UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SOARING EAGLE CASINO AND RESORT,
AN ENTERPRISE OF THE SAGINAW CHIPPEWA
INDIAN TRIBE OF MICHIGAN

Respondent Case 7–CA–53586

and

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW)

Charging Party

Mary Beth Foy, for the General Counsel.
Sean J. Reed, Esq., of Mt. Pleasant, Michigan, and
William A. Szotkowski, of St. Paul, Minnesota, for the Respondent.
Blair K. Simmons, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Mount Pleasant, Michigan, on December 14–15, 2011. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the Union) filed the initial charge on April 1, 2011,[1] and the General Counsel issued the amended complaint on September 22, 2011. The amended complaint alleges that the Soaring Eagle Casino and Resort, an Enterprise of the Saginaw Chippewa Indian Tribe of Michigan (the Tribe), violated: Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining an unlawful no-solicitation policy in its handbook and prohibiting employees from talking about the Union in the employee hallway; and (2) Section 8(a)(3) and (1) of the Act by suspending and then discharging an employee for engaging in union solicitation and distribution activities in the employee hallway and public bathroom in the casino. The Tribe denies the allegations and contends that Federal laws, including the Act, do not apply to a tribal Government's exercise of sovereign authority absent express congressional authorization.

[1] All dates are in 2011, unless otherwise indicated.

FINDINGS OF FACT

I. Jurisdiction

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act. The Tribe, a federally recognized Indian Tribe with an office and facility in Mount Pleasant, Michigan, is engaged in the operation of a hotel and gaming enterprise. During 2010, the Tribe, in conducting said business operations, derived gross revenues in excess of $1,000,000 and purchased and received at its Mount Pleasant facility goods and materials valued in excess of $50,000 directly from points outside the State of Michigan. Notwithstanding such economic activity within the stream of interstate commerce, the Tribe contends that its unique status as a federally recognized Indian tribe immunizes it from the jurisdictional reach of Section 2(2), (6), and (7) of the Act. This question is, indeed, determinative of the outcome of this case.

II. The Saginaw Chippewa Tribe

A. The 1855 and 1864 Treaties

The Saginaw Chippewa Tribe (the Tribe), a Federally recognized Indian Tribe,[2] is a successor to the 1855 Treaty with the Chippewa of Saginaw, Swan Creek, and Black River (the predecessor Tribe), 11 Stat. 633, and the 1864 Treaty with the predecessor Tribe, 14 Stat. 637.[3]

The 1855 Treaty, as amended, affirmed[4] the rights of the predecessor Tribe to the exclusive use, ownership, occupancy, and self-governance of a permanent homeland. It dealt with land allocation, support payment of moneys by the United States Government to the Tribe, and provision of an interpreter for the Indians. The 1864 Treaty provided for the Tribe to relinquish lands reserved to the Tribe under the 1855 Treaty, but allocated land in Isabella County—the Isabella Reservation—for "the exclusive use and occupancy" of the predecessor Tribe as a sovereign nation. It specifically mentioned monetary support by the Federal government for agricultural operations, a school and a blacksmith shop on the reservation. The 1855 and 1864 treaties also included the rights to exclude non-Indians from living on the reservation.[5]

Subsequently, the predecessor Tribe invoked the treaties in order to exclude non-Indians from their lands. In one instance, the predecessor Tribe succeeded in having a Federal agent involved in land fraud removed from their reservation. In another instance, the Tribe succeeded in having the awards of reservation land to a missionary revoked and the missionary excluded from their land.[6] More recently, on August 31, 2011, the Tribe enacted its most recent

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[2] 75 Fed. Reg. 60,810 (Oct. 1, 2010).

[3] R. Exh. 2–3.

[4] The General Counsel did not dispute the opinion of the Tribe's expert that Indian treaties affirm, rather than create, longstanding sovereign rights. (Tr. 70.)

[5] Previous testimony by the Tribe's expert, John Bowes, was accepted as fact regarding the predecessor Tribe's right to exclude. (R. Exh. 4 at 2). In addition, there several general reference to an 1864 "Statement of the Indians" as reinforcing that right. (Jt. Exh. 1.)

[6] This historical rendition by Bowes was not disputed. (Tr. 88-94.)

law excluding non-Indians from the Isabella Reservation.[7] Neither treaty, however, even remotely addresses the future application of Federal regulatory laws to the predecessor Tribe's business operations involving non-Indian employees.[8]

B. The Isabella Reservation

The reservation created by the Treaties of 1855 and 1864 is located primarily within Isabella County, with a portion in Arenac County, Michigan. The Tribe's casino is located entirely within the geographical boundaries of the Isabella Reservation. The City of Mount Pleasant, with its own police, fire, and public safety departments, is located entirely within the geographic boundaries of the reservation. With respect to activities within the reservation, Mount Pleasant governmental entities have jurisdiction only over nonmembers of the Tribe. They have no jurisdiction at the casino.[9]

The Tribe has approximately 3046 members. Its tribal council is comprised of 12 members elected by the tribal membership and headed by an elected tribal chief. The tribal council enacts laws applicable to tribal members and the Tribe's various enterprises. The council also governs and manages economic development. It holds regular meetings open to tribal members and special sessions to handle contracts, invoices, grants, and vote on proposed motions and resolutions.[10]

On August 20, 1993, in accordance with the Indian Gaming Regulatory Act, a compact between the State of Michigan and the Tribe, approved by the U.S. Government, authorized the Tribe to conduct a gaming enterprise on the reservation. The compact does not give Michigan regulatory authority over the Tribe's gaming enterprise, except for inspection of class III devices and records. The Tribe has its own regulatory body, the Tribal Gaming Commission (the Commission). The Commission consists of a six-member board. They are hired by the tribal council, must be tribal members, and serve 4-year terms. The tribal council enacted a gaming code on October 5, 1993, which is enforced by the Commission. The gaming code establishes internal controls and licensing criteria for casino employees who handle tribal funds. The Commission reports to the tribal council on a monthly basis. It reports formal violations, and gaming licenses that have been issued or removed. No housekeeping employees are issued licenses. On November 16, 1993, the Tribe created Soaring Eagle Gaming as a Governmental entity to operate and manage the casino, as established by Charter of Soaring Eagle Gaming. The tribal council hires all management-level employees for the casino, including the chief executive officer. The casino's controller, an employee of the Tribe, submits the casino's budget to the tribal council for approval. The tribal council approves all contracts with the casino's

[7] Ordinance No. 3, "Code of Conduct and Power to Exclude Non-Members. (R. Ex. 6; Tr. 88–94).

[8] The testimony of Bowes and the Tribe's other expert in Native American history, Randolph Valentine and John Bowes, was not disputed. Besides providing legal conclusions that the Act does not apply to any of the Tribe's operations, they credibly explained the predecessor Tribe's understanding as to how the treaties related to their sovereign rights. (Tr 11–46, 67–94; R. Exhs. 1–5.) Valentine's opinion that any ambiguities under treaties with Native American tribes were historically construed in their favor was also not disputed. (Tr. 17–18.) Neither expert provided an explanation, however, as to how the right to exclude non-Indians from reservations lands related to the application of Federal regulatory laws, more than 150 years later, to a tribe's business operation that serves thousands of nontribal members each year.

[9] GC Exhs. 2–3.

[10] GC Exhs. 2 at 3-4.

vendors. The casino department managers and directors regularly report to the tribal council. The Tribe considers all casino employees to be Governmental employees of the Tribe.[11]

The Tribe's primary source of revenue is generated by its gaming enterprise, with about 90 percent of tribal income derived from the casino operation. The tribal council decides how to distribute gaming revenue to support the Tribe's programs and services. The Tribe has 37 Governmental departments and 159 programs. These departments include behavioral health, community and economic development, education, fire, the gaming commission, health administration, judicial, police, utilities, and the casino. About 90 percent of the departments and programs are funded by revenue generated by the casino. The remainder comes from grants and contracts. The Tribe operates a police department, tribal court system, tribal administration building, and fire department. The Tribe also operates programs that provide health services, behavioral health services and social services to tribal members and members of other tribes.[12]

C. The Casino

The Tribe's casino consists of two buildings located on 121 acres. One building houses bingo and slots machines; the other building includes casino activities, restaurants, bars, entertainment facilities and a hotel. The casino, open 24 hours a day, 7 days a week, is open to non-members of the Tribe. The casino has gross annual revenues of approximately $250 million and draws approximately 20,000 customers per year. Approximately 3000 employees work at the casino; approximately 221, or 7.4 percent, of those employees are members of the Tribe. Of these tribal members, about 65, or 29 percent, are in management positions. The casino's current chief executive officer, Andy Asselin, is not a member of the Tribe. The casino advertises throughout Michigan, including the metropolitan Detroit area, via billboards, newspapers, radio, and television. The casino was economically impacted by the opening of three casinos in Detroit, which is located in southeast Michigan.[13]

The relevant Tribe officials and casino supervisors include: Dennis Kequom–the Tribal chief; Andy Asselin–the casino's chief executive officer; Ben Perez–senior manager, casino housekeeping; Greg Falsetta–the Tribe's director of human resources; Lisa Morris–human resources assistant manager; Carla O'Brien–human resources manager; Greg Lott–supervisor/manager; Dorothy Munro–team leader; Robert Rood–team leader; and Julia St. John–team leader.[14]

The relevant portions of the casino include the employee hallways, an employee break room and the three casino floor bathrooms. The employee hallway is limited to employee access and casino patrons are prohibited from entering that area. There are employee-entrance doors leading from the employee parking lot into the employee hallway area. The employee hallway area consists of two hallways: a "main employee hallway" and a "side employee hallway." The main employee hallway consists of three time clocks; an employee break room, which is a nonworking area; an entrance to the food and beverage service area; and a security stand leading to entry doors out to the main casino. The side employee hallway consists of two time clocks; employee bathrooms; employee locker rooms; a pre-shift meeting room; and

[11] Id. at 4.
[12] Id. at 4.
[13] Id. at 4-5.
[14] The Tribe concedes that all of these individuals served as its supervisors and agents within the meaning of Sec. 2(11) and (13) of the Act, respectively, if the Act is found to apply to the Tribe and the Board determined to have jurisdiction over it.

security, surveillance, maintenance, and housekeeping offices. Employee activities take place on occasion in the employee side hallway area such as "employee appreciation day" during which employees congregate, play games, and eat food. The most recent employee appreciation days occurred in the employee hallway area in or about October 2009 and October 2011.[15]

D. Rules and Regulations

The casino's employee rules are contained in the "Soaring Eagle Casino & Resort Associate Handbook." On October 13, 2006, the Tribe promulgated and implemented its no-solicitation policy by formal action of the Tribal Council applicable to Soaring Eagle Casino and Resort (SECR). This no-solicitation policy is contained at Section 5.3.[16] The Tribe's no-solicitation policy states the following:

1. Item number 4 under "DEFINITIONS" includes "any place where any employees perform job duties for Soaring Eagle" as a "working area."

2. Item number 6 under "DEFINITIONS" includes "parking lots and roadways" as "Soaring Eagle premises."

3. Item number 2 under "PROHIBITED CONDUCT" prohibits employees "from soliciting in any work area."

4. Item number 3 under "PROHIBITED CONDUCT" prohibits employees "from posting notices, photographs or other written materials on bulletin boards or any other Soaring Eagle premises."

5. Paragraph one under "ENFORCEMENT AND DISCIPLINE" requires that employees "shall notify" Respondent of any form of solicitation that is occurring or has occurred at SECR.

6. Paragraph two under "ENFORCEMENT AND DISCIPLINE" states that "Any person violating this policy will be subject to disciplinary action up to, and including, termination."

On October 24, 2007, after the filing of the petition in Case 7–RC–23147, the tribal council enacted Ordinance 28, the Tribal Government Labor Ordinance, which prohibited employees from forming or joining labor organizations for purposes of collective bargaining or mutual aid. On September 17, 2008, the Tribal Council repealed Ordinance No. 28.[17]

III. The History Between the Tribe and the Union

On November 20, 2007, the Regional Director for Region 7 affirmed a hearing officer's rulings and issued a Direction of Election for bargaining unit members represented by the Union. The Tribe stipulated to the appropriateness of the petitioned-for unit, but asserted that the petition should be dismissed for lack of jurisdiction. The Tribe argued that the controlling law on whether the Board can assert jurisdiction over a casino on Indian land, *San Manual Indian Bingo & Casino,* 341 NLRB 1055 (2004), affd. 475 F.3d 1306 (D.C. Cir. 2007), was wrongly

[15] GC Exh. 19, Sections 30, 34-41.
[16] GC Exh. 4.
[17] Resolution 08-148. (GC Exh. 18.)

decided. Applying the analysis set forth in *San Manuel,* the Regional Director found that the Board had jurisdiction over the Tribe. He further concluded that "[t]he Casino is not an exercise of self-governance or a purely intramural matter. The application of the Act will not abrogate the general right to the exclusive use, ownership and occupancy of land reserved under the Tribe's treaties with the United States. The language and legislative history of the Act does not establish that Congress intended to exclude Indians' commercial enterprises from the Board's jurisdiction. Finally, the [Tribe] has not raised any other meritorious jurisdictional defenses." On December 19, 2007, the Board denied the Tribe's Request for Review of the Regional Director's Decision and Direction of Election on the ground that it raised no substantial issues warranting review. The Board also denied the Tribe's motion to stay the election.[18]

On November 28, 2007, the Union filed its initial petition to hold a representative election on behalf of the casino's security department. On January 17, 2008, the Regional Director issued a Decision and Direction for Election. On February 13, 2008, the Regional Director for Region 7 approved the Union's request to withdraw the petition and canceled the election. As a result, the Board's Associate Executive Secretary informed the Tribe that the issues in its request for review were moot and would not be forwarded to the Board for consideration.[19]

In a letter to Tribal Chief Fred Cantu, dated July 30, 2009, Union Secretary-Treasurer Elizabeth Bunn requested a meeting to discuss the interest of several employees in organizing a bargaining unit of the Union.[20] Chief Cantu did not respond and, on March 10, 2010, Bunn followed up with a similar request to his successor, Tribal Chief Dennis Kequom. Bunn asserted that the Tribe's management had "initiated an anti-union campaign" ever since the Union reached out to Chief Cantu.[21]

IV. Susan Lewis

Susan Lewis was employed by the Tribe as a housekeeper in the casino's housekeeping department. She was initially hired on or about July 13, 1998. Lewis voluntarily resigned on or about December 10, 2002, but was rehired by the Tribe on about January 26, 2005. Throughout her employment by the Tribe, Lewis worked the second shift from 3:00 to 11:00 p.m.

Lewis's performance evaluation for the period of May 6, 2005, to October 30, 2010, indicates that she either met or exceeded performance standards with respect to her job responsibilities, customer service, communication and teamwork, and productivity. With respect to compliance with policies and procedures, Lewis also exceeded performance standards as to two of that category's three criteria. The remaining criteria—"Understands and adheres to Associate Handbook policies and procedures within departmental operating guidelines"—was rated at below performance standards. Her overall rating was 3.4, which fell near the midrange of her performance ratings from the previous 5 years (2.9 to 3.7).[22]

On September 29, 2009, Lewis engaged in union solicitation. The following day, Lott and Munro issued a notice to Lewis informing her that such solicitation in the women's restroom,

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[18] *Soaring Eagle Casino & Resort v. Local 286, Teamsters*, Case 7–RC–23147, Nov. 20, 2007. (GC Exh. 2.)

[19] *Soaring Eagle Casino & Resort v. International Union, Security, Police and Fire Professionals of America (SPFPA)*, Case 7–RC–23163, January 17, 2008. (GC Exh. 3.)

[20] GC Exh. 15.

[21] GC Exh. 16.

[22] GC Exh. 17.

rather than the break room, violated the Respondent's no-solicitation policy. She was warned of the potential disciplinary consequences, including termination, if such activities continued.[23]

On August 25, 2010, Lewis again engaged in union solicitation activities. Five days later, on August 30, Ben Perez, the casino housekeeping department's senior manager, issued her a notice for engaging in union solicitation activities in violation of the Tribe's no-solicitation policy.[24]

In early October 2010, Perez, told Lewis that she could not engage in solicitation activities, including talking to other employees about unions, in the employee hallway. The directive did not, however, deter Lewis. On October 4, 2010, just before clocking-out near the end of her shift at 11 p.m., management officials observed Lewis on a surveillance camera in the side employee hallway placing a blue wrist band on another housekeeper. She was also handing out the wrist bands, which stated, "BAND TOGETHER 2010," to other housekeepers. A few weeks later, on October 23, Perez issued a notice to Lewis suspending her for engaging in solicitation activities on October 4 in violation of the Tribe's no-solicitation policy.[25]

On November 7, 2010, Lewis entered bathroom B from her work station in section 2 of the casino and engaged in conversation for about 7 minutes with another housekeeper assigned to work at the same time in bathroom B on the casino floor. During that conversation, Lewis solicited on behalf of the Union. On November 15, 2010, Perez issued her a notice discharging her for engaging in union solicitation activities in violation of the Tribe's no-solicitation policy.[26]

Except for Susan Lewis, no other employees of the Tribe have been disciplined for violating its no-solicitation policy.

Legal Analysis

I. Jurisdiction

The Tribe operates a casino on the Isabella Reservation in Isabella County, Michigan. It is undisputed that the 1855 and 1864 Treaties affirmed the Tribe's rights to the ownership, use and occupancy of land within the Isabella Reservation. The complaint alleges, however, that the Act applies to the Tribe's casino operations because it is not an essential Government operation of the Tribe. The Tribe disagrees, contending that the exclusive use rights in the treaties must be interpreted as applying to all operations of the Isabella Reservation, including the casino.

The Supreme Court has long held that statutes of "general application" apply to the conduct and operations of individual Indians and their property interests. *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99, 116 (1960). The Board has found that the Act is a statute of general applicability. *Sac & Fox Indus.*, 307 NLRB 241 (1992). In *San Manuel*, the Board adopted the *Tuscarora* rule and asserted jurisdiction over a gaming facility owned and operated by a tribal Government located on tribal land. *San Manuel Indian Bingo & Casino (San Manuel I)*, 341 NLRB 1055 (2004), enfd. 475 F.3d 1306 (D.C. Cir. 2007). Neither the Act nor Federal Indian policy requires that the Board decline jurisdiction over commercial enterprises operated by Indian tribes on tribal reservations. Id.

[23] Department Record of Conversation (GC Exh. 10.)
[24] Fair Action Notice (GC Exh. 12.)
[25] Fair Action Notice (GC Exh. 13.)
[26] Fair Action Notice (GC Exh. 14.)

Prior to *San Manuel*, the Board determined whether it had jurisdiction over Indian tribal entities based on the location of the tribal enterprise. Indians and Indian tribal Governments on reservation lands were generally free from state or Federal intervention, unless Congress provided for the contrary. *Fort Apache Timber Co*., 290 NLRB 436 (1988). The Board could, however, assert jurisdiction where a tribal business was not located on the reservation. See *Sac & Fox Indus*., 307 NLRB 241 (1992); *Yukon Kuskokwim Health Corp*., 328 NLRB 761 (1999), vacated on other grounds 234 F.3d 1186 (10th Cir. 2002).

In *San Manuel*, the Board departed from this on/off-reservation dichotomy, concluding that it would consider whether it had jurisdiction on a case-by-case basis. The Board adopted the *Tuscarora* doctrine, and held that statutes of general application apply to the operations of Indian tribes and their enterprises unless: (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. *San Manuel I*, 341 NLRB at 1059 (citing *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985)). The Board will also analyze whether policy considerations militate in favor of or against the assertion of its discretionary jurisdiction. Id. at 1062.

A. Applicability of the Act to Indian Tribes

The Tribe contends that since neither the Act nor its legislative history mention Indian tribes, it should not be applied to them. It asserts that Federal regulatory schemes are inapplicable to tribes exercising their sovereign authority unless Congress expressly authorized its application. See *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1196 (10th Cir. 2002). In this instance, the Tribe insists that application of the Act to regulate its casino operations infringes on its inherent right to regulate economic activity.

This forum must adhere to applicable case law which neither the Board nor Supreme Court have reversed. See *Iowa Beef Packers, Inc*., 144 NLRB 615, 616 (1963). In *San Manuel I*, the Board concluded that the Act applies to Indian tribes' operations of on-reservation casinos. The Board ruled that the Act is a statute of general applicability, and thus may be applied to Indians and their enterprises provided that none of the *Couer d'Alene* exceptions apply. 341 NLRB at 1063. Accordingly, the allegations in the instant complaint must be analyzed by the framework set forth in *San Manuel*.

B. San Manuel Analysis

1. Self-governance

The General Counsel contends that Federal regulation of the casino does not interfere with the Tribe's right of self-governance of intramural matters on two grounds: (1) the casino operation is a commercial venture; and (2) its regulation does not interfere with internal tribal activity. The Tribe argues that its treaties with the United States affirm its right of self-government, which includes the right to operate a casino on its reservation without interference by the Federal government.

Governance of intramural matters generally involves subject matters such as tribal membership, domestic relations, and inheritance rules. *San Manuel I,* 341 NLRB at 1063 (citing

Coeur d'Alene, 751 F.2d at 1116). Commercial enterprises that blur the distinction between the tribal Government and private corporations are not activities that are normally associated with self-governance. *San Manuel v. NLRB (San Manuel II)*, 475 F.3d1306, 1314 (D.C. Cir. 2007). See also *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 181 (2d Cir. 1996) (tribal construction company that worked exclusively on reservation projects was not exempt from OSHA regulations because construction activities were of a commercial, and not Governmental, character). The Act's jurisdiction over on-reservation Indian gaming facilities does not implicate the tribe's self-governance over intramural matters because "operation of the casino is not an exercise of self-governance." *San Manuel I*, 341 NLRB at 1063 (citing *Florida Paraplegic Assn. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1129 (11th Cir. 1999) ("tribe-run business enterprises acting in interstate commerce do not fall under the 'self-governance' exception to the rule that general statutes apply to Indian tribes").

Operating a casino on tribal land is not an exercise of self-governance of a purely intramural matter. Like the casino in *San Manuel*, the Tribe's casino is a commercial venture that generates income for the Tribe. The casino serves predominantly nontribal customers, competes with nontribal casinos, and employs mostly nontribal members. Moreover, the Tribe's operation of the casino, a commercial enterprise, is not vital to its ability to govern itself. *San Manuel I*, 341 NLRB at 1061. Furthermore, the operation of a casino is not a *purely intramural* matter, as it involves hiring nontribal employees, attracting nontribal customers, and competing with nontribal businesses. Lastly, commercial entities on Indian reservations are subject to various Federal laws. See *San Manuel I*; *Menominee Tribal Enterprises v. Solis*, 601 F.3d 669, 674 (7th Cir. 2010).

It is clear, therefore, that applying the Act to the Tribe's casino operations would not interfere with its rights of self-governance of intramural matters.

2. Abrogation of treaty rights

The General Counsel acknowledges that the Tribe's treaties with the United States give it a general right of exclusion and possession, but contends that this general right of exclusion is insufficient to bar application of the Act. The Tribe disagrees, insisting that application of the Act to its casino operations would prevent it from exercising its power to remove unwanted intruders, including Federal regulators, from the Isabella Reservation.

General treaty language devoting land to a tribe's exclusive use is insufficient to preclude application of Federal law. *See Menominee Tribal Enterprises v. Solis*, 601 F.3d 669, 674 (7th Cir. 2010); *DOL v. OSHRC*, 935 F.2d 182, 184 (9th Cir. 1991) (treaty language prohibiting "any white person" from residing on tribe's land was a general right of exclusion and insufficient to bar application of OSHA to tribe's sawmill); *U.S. v. Farris*, 624 F.2d 890 (9th Cir. 1980) superseded on other grounds by statute, as noted by *U.S. v. E.C. Investments, Inc.*, 77 F.3d 327, 330 (9th Cir. 1996) ("general treaty language such as that devoting land to a tribe's 'exclusive use' is not sufficient"). But see *Donovan v. Navajo Products Industries*, 692 F.2d 709 (10th Cir. 1982) (tribe whose treaty excluded all persons from reservation lands, but allowed Government officers, agents, and employees to enter as expressly authorized, was exempt from OSHA). Thus, a general right to exclude non-Indians from tribal land, without more, is insufficient to bar the application of Federal laws to commercial entities on Indian reservations. *DOL v. OSHRC,* 935 F.2d at 186.

The treaties affirm the Tribe's right to exclude nontribal members from the Isabella Reservation. The 1864 Treaty "sets apart [tribal land] for the exclusive use, ownership and

occupancy" for the Tribe's members. The Tribe's expert witnesses elucidated that, during negotiations over the 1864 Treaty, the predecessor Tribe sought to prevent "white settlers" from living on its reservation. Its expert witness opined, therefore, that the Saginaw Tribe's power to promulgate and enforce a no-solicitation policy and right to exclude ordinance emanated from its sovereign rights affirmed in the 1855 and 1864 treaties. The Tribe contends that it has exercised these treaty rights by: (1) developing policies that place conditions upon entry for nonmembers and (2) passing an ordinance that codifies the right to remove employees and others from its lands should they violate conditions that the Tribe places upon entry.

These historical facts and current practices, however, do not demonstrate that the treaties granted the Tribe anything more than a general right of exclusion and possession. See *DOL v. OSHRC*, 935 F.2d 182 (treaty language stating that the tribe had exclusive use of reservation lands and that any non-Indian would not be permitted to reside upon the land without permission of the tribe gave the Tribe a general right of exclusion).

Nevertheless, the Tribe contends that its power to enact a no-solicitation policy and right to exclude ordinance emanates from its treaty rights to exclude; thus, application of the Act would infringe on its treaty rights. As previously explained, however, the text of the treaty provides nothing more than a general right of exclusion, which is insufficient to bar application of federal law. It is, therefore, insufficient to bar application of the Act. Notwithstanding the claims of the Tribe's expert witnesses, treaties cannot be "expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1942). If one were to construe a general right of exclusion otherwise, the enforcement of nearly all generally applicable Federal laws would be nullified when applied to any Tribe which has signed a treaty containing an exclusion provision. See *DOL*, 935 F.2d at 186.

Therefore, application of the Act does not abrogate the Tribe's treaty right to exclude nontribal members from its land.

3. Proof of Congressional intent

There is no indication in either the language of the Act or its legislative history that Congress intended to exclude Indians or their commercial enterprises from the Act's jurisdiction. *San Manuel I*, 341 NLRB at 1063. Thus, based on the precedent set forth in *San Manuel*, there is no legislative bar toward application of the Act to Indian tribes or their commercial enterprises.

4. Policy considerations

The last factor in the jurisdictional analysis is determining whether policy considerations favor application of the Board's discretionary jurisdiction. *San Manuel I* at 1062. The General Counsel asserts that the operation of a casino on Indian land is not a traditional tribal function. The Tribe, on the other hand, contends that operating a casino is paramount to its treaty-based rights of self-governance and inherent authority to engage in economic activity and fund essential Government functions.

The Board must balance its interest in effectuating the policies of the Act with the need to accommodate the unique status of Indians in our society. *Yukon Kuskokwim Health Corp*., 341 NLRB 1075 (2004). When an Indian tribe is fulfilling a traditionally tribal or Government function that is unique to its status, the Board's interest in asserting jurisdiction is lower than when the tribe is acting in a typically commercial matter. *San Manuel I*, at 1062–1063.

The casino operation is a commercial enterprise that competes with nontribal casinos. It is not a traditional tribal or Government function. Unlike in *Yukon Kuskokwim,* where the employer fulfilled a unique Governmental function by providing free health care to Native Americans as dictated by the Indian Health Care Improvement Act, the Tribe is not providing a similar tribal or Government function. Rather, it operates a business, one that competes with nontribal businesses and services nontribal customers. Thus, the "special attributes" of the Tribe's sovereignty are not implicated. *San Manuel I*, at 1062. Under the circumstances, the policy considerations weigh in favor of the Board asserting its discretionary jurisdiction over the Tribe.

Based on the foregoing, I conclude that the Tribe is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Merits

A. The No-Solicitation Policy

The complaint alleges that the Tribe violated Section 8(a)(1) by maintaining and enforcing an overly broad and unlawful no-solicitation policy. Unlike its vigorous contesting of the jurisdictional issues, however, the Tribe did not refute the testimony and other evidence regarding the merits of the unfair labor practice charges.

Employees have a right to solicit on company property during their non-working time, absent special circumstances. *Stoddard-Quirk Mfg. Co*., 138 NLRB 615 (1962). Solicitation rules prohibiting union solicitation on company property outside working time are an unreasonable impediment to self-organization and, therefore, are discriminatory in the absence of unusual circumstances. *Republic Aviation*, 324 U.S. 793, 803 fn. 10 (1945); *Peyton Packing Co.,* 49 828, 843-44 (1943), enfd, 142 F.2d 1009 (5th Cir.), cert. denied, 323 U.S. 730 (1944). See also *NLRB v. Pneu Elec., Inc.,* 309 F.3d 843 (5th Cir. 2002) (employer generally may not issue a blanket statement against solicitation by employees at a worksite, even during nonworking time); *Our Way, Inc.*, 268 NLRB 394 (1983) (rules prohibiting union solicitation or activities during an employee's break times or other nonworking periods are overly broad and presumptively invalid because they could reasonably be construed as prohibiting solicitation at any time). Moreover, an employer must allow solicitation during meals, breaks, and other nonworking time, even if the employees are clocked in. *Pneu Elec., Inc.* 309 F.3d 843. Lastly, no-solicitation policies must be uniformly enforced to retain their validity. *Publix Super Mkts., Inc.,* 347 NLRB 1434 (2006); *Funk Mfg. Co.*, 301 NLRB 111 (1991).

Employers may, however, restrict employee distributions to nonworking areas of the premises. *Stoddard Quirk*. An employer has a property right to "regulate and restrict employee use of company property." *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663-64 (6th Cir. 1983). See also *Mid-Mountain Foods*, 332 NLRB 229 230 (2000) (no statutory right to use television in breakroom to show a prounion video), enfd. 269 F.3d 1075 (D.C. Cir. 2001); *Eaton Technologies,* 322 NLRB 848, 853 (1997) (no statutory right to use an employer's bulletin board). Employers generally may restrict employee use of company property, but may not promulgate or enforce these restrictions in a discriminatory manner. *Container Corp. of Am*., 244 NLRB 318 (1979); *Allied Stores Corp.*, 308 NLRB 184 (1992). Thus, employees have no statutory right to use an employer's equipment or media for Section 7 purposes, provided the restrictions are nondiscriminatory. *The Register Guard*, 351 NLRB 1110 (2007). Discrimination under the Act means drawing a distinction along Section 7 lines. Id.

The General Counsel correctly contends that the Tribe's no-solicitation policy, as contained in the "Definitions" and "Prohibited Conduct" sections of its company rules, is facially invalid and overly broad. The policy prohibits employees from soliciting in any work area and during their working time. The policy defines "working area" as "any place where any employees perform job duties at the Casino." No-solicitation rules that prohibit employee solicitation in working areas during nonworking time, however, are presumptively invalid and unlawfully interfere with Section 7 rights. *Stoddard-Quirk* at 621. Since the Tribe's policy simply bans solicitations in working areas and does not distinguish between working time and nonworking time, the rule can be read to prohibit solicitations during nonworking time. It is, therefore, unlawfully overbroad.

The General Counsel also contends that the Tribe's no-solicitation policy is facially invalid to the extent it restricts use of casino property. An employer's restriction of employee use of company property is legal if done in a nondiscriminatory manner. *Register Guard*, 351 NLRB 1110 (2007). However, the Tribe's enforcement of this policy was unlawful because it was limited to situations involving union solicitation. The Tribe concedes that, except for Lewis, no other employees have been disciplined or discharged for violating its no-solicitation policy. Thus, the Tribe promulgated a discriminatory no-solicitation policy and applied it in a discriminatory manner in violation of Section 8(a)(1).

B. Discussion among Employees about the Union in the Hallway

The complaint alleges that the Tribe violated Section 8(a)(1) when Perez, a statutory supervisor and agent, prohibited Lewis and other employees from discussing Union matters in the employee hallway. The parties stipulated that Perez informed Lewis during October 2010 that she could not talk to other employees about unions in the employee hallway.

Employers cannot place restrictions on employees' rights to discuss self-organization amongst themselves, unless the employer can demonstrate the restrictions are necessary to maintain production or discipline. *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105, 113 (1956). Oral solicitations by employees may be prohibited only during working time. *Valmont Indus. v. NLRB*, 244 F.3d 454 (5th Cir. 2001). A prohibition on communications may not, however, be overly broad so that it prohibits communications among employees during paid or unpaid nonwork periods. Thus, an employer must allow solicitations during breaks and other nonworking time, even if the employee remains clocked in. Id., citing *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245, 1249 (5th Cir. 1992). Moreover, an employer may not ban employee solicitation in nonwork areas. See *Crowne Plaza Hotel,* 352 NLRB 382 (2000). Any ambiguity in a particular prohibition is construed against the employer which formulated that prohibition. *Altorfer Machinery,* 332 NLRB 130, 133 (2000). See also *Albertson's Inc.*, 307 NLRB 787, 788 fn. 6 (1992).

The parties stipulated that the employee hallway is an employee area of the casino. It consists of multiple time clocks, a break room, entrance to the restrooms, and several employee offices. Nonwork activities, however, take place in the hallway, as employees pass through it to use the bathroom, locker room and food service area. Since the employee hallway is a nonworking area, employees may solicit there in their nonworking time. *Stoddard-Quirk Mfg. Co*., 138 NLRB 615 (1962).

Under the circumstances, the Tribe violated Section 8(a)(1) when it prohibited employees from discussing unionization in the employee hallway, a nonworking area.

C. Suspension/Discharge

The complaint alleges that the Tribe violated Section 8(a)(3) and (1) by: (1) suspending Lewis on October 23 because she solicited on behalf of the Union in the employee hallway on October 4; and (2) and discharging her on November 15 because she solicited on behalf of the Union in the employee hallway on October 4 and 24, and spoke with an on-duty employee about the Union in bathroom B while off-duty on November 7.

The framework for analyzing alleged violations of Section 8(a)(3) is *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must show, by a preponderance of the evidence, that the employee's protected conduct motivated the employer's adverse action. The prima facie case must establish that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus against the protected activity, and the employer took action because of this animus. If the General Counsel establishes these elements, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399, 403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (per curiam). To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting,* 332 NLRB 1363, 1366 (2000), citing *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984). If, however, the evidence establishes that the reasons given for the employer's action are pretextual, the employer fails by definition to show that it would have taken the same action for those reasons, and thus there is no need to perform the second part of the *Wright Line* analysis. *United Rentals*, supra at 951–952 (citing *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)).

1. Concerted protected activity

The parties stipulated that Lewis engaged in concerted protected activity while working at the casino. Her union activities began in 2009, when she initiated contact with the Union. She participated in the organizing campaign by attending union meetings, signing and distributing authorization cards, conducting local radio and newspaper interviews, and adding her picture to the organizing campaign's website. Lewis' activities culminated with her attempts to rally other employees in support of the Union in October and November 2010.

2. Knowledge of the activity

Here, again, the parties stipulated that the Tribe was well aware of Lewis' activities in support of the Union prior to her discharge. In March 2010, Lewis and four other employees delivered a letter to Tribal Chief Kequom expressing their desires to organize. Moreover, prior to her suspension, Tribe supervisors issued disciplinary write-ups to Lewis for engaging in union solicitation activities. Indeed, they suspended and ultimately discharged her because she engaged in union solicitation in October and November 2010.

3. Animus

Similarly, the Tribe did not offer any evidence disputing the last element of a prima facie case. It harbored animus against Lewis because she engaged in protected concerted activity. Lewis's 2009 and 2010 evaluations, issued during the height of the organizing campaign, did not reflect a remarkable decline in her performance ratings. However, she did receive several disciplinary write-ups for violating the Tribe's unlawful no-solicitation policy. Most significantly, aside from Lewis, no other employee has ever been disciplined or discharged for violating the Tribe's no-solicitation policy.

4. The Company's burden of proof

Since the General Counsel established a prima facie violation of Section 8(a)(3) and (1), the burden shifted to the Tribe to show that it took the adverse action for a legitimate nondiscriminatory reason. See *Wright Line*, supra at 1089. Again, the Tribe offered no evidence even remotely suggesting that it discharged Lewis for any reason other than the fact that she engaged in solicitation activities on behalf of the Union in October and November 2010.

In any event, the facts would not have supported a contention that the Tribe was justified in disciplining Lewis because she solicited in a working area during work time. As previously discussed, the employee hallway was a non-work area. Similarly, the facts also demonstrated that Bathroom B was not a work area for purposes of determining the validity of the Tribe's no-solicitation rule. The occurrence of work activity incidental to an employer's main function on part of its property does not, by itself, allow an employer to declare its entire property to be a "working area" for the purpose of excluding employee solicitation activity. See *Santa Fe Hotel, Inc.*, 331 NLRB 723, 729 (2000), *US Steel Corp*., 223 NLRB 1246, 1247-48 (1976). Moreover, the Board has long compared casinos to retail store floors in upholding bans on employee solicitation in areas frequented by customers, while also finding unlawful similar bans on such activity in adjacent locations, such as restrooms. *Double Eagle Hotel*, 341 NLRB 112, 113 (2004). Coupled with the previous suspension for engaging in the same type of protected conduct, it is evident that the Tribe would not have discharged Lewis in the absence of her role as an advocate for the Union.

Under the circumstances, the Tribe violated Section 8(a)(3) and (1) when it suspended and subsequently discharged Lewis for engaging in union solicitation in the employee hallway and Bathroom B.

CONCLUSIONS OF LAW

1. By promulgating a no-solicitation rule that prohibits employees from (1) soliciting other employees during nonwork time to support the Union or any other labor organization, and (2) distributing union literature or campaign paraphernalia during nonwork time in nonwork areas, the Tribe has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. By telling employees they could not talk to other employees about the Union in the employee hallway, the Tribe violated Section 8(a)(1) of the Act.

3. By disciplining and discharging employee Susan Lewis because she engaged in activities in support of the Union, the Tribe violated Section 8(a)(3) and (1) of the Act.

4. The aforementioned unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Tribe has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Tribe, having discriminatorily disciplined and discharged an employee, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010), enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

The Respondent, Soaring Eagle Casino and Resort, an Enterprise of the Saginaw Chippewa Indian Tribe of Michigan, Mount Pleasant, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for being members of or supporting the International Union, United Automobile, Aerospace and Agricultural Implement Workers Of America or any other union.

(b) Promulgating a no-solicitation rule that prohibits employees from (1) soliciting other employees during nonwork time to support the Union or any other labor organization, and (2) distributing union literature or campaign paraphernalia during nonwork time in nonwork areas..

(c) Telling employees they cannot talk to other employees about the Union in the employee hallway, the Tribe violated Section 8(a)(1) of the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Susan Lewis full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Make Susan Lewis whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its casino facility in San Juan, Puerto Rico, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since [*date of first unfair labor practice*].

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 26, 2012

_____
Michael A. Rosas
Administrative Law Judge

28 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America or any other union.

WE WILL NOT promulgate a no-solicitation rule prohibiting employees from: (1) soliciting other employees during non-work time to support the Union or any other labor organization, and (2) distributing union literature or campaign paraphernalia during non-work time in non-work areas..

WE WILL NOT tell employees they cannot talk to other employees about the Union in the employee hallway.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Susan Lewis full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Susan Lewis whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the discipline and unlawful discharge of Susan Lewis and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge and other disciplinary action will not be used against her in any way.

SOARING EAGLE CASINO AND RESORT, AN ENTERPRISE OF THE SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Room 300, Detroit, MI 48226-2569

(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.