UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL GOVERNMENT

Respondent

and **CASE 7-CA-51156**

LOCAL 406, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Charging Union

COUNSEL FOR ACTING THE GENERAL COUNSEL'S BRIEF IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AND IN SUPPORT OF FINDINGS THAT RESPONDENT HAS VIOLATED SECTION 8(a)(1) OF THE ACT

Respectfully submitted this 24th day of February, 2012

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I. INTRODUCTION

The central issue in this case is whether Respondent, the Little River Band of Ottawa Indians Tribal Government, (Respondent, Tribe or Band) is subject to the jurisdiction of the Board in connection with its ownership, operation and management of the Little River Casino Resort (LRCR), a commercial gaming resort located on its tribal trust lands in Manistee, Michigan. The labor relations ordinance, enacted by the Tribe and applied to the LRCR employees and unions who represent or seek to represent them, explicitly interferes with the Section 7 rights of its employees by, among other things, (a) prohibiting lawful strikes and other protected concerted activities, (b) subjecting employees and unions to severe penalties for engaging in such activities, (c) requiring unions seeking to organize LRCR employees to obtain licenses from the Tribe, (d) narrowly circumscribing the LRCR's duty to bargain with recognized unions, and (e) otherwise preempting, restricting and limiting the rights and remedies provided in the Act.

The LRCR is precisely the type of tribally-owned commercial gambling enterprise that the Board held is subject to its jurisdiction in ***San Manuel Indian Bingo & Casino***, 341 NLRB 1055 (2004), enfd. 475 F. 3d 1306 (D.C. Cir. 2007). The Tribe contends that application of the NLRA to the LRCR impinges upon its inherent sovereign rights as an Indian nation. Its Tribal sovereignty, however, concerns the right to govern its intramural affairs. The Tribe is the employer of the LRCR employees under Section 2(2) of the Act, and affording the employees of the Tribe's commercial gaming enterprise, and the labor organizations who represent them or seek to represent them, the rights and remedies under the Act will not significantly impinge upon the Tribe's traditional sovereign rights. By maintaining and publishing a labor relations ordinance that explicitly applies to the LRCR, which by its terms preempts and conflicts with

the rights and remedies in the Act, the Tribe has violated and continues to violate Section 8(a)(1) of Act.

II. PROCEDURAL BACKGROUND

On March 28, 2008, Local 406, International Brotherhood of Teamsters (Local 406 or Union) filed an unfair labor practice charge alleging in essence that the Tribe violated Section 8(a)(1) of the Act by, *inter alia*, promulgating a code which preempts the Act, reserving for itself the conditions under which collective bargaining may or may not occur and prohibiting the right to strike (G.C. Exh. 1(a)). On February 18, 2010 the Tribe filed a civil action in U.S. District Court for the Western District of Michigan seeking to enjoin the Board from proceeding against it, claiming that the Board lacked jurisdiction. On September 10, 2010, U.S. District Judge Janet Neff issued an opinion and order dismissing the Tribe's action for lack of subject matter jurisdiction. ***Little River Band of Ottawa Indians v. National Labor Relations Board,*** 747 F. Supp.2d 872 (W.D. Mich. 2010).

On December 16, 2010, an unfair labor practice complaint and notice of hearing was issued in the present case, alleging that that the Tribe, through its maintenance and publication of its Fair Employment Code, has been interfering with, restraining, and coercing employees in exercise of their rights under Section 8(a)(1) of the Act.[1] (G.C. Exh. (b)) Originally, the hearing was scheduled for February 2, 2011. (Copy attached as Exh. C) On March 4, 2011 the Respondent filed a Motion to Dismiss or for Summary Judgment. Ultimately the parties requested that the Board delay ruling on the Respondent's Motion to Dismiss or for Summary Judgment because the parties intended to submit the case for decision by the Board on a

[1] Citations to the Statement of Stipulated Facts are referred to as "Stip. ¶ __." Citations to the General Counsel Exhibits are referred as "G.C. Exh. __." Citations to the Joint Exhibits are referred to as "Jt. Exh. ___."

stipulated record. The parties then submitted the case to the Board by Joint Motion on August 11, 2011 for decision on a stipulated record. On December 20, 2011, the Board issued an Order Approving Stipulation, Granting Motion, and Transferring the Proceedings to the Board. On February 16, 2012 the parties filed a Joint Motion to Substitute Exhibit and Stipulations to amend paragraphs 25 and 29 of the Stipulated Facts and to substitute the recently amended version of the Tribe's Gaming Enterprise Board of Directors Act of 2010 ("GEBDA") for the earlier version, as Joint Exhibit 5.

III RELEVANT FACTS

A. The Tribe

The Tribe is a federally-recognized Indian Tribe, with over 4,000 enrolled members. The Tribe has the use of over 1,200 acres of its ancestral lands in and near Manistee and Mason Counties in Michigan which are held in trust for the tribe by the Federal Government. The offices of the Tribal Government are located on the trust lands in the City of Manistee. Three hundred and eighty Tribal members live in or near the trust lands. (Stip. ¶1& 2)

B. The Tribe's Business Venture, the Little River Casino Resort

The Tribe owns and operates the Little River Casino Resort ("LRCR"), a large commercial Class II and III gambling resort, on its tribal trust lands in Manistee in accordance with the Indian Gaming Regulatory Act (25 U.S.C. § 2701 *et seq.*) ("IGRA"), and a compact that it has entered into with the State of Michigan. (Stip. ¶ 9, 10, Jt. Exh. 25)

The LRCR is directly engaged in interstate commerce.[2] Its facilities include: a casino with more than 1,500 slot machines, gaming tables, a high limits gaming area, and bingo facilities, a 292-room hotel, a 95-space RV park, three restaurants, a lounge, a 1,700 seat events theatre that is rented out for business conferences and weddings and is a venue for nationally known entertainment acts. The majority of LRCR employees live outside of the Tribe's trust lands and are neither members of the Tribe nor Native Americans. The Tribe employs 905 employees at the LRCR; only 107 of these employees are enrolled tribal members and only 27 are members of other Native American tribes.[3] Likewise, the majority of the LRCR customers are drawn from Michigan outside of the Tribe's trust lands from other states and from Canada. The Tribe's gaming enterprise advertises using various media in Michigan, neighboring states and Canada and competes with other Indian and non-Indian owned casinos in Michigan, other states and Canada. (Stip. ¶ 11, 12 & 19)

C. Tribal Governmental Authority and Structure

The Tribe's constitution provides that the "Tribe's jurisdiction shall be exercised to the fullest extent consistent with this Constitution, the sovereign powers of the Tribe, *and federal law*." (Stip. ¶6, LRBOI Const., Art.2, §2, Jt. Exh. 1) (Emphasis added) Respondent has three governmental branches: (1) an executive branch, known as the office of the Tribal Ogema; (2) a legislative branch, known, as the Tribal Council; and (3) a judicial branch known as the Tribal Court. (Stip. ¶ 5).

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[2] During the fiscal year which ended December 31, 2010, the Tribe earned revenues in excess of $20,000,000 from its gaming operations. During the same period, the Tribe purchased and received at its Manistee, Michigan facility gaming supplies, services, and other supplies valued in excess of $50,000 for use in connection with the LRCR, directly from suppliers located outside of the State of Michigan. During the same period of time, the Respondent received in excess of $50,000 from the Federal government to fund various programs for its Tribal members. (Stip. ¶ 11)

[3] Overall, a total of 1,150 employees currently work for Respondent's tribal governmental and its subordinate organizations, agencies and departments, including the 905 employees who work for the LRCR. (Stip. ¶ 19)

The Tribal Ogema, the chief executive, who is elected by members of the Tribe, is empowered under the Tribal Constitution to enforce the laws and the resolutions of the Tribal Council, to oversee the administration and management of the Tribal Government, to appoint heads of its subordinate organizations, and to prepare the annual budget and submit it to the Tribal Council for approval subject to the Omega's right to veto. (LRBOI Const. Art. V §5(a) 1, Jt. Exh. 1) Among the express powers of the Ogema set forth in its constitution is managing "the economic affairs, *enterprises*, property... and other interests of the Tribe consistent with ordinances and resolutions enacted by the Tribal Council." (LRBOI Const. Art. V, § 5(a)(8), Jt. Exh. 1)(Emphasis added) It is undisputed that the Ogema is responsible for managing the economic affairs of the Tribe, including the LRCR. (Stip. ¶ 23)

The Tribe's legislative powers are vested in the Tribal Council, an elected body that acts through passage of laws, ordinances and motions.[4] Among the Tribal Council's powers specified in its Constitution are: to govern the conduct of the Tribe and other persons within its jurisdiction; to promote, protect and provide for the general welfare of the Tribe and its members;; to create by ordinance regulatory commissions or subordinate organizations; and to delegate to them the power to manage the affairs and enterprises of the Tribe. (LRBOI Const. Art. IV, §7(a), Jt. Exh.1; Stip. ¶ 21)

The Tribal Court system consists of Tribal Court and a Court of Appeals, and, according to the Tribe's Constitution, has "judicial powers that extend to all cases and matters in law and equity arising under [the Tribe's] constitution, the laws and ordinances of or applicable to the Tribe...." (LRBOI Const. Art. VI, §1 & 8, Jt. Exh. 1)

[4] The general membership of the Tribe retains certain governmental powers, including as specified in Article VII of its Constitution, the power to initiate, repeal or amend existing ordinances by referendum at its semi-annual general membership meetings. (Joint Exhibit 1,LRBOI Const. Art VII, §§ 2-5)

D. The Tribe's Ownership, Management, and Control of the LRCR

The LRCR is a subordinate economic organization and tribally chartered instrumentality of the Tribe that the Tribe owns, manages and controls. (Stip. ¶ 9) The Gaming Ordinance adopted by Respondent, states, "The Tribe shall have the sole proprietary interest in, and responsibility for, the conduct of any gaming enterprises..." and "[n]o individual partnership, corporation or entity of any kind shall own in whole or in part any Class II or III gaming enterprise...." (Gaming Commission Ordinance Article V, Sections 5.01 and 5.02, Jt. Exh. 20 at p. 5)

The Tribe manages the operation of the LRCR, including the terms and conditions of employment of LRCR employees, directly and through subordinate organizations that it established and controls, principally the Gaming Enterprise Board of Directors ("Gaming Board"). The Tribe maintains strict oversight of the LRCR including the terms and conditions of employment of the LRCR employees through approval of the annual LRCR operating plans and budget, by retaining and exercising the right to approve and amend terms and conditions of employment of the LRCR employees, and through application of its labor relations ordinance, Articles XVI and XVII of its Fair Employment Practices Code ("FEP Code") and related regulations that govern the terms and conditions of employment of its LRCR employees. (Jt. Exh. 4)

The Tribe established the five member Gaming Enterprise Board of Directors ("Gaming Board"), a subordinate organization, to "provide monitoring, oversight, and direction regarding the management of the gaming enterprise" through passage of an ordinance known as Gaming Board of Directors Act of 2010. ("GEBDA")[5] This Gaming Board in turn is subject to the oversight by the Tribal Ogema and by the Tribal Council. (Stip. ¶ 24 & ¶25; Jt. Exh. 5, GEBDA

[5] Presently, the LRCR is the only gaming enterprise of the Tribe.

§4.01, 4.02) Significantly, the Tribal Ogema, who is responsible for managing the economic affairs of the LRCR, is required to have a seat on the Board of Directors. He serves as its Chairperson or designates a Board member to serve in his stead. Another seat is reserved for a sitting member of the Tribal Council. There are three at large members who are enrolled Tribal members appointed by the Tribal Ogema and approved by the Tribal Council. Only three Board members are needed for a quorum. Additionally, the Tribal Council retains the ultimate authority to remove members of the Board of Directors. (Stip. ¶25 & 26, Joint Exh. 5, GEBDA §§ 4.02 5.05, 8.01, 9.02-9.04) Thus, the structure of the Board of Directors is clearly designed to ensure that the Tribe retains effective control of the LRCR.

The Tribe retains the power of the purse over the LRCR. Each year the Gaming Board must submit a detailed annual budget and annual operating plan for the LRCR to the Tribal Council for approval or amendment. It is the responsibility of Chairperson of the Gaming Board (the Tribal Ogema or someone he appoints to act in his stead) to prepare the annual budget and operating plan for the LRCR and to submit them to the Tribal Council for amendment or approval. (Stip. ¶ 31) Among the many statements that must be submitted to the Tribal Council for approval as a part of the annual budget are detailed statements of revenues and expenses for each LRCR department for the past and current fiscal years. Significantly, one of the other reports the Chairperson of the Gaming Board must present to the Tribal Council for approval with the budget is an "Annual Human Resources Report, for the current fiscal year to date as well as for the upcoming fiscal year by month." This annual human resources report for the LRCR must set forth, a head count schedule, a preference employment report, hiring plans, a training schedule, employee development plans, proposed changes to employee benefit plans, compensation plans, disclosure of any bonus plans, status of collective bargaining agreements or

other union activities, and a termination report. The Gaming Board must also submit to the Tribal Council an operating plan which includes for the upcoming fiscal year, by month: (1) the operating goals for the enterprise, (2) the operating goals for each department, (3) the proposed changes in operations, (4) the status of collective bargaining agreements and other union activities, and (5) a schedule and discussion of risks and opportunities. (Stip. ¶ 31; GEBDA §12.02, Jt. Exh. 5 at p. 11 &12)

The Gaming Board is also mandated to submit monthly reports to the Tribal Ogema and to the Tribal Council setting forth much of the same information that is set forth in the annual budget and annual operating plan, including, *inter alia*, detailed statements of budgeted and actual spending by month and department, a detailed management narrative by department, a human resources report that includes a head count report, a preference employment report, a summary of new hires, a head count forecast for the next three months, a termination report, and a report on the status of collective bargaining and other union activities. (Stip. ¶31 at p. 31; Jt. Exh. 5, GEBDA §12.3)

To ensure that the Tribe retains strict control over the LRCR , Article XI, § 11.05 of GEBDA provides, "The Board of Directors shall have no authority to obligate funds outside the parameters of the approved budget without prior approval by the Tribal Council, including but not limited to, funding connected to any bonus or profit sharing plans." (Jt. Ex. 5 at p. 11) Furthermore, § 12.01 of GEBDA provides, "The operation of the Gaming Enterprise(s) is governed by the provisions contained within this article. No deviation from approved plans and budgets shall occur unless approved by the Board of Directors and ratified by Tribal Council Resolution." (Jt. Exh. 5 at p. 11)

The Gaming Board is required to account to the Tribe for all LRCR gaming revenues, to place all gaming revenues outside of normal operating expenses in an account established by the Tribal Council within 48 hours, and to remit the net gaming revenues to the Tribe each month. The net gaming revenues may be used by the Tribe only for the general welfare of the Tribe or for charitable purposes. (Jt. Exh. 5, GEBDA §¶ 9.01(c), 9.04, 13.01(d), Jt. Exh. 5) The Tribe uses the casino revenues to help fund various tribal programs for its members and tribal government agencies. (Stip. ¶ 16 & 17)

Although the Tribe delegated to the Gaming Board the authority to hire a general manager for the LRCR, the general manager's employment contract is subject to the ratification of the Tribal Council. (GEBDA §9.03(a), Jt. Exh. 5 at p.8) The Gaming Board has the right to approve and amend the personnel manual for the LRCR employees, but this is "subject to the overriding authority of the Tribal Council to alter the personnel manual...." The Gaming Board must give the Tribal Ogema and the Tribal Council 30 days' notice of any proposed changes to the personnel manual. (Stip. ¶ 5; GEBDA § 9.03(c), Jt. Exh. 5 at p.8) Similarly, the Gaming Board has the authority to prepare a grievance procedure for non-unionized employees, but it also must be submitted to the Tribal Council for approval. (GEBDA §9.03(d), Jt. Exh. 5 at p. 9) Likewise, the health insurance plans for the LRCR must be submitted to the Tribal Council for approval. (Stip. ¶ 31 at p. 12) When the Tribe entered into an election procedures agreement with a union seeking to represent the security employees at the LRCR, the agreement was negotiated and entered into by the office of the Tribal Ogema. (Stip. ¶ 51 & 52, Jt. Exh. 22)

The Tribe delegated to the Gaming Board, which it controls, only very limited authority to enter into collective bargaining agreements. The Tribe restricts the authority of the Board of Directors to enter into such agreements by expressly limiting the Gaming Board's authority to

waive the Tribe's sovereign immunity. (Stip. ¶ 29) More importantly, the Tribe retains the authority to control essential terms and conditions of employment of LRCR employees by narrowly circumscribing the duty to bargain and by retaining for itself the right to impose the economic terms of the collective bargaining. For example, under FEP Code, §16.12(a), "management decisions to hire, layoff, to recall or to reorganize work duties" are explicitly excluded from the definition of "other terms and conditions of employment." (Jt. Exh. 4 at p. 22) Additionally, FEP Code § 16.18 limits collective bargaining agreements to terms of three years or less. (Jt. Exh. 4 at p. 31) FEP Code §16.20(b) also prohibits bargaining with respect to the policies concerning testing for drug and alcohol abuse. (Jt. Exh. 4 at p. 32) Under the interest arbitration-impasse resolution procedure set forth in the FEP Code, the Tribal Council retains the right to unilaterally impose the economic provisions of a collective bargaining agreement.[6]

Furthermore, the Gaming Board has the authority to enter into collective bargaining agreements only "on behalf of Tribe." (GEBDA § 9.03(e), Jt. Exh. 5) After a collective bargaining agreement was entered into by the Gaming Board and the United Steel Workers for a unit of security employees at the LRCR, Tribal Ogema Larry Romanelli wrote in the Tribal newsletter that is published on the Tribe's public website that the "LRBOI [Little River Band of Ottawa Indians] signed a collective bargaining agreement with the United Steel Workers...." (Stip. ¶77, p. 27)

[6] The FEP Code§ 16.17 contains an impasse resolution procedure, including interest arbitration. (Jt. Exh. 4, at pp. 27-31) The arbitrator's award is binding except with respect to the economic terms, including "wages, salaries, bonuses, insurance, pension or retirement contributions...." (FEP Code §16.17(d) and (e), Jt. Ex. 4 at pp. 28-29) If the arbitrator accepts the union's economic proposal, the Gaming Board may reject it and appeal to the Tribal Council, and the Council essentially retains the right to reject the decision of the arbitrator with respect to the economic terms and insist that the Gaming Board's economic proposal be included in the collective bargaining agreement. (FEP Code §§ 16.17 (d) and (e), Jt. Exh. 4 at pp. 28-30)

E. The Tribe's Labor Relations Ordinance

The Tribe's labor relations ordinance, which is set forth in Articles XVI and XVII of the FEP Code was enacted by Respondent in 2007 and most recently amended on July 2010. (Joint Exh. 4 at pp. 17-35, Stip. ¶¶ 36-42, 61-62) The FEP Code by its express terms applies to the LRCR, LRCR employees and the unions that seek to represent them.[7] The Tribe maintains that they are governed by the FEP Code and are not subject to the jurisdiction of the Act. (Stip. ¶¶ 39 and 40) Article XVI of the FEP Code guarantees employees certain collective bargaining rights, establishes unfair labor practices and procedures for resolving them, establish procedures for determining appropriate bargaining units and establishes procedures for certifying and decertifying collective bargaining representatives. However, in many respects the provisions of this labor relations ordinance conflict with and take away from the rights and remedies that employees and unions are entitled to under the Act. The offending provisions of the FEP Code are described below and are discussed in detail in Section V, infra.

[7] The FEP Code applies to "public employers." The Tribe considers the LRCR to be a "public employer" and the LRCR employees to be "public employees." Articles XVI and XVII of the FEP Code apply to what the Code calls "governmental operations" of the Band. (FEP Code § 1.602, and 16.03, Jt. Exh. 4 at p. 17-18, Stip. 36-39) The LRCR is specifically included in the definition of government operations of the Band, as a "subordinate economic organization, that generates "revenue in support of governmental services...." (FEP Code §16.03, Jt. Ex. 4 at p. 18) Under the FEP Code §16.03, the LRCR is defined as the "Band's gaming enterprise, including restaurant services located at 2700 Orchard Highway, Manistee, Michigan, wherein the Tribe operates Class II and Class III gaming to generate government revenue for the Tribe...."(Jt. Exh. 4 at p. 18, Stip.¶ 39) The labor relations provisions of the FEP Code also apply to agencies and departments of Respondent that provide traditional governmental services to Tribal members or are involved in law enforcement or in operation of the Tribal government, such as the Department of Public Safety ,the Department of Natural Recourses, the Health Clinic for tribal members, the Department of Education, the Department of Mental Health Services, the Tribal Court and the Office of the Tribal Ogema. The General Counsel is not contending that the NLRA should be applied to employees who work for Tribal agencies that are involved in providing traditional governmental services to Tribal members, or who work for agencies performing traditional governmental functions involving intramural matters of the Tribe. (FEP § 16.03, Jt. Exh. 4 at p. 18)

The FEP Code interferes with, restrains, and coerces employees in the exercise of their rights guaranteed in Section 7 of the Act as follows:

- By granting the Tribe exclusive authority to regulate the terms and conditions under which collective bargaining may or may not occur, thereby preempting application of the Act and interfering with access to the Board's processes. (FEP Code §16.01, Jt. Exh.4 at p. 17)
- By prohibiting all strikes and subjecting employees and unions who instigate, participate in or support a strike to civil fines, injunctions and other penalties. (FEP Code §§ 16.02, 16.06(a),(b) &(c), 16.15(b)(1), 16.15(b)(5), 16.24(a), Jt. Exh. 4 at p. 17, 20-21, 24-25, 32)
- By prohibiting employees and unions from interfering with governmental operations of the Tribe, including its LRCR, and thereby prohibiting or restricting lawful protected concerted activities (FEP Code 16.06(a), Jt. Exh. 4 at p. 20)
- By prohibiting unions from calling for any action that interferes with the Tribe's business operations, and thereby prohibiting lawful strikes and other protected concerted activities of employees.(FEP Code § 16.15(b)(1), Jt. Exh. 4 at p. 24)
- By requiring unions to obtain licenses from the Tribe in order to organize employees or conduct other business within the Tribe's jurisdiction and by requiring that, as condition for obtaining a license, a labor organization must agree to be subject to the laws of the Tribe, including its FEP Code and related regulations. (FEP Code §16.02 and §16.08, Jt. Ex. 4 at p. 17, 21)
- By subjecting unions who fail to comply with the licensing requirements to fines, injunctions and other penalties. (FEP Code §16.24(c), Jt. Exh. 4 at p. 33)

- By making the Tribe's decisions to hire, to layoff, to recall, or to reorganize duties of its employees permissive subjects of bargaining. (FEP Code §16.12(a)(1)(B), Jt. Exh. 4 at p. 22)
- By mandating that collective bargaining agreements have terms of three years or less thereby precluding bargaining a mandatory subject, the duration of the agreement. (FEP Code §16.18, Jt. Exh. 4 at p. 31)
- By making drug and alcohol policies unlawful subjects of bargaining. (FEP Code §16.20(b), Jt. Exh. 4 at p. 32)
- By prohibiting collective bargaining over any subjects in conflict with provisions of the Tribe's tribal laws, thereby unlawfully asserting the Tribe's supremacy over bargaining rights and obligations established by the Act. (FEP Code §16.12(b), Jt. Exh. 4 at p. 22)
- By precluding the Board and the Courts from reviewing arbitration decisions and awards concerning unfair labor practices and by requiring labor organizations to notify the Tribe, in writing, of any alleged unfair labor practices and to attempt to resolve the disputes before resorting to any outside forum, thereby imposing an unlawful exhaustion requirement before seeking access to the Board's processes. (FEP 16.16, Jt. Exh. 4 at p. 25-26)
- By precluding review by the Board or Federal Courts of any potentially unlawful interest arbitration awards (FEP Code §16.17(h), Jt. Exh. 4 at p. 30-31)
- By limiting the period of time that employees may file a deauthorization petition to the first three months of a contract. (FEP Code §16.13(e), Jt. Exh. 4 at p. 23)
- By providing that decisions by the Tribal Court over disputes involving the duty to bargain in good faith or alleged conflicts between a collective-bargaining agreement and

tribal laws shall be final and not subject to appeal, thereby unlawfully limiting access to the Board's processes. (FEP Code §16.24(d), Jt. Exh.4 at p. 33)

- By discouraging labor organizations and employees from invoking procedures or remedies outside of the FEP Code, thereby unlawfully interfering with access to the Board's processes and reasserting Tribe's authority to regulate collective bargaining and to preempt application of the Act. (FEP Code 17.1(c), Jt. Exh. 4 at p. 34)

IV. THE TRIBE IS AN EMPLOYER UNDER SECTION 2(2) OF THE ACT AND IT IS APPROPRIATE FOR THE BOARD TO ASSERT JURISDICTION

A. The Tribe is the Employer of the LRCR Employees

The Tribe is the employer of the LRCR employees. The LRCR is a subordinate organization and instrumentality of the Tribe that is solely owned, operated, managed and controlled by the Tribe. The LRCR is not an independent corporate entity that is operated at an arm's length basis from the Tribal government nor does the Tribe contend that it is. In its brief in support of its Motion to Dismiss, the Tribe states that the LRCR "operates, in essence, as a Branch of the Band." (Resp. 2011 Br. at 15)[8] Under the FEP Code, the LRCR is referred to as a "governmental operation" of the Tribe. It also refers to the LRCR as the "Band's gaming enterprise." (FEP Code §16.03, Jt. Ex. 4 at p.18; Stip. ¶ 39). The Ogema, the Tribe's chief executive, is admittedly responsible for managing the economic affairs of the LRCR. All the LRCR's gaming revenues must be strictly accounted for to the Tribe, and all net revenues must be turned to over to the Tribe.

[8] In this brief, the CAGC responds to arguments made in the Band's March 4, 2011 Brief in Support of its Motion to Dismiss or for Summary Judgment ("Resp. 2011 Br.").

As set forth above, the Tribe controls the labor relations of the LRCR as follows: (1) by requiring that essential terms and conditions of employment, including such things as personnel policies, grievance procedure, health policies, bonuses, profits sharing plans, and bonuses be approved by the Tribal Council;(2) through its control of the Gaming Board, one member of which is required to be the Tribal Ogema, another must be a sitting member of the Tribal Council, and the other three are appointed by the Tribal Ogema and approved by the Tribal Council; (3) through control of the annual budget and the operating plans for the LRCR, that the Gaming Board Chairperson (the Tribal Ogema or someone appointed by him) presents to the Tribal Council for approval; (4) through the specific monthly reports that the Gaming Board is required to submit to the Tribal Council and Tribal Ogema with respect to virtually every aspect the LRCR, including, inter alia, reports with respect to hiring, firing, collective bargaining, union activities other terms and conditions of employment; and (5) through the provisions of its FEP Code that ensure that the Tribe retains the right to control the essential terms and conditions of employment of the LRCR employees by excluding from the duty to bargain key terms and conditions of employment, and by reserving for itself the right to unilaterally impose through its Tribal Council the economic terms of any collective bargaining agreement. Thus, although the Tribe delegated to the Gaming Board the authority to enter into collective bargaining agreements on "behalf of the Tribe", that authority is severely limited. When the LRCR recently entered into a collective bargaining agreement, the Tribal Omega publicly stated in the Tribal newsletter it was the Little River Band of Ottawa Indians ("LRBOI") that had signed the agreement.

Thus, the Tribe functions as the employer of the LRCR employees. The LRCR is not a separate corporate entity from the Tribe; it is a branch of the Tribe. Even if it were, the Tribe

and LRCR would easily meet the test of being a single employer. They are a single integrated enterprise with common ownership, common management, centralized control of labor relations and an interrelationship of operations. See, e.g., ***Mercy Hospital of Buffalo***, 336 NLRB 1282, 1283 (2001); ***Radio Union v. Broadcast Service of Mobile, Inc.***, 380 U.S. 255, 256 (1965); ***Emsing's Supermarket***, 284 NLRB 302, 304 (1987) enfd. 873 F. 2d 1279 (7th Cir. 1989); ***Central Mack Sales***, 273 NLRB 1268, 1271-1272 (1984); ***Blumfield Theatres Circuit***, 240 NLRB 206, 215 (1979), enfd. mem. 626 F. 2d 865 (9th Cir. 1980); ***George v. Hamilton, Inc.***, 289 NLRB 1335, 1337 (1988).

B. It Is Appropriate For The Board To Assert Jurisdiction Over The Tribe

1. The Board's *San Manuel* Framework

In ***San Manuel***, the Board held that commercial enterprises operated by Indians on tribal reservations are "employers" within the meaning of Section 2(2) of the Act (29 U.S.C. § 152(2)), and that Indian tribal law and policy do not preclude the Board from asserting jurisdiction over tribal enterprises. 341 NLRB at 1057-62. The Board departed from prior Board precedent that had declined to assert jurisdiction over *on*-reservation tribal enterprises, and chose to follow the "well established" precedent of ***Federal Power Commission v. Tuscarora Indian Nation***, 362 U.S. 99, 116 (1960), "that statutes of 'general application' apply to the conduct and operations, not only of individual Indians, but also of Indian tribes." 341 NLRB at 1059 (citing cases following ***Tuscarora***). *See generally* ***United States v. Dakota***, 796 F.2d 186, 189 (6th Cir. 1986) (application of federal Organized Crime Control Act on tribal land "presents no threat to Indian sovereignty, but rather only underscores the supremacy of federal law.").

The ***San Manuel*** Board also adopted three exceptions to the ***Tuscarora*** doctrine which originated from the Ninth Circuit's decision in ***Donovan v. Coeur d'Alene Tribal Farm***, 751

F.2d 1113 (9th Cir. 1985):

> [S]tatutes of general applicability should not be applied to the conduct of Indian tribes if (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.

341 NLRB at 1059 (citing *Coeur d'Alene*, 751 F.2d at 1115).[9]

The Board in ***San Manuel*** further determined that while a tribal enterprise may thus qualify as a Section 2(2) employer, the Board would make a further inquiry "to determine whether policy considerations militate in favor of or against the assertion of the Board's discretionary jurisdiction." *Id.* at 1062. "Our purpose in undertaking this additional analytical step is to balance the Board's interest in effectuating the policies of the Act with its desire to accommodate the unique status of Indians in our society and legal culture." *Id.* The Board reasoned that it would not exercise its discretionary jurisdiction over tribal activities, whether or not on reservations, which involved the performance of traditional governmental functions or functions unique to tribal status. *Id.* at 1062-63.[10]

Applying the ***Tuscarora-Coeur d'Alene*** framework to the facts of ***San Manuel***, the Board found that none of the ***Coeur d'Alene*** exceptions applied to prevent the Board from asserting jurisdiction over the San Manuel Band's casino. *Id.* at 1063. The Board explained that NLRA jurisdiction would not implicate the Band's self-governance over intramural matters

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[9] The ***Tuscarora-Coeur d'Alene*** framework adopted by the Board in ***San Manuel*** has been widely adopted to sustain the application to tribal enterprises of a number of federal employment and civil rights statutes. *See, e.g.*, ***Fla. Paraplegic Assn. v. Miccosukee Tribe of Indians***, 166 F.3d 1126, 1129-1130 (11th Cir. 1999) (ADA); ***Reich v. Mashantucket Sand & Gravel***, 95 F.3d 174, 177 (2d Cir. 1996) (OSHA); ***Smart v. State Farm Ins. Co.***, 868 F.2d 929, 932 (7th Cir. 1989) (ERISA); ***Donovan v. Coeur d'Alene Tribal Farm***, 751 F.2d 1113, 1115 (9th Cir. 1985) (OSHA).

[10] The Board also determined that the assertion of NLRA jurisdiction does not conflict with the Indian Gaming Regulatory Act (25 U.S.C. § 2701 *et seq.*) ("IGRA"), since the NLRA does not regulate gaming, nor does IGRA address labor relations. *Id.* at 1064.

because "operation of the casino is not an exercise of self-governance." *Id.* The Band did not allege that any treaty rights were implicated, so the Board found that application of the NLRA would not abrogate such rights. The Board also found that nothing in the NLRA or its legislative history showed that Congress intended to exclude Indians or their commercial enterprises from NLRA jurisdiction. *Id.* The Board further found that discretionary jurisdiction over the Band was proper where the Band's "casino is a typical commercial enterprise, it employs non-Indians, . . . it caters to non-Indian customers," and jurisdiction would not "unduly interfere" with tribal self-governance. *Id.*

The D.C. Circuit enforced the Board's order in ***San Manuel***, stating:

> In sum, the Supreme Court's decisions reflect an earnest concern for maintaining tribal sovereignty, but they also recognize that tribal governments engage in a varied range of activities *many of which are not activities we normally associate with governance.* These activities include off-reservation fishing, investments in non-residential private property, and *commercial enterprises that tend to blur any distinction between the tribal government and a private corporation.* The Supreme Court's concern for tribal sovereignty distinguishes among the different activities tribal governments pursue, focusing on acts of governance as the measure of tribal sovereignty. The principle of tribal sovereignty in American law exists as a matter of respect for Indian communities. It recognizes the independence of these communities as regards internal affairs, thereby giving them latitude to maintain traditional customs and practices. *But tribal sovereignty is not absolute autonomy, permitting a tribe to operate in a commercial capacity without legal constraint.*

475 F.3d 1306, 1314 (D.C. Cir. 2007) (emphasis added).

As set forth below, none of the three ***Coeur d'Alene*** exceptions are applicable here to preclude application of the NLRA, and it is appropriate for the Board to assert discretionary jurisdiction.

2. <u>Application of the *San Manuel* Framework</u>

(a) Application of the NLRA to the Tribe's Casino Resort Does Not Interfere with Exclusive Rights of Tribal Self-Governance Over Intramural Matters

The instant matter does not involve "exclusive rights of self-government in purely

intramural matters." ***San Manuel***, 341 NLRB at 1059 (quoting ***Coeur d'Alene***, 751 F.2d at 1115). The Tribe's operation of its casino and the revenue used for governance functions, though significant to the Tribe, are *not*, as a matter of law, an exercise of self-governance within the meaning of the first ***Coeur d'Alene*** exception. ***San Manuel***, 341 NLRB at 1063. Rather, "[i]ntramural matters generally involve topics such as 'tribal membership, inheritance rules, and domestic relations.'" *Id.* (citations omitted). Operation of the casino involves no similar *internal* activity.

Indeed, like the San Manuel Band's casino, the Tribe's casino is a commercial venture generating income for the Tribe from its public customers, most of whom are not tribal members. The casino competes in the same commercial arena as other nontribal casinos, overwhelmingly employs nontribal members, and actively markets its gaming, hotel, restaurants, entertainment, and other retail ventures to the general public. *See* ***San Manuel***, 341 NLRB at 1061 ("[T]he operation of a casino— which employs significant numbers of non-Indians and that caters to a non-Indian clientele—can hardly be described as 'vital' to the tribes' ability to govern themselves or as an 'essential attribute' of their sovereignty."); ***Menominee Tribal Enterprises v. Solis***, 601 F.3d 669, 674 (7th Cir. 2010) ("The Menominees' sawmill is just a sawmill, a commercial enterprise."); ***Mashantucket***, 95 F.3d at 181 ("[T]he nature of [the construction company's] work, employment of non-Indians, and the construction work on a hotel and casino that operates in interstate commerce—when viewed as a whole . . . is distinctly inconsistent with the portrait of an Indian tribe exercising exclusive rights of self-governance in purely intramural matters.").[11] Moreover, that the casino is owned by the Tribe "does not ipso facto elevate it to the status of a

[11] *See also* ***EEOC v. Karuk Tribe Housing Authority***, 260 F.3d 1071, 1081 (9th Cir. 2001) (tribal member's discharge by the tribal housing authority was not subject to the ADEA because it "[did] not concern non-Indians as employers, employees, customers, or anything else.").

tribal government." ***Mashantucket***, 95 F.3d at 180.

There is no merit to the Tribe's claim that the Board has no power to interfere with the Tribe's sovereignty so as to "strike down the Band's law. . . ." (*see* Resp. 2011 Br. at 10-26, quote from Heading I). First, Counsel for the Acting General Counsel does here seeks to invalidate *only* those portions of the Code in so far as they apply to the LRCR and are in conflict with the NLRA. To be sure, application of the NLRA to the LRCR casino will make unlawful the Band's application to LRCR casino employees of certain FEP Code provisions that would tend to interfere with the exercise of rights guaranteed in Section 7 of the Act. A remedy for the alleged NLRA violations necessarily will enjoin the continued application of these FEP Code provisions to labor relations at the casino. However, as should be clear, counsel for the Acting General Counsel is seeking application of the NLRA *only* to the LRCR and to no other Tribal activity or enterprise. If, as we assert, the LRCR is an employer properly subject to the NLRA consistent with ***San Manuel***, this application of the NLRA should not unduly infringe the Band's legitimate sovereign right to self-governance of other governmental and internal matters.

It is consistent with applicable precedent to invalidate portions of the Band's labor relations Code *to the extent* it applies to the LRCR, *and* conflicts with the NLRA. The D.C. Circuit explained in ***San Manuel***, 475 F.3d at 1314, 1315:

> Of course, in establishing and operating the Casino, San Manuel has not acted solely in a commercial capacity. *Certainly its enactment of a tribal labor ordinance to govern relations with its employees was a governmental act*, as was its act of negotiating and executing a gaming compact with the State of California, as required by IGRA. *See* 25 U.S.C. § 2710(d)(3). Moreover, application of the NLRA to employment at the Casino will impinge, to some extent, on these governmental activities. *Nevertheless, impairment of tribal sovereignty is negligible in this context, as the Tribe's activity was primarily commercial and its enactment of labor legislation and its execution of a gaming compact were ancillary to that commercial activity.* The total impact on tribal sovereignty at issue here amounts to some unpredictable, but probably modest, effect on tribal revenue and the displacement of legislative and executive authority that is secondary to a commercial

undertaking. We do not think this limited impact is sufficient to demand a restrictive construction of the NLRA. [emphasis added]

The D.C. Circuit's analysis is consistent with that of other Circuit Courts. For example, in ***Smart v. State Farm Ins. Co.***, 868 F.2d 929, 935 (7th Cir. 1989), the Seventh Circuit Court of Appeals in applying ***Coeur d'Alene,*** stated, "a statute of general application will not be applied to an Indian Tribe when the statute threatens the Tribe's ability to govern its intramural affairs, but not simply whenever it merely affects self-governance as broadly conceived." The court noted that even a statute requiring the withholding of federal taxes from employees' salaries interfered with tribal sovereignty to some extent. *Id.* It concluded that ERISA, if anything, was less of an interference with tribal self-governance than the withholding tax law, for it "[did] not broadly and completely define the employment relationship," but only required the tribe to meet reporting and accounting standards designed for the protection of the employees. *Id.* at 935-36.

Similarly, application of the NLRA here only requires invalidation of those provisions of the FEP Code which restrict, deny, or otherwise interfere with the rights of casino employees and unions that seek to represent them. But such invalidation does not hinder the Band's ability to determine tribal membership, inheritance rules, domestic relations, working conditions of other non-casino resort tribal governmental employees, or traditional areas of tribal self-governance. *See* ***San Manuel***, 341 NLRB at 1063. A tribe's ability to exempt its casino employees from the NLRA by passage of an ordinance that conflicts with NLRA guaranteed rights would license the Tribe to circumvent ***San Manuel***. Instead of a supervisor approaching an employee at the workplace and saying "you're never allowed to strike," or "you are fired because of your union activity," the Tribe would simply exempt itself from federal law by passing a No-Strike or No Union Activity Ordinance.

While the Band has emphasized that some of its employees are engaged in traditional tribal functions – administering its tribal government, providing law enforcement, education, health care, and housing for tribal members, and maintaining and protecting its natural resources of its trust lands – the instant case does not concern those government functions.

Moreover, the Band's use of casino revenue to fund governmental functions does not make its casino operation an intramural function. As the Board stated in ***San Manuel***, under such a definition of intramural, "the *Coeur d'Alene* exception would swallow the *Tuscarora* rule." *Id. See also* ***United States Dep't of Labor v. Occupational Safety & Health Rev. Comm'n (DOL v. OSHRC)***, 935 F.2d 182, 184 (9th Cir. 1991); ***Chao v. Spokane Tribe of Indians***, 2008 WL 4443821, at *5 (E.D. Wash. Sept. 24, 2008) ("the economic impact of the application of a federal statute on the tribal business is not a factor to consider"). In short, there is no showing here that any consequences flowing from NLRA application to the Respondent's operation of this casino interfere with the Tribe's internal tribal governance.[12]

The Band's further argument that a federal law cannot be applied to a tribe, absent a clear Congressional mandate to do so, is based on a line of cases involving the regulation of intramural tribal matters that the Board in ***San Manuel*** found not to be controlling. *Id.* 341 NLRB at 1059-62. While the Supreme Court has recognized that a tribe may retain the power to exclude non-Indians from its reservation, which "necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct . . . ," ***Merrion v. Jicarilla Apache Tribe,*** 455 U.S. 130, 144 (1982), the Court has not held that a tribe may condition entry into tribal land upon a person's abandonment of rights guaranteed by a federal statute. Such a

[12] The Board noted in ***San Manuel***, for example, that "the collective-bargaining process will not impair the Tribe's ability to hire as it wishes. An employer is not obligated to agree in bargaining to hiring restrictions, and the Board cannot impose any agreements. See ***H.K. Porter v. NLRB***, 397 U.S. 99 (1970)." 341 NLRB at 1063 n.23.

conclusion would elevate the tribe's sovereignty over that of the federal government. The law, however, is the reverse. *See, e.g.,* ***Oliphant v. Squamish Indian Tribe,*** 435 U.S. 191, 208-10 (1978); ***Tuscarora***, 362 U.S. at 116; ***Reich v. Mashantucket Sand & Gravel,*** 95 F.3d 174, 178-79 (2d Cir. 1996).

Indeed, most of the cases cited by the Band for inherent sovereign authority to govern economic affairs involve the rights of Indian tribes versus those of the States – *not* the Federal government – and/or concern tribal sovereignty over intramural affairs involving tribal members. *See, e.g.*, ***Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe***, 498 U.S. 505, 511-14 (1991) (tribal sovereignty immunity precluded State from suing to collect taxes from the tribe or its members, but not from non-members); ***United States v. Wheeler***, 435 U.S. 313, 326-28 (1978) (tribe retained sovereign authority to prosecute a tribal member for a crime); ***Ex parte Kan-gi-shun-ca***, 109 U.S. 556, 572 (1983) (right of tribe to prosecute a crime involving one Indian against another); ***Worcester v. Georgia***, 31 U.S. 515, 595-96 (1832) (State lacked authority to pass laws concerning internal affairs of the tribe); ***Williams v. Lee***, 358 U.S. 217, 223 (1959) (owner of store on Indian reservation cannot sue member in state court for nonpayment of a debt); ***Montana v. United States***, 450 U.S. 544, 566-67 (1981) (tribe does not have inherent authority to regulate hunting and fishing of nonmembers on property owned by nonmembers on the reservation, but does have inherent authority to regulate fishing and hunting of members and nonmembers on tribally owned lands).

Similarly, the cases the Band has cited for inherent authority to regulate the employment relationship on Tribal lands concern either (a) a *State* intrusion on tribal governance, traditional intramural areas of self governance, or (b) only involved tribal members. *See* ***Penobscot Nation v. Fellencer***, 164 F. 3d 707, 713 (1st Cir. 1999) (discrimination claim of community health nurse

employed by Tribal health clinic must be brought before the tribal authorities, and not the State of Maine's community anti-discrimination statute); ***E.E.O.C. v. Fond du Lac Heavy Equipment and Const. Co., Inc.***, 986 F.2d 246, 249, 251 (8th Cir. 1993) (ADEA does not apply to "strictly internal" employment discrimination dispute between tribal employer and tribe-member employee); ***Reich v. Great Lakes Fish and Wildlife Commission***, 4 F.3d 490, 495 (7th Cir. 1993) (tribal law enforcement employees performing governmental functions, but not employees "engaged in routine activities of a commercial or service character," are exempt from FLSA); ***Davis v. Mille Lacs Band of Chippewa Indians***, 26 F. Supp. 2d 1175, 1179 (D. Minn. 1998) (tribal court had jurisdiction over tribal member's discrimination and negligence claims against tribal police department), aff'd on other grounds 193 F.3d 990 (8th Cir. 1999).

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), also does not support the Band. As the Board found in ***San Manuel***, the Court's determination that an Indian tribe could impose severance taxes on a non-Indian with respect to a gas and oil lease on tribal land does not address the applicability of a federal statute to a tribal's commercial enterprise. *See* 341 NLRB at 1062 and n.20. *See also* ***Couer d'Alene***, 751 F.2d at 1117 (***Merrion*** "said that the right to exclude and tax non-Indians was a 'hallmark' of sovereignty. It in no way addressed Congress' ability to modify those rights through the exercise of its plenary powers. Unlike the Secretary [of Labor] in this case, the non-Indian petitioners in ***Merrion*** could point to no statute of general applicability that even appeared to modify the tribe's sovereign power to tax or exclude.") (citation omitted).

The Tenth Circuit's decision in ***N.L.R.B. v. Pueblo of San Juan***, 276 F.3d 1186, 1192-93 (10th Cir. 2002), relied upon by the Band, also does not call for a different result. At issue there was the tribe's application of an ordinance, which the Court found to be essentially consistent with the NLRA, to a private employer on tribal land – not, as here, the application of the NLRA

to the Tribe as employer of its own commercial enterprise. 276 F.3d at 1191 ("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."). Moreover, the Tenth Circuit in ***Pueblo of San Juan*** stated, ***Tuscarora*** may apply "where an Indian tribe has exercised its authority . . . in a propriety capacity such as that of an employer or landowner." In ***Pueblo of San Juan***, the Court concluded that the NLRA did not preclude the tribal ordinance prohibiting union security agreements because the NLRA, through Section 14(b), does not establish a uniform scheme throughout the country regarding such agreements, as it permits states to outlaw them. By contrast, the NLRA does establish a uniform labor policy regarding the other provisions of the NLRA that are at issue here. Accordingly, application of the Band's FEP Code provisions to NLRA employees would interfere with the uniform application of Section 7 protections and is precluded by the NLRA.

(b) The Band Has Not Raised a Treaty as a Defense

To fit within the second ***Coeur d'Alene*** exception, application of a federal statute must jeopardize a specific right that is secured by a treaty. *See* ***Smart v. State Farm Ins. Co.***, 868 F.2d 929, 934-35 (7th Cir. 1989) (treaties only conveyed land to tribe and neither tribe nor court could find a single specific treaty right that would be abrogated by application of ERISA); ***United States v. Sohappy***, 770 F.2d 816, 820 (9th Cir. 1985) (treaty-reserved right to control and regulate Indian fishing did not preclude application of federal law regulating Indian and non-Indian fishing, where treaty did not reserve "*exclusive* jurisdiction" over fishing matters nor exempt Indians from laws of general applicability) (emphasis in original). The Band here, like the tribe in ***San Manuel***, does not contend that application of the NLRA to its gaming operation will violate any treaty provision. Accordingly, this exception has no application here and does

not preclude application of the Act.[13]

(c) There is No Evidence that Congress Intended that the NLRA Would Not Apply to the Tribe's Casino, Nor Does the IGRA Supersede the NLRA

The third ***Coeur d'Alene*** exception is also inapplicable because, as discussed above, the Board has concluded that "neither the language of the Act, nor its legislative history, provides any evidence that Congress intended to exclude Indians or their commercial enterprises from the Act's jurisdiction." ***San Manuel***, 341 NLRB at 1063. The Tribe can offer no evidence that Congress intended to exclude Indian Tribes from coverage of the Act.

The Board further determined in ***San Manuel*** that application of the NLRA does not conflict with IGRA because the NLRA does not regulate gaming, and IGRA does not address labor relations. *Id.* at 1064; *see supra*, n.3. As the D.C. Circuit explained, while IGRA allows tribes and states to regulate gaming, "it is a considerable leap from that bare fact to the conclusion that Congress intended federal agencies to have no role in regulating employment issues that arise in the context of tribal gaming." ***San Manuel***, 475 F.3d at 1318. Indeed, one of the only three reasons the Secretary of the Interior may rely upon to disapprove a tribal-state compact under IGRA is if the compact violates "any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands." 25 U.S.C. § 2710(d)(8)(B). This provision strongly suggests that IGRA was not intended to frustrate the application of other federal laws.

(d) The Board's Reasons for Exercising Discretionary Jurisdiction Are as Significant Here as in *San Manuel*

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[13] There were two treaties entered into by the Grand River Ottawas Tribe prior to the 1855 treaty that dissolved the Tribe. The Band has not asserted these treaties as a defense to the Board's exercise of jurisdiction, and thus has waived them as a defense. *See* ***Christopher St. Corp.***, 286 NLRB 253, 253 (1987). In any event, these treaties provided for the ceding of land in exchange for monetary payments, and gave the tribe general occupancy and hunting privileges. It is settled that general treaty provisions that do not *specifically* conflict with the application of federal statutes of general applicability do not preclude the application of such statutes to Indian tribes. *See* ***DOL v. OSHRC***, I935 F.2d 182, 184, 186 (9th Cir. 1991).

The discretionary jurisdiction policy considerations are the same as in ***San Manuel***. As the Board there stated, "the casino is a typical commercial enterprise, it employs non-Indians, and it caters to non-Indian customers. Moreover, assertion of jurisdiction would not unduly interfere with the tribe's autonomy. . . . [T]he Act would not broadly and completely define the relationship between the Tribe and its employees. Nor would the Act's effects extend beyond the tribe's business enterprise and regulate intramural matters." 341 NLRB at 1063. *Compare* ***Yukon Kuskokwim Health Corp.***, 341 NLRB 1075, 1076 (2004) (Tribal Health Corporation fulfilled a "unique governmental function . . . the Federal Government's trust responsibility to provide free health care to Indians."). As in ***San Manuel***, the Tribe here operates a business that competes with other private enterprises regulated by the Act. In these circumstances, it is appropriate for the Act to be applied to the Tribe's LRCR.

3. The Band's Asserted Sovereignty Against Section 301 Lawsuits Does Not Impact the Board's Jurisdiction in Unfair Labor Practice Proceedings

The Band has also asserted in its Motion to Dismiss or for Summary Judgment that because sovereign immunity prohibits suits against it by unions seeking to enforce a collective bargaining agreement under Section 301 of the LMRA, 29 U.S.C. § 185, Congress must have also intended that the entire NLRA be unenforceable against it. Thus, the Band has argued, "[i]n an integrated statutory scheme such as the NLRA, it would have been absurd for Congress to have left tribes out of section 301 while, at the same time, intending to include them under any other provision." Resp. 2011 Br. at 28. While it has cited no case actually holding sovereign immunity protects tribes from Section 301 breach of contract suits, the Band correctly notes that Section 301 "establishes a private right of action" for parties to sue to enforce collective bargaining agreements, *and* that Section 8(a)(1) is the provision Counsel for the Acting General

Counsel alleges the Band violated in the instant proceeding. (Resp. 2011 Br. at 26-27.) This point defeats the Tribe's own argument.

The two parts of the NLRA – (a) Section 301 providing federal court jurisdiction for union and employer contract disputes, and (b) Sections 1-10 pertaining to the Board's elimination of unfair labor practices (29 U.S.C. § 151-160) – provide separate enforcement schemes each with its own policies and protections. That Congress, through both the Wagner Act in 1935, Pub.L. 74-198, 49 Stat. 449, and the LMRA in 1947, Pub. L. 80-101, 61 Stat. 136, may have intended an "overarching goal of promoting workplace harmony" (Resp. 2011 Br. at 27), does not detract from the fundamental distinctions between the different schemes established by Congress. On the one hand, Congress chose in Section 301 to permit private parties to enforce their contractual rights. "Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law.'" ***Charles Dowd Box Co. v. Courtney***, 368 U.S. 502, 509, 513 (1962) (emphasis added); *see also* ***NLRB v. C&C Plywood Corp.***, 385 U.S. 421, 427-29 (1967). On the other hand, Congress designated the NLRB exclusively to prevent unfair labor practices on behalf of the public. *See* 29 U.S.C. § 160(a) ("the *Board* is empowered . . . to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce.") (emphasis added); *id.* at § 153(d) (the General Counsel of the Board "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board . . . .").

Indeed, the private and public enforcement schemes operate differently; a court's enforcement of a collective bargaining agreement does not affect the Board's authority to remedy unfair labor practices. *See* ***Smith v. Evening News Ass'n***, 371 U.S. 195, 197-98 (1962).

Whereas Section 301 "would be purposeless unless" labor and management could sue to enforce their private agreement, ***Dowd Box***, 368 U.S. at 509, "[t]he Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the [unfair labor practices] in order to remove obstructions to interstate commerce." ***Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776***, 346 U.S. 485, 493-94, 501 (1953) (citation omitted); *see* ***Vaca v. Sipes***, 386 U.S. 171, 182-83 n.8 (1967) ("The public interest in effectuating the polices of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies."). Of course, "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States" (***Washington v. Confederated Tribes of the Colville Indian Reservation***, 447 U.S. 134, 154 (1980), and certainly not private parties asserting contractual claims.

Accordingly, there are two different schemes of enforcement – one for private causes of action and the other for a Federal agency's prosecution of violations of federal law to achieve a public benefit. There is no law or logic requiring application of sovereign immunity rules that might bar private claims against a Tribe to also bar the United States government from enforcing generally applicable federal law. In short, because it is clear that "Indian tribes have no sovereign immunity against the United States," ***San Manuel***, 341 NLRB at 1061, the Band's ability to raise a sovereign immunity claim against a private party in a Section 301 suit simply has no import here.

V. THE PROVISIONS OF TRIBE'S LABOR RELATIONS ORDINANCE VIOLATE SECTION 8(a)(1) OF THE ACT

A. <u>The FEP Code By Its Terms Seeks to Preempt the NLRA</u>

In FEP Code §16.01, the Tribe asserts that it has the "inherent authority to govern labor relations within its jurisdiction, and this includes regulating the terms and conditions of employment under which collective bargaining may or may not occur within its territory." (Jt. Exh. 4 at p. 17) This language suggests incorrectly that the Tribe and not the Board has the supreme authority to regulate the collective bargaining rights of the LRCR employees. In fact, the Tribe does not dispute that it maintains that the NLRB lacks jurisdiction to decide and regulate the collective bargaining rights of its LRCR employees. (Stip. ¶ 80) This pronouncement in its ordinance, which is published on its pubic website, clearly conveys the message that the laws of the Tribe and not the NLRA govern the collective bargaining rights of the LRCR employees. (Jt. Exh. 4 at p. 17)

Section 7 of the Act protects the right of employees to utilize the Board's processes, including the right to file unfair labor practice charges. ***Braun Electric Co., Inc.***, 324 NLRB 1, 3 (1997). An employer's rule or policy that unduly interferes with or restricts that right will be found to be unlawful. ***Bill's Electric, Inc.***, 350 NLRB 292, 296 (2007); ***U-Haul Co. of California***, 347 NLRB 375, 377 (2006); ***Lutheran Heritage Village-Livonia***, 343 NLRB 646 (2004). If a rule or policy does not explicitly restrict access to the Board, the rule will be found to violate the Act if it can be reasonably read by affected employees to restrict their access to the Board. ***Bill's Electric, Inc.***, *Id*; ***In re D. R. Horton, Inc.***, 357 NLRB No. 184 at p.4 (Jan 3, 2012). Employees by any reasonable reading of this provision would assume that they are prohibited from bringing claims concerning their Section 7 rights to the Board. The policy set forth in this ordinance, preempts the rights and remedies in the Act, interferes with employees' access to the Board, and violates Section 8(a)(1).

B. <u>The FEP Code Prohibits Strikes and Other Protected Concerted Activities</u>

The FEP Code §16.15(b)(5) expressly prohibits striking by LRCR employees and labor organizations seeking to represent them including, "participating in a strike against the Governmental Operations of the Band by instigating or supporting, in any positive manner, a strike." (See also, FEP Code §§16.02, 16.06 (b) & (c); Jt. Exh. 4 at 20-21) The no-strike provisions explicitly apply to the LRCR employees, as FEP Code § 16.06(b) provides, "Employees within the Governmental departments and agencies of the Band, including the Little River Casino Resort, have no right to strike." (Jt. Exh. 4 at p. 20)

The term "Strike" is broadly defined; FEP Code §16.03 states, "Strike means an employee's refusal, in concerted action with other employees, to report for duty or to be willfully absent, in whole or in part, from the full faithful and proper performance of their duties or employment for the purpose of inducing, influencing or coercing a change in the conditions, compensation, rights, privileges or obligations of employment of any kind. The term 'strike' includes boycotts of any kind designed to adversely affect a public employer....." (Jt Exh. 4 at p. 19) FEP Code § 16.02 provide that "...the policy of the Tribe...is to prevent and prohibit all strikes...." (Jt. Exh. 4 at p. 17) Thus, virtually any lawful strike or boycott is prohibited by these provisions.

The broad language of these provisions by reasonable interpretation prohibits activities protected by the Act other than actual striking--such as threatening to strike, encouraging others to strike, picketing, refusing to cross a picket line, and consumer boycotts. The language may reasonably be construed to prohibit strike-related activities directed at the LRCR that take place outside of Tribal lands by LRCR employees who are not Tribal members (i.e. discussing plans to strike, encouraging others to engage in a lawful strike or a boycott).

In addition, in FEP Code §16.06(a) the prohibition is worded even more expansively; it states "No employee or labor organization shall *interfere with*, threaten or undermine the Government Operations of the Band." [14] (Jt. Ex. 4 at p. 20)(Emphasis added). Similarly, under FEP Code § 16.15(b)(1), "A labor organization or any one acting in its behalf or its officers, representatives, agents or members are prohibited from...*[i]interfering with*, restraining or coercing ....management by reason of its performance or duties or other activities undertaken in the interests of the Governmental Operations of the Band." (Jt. Exh. 4 at p. 24)(Emphasis added) The broad language of FEP Code §16.06(a) and §16.15(b)(1) can reasonably interpreted to prohibit a whole host of lawful protected concerted activities by employees as well as unions, including, among other things, strikes, temporary work stoppages, and employees simply taking up management's time by attempting to discuss grievances.

LRCR employees and unions that violate the strike prohibition are subject to severe penalties. Thus, under FEP Code§ 16.24(a) any "public employees or labor organization, or any employee or agent of any labor organization" that violates or "seeks to violate" the prohibition against striking..." is subject to a civil action brought in Tribal Court for declaratory or injunctive relief. Additionally, the Tribal Court may impose civil fines against labor organizations of up to $5,000 for each violation and against employees of up to $1,000 for each violation. Employees who violate the strike ban are subject to suspension or termination. Labor organizations found by the Tribal Court to have violated the strike ban "shall be deemed decertified from representing any public employees." (Jt. Exh. 4 at p. 32, See also FEP §16.15(b)(5), Jt. Exh.4 at p. 25)

[14] Under FEP Code 16.03, "Government operations of the Band" are defined to include, *inter alia*, "... the generation of revenue to support the Band's governmental services and programs, including the operation of 'Class II' and 'Class III' gaming through the Little River Casino Resort." (Jt Exh. 4 at p. 18)

The Tribe asserts that because the gaming operations are a major source of funding for its governmental operations, a strike could seriously jeopardize these operations. Therefore, it argues that it has the right to prohibit striking under its inherent sovereign powers. The Tribe argues that in applying the no-strike provision to the LRCR, it is doing nothing more than a state government does in prohibiting strikes by public employees. State governments, unlike Indian tribes, however, are specifically excluded from coverage under the Act. Furthermore, LRCR employees are not public employees in any real sense.

The right to strike is fundamental under the NLRA and it is an economic tool that unions are allowed to use to obtain leverage at the bargaining table. A no-strike clause is a mandatory subject of bargaining, and such clauses are common in collective bargaining agreements. The Tribe may protect itself by negotiating with unions to include no-strike clauses in their collective bargaining agreements. Furthermore, as an employer covered by the NLRA, the Tribe has plenty of lawful economic weapons to counter the impact of a strike. An employer, for example, has the right to continue to operate during a strike and can hire strike replacements. Finally, there is nothing to suggest that strikes are inevitable or that they are more likely with respect to Indian-owned enterprises than they are for non-Indian owned enterprises.

By prohibiting striking and other protected activities in its ordinance the Tribe has violated Section 8(a)(1) of the Act.

C. The FEP Code Requires that Unions Obtain A License from the Tribe

FEP Code §16.08(a) provides that "No labor organization shall engage in organizing employees working for any public employer, without a license issued by the Little River Band of Ottawa Indians Gaming Commission...." (Jt. Exh. 4 at p. 21; See also FEP Code §16.02, Jt. Exh.

4 at p.17) As a condition for obtaining a license, a labor organization must agree to: (A) comply with all rules, regulations and laws of the Tribe, (B) submit to the jurisdiction of the Tribe, including the Tribal Court, and (c) pay an annual fee..." (Stip. ¶ 48, FEP Code § 16.08(a)(1), (2) & (3), Jt Exh. 4 at p. 21, Jt. Exh. 15, 16 & 17) Thus, this ordinance requires any labor organization seeking to organize LRCR employees to agree to the FEP Code, including those provisions discussed herein, which by their terms preempt the Act, and interfere with the rights of employees and unions guaranteed in the Act. Labor organizations that fail to obtain a license or fail to comply with the licensing regulations, [15] are subject to being enjoined and being issued a civil fine of up to $5,000 by the Tribal Court. (FEP Code § 16.24(c), Jt. Exh. 4 at p. 33)

The Tribe asserts that because it has the power to exclude non-Indians from its trust lands, it has the lesser power to impose conditions on those who chose to enter the reservation, and, as a result, it can require a labor organization to obtain a license as a condition of or organizing or representing its employees. The Board majority in ***San Manuel*** ruled that a tribe's sovereign right to exclude non-members from its reservation does not preclude the Board from asserting jurisdiction over the tribe. 341 NLRB at 1061-1062. Moreover, as discussed above, the Tribe's right to exclude non-Indians from tribal lands does give it the right to compel those who enter tribal lands to forgo their rights under Federal law. *See, e.g.,* ***Oliphant v. Squamish Indian Tribe,*** 435 U.S. at 208-10; ***Reich v. Mashantucket Sand & Gravel,*** 95 F.3d at 178-79 . This licensing provision goes far beyond excluding nonemployee organizers from its premises and by

[15] The licensing regulations issued by the Respondent's Gaming Commission require labor organizations to provide detailed information to the Commission for each "designated individual" of the local which includes "officers, agent, principal, or *individual performing any of the following functions on behalf of labor with respect to employees of any gaming organization of the Tribe..."* One of the duties of a "designated individual" is "soliciting employees for union membership." (Labor Organization Licensing Regulations § 1-4, Jt. Exh. 9 at p. 1) This licensing regulation by its broad terms applies to employees who are organizing on behalf a union.
As a part of the licensing requirement, a labor organization must identity by name, address, and social security number each such "designated individual", and must describe the duties performed by such individual, and set forth when such individual first "consulted with" the labor organization. (Labor Organization Licensing Regulation § 2-3 and 2-4, Jt. Exh. 9 at p. 1)

its broad terms applies to employees and nonemployees alike. To obtain a license a union is compelled to agree to abide by the unlawful provisions of the Tribe's labor relations ordinance and to agree to forgo rights and remedies guaranteed under the NLRA. This provision is clearly an unlawful denial of access to the Board and its processes, and it violates Section 8(a)(1) of the Act. *Cf.* ***In Re D.R. Horton, Inc.***, 357 NLRB No. 184 at p. 4-6 (compelling employees to waive Section 7 rights as a condition of employment violates the Act)

D. <u>The FEP Code Unlawfully Restricts the Duty to Bargain</u>

Under the FEP Code, the duty to bargain in good faith is very narrowly tailored, and it unlawfully excludes many mandatory subjects of bargaining. FEP Code § 16.12(a)(1) requires an employer to "bargain in good faith on wages, hours and other terms of employment." However, FEP Code §16.12(a)(1)(B) states that "management decisions to hire, to layoff, to recall or to reorganize duties shall not constitute 'other terms and conditions of employment'....", thus treating these mandatory bargaining subjects as merely permissive subjects. (Jt. Exh. 4 at p. 22) See, e.g., ***Odebrecht Contractors of California,*** 324 NLRB 396, 397 (1997); ***Quality Packaging,*** 265 NLRB 1141 (1982); ***St Johns General Hosp.,,*** 281 NLRB 1163(1986) enfd. 825 F. 2d 740 (3rd Cir. 1987).

FEP Code §16.18 mandates that collective-bargaining agreements have terms of three years or less, therefore prohibiting bargaining with respect to another mandatory subject, the duration of the agreement. (Jt. Exh. 4 at p. 31) See, e.g., ***NLRB v. Yutana Barge Lines***, 315 F.2d 524 (9th Cir. 1963).

FEP §16.20(b) prohibits collective bargaining with respect to drug and alcohol testing policies. It vests "public employers" with the right to address the terms and conditions for testing public employees for alcohol and drug use, consistent with the laws of the Tribe and

provides that "such policies will not be subject to bargaining with any labor organization." (Jt. Exh. 4 at p. 31-32)

The Tribe asserts that because of traditional problems native populations have had with substance abuse, it is within its tribal sovereignty to preclude bargaining with respect to drug and alcohol testing of its employees. Unfortunately, drug and alcohol abuse is a problem that affects the population at large and many employers. The Board has ruled that drug and alcohol testing is a mandatory bargaining subject for existing employees. ***Johnson-Bateman Co.***, 295 NLRB 180 (1990). When LRCR employees are represented by a union, the Tribe may of course insist on the inclusion of a clause that allows for such testing, but it must do so at the bargaining table while bargaining in good faith.

Finally, FEP § 16.12(b) contains a catchall exclusion that states that the obligation to bargain "shall not be construed to require management and an exclusive representative to negotiate over matters that would conflict with the provisions of any other laws of the Tribe, and in the event of any conflict between the provisions of any other laws of the Tribe and an agreement entered into between the public employer and the exclusive collective bargaining representative, the laws of the Tribe shall prevail." (Jt. Exh. 4 at p. 22) Thus, by this provision the Tribe is unlawfully asserting the supremacy of Tribal laws over the bargaining rights and obligations set forth under the NLRA, and is unlawfully interfering with employees' and union's access to the Board.[16]

E. The FEP Code Interferes with Employees' and Unions' Access to the Board and Its Processes

[16] The phrase "the laws of the Tribe" is defined very broadly in FEP Code §16.03 as "the [Tribal Constitution and Tribal Code....,resolutions of the Tribal Council and the Tribal Regulations of the commissions, agencies, departments and authorities of the Little River Band of Ottawa Indians." Thus, the Tribal Council could exempt matters from collective bargaining simply by adopting a resolution.

In a number of other provisions of the FEP Code, the employees of the LRCR and their unions are directed to the procedures set forth in this ordinance and to the Tribal Court for any final redress of their grievances, thus interfering with their access to the Board.

Thus, not only does the FEP Code provide that there is no duty to bargain with respect to matters that conflict with Tribal laws, as discussed above, the FEP Code provides that the Tribal Court will be the final arbiter over such conflicts. FEP Code §16.24(d)(1) states that "Unresolved disputes ...over the duty to bargain in good faith, involving a controversy over whether a subject conflicts with the laws of the Tribe, may be brought...to the Tribal Court for resolution...."(Jt. Exh. 4 at p. 33) Similarly, FEP Code §16. 24(d)(2) provides that "Unresolved... disputes concerning an alleged conflict between a provision of a collective bargaining agreement and the laws of the Tribe" may also be brought to the Tribal Court for resolution." (Jt. Exh. 4 at p. 33) The decisions of the Tribal Court on these alleged conflicts are final and are not subject to appeal. (FEP Code §16.24(d)(4), Jt. Exh. 4 at p. 33) There is no mention in these provisions that unions or employees may bring such disputes to the Board. Thus, these provisions by reasonable interpretation mean that such disputes must be brought before the Tribal Court from which there can be no appeal to the Board. These provisions interfere with the access of unions and employees to the Board and violate Section 8(a)(1). *See, e.g.,* ***Bill's Electric, Inc.***, supra; ***In re D. R. Horton, Inc.***, supra.

Additionally FEP §16.16 contains an arbitration procedure for resolving unfair labor practices. (Jt. Exh. 4 at p. 25-26) However, before demanding arbitration a union must give 10-day notice of the alleged unfair labor practice to the Tribe, and meet with the Tribe's representative in an attempt to resolve it. Thus, FEP § 16.16 (a)(1)(A) states, "Should either

management or an exclusive representative become aware of perceived conduct constituting an unfair labor practice, it *shall* notify the other party, in writing ... of the charge and the alleged factual basis for the charge. The recipient party *shall* respond in writing...within 10 days of receipt of the charge. Management and the exclusive bargaining representative *shall* then make a good faith effort to resolve the alleged violation. The good faith effort *shall* include each party providing the other with unprivileged information relevant to the charge upon request." (Jt. Exh. 4 at p. 25)(Emphasis added) "If good faith efforts do not resolve the charge," then a demand can be made to submit the case to arbitration. (FEP Code§16.16(a)(1)(B), Jt. Exh. 4 at p. 25) The arbitrator's decision is final and binding, except for limited review by the Tribal Court with respect to whether the award violates or conflicts with the law of the Tribe or was "procured by corruption, fraud, or other undue or illegal means." (FEP Code§16.16(a)(2)(C); FEP Code§16.16(a)(3)(A)(B) & (D), Jt. Exh. 4 at p.26)

First, this scheme which repeatedly uses the word "shall" is mandatory. Furthermore, by reasonable construction it includes unfair labor practices covered by the Act. There is no express language excluding such unfair labor practices or advising unions and employees that they have the right to go to the Board. ***Bill's Electric, Inc.*** supra; In ***re D. R. Horton, Inc.***, supra. Thus, a reasonable interpretation of this provision is that a union or an employee must first go through this process, before filing a charge with the Board, and it imposes an unlawful exhaustion requirement and interferes with access to the Board's processes.

Secondly, this scheme by reasonable interpretation precludes review of the arbitrator's unfair labor practice award by the Board or the Federal Courts, and leaves a union with only a limited option of having the arbitrator's unfair labor practice decision reviewed by the Tribal Court which is required to apply Tribal law. These provisions conflict with the rights and

remedies set forth in the Act and deny unions and the employees they represent from having their unfair labor practices decided by the Board, and by Federal Courts of Appeal on review. ***Bills Electric, Inc.***, supra; ***In re D. R. Horton, Inc.***, supra.

Additionally, FEP Code §16.17 contains an impasse resolution procedure, which includes interest arbitration. (Jt. Exh. 4, at pp. 27-31) However, the only review of an arbitrator's interest arbitration award on noneconomic issues is to the Tribal Court, and then Tribal Court's review is limited to whether the award violates or conflicts with Tribal law or "was procured by corruption, fraud or other undue or illegal means." The decision of the Tribal Court is final and may not be appealed. (FEP Code §16.17(h), Jt. Exh. 4 at pp. 30-31) Thus, under this interest arbitration provision, the Tribe may propose a contract that contains a provision that violates the NLRA, and if adopted by the arbitrator, the union and the employees the union represents would be deprived of their rights to have the matter considered by the Board and the Federal Courts. Thus, by these provisions, unions and employees are unlawfully precluded from seeking review of the interest arbitration awards with the Board and the Courts to ensure that they comply with the NLRA. ***Bills Electric, Inc.***, supra; ***In re D. R. Horton, Inc.***, supra.

Next, FEP Code §16.13(e) provides a procedure for employees to file petition for election to rescind a "fair share" union security provision that has been included in a collective bargaining agreement. However, under this provision, such a deauthorization petition must be filed "[w]ithin 90-days after a public employer and a labor organization execute a collective bargaining agreement containing a fair share provision." (Jt. Exh.4 at p. 24) This provision conflicts with and curtails employees rights under Section 10(e) of the Act, that has no such 90-day limitation. Deauthorization petitions filed under Section 10(e) of the Act can be filed any time during the term of a collective bargaining agreement.

Finally, the FEP Code seeks to generally discourage employees from invoking the Board's procedures and processes. In this vein, FEP Code §17.1(c) states in part:

> The integrity of this Code is threatened if parties bypass the procedures, rights and remedies established herein and seek, instead, to invoke procedures or remedies outside this Code for controversies that this Code is designed to address and resolve in accordance with the unique public polices of the Band. Investigations or proceedings directed at employers, apart from those provided by this Code, which seek to address controversies or rights covered by this Code, require the expenditure of time and resources to the detriment of those involved and, in many instances, to the governmental operations of the Band. (FEP Code §17.4(c), Jt. Exh. 4 at p. 34).

When FEP Code §17.1(c) is read in conjunction with FEP Code § 16.01, discussed above, that indicates the Tribe has the supreme authority to decide when collective bargaining may or may not occur, it is bound to unlawfully discourage unions and employees from using the Board's processes.. ***Bill's Electric, Inc.***, supra; ***In Re H.R. Horton,*** supra.

In short, while the FEP Code provides to employees the right to engage in union activities and allows for collective bargaining representation by labor organizations that enjoy majority support, it also expressly limits those rights in ways that directly conflict with the NLRA, by interfering with or limiting rights contained in Section 7 of the Act, including the right to strike and engaging in other protected concerted activities, by requiring unions to obtain licenses, by unlawfully limiting the duty to bargain, by preempting the authority of the Board to enforce these rights, and by discouraging employees and unions from seeking redress of their rights under the NLRA before the Board and Courts.

VI. CONCLUSION

For the reasons set forth above, Respondent should be held to be subject to the jurisdiction of the Board in its capacity as the employer of the LRCR employees, and the provisions of its labor relations ordinance which seek to preempt the Act, and interfere with the rights and remedies of employees and labor organizations under the Act, should be found to violate Section 8(a)(1) of the Act. The provisions of the FEP Code should be ordered invalidated but only insofar as they apply to the LRCR. and conflict with the rights and remedies set forth in the Act. Accordingly, it is also requested that Respondent's Motion to Dismiss or for Summary Judgment be dismissed.

Respectfully submitted this 24th day of February, 2012

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LITTLE RIVER BAND OF OTTOWA INDIANS TRIBAL GOVERNMENT and LOCAL 406, INTERNATIONAL BROTHERHOOD OF TEAMSTERS	**Case(s)** 07-CA-051156 DATE OF SERVICE February 24, 2012

CERTIFICATE OF SERVICE OF THE COUNSEL FOR ACTING GENERAL COUNSEL'S BRIEF IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS OR FOR SUMMARY JUDGEMENT AND IN SUPPORT OF FINDING THAT RESPONDENT HAS VIOLATED SECTION 8(a)(1) OF THE ACT

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the email and/or addresses and in the manner indicated below.

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