

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 31

SAN MANUEL INDIAN BINGO & CASINO

Employer

and

SAN MANUEL BAND OF MISSION INDIANS

Interested Party

and

LAW ENFORCEMENT EMPLOYEES BENEVOLENT
ASSOCIATION, LEEBA

Petitioner

31-RC-114638

DECISION AND ORDER

As amended at the hearing, Petitioner seeks to represent a unit of all full-time and regular part-time public safety officers performing guard duties as defined in Section 9(b)(3) of the Act, employed at the Employer's Highland, California facility; excluding public safety assistants, office clerical employees, corporals, professional employees and supervisors as defined in the Act, and all other employees. While neither the Employer nor the Interested Party would stipulate to the appropriateness of the unit, they also did not contend that another unit is more appropriate. Therefore, were I to find that the petition in this matter was appropriately before the Board, the unit sought by Petitioner is appropriate for collective bargaining.

There are two issues in this case. The first issue is what entity employs the public safety officers Petitioner seeks to represent. Petitioner initially filed this petition identifying San Manuel Indian Bingo & Casino (herein Casino) as the employing entity. However, at the hearing, Petitioner amended its petition to identify the Casino and the San Manuel Band of Mission Indians (herein Tribe) as either the joint or single employer of the public safety officers. Petitioner also made clear at the hearing that it seeks to represent the public safety officers regardless of whether the employing entity is the Casino, the Tribe, or both. On the other hand, both the Casino and the Tribe contend that the Casino is not the employing entity on its own or as a joint or single employer with the Tribe. Rather, they maintain that the Tribe alone is the employing entity.

The second issue is whether the Board has jurisdiction in this matter. Both the Casino and Tribe contend that the Board lacks jurisdiction because the Tribe is a distinct independent political community qualified to exercise powers of self-government by reason of tribal sovereignty. Petitioner, on the other hand, contends that no matter which the employing entity is, the Board has jurisdiction in this matter.

Because I conclude that the Board lacks jurisdiction in this matter under the Board's test established in *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), I decline to order an election and dismiss this petition.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. I note that the hearing officer deferred to me motions to

dismiss the petition filed by the Tribe and Casino. I deny the motions for reasons set forth later in this decision.

2. The Casino and Tribe refused to stipulate to the labor organization status of Petitioner. While the record does not contain evidence about Petitioner, I note that the Board has previously concluded that Petitioner is a labor organization within the meaning of Section 2(5) of the Act. *Sands Casino Resort Bethlehem*, 358 NLRB No. 49 (2012). Therefore, I reach the same conclusion.

3. There does not appear to be any dispute that the Casino meets the Board's monetary jurisdictional standards. In this regard, Petitioner, the Casino and the Tribe stipulated that both the Casino and Tribe each purchase in excess of \$5,000 from suppliers located outside the State of California. However, the record is silent with regard to the Casino's gross revenues. Nevertheless, I take administrative notice that the Board asserted jurisdiction over the Casino in *San Manuel Indian Bingo & Casino*, 341 NLRB 1055, and conclude that the Casino meets the Board's monetary jurisdictional standards. Therefore, the jurisdictional question in this matter is limited to whether the Casino and/or Tribe are exempt from the Board's jurisdiction.

4. This decision begins with an analysis of Board law. The second section provides an overview of the Tribe, including its reservation, its governing structure, the role of the Tribe's administrative officer, and the Tribe's labor relations ordinance. The third section provides a detailed description of the management structure and operation of the Tribe's Department of Public Safety, which is where the employees sought by Petitioner are employed. The fourth section includes a detailed description of the job duties and terms and conditions of the employees sought by Petitioner, including the relationship the Department of Public Safety has with other law enforcement agencies

and the role the Casino plays in the employment of the employees in dispute. Finally, this decision ends by applying Board law to the facts of the case and explains my conclusion that the petition in this case should be dismissed.

Board Law

As noted above, the Casino has been involved in a prior Board proceeding, *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), *enfd.* 475 F.3d 1306 (D.C. Cir. 2007). In fact, it is this prior case where the Board reconsidered the question of whether and when to assert jurisdiction over a commercial enterprise wholly owned and operated by an Indian tribe. The Board concluded, contrary to prior precedent, that nothing in the Act precluded the Board from asserting jurisdiction over tribal operations. Moreover, the Board concluded that Federal Indian policy did not require the Board to decline jurisdiction. Therefore, the Board stated that it would apply the three exceptions articulated in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F. 2d 1113, 1116 (9th Cir. 1985) in assessing whether Federal Indian law and policy precludes the Board's assertion of jurisdiction over Indian tribes and their commercial enterprises. Those three exceptions are: whether applying the Act will "touch exclusive rights of self-governance in purely intramural matters," such as "tribal membership inheritance rules, and domestic relations;" whether applying the Act will abrogate any treaty rights; or whether there is proof in the statutory language or legislative history that Congress did not intend the law to apply to Indian tribes.

In addition to applying the three *Coeur d'Alene* exceptions, the Board adopted a discretionary jurisdictional standard. This standard is intended to balance the Board's interest in effectuating the policies of the Act with the need to accommodate the unique status of Indians. Thus, "when the Indian tribes are acting with regard to the

particularized sphere of traditional tribal or government functions, the Board should take cognizance of its lessened interest in regulation and the tribe's increased interest in its autonomy." 341 NLRB at 1063. Conversely, "when Indian tribes participate in the national economy in commercial enterprises, when they employ substantial numbers of non-Indians, and when their businesses cater to non-Indian clients and customers, the tribes affect interstate commerce in a significant way" such that the Board should assert jurisdiction. *Id.* at 1062.

In applying the balancing test, the Board concluded that it would assert jurisdiction over the Casino in the 2004 case.

On the same day that the Board issued the *San Manuel* decision described above, it refused to assert jurisdiction over a tribal enterprise in *Yukon Kuskokwim Health Corp.*, 341 NLRB 1075 (2004). The Board's refusal to assert jurisdiction was based on an analysis of the same policy considerations that led it to assert jurisdiction in *San Manuel*. The Board concluded that the Yukon Kuskokwim Health Corporation was fulfilling a traditionally tribal or government function unique to its status, and thus the Board's interest in asserting jurisdiction was lower than when a tribe is acting in a typically commercial manner. Specifically, the Health Corporation provided free medical care to Indians. Under the Indian Health Care Improvement Act, according to the Board, it is national policy to assure the highest possible health status for Indians, and to provide all resources necessary to effect that policy. Moreover, the Board concluded that the Health Corporation's impact on interstate commerce was relatively limited because 95 percent of its patients were native Alaskans from the geographical area of the corporation and because it did not compete with other hospitals within the purview of the Act. While the facts that the facility was not on tribal land and that it

employed mostly non-Native Alaskans would normally be factors weighing in favor of jurisdiction, the Board noted that no reservations exist in the State of Alaska (thus there was no choice but to operate off reservation), and that the make-up of the work force was likely to change over time because of federally mandated policies to achieve greater employment of natives.

Overview of the San Manuel Band of Mission Indians

The San Manuel Band of Mission Indians is an Indian tribe located on the San Manuel Indian Reservation in San Bernardino County, California.¹ The reservation is about 950 acres in size. On the reservation land are the Casino, parking structures for use by customers of the Casino, a fire station, a community center (which, among other things, houses the tribal government), a service center providing a variety of functions, residences of members of the Tribe, and undeveloped land. Part of the reservation land is open to the public and part is secured. The secured part includes the residential area, the community center, and some other tribal functions not otherwise described. Access to the secured part requires going through a checkpoint or gate manned by employees Petitioner seeks to represent (further details related to this are provided later herein).

Not included in the record is the numerical size of the Tribe, although at one point in the record the Tribe's administrative officer acknowledged that tribal members make up a very small number of the Casino's total customers.

The Tribe's governing structure includes a general council consisting of all tribal members 21 years of age and older. The general council enacts tribal ordinances and

¹ In the Board's 2004 decision involving the same Casino as in this case, the tribe is referred to as the San Manuel Band of Serrano Mission Indians.

legislation and makes major policy decisions not otherwise described in the record. The general council also elects a seven-member business committee. The business committee runs the day-to-day operations of the tribe. According to the Tribe's administrative officer, the business committee is akin to the executive branch of a typical government. The business committee consists of a chair, vice chair, secretary, treasurer, and three standing members. All participants on the business committee are members of the Tribe.

Members of the business committee are paid by the Tribe. Each member has an office in the community center. According to the Tribe's administrative officer, "it's not uncommon," for the members of the business committee to work Monday through Friday.

The Tribe's administrative officer is Jerry Paresa. He is akin to a city manager, in that he supervises all "municipal" functions of the Tribe. These functions include the fire and water departments, the environmental department, and—most relevant to these proceedings—the public safety department. In his role overseeing these departments, Paresa executes directives from the Tribe and makes recommendations to the Tribe on strategic matters. On a daily basis, Paresa meets with members of the business committee, either individually or as a group, to discuss issues. He also has a weekly meeting with the business committee with a set agenda. Reporting to Paresa are various heads of the departments, described in more detail later herein. The tribal government employs a total of 720 employees.

Paresa is not a member of the Tribe and is employed solely by the Tribe. He is not employed by the Casino, and he does not have any supervisory or managerial role related to the Casino. His office is in the community center. None of the managers

who report to Paresa is a member of the Tribe. When the Tribe hires managers who report to Paresa, some or all of the members of the business committee conduct the interviews and decide which candidates to hire.

As noted in the Board's 2004 decision, the Tribe has adopted a tribal labor relations ordinance regulating labor relations. The record in this proceeding reveals that the ordinance precludes security officers from engaging in collective bargaining, because the Tribe considers security issues an intramural function. Therefore, from the Tribe's perspective, collective bargaining would infringe on tribal sovereignty.²

Overview of the San Manuel Indian Bingo & Casino

The Board's 2004 decision involving this same Casino describes in general terms the operation of the Casino, as well as the Tribe's ownership and role in operating it. 341 NLRB at 1055-1056. The record in this matter provides additional detail relevant to the issue of whether to assert jurisdiction here. Specifically, the Casino is owned and operated by the San Manuel Entertainment Authority (EA), which is a distinct governmental instrumentality of the Tribe. The EA oversees all assets and decisions related to the operation of the Casino.

However, there are a few links between the Tribe and the Casino. For instance, the general council of the Tribe enacts tribal ordinances governing both the operation of the Tribe as well as the Casino. Another example is the members of the business committee of the tribal government also make up the membership of the EA. However, other than the fact that the business committee members also constitute the membership of the EA, no one else works for both the Tribe and the Casino. The

² One of the main points raised in Petitioner's post-hearing brief is that the tribal labor relations ordinance infringes on the security officers' Constitutional freedom of association. Whatever the merits of this point, it is not relevant to the issue of whether the Board should assert jurisdiction in this matter.

record does not reveal any other links between the Tribe and the Casino and in fact, makes clear that the Casino and the Tribe have separate federal tax identification numbers and that the management of the Casino is separate from the management of the Tribe.

The Tribe's Department of Public Safety

According to evidence in the record provided by the Tribe, which is not rebutted by Petitioner, the Department of Public Safety (where the employees Petitioner seeks to represent work) is a department of the Tribe--and not a department of the Casino. Thus, John Klein, the Director of the Department of Public Safety, is employed by the Tribe, not the Casino. The offices of the Department of Public Safety are at 101 Pure Water Drive, which is on reservation land. The record is unclear whether this location is the service center; but the record is clear the location is not the community center where the tribal government is located. There are a total of 380 employees in the department.

The public safety department is further divided into five divisions, with a captain being responsible for each division, except for the division labeled "director office," which Klein heads. The other divisions and their functions are: the administrative division, where dispatch, fleet maintenance, evidence, radios and cadets are overseen; the training division, responsible for both mandatory and optional training of all staff in the department; the patrol division, which secures the safety and security of tribal members as well as visitors and guests when they are outside the Casino (including in the parking structures used by customers of the Casino); and the Casino division, charged with protecting the assets of the Casino and the safety of guests and employees who are in the building housing the Casino.

While the record is not entirely clear on whether the supervisory structure below the captain level applies to all or only some divisions, at least with regard to the patrol and Casino divisions, there are lieutenants who report to the captains. These lieutenants oversee the function and operation of the four shifts of public service officers. Reporting to the lieutenants are sergeants, and reporting to either the lieutenants or sergeants (the record is not clear) are corporals. Sergeants and corporals are first-line supervisors. The corporals schedule employees' hours, assign work, determine staffing levels, conduct evaluations, supervise day-to-day activities, and evaluate the seriousness of public safety incidences. Sergeants and corporals are allowed to select their own areas to supervise every six months on the basis of seniority. This means that, based on the bidding, employees in these two classifications could move from the patrol division to the Casino division, and vice versa.

While not specifically addressed (other than agreeing that corporals would be excluded from the unit), it appears that all parties agree that the captains, lieutenants, sergeants and corporals would be excluded from the unit being sought by Petitioner.

With regard to the administrative department, the record contains evidence concerning the dispatchers. Dispatchers take calls from tribal members, Casino departments, and the general public. These calls concern requests for assistance. The dispatchers send out security officers to assist the callers when appropriate. It appears that dispatchers are assigned to take calls from specific groups. For example, a dispatcher might be responsible for calls from the Casino one day and then calls from tribal members the next. The dispatchers track and log calls; they are also the liaison

between the Department of Public Safety and the San Bernardino County sheriff or police department.³

The training division is responsible for all training conducted for the entire department, no matter what the employee's classification and no matter what division the employee is in. Some training is mandatory, and some is optional. Some of the employees employed in the training division are security officers, and therefore would be included in the unit being sought by Petitioner.

Information Regarding Public Safety Officers

Petitioner seeks to represent a unit of public safety officers (PSOs) employed in the patrol and Casino divisions of the department of public safety. This section of the decision first discusses who establishes the terms and conditions of employment and hires the PSOs. Second is a general description of the jobs of PSOs, including their ability to bid for jobs in either the patrol or Casino divisions. The third part of this section describes the role of PSOs in relation to the San Bernardino sheriff's office and the police department. Finally, I discuss the record evidence regarding the role of Casino personnel in the jobs performed by PSOs.

PSOs' Terms and Conditions of Employment and Hiring

There are about 160 PSOs employed by the Tribe in the unit Petitioner seeks to represent. At any one time, 89 PSOs are assigned to work in the Casino division and another 63 are assigned to work patrol division. These assignments to work in one division or the other are not permanent (this is further discussed later herein).

³ Petitioner does not seek to include dispatchers in the unit.

Paychecks for PSOs are issued by the Tribe, and the Tribe considers the PSOs to be employed by it. Petitioner did not contradict record evidence that the tribal general council determines the qualifications needed to become a PSO. Wage rates and the overtime policy for PSOs are identical regardless of whether they work in the patrol or Casino divisions. With regard to overtime, PSOs employed in either the patrol or Casino divisions may sign the list indicating a desire to work overtime in either division. Wages, health insurance, and other benefit costs for PSOs are in the tribal government budget regardless of where PSOs work. On the other hand, costs for employees employed by the Casino are in the Casino's budget—not in the tribal government budget.

Hiring of PSOs is done within the Department of Public Safety. The training sergeant and captain review applications, and based on their review, choose the most qualified. Next, an interview panel (consisting of the training sergeant or captain, as well as a department lieutenant) conducts interviews and submits a list of the best candidates to Public Safety Director Klein. Klein then interviews and selects those hired. The Office of Human Resources follows up with background checks. Discipline and discharge decisions related to PSOs are made by Director Klein, although recommendations may be initiated by supervisors below Klein.

In order to be hired as a PSO, an applicant must be 21 years of age and possess both gun and guard cards. In addition, every PSO must have a gaming license in order to work. With regard to both the gun and guard cards, it appears (but is not entirely clear) that applicants can obtain them after being hired. When hired, PSOs undergo initial training and, during their first year of employment, take an additional 32 hours of training in order to obtain and retain their guard cards. PSOs also carry handguns,

which require PSOs to also have gun cards issued by the State of California. Prior to obtaining gun cards, PSOs must take 6 hours of classroom instruction, and another 6-8 hours of range training. In addition, PSOs have their own training manual, their uniforms are the same regardless of where they work, the logo on their uniforms is “Department of Public Safety Tribal Officer,” and when PSOs are in vehicles while doing their jobs, the logo on the vehicle is “San Manuel Band of Mission Indians – DPS.”

In dispute between Petitioner and the Tribe is what equipment is provided by the tribe and what equipment PSOs must provide for themselves. It is clear that PSOs provide their own handguns and holsters. It is also clear that the Tribe provides vehicles and radios. It appears that at one time PSOs may have had to purchase their own uniforms, but they may not have been required to as of the time of the hearing. However, I conclude that any dispute regarding the question of what equipment PSOs must provide themselves does not impact the ultimate conclusion with regard to whether jurisdiction should be asserted.

The Work Performed by PSOs and Their Bidding Procedure

PSOs maintain the safety of reservation guests and of tribal members. They also protect the assets of the Tribe. In performing these functions, PSOs are divided into two divisions. One division, referred to as the Casino division, protects guests and assets inside the Casino (including the Casino building itself). The other division, referred to as the patrol division, protects tribal members and guests when they are not in the Casino building. This would include guests using the parking structure and using the roads to enter and leave reservation land, including getting to and leaving the Casino. The patrol division also protects the integrity of the reservation’s secured area

as well as the well-being of tribal members while they are on the reservation, including in their residences.

The Casino division consists of 89 PSOs at any one time. These 89 PSOs are assigned to the interior of the Casino. PSOs assigned to the Casino perform a variety of functions. They transport betting chips to tables; they assist patrons who are injured or who have medical problems (including performing CPR); and they monitor guest behavior and can eject guests for a period of time ranging from 30 days to one year for infractions such as panhandling, theft, loitering, or getting into physical altercations. However, PSOs are to obtain authorization from their supervisors before issuing ejection orders. It is unclear how ejections are enforced, as there does not appear to be any central method of monitoring who enters the Casino. In any event, ejected guests sign an acknowledgment that if they gamble at the Casino when under an ejection order, they will not be paid any winnings. PSOs do not guard or protect any other business interests of the Tribe because, other than the Casino, the Tribe has no other business-generating revenue.

PSOs in the patrol division perform many of the same functions as PSOs in the Casino (except functions unique to the Casino, such as transporting betting chips) but do so throughout the reservation. They drive cars provided by the Tribe and patrol the reservation and parking structures, or they occupy the checkpoints (guard shacks) to monitor who enters and exits the secured area of the reservation. In performing work for the patrol division, PSOs operate much like a community police department but with far less power related to criminal matters. PSOs in the patrol division also enforce tribal ordinances on the reservation, both with regard to tribal members and guests. However, the ordinances are limited to two areas – animal control and disorderly

conduct (although there are 11 categories of disorderly conduct). In addition, PSOs in the patrol division serve as bailiffs in the tribal court, respond to residence alarms, act as process servers, and protect ingress and egress with regard to some (unspecified) tribal buildings. PSOs in the patrol division also have the authority to eject. For example, in the last several months, a PSO ejected someone trespassing on the reservation.

With regard to enforcing tribal ordinances, PSOs are dispatched when a call is received or react if they observe a problem. They interview relevant witnesses, collect evidence, and write reports. Those reports are forwarded to the tribal court, which may choose to conduct a hearing. PSOs might testify at the hearing. Tribal ordinances are not enforced in the Casino—at least not by writing a report that is forwarded to the tribal court. Rather, incidences in the Casino are dealt with by ejecting the wrongdoer or by proceeding with a criminal complaint (further described later herein). The record contains little evidence suggesting PSOs' enforcement of tribal ordinances occurs on a regular basis. In fact, Public Safety Director Klein recalled only one incident where a person was prosecuted in tribal court. The incident involved a trespasser on the reservation who refused to cooperate with the PSO and who had a family connection to a tribal member. There is no jail on the reservation; the tribal court does not have the power to incarcerate.

PSOs, whether assigned to the Casino or on patrol, are no different than any other citizen with regard to criminal matters. That is, they do not have the authority to arrest anyone other than conducting a “citizen’s arrest.”⁴ PSOs can choose not to make

⁴ In the State of California, the term used is “private person’s arrest” since one need not be a citizen to make such an arrest. However, for the sake of brevity and clarity, I refer to it as “citizen’s arrest” in this decision.

a citizen's arrest. However, when making a citizen's arrest, the PSO must contact the police department or sheriff's office for further action. An officer would respond, the PSO would brief the officer on the basis for the arrest, and the officer would evaluate and decide on what action is appropriate. PSOs are not authorized to stop someone based on suspicions that the person is driving under the influence of alcohol or drugs. The most PSOs can do is immediately contact the sheriff or police department and report the suspicion.

In most circumstances, PSOs are likely to be the first responders. Depending on the incident (not involving a violation of a tribal ordinance), a PSO may simply observe and write a report or may call the sheriff or police department for assistance.

According to Director Klein, PSOs conduct citizen's arrests on a weekly--if not daily—basis, whether on patrol or working in the Casino. Little detail beyond this statement was provided about these occurrences. Thus, while I assume the fact arrests occur on a weekly, if not daily, basis means that the police department or sheriff is called and an officer responds on a weekly, if not daily, basis, Klein did not specifically so testify.

Director Klein receives a daily blotter that documents all PSO reports during a 24-hour period. Klein reviews it, looking for "significant incidents" that require notification of administrator Paresa or members of the business committee or that require follow-up. In particular, Klein looks for incidents involving death, any tribal member, the use of force, potential liability for the tribe, or police activity on the reservation. Klein sends the chair of the business committee a report on the week's activities on a weekly basis and also forwards significant incidents involving tribal members or requiring follow up by the tribal court.

PSOs work 12.5-hour shifts. Therefore, they work three days one week and then four days the next week. Every six months, PSOs are allowed to bid on the shift and team they would like to work on in both the Casino and patrol divisions. Thus, at least theoretically, PSOs can move between the two divisions within the context of the bidding procedure. However, bids are awarded by seniority, and most PSOs prefer to work in the patrol division rather than the Casino division. Thus, most (but not all) senior PSOs bid to work jobs in the patrol division. One PSO who testified has worked in the Casino for five years because she lacks sufficient seniority to successfully bid on a job in the patrol division. In each of the last three bidding cycles, 8 – 12 PSOs moved between divisions.

PSOs can be temporarily moved from one job to another, including from a job in one division to a job in another division. This occurs only when there is a shortage of personnel in one area due to absenteeism. The record contains little evidence on how often temporary reassignments occur. I note, however, that the PSO who has worked in the Casino for five years testified that on one occasion she was moved to a checkpoint for a period of three days.

The Relationship between the Tribe's Department of Public Safety and County Law Enforcement Agencies

The Tribe has contracts with the sheriff for San Bernardino County as well as with the police department regarding law enforcement on the reservation. One district attorney is devoted to issues arising on the reservation. In addition, one officer from the sheriff is on the reservation full-time (the record is not clear whether this is one officer at all times, or one officer for certain times of the day). As already noted, PSOs are not authorized to stop anyone because of suspicion of driving under the influence, are not

authorized to arrest anyone (other than a citizen's arrest), and are not able to detain anyone to prevent a crime. To quote Public Safety Director Klein, "we are private security as far as our ability to detain and arrest." Thus, for any issues involving more than ejection or violations of tribal ordinances, PSOs contact the sheriff or police department.

The Role of Casino Managers in Relation to PSOs

There is no evidence that managers employed by the Casino (at any level) have a role in hiring, disciplining or evaluating PSOs, or any role in setting terms and conditions of employment of PSOs. Casino managers also do not assign overall responsibilities to PSOs, do not determine whether they will work overtime, and do not determine their shifts. The record is silent, and therefore does not suggest, that Casino managers determine where within the Casino each of the 89 PSOs works. The only record evidence suggesting that Casino managers have any work-related supervision over PSOs is that the managers seem to give PSOs ad hoc instructions regarding some work. One PSO who testified estimated that once per week a Casino manager would instruct him to do something, and he further testified that he complied with those instructions. For example, even though it is not his job, a manager might ask him to carry betting chips to a table. However, he also stated that if a manager in the Casino gave him instructions inconsistent with what he understood his job to be or inconsistent with instructions from his supervisor, he would go to his lieutenant, alert the lieutenant regarding the matter, and then do whatever the lieutenant told the PSO should be done.

Application of Board Law to the Facts

Motion to Dismiss Petition

Both the Casino and Tribe (who were separately represented at the hearing) filed motions to dismiss the petition. In essence, both complain that Petitioner's amendment of the petition at the hearing to identify the employing entity as the Tribe and/or Casino, and further to claim that they may be joint or single employers, was untimely (until the hearing the employing entity was identified as the Casino). While both claimed the late amendments violated their rights of due process, neither claimed to be unprepared to litigate the issues presented by the amendment. More importantly, the amendment could not have impacted the only defense raised by the Tribe--that the Board lacks jurisdiction in this matter. Thus, I conclude no party was prejudiced by the amendment, and the hearing officer properly proceeded with the hearing. *Atlantic Richfield Co.*, 208 NLRB 142 (1974).

The Issue of Joint or Single Employer

Petitioner desires an election be held involving whoever the employing entity is. That is, if I conclude that the employing entity is only the Tribe or only the Casino, then the election would involve the PSOs employed by the Tribe or the Casino. On the other hand, if I find that the Tribe and Casino constitute a single or joint employer, then Petitioner asks that the election involve the PSOs employed by the Tribe and Casino, as single or joint employers.⁵

⁵ Petitioner's post-hearing brief does not address this issue. In fact, the first sentence of the brief suggests that Petitioner has reached the same conclusion that I ultimately reach, which is that the only employer entity of the PSOs is the Tribe. In this regard, Petitioner's brief begins, "PSOs employed by San Manuel Band of Serrano Mission Indians ("Band") perform security functions on the reservation and protect the only-revenue producing entity on the Indian Reservation which is the Casino."

The evidence is clear that the employing entity is not the Casino. There is literally no evidence supporting a finding that the Casino employs the PSOs. There also is little evidence of single employer status. There is no evidence of common management. The record is clear that the tribal members who comprise the business committee of the Tribe also comprise the membership of the EA. Therefore, both the Casino and Tribe are commonly operated at something akin to the chief executive officer level. However, both organizations have separate management from the top of the organization (who report to the business committee and EA, respectively) to the first-line supervisor level. In addition, there is no evidence of functional integration. While it is certainly the case that the PSOs in the Casino work alongside employees employed by the Casino, their work is functionally distinct. Moreover, there is no evidence that the PSOs in the patrol division have any functional integration with employees employed by the Casino. There is also no evidence of centralized control of labor relations. The record does not establish that the business committee members for the Tribe make critical decisions in labor relations for the Casino, nor does it establish that those same members of the business committee make critical decisions in labor relations for the Tribe as members of the EA. If they do make those decisions, it is not reflected in this record. Therefore, the record is insufficient to conclude that the Casino and Tribe are a single employer. Cf. *AG Communications Systems Corp.*, 350 NLRB 168 (2007). Because of the paucity of evidence regarding the roles of the business committee and EA in labor relations decisions, it is impossible to conclude that the Casino and Tribe constitute a joint employer. Thus, I conclude that the employer of the PSOs is the Tribe.

The Issue of Whether the Board Has Jurisdiction

The question of whether to assert jurisdiction over the Tribe as an employer of the PSOs is somewhat difficult because of the lack of further Board guidance on the question when policy considerations weigh against the assertion of jurisdiction.⁶ The reason I focus on the question of whether policy considerations weigh against the assertion of jurisdiction is that I conclude none of the *Coeur d'Alene* exceptions apply. That is, there is no evidence that asserting jurisdiction would abrogate treaty rights, and the Board has already found that there is no proof in the Act or its legislative history that Congress did not intend the Act to apply to Indian tribes. While the Tribe contends that assertion of jurisdiction in this matter would touch on “exclusive rights of self-government in purely intramural matters” (which is the third exception), nothing in the record supports this contention. The employment of PSOs and their job duties do not touch on “tribal membership, inheritance rules, and domestic relations.” On the contrary, the record is replete with examples of how PSOs interact with and control the actions of nontribal members. Thus, the Tribes, as an employer of PSOs, is not engaged in rights of self-government *in purely intramural matters*.

On the other hand, the Board has a lower interest in asserting jurisdiction when a tribe acts in a manner that fulfills a traditionally governmental function. In this case, the Tribe’s employment of PSOs does fulfill a governmental function—providing a level of law enforcement on the reservation. In essence, albeit with significant limits placed on their authority, the PSOs perform the function of municipal law enforcement

⁶ I disagree with the Tribe’s claim in its post-hearing brief that the Board has concluded that employees of a tribe involved in law enforcement are not covered by the Act. The case cited by the Tribe, *Little River Band of Ottawa Indians Tribal Government*, 359 NLRB No. 84 (2013) concerns a Casino where the Board asserts jurisdiction. The Board’s reference to law enforcement personnel is only to state that the employees involved in the case are not law enforcement personnel. The Board makes no finding that law enforcement personnel employed by an Indian tribe are not covered by the Act.

departments. Without the PSOs, the Tribe would be required to contract for even more services with the San Bernardino County sheriff's office or a municipal police department. Significantly, with regard to the PSOs in the patrol division, they do not provide services of an arguably commercial nature. Rather, they enforce tribal ordinances, fulfill certain functions for the tribal court, protect the reservation from trespassers, provide enhanced security to the residences of tribal members as well as to some tribal government buildings, and patrol the roads within the reservation. These are similar to the services provided by governmental law enforcement agencies.

A majority of the PSOs provides security services in the Casino, and the Board asserted jurisdiction over the Casino as an employer of the employees employed by the Casino. One of the reasons the Board asserted jurisdiction over the Casino as an employer is the fact that a significant percentage of the Casino customers was not members of the Tribe. Here however, the focus of the responsibility of the PSOs is protecting the Tribe's assets. Arguably, one of those assets is the goodwill and well-being of the Casino's customers. Thus, while the PSOs ensure the well-being of customers of the Casino and while the vast majority of those customers are not Tribe members, the PSOs do so not as part of the Casino's commercial enterprise but rather on behalf of the Tribe to protect the value of the Tribe's sole commercial source of revenue.

In addition, the Tribe, as employer of the PSOs, is run by managers and supervisors who are employed by the Tribe, with the ultimate authority over the operation of the Department of Public Safety resting with the Tribe's business committee. The members of this business committee are elected by the members of the Tribe.

In conclusion, the Tribe, as an employer of the PSOs, is not similar to a traditional commercial enterprise and is fulfilling the unique governmental function of providing law enforcement services to the reservation and protecting the tribal members and their assets individually as well as the assets of the Tribe as a whole. Thus, “the character of (the employer’s) enterprise,” as well as its principal purpose to protect tribal members and their assets, as well as the commercial assets of the Tribe, “militate against the Board’s assertion of jurisdiction.” *Yukon Kuskokwim Health Corp.*, 341 NLRB at 1076. Specifically, it appears that the Tribe, as the employer of PSOs (as opposed to as an operator of the Casino), exerts little impact on interstate commerce. In reaching this conclusion, and although not contained in the record, I acknowledge that it is likely that most of the PSOs are not tribal members, and that there is no evidence that there is a hiring preference for tribal members when filling PSO positions.

In light of the foregoing and the record as a whole, I dismiss this petition because the Board does not have jurisdiction over the Tribe as an employer of public safety officers.⁷

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the National Labor Relations Board’s Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. The request for review must contain a complete statement of the facts and reasons on which it is based.

⁷ In dismissing this petition, I do so only for the reasons given. I have not considered the Tribe’s arguments in its post-hearing brief that the Board’s 2004 decision in *San Manuel* was incorrectly decided, or that processing the petition in this matter in and of itself violates the Tribe’s sovereign immunity.

Procedures for Filing Request for Review: A request for review must be received by the Executive Secretary of the Board in Washington, D.C., by close of business (5:00 p.m. Eastern Time) or be received by the Board in Washington by **November 29, 2013**, unless filed electronically. If filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Standard Time on November 29, 2013. Consistent with the Agency's E-Government initiative, parties are encouraged, but not required, to file a request for review electronically.** Section 102.114 of the Board's Rules do not permit a request for review to be filed by facsimile transmission. A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Upon good cause shown, the Board may grant special permission for a longer period within which to file a request to review. A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to

the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

Signed at Minneapolis, Minnesota, this 14th day of November, 2013.

/s/ Marlin O. Osthus

Marlin O. Osthus, Acting Regional Director
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