 (1938) ("the rules requiring exhaustion of an administrative remedy cannot be circumvented by asserting that the charge on which the

[7] The Nation's assertion to the contrary – that merely participating in the NLRB proceeding would cause irreparable injury to the tribe's inherent sovereign authority – relies upon inapposite cases that involve state forums or actors, not a federal statute like the NLRA which guarantees review in the Circuit Court. Indian Nations are not subordinate to the several States, only to the federal government. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980) ("it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States"). *See* Pl.'s Br. at 27.

complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable harm").[8] Application of the NLRA could impact the Nation's gaming operations, but if the Board's proceeding goes forward, such application cannot and will not happen until a federal court of appeals reviews any decision made by the Board and rules on the propriety of applying the NLRA to the Nation's casino.

3. This case is controlled by *Myers v. Bethlehem Shipbuilding Corp.*, and, contrary to the Nation's argument, it does not fall within the exceptions articulated in *Leedom v. Kyne* or *McCulloch v. Sociedad Nacional de Marineros de Honduras.*

Neither of the two exceedingly narrow exceptions to the NLRA rule of exhaustion established in *Myers* applies here because this case stems from an unfair labor proceeding, not a representation proceeding, and the Nation's casino, the employer in this case, has access to federal court review. Accordingly, this Court should "hold that the petition for review process detailed in the National Labor Relations Act, 29 U.S.C. § 160(f), which authorizes appellate court review of final decisions by the National Labor Relations Board, is the exclusive mechanism for federal court review of decisions made in unfair labor practice hearings." *Amerco v. NLRB*, 458 F.3d 883, 884 (9th Cir. 2006).

[8] The Nation asserts that application of the NLRA "deprives the Nation of its federal right to be immune from suits to which it has not given its consent." (Pl.'s Resp. at 29.) But the cases cited by the Nation do not support that assertion. Here, there is no private party claim or a state forum that could impose liability upon the Nation. *Cf.* Pl.'s Br. at 23-24 and Pl.'s Resp. at 29 (citing *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1172 (10th Cir. 1998)). Similarly, the cited cases concerning state actor's qualified immunity or the appealability of a claim based upon the Double Jeopardy Clause are not relevant to this case. *Cf.* Pl.'s Br. at 27 (citing *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf*, 506 U.S. 139, 143-44 (1993); *Abney v. United States*, 431 U.S. 651, 660 (1977)).

Leedom v. Kyne, 358 U.S. 184 (1958), arose in the context of Section 9 representation proceedings, which are distinct from Section 10 unfair labor practice hearings in a way critical to this case. *See* 29 U.S.C. § 159 (establishing procedures for selecting union representation and determining appropriate bargaining units). Whereas Congress explicitly authorized appellate review for *any* party aggrieved by an NLRB unfair labor practice decision, Congress provided no similar check on NLRB election decisions made pursuant to Section 9. *Amerco v. NLRB*, 458 F.3d at 888-89; *NLRB v. Interstate Dress Carriers, Inc.*, 610 F.2d 99, 105 (3d Cir. 1979) (explaining that Congress omitted judicial review from Section 9 "[b]ecause of the compelling interest in moving collective bargaining forward in an expeditious manner"); *see also Am. Fed'n of Labor v. NLRB*, 308 U.S. 401, 409 (1940). Judicial review of representation rulings is available only when the Board certifies a union as bargaining representative, the employer refuses to bargain with the certified union, and the Board issues a final order finding that the employer's conduct constitutes an unfair labor practice. That order is then directly reviewable in an appropriate court of appeals pursuant to Sections 10(e) and (f) of the NLRA, 29 U.S.C. § 160(e), (f). *See American Fed'n of Labor*, 308 U.S. at 409. Here, however, the Chickasaw Nation's claim arises out of an unfair labor practice proceeding, and thus there is no dispute that the Nation has a meaningful opportunity to seek appellate review, and therefore this case does not qualify for the *Leedom* exception.[9] *See*

[9] Nor does the Nation meet the additional requirement for *Leedom* jurisdiction: that the Board has violated "a specific prohibition in the [NLRA]." *Goethe House New York, German Cultural Center v. NLRB*, 869 F.2d 75, 80 (2d Cir. 1989) (emphasis added). *See also Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308, 1312 (D.C. Cir. 1984) ("[o]nly

Board of Governors of the Federal Reserve System v. MCorp Financial, Inc., 502 U.S. 32, 43 (1991) (finding no "sacrifice or obliteration" of a right where "a meaningful and adequate opportunity for judicial review" is available); *see also Amerco v. NLRB*, 458 F.3d 883, 888-89 (9th Cir. 2006); *NLRB v. Interstate Dress Carriers, Inc.*, 610 F.2d 99 (3d Cir. 1979); *J. P. Stevens Emp. Educational Committee v. NLRB*, 582 F.2d 326 (4th Cir. 1979); *Bokat v. Tidewater Equipment Co.*, 363 F.2d 667 (5th Cir. 1960); *Blue Cross & Blue Shield of Mich. v. NLRB*, 609 F.2d 240, 244-45 (6th Cir. 1979).

An equally narrow exception was recognized in *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), which also arose in the context of a Section 9 proceeding. There, the Supreme Court held that a district court had jurisdiction to enjoin an NLRB-ordered representation election involving foreign seamen, who were already represented by a foreign union, on shipping vessels owned by a Honduran corporation. Although three certiorari petitions were involved in *McCulloch*, including one filed by the Honduran company, the Supreme Court only reached the merits with respect to the petition filed by the foreign union, which was not a party to the NLRB's proceeding and was unable to secure judicial review through the normal procedures set forth in the NLRA.[10] *See* 372 U.S. at 16. Again, the Chickasaw Nation has full access to federal review in this case and thus the *McCulloch* exception in inapposite.

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where the Board has clearly violated an express provision of the statute and the plaintiff has no means of obtaining review through a refusal to bargain, have the courts granted relief under *Kyne*.").

[10] The Second Circuit interpreted that the Supreme Court in *McCulloch* precluded jurisdiction for the case brought by the employer because the employer could seek

Moreover, *McCulloch* has no application here because this case does not involve international relations. "The Supreme Court has consistently characterized Indian tribes as "domestic dependent nations, subject to the paramount authority of the federal government." *Chickasaw Nation v. United States*, 208 F.3d 871, 884-85 (10th Cir. 2000) (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831)) (internal citations omitted). Because the Chickasaw Nation is a "domestic dependent nation[]," *id.*, its interests occupy a substantively different position than those of the Republic of Honduras in *McCulloch*.[11] *See also Goethe House New York*, 869 F.2d at 79 (rejecting *McCulloch* jurisdiction on basis that, among other reasons, "disturbances and embarrassment in international relations" would not result from NLRB's assertion of jurisdiction).

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indirect review through a post-election refusal to bargain unfair labor practice proceeding. *See Goethe House New York, German Cultural Center v. NLRB*, 869 F.2d 75 (2d Cir. 1989) (finding it "significant that" the Supreme Court "decided to adjudicate only the union-initiated case, and declined to rule on whether the district court had jurisdiction in the employer-initiated case[,] and holding that "since Goethe House is an employer and can seek indirect review, there was no warrant for the district court to assert jurisdiction"). Like the Employer in *McCulloch* and in *Goethe House*, here too, the Nation has full access to judicial review.

[11] To the extent that the Nation claims that treaty rights and the IGRA preempt the NLRA (Pl. Resp. at 4, 19, 23), this argument misapprehends the meaning of preemption, which, pursuant to the Supremacy Clause of the Constitution, accords federal law and treaties a superior status to *state* law. U.S. Const. art. 6, cl. II. In contrast to preemption, the task of a court determining the relationship between two federal enactments is to decide the issue before it in a way that best accommodates and reconciles the policies of *both* federal rules where possible. *See Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 621-623 (1975); *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective"). In short, federal preemption is not relevant here.

4. The Circuit Courts, including the Tenth Circuit, have declined to find that Indian Tribes are irreparably harmed if required to participate in federal administrative proceedings.

The Nation repeatedly contends that the federal district court may assert jurisdiction to enforce treaty provisions that protect its right to self-government and to exclude persons from the Chickasaw Nation. However, the NLRB's motion to dismiss does not rely upon any particular reading of the treaties, nor on defeating the Nation's claim that application of the NLRA to its casino will violate sovereign tribal rights. Rather, the NLRB's argument is that the Nation's rights under treaties (or the IGRA or federal common law) do not provide a legitimate basis for disregarding the statutory review procedures. (*See infra* part 1.)

Thus, the Nation's exhaustive substantive explanation of its treaty rights, in effect, argues against a straw man, because the NLRB cannot now address or dispute the Nation's assertion that substantive treaty rights preclude application the NLRA. Nor was the NLRB's aim in its motion to dismiss to comprehensively discuss every relevant treaty provision, as the Nation seems to suggest. In fact, the NLRB's five-sentence discussion of the treaties,[12] (NLRB's Mem. at 3), contains no argument regarding how the Nation's

[12] The Nation did not assert that its treaties provide it *exclusive* right to self-governance. (*Id.* art. 7 and 8(4).) "The Supreme Court has consistently characterized Indian tribes as "domestic dependent nations, subject to the paramount authority of the federal government." *Chickasaw Nation v. United States*, 208 F.3d 871, 884-85 (10th Cir. 2000) (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831)) (internal citations omitted). As a domestic dependent nation, Chickasaw Nation is subject to some, but clearly not all, of the laws of the United States. Similarly, the Nation did not dispute the Board's modest assertion that (i) the 1866 Treaty renders "null and void" all inconsistent provisions in prior treaties, including the 1830 and 1855 treaty (Pl.'s Br. Ex. 5 art. 51), and (ii) the

treaty rights may impact the potential application of the NLRA to the Nation's casino because the Board has not yet considered the issue, and Congress reserved that initial determination to the Board and the federal appellate courts on review.[13]

In any event, under long-settled Supreme Court law, this Court must provide the Board with opportunity to adjudicate in the first instance whether the NLRA applies to the Casino. As the NLRB previously stated (NLRB's Mem. at 25), such a course was charted by the San Manuel Indian tribe when it argued that its sovereignty precluded application of the NLRA to its casino – that is, it made arguments to the Board, which decided the issue in the first instance, and then subsequently made arguments to the D.C. Circuit on review of the Board's order. *San Manuel Indian Bingo & Casino*, 475 F.3d 1306, 1317 (D.C. Cir. 2007). Significantly, the same procedure was followed by the Navajo tribe when it disputed application of the OSHA to a tribal enterprise in *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709, 712 (10th Cir. 1982), a case relied upon by the Nation (Pl.'s Br. at 9, 11, 13, 22). In that case, OSHA officers inspected NFPI business facilities, owned and operated by the Navajo Tribe, and the Secretary of Labor issued a citation charging various OSHA violations. *Donovan*, 692 F.2d at 710. NFPI contested the citation, asserting that the Secretary lacked jurisdiction over an Indian

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1866 Treaty explicitly grants federal government employees the rights to enter tribal land. (*Id.* art. 43.)

[13] The NLRB's discussion of the Board's prior use of the *Tuscarora* and *Coeur d'Alene* tests similarly did not seek to establish NLRB jurisdiction, but rather to show to the Court that Board jurisdiction "in the underlying unfair labor practice case is hardly as open-and-shut as the Nation would have this Court conclude." (NLRB Mem. at 30.)

tribal enterprise. *Id.* An Administrative Law Judge found that OSHA did not apply, and on review the Occupational Safety and Health Review Commission found that applying OSHA to NFPI would violate the Navajo Treaty. *Id.* The Secretary of Labor appealed and the Tenth Circuit agreed with the Commission. *Id.*

The same process must be followed here -- the Board will initially decide the Nation's legal defenses, and appellate court review will be available upon any adverse agency decision. Indeed, the Nation here is in *a better* position than the Navajo Tribe because the NLRB General Counsel, unlike the Secretary of Labor, can not appeal a Board decision to the circuit court if that decision agrees with the Nation' asserted immunity from the NLRA. The Nation can point to no good reason why it is entitled to a different, earlier (and statutorily precluded) form of judicial review than was followed in *Donovan*, 692 F.2d at 710, and *San Manuel Indian Bingo & Casino*, 475 F.3d 1306, 1317 (D.C. Cir. 2007) .

CONCLUSION

The Nation's attempt to interfere with the pending unfair labor practice case by asking this Court for equitable relief in a case over which it lacks jurisdiction is inappropriate and contrary to law. It follows that the Nation's motion for injunctive relief should be denied and its Complaint dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

Respectfully submitted,

CHARLES T. HOSKIN
Attorney
(918) 581-7946
Charles.Hoskin@nlrb.gov

National Labor Relations Board
Region 17 – Resident Office
Tulsa Resident Office
224 South Boulder Avenue
Room 318
Tulsa, OK 74103-3027

ERIC G. MOSKOWITZ
Assistant General Counsel
(202) 273-2931
Eric.Moskowitz@nlrb.gov

NANCY E. KESSLER PLATT
Supervisory Attorney
(202) 273-2937
Nancy.Platt@nlrb.gov

s/ Nina Schichor
NINA SCHICHOR
Attorney
(202) 273-7957
Nina.Schichor@nlrb.gov

National Labor Relations Board
Special Litigation Branch
1099 14th Street, NW
Washington, DC 20570

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