

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

LITTLE RIVER BAND OF OTTAWA
INDIANS TRIBAL GOVERNMENT

Respondent

CASE 7-CA-51156

LOCAL 406, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Charging Union

**ANSWERING BRIEF OF RESPONDENT
THE LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL GOVERNMENT**

The Little River Band of Ottawa Indians Tribal Government (the “Band” or the “Tribe”) submits this brief pursuant to the Order of March 26, 2012, extending the due date for the parties’ Answering Briefs to May 15, 2012.

I. THE BOARD LACKS JURISDICTION TO STRIKE DOWN THE DULY ENACTED LAWS OF THE BAND ON A CLAIM THAT THEY ARE PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT.

This is the first time this Board has been asked to strike down the duly enacted laws of a sovereign tribal government (or of any government for that matter) as an “unfair labor practice.” This would be an extraordinary assertion of jurisdiction. Under time-honored principles of federal Indian law, the Board has no such jurisdiction absent a clear indication of intent from Congress. There is no such indication in the National Labor Relations Act (“NLRA”). Thus, this case must be dismissed.

In its opening brief, Counsel for the Acting General Counsel (“AGC”) presumes that the Board has jurisdiction over this case because of the relationship between the Little River Band of

Ottawa Indians and its gaming operations under the Indian Gaming Regulatory Act (“IGRA”). Nowhere does the AGC contend that the Band lacks inherent sovereign authority to enact and implement its laws with respect to employment relations within those operations. Unequivocal Supreme Court precedent, fully detailed in the Band’s opening brief in section I(A) of its Argument (at pages 13 through 18) stands in the AGC’s way.¹

Instead, the AGC consistently asserts that the Band is “unlawfully” seeking to “preempt” the NLRA through the enactment and implementation of Articles XVI and XVII. *See, e.g.,* AGC’s Brief at 4, 15, 17, 33, 43-44. In fact, what the AGC and Charging Union seek to achieve in this case is the preemption of the *Band’s* law. This is nothing but a preemption case in the guise of an unfair labor practice proceeding: a claim that Articles XVI and XVII are preempted by the NLRA. As fully explained in the Band’s opening brief, Congress is deemed to protect and enhance the Band’s exercise of inherent sovereign authority exhibited by Articles XVI and XVII (whether applied to the Band’s IGRA gaming operations or any other economic activities over which the Band has jurisdiction). Thus, absent a clear indication from Congress, the NLRA cannot be construed to empower the Board to destroy that authority.

Indeed, all of the principles of federal Indian law set forth in the Band’s opening brief have the force of federal law under the Supremacy Clause. *See, e.g., Wilburn Boat Company v. Fireman’s Fund Insurance Company*, 348 U.S. 310, 314 (1955) (federal common law is “federal law” with same force as federal statutes under the Supremacy Clause); *Igatura de La Rosa v. United States*, 417 F.3d 145, 177-178 (1st Cir. 2005) (same); *Sampson v. F.R.G.*, 250 F.3d 1145, 1153 n.4 (7th Cir. 2001) (same); *McCormack v. A.T. & T. Technologies, Inc.*, 934 F.2d 531, 539

¹ By its “opening brief,” the Band refers to *Brief of Respondent The Little River Band of Ottawa Indians Tribal Government*, dated February 4, 2012 and filed in accordance with the Board’s *Order Approving Stipulation, Granting Motion, and Transferring Proceeding to the Board*, dated December 20, 2011 and the Board’s Order of December 28, 2011, extending the due date for the parties’ opening briefs to February 24, 2011.

(4th Cir. 1991) (same). This includes the federal Indian common law that recognizes (a) the Band's inherent sovereign authority to enact and implement Articles XVI and XVII with respect to all employees and any of their union representatives at LRCR (*see* the Band's opening brief at 13-18) and (b) the principle that such authority may not be destroyed under color of a federal statute like the NLRA absent a clear expression of intent by Congress (*see* the Band's opening brief at 26-28, 34-35). Thus, the Band's exercise of sovereign authority and the protection afforded to it are backed by the "Supreme Law of the Land." The AGC wrongly asserts that the NLRA, as federal law, can somehow trump the venerable federal Indian common law supporting the Band. It cannot.

In fact, the opposite is true. When a federal authority seeks to preempt the exercise of an Indian nation's inherent sovereign authority under color of a federal statute as the AGC would ask of the Board in this case, the burden rests upon that federal authority to show a clear intent on the part of Congress to achieve that preemption. *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1190 (10th Cir. 2002) (en banc) ("The burden falls on the NLRB and the Union, as plaintiffs attacking the exercise of sovereign tribal power, to show that it has been modified, conditioned or divested by Congressional action.") (citation and quotations omitted). The NLRA is entirely devoid of any indication of such intent. The AGC's argument fails. Lacking clear authority under the NLRA, the Board has no power to destroy the Band's laws as requested in the Complaint.²

² The AGC fails to cite a single case in which a federal agency has sought to strike down the duly enacted laws of an Indian tribal government. *See* AGC's Brief at 20, n. 9, 22, 24-25. The only case on point is *N.L.R.B. v. Pueblo of San Juan*, and that case makes perfectly clear that Congress must be presumed to protect and enhance tribal sovereign authority, not to undermine it without clear intent. *See Pueblo of San Juan*, 276 F.3d at 1194-95.

II. THE AGC MISCONSTRUES THE INTERFERENCE WITH TRIBAL SOVEREIGNTY AT ISSUE IN THIS CASE.

The AGC repeatedly makes the astounding assertion that the destruction of the Band's duly enacted labor relations laws "will not significantly impinge upon the Tribe's traditional sovereign rights." *See, e.g.*, AGC Brief at 4, 25. There is nothing more at the core of the Band's "traditional sovereign rights" than to govern the economic use of its territory by its members and non-members, which is exactly what the provisions the AGC seeks to strike down in this case do. *See* the Band's opening brief at 18, 20-26.

The Band's enactment and implementation of Articles XVI and XVII -- taking practical effect within its territory in the form of the licensure of the USW, negotiated collective bargaining agreements entered into by the LRCR and the USW, and the resolution of multiple disputes along the way, all under tribal law, and all in accordance with sensitive public policy judgments by the tribal government named as respondent here -- stem from the Band's inherent authority, not only over its own members, but over non-members who enter the Band's lands for economic gain. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982); *Pueblo of San Juan*, 276 F.3d at 1192-93. The Band's authority over non-member employees and their union representatives is grounded in what the Supreme Court describes as the Band's "traditional and undisputed power" to exclude them from the Band's territory and to condition their presence while they remain. *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 335 (2008) (emphasis added). The AGC wrongly attempts to describe the Band's authority to enact and implement Articles XVI and XVII as something other than "traditional." The AGC badly misconceives federal Indian law in asserting throughout its brief that "tribal sovereignty [only] concerns its right to govern its intramural affairs," which the AGC would confine to the Band's own citizens. *See* AGC's Opening Brief at 4.

Because the AGC fails to appreciate the fact that Articles XVI and XVII reflect the “traditional and undisputed” exercise of tribal sovereign authority, the AGC is blind to the destruction of that sovereignty at issue in this case. Of course, nothing could be more destructive of a sovereign than to destroy its laws. To suggest, as the AGC does here, that application of the NLRA to destroy the Band’s lawful governance of employment relations at LRRCR pursuant to its inherent sovereign authority “will not significantly impinge upon the Tribe’s traditional sovereign rights,” AGC Brief at 4, is to ignore every modern teaching of federal Indian law.

III. THE AGC’S TREATY ARGUMENT IS MISPLACED.

The AGC argues that the Band has no treaty rights argument in this case. What the AGC fails to understand, however, is that treaties do not grant rights to Indian nations; they can only take away rights, and what is not expressly taken away is retained. *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 195-202 (1999); *United States v. Winans*, 198 U.S. 371, 381 (1905). The Band has existed from time immemorial as a sovereign Indian nation. Its treaties with the United States evidence its status as an Indian tribal government with inherent sovereign powers predating the formation of the United States, and Congress reaffirmed the Band’s status as a sovereign Indian nation in the Reaffirmation Act. *See Senate Report, Reaffirming and Clarifying the Federal Relationships of the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians as Distinct Federally Recognized Indian Tribes*, S. REP. NO. 103-260 at 1, 5-6 (1994) (“Senate Report”); House Report, *Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act*, H.R. REP. NO. 103-621 at 7 (1994).

Since the Band’s treaties with the United States and the Reaffirmation Act of Congress do not divest the Band of its inherent sovereignty, that sovereignty is intact to support the

enactment and implementation of Articles XVI and XVII as fully set forth in the Band's opening brief. And the Band's retained, inherent sovereign authority, established as a matter of federal Indian common law, is no less protected from divesture by Congressional silence than an express treaty provision. *Pueblo of San Juan*, 276 F.3d at 1196; *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 493 (7th Cir. 1993); *E.E.O.C. v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989).

Thus, the Band need not articulate an express treaty right that would be undermined by the destruction of its laws in this case. On the contrary, its treaties and the Reaffirmation Act show that is a sovereign Indian nation with the power to enact and implement Articles XVI and XVII under its inherent sovereign authority, authority that cannot be undermined absent a clear expression of intent by Congress.

IV. THE BAND HAS SOVEREIGN IMMUNITY FROM ANY ACTION UNDER SECTION 301, AND CONGRESS'S FAILURE TO INCLUDE THE BAND IN SECTION 301 REVEALS CONGRESS'S INTENT TO EXCLUDE INDIAN NATIONS FROM THE NLRA, JUST LIKE THE STATES AND THE FEDERAL GOVERNMENT.

The AGC questions whether the Band would have sovereign immunity from suit under section 301. *See* AGC Brief at 30 (the Band "has cited no case actually holding sovereign immunity protects tribes from Section 301 breach of contract suits"). No such citation is needed in specific reference to section 301 because the doctrine of sovereign immunity makes it axiomatic. In its opening brief, the Band pointed out that in *U.S. v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940), the Supreme Court confirmed that Indian nations have sovereign immunity from suit on contracts absent an express waiver. The Court has reconfirmed that view time and time again, *see Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), leaving it up to Congress, not to the Court, to dispense with such immunity, *id.* at 759. Because Congress did not waive the sovereign immunity of Indian tribes from suit under

section 301, the Band is not subject to suit under section 301. *See Kiowa Tribe*, 523 U.S. at 754; *United State Fidelity & Guaranty*, 309 U.S. at 512.

The AGC makes light of Congress's failure to include Indian nations under section 301, asserting that it is a "different scheme" than NLRB unfair labor practice proceedings. AGC Brief at 32. The AGC misses the point. The Wagner Act and the Labor Management Relations Act, together constitute a national scheme to govern labor relations in the private sector. So important is section 301 to that uniform scheme that it is considered preemptive of any state law of contracts under which a collective bargaining agreement might be enforced. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987). Yet Congress, which is deemed to know the law surrounding its enactments, including the Supreme Court's decisions, clearly left Indian nations out of section 301. If Congress intended Indian nations to be covered by the NLRA it would not have left them out of section 301; for it would ruin the uniformity of the Act: Indian nations would be the only "employers" not subject to section 301, and there would be no ability to develop uniform federal law governing collective bargaining agreements entered into under the NLRA.³

By leaving Indian nations out of section 301 Congress flagged its intent to leave them out of the NLRA altogether.

³ Indeed, this is starkly revealed in this case, where the collective bargaining agreements entered into by the LRRCR and the USW are fully enforceable in the Little River Band of Ottawa Indians Tribal Court because the Band has waived sovereign immunity for breach of contract actions there. *See* FEP Code §16.26. Tribal law, not federal law, will govern collective bargaining agreements entered into pursuant to tribal law.

CONCLUSION

For all of the reasons set forth in the Band's opening brief and those set forth above, this case must be dismissed.

Dated: May 15, 2012

/s/ Kaighn Smith, Jr.

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STATEMENT OF SERVICE

Copies of this Answering Brief of Respondent Little River Band of Ottawa Indians Tribal Government have this day been served upon the following by electronic mail to the email addresses shown:

- Gary W. Saltzgeber, Esq., National Labor Relations Board (Gary.Saltzgeber@nlrb.gov)
- Dennis Boren, Esq., National Labor Relations Board (Dennis.Boren@nlrb.gov)
- Local 406, International Brotherhood of Teamsters c/o its counsel Ted M. Iorio, Esq. (titorchmi@aol.com)
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- Rebekah M. Krispinsky, Esq., Office of the Solicitor, U.S. Department of the Interior (Rebekah.Krispinsky@sol.doi.gov)

This Brief has this day been electronically filed with the Executive Secretary of the National Labor Relations Board.

Dated: May 15, 2012

/s/ Kaighn Smith, Jr. _____

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