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

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

Respondent

and **CASE 07-CA-053586**

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

Charging Party

ANSWERING BRIEF OF COUNSEL FOR THE ACTING GENERAL COUNSEL TO EXCEPTIONS OF RESPONDENT

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INTRODUCTION

Pursuant to a charge filed by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (hereafter Charging Party or Union), the Regional Director for the Seventh Region of the National Labor Relations Board issued an Amended Complaint on October 12, 2011, in the above case against Respondent, Soaring Eagle Casino and Resort, An Enterprise of the Saginaw Chippewa Indian Tribe of Michigan. A hearing was conducted in this matter in Mt. Pleasant, Michigan on December 14-15, 2011, before Administrative Law Judge Michael A. Rosas. Thereafter, ALJ Rosas issued a Decision (or ALJD) on March 26, 2012, including Findings of Fact, Remedy, Order, and Notice provisions. ALJ Rosas found that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and engaged in conduct violative of Section 8(a)(3) and (1) of the Act.

Specifically, the Amended Complaint alleges, and the ALJ found, that Respondent violated Section 8(a)(1) of the Act by: (1) maintaining and enforcing an overly broad and unlawful no-solicitation policy; and (2) prohibiting employees from discussion unionization in the employee hallway, a non-working area, during October 2010. The ALJ additionally found that Respondent violated Section 8(a)(3) and (1) of the Act by: (1) suspending employee Susan Lewis on October 23, 2011 because she solicited on behalf of the Charging Party in the employee hallway on October 4; and (2) subsequently discharging Lewis on November 15 because she solicited on behalf of the Charging Party in the employee hallway on October 4 and 24, and spoke with an on-duty employee about the Charging Party in Bathroom B while off-duty on November 7.

SUMMARY OF THE CASE

Respondent is a governmental subdivision of the Saginaw Chippewa Indian Tribe of Michigan (Tribe). It is engaged it the operation of a hotel, restaurant, entertainment and gaming complex (Casino) located on the Federal government-recognized Isabella Indian Reservation in Mount Pleasant, Michigan. Dennis Kequom has been Tribal Chief for the Tribe; Ben Perez has been Senior Manager, Casino Housekeeping; Greg Falsetta has been Director of Human Resources; Carla O'Brien has been Human Resources Manager; Lisa Morris has been Human Resources Assistant Manager; Andy Asselin has been CEO; Greg Lott has been a Supervisor/Manager; and Dorothy Munro, Robert Rood, and Julia St. John have been Team Leaders. Employee Susan Lewis was employed by Respondent from January 26, 2005, to November 15, 2010, as a second-shift housekeeper in the Casino Housekeeping department.

The Tribe has approximately 3,046 members and is a successor to the Treaty with the Chippewa Indians of Saginaw and of Swan Creek and Black River, August 2, 1855, 11 Stat. 633 (the 1855 Treaty), and the Treaty between the United States and the Chippewa Indians of Saginaw, Swan Creek, and Black River, Michigan, October 18, 1864, 14 Stat. 657 (the 1864 Treaty). The Treaties address land allocation, including the Tribe's exclusive use, ownership, and occupancy of reservation lands located primarily within Isabella County. Respondent's Casino is located entirely within the geographical boundaries of the Tribe's Isabella Reservation. The city of Mount Pleasant is also within the reservation's boundaries. The city has its own police, fire, and public safety departments. These Mount Pleasant entities do not have jurisdiction within the reservation except over their nontribal citizens. They have no jurisdiction at the Casino.

The Tribe is governed by a tribal council comprised of 12 members elected by the tribal membership and headed by an elected tribal chief, in accordance with the Tribe's amended constitution and by-laws. The Tribal Gaming Commission (the Commission) consists of a six-member board hired by the tribal council to enforce the gaming code enacted by the council in October 1993. The gaming code establishes internal controls and licensing criteria for key persons employed at the Casino who handle tribal funds. In November 1993, the Tribe created Soaring Eagle Gaming as a governmental entity to operate and manage all gaming activities at the Casino, as established by Charter of Soaring Eagle Gaming.

The tribal council hires all management-level employees for the Casino, including the chief executive officer. The Casino's controller, an employee of the Tribe, submits the Casino's budget to the tribal council for approval. The tribal council approves all contracts with outside vendors conducting business at the Casino. The Casino department managers and directors regularly report to the tribal council during board of directors meetings. The Tribe considers all of the Casino's employees to be governmental employees of the Tribe.

The Tribe's primary source of revenue is generated by their gaming enterprise, with about 90% of tribal income derived from the operation of the Casino. The tribal council decides how to distribute gaming revenue to support the Tribe's programs and services. About 90% of the Tribe's departments and programs are funded by revenue generated by the Tribe's gaming enterprise.

The Casino is owned and managed by the Tribe. It remains open 24 hours a day, 7 days a week, and is open to nontribal members of the public. Approximately 3,000 employees work at the Casino, of whom about 221, or 7.4%, are tribal members. Of these tribal members, about 29%, approximately 65, are in management positions.

In about February 2009, Respondent's employees became interested in joining the Union. During the organizing campaign, from February 2009 to December 2010, housekeeping employee Lewis initiated contact with the Union and engaged in numerous union activities, including attending union meetings, signing union authorization cards, passing out and collecting cards from other employees, conducting news and radio interviews, and supporting the Union's campaign website.

On October 13, 2006, Respondent promulgated and implemented a no-solicitation policy, including the following provisions:

a. Item number 4 under "DEFINITIONS" includes "any place where any employees perform job duties for Soaring Eagle" as a "working area."
b. Item number 6 under "DEFINITIONS" includes "parking lots and roadways" as "Soaring Eagle premises."
c. Item number 2 under "PROHIBITED CONDUCT" prohibits employees "from soliciting in any work area."
d. Item number 3 under "PROHIBITED CONDUCT" prohibits employees "from posting notices, photographs, or other written materials on bulletin boards or any other Soaring Eagle premises."
e. Paragraph one under "ENFORCEMENT AND DISCIPLINE" requires that employees "shall notify" Respondent of any form of solicitation that is occurring or has occurred at SECR.
f. Paragraph two under "ENFORCEMENT AND DISCIPLINE" states that "Any person violating this policy will be subject to disciplinary action up to, and including, termination."

In October 2010, Respondent housekeeping manager Perez told Lewis that she could not engage in solicitation activities, including talking to other employees about unions, in the employee hallway. On October 23, Respondent suspended Lewis for passing out blue wrist bands stating "BAND TOGETHER 2010" to other housekeeping employees and placing one on another employee on October 4, in violation of the No-Solicitation Policy. On November 15, Respondent discharged Lewis for soliciting for the Union in Bathroom B of the Casino on November 7, in violation of the No-Solicitation Policy. Except for Lewis, no other employees

employed by Respondent have been disciplined or discharged for violation of Respondent's No-Solicitation Policy.

The facts of this case are succinctly set forth in further detail by ALJ Rosas in his March 26, 2012 Decision.

Respondent states 23 exceptions, 22 of which (Nos. 1-22) contend that the ALJ erred in both fact and law in determining that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it is appropriate for the Board to assert jurisdiction over Respondent. Respondent's remaining exception (No. 23) contends that the ALJ's finding that Respondent would not have discharged Lewis in the absence of her role as an advocate for the Union is not supported by the evidence.

ARGUMENT

I. THE ALJ CORRECTLY FOUND THAT RESPONDENT IS AN EMPLOYER ENGAGED IN COMMERCE WITHIN THE MEANING OF SECTION 2(2), (6), AND (7) OF THE ACT, AND IT IS APPROPRIATE FOR THE BOARD TO ASSERT JURISDICTION OVER RESPONDENT.

In its exceptions Nos. 1-22, Respondent takes exception to the ALJ's findings that the National Labor Relations Act ("NLRA") applies to its Soaring Eagle Casino and Resort, which is operated by the Saginaw Chippewa Indian Tribe of Michigan on its reservation, and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, arguing that the ALJ's Decision, at pages 2-3 and 7-11, is erroneous in both fact and law, and is a misapplication of the law. In this regard, Respondent has argued that it is insulated from application of the NLRA because it interferes with the Tribe's rights under its treaties and its inherent rights of self-government.

As set forth below, neither the Tribe's treaty right to exclude others from its land, nor its inherent sovereignty, give it license to operate the casino in violation of the NLRA where the casino employs significant numbers of non-Tribe members, is commercial in nature, and 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). The NLRA is a law of general applicability that does not materially impact Respondent's rights as a sovereign tribe. "If one were to construe a general right of exclusion [to bar application of the NLRA], the enforcement of nearly all generally applicable Federal Laws would be nullified when applied to any Tribe which has signed a treaty containing an exclusion provision." ALJD at 10. The Board should affirm the Administrative Law Judge's decision in this regard.[1]

A. **The Board's *San Manuel* Framework**

In ***San Manuel***, the Board held that commercial enterprises operated by Indian tribes 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

[1] Last year, Respondent brought an action against the Board in the United States District Court for the Eastern District of Michigan, seeking to enjoin the instant unfair labor practice proceeding based on its sovereignty and treaty claims. However, the Court dismissed that action, concluding that "Congress, of course, has expressly designated that review of the Board's decision shall be made by the court of appeals. 29 U.S.C. § 160." ***Saginaw Chippewa Indian Tribe of Michigan v. NLRB***, 2011 WL 6754102, at *6 (E.D. Mich. Dec. 23, 2011).

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).

The Board in ***San Manuel*** further determined that while a tribal enterprise may qualify as a Section 2(2) employer under these standards, 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, in its discretion, it would not exercise 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.[2]

Applying the "***Tuscarora-Coeur d'Alene*** standard" to the facts of ***San Manuel***, the Board found that none of the ***Coeur d'Alene*** exceptions applied to prevent the Board from

[2] 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.

asserting jurisdiction over the San Manuel Band's casino. *Id.* at 1062-63. The Board explained that NLRA jurisdiction would not implicate the Band's self-governance over intramural matters because "operation of the casino is not an exercise of self-governance." *Id.* Nor did the Band allege that any treaty rights were implicated. 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***, reasoning:

> [T]he 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 at 1314.

B. <u>The Board Should Continue to Apply *San Manuel*, Which is the Proper Approach for Analyzing Whether the NLRA Applies to a Casino Operated by a Tribe</u>

The Board should continue to follow ***San Manuel*** and its reasonable reliance upon the Supreme Court's statement in ***Tuscarora*** that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property

interests" (Resp. Br. 19-23, 27).

Notwithstanding the Tribe's assertions that ***Tuscarora*** enjoys "no unanimity in the lower courts about the continued force of its dictum" (Resp. Br. 21), the Supreme Court and the majority of the Circuit courts to address the issue have reaffirmed its principle that Indian tribes' sovereignty generally does not extend so far as to override inconsistent federal interests. In ***Merrion v. Jicarilla Apache Tribe***, 455 U.S. 130 (1982), the Supreme 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*…" *Id.* 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* ***Reich v. Mashantucket Sand & Gravel***, 95 F.3d 174, 179 (2d Cir. 1996) ("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 result is entirely consistent with the subordinate position of tribal authority to federal law.

The ***Tuscarora-Coeur d'Alene*** framework has been widely applied 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).[3] And for good

[3] Respondent mistakenly asserts that the court in ***EEOC v. Fond du Lac Heavy Equip. & Constr. Co***., 986 F.2d 246 (8th Cir. 1993), distanced itself from ***Tuscarora*** (Resp. Br. 22). There the Eighth Circuit held that the ADEA did not apply to a "strictly internal" employment

reason: this framework balances the interest of tribal sovereignty with the interest of Congress in applying its laws of general applicability. In ***San Manuel***, the D.C. Circuit appreciated the range of Supreme Court decisions balancing the supremacy of federal law with the preservation of tribal sovereignty, and concluded that the application of the NLRA to a tribal casino negligibly impaired tribal 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]

Respondent would have the Board follow Tenth Circuit cases (Resp. Br. 1, 3),[5] which Respondent asserts require explicit evidence of congressional intent for a federal law to apply to a tribal enterprise. In ***San Manuel***, however, the Board reasonably chose to follow the ***Tuscarora-Coeur d'Alene*** framework, relying not on Tenth Circuit law, but on "the broad consensus in the courts of appeals for the appropriate interpretation of Supreme Court precedent." 341 NLRB at 1060 n.16.

Moreover, it is far from clear that the Tenth Circuit has rejected the ***Tuscarora-Coeur d'Alene*** framework in cases like this concerning application of a federal law to a tribal business. For example, in ***Dobbs***, although the Tenth Circuit stated that "[a]pplying certain federal

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discrimination dispute between a tribal employer and tribe-member employee. 986 F.2d at 249, 251 ("Federal regulation of the tribal employer's consideration of age in determining whether to hire the member of the tribe to work at the business located on the reservation interferes with an intramural matter that has traditionally been left to the tribe's self-government."). The court's focus on the intramural character of the dispute tracks closely the first ***Coeur d'Alene*** exception (751 F.2d at 1116).

[4] Respondent takes issue with circuit courts' "invent[ion] of judicial 'exceptions' to make the [***Tuscarora***] *dictum* work under today's policies" (Resp. Br. 22). However, the D.C. Circuit's discussion in ***San Manuel***, however, elucidates the appropriateness of the decisions balancing the Supreme Court's "earnest concern" for sustaining tribal sovereignty with those decisions that acknowledge that tribal governments engage in activities "many of which are not activities we normally associate with governance." ***San Manuel,*** 475 F.3d at 1314.

[5] *E.g.*, ***Dobbs v. Anthem Blue Cross and Blue Shield***, 600 F.3d 1275 (10th Cir. 2010); ***NLRB v. Pueblo of San Juan***, 276 F.3d 1186 (10th Cir. 2002).

regulatory schemes to Indian tribes would impinge upon their sovereignty," it explained that federal statutes of general applicability apply to tribal governments in circumstances where they exercise property rights rather than their authority as a sovereign: "We have distinguished, however, between cases in which an Indian tribe exercises its property rights and cases in which it 'exercise[s] its authority as a sovereign.'" 600 F.3d at 1284 n.8. The Tenth Circuit also made that distinction in ***Pueblo of San Juan***, 276 F.3d at 1199, where it found ***Tuscarora*** applicable to situations, like here, where tribes act "in a proprietary capacity such as that of employer or landowner." The court in ***Pueblo of San Juan*** additionally reasoned that "***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 Tribe seeks to trump, are applicable nationwide to all employers covered by the NLRA, and states and territories may not legislate otherwise.

In ***Nero v. Cherokee Nation***, 892 F.2d 1457, 1462-63 (10th Cir. 1989), the Tenth Circuit in fact relied upon the ***Tuscarora-Coeur d'Alene*** *framework*, concluding that applying 42 U.S.C. § 1981 and 42 U.S.C. § 2000d to prohibit tribal officials from refusing to accord plaintiffs tribal membership on the basis of plaintiffs' race "would affect the Tribe's right to self-governance in a purely internal matter," and thus should not be applied under the first ***Coeur d'Alene*** exception (751 F.2d at 1116). And in ***EEOC v. Cherokee Nation***, 871 F.2d 937, 938 n.3 (10th Cir. 1989) (*see* Resp. Br. 19 n.64), while the Tenth Circuit questioned ***Tuscarora*'s** continuing import, the court cited ***Coeur d'Alene***, 751 F.2d at 1116, among other cases, for the proposition that "the so-called ***Tuscarora*** rule *is not applicable* to treaty cases such as this one."

There is also no merit to Respondent's assertion that ***Tuscarora*** was "implicitly overruled" by later Supreme Court decisions (Resp. Br. 22, 29). As noted above, in ***Merrion***, the Supreme Court explained that a tribe's sovereign powers may not extend so far as to be inconsistent with federal law. *See supra,* 455 U.S. at 145 n.12. And, as discussed below, there is also no merit to Respondent's reliance on ***United States v. Dion***, 476 U.S. 734, 738 (1986), for the proposition that Congress must make its intention "clear and plain" to abrogate treaty rights (Resp. Br. 9), as the casino's compliance with the NLRA does not impact the Tribe's right to exclude others from its land.

Nor is there merit to Respondent's contention that the Board must follow general policies of Congress and the Executive Branch, which since ***Tuscarora*** have assertedly "changed dramatically" to "promote[] tribal self-sufficiency and independence" (Resp. Br. 21). Indeed, the specific authority cited by Respondent (Resp. Br. 17 n.59, 26 n.84 & 85) is not applicable to whether the NLRA applies to a tribal casino. For example, Executive Order 13084 and Executive Order 13175, by their terms, apply to an "Agency" and define that term to exclude "independent regulatory agencies," such as the National Labor Relations Board. *See* Sec. 1(c) of Executive Order 13084; Sec. 1(c) of Executive Order 13175; 44 U.S.C. § 3502(5). Moreover, as explained below, the Board has reasonably concluded that IGRA's promotion of tribal development through gaming is not inconsistent with application of the NLRA to tribal casinos. And, although Respondent quotes certain other federal statutes indicating that Congress has sought to promote tribal development, Respondent has not explained why those statutes warrant concluding that the NLRA cannot apply to commercial enterprises operated by Indian tribes. *See generally* ***San Manuel***, 475 F.3d at 1318 (rejecting argument that the IGRA "implicitly restricts the scope of the NLRA").

In any event, recent circuit decisions continue to apply the ***Tuscarora-Coeur d'Alene*** framework starting with the principle that a generally applicable federal law applies to a tribe where the tribe's sovereignty or treaty right is not specifically impacted by the federal law. For example, in ***Menominee Tribal Enterprises v. Solis***, 601 F.3d 669, 673-74 (7th Cir. 2010), the court held that OSHA applied to a tribal sawmill, where the court found no evidence that Congress, in enacting the OSHA, intended to exempt Indian tribes, and the tribe's treaty did not explicitly prohibit government agents from entering the reservation. *See also* ***United States Dep't of Labor v. Occupational Safety & Health Rev. Comm'n (DOL v. OSHRC)***, 935 F.2d 182, 185-87 (9th Cir. 1991) (ruling that treaty's general right of exclusion, even "construed liberally," does not bar application of OSHA).

Notwithstanding that the ***Tuscarora*** statement applying laws of general applicability to Indian tribes may have been dicta (Resp. Br. 20-21), that principle correctly positions federal law as supreme when applied to an Indian tribe's commercial operation and it continues to be followed by a majority of the circuits. As the Board concluded in ***San Manuel***, the

> suggestion that the real holding of *Tuscarora* is limited to other cases involving the property rights of individual Indians under the Federal Power Act, [the statute at issue in *Tuscarora*,] stands in stark contrast to the consensus of the courts of appeals. That it would have been possible for the Court to decide the case on a narrow ground does not transform into dicta any analysis that goes beyond that narrow ground. *See Railroad Companies v. Schutte*, 103 U.S. 118, 143 (1880) ("It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter.") . . . ."

San Manuel, 341 NLRB at 1060-61. *See also* ***Coeur d'Alene***, 751 F.2d at 1115 (relying on ***Tuscarora***, explaining "we have not adopted the proposition that Indian tribes are subject only to those laws of the United States expressly made applicable to them.") (citing cases).

Tuscarora and ***Coeur d'Alene*** remain good law, and should be applied to this tribal

casino.

C. Under *San Manuel*, It Is Appropriate to Assert NLRA Jurisdiction Over Respondent's Casino

None of the ***Coeur d'Alene*** exceptions adopted by the Board in ***San Manuel*** are applicable here to preclude application of the NLRA to the Tribe's casino.

1. Application of the NLRA to Respondent's Casino 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). "Intramural 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. *See* ALJD at 9.

Like the San Manuel Band's casino, Respondent's casino is a commercial venture generating income for the Tribe from its public customers, most (about 92%) of whom are not tribal members (GC 2, 3, 20-page 87; GC 21-22). [6] *See also* ALJD at 9. The casino competes in the same commercial arena as other nontribal casinos, overwhelmingly employs nontribal members – including discriminatee Susan Lewis – and actively markets its gaming, hotel, restaurants, entertainment and other retail ventures to the general public. (GC 2, 3, 20-pages 87-89, 113-115; GC 21-22.) *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***, 601 F.3d at 674 ("The

[6] References to the Acting General Counsel Exhibits, Respondent Exhibits, and the Transcript are referred to as GC, R, and TR, respectively. TR_____ refers to a specific page of the trial transcript. STIP___ refers to a numbered Trial Stipulation contained in GC 19, "Trial Stipulations."

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.").[7] In short, that the casino is owned and managed by the Tribe "does not ipso facto elevate it to the status of a tribal government." ***Mashantucket***, 95 F.3d at 180.

The Seventh Circuit's holding that the FLSA does not apply to tribal agencies' law-enforcement personnel or other employees exercising traditional governmental functions does not, as Respondent suggests (Resp. Br. 22, 30), demonstrate that "intramural matters" are at stake here. *See* ***Reich v. Great Lakes Fish and Wildlife Commission***, 4 F.3d 490, 495 (7th Cir. 1993). While the court in ***Great Lakes*** found it relevant that the FLSA exempts state and local law enforcement officials similar to the tribal governmental officials at issue, the court did not hold that all employees of tribal agencies were exempt from the FLSA. *Id.* at 492-93, 495. Instead, the ***Great Lakes*** court distinguished employees engaged in traditional government functions from those engaged "in routine activities of a commercial or service character," the latter of which, the court acknowledged, have been subject to federal statutes regulating employment. *Id.* at 495. Respondent's casino operations are clearly of a commercial character,

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[7] *See also* ***Montana v. United States***, 450 U.S. 544, 564 (1981) (" 'the powers of self-government ... involve *only the relations among members of a tribe.*'") (citation omitted); ***United States v. Wheeler***, 435 U.S. 313, 326 (1978) (areas where tribes "implicitly lost [sovereignty] by virtue of their dependent status" are "those involving the relations between an Indian tribe and nonmembers of the Tribe;" retained powers of self-government "involve only the relations among members of a tribe"); ***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.").

readily distinguishable from the law-enforcement employees in ***Great Lakes***.

Respondent errs in asserting that the Tribe's use of casino revenue to fund government functions makes its casino an intramural matter (Resp. Br. 17-18). As the Board stated in ***San Manuel***, under such a definition of intramural, "the ***Coeur d'Alene*** exception would swallow the ***Tuscarora*** rule." 341 NLRB at 1063. *See also* ***DOL v. OSHRC,*** 935 F.2d at 184; ***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 consequence flowing from NLRA application to Respondent's operation of this casino materially interferes with the Tribe's internal governance.[8]

2. Respondent's Treaty Providing a Right of General Exclusion From Tribal Land Is Insufficient to Exempt it from Compliance with the NLRA

The second ***Coeur d'Alene*** exception asks whether a tribe's treaty rights will be abrogated by application of federal law. Respondent heavily relies upon its 1855 and 1864 Treaty rights "to exclude non-members," and, in particular, the 1864 Treaty, which "set[s] apart for the exclusive use, ownership, and occupancy" certain lands for the Tribe (Resp. Br. 8, 11, 24). Respondent similarly asserts that its expert testimony shows that the Tribe understood that they had treaty rights to exclude individuals from their land. (Resp. Br. 8-9, 13, 25). However, the right to prevent "undesirable intruders" (Resp. Br. 4) from tribal land does not translate into a right to avoid federal regulation of commercial enterprises operating on that land.

Indeed, courts which have been presented with this same argument have reasonably

[8] 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. Respondent is thus mistaken in its assertion that a labor organization can use the collective bargaining process to "determine what laws" will apply to Respondent's casino (Resp. Br. 3).

concluded that such "general treaty language" raised by a tribe, which "devot[es] land to [its] 'exclusive use[]'" is "not sufficient" to generally preclude application of an otherwise generally applicable federal law. *See* ***United States v. Farris***, 624 F.2d 890, 893 (9th Cir. 1980), superseded on other grounds by statute, as noted by ***United States v. E.C. Investments, Inc***., 77 F.3d 327, 330 (9th Cir. 1996). To properly fit within the second ***Coeur d'Alene*** exception, application of a federal statute should jeopardize a specific tribal right that is secured by a treaty. *See* ***Smart***, 868 F.2d at 934-35 (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).

The Ninth Circuit's decision in ***Farris*** is instructive. There the court determined that the Organized Crime Control Act, (18 U.S.C. § 1955), which prohibited gambling in certain circumstances, would abrogate Indian treaty rights only if the treaty spoke to the subject of the federal law at issue or otherwise prohibited application of federal law. ***Farris***, 624 F.2d at 893. The Court "presumed that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws…" *Id.* at 894. The Ninth Circuit came to a similar conclusion in ***DOL v. OSHRC***, 935 F.2d at 184, 186-87. The court there was presented with the question whether OSHA should apply to a tribe that was party to a treaty prohibiting "any white person" from residing on the tribe's land without permission. Relying on ***Farris***, the court held that although "the [treaty] provision sets forth a general right of exclusion," that right was insufficient to bar application of OSHA to the tribe's sawmill operation. *Id.* at 185-87. Similarly, the Seventh Circuit in ***Menominee Tribal Enterprises v. Solis***, 601 F.3d 669, 674 (7th Cir. 2010), concluded that non-specific treaty language – providing a "right of way" through the

tribe's land – was insufficient to bar application of OSHA to the tribe's sawmill and related commercial activities. *Id.* [9]

By contrast, the treaty in ***Donovan v. Navajo Forest Products***, 692 F.2d 709 (10th Cir. 1982), which the Tenth Circuit held *did* exempt the Navajo Tribe from OSHA, stated "no persons . . . except such *officers, soldiers, agents and employees of the government . . . as may be authorized* to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon or reside in, the territory described in this article." 692 F.2d at 711 (emphasis added). The Tenth Circuit explained that by such language "the United States Government agreed to leave the Navajos alone on their reservation to conduct their own affairs with a minimum of interference from non-Indians, and then only by those *expressly* authorized to enter upon the reservation." *Id.* at 711-12 (emphasis in original).[10] *But see* ***Navajo Tribe v. NLRB***, 288 F.2d 162, 164-65 n.1 (D.C. Cir. 1961) (upholding Board's jurisdiction to direct an election involving employer on tribal land, and rejecting reliance on Navajo treaty).

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[9] To aid in their analyses of whether a federal law applies to an Indian tribe, courts have reasonably compared similar language in other treaties. *See, e.g.,* ***Brendale v. Yakima Indian Nation***, 492 U.S. 408, 422-23 (1989) (plurality); ***Menominee Tribal Enterprises***, 601 F.3d at 674; ***Smart***, 868 F.2d at 934-35. The ALJ also reasonably made such a comparison (ALJD at 9-10), which is not a "one-size-fits-all general interpretation of Indian treaty rights" (Resp. Br. 15). Rather, it is a common interpretation tool not dissimilar to comparing judicial or administrative precedents. In fact, Respondent itself compares its treaty language to others. *See* Resp. Br. 11-12 ("The Supreme Court has examined similar language [to Respondent's 1864 Treaty] in other treaties and held that it gives an Indian tribe the right to exclude non-Indians from reservation lands that today are still held by the United States in trust for the tribe or its members.").

[10] To the extent the court in ***Navajo Forest Products*** suggested (692 F.2d at 712-13) that even in the absence of a specific treaty right, the right to exclude outsiders must be expressly abrogated by statute, that principle was rejected by ***Coeur d'Alene***. 751 F.2d at 1117 n.3. In any event, as discussed above, the Board in ***San Manuel*** correctly rejected the Tenth Circuit approach to these issues in favor of the broadly accepted ***Tuscarora-Coeur d'Alene*** analysis. 341 NLRB at 1060 n.16.

Thus, the courts have repeatedly concluded that a treaty provision containing only a general right of possession and exclusion is not sufficient to trigger the second ***Coeur d'Alene*** exception. Such a general right of possession and exclusion is analogous to the inherent sovereign right that was insufficient to bar application of OSHA in ***Coeur d'Alene*** itself, and, as the court stated in *DOL v. OSHRC*, "[t]he identical right should not have a different effect because it arises from general treaty language rather than recognized, inherent sovereign rights." 935 F.2d at 186.

Here, the documents and testimony relied upon by Respondent do not demonstrate that the 1864 Treaty provides a specific right that would be "abrogated" by application of the NLRA (Resp. Br. 9-11).[11] As in ***Farris***, *supra*, the Treaty here does not exempt Respondent from any federal labor laws specifically or generally. And unlike in ***Navajo Forest Products***, the Treaty here does not specifically require tribal consent for federal officials to enter tribal land. Nor does Respondent's additional evidence speak to the treatment of non-Indian persons the Tribe has invited on its land for employment purposes.

While Respondent claims that its treaties authorize the Tribe to bar a non-tribal member's access to its reservation (Resp. Br. 13), that is not what it has done here. Rather, Respondent invited many non-tribal members to its land, including Susan Lewis, the alleged discriminatee, to perform services at the casino which are critical to its operation. The General Counsel is not asserting here that the Tribe must invite persons into the casino that the Tribe desires to exclude. But, once nonmembers of the Tribe are invited and employed in the casino, they should not be deprived of protections the NLRA affords other casino employees.

[11] Nor does the text of the 1855 Treaty appear to provide any specific (let alone general) right that would be impacted by application of the NLRA.

Respondent's reliance upon ***United States v. Dion,*** 476 U.S. 734, 738 (1986) (Resp. Br. 9) is misplaced because, as discussed above, Respondent's compliance with the NLRA simply does not undermine its right to exclude others from its land. In *Dion*, the Supreme Court held that the federal Eagle Protection Act specifically abrogated certain Indian treaty rights to hunt and fish on lands reserved to tribes. *Id.* at 737-740. The Court explained, "Dion here asserts a treaty right to engage in precisely the conduct that Congress, overriding Indian treaty rights, made criminal in the Eagle Protection Act. Dion's treaty shield for that conduct, we hold, was removed by that statute," and Congress did not later revive that treaty right in another statute. *Id.* at 746. Thus, in ***Dion***, "[a]ll parties . . . agree[d] that the treaty rights . . . included the exclusive right to hunt and fish on their land" and the Eagle Protection Act banned "precisely the [same] conduct" (*id.* at 737, 746). Here the subject matter of the NLRA – the regulation of labor relations – is not at all contemplated by the exclusion and possession rights in Respondent's treaties. Because there is *no* treaty shield for the Tribe's interfering with employee conduct protected by the NLRA, it follows that the NLRA need not contain a clear intent to apply its protections to the casino employees. *See* ***Farris***, 624 F.2d at 893-44 (finding that federal law regulating gambling is not a "subject[] specifically covered" in the treaty "devoting land to a tribe's 'exclusive use'"); ***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). In short, application of the NLRA to eliminate unfair labor practices at Respondent's casino is not inconsistent with the Tribe's treaty right to exclude unwanted persons from its land.

Respondent also argues that the Tribe's treaty-based right to exclude contains implied rights that are necessary to effectuate the treaty's purpose, including the right to "condition that entry on compliance with Tribal laws" and to regulate its economic resources (Resp. Br. 11-13, 15-17). However, the cases Respondent cites do not address the issue here – a tribe's ability to condition nonmembers' entry on tribal lands *upon the invalidation of federal law*. *See supra*, ***Merrion***, 455 U.S. at 145 n.12.[12]

None of the additional historic evidence relied upon by the Tribe precludes application of the NLRA. Such evidence includes: (a) the 1855 Report of the Commissioner of Indian Affairs and the 1864 letter to the President showing that one of the Tribe Chief's primary concerns when the 1864 Treaty was negotiated was to prevent "white settlers" from living on the reservation (GC 24-Exh E1, E2); (b) an 1864 letter and 1871 petition for removal of John Iron showing that in the years following the 1864 Treaty, the Tribe was "vigilant" in enforcing its right to exclude "white settlers" from the reservation (GC 24-Exh E3); (c) minutes from the 1889 Chiefs meeting demonstrating that the Chiefs wanted to prevent all "white men" from "trespassing" on tribal

[12] Contrary to Respondent's suggestion (Resp. Br. 13), by working for a tribe's casino, employees have not implicitly "consensually" surrendered their Section 7 rights. In other contexts, the Board and the courts have disallowed and invalidated actual agreements that required the surrender of federal rights. For example, agreements have been invalidated where they prevent employees from vindicating their rights under a federal statute. *See, e.g.*, ***Goya Foods, Inc***., 358 NLRB No. 43, 2012 WL 1795825, at *1-2 (May 17, 2012) (holding invalid settlement agreements between an employer and two discriminatees which required the discriminatees to "not engage in any union activity relating to GOYA and/or its employees."); ***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).

land (GC 24-Exh E4); (d) testimony of Professor Valentine that the Tribe understood their 1855 Treaty to empower the Tribe to ban "the white man" from their reservation lands (TR-13-36); and (e) testimony of Professor Bowes that the 1855 Treaty negotiations and the 1864 Treaty show that the Tribe was provided land as its permanent home, the right to self-govern, and the right to exclude non-Indians from their reservation lands (TR-67-95; R 4).

These historic facts, while not in dispute, demonstrate no more than the treaties with the United States guaranteed the Tribe a general right of possession and exclusion, which, as discussed, is insufficient to bar application of the NLRA to the Tribe's casino. *See* ***DOL v. OSHRC***, 935 F.2d at 185-87. The Board should decline the Tribe's demand to apply its treaties beyond their clear terms "to remedy a claimed injustice or to achieve the asserted understanding of the parties." ***Choctaw Nation of Indians v. United States***, 318 U.S. 423, 432 (1943).

In short, the text of the 1864 Treaty and the proffered historic facts do not distinguish this case from others finding that "general use" treaty provisions do not exempt tribes from federal laws like the NLRA that negligibly, if at all, impinge on sovereignty.

3. There Is No Evidence that Congress Intended that the NLRA Not Apply to the Tribe's Casino, Nor Does the IGRA Supersede the NLRA

There is no evidence to show that Congress intended to exclude tribal enterprises from NLRA coverage. As the Board previously concluded in ***San Manuel***, "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.

Respondent's reliance on Section 2(2)'s exemption for States and political subdivisions is misplaced (Resp. Br. 28). Excluded as a "political subdivision" is an entity that is "(1) created

directly by the State, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." ***San Manuel***, 341 at 1058 (citing ***Hawkins County***, 402 U.S. at 604-05). The Board has explained that Indian tribes and their commercial enterprises "are not created directly by the States, or departments, or administrative arms of State government. Moreover, neither public officials nor the general electorate are at all involved in the selection of an Indian tribe or its enterprises. Indeed, the Supreme Court and several Federal courts of appeals specifically have held that neither Indian tribes nor their enterprises are States or political subdivisions of States (citing cases)." *Id.*

The D.C. Circuit properly rejected the argument that because courts have held that certain entities are impliedly exempt from the "employer" definition, tribal governments should similarly be held impliedly exempt (Resp. Br. 30-31):

> San Manuel argues, however, that nothing in the legislative history or text of the NLRA indicates a Congressional intent to apply the NLRA to tribal governments . . . This point is irrelevant in light of our conclusion above that the NLRA does not impinge on the Tribe's sovereignty enough to warrant construing the statute as inapplicable. In the absence of a presumption against application of the NLRA, the legislative history need not expressly anticipate every category of employer that might fall within the NLRA's broad definition.

San Manuel, 475 F.3d at 1317.

Respondent correctly notes (Resp. Br. 30-31) that the NLRA's exemptions have been construed to cover non-commercial entities like the World Bank,[13] a county gas utility,[14] U.S. territorial government agencies,[15] and Church-operated schools.[16] But the Tribe's operation of its

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[13] ***Herbert Harvey, Inc***., 171 NLRB 238, 238 (1968), enfd. 424 F.2d 770 (D.C. Cir. 1969).

[14] ***NLRB v. Natural Gas Utility Dist. of Hawkins County, Tennessee***, 402 U.S. 600, 609 (1971).

[15] *See* ***Compton v. Nat'l Maritime Union of America***, 533 F.2d 1270, 1274 (1st Cir. 1976); ***Virgin Islands Port Authority v. SIU de Puerto Rico***, 354 F.Supp. 312, 312 (1973).

casino, which competes with other casinos regulated by the NLRA,[17] is not such a "traditional" government function; nor is the casino "unique to [its] status as [an] Indian tribe[]," and it should therefore not be held exempt from the NLRA. *See San Manuel*, 341 NLRB at 1063-64. A casino, even when operated by an Indian tribe, is qualitatively different from entities properly characterized as governmental. *See, e.g.*, ***Hawkins County***, 402 U.S. at 608 (indicia of a county utility's status as "political subdivision" included the utility's power to exercise eminent domain, hold public hearings, and issue written decisions). Nor is a casino similar in nature to an entity such as the World Bank, "an International organization which enjoys the privileges and immunities from the laws of the sovereignty in which it is located customarily extended to such organizations." ***Herbert Harvey, Inc***., 171 NLRB at 240 (discussing ***McCulloch v. Sociedad Nacional de Marineros de Honduras***, 372 U.S. 10, 21-22 (1963)); *see also* ***Saginaw Chippewa Indian Tribe of Michigan v. NLRB***, 2011 WL 6754102, at *8 (E.D. Mich. Dec. 23, 2011) ("[A]lthough the Tribe is correct that it retains sovereign attributes, the extent of its sovereignty is not 'analogous' to that of a foreign government…").

Counsel for the Acting General Counsel recognizes that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory…" ***Wheeler***, 435 U.S. at 323 (citation omitted). Indian tribes may be managed by their own "governments in every meaningful sense" (Resp. Br. 30). However, when examining whether federal law should apply to a particular tribal activity, the courts consistently have looked to the nature of the tribal enterprise, among other factors. *See, e.g.*, ***EEOC v. Karuk Tribe Housing Authority***, 260 F.3d 1071, 1080-81 (9th Cir. 2001) (declining to assert ADEA over trial housing

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[16] ***NLRB v. Catholic Bishop***, 440 U.S. 490 (1979).

[17] *E.g.*, ***New York New York, LLC***, 356 NLRB No. 119, 2011 WL 1113038 (Mar. 25, 2011).

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."); ***Mashantucket***, 95 F.3d at 180 (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").

Respondent also asserts that the ALJ erred in rejecting its argument that the IGRA precludes application of the NLRA (Resp. Br. 32). However, where two federal statutes "are capable of co-existence," the correct standard is that both should be given effect "absent a clearly expressed congressional intent to the contrary." ***Morton v. Mancari***, 417 U.S. 535, 551 (1974). The Board in ***San Manuel*** correctly determined 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. *Id.* at 1064; *see supra* n.2. Respondent argues that Congress "enacted a comprehensive scheme concerning *all* regulation at Indian casinos" (Resp. Br. 32). However, "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, under the IGRA, 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. Compliance with the NLRA, which is designed to "promote[] the free flow of commerce by removing certain recognized sources of industrial strife and unrest" (29 U.S.C. § 151), should serve to promote, not frustrate, Respondent's "economic

development" through its gaming activities (Resp. Br. 26).[18]

D. <u>The Board's Reasons for Exercising Discretionary Jurisdiction Are as Significant Here as in *San Manuel*</u>

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, 1077 (2004) (declining jurisdiction over tribal health clinic providing free health care to members which had "relatively limited impact" on interstate commerce and did not compete with other NLRA-regulated hospitals). Though the location of the gaming activity on Respondent's reservation is a factor weighing against the assertion of jurisdiction (Resp. Br. 27), as in ***San Manuel***, that factor "is insufficient to outweigh the others." 341 NLRB at 1064.

Respondent contends that "the long-standing rule of construction" of ambiguous statutes to favor tribal interests should weigh against application of the NLRA (Resp. Br. 27). However, as in ***San Manuel***, "the NLRA does not impinge on the Tribe's sovereignty enough to indicate a

[18] It is not helpful for Respondent to engage in conjecture about what Congress might have stated in the IGRA if the NLRB had already decided ***San Manuel*** (Resp. Br. 32). For whatever reason, Congress could have, but did *not*, speak to whether the NLRA or other federal laws of general application would apply to Indian tribes or their casinos. *Cf.* ***Chevron USA, Inc. v. NRDC***, 467 U.S. 837, 865 (1984) ("Perhaps [Congress] consciously desired the [agency] to strike the balance at this level . . .; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question . . . For judicial purposes, it matters not which of these things occurred.").

need to construe the statute narrowly against application to employment at the Casino. First, operation of a casino is not a traditional attribute of self-government. Rather, the casino at issue here is virtually identical to scores of purely commercial casinos across the country. Second, the vast majority of the Casino's employees and customers are not members of the Tribe, and they live off the reservation." 475 F.3d at1314-15. *See also* ALJD at 11 ("[T]he 'special attributes' of the Tribe's sovereignty are not implicated.") (citation omitted).

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 NLRA to be applied to the Tribe's casino.

II. THE ALJ CORRECTLY FOUND THAT, COUPLED WITH THE PREVIOUS SUSPENSION FOR ENGAGING IN THE SAME TYPE OF PROTECTED CONDUCT, IT IS EVIDENT THAT THE TRIBE WOULD NOT HAVE DISCHARGED LEWIS IN THE ABSENCE OF HER ROLE AS AN ADVOCATE FOR THE UNION, AND HIS FINDING WAS NOT ERRONEOUS IN FACT OR UNSUPPORTED BY THE EVIDENCE.

Section 102.46 of the Board's Rules and Regulations provides, in part:

(b)(1) Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. If a supporting brief is filed the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief….
(2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.
(c) Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:
(1) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.
(2) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.

(3) The argument, presenting clearly the points of fact an law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on.

Respondent does not articulate the grounds for its exception 23 to the ALJ's finding at page 14, lines 33-35 of his Decision, that the Tribe would not have discharged Lewis in the absence of her role as an advocate for the Union. Respondent merely asserts in its exception that such finding is erroneous in fact and not supported by the evidence that demonstrated "Lewis was discharged for violating the Tribe's Solicitation Policy." At page 7, No. 23, of its exceptions document, Respondent cites to pages 4-5 of its supporting brief to support this exception. However, Respondent provides no grounds, case authority, argument or any references to exception No. 23 whatsoever, in its supporting brief to support such exception.

In the absence of any explanation for Respondent's exception No. 23, Counsel for Acting General Counsel requests that the Board find that such exception is insufficient to put in issue the ALJ's findings regarding Respondent's unlawful suspension and termination of employee Lewis. ***The W-L Molding Company***, 272 NLRB 1239 (1984), citing ***Aitoo Painting Corp***., 238 NLRB 366 (1978); ***Singer Co. v. NLRB***, 429 F.2d 172, 180-182 (8th Cir. 1970); ***NLRB v. Daniel Construction Co***., 731 F.2d 191, 198 (4th Cir., 1984). Accordingly, Counsel for the Acting General Counsel requests that the Board automatically adopt the ALJ's findings regarding Respondent's unlawful suspension and termination of Lewis, in violation of Section 8(a)(3) and (1) of the Act.

In any event, Counsel for the Acting General Counsel contends that the evidence is overwhelming regarding the ALJ's findings concerning the unlawful suspension and termination of Lewis, and such findings were not erroneous in fact.

The amended complaint alleges that Respondent violated Section 8(a)(3) by suspending Lewis on October 23, 2010, because she engaged in union solicitation and distribution activities in an employee hallway at the casino on October 4, and by discharging Lewis on November 15, 2010, because she engaged in the prior union solicitation and distribution activities on October 4 and October 24, as well as union solicitation and distribution activities on November 7, in Bathroom B of the Casino. (GC 1(m)).

Section 8(a)(3) of the Act provides that it shall be an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. In cases involving discrimination based on employees' union activities, under ***Wright Line***, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. den. 455 U.S. 989 (1982), General Counsel has the initial burden of proving protected activity by an employee, employer knowledge of that activity, and animus on the part of the employer. If the General Counsel meets the initial burden, the burden shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's protected activity. ***Wright Line***, *supra* at 1089. This burden is not carried by an employer merely showing that it also had a legitimate reason for taking the adverse action. Rather, it must "persuade" that the action would have taken place in the absence of the protected conduct "by a preponderance of the evidence." ***Roure Bertrand Dupont, Inc***., 271 NLRB 443 (1984). If the employer fails to carry its burden of persuasion, a violation will be found. ***Bronco Wine Company***, 256 NLRB 53, 54 (1981).

The Acting General Counsel has clearly established a prima facie case of discrimination and met its ***Wright Line*** burden as to the suspension and discharge of Lewis for union solicitation and distribution activities. Lewis' union activities date back to about February 2009,

when she initiated contact with a local UAW office and was put in contact with the Union. (TR-55). During the organizing campaign, from February 2009 to December 2010, Lewis engaged in numerous union activities, including attending union meetings; signing union authorization cards; passing out and collecting cards from other employees; conducting local newspaper and radio interviews; and posting her picture on the UAW KeeptheEagleSoaring.com website. (TR-56-59, 60-61; GC 5, 6, 8, 9). Around March 30, 2010, Lewis and four other employees delivered a letter to Chief Kequom expressing their desires to organize with the Union. (TR-59-60; GC 7). By letters dated July 30, 2009 and March 10, 2010, with acknowledged receipt by Respondent, the Charging Party advised Tribal Chiefs Fred Cantu and Kequom regarding its efforts to organize Respondent's employees and invited them to meet. (GC 15, 16, 19-STIP 11, 12, 13, 14). Moreover, Respondent acknowledges that Lewis engaged in union solicitation activities resulting in the disciplinary write-ups issued to her prior to her suspension and discharge, as well as the suspension and discharge themselves. (GC-10, 12, 13, 14, 19-STIP 15-22, 24, 27-29). There is no question that Lewis was engaged in union activities and that Respondent had knowledge of such activities.

There is also no question that Respondent bore animus toward Lewis' activities. Respondent's general animosity toward employees' union activities is evidenced by Perez' acknowledged statement to Lewis, as described above, that she could not engage in solicitation activities, including talking to other employees about unions, in the employee hallway. (GC-26). Respondent's animus toward Lewis' union activities is also evidenced by the multitude of disciplinary write-ups she received for violating the no-solicitation policy, both before her suspension and discharge, as well as the suspension and discharge themselves. These write-ups

are discriminatory on their face by asserting solicitation of union activity as the basis for discipline.[19] (GC 10, 12, 13, 14, 19-STIP 15-22, 24, 27-29)

While acknowledging that it suspended and discharged Lewis for engaging in union solicitation (GC 19-STIP 21, 22, 24, 28, 29), Respondent conclusionarily states in its exception that "[t]he evidence demonstrated that Lewis was discharged for violating the Tribe's Solicitation Policy." However, the ALJ correctly found that Lewis' union solicitations in the employee hallway and Bathroom B of the Casino, resulting in her suspension and termination, could not be banned by Respondent as these areas were "not…work area[s] for purposes of determining the validity of the Tribe's no-solicitation rule." See ALJD at page 12, lines 32-54, and page 14, lines 22-39 (citations omitted).

Employees have the right to engage in solicitation for a union in both work and non-work areas during their non-working time, absent special circumstances. ***Stoddard-Quirk Mfg. Co.***, 138 NRLB 615 (1962). The Board has long concluded that gambling casino and hotel facilities, such as operated by Respondent, are analogous to retail stores for purposes of considering the validity of enforcement of no-solicitation/no-distribution rules in asserted working areas. ***Santa Fe Hotel, Inc***., 331 NLRB 723, 729-730 (2000); ***Dunes Hotel***, 284 NLRB 871, 875 (1987); ***Barney's Club***, 227 NLRB 414 (1976). From this, it is clear that the working areas of a gaming establishment, such as operated by Respondent, encompass the gambling areas of the casino and adjacent aisles and corridors, areas which the Board equates to the selling area of a retail store, but exclude the public bars and restaurants. ***Harolds Club***, 267 NLRB 1167 (1983); ***Barney's Club***, *supra* at 417.

[19] Counsel for the Acting General Counsel does not allege that the write-ups issued on September 30, 2009, and August 30, 2009, violate the Act as they are outside of the statutory Section 10(b) period. However, they certainly provide background evidence as to Respondent's motivation and unlawful discrimination regarding Lewis' subsequent suspension and discharge.

Counsel for the Acting General Counsel contends that the ALJ correctly found that the employee hallway is a non-work area, where employees are privileged to speak to other employees about the Union, and distribute wristbands, on non-working time. Although this union solicitation occurred technically during Lewis' shift hours, it occurred in a non-work area (i.e., away from casino gambling activities) during non-working time at the end of her shift as she was clearly in the hallway to punch out.

Counsel for the Acting General Counsel contends that the ALJ also correctly found that Bathroom B was not a "work area" in which soliciting could be prohibited. The Board, in ***Double Eagle Hotel and Casino***, 341 NLRB 112, 113 (2004), noted that "[g]ambling casinos…have long been considered akin to retail stores for purposes of assessing the legality of employee no-solicitation rules…. Thus, as with a retail store's selling floor, the Respondent lawfully could prohibit employees from soliciting each other in the casino gambling areas, and adjacent aisles and corridors frequented by customers, but it could not lawfully maintain a general ban on that activity beyond that area." The Board concluded that the no-solicitation rule in question was unlawful "at least to the extent that it bars discussion in places outside the gaming area, such as, for example restrooms, public bars and restaurants, sidewalks and parking lots." ***Double Eagle Hotel and Casino***, *supra* at 113 (emphasis added); ***Crowne Plaza Hotel***, 352 NLRB 382, 384-385 (2008).

Without disputing that the solicitation resulting in Lewis' discharge occurred during the shift hours of Lewis and the other employee, Counsel for the Acting General Counsel argues that Lewis' alleged breach of Respondent's no-solicitation policy was momentary, during a bathroom break, within a seven-minute time-span, from 3:12 to 3:19 p.m. (GC 19-STIP 31, 32). The Board has long viewed rules prohibiting union solicitation or activities during an employee's break

times or other nonwork periods as overly broad and presumptively invalid because they could reasonably be construed as prohibiting solicitation at any time. ***Our Way, Inc.***, 268 NLRB 394 (1983); ***Krystal Enterprises Inc***., 345 NLRB No. 15, slip op. at 37 (2005); ***A.P. Painting & Improvements, Inc***., 339 NLRB 1206, 1207 (2003); ***K.B. Specialty Foods Co***., 339 NLRB 740, 742 (2003); ***Becker Group, Inc***., 329 NLRB 103, 109 (1999); ***Carry Companies Of Illinois, Inc***., 311 NLRB 1058, 1070 (1993). In the context of the prior unlawful warning and suspension for the same type of Section 7 conduct, it is clear that Respondent seized upon this brief incident as a pretext to terminate Lewis. This is evident by Respondent's multitude of previous discipline issued to Lewis on September 30, 2009, August 30, 2010, and October 23, 2010, for breach of its no-solicitation policy, as well as Respondent's October 2010 admonishment to Lewis that she could not engage in solicitation activities in the employee hallway. (GC 10, 12, 19-STIP 15, 16, 17, 18, 19, 20). Thus, the record is replete with instances which illustrate Respondent's practices of enforcing its unlawful no-solicitation policy and pattern of unlawful discrimination against Lewis for engaging in union solicitation and distribution activities.

Thus, the ALJ correctly found that Respondent did not meet its burden under ***Wright Line***. Respondent's explanation of its motivation in suspending and firing Lewis is pretextual as the evidence supports the conclusion that Respondent's true motivation was not Lewis' alleged solicitation at the end of a shift or in the bathroom assertedly during working time in working areas, but rather her overall union organizing activities. Respondent acknowledged that, except for Lewis, no other employees employed by Respondent have been disciplined or discharged for violation of Respondent's No-Solicitation Policy implemented on October 13, 2006. (GC 19-STIP 10). The decline in the overall ratings of Lewis' performance evaluations issued to her from 2009 to 2010, the same time as the height of the organizing campaign, when accompanied

by Respondent's references in the comment sections of Lewis' 2010 evaluation to her "attitude" and "negative opinions," further demonstrate Respondent's true motivation for Lewis' suspension and discharge, i.e., her union organizing activities. (GC 17).

Lewis' suspension and discharge were based on a no-solicitation policy fraught with violations. Since the no-solicitation policy was unlawful, it follows that her suspension and discharge for engaging in union solicitation in violation of that policy, were also unlawful. The Board has held that where discipline is imposed on an employee for engaging in Section 7 activities pursuant to an overly broad rule, that discipline is unlawful regardless of whether the conduct could have been prohibited by a lawful rule. ***Double Eagle Hotel & Casino***, *supra* at 116, fn. 3, citing ***Opryland Hotel***, 323 NLRB 723, 728 (1997)[20]; See also, ***The Times Publishing Company***, 231 NLRB 207, 208 (1977), 240 NLRB 1158, 1160 (1979) ("…the Board has consistently held that when an employer promulgates and maintains overly broad no-solicitation and no-distribution rules those rules are invalid for all purposes and not valid in part as they apply to a given area.").

Accordingly, Counsel for the Acting General Counsel requests that the Board adopt the ALJ's findings regarding Respondent's unlawful suspension and termination of Lewis, in violation of Section 8(a)(3) and (1) of the Act.

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[20] Recently, in ***The Continental Group, Inc***., 357 NLRB No. 39, slip op. at 4 (August 11, 2011), the Board outlined limits to the application of the ***Double Eagle*** rule. The Board held there that discipline imposed under an unlawfully overbroad rule only violated the Act where an employee violated the rule by (1) engaging in protected conduct (e.g., concerted solicitation, distribution, or discussion of terms and conditions or employment); or (2) engaging in conduct that otherwise "implicates the concerns underlying Section 7 of the Act." (e.g., conduct that seeks higher wages) but is not protected by the Act because it is not concerted. ***The Continental Group, Inc***., *supra*, slip op. at 3-4. Lewis' union solicitation activities in this regard are clearly protected, thus, the ***Double Eagle*** rule is applicable. Moreover, Respondent has failed to demonstrate that Lewis' conduct on October 4 or November 7 actually interfered with Respondent's operations, and that her interference, rather than the violation of the rule, was the reason for the discipline. See ***The Continental Group***, *supra*, slip. op. at 6. Rather, Respondent merely cites Lewis' violation of the overbroad no-solicitation policy in the October 23 suspension and November 15 discharge disciplines issued to her.

CONCLUSION

For all of the above reasons, Counsel for the Acting General Counsel requests that the National Labor Relations Board affirm the Decision and Order of the Administrative Law Judge finding that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and violated Section 8(a)(3) and (1) of the Act, and grant all of the recommended relief.

Respectfully submitted this 25th day of May, 2012.

/s/ Mary Beth Foy
Mary Beth Foy
Counsel for the Acting General Counsel
National Labor Relations Board
Patrick V. McNamara Federal Building
477 Michigan Avenue – Room 300
Detroit, Michigan 48226-2569
(313) 226-4254
Marybeth.Foy@nlrb.gov