

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

FOR DISTRIBUTION

DATE: February 25, 2010

TO : Stephen Glasser, Regional Director
Region 7

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Little River Band of Ottawa Indians 220-7567-7000
d/b/a Little River Casino Resort
Cases GR-7-CA-52446 and GR-7-52449

These cases were submitted for advice as to whether the Region should hold them in abeyance pending the resolution of related district court litigation concerning the Board's jurisdiction over the tribal government that owns and operates the Employer. Because we conclude that both charges lack merit, they should be dismissed, absent withdrawal. Therefore, we need not address whether these cases should be held in abeyance because of the related district court litigation or because, as the tribal government argues, the doctrine of tribal exhaustion requires the Charging Parties to pursue tribal remedies before the Region may call for the Employer to respond to the charges.

FACTS

The Employer is a casino-resort owned and operated by the Little River Band of Ottawa Indians (the Tribe) in Manistee County, Michigan. Since on or about October 2007, the United Steelworkers (Union) has commenced campaigns to organize different units of the Employer's employees. A charge filed by a different union in March 2008, GR-7-CA-51156, alleges that the Tribe maintains an ordinance that unlawfully deprives the Employer's employees of their Section 7 rights. While that case was still under investigation -- and while the Union's organizing campaigns were underway -- the Tribe filed suit in the United States District Court for the Western District of Michigan seeking declaratory and injunctive relief to prevent the Agency from taking any further action in relation to the charge. The Tribe argues that the Board lacks jurisdiction to

decide whether a tribal law violates the Act. That litigation is ongoing.

The present charges were filed in October 2009 by individual employees. The first charge, GR-7-CA-52446, originally alleged that the Employer violated Section 8(a)(3) by issuing disciplinary warnings to the Charging Party (the First Charging Party) on four separate occasions because of the employee's union activities. After the charge was filed, the employee received a performance evaluation that included a lower overall score than prior performance evaluations. As a result, the charge was amended in December 2009 to include an allegation that the low score contained in the most recent performance evaluation constituted unlawful retaliation prohibited by Section 8(a)(4). In addition, the allegation regarding the four disciplinary warnings was amended to state that the warnings were issued both to discourage the employee's union activities and in retaliation for earlier, resolved unfair labor practice charges filed by the employee in April and May 2009.

The second charge, GR-7-CA-52449, was also filed in October 2009. It alleges that the Employer disciplined and eventually discharged a different employee (the Second Charging Party) because of her union activities in violation of Section 8(a)(3).

The following facts are common to both cases. At all relevant times, the Charging Parties were employed as Guest Service Agents (GSAs), who interact with the casino-resort's customers at the front desk as well as in its gift shop. Since about January 2009, the Employer has maintained and enforced a work rule requiring GSAs to sign out for each break. Infractions of that rule result in discipline. Furthermore, in May 2009, the Union prevailed in a non-Board election to represent the casino-resort's employees.¹ The Employer has recognized the Union though, to date, the parties have not reached a collective bargaining agreement. The facts unique to each case will now be set forth in seriatim.

¹ In October 2008, the Union had prevailed in a non-Board election to represent the Employer's security officers.

The First Charging Party, Case GR-7-CA-52446

The First Charging Party began working for the Employer in April 2007. In early 2008, she wore a pin on her work uniform to show support for the Union. Soon afterwards, the Employer instituted a work rule prohibiting employees from wearing non-casino jewelry on their uniforms. In addition, the investigation has revealed that several individual supervisors and managers were specifically aware of the First Charging Party's union activities.

In November 2008, the Employer included the First Charging Party in a round of layoffs that affected approximately 100 employees. She was recalled from layoff in February 2009, and returned to work the next month on a part-time basis. On April 13, 2009,² she filed an unfair labor practice charge alleging that her inclusion in the November 2008 layoffs violated Section 8(a)(3). Then, on April 28, the First Charging Party failed to sign out for a cigarette break after attending a mandatory meeting. She received a write-up on May 2 for this incident. The First Charging Party then filed a second unfair labor practice charge on May 18, claiming that she experienced Section 8(a)(4) harassment in retaliation for filing the original charge.

While the Region was investigating those charges, the First Charging Party received two additional write-ups. On May 23, she initially refused to check in a young couple when she discovered that the woman was not twenty-one years old. After discussing the issue with a supervisor, the First Charging Party was instructed to permit the couple to check in, and she followed this guidance. However, the Employer received a letter from the male's father, who is a "gold-club" member of the casino, complaining of the treatment the couple had received. Without soliciting the First Charging Party's version of the events described in the letter, the Employer issued a write-up on June 4 for the May 23 incident. The First Charging Party received the next write-up on June 16 for accumulating three attendance points because she was absent on two consecutive days the prior week. Although the First Charging Party had notified

² Unless otherwise noted, all future dates are in 2009.

a direct supervisor that she needed to take time off due to a family emergency, she declined to reveal the nature of the emergency when asked, and she was warned by the supervisor that she might still incur attendance points despite delivering advance notice of her absences.

On June 25, the original unfair labor practice charges filed in April and May 2009 were withdrawn following a pre-complaint non-Board settlement. The Employer agreed to pay the First Charging Party \$900 and converted her to full-time status.

Meanwhile, the First Charging Party had filed internal grievances over the three write-ups. The Employer's Board of Directors ultimately denied the grievances on August 4. Dissatisfied with this result, the First Charging Party filed a "Charge of Discrimination" under tribal law on August 7. Pursuant to that law, the Tribal Court appointed a "Fair Employment Practices Investigator" (FEPI) to investigate the allegations and to produce a written report containing factual findings and conclusions of law. FEPIs, who must be attorneys with "experience in employment law and mediation," are not subject to the supervision of the Tribal Court or any of its judges in the performance of their duties.³

While the appointed FEPI's investigation was underway, the First Charging Party received the last of her four write-ups. On September 22, a customer attempted to purchase an item using his Players Club card. When the First Charging Party attempted to complete the transaction, she discovered that the balance on the customer's card would not cover the transaction. The customer was confused because he claimed that he had been told by someone else that he had more than enough money on the card to buy the item. The customer apparently complained to the Employer, and this complaint resulted in a write-up dated October 6.⁴

³ Little River Band of Ottawa Indians Code ch. 600, tit. 3, art. VI, § 6.01 (2010).

⁴ Although the basis for this discipline is not entirely clear, evidence suggests that the Employer blamed the First Charging Party for the discrepancy in the customer's Players Club card balance.

The next day, on October 7, the FEPI issued a report concluding that the three prior write-ups dated May 2, June 4, and June 16 were not motivated by an unlawful Employer desire to punish the First Charging Party for her union activities.⁵

On October 15, the First Charging Party filed this charge, alleging that the four write-ups were due to her support of the Union in violation of Section 8(a)(3). On November 17, the First Charging Party received a performance evaluation containing a lower overall rating than her prior evaluations.⁶ Consequently, she amended the charge on December 12 to allege that the November 17 evaluation was retaliatory under Section 8(a)(4).⁷

The Second Charging Party, Case GR-7-CA-52449

The Second Charging Party also began working for the Employer as a Guest Service Agent in April 2007. Unlike the First Charging Party, the Second Charging Party was not laid off in late 2008. She was continuously employed by the Employer until her discharge in September 2009.

⁵ The report notes that the Tribe's labor law "closely follows the National Labor Relations Act." Indeed, the investigator expressly "look[ed] to federal case law for guidance" and analyzed the Charge of Discrimination under the burden-shifting framework established by the Board in Wright Line, 251 NLRB 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982). Although the investigator ultimately found no merit to the charge, the First Charging Party has the right to seek further review in Tribal Court. She has not yet exercised that right.

⁶ She received 52 points on both her ninety-day and sixth-month evaluations in 2007. A performance review from June 2009 rated her at 48 points, and she received 47 points on the November 2009 evaluation.

⁷ In addition, the existing allegation regarding the four write-ups was amended to include the claim that they were also in retaliation for the April and May 2009 unfair labor practice charges.

Also in contrast to the First Charging Party, the Second Charging Party did not wear a Union pin or openly demonstrate support for the Union that would have been visible to supervisory or managerial employees. However, on two separate occasions, she engaged in discussions with superiors that involved working conditions. First, in May 2008, the Second Charging Party sent an e-mail to all GSA supervisors and to the Hotel Director suggesting that it would be preferable to limit the cross-training of GSAs to areas in which each GSA had expressed interest and for which each was suited. The Hotel Director responded that she would prefer that any GSA concerns about cross-training be sent to her directly. Second, in March 2009, the Second Charging Party had a face-to-face discussion with the Hotel Director about several subjects, including the decision to retain temporary employees while permanent employees remained on layoff, the decision to limit retained full-time employees to thirty-two hours of work per week, and the implementation of a new on-call policy that required GSAs to call in on their off days to see if they were needed. The Second Charging Party told the Hotel Director that she had spoken with fellow employees about several of these matters and that she was voicing commonly felt frustrations. The Second Charging Party had not told any other employee that she planned to speak to the Hotel Director about these matters, and no other employees authorized her to speak on their behalf. The Hotel Director expressed minor agitation and stated that it was her (i.e., the Hotel Director's) decision both to limit the hours of full-time employees and to retain the temporary employees. The Second Charging Party stated that she hoped that management would make good and fair decisions for the benefit of all affected employees, and the conversation ended.

Thereafter, the Second Charging Party was disciplined several times between March 2009 and September 2009. She received write-ups for a cash variance, for taking excessive breaks, and for failing to submit her audit bag and associated paperwork at the end of her shift. There is no evidence that the Employer knew of the Second Charging Party's union activities until she alleged in internal grievances that the write-ups were in retaliation for her support of the Union.

On September 8, 2009, the Second Charging Party attended a disciplinary meeting regarding her final write-up. The Hotel Director, a human resources specialist, and two supervisors were also present. During the meeting, the Second Charging Party expressed frustration with the Hotel Director's management style and stated that this frustration was shared by other employees. She further alleged that some coworkers had stated that the Hotel Director "should be run over thump-thump." The Hotel Director responded that the Employer received a signed statement from another employee alleging that the Second Charging Party had threatened to strike the Hotel Director in the face. The Second Charging Party did not specifically deny the allegation during the meeting but claims that the allegation is false. However, the investigation has revealed that another employee did hear the Second Charging Party make that statement and in fact reported it to the Employer in May or June of 2009.

On September 11, 2009, the Second Charging Party met with a security officer and the human resources specialist regarding the "thump-thump" comment. She was never asked to identify the employee who allegedly made the statement and was told that merely repeating it was equivalent to making the statement directly. Despite repeated prodding from the security officer, the Second Charging Party refused to apologize for repeating something that she attributed to another person. She was discharged the following day.

The Second Charging Party grieved some, but not all, of the write-ups in May 2009. Her grievances were eventually denied by the Employer's Board of Directors. She has not grieved the discharge. In addition, she has not filed a "Charge of Discrimination" under tribal law in Tribal Court. Instead, she filed this unfair labor practice charge on October 14 alleging that the disciplines and her discharge violated Section 8(a)(3).

Evidence Regarding Disparate Treatment-Common to Both Cases

The investigation has revealed that the Employer has consistently disciplined other employees for similar infractions of its work rules and policies.

The work rule regarding breaks, which was implemented in January 2009, has been applied in write-ups issued to other employees throughout 2009 including to those thought to have been favored by supervisors. In addition, other employees have confirmed to the Region that the Employer has disciplined GSAs in response to customer complaints without first seeking the affected employee's side of the story. Moreover, the Employer's attendance points system and its decision to discipline employees for the accumulation of three or more attendance points also appear to have been consistently applied. Finally, although there is no evidence regarding the Employer's treatment of workplace threats, the investigation revealed that the Employer had previously discharged an employee for a physical confrontation with a manager.

The Tribe's Request for Consultation-Common to Both Cases

The Employer has refused to cooperate with the investigation of either case in any manner. Instead, on December 10, 2009, the Tribe sent a letter to the General Counsel and to the Regional Director for Region 7 requesting tribal-government consultation pursuant to the President's Memorandum on Tribal Consultation, which reaffirms the obligations and responsibilities of "executive departments and agencies" to consult with tribal authorities in certain circumstances pursuant to Executive Order 13175.⁸ The Tribe's letter argues that the Charging Parties must exhaust tribal remedies before seeking relief under the Act and that "[a]ny attempt by the NLRB to force [the Employer to respond to the pending charges] would do significant harm to the spirit of the exhaustion doctrine and, therefore, tribal self-government." Accordingly, the letter asserts that this situation falls within the parameters of the President's Memorandum and requests that Agency officials meet with tribal officials to discuss each other's views regarding the application of the tribal exhaustion doctrine to these cases.⁹

⁸ Memorandum on Tribal Consultation, 74 Fed. Reg. 57881 (Nov. 5, 2009).

⁹ By letter dated December 24, 2009, the General Counsel disagreed with the Tribe's contention that the President's Memorandum applied to these cases, but expressed his

ACTION

We conclude that the charges should be dismissed, absent withdrawal, because there is insufficient evidence to find a violation of the Act in either case. Therefore, we need not address the Tribe's argument that the doctrine of tribal exhaustion would be undermined by forcing the Employer to respond to the charges. Similarly, there is no need to address whether these cases should be held in abeyance pending resolution of the ongoing district court litigation involving the March 2008 charge concerning the Tribe's labor ordinance.

As set forth in NLRB v. Transportation Management Corp., 462 U.S. 393, 400 (1983), where the Supreme Court approved the Wright Line test,¹⁰ in Section 8(a)(3) cases the General Counsel has the burden of persuading the Board by a preponderance of the evidence that the employer unlawfully discriminated against protected union activity by taking an adverse action based at least in part on anti-union animus. The General Counsel can establish a prima facie case of unlawful discrimination under Section 8(a)(3) by showing the existence of protected activity, employer knowledge of that activity, and union animus culminating in an adverse personnel action. Once the General Counsel has made that showing, the employer can avoid liability only by proving by a preponderance of the evidence that its actions were also motivated by legitimate, non-discriminatory concerns that would have caused it to take the same action even absent any unlawful motivation. Wright Line applies with equal force in Section 8(a)(4) cases, but there, the General Counsel's burden is to show discrimination motivated by a desire to retaliate for cooperation with a Board case or investigation.¹¹ Otherwise, the analysis is essentially identical.

willingness to meet with the Tribe to discuss the issues raised in its letter.

¹⁰ Wright Line, 251 NLRB 1083 (1980).

¹¹ See NLRB v. Advance Transp. Co., 979 F.2d 569 (7th Cir. 1992).

In addition, the Board has determined that a single employee's activity is concerted—and eligible for protection under Section 8(a)(1)—when he or she acts “with or on the authority of other employees, and not solely by and on behalf of the employee himself.”¹² This definition of concerted activity “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action.”¹³ Once the activity is deemed concerted, the Board will find a Section 8(a)(1) violation if the employer knew of the concerted nature of the employee's activity, the concerted activity was protected under Section 7, and the challenged adverse employment action was motivated by the employee's protected concerted activity.¹⁴

With respect to the First Charging Party, there is arguably a prima facie case of discrimination under Sections 8(a)(3) and (4). The employee's support for the Union, as evidenced by her wearing of the Union pin on her work uniform in 2008, was well known within the company. So, too, were the unfair labor practice charges she filed in April and May 2009, as well as in the instant case.¹⁵ Further, the Employer's decision to include her in the November 2008 layoffs might demonstrate union animus. However, there is no direct evidence of anti-union sentiment by the casino-resort's supervisors or managers, and there is no evidence that the Employer targeted the

¹² Meyers Industries (Meyers I), 268 NLRB 493, 497 (1984), revd. sub nom Prill v. NLRB, 755 F.2d 941 (D.C. Cir.), cert. denied, 474 U.S. 948 (1985), on remand Meyers Industries (Meyers II), 281 NLRB 882 (1986), enf'd sub nom. Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988).

¹³ Meyers II, 281 NLRB at 887.

¹⁴ Meyers I, 268 NLRB at 497.

¹⁵ The timing of the write-ups does not add much strength to the prima facie case because the majority of them issued before the First Charging Party settled her earlier Section 8(a)(3) and (4) charges in June 2009. This suggests that the First Charging Party did not question the validity of the write-ups when she initially received them.

First Charging Party for retaliatory discipline. Indeed, the Employer can establish a Wright Line defense for each of the four write-ups because the investigation reveals no evidence of disparate treatment. Rather, the Employer uniformly applies the work rules and policies it has relied upon to discipline the First Charging Party. For instance, the evidence shows that the Employer has disciplined employees for violations of both its break time rule and its attendance point rule. Moreover, because the Employer can justify the low performance evaluation score recently received by the First Charging Party as a natural consequence of the four disciplinary write-ups, the allegation limited to that particular occurrence would also fail under a Wright Line analysis.¹⁶

The second case is more straightforward: The evidence simply does not support a prima facie case of discrimination under Section 8(a)(3). There is no evidence of Employer knowledge of the Second Charging Party's support for the Union until May 2009, when the Second Charging Party declared on a grievance form that the three write-ups she had received up to that point were issued in retaliation for her support of the Union. Furthermore, the investigation has revealed corroborating evidence of the Employer's claim that the Second Charging Party threatened to strike the Hotel Director in the face. Thus, assuming arguendo the existence of a prima facie case, the Employer could establish a legitimate, nondiscriminatory defense of its decision to discharge the Second Charging Party.

In addition, there is little reason to believe that the disciplines or discharge resulted from protected concerted activity or a mistaken Employer belief of such activity. Neither the May 2008 e-mail nor the March 2009 conversation with the Hotel Director establishes the existence of protected concerted activity. Indeed, both incidents lack essential indicia of concerted action. For example, there is no evidence that any employee either tacitly or expressly authorized the Second Charging Party to speak on

¹⁶ Furthermore, the significance of the November 2009 evaluation in proving the Employer's discriminatory motive is diminished by the fact that it contains a score that is only one point less than what the First Charging Party received in June 2009.

his or her behalf on either occasion. In addition, there is no indication that either the Second Charging Party or the coworkers with whom she discussed working conditions contemplated taking group action. Without the presence of these factors, there cannot be concerted activity. Thus, the complaints aired by the Second Charging Party to the Hotel Director are best characterized as "mere griping."¹⁷ We also reject any contention that the Employer might have mistakenly believed the Second Charging Party's activities to have been concerted. There is no evidence to suggest that the Hotel Director -- or any other supervisory or managerial employer -- held such a mistaken impression.¹⁸ For these reasons, there is insufficient evidence to establish a violation of the Act in the second case.

In sum, we conclude that there is inadequate evidence of discriminatory or otherwise unlawful treatment to proceed with either charge. Therefore, the Region should dismiss these cases, absent withdrawal.

/s/

B. J. K.

¹⁷ See Holling Press, Inc., 343 NLRB 301, 302 (2004); Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964) ("Activity which consists of mere talk must, in order to be protected, be talk looking toward group action.").

¹⁸ See Gulf-Wandes Corp., 223 NLRB 772, 778 (1977) ("It is a firmly established rule, however, that when an employee is disciplined for concerted or union activities which his employer mistakenly believes he had participated in, the statute affords him relief.").