

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

**CHICKASAW NATION operating  
WINSTAR WORLD CASINO**

**Respondent**

**and**

**Cases 17-CA-025031  
17-CA-250121**

**INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS LOCAL 886,  
affiliated with THE INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS**

**Charging Party**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF  
TO THE NATIONAL LABOR RELATIONS BOARD**

## TABLE OF CONTENTS

<b>BACKGROUND</b> .....	1
<b>PROCEDURAL HISTORY</b> .....	1
<b>ISSUES</b> .....	3
<b>RESPONDENT IS AN EMPLOYER WITHIN THE MEANING OF SECTION 2(2) OF THE ACT AND IT IS APPROPRIATE FOR THE BOARD TO ASSERT JURISDICTION OVER THE CASINO</b> .....	3
A. <u>The Board’s <i>San Manuel</i> Framework</u> .....	3
B. <u><i>Coeur d’Alene</i> Exceptions Are Not Applicable and Assertion Of Jurisdiction Is Appropriate Under <i>San Manuel</i></u> .....	6
1. Application of the NLRA to Respondent’s Casino Does Not Interfere With Exclusive Rights of Tribal Self-Government in Intramural Matters .....	6
2. Application of the NLRA to Respondent’s Casino Does Not Abrogate Asserted Treaty Rights.....	8
a. Respondent’s Treaty Rights Were Designed to Shield it from State, Not Federal, Regulation.....	8
b. A Treaty Providing a Right of General Exclusion from Tribal Land Is Insufficient to Exempt the Tribe from Compliance with the NLRA.....	11
3. There Is No Evidence that Congress Intended that the NLRA Not Apply to Respondent’s Casino, Nor Does IGRA Supersede the NLRA .....	13
C. <u>Policy Considerations Militate in Favor of the Assertion of Discretionary Jurisdiction</u> .....	14
D. <u>Respondent’s Arguments for Applying the Tenth Circuit’s Jurisdictional Standard are Unavailing.</u> .....	15
<b>RESPONDENT VIOLATED SECTION 8(A)(1) OF THE ACT BY INFORMING EMPLOYEES THAT THEY DID NOT HAVE THE PROTECTIONS OF THE NATIONAL LABOR RELATIONS ACT</b> .....	17
<b>CONCLUSION</b> .....	17

**TABLE OF AUTHORITIES**

**CASES**

*Chao v. Spokane Tribe of Indians*, 2008 WL 4443821 (E.D. Wash. Sept. 24, 2008) ..... 9

*Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F. 3d 1275 (10<sup>th</sup> Cir. 2010).. 2, 17, 18

*Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985)..... 4, 5, 7

*EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, (8th Cir. 1993) ..... 5

*EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071 (9th Cir. 2001) ..... 8

*Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960)..... 4

*Fla. Paraplegic Assn. v. Miccosukee Tribe of Indians*, 166 F.3d 1126 (11th Cir. 1999). 5

*H.K. Porter v. NLRB*, 397 U.S. 99 (1970) ..... 9

*Jefferson Chemical Co.*, 200 NLRB 992 (1972) ..... 3

*Menominee Tribal Enterprises v. Solis*, 601 F.3d 669 (7th Cir. 2010)..... 8

*Montana v. United States*, 450 U.S. 544 (1981) ..... 7

*NLRB v. Pueblo of San Juan*, 276 F. 3d 1186 (10<sup>th</sup> Cir. 2002) ..... 2, 17, 18

*NLRB v. San Manuel Indian Bingo and Casino*, 475 F.3d 1306 (D.C. Cir. 2007) .. 6, 15, 18

*Oklahoma Tax Commission*, 515 U.S. 450 (1995)..... 10

*Peyton Packing Co.*, 129 NLRB 1358 (1961)..... 3

*Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996) (OSHA) ..... 5, 8

*San Manuel Indian Bingo and Casino*, 341 NLRB 1055 (2004)..... passim

*Smart v. State Farm Ins. Co.*, 868 F.2d 929 (7th Cir. 1989) (ERISA)..... 5, 9

*The Chickasaw Nation v. NLRB*, No. 11-cv-00506-W (W.D. Okla., filed May 10, 2011) ..... 17

*United States Dep’t of Labor v. Occupational Safety & Health Rev. Comm’n (DOL v. OSHRC)*, 935 F.2d 182 (9th Cir. 1991)..... 9, 14

*United States v. E. C. Investments, Inc.*, 77 F.3d 327 (9th Cir. 1996) ..... 12

*United States v. Dakota*, 796 F.2d 186 (6th Cir. 1986)..... 4

*United States v. Farris*, 624 F.2d 890 (9th Cir. 1980) ..... 10, 13

*United States v. Sohappy*, 770 F.2d 816 (9th Cir. 1985)..... 9

*United States v. Wheeler*, 435 U.S. 313 (1978) ..... 8

*Yukon Kuskokwim Health Corp.*, 341 NLRB 1075 (2004) ..... 16

**STATUTES**

Indian Gaming Regulatory Act (25 U.S.C. § 2701 *et seq.*) ..... 5, 14

**TREATIES**

1830 Treaty of Dancing Rabbit Creek, Act of Sept. 30, 1830..... 10, 11

1855 Treaty of Washington, Act of Jun. 22, 1855 ..... 11, 12

1866 Treaty of Washington, Act of Apr. 28, 1866 ..... 11

## **BACKGROUND**

The Chickasaw Nation (Nation) is a federally-recognized American Indian Tribe. The Nation operates several tribal gaming facilities including WinStar World Casino (WinStar), which is located outside of Thackerville, Oklahoma on Nation trust lands within the Nation's treaty boundaries. A majority of WinStar's patrons are non-Indian as is the majority of its workforce.

## **PROCEDURAL HISTORY**

On December 10, 2010, the International Brotherhood of Teamsters, Local 886 (Union) filed an unfair labor practice charge against the Nation, herein referred to as the Respondent, in Case 17-CA-025031. The charge was amended on December 23, 2010, and February 22, 2011, and alleged multiple violations of Section 8(a)(1) of the Act and a violation of Section 8(a)(3) of the Act. On April 8, 2011, the Union filed a second charge against Respondent in Case 17-CA-025121. The charge was amended on May 3, 2011, and alleged multiple violations of Section 8(a)(1) and a violation of Section 8(a)(3) of the Act.

On May 10, 2011, the Regional Director for Region 17 issued an Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing in Cases 17-CA-25031 and 17-CA-25121. Among the violations alleged by the Consolidated Complaint was Paragraph 5(p), which alleged that Respondent, acting through its supervisor and/or agent Bill Foley, "[i]nformed employees that they did not have the protections of the Act because of tribal sovereignty." On that same day, Respondent filed a complaint against the Board in the United States District Court for the Western District of Oklahoma (Civil Action No. 5:11-cv-506-W). The complaint requested an injunction to prevent the Board

from applying the National Labor Relations Act to WinStar. On July 11, 2011, the District Court entered an order granting Respondent's Motion for a preliminary injunction and enjoining the NLRB "from proceeding to hearing on its complaint against the Chickasaw Nation" on the basis that the Tenth Circuit has clearly held that "federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization," citing *Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F. 3d 1275, 1283 (10<sup>th</sup> Cir. 2010) and *NLRB v. Pueblo of San Juan*, 276 F. 3d 1186, 1196 (10<sup>th</sup> Cir. 2002), and finding that under Tenth Circuit law cited above, the NLRA is not applicable to Respondent.

The Board appealed the District Court's Order to the United States Court of Appeals for the Tenth Circuit (No. 11-6209), and entered into settlement negotiations with the Nation. Pursuant to those negotiations, the Board, Respondent, and the Union agreed to jointly request that the District Court modify its July 11, 2011, injunction to permit the NLRB to proceed on the instant Complaint alleging a single violation of the Act -- i.e., paragraph 5(p) of the May 10, 2011 Consolidated Complaint - in order to present to the Board the issue of whether the Board has jurisdiction over Respondent in this matter. On June 20, 2012, the District Court issued an Order granting the request, thus permitting the parties to move to present the jurisdictional issue to the Board.

On July 10, 2012, an Amended Consolidated Complaint issued in Cases 17-CA-025031 and 17-CA-025121, which presents the jurisdictional issue and a single unfair labor practice allegation.<sup>1</sup> On July 11, 2012, Respondent filed its answer which, in

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<sup>1</sup> Previously, on June 29, 2012, Respondent executed a waiver pursuant to *Jefferson Chemical Co.*, 200 NLRB 992 (1972), and *Peyton Packing Co.*, 129 NLRB 1358 (1961). See Ex. 5. Consequently, the remaining allegations from the original Consolidated Complaint are not at issue in this proceeding but may be litigated at a future date.

relevant part, denies that it is subject to the NLRA. On July 19, 2012, Respondent, the Union, and Counsel for the Acting General Counsel of the National Labor Relations Board filed a Joint Motion to Transfer Proceeding to Board on Stipulated Record. On September 4, 2012, the Board granted the parties' Motion.

## **ISSUES**

The parties stipulate that the issues are as follows:

1. Whether the Board has jurisdiction over Respondent.
2. Whether, if the Board has such jurisdiction, Respondent has violated Section 8(a)(1) of the Act by informing employees that they did not have the protections of the Act because of tribal sovereignty.

### **RESPONDENT IS AN EMPLOYER WITHIN THE MEANING OF SECTION 2(2) OF THE ACT AND IT IS APPROPRIATE FOR THE BOARD TO ASSERT JURISDICTION OVER THE CASINO**

It is appropriate for the Board to assert jurisdiction over Respondent pursuant to *San Manuel Indian Bingo and Casino*, 341 NLRB 1055 (2004), *enf'd*, 475 F.3d 1306 (D.C. Cir. 2007), the Board precedent setting forth the standards for whether the Board may assert jurisdiction over a tribal casino. There is no merit to any contention by Respondent that application of the NLRA would violate its sovereignty or abrogate its treaty rights.

#### **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 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 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).<sup>2</sup> The Board in *San Manuel* further determined that while a tribal enterprise may thus qualify as a Section 2(2) employer, the Board would make a further inquiry “to determine whether policy considerations militate in favor of or against the assertion of the Board’s discretionary

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<sup>2</sup> The *Tuscarora-Coeur d’Alene* framework adopted by the Board in *San Manuel* has been widely adopted to sustain the application to tribal enterprises of a number of federal employment and civil rights statutes. See, e.g., *Fla. Paraplegic Assn. v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1129-1130 (11th Cir. 1999) (ADA); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 177 (2d Cir. 1996) (OSHA); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932 (7th Cir. 1989) (ERISA); *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985) (OSHA). Cf. *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 249, 251 (8th Cir. 1993) (holding ADEA did not apply to “strictly internal” employment discrimination dispute between tribal employer and tribe-member employee).

jurisdiction.” *Id.* at 1062. The Board’s purpose in undertaking this additional analytical step was “to balance the Board’s interest in effectuating the policies of the Act with its desire to accommodate the unique status of Indians in our society and legal culture.” *Id.* The Board reasoned that it would not exercise its discretionary jurisdiction over tribal activities, whether or not on reservations, which involved the performance of traditional governmental functions or functions unique to tribal status. *Id.* at 1062-63.<sup>3</sup>

Applying the *Tuscarora-Coeur d’Alene* framework to the facts of *San Manuel*, the Board found that none of the *Coeur d’Alene* exceptions applied to prevent the Board from asserting jurisdiction over the San Manuel Band’s casino. *Id.* at 1063. The Board explained that NLRA jurisdiction would not implicate the Band’s self-governance over intramural matters because “operation of the casino is not an exercise of self-governance.” *Id.* The Band did not allege that any treaty rights were implicated, so the Board found that application of the NLRA would not abrogate such rights. The Board also found that nothing in the NLRA or its legislative history showed that Congress intended to exclude Indians or their commercial enterprises from NLRA jurisdiction. *Id.* The Board further found that discretionary jurisdiction over the Band was proper where the Band’s “casino is a typical commercial enterprise, it employs non-Indians, . . . it caters to non-Indian customers,” and jurisdiction would not “unduly interfere” with tribal self-governance. *Id.*

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

In sum, the Supreme Court’s decisions reflect an earnest concern for maintaining tribal sovereignty, but they also recognize that tribal

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<sup>3</sup> 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.

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*.

***San Manuel Indian Bingo and Casino v. NLRB***, 475 F.3d 1306, 1314 (D.C. Cir. 2007)

(emphasis added).

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

**B. *Coeur d'Alene* Exceptions Are Not Applicable and Assertion Of Jurisdiction Is Appropriate Under *San Manuel***

1. Application of the NLRA to Respondent's Casino Does Not Interfere With Exclusive Rights of Tribal Self-Government in 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). Respondent's operation of its casino and the revenue used for governance functions, though significant to the Nation, are *not*, as a matter of law, an exercise of self-governance within the meaning of the first ***Coeur d'Alene*** exception. ***San Manuel***, 341 NLRB at 1063. Rather, “[i]ntramural matters generally involve topics such as ‘tribal membership, inheritance rules, and domestic relations.’” *Id.* (citations omitted).

Operation of the casino involves no similar *internal* activity.

Indeed, like the San Manuel Band's casino, Respondent's casino is a commercial venture generating income for the Nation from its public customers, a majority of which are not tribal members. The casino competes in the same commercial arena as other nontribal casinos, employing a workforce that consists of a majority of nontribal members, and actively markets its gaming, hotel, restaurants, entertainment, and other retail ventures to venues outside of the Nation including the general public. See *San Manuel*, 341 NLRB at 1061 (“[T]he operation of a casino -- which employs significant numbers of non-Indians and that caters to a non-Indian clientele -- can hardly be described as ‘vital’ to the tribes' ability to govern themselves or as an ‘essential attribute’ of their sovereignty.”); *Menominee Tribal Enterprises v. Solis*, 601 F.3d 669, 674 (7th Cir. 2010) (“The Menominees’ sawmill is just a sawmill, a commercial enterprise.”); *Mashantucket*, 95 F.3d at 181 (“[T]he nature of [the construction company’s] work, employment of non-Indians, and the construction work on a hotel and casino that operates in interstate commerce --when viewed as a whole . . . is distinctly inconsistent with the portrait of an Indian tribe exercising exclusive rights of self-governance in purely intramural matters.”).<sup>4</sup> Moreover, that the casino is owned by the Nation “does not *ipso facto* elevate it to the status of a tribal government.” *Mashantucket*, 95 F.3d at 180.

Finally, the Nation's use of the casino revenue to fund government functions does

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<sup>4</sup> 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]” 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.”).

not make its casino an intramural matter. 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 *United States Dep’t of Labor v. Occupational Safety & Health Rev. Comm’n (DOL v. OSHRC)*, 935 F.2d 182, 184 (9th Cir. 1991); *Chao v. Spokane Tribe of Indians*, 2008 WL 4443821, at \*5 (E.D. Wash. Sept. 24, 2008) (“the economic impact of the application of a federal statute on the tribal business is not a factor to consider”). In short, there is no showing here that any consequences flowing from NLRA application to Respondent’s operation of this casino interfere with the Tribe’s internal tribal governance.<sup>5</sup>

2. Application of the NLRA to Respondent’s Casino Does Not Abrogate Asserted Treaty Rights

a. Respondent’s Treaty Rights Were Designed to Shield it from State, Not Federal, Regulation

The second *Coeur d’Alene* exception, which asks whether a tribe’s treaty rights will be abrogated by application of federal law, also does not preclude application of the NLRA in this case. To fit within the second *Coeur d’Alene* exception, application of a federal statute must jeopardize a specific right that is secured by a treaty. See *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 934-35 (7th Cir. 1989) (treaties only conveyed land to tribe and neither tribe nor court could find a single specific treaty right that would be abrogated by application of ERISA); *United States v. Sohapp*, 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

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<sup>5</sup> 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.

reserve “*exclusive* jurisdiction” over fishing matters nor exempt Indians from laws of general applicability) (emphasis in original). The Ninth Circuit’s decision in *United States v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980) is instructive. The Court there 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 exempted the tribe from the subject of the law at issue -- there gambling -- or otherwise prohibited application of federal law. *Farris*, 624 F.2d at 893. “[T]here would have to be specific language permitting gambling or ‘purporting to exempt Indians from the laws of general applicability throughout the United States regardless of situs of the act.’” *Id.* (citation omitted). The Court further reasoned that “it is presumed that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws, unless it makes specific reference to Indians. . . . But this rule applies only to subjects specifically covered in treaties, such as hunting rights; usually, general federal laws apply to Indians. . . . *general treaty language such as that devoting land to a tribe’s ‘exclusive use’ is not sufficient.*” *Id.* at 894 (emphasis added).

Respondent has not and cannot point to any specific treaty right that would be abrogated by assertion of NLRA jurisdiction. The most relevant treaty language provides that:

The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U. S. shall forever secure said Choctaw Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such

as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.<sup>6</sup>

1830 Treaty of Dancing Rabbit Creek, Act of Sept. 30, 1830, 7 Stat.333, art. 4. This language does not support the argument that Respondent has the right to be free of Federal, as opposed to state, government regulation. With regard to this particular treaty, the Supreme Court stated in *Oklahoma Tax Commission*, 515 U.S. 450, 467 (1995), that “the purpose of the Treaty was to put distance between the Tribe and the States.” The Court further made clear that the 1830 Treaty only limits the applicability of territorial or state law to the Choctaw and Chickasaw Nations by restating the relevant section of the Treaty with the addition of the word “such” to refer specifically to territorial or state laws:

no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants . . .but the U.S. shall forever secure said [Chickasaw] Nation from, and against, all [*such*] laws . . .

Id at 469 (bracketed text in original, emphasis added). Even the minority opinion in *Oklahoma Tax* noted that the treaty promised to secure the Choctaw Nation from all laws, “except those the Nation made itself or that Congress made.” Id at 469 (Breyer, J., concurring in part, dissenting in part).

Moreover, the Choctaw and Chickasaw Nations’ treaties themselves repeatedly provide for the supremacy of Federal law and anticipate federal regulation of tribal activities:

The U.S. shall forever secure said Choctaw Nation from, and against, all

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<sup>6</sup> The Nation has explained that this Choctaw treaty was made applicable to the Chickasaw Nation as well.

laws except such as from time to time may be enacted in their own National Councils, *not inconsistent with the Constitution, Treaties, and Laws of the United States.*

Treaty of Dancing Rabbit Creek, *supra* (emphasis added).

*So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and the Chickasaws shall be secured in the unrestricted right of self government . . .*

1855 Treaty of Washington, Act of Jun. 22, 1855, 11 Stat. 611, art.7 (emphasis added).

The Choctaws and the *Chickasaws agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection for the rights of person and property within the Indian Territory:* Provided, however, such legislation shall not in anywise interfere with or annul their present tribal organization, or their respective legislatures or judiciaries, or the rights, laws, privileges, or customs of the Choctaw and Chickasaw Nations respectively.

1866 Treaty of Washington, Act of Apr. 28, 1866, 14 Stat. 769, art. 7 (emphasis added)

*No law shall be enacted inconsistent with the Constitution of the United States or the laws of Congress, or existing treaty stipulations . . .*

1866 Treaty of Washington at art 8.4 (emphasis added).

b. A Treaty Providing a Right of General Exclusion from Tribal Land Is Insufficient to Exempt the Tribe from Compliance with the NLRA

Respondent may also assert that application of the NLRA to the Nation would abrogate the Nation's general right of exclusion. The applicable treaties set forth some general exclusionary language, e.g.:

...all persons, with their property, who are not by birth, adoption or otherwise citizens or members of either the Choctaws or Chickasaw tribe, and all persons, not being citizens or members of either tribe, found within their limits, shall be considered intruders, and be removed from, and kept out of the same, by the United States agent, assisted if necessary by the military, with the following exceptions, viz: Such individuals as are now, or may be in the employment of the Government, and their families; those

peacefully travelling, or temporarily sojourning in the country or trading therein, under license from the proper authority of the United States, and such as may be permitted by the Choctaws or Chickasaws, with the assent of the United States agent, to reside within their limits, without becoming citizens or members of either of said tribes.

1855 Treaty of Washington, *supra*. However, this assertion fails, as the treaties expressly except individuals employed by the Federal Government from the Nation's general right of exclusion.

In any case, the right to prevent non-tribal members from settling on 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 repeatedly and reasonably concluded that such "general treaty language," which "devot[es] land to [a tribe's] 'exclusive use[]'" is not sufficient to preclude application of federal law. *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). In *DOL v. OSHRC*, 935 F.2d at 184, 186-87, the court was presented with the question of 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 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.

Thus, 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. In these circumstances, the Nation's treaties do not preclude application of the NLRA, which provides statutory rights to employees, including non-tribal members whom the Nation has invited onto its land to perform services critical to the casino's operation.

Other than the right to be free of state laws, and the general right to exclude non-tribal members from tribal land, the only other right established in these treaties is the right of self-governance. The *San Manuel* Board has already determined that application of the NLRA to commercial enterprises such as Respondent's casino does not interfere with the Nation's right to self governance. *San Manuel, supra*. Thus, there are no specific treaty rights that will be abrogated by application of federal law so as to preclude the application of the NLRA here, and the assertion of jurisdiction is entirely appropriate.

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

The third *Coeur d'Alene* exception is also inapplicable because, as discussed above, the Board has concluded that "neither the language of the Act, nor its legislative history, provides any evidence that Congress intended to exclude Indians or their commercial enterprises from the Act's jurisdiction." *San Manuel*, 341 NLRB at 1063.

The Board further determined in *San Manuel* that application of the NLRA does not conflict with IGRA because the NLRA does not regulate gaming, and IGRA does not address labor relations. *Id.* at 1064; *see supra*, n.3. As the D.C. Circuit explained, while IGRA allows tribes and states to regulate gaming, "it is a considerable leap from that bare

fact to the conclusion that Congress intended federal agencies to have no role in regulating employment issues that arise in the context of tribal gaming.” *San Manuel*, 475 F.3d at 1318. Indeed, one of the only three reasons the Secretary of the Interior may rely upon to disapprove a tribal-state compact under IGRA is if the compact violates “any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands.” 25 U.S.C. § 2710(d)(8)(B). This provision strongly suggests that IGRA was not intended to frustrate the application of other federal laws.

C. Policy Considerations Militate in Favor of the Assertion of Discretionary Jurisdiction

The discretionary jurisdiction policy considerations herein are the same as in *San Manuel*. As the Board stated in *San Manuel*, “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 1063-64. *Compare Yukon Kuskokwim Health Corp.*, 341 NLRB 1075, 1076 (2004) (Tribal Health Corporation fulfilled a “unique governmental function . . . the Federal Government’s trust responsibility to provide free health care to Indians.”). As in *San Manuel*, Respondent operates a business that employs non-Indians, caters to non-Indian customers, and competes with other private enterprises regulated by the Act. In these circumstances, public policy weighs in favor of the application of the NLRA to Respondent’s operation of the casino.

For all these reasons, Respondent is an employer within the meaning of Section 2(2) of the Act and it is appropriate for the Board to assert jurisdiction over the casino.

D. Respondent's Arguments for Applying the Tenth Circuit's Jurisdictional Standard are Unavailing.

The Nation argues primarily that the Board should abandon *San Manuel* and adopt the Tenth Circuit's test for Federal jurisdiction over commercial enterprises operated by Indian tribes. But the Board already considered and rejected such an argument in *San Manuel*. Moreover, even under the law of the Tenth Circuit, which the parties have agreed will hear any petition for review or enforcement in this case,<sup>7</sup> the Board has jurisdiction over WinStar World Casino.

Relying on cases such as *Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d at 1283, Respondent argues that the Tenth Circuit requires a "clear and plain" expression of congressional intent before it will apply federal regulations to tribal governments. Under that test, since neither the text nor the legislative history of the National Labor Relations Act mentions Indian tribes, the Act would not apply to a tribe-operated casino. But this is nothing new; the Board heard this argument in *San Manuel* and rejected it in favor of the *Tuscarora-Coeur d'Alene* framework. See 341 NLRB at 1060 n.16.

More importantly for the Tenth Circuit, Respondent's argument suffers from a deeper flaw -- it cannot be squared with other Tenth Circuit precedent recognizing that *Tuscarora* applies in circumstances where Indian tribes act as employers in pursuit of proprietary interests. In *NLRB v. Pueblo of San Juan*, the en banc Tenth Circuit

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<sup>7</sup> In settling the Tenth Circuit appeal of the district court's preliminary injunction of this unfair labor practice proceeding, the Board, the Nation, and the Union stipulated that "any appeal from a final decision" of the Board in this matter "shall be heard by the United States Court of Appeals for the Tenth Circuit." *The Chickasaw Nation v. NLRB*, No. 11-cv-00506-W (W.D. Okla., filed May 10, 2011) (Dkt. No. 59 at ¶7).

reaffirmed that *Tuscarora* supplies the rule of law whenever a tribe acts “in a proprietary capacity such as that of employer or landowner.” 276 F.3d at 1199. By contrast, the strict test urged by Respondent only comes into play “[w]here tribal sovereign authority is at stake.” *Id.* at 1195. Even in *Dobbs*, such a distinction was recognized: “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 (quoting *Pueblo of San Juan*, 276 F.3d at 1199). And, as already explained, the operation of a casino is a predominantly proprietary activity. *See supra* part B.1. Thus, Respondent gains nothing by pointing to the Tenth Circuit’s recent pronouncement in *Dobbs* that “respect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization.” 600 F.3d at 1283. That statement simply does not address the question of *whether* the operation of WinStar World Casino is an exercise of the Nation’s sovereign authority or not – as shown above, it is not. *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1315 (D.C. Cir. 2007) (“[I]mpairment of tribal sovereignty is negligible in this context, as the Tribe’s activity was primarily commercial . . .”).

In sum, the *Tuscarora-Coeur d’Alene* framework, as applied by the Board in *San Manuel*, is the applicable precedent for deciding whether the Board may assert jurisdiction over a tribal casino. Nevertheless, because the parties have all agreed that any petition for review or enforcement in this case will be presented to the Tenth Circuit, it would be appropriate for the Board to explain that the law of the Tenth Circuit also supports the application of *Tuscarora* to the question of Board jurisdiction over the labor

relations of a commercial enterprise such as a casino. And, applying that standard to the facts of this case also leads to the conclusion that Board has jurisdiction.

**RESPONDENT VIOLATED SECTION 8(A)(1) OF THE ACT BY INFORMING EMPLOYEES THAT THEY DID NOT HAVE THE PROTECTIONS OF THE NATIONAL LABOR RELATIONS ACT**

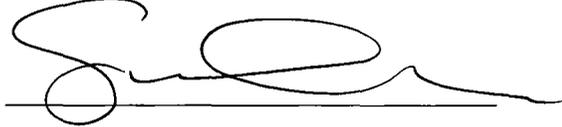
Respondent violated Section 8(a)(1) of the Act when on or about December 18, 2011, acting through its supervisor and/or agent Bill Foley, it informed employees that they did not have the protections of the Act because of the Respondent Nation's sovereignty. Clearly, it is coercive of Section 7 rights to inform employees that they do not have the protection of the Act when indeed they do; such a statement has the tendency to intimidate and coerce employees into abandoning their rights under the Act in fear of retaliation for the exercise of such rights. Indeed, Respondent contests only the Board's assertion of jurisdiction here; it does not contest that it made the alleged statement or that the statement violated Section 8(a)(1).

**CONCLUSION**

Under *San Manuel*, the Board has jurisdiction over Respondent's Casino because the assertion of jurisdiction would not interfere with Respondent's right of self governance over intramural matters, it would not abrogate Respondent's treaty rights, there is no evidence that Congress intended to exclude Respondent from application of the NLRA, and policy considerations favor the assertion of discretionary jurisdiction. Respondent violated Section 8(a)(1) of the Act by informing employees of the Casino that they did not have the protections of the NLRA. The Acting General Counsel seeks

an order requiring Respondent to recognize and respect the Section 7 rights of its Casino employees, and to remedy its violation of the Act.

Respectfully submitted on October 1, 2012

A handwritten signature in black ink, appearing to read 'Susan A. Wade-Wilhoit', written over a horizontal line.

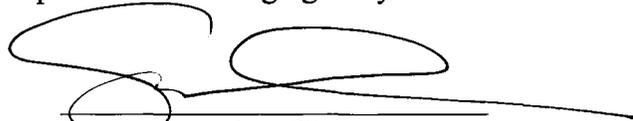
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**Cases 17-CA-025031  
17-CA-025121**

**STATEMENT OF SERVICE**

I hereby certify that I have this date served copies of the foregoing Counsel for the Acting General Counsel's Brief to the National Labor Relations Board on all parties listed below pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with the Office of the Executive Secretary of the National Labor Relations Board and by electronic mail to Counsel for Respondent, Counsel for the Charging Party Union, Respondent and Charging Party

Dated: October 1, 2012



Susan A. Wade-Wilhoit  
Counsel for the Acting General Counsel

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