

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

**LITTLE RIVER BAND OF OTTAWA
INDIANS TRIBAL GOVERNMENT,
Respondent**

and

CASE 07-CA-051156

**LOCAL 406, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
Charging Union**

**COUNSEL FOR ACTING THE GENERAL COUNSEL'S BRIEF
IN OPPOSITION TO RESPONDENT'S BRIEF**

Respectfully submitted this 15th day of May, 2012

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INTRODUCTION

At issue in this case is whether the National Labor Relations Act (“NLRA”) applies to the Little River Casino Resort so as to invalidate the application to casino employees of the Little River Band of Ottawa Indians’ labor code. The Band has argued that it is insulated from application of the NLRA because it interferes with the Band’s inherent sovereignty to enact and implement its own labor code governing employees at its casino.

As set forth below, however, the Band has not retained inherent sovereignty to operate the casino in violation of the NLRA, where the casino employs significant numbers of non-Band members, it is commercial in nature, and it operates in interstate commerce, attracting non-tribal customers. *See San Manuel Indian Bingo & Casino*, 341 NLRB 1055, 1061 (2004), *enf’d*, 475 F.3d 1306 (D.C. Cir. 2007). That its revenues support governmental functions (Resp. Br. 21-22, 37-39) is not determinative of whether a federal law should apply to a tribal enterprise. Indeed, the Band’s “proposed test would almost invariably compel the conclusion that every federal statute that failed expressly to mention Indians would not apply to them . . . [S]o sweeping a conclusion is inconsistent with the limited sovereignty retained by Indian tribes.” *See Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 178 (2d Cir. 1996). Moreover, that the Band’s conduct at issue here is its maintenance and publication of a labor code does not dictate a contrary result, where such asserted authority is not over an intramural matter within its retained inherent sovereignty.

Accordingly, for the reasons stated in our initial Brief (“NLRB Br.”) and below, Counsel for the Acting General Counsel respectfully requests that the Board hold that the Band is subject to NLRA jurisdiction in connection with its ownership, operation, and management of its casino,

and that the Band's maintenance and publication of its labor code as applied to its casino is a violation of the Act.

I. **THE BOARD'S *SAN MANUEL* DECISION SHOULD BE APPLIED HERE TO ASSERT JURISDICTION OVER THE BAND'S CASINO**

Initially, we note that it is appropriate for the Board to apply its decision in *San Manuel* here (NLRB Br. at 29-30), despite the Band's claims of sovereignty, discussed below. As the D.C. Circuit explained in enforcing the Board's decision to assert jurisdiction over the San Manuel Band's casino, "[t]he 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." 475 F.3d at 1315; see also *Soaring Eagle Casino & Resort, Saginaw Chippewa Indian Tribe of Michigan*, JD-17-12 at 11 (Mar. 26, 2012 NLRB Div. of Judges).¹

The Band has asserted that *San Manuel* should not be applied here for several reasons. First, the Band contends that the NLRA is not a law of general application (Resp. Br. 33), making the *Tuscarora* principle inapplicable (*Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960)). The Board previously has concluded, however, that "because Congress intended the Act to have the broadest possible breadth permitted under the

¹ On March 26, 2012, the ALJ in *Soaring Eagle* applied the Board's analysis in *San Manuel* and held that application of the NLRA to the Tribe's casino operation was appropriate. See NLRB Case No. 7-CA-53586, JD-17-12 at 7-11. The ALJ further found, *inter alia*, that the Tribe (i) promulgated a rule prohibiting employees from soliciting other employees to support a union, in violation of Section 8(a)(1); and, (ii) disciplined and discharged an employee because she engaged in activities supporting a union in violation of Section 8(a)(1) & (3). See JD-17-12 at 11-14. Exceptions to the ALJ's decision were filed May 11, 2012.

Constitution, the Act is a statute of general application.” *San Manuel*, 341 NLRB at 1059.²

Second, the Band asserts that the NLRA cannot apply to its casino because the Band’s enactment and enforcement of its Fair Employment Practices Code is an exercise of its inherent sovereignty, which would be diminished by the application of the NLRA to its casino (Resp. Br. 13-30). As explained below, however, there is no merit to this claim because application of the Band’s Code to the casino does not impact *internal* tribal matters, a circumstance that might otherwise insulate a tribe from federal regulation.³

² There is no merit to the Band’s reliance on *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1199 (10th Cir. 2002), to support its assertion that the NLRA is *not* a law of general application (Resp. Br. 33). As counsel for the Acting General Counsel previously explained (NLRB Br. 27-28), the applicability of federal labor law to a tribal enterprise was *not* at issue in that case. Rather, the court’s conclusion there that *Tuscarora* was not apposite because the federal law was not “generally applicable” was based on the particular provision of the NLRA at issue. That provision was Section 14(b), 29 U.S.C. § 164(b), which explicitly permits states and territories to enact laws prohibiting union-security agreements (so-called “right to work laws”). Because of that significant exception, the provision of the NLRA that otherwise *permits* union-security agreements in non-right to work states (§ 8(a)(3)), was found by the Tenth Circuit not to be “generally applicable.” As the court stated: “*Tuscarora* does not control where, as here, the law is not generally applicable as the exceptions of § 14(b) show. The exception to § 8(a)(3) recognized in § 14(b) indicates that Congress did not intend inclusion within its general ambit as the norm.” 276 F.3d at 1199 (citations omitted). Here, by contrast, the general employee protections of Section 7 of the NLRA, which the Band seeks to trump, are applicable nationwide to all employers covered by the NLRA, and states and territories may not legislate otherwise. Accordingly, the NLRA – aside from its provision permitting union security – is “generally applicable” within the meaning of *Tuscarora*.

³ The Band also asserts that the *Tuscarora* decision, on which the Board relied, is no longer good law in light of the Supreme Court’s decision in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (Resp. Br. 32). Yet, since *Merrion* was decided, numerous circuits have continued to rely on the *Tuscarora/Coeur d’Alene* framework to apply to tribal entities federal statutes that are silent as to their application to tribes. See *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). Moreover, the *Tuscarora/Coeur d’Alene* framework relied upon by the circuits balances the interest of respecting tribal sovereignty with the interest of Congress in applying its laws of general applicability. The D.C. Circuit noted the tension between *Tuscarora* and other Supreme Court cases reflecting a concern for maintaining tribal sovereignty, and nonetheless concluded that application of the NLRA to the casino negligibly impaired tribal

A. The Band Has Not Retained Inherent Sovereignty to Preclude a Federal Law’s Application to its Casino that Employs and Caters to Non-members

The Band’s inherent sovereignty does not include authority over nonmembers’ conduct that Congress already regulates through the NLRA. In *Montana v. United States*, 450 U.S. 544 (1981), on which the Band relies (Resp. Br. 14-18), the Supreme Court explained, “in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.” 450 U.S. at 564. Absent “express congressional delegation,” the *Montana* Court held, a tribe’s “inherent sovereign power” does not extend to the conduct of nonmembers. *Id.* at 564.⁴ The Court further explained that through tribes’ original incorporation into the United States, as well as through specific treaties and statutes, tribes “have lost many of the attributes of sovereignty. . . . The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe . . .*” 450 U.S. at 563-64 (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

The Band correctly notes (Resp. Br. 14-15) that the Court in *Montana* also articulated exceptions to this prohibition of tribal regulation of nonmembers: tribes retain authority over those who enter consensual relationships with the tribe or its members, and over conduct that threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. 450 U.S. at 565-66. However, these exceptions have been narrowly

sovereignty where the casino at issue was “virtually identical to scores of purely commercial casinos across the country.” *San Manuel*, 475 F.3d at 1315.

⁴ Of course, Congress has not provided the Band “express” delegation to regulate labor relations involving members and non-members. *Montana*, 450 U.S. at 564. Congress instead vested that power *exclusively* with the Board. See 29 U.S.C. §§ 160(a), 153(d); NLRB Br. at 31-32.

construed so as not to frustrate the general *Montana* rule. For example, in *Strate v. A-1 Contractors*, the Supreme Court explained that “[n]either regulatory nor adjudicatory authority over” a traffic accident involving nonmembers “is needed to preserve ‘the right of reservation Indians to make their own laws and be ruled by them.’ The *Montana* rule, therefore, and not its exceptions, applies to this case.” 520 U.S. 438, 459 (1997) (citation omitted).⁵

Significantly, *Montana* and its progeny do not address the issue here – a tribe’s ability to condition nonmembers’ entry on tribal lands *upon the invalidation of federal law*. Indeed, the Supreme Court, after *Montana*, made clear that tribes may *not* so regulate nonmembers contrary to federal law. In *Merrion*, relied upon by the Band here, the Court explained that “the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, *provided only such determination is consistent with applicable Federal laws . . .*” 455 U.S. at 145 n.12 (emphasis added). The Court further noted that “[f]ederal limitations on tribal sovereignty can also occur when the exercise of tribal sovereignty would be inconsistent with overriding national interests.” *Id.* at 146 n.13. *See also Mashantucket*, 95 F.3d at 179 (“tribal power, even regarding exclusively internal conflicts, may be limited by treaty or federal statute, including statutes that are silent as to Indians” (citations omitted)). This is entirely consistent with the subordinate position of tribal authority to federal law. The Band’s desire to regulate the labor relations of non-members employed at its casino should not elevate the Band’s sovereignty over the Board’s ability to enforce the Section 7 rights of casino employees. *See United States v. White*, 237 F.3d 170, 174 (2d Cir. 2001) (“[E]ven assuming that the transactions for which [Indian] defendants were prosecuted took

⁵ *See also Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 330 (2008) (*Montana* exceptions are “limited” and “cannot be construed in a manner that would ‘swallow the rule,’ or ‘severely shrink’ it.”) (citations omitted).

place exclusively within the territory of the St. Regis Mohawk Indian Reservation,” defendants must comply with federal law.) (opinion by Sotomayor, J.).⁶ Indeed, the Board rejected that distinction in *San Manuel*, overruling its prior precedent asserting jurisdiction over tribal enterprises located off reservations, but declining jurisdiction over tribal enterprises located on reservations. 341 NLRB at 1060.⁷

Finally, the Band cites several cases dealing with tribal regulation over *private individuals* (Resp. Br. 17-18), but none concerned, as here, *the conflicting federal government’s*

⁶ The Board should reject the contention (Resp. Br. 15-16) that by working for a tribe’s casino, employees have “consensually” surrendered their Section 7 rights. In other contexts, such required surrender of rights has been invalidated. For example, arbitration agreements will be not upheld if they prevent employees from vindicating their rights under a federal statute. See, e.g., *D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274, at *5-6, 17 (Jan. 3, 2012) (finding Section 8(a)(1) violation where mandatory arbitration agreement prohibited employees from filing joint, class, or collective employment-related claims before both an arbitrator and a court); *Chen-Oster v. Goldman, Sachs & Co.*, 785 F. Supp. 2d 394, 409-10 (S.D.N.Y. Apr. 28, 2011) (holding agreement unenforceable where plaintiff could not arbitrate class pattern-or-practice Title VII claim). Cf. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (“[W]e recognized that ‘[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.’”) (citation omitted). *MacArthur v. San Juan County*, 497 F.3d 1057, 1071 (10th Cir. 2008) (Resp. Br. 16), on which the Band relies to show a consensual relationship between the Band and its employees, involved tribal regulatory authority over nontribal employers -- not tribal authority to trump employees’ federal statutory rights.

⁷ The Band cites *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), and *Williams v. Lee*, 358 U.S. 218, 223 (1959), for the proposition that tribes have the right to conduct economic activity on their reservation “without external interference” (Resp. Br. 14). In *Mescalero*, the Supreme Court found that tribal authority to regulate hunting and fishing preempted New Mexico’s concurrent authority to regulate in those fields where Congress “repeatedly” confirmed the tribe’s hunting and fishing powers in treaties and statutes. 462 U.S. at 338. In *Williams*, the Court also decided a question concerning the relationship between a tribe and a state: the Court found Arizona state court jurisdiction over a suit by a non-Indian store owner against a tribal customer to be impermissible because it undermined the authority of tribal courts over on-reservation affairs. 358 U.S. at 222. Here, however, the question is Congress’s authority to regulate labor relations without interference from an Indian tribe’s contrary regulation, not an Indian tribe’s regulatory power vis-à-vis a state.

enforcement of a federal law based on a Tribe's conduct.⁸ Whereas the Band may be protected from suit by private individuals, "Indian tribes do not enjoy sovereign immunity against suits brought by the federal government" *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1075 (9th Cir. 2001); *see also Mashantucket*, 95 F.3d at 178, 182. The Band can cite no authority – for none exists – for the theory that Indian tribes have retained inherent authority to regulate the employment relationships of Indians and non-Indians at a tribal business in violation of federal law.⁹

B. In Determining Whether Federal Law Applies to a Tribe, the Board and Circuit Courts Have Distinguished the Tribal Entity's "Commercial" Versus "Governmental" Qualities

The Band reasonably asserts that Indian tribes should not be treated "merely" as private entities (Resp. Br. 33 n.27, 39 n.29, 41). Indeed, Counsel for the Acting General Counsel recognizes that "Indian tribes are unique aggregations possessing attributes of sovereignty over

⁸ *See Breakthrough Management Group v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1195-96 (10th Cir. 2010) (sovereign immunity protected tribe from suit by private company); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046-47 (9th Cir. 2006) (sovereign immunity protected tribe from civil claims by former employee); *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1140-41 (9th Cir. 2006) (tribal court, "critical to Indian self-governance," had jurisdiction over nonmember's tort suit against tribal college); *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1044 (8th Cir. 2000) (sovereign immunity barred suit by nonmember against tribal college alleging race discrimination).

⁹ The Band also asserts (Resp. Br. 37-38) that the implementation of its Code is shielded from the NLRA because Congress, through the Indian Gaming Regulatory Act (25 U.S.C. § 2701 *et seq.*) ("the IGRA"), gave it such right. However, as explained previously (NLRB Br. 29), the Board and D.C. Circuit have properly ruled in similar circumstances that application of the NLRA does not conflict with the IGRA because the NLRA does not regulate gaming, and the IGRA does not address labor relations. *See San Manuel*, 341 NLRB at 1064; 475 F.3d at 1318. The two statutes are not inconsistent. Indeed, one of the only three reasons the Secretary of the Interior may rely upon to disapprove a tribal-state compact under the 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 the IGRA was not intended to frustrate the application of other federal laws. The Band's reliance on Section 301 of the LMRA, 29 U.S.C. § 185 (Resp. Br. 29-31), also has no merit and was addressed in Counsel for the Acting General Counsel's initial brief (NLRB Br. 30-32).

both their members and their territory” *Wheeler*, 435 U.S. at 323 (citation omitted).

However, when examining whether federal law should apply to a tribal activity, the courts nonetheless consistently have looked to the nature of the tribal enterprise, among other factors. *See, e.g., Karuk*, 260 F.3d at 1080-81 (declining to assert ADEA over tribal housing authority because “the employer in this case is the tribal government, acting in its role as provider of a governmental service: ensuring adequate housing for its members.”); *Reich v. Mashantucket Sand and Gravel*, 95 F.3d 174, 180 (2d Cir. 1996) (applying OSHA to tribal business: “When all is said and done, [Mashantucket Sand and Gravel] is in the construction business; and its activities are of a commercial and service character, not a governmental character”); *Reich v. Great Lakes Fish and Wildlife Commission*, 4 F.3d 490, 495 (7th Cir. 1993) (FLSA does not apply to tribal law enforcement employees performing governmental functions, but does apply to employees “engaged in routine activities of a commercial or service character”).¹⁰

Here, the Band’s operation of the casino is not akin to operation of, for instance, tribal law enforcement agencies or a tribal housing authority, which perform traditional government functions. As the court stated in *Karuk*, 260 F.3d at 1080-81, “[t]he Housing Authority thus functions as an arm of the tribal government and in a governmental role. It is not simply a business entity that happens to be run by a tribe or its members, but, rather, occupies a role quintessentially related to self-governance. Courts conducting ‘self-governance’ analysis have *distinguished such essentially governmental functions from commercial activities* undertaken by

¹⁰ *See also Coeur d’Alene*, 751 F.2d at 1116 (“[I]f the right to conduct commercial enterprises free of federal regulation is an aspect of tribal self-government, so too, it would seem, is the right to run a tribal enterprise free of the potentially ruinous burden of federal taxes. Yet our cases make clear that federal taxes apply to reservation activities even without a ‘clear’ expression of congressional intent.”); *Soaring Eagle Casino & Resort (Saginaw Chippewa Indian Tribe of Michigan)*, JD-17-12 at 9 (Mar. 26, 2012 NLRB Div. of Judges) (“Commercial enterprises that blur the distinction between the tribal Government and private corporations are not activities that are normally associated with self-governance.”).

tribes and have classified actual tribal governmental entities as aspects of ‘self-government.’” (emphasis added) (citing cases). *See also NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1199 (10th Cir. 2002) (noting that Circuit Courts “have applied the *Tuscarora* principle to Indian tribal governments acting in proprietary capacities”). And, following *Tuscarora*, courts have “rejected an argument that tribal self-government embraces all tribal business and commercial activity,” and instead, have found that tribal businesses that affect matters beyond traditional tribal ones, like the Band’s casino, are properly regulated by federal law. *See NLRB v. Chapa De Indian Health Program*, 316 F.3d 995, 999-1000 (9th Cir. 2003) (discussing cases).

Cases the Band cites discussing the distinction between private entities and tribal governments (Resp. Br. 33 n.27, 39 n.29, 41-42) arose in contexts very different from this case involving the application of a generally applicable federal law to an Indian tribe’s commercial enterprise. In *Bryan v. Itasca County*, 426 U.S. 373, 388 (1976), for example, a county in Minnesota argued for an interpretation of a federal law that would have permitted the application of state law to tribal governments and reservation Indians, “subordinat[ing]” the tribe and its members to “the full panoply of civil regulatory powers, including taxation, of state and local governments.” The Court concluded that such an extension of civil jurisdiction to a state government would convert tribes into “little more than private, voluntary organizations.” *Id.* at 388. And in *United States v. Mazurie*, 419 U.S. 544, 557 (1975), the Supreme Court held that Congress properly delegated to Indian tribes the power to regulate the distribution of alcoholic beverages because tribes “possess a certain degree of independent authority” over such subjects that affect “the internal and social relations of tribal life,” in contrast to “private, voluntary organizations,” which lack governmental authority. The circumstances in those cases are readily distinguishable, and in neither case did the Court suggest that where an Indian tribe maintains a

code that applies to a commercial entity it operates, and which conflicts with a generally applicable federal statute, its code takes precedence over the act of Congress.

II. THAT THE BAND HAS MAINTAINED AND PUBLISHED A FAIR EMPLOYMENT CODE DOES NOT INSULATE IT FROM REGULATION BY THE FEDERAL GOVERNMENT

The Band's significant reliance on the fact that it "enacted" its Fair Employment Code does not change the analysis or result. (Resp. Br. at 16-17, 19-20, 36-41.) In this case, the Band's "sensitive policy judgments" and "critical public policy choices" (*Id.* at 20, 41) involve labor law rights of nonmembers, and cannot stand in the face of other choices on labor relations made by Congress, the superior sovereign. See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980) ("tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States"); 29 U.S.C. § 151 ("It is hereby declared to be the policy of the United States . . . [to encourage] . . . collective bargaining and . . . the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.").

Arguments similar to the Band's have been rejected by several circuit courts, which have upheld the application of federal law to an Indian tribe's business, despite the existence of (or potential for) a tribal code regulating the same subject as a federal law. As the Second Circuit has stated,

Nobody questions that an Indian tribe may, in the absence of a federal statute, act on its inherent sovereign power to adopt regulations for its tribe. It is quite different to hold, however, that this broad sovereign power essentially preempts the application of a federal regulatory scheme which is silent on its application to Indians.

Mashantucket, 95 F.3d at 179.¹¹

In *Mashantucket*, the court rejected the argument that OSHA’s application to a tribe-run construction business “would interfere with the Tribe’s ability to self-govern by precluding the Mashantucket Pequot from adopting their own safety regulations.” *Id.* at 179. The court explained that such argument “proves too much” because “[t]he question is not whether the statute affects tribal self-governance *in general*, but rather whether it affects tribal self-governance *in purely intramural matters*.” *Id.* at 181 (emphasis in original). The nature of the Tribe’s commercial activities in that case—the construction on its Foxwoods casino, and its employment of non-Indians—persuaded the court that application of OSHA was appropriate because it would impact conduct external to the Tribe. *Id.* Similarly, the D.C. Circuit in *San Manuel* recognized that while the San Manuel Band’s enactment of a tribal labor ordinance covering its casino was a governmental act, the impairment of tribal sovereignty in such circumstance was “negligible” because San Manuel’s operation of its casino was “primarily commercial,” and thus its ordinance was simply “ancillary” to that commercial activity. *Id.* at 1314-15; 1317-18. *See also Lumber Industry Pension Fund v. Warm Springs Forest Products Indus.*, 939 F.2d 683, 685 (9th Cir. 1991) (applying ERISA to compel contributions by a tribe-run sawmill to a private pension fund, despite tribal ordinance requiring the mill to transfer tribe members to a separate tribal pension fund).

The fact that the Band here chose to define the rights of its casino employees through an ordinance rather than through other means, such as work rules at its casino, must be irrelevant if

¹¹ *See also United States v. Funmaker*, 10 F.3d 1327, 1332 (7th Cir. 1993) (“The decision-making power of Indian tribes ends . . . at the point when those decisions would violate federal law designed to safeguard important federal interests such as the free flow of interstate commerce.”). *Cf. FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1315 (9th Cir. 1990) (upholding Tribes’ ordinance requiring tribal hiring preferences where no federal law was raised).

the *San Manuel* framework is to have meaning. The Band should not be permitted to assert form over substance to license itself to prohibit employees of a tribal business from engaging in self-organization, a right explicitly guaranteed by Section 7. *See* NLRB Br. 24.

In short, while the Band argues that application of the NLRA will “destroy tribal laws” (Resp. Br. at 1), such a result is far from the case. Counsel for the Acting General Counsel has argued only that the Band’s labor code should be held invalid *insofar as it conflicts with the NLRA and applies to the Band’s casino*. The labor code may, of course, apply to traditional governmental tribal enterprises not within the NLRA. Nor will application of the NLRA generally prohibit the Band from enacting other ordinances regulating its casino. Congress’s rule of law, when applied to these casino employees, should be paramount.

CONCLUSION

Because application of the NLRA to the Band’s casino “would not impair tribal sovereignty, federal Indian law does not prevent the Board from asserting jurisdiction.” *San Manuel*, 475 F.3d at 1315. The Board should therefore hold the Band subject to the jurisdiction of the Board in the Band’s capacity as employer of the casino employees, and find its maintenance and publication of Sections 16.01, 16.02, 16.06(a)-(c), 16.08, 16.12(a)(1)(B), 16.12(b), 16.13(e), 16.15(b)(1) and(5), 16.16, 16.17, 16.18, 16.20, 16.24(a), (c) and (d), and 17.1(c) of its Fair Employment Practices Code (also known as Ordinance No. 05-600-03) to be in violation of Section 8(a)(1) of the Act.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 07**

**LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL GOVERNMENT**

Charged Party

and

**LOCAL 406, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS**

Charging Party

Case 07-CA-051156

**CERTIFICATE OF SERVICE OF COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN
OPPOSITION TO RESPONDENT'S BRIEF**

I, the undersigned employee of the National Labor Relations Board, state under oath that on May 15, 2012, I served the above-entitled document(s) by email and/or addresses and in the manner indicated below:

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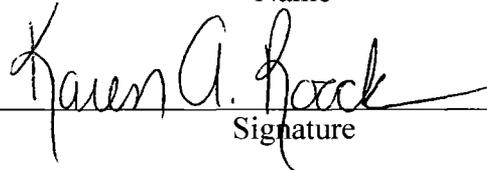
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