NO. _____

In the
Supreme Court of the United States

SOARING EAGLE CASINO AND RESORT, an enterprise of the Saginaw Chippewa Indian Tribe of Michigan,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM A. SZOTKOWSKI
JESSICA INTERMILL
HOGEN ADAMS PLLC
1935 W. County Rd. B2
Suite 460
St. Paul, MN 55113
651-842-9100

SEAN REED
GENERAL COUNSEL
SAGINAW CHIPPEWA
INDIAN TRIBE
7070 East Broadway
Mt. Pleasant, MI 48858
989-775-4032

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
MICHAEL D. LIEBERMAN
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
202-234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

February 12, 2016

QUESTIONS PRESENTED

For more than sixty years, the National Labor Relations Board correctly declined to exercise jurisdiction over tribal operations on tribal lands. But in recent years, the Board has belatedly asserted the extraordinary power to regulate the on-reservation activities of sovereign Indian tribes, precipitating a three-way circuit split in the process. Nothing in the text of the National Labor Relations Act changed in that interval; it contains no language granting the Board authority over Indian tribes. Nor has the language of various Indian treaties, like those between the Saginaw Chippewa Indian Tribe and the United States, changed; they continue to recognize the Tribe's authority to exclude non-members. And despite the Board's complete lack of expertise in Indian law, the Board now dictates that some tribal operations are subject to the NLRA and others are not based on its evaluation of the centrality of certain functions to tribal sovereignty and subtle differences in treaty language.

This case presents two questions, both of which have divided the courts of appeals:

(1) Does the National Labor Relations Act abrogate the inherent sovereignty of Indian tribes and thus apply to tribal operations on Indian lands?

(2) Does the National Labor Relations Act abrogate the treaty-protected rights of Indian tribes to make their own laws and establish the rules under which they permit outsiders to enter Indian lands?

PARTIES TO THE PROCEEDING

Petitioner Soaring Eagle Casino and Resort was the Petitioner and Cross-Respondent in the Sixth Circuit. Respondent National Labor Relations Board was the Respondent and Cross-Petitioner in the Sixth Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner Soaring Eagle Casino and Resort is a governmental enterprise of the Saginaw Chippewa Indian Tribe of Michigan. The Tribe is a federally recognized Indian Tribe. It has no parent corporation and has issued no stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

For the first six decades of its existence, the National Labor Relations Board ("Board" or "NLRB") never sought to exercise jurisdiction over tribal operations on Indian lands. And for good reason. Under longstanding principles of inherent tribal sovereignty—as well as the treaties that many tribes have signed with the United States—Congress must clearly express any intent to limit tribal sovereignty or abrogate treaty rights. Nothing in the National Labor Relations Act ("NLRA") or its legislative history, which are entirely silent regarding whether the Board has jurisdiction over tribes, comes close.

In 1998, even though there had been no change to either the text of the NLRA or the relevant Indian treaties, the Board began to assert jurisdiction over tribal labor policy and tribal operations on Indian lands. Remarkably, even though the Board had neither experience nor expertise in matters of Indian law, it created and sought to apply an amorphous jurisdictional test that involves an ad hoc balancing of tribal sovereignty against the Board's own policy concerns. More recently, the Board has also drawn distinctions between tribes based on subtle differences in treaty language.

Today, more than a decade after the Board's initial foray onto Indian reservations, the law in this area is—to put it charitably—a mess. The Tenth Circuit has correctly held that the Board lacks jurisdiction over tribal labor policy because nothing in the NLRA clearly abrogates tribes' inherent sovereignty. In reaching that holding, the Tenth Circuit rejected the Ninth Circuit's opposite approach,

which presumes that federal statutes abrogate tribal sovereignty unless Congress clearly states otherwise. The D.C. Circuit, in contrast, has upheld the Board's jurisdiction over Indian tribes under a balancing test—a test that is different from but no less amorphous than the Board's balancing test—based on that court's determination that the NLRA does not abrogate tribal sovereignty *too much*.

The Sixth Circuit further deepened this acknowledged split. In a 2-1 decision in *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537 (6th Cir. 2015), the panel majority followed the Ninth Circuit's approach and held that even a statute that is entirely silent regarding its applicability to Indian tribes (such as the NLRA) can displace a tribe's sovereign authority. Judge McKeague dissented, arguing that the majority's approach was contrary to longstanding principles of Indian law and that the court should have instead followed the Tenth Circuit's approach.

Just three weeks after the *Little River* decision, a separate panel of the Sixth Circuit issued its decision in this case, which underscored this confusion. The panel expressly disagreed with *Little River* (while reluctantly applying it) and then split 2-1 over whether language in the Saginaw Chippewa's Treaties with the United States made an outcome-determinative difference, an issue that implicates a separate circuit split. Quite remarkably, the Sixth Circuit then denied en banc review in this case and *Little River*, even though a majority of the six judges to consider the statutory issue agreed that the Board lacks jurisdiction.

The net result of all of this is that the Board—an agency with absolutely no expertise in Indian law—is exercising authority over some (but not all) tribal operations on tribal lands, drawing lines based on its own evaluation of tribal sovereignty and subtle differences in treaty language, unless the tribe is fortunate enough to be able to seek review in the Tenth Circuit. This situation is wholly untenable. A tribe's sovereignty should turn on neither the happenstance of whether its reservation lies within the Tenth Circuit nor the Indian-law determinations of the Labor Board. Instead, tribal sovereignty should turn on statutory or treaty language, which in this case both point toward the same conclusion: the Board's exercise of jurisdiction is *ultra vires*.

OPINIONS BELOW

The Sixth Circuit's opinion is published at 791 F.3d 648 and reproduced at Pet.App.1-58. The Board's order is published at 361 NLRB No. 73 and reproduced at Pet.App.61-66. That order adopts in full an earlier order, which is published at 359 NLRB No. 92 and reproduced at Pet.App.67-110.

JURISDICTION

The Sixth Circuit issued its decision on July 1, 2015, and denied a timely petition for rehearing en banc on September 29, 2015. Pet.App.59-60. On December 16, 2015, Justice Kagan extended the time to file a petition for certiorari until February 26, 2016. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND TREATY PROVISIONS INVOLVED

The Treaty of 1855, 11 Stat. 633, is reproduced at Pet.App.111-19, and the Treaty of 1864, 14 Stat. 657, is reproduced at Pet.App.120-30. The relevant provisions of the NLRA, 29 U.S.C. §§152, 158(a), are reproduced at Pet.App.131-36.

STATEMENT OF THE CASE

A. The Board's Newfound Desire To Assert Jurisdiction Over Tribes

Indian tribes are "domestic dependent nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014). As dependent sovereigns, tribes are subject to Congress' plenary authority. But, "unless and until Congress acts, the tribes retain their historic sovereign authority." *Id.* This Court has long held that courts may construe a federal statute as impairing tribal sovereignty only if Congress clearly expresses its desire to reach that result. *See*, *e.g.*, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149-52 (1982).

For the first six decades of its existence, the Board did not exercise jurisdiction over tribes on their reservations. The Board occasionally asserted jurisdiction over *non-tribal* employers operating on Indian reservations. *See, e.g., Navajo Tribe v. NLRB*, 288 F.2d 162, 164 (D.C. Cir. 1961). But it simultaneously acknowledged that "Federal Indian law and policy preclude Board jurisdiction" over *tribal* operations in Indian country. *Fort Apache Timber Co.*, 226 N.L.R.B. 503, 506 (1976). The Board followed this Court's precedent and refused to abrogate tribal

sovereignty because the NLRA had not "specifically provided to the contrary." *Id.*

But in 1998, the Board changed course. It argued that the NLRA preempted a tribe's right-to-work ordinance. The district court granted summary judgment to the tribe and the Tenth Circuit (sitting en banc) affirmed. *See NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002). The court concluded that the tribe "retains the sovereign power to enact its right-to-work ordinance … because *Congress has not made a clear retrenchment of such tribal power as is required to do so validly*." *Id.* at 1191 (emphasis added). The Tenth Circuit also rejected the Board's reliance on *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960). *Tuscarora* noted in passing that federal statutes of general applicability presumptively apply to *individual* Indians, but the Tenth Circuit emphasized that this dictum "does not apply where an Indian tribe has exercised its authority as a sovereign." 276 F.3d at 1199.

Undeterred, the Board again attempted to assert jurisdiction over a tribe in 2004, even though nothing had changed in the text of the NLRA or federal Indian law since the Tenth Circuit's decision. *See San Manuel Indian Casino Emps. Int'l Union*, 341 N.L.R.B. 1055, 1059 (2004). The Board asserted that this intrusion into tribal sovereignty was needed because tribal enterprises were becoming "serious competitors with non-Indian owned businesses." *Id.* at 1062.

As support for its assertion of jurisdiction, the Board cited the very same dictum from *Tuscarora* that

the Tenth Circuit had found inapposite. *Id.* at 1059-60. The Board made clear that it was not asserting jurisdiction over all tribes. Instead, it would consider, on a case-by-case basis, "whether policy considerations militate in favor of or against the assertion of the Board's discretionary jurisdiction." *Id.* at 1062. The Board concluded that this "new standard" would "better accommodat[e] the need to balance the Board's interest in furthering Federal labor policy with its responsibility to respect Federal Indian policy." *Id.* at 1055-59. The Board embraced that amorphous balancing of competing policies even though it readily concedes that its "'expertise and delegated authority'" pertain to the former and not the latter. Pet.App.11.

In *San Manuel Indian Casino v. NLRB*, 475 F.3d 1306, 1311 (D.C. Cir. 2007), the D.C. Circuit departed from the Tenth Circuit's holding and upheld the Board's assertion of jurisdiction over tribes, albeit under a test different from (but no more administrable than) the balancing test the Board applies. The court acknowledged that "*Tuscarora*'s statement is of uncertain significance" and is "in tension with the longstanding principles that (1) ambiguities in a federal statute must be resolved in favor of Indians, and (2) a clear expression of Congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty." *Id.*

The D.C. Circuit nonetheless concluded (without citation) that "[t]he total impact on tribal sovereignty at issue here amounts to some unpredictable, but probably modest, effect on tribal revenue and the displacement of legislative and executive authority that is secondary to a commercial undertaking." *Id.* at

1315. Under its new sliding-scale approach to tribal sovereignty, the court concluded that "the NLRA does not impinge on the Tribe's sovereignty *enough* to indicate a need to construe the statute narrowly against application to employment at [a tribal casino]." *Id.* (emphasis added).

B. The Saginaw Chippewa Tribe, the Treaties, and the Casino

The Saginaw Chippewa Indian Tribe of Michigan ("Tribe") is a federally recognized Indian tribe with sovereign authority over its territory in central Michigan. The Isabella Reservation was set apart for the Tribe by Executive Order in 1855 and secured by treaties in 1855 and 1864. Pet.App.111-19, 120-30. For many years, the Reservation lacked any meaningful economic opportunity, and tribal members lived in substandard housing without running water, accessible only by unpaved roads. C.A.App.239, 256.[1]

In 1998, the Tribe opened the Soaring Eagle Casino and Resort ("Casino"), which brought "tremendous socio-economic change" to the Reservation. C.A.App.250-51. Under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §2702, and the Tribe's own laws, C.A.App.96-98, the Tribe operates the Casino on tribal trust land as a governmental endeavor to "provide a funding source for the exercise of tribal sovereignty and the operation of tribal governmental programs and services," C.A.App.61-62. The Tribe relies on the Casino "to raise the funds necessary to finance and expand its social, health, education and governmental services

[1] "C.A.App." refers to the Appendix in the Sixth Circuit.

programs, increase employment within the Reservation and improve the Tribe's on-Reservation economy." C.A.App.60. The Casino generates 90% of the Tribe's governmental income and is used to fund nearly all of the Tribe's 37 departments and 159 programs. Pet.App.5.

These programs could not exist without the Casino's governmental revenue stream. C.A.App.225-26. Any disruption of the Casino's operations would have a "devastating" impact on the Tribe and its provision of government services. C.A.App.248. The Tribal Council accordingly maintains "very detailed" oversight of the Casino. C.A.App.219. For example, the Tribal Council hires all Casino management, requires regular reports from the Casino's departmental managers, and approves all of the Casino's contracts with outside vendors. C.A.App.218-19, 228-29. The Tribal Council's enactments, including its employment policies, reflect the "cultural values and the heritage of [the] community." C.A.App.215.

Tribal law also makes clear that the Tribe retains the power to exclude individuals from its sovereign territory, including the Casino. C.A.App.147-51. The right to exclude is grounded in the Tribe's inherent sovereignty and secured by the Treaties of 1855 and 1864. Those Treaties protect the Tribe's right to govern itself and exclude unwanted persons from the Reservation. Pet.App.121. While negotiating the 1855 and 1864 Treaties, tribal negotiators specifically bargained for the Tribe's right to exclude unwanted intruders from the Reservation in perpetuity. Pet.App.78 n.8; C.A.App.161-62, 216, 272-74.

Consistent with the Tribe's Treaties and inherent sovereignty, tribal law provides that a non-member who enters and works within the Reservation "does so only as a guest upon invitation of the Tribe." C.A.App.147. The Tribal Council has adopted specific rules for Casino employees that are listed in an Associate Handbook. Pet.App.5. The handbook includes a neutral no-solicitation policy that is not targeted at labor solicitation, but prohibits all employees from soliciting at the Casino for any purpose. Pet.App.5-6.

Throughout 2009 and 2010, a Casino employee (who is not a member of the Tribe) repeatedly violated the Tribe's policies by engaging in unapproved union solicitation on the Reservation. The Tribe progressively disciplined and eventually terminated that employee for violating its employment law. Pet.App.6-7.

C. Proceedings Before the Board

At a labor union's request, the Board filed a complaint against the Tribe, alleging that the Tribe's application of its law to the employee in question violates the NLRA. The Tribe defended on the ground that the Board lacks jurisdiction over the Casino because the NLRA does not expressly apply to tribes and does not abrogate either the Tribe's inherent sovereign authority or its rights under the 1855 and 1864 Treaties.

In the proceedings before an Administrative Law Judge, the Board demonstrated that its expertise does not extend beyond labor law to Indian law. For example, when the Tribe offered expert testimony concerning the Indian negotiators' understanding of

certain treaty provisions, the union and Board objected that Indian understanding of the Treaties—a foundational tenet of Indian-treaty interpretation—was irrelevant. C.A.App.261, 266. The ALJ also noted several times that he was unfamiliar with the governing law, remarking that "this seems like a very unusual situation … *is all very—appears to be very new to me*." C.A.App.259-60, 262 (emphasis added).

Despite his obvious lack of expertise with federal Indian law and policy, the ALJ applied the Board's *San Manuel* policy-balancing test, *see supra* at 5-6, and unsurprisingly concluded that labor policy triumphed. The ALJ downplayed the impact on tribal sovereignty, concluding that: (1) "applying the Act to the Tribe's casino operations would not interfere with its rights of self-governance of intramural matters"; and (2) "application of the Act does not abrogate the Tribe's treaty right to exclude nontribal members from its land." Pet.App.92, 95. The ALJ thus asserted "discretionary jurisdiction over the Tribe," Pet.App.96, ordered the Tribe to "cease and desist" from applying its no-solicitation law, and ordered the employee to be reinstated with full backpay, Pet.App.105-08.

The Board subsequently affirmed the ALJ's "rulings, findings, and conclusions." Pet.App.9. Cross-petitions to the Sixth Circuit followed. After a voluntary remand in the wake of *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), a constitutionally composed Board reconsidered the matter de novo and reaffirmed the ALJ's original decision. Pet.App.62.

D. Proceedings Before the Sixth Circuit

The Tribe again appealed to the Sixth Circuit, and its case was fully briefed and argued before a panel of

that court. But before the panel could issue its decision in this case, another Sixth Circuit panel issued its own decision in *NLRB v. Little River Band of Ottawa Indians Tribal Government*, 788 F.3d 537 (6th Cir. 2015). Like this case, *Little River* raised the question of whether the Board has jurisdiction over a tribe, but (unlike this case) *Little River* did not address whether the Board's assertion of jurisdiction was foreclosed by a treaty-based right to exclude. *See* Pet.App.26 n.9 ("no treaty right at issue" in *Little River*).

1. The *Little River* panel held by a 2-1 vote that the Board could exercise jurisdiction over a tribal casino located on tribal land. The panel followed the approach of the Ninth Circuit, under which "federal laws generally applicable throughout the United States apply with equal force to Indians on reservations." *Little River*, 788 F.3d at 547 (quoting *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985)). In other words, the panel concluded that "aspects of inherent tribal sovereignty can be *implicitly divested by comprehensive federal regulatory schemes that are silent as to Indian tribes.*" *Id.* at 548 (emphasis added). In reaching that holding, the panel emphasized that it "[does] not agree" with the Tenth Circuit's decision in *Pueblo of San Juan*, which held that federal statutes of general applicability "do not presumptively apply" where a tribe has "'exercised its authority as a sovereign.'" *Id.* at 549-50.

Judge McKeague dissented, arguing that the panel majority's decision "impinges on tribal sovereignty, encroaches on Congress's plenary and

exclusive authority over Indian affairs, conflicts with Supreme Court precedent, and unwisely creates a circuit split." *Id.* at 556. Judge McKeague explained why the panel's reliance on *Tuscarora* was misplaced. *Id.* at 557-59. He chided the Board for its "[e]xtraordinary" decision to continue asserting jurisdiction over tribes even after the Tenth Circuit's decision in *Pueblo of San Juan*. *Id.* at 559. And he argued that the Tenth Circuit's approach "is true to the governing law and should be adopted in the Sixth Circuit as well." *Id.* at 561.

2. Just 22 days after the *Little River* panel issued its decision, a different panel of the Sixth Circuit issued its decision in this case. The court concluded that it was bound by circuit precedent to follow *Little River* and affirm the Board's jurisdiction over the Casino. Pet.App.25-26. But, remarkably, *all three members of the panel* joined a lengthy opinion explaining why they believed *Little River* was incorrectly decided.

In particular, whereas the *Little River* majority adopted the Ninth Circuit's approach from its *Coeur d'Alene* decision, the panel in this case would have rejected that approach because it "fails to respect the historic deference that the Supreme Court has given to considerations of tribal sovereignty in the absence of congressional intent to the contrary." Pet.App.51-52. Applying *Montana v. United States*, 450 U.S. 544 (1981), the panel would have held that "the Tribe as a sovereign" may "choose to place conditions on its contractual relationships with … nonmembers." Pet.App.38. Thus, "if writing on a clean slate," the panel would have held that "the

Tribe has an inherent sovereign right to control the terms of employment with nonmember employees at the Casino, a purely tribal enterprise located on trust land." Pet.App.42.

Because this case, unlike *Little River*, implicates treaty rights as well as the Tribe's inherent sovereignty, the panel also addressed (and divided over) the separate question whether "the language of the 1855 and 1864 Treaties prevent[s] application of the NLRA to the Casino's activities." Pet.App.12. The panel majority found this question "close" but concluded that a "general right of exclusion" in a treaty is "insufficient to bar application of federal regulatory statutes of general applicability." Pet.App.23.

Judge White dissented in relevant part. She agreed that "*Little River* was wrongly decided" and controlling, but nonetheless believed that the Tribe's treaty rights made an outcome-determinative difference. She emphasized that "the Tribe … has treaty rights protecting its on-reservation activities," and that "the Tribe would reasonably have understood" the right to exclude in its 1855 and 1864 Treaties "to mean that the federal government could not dictate, in any way, what the Tribe did on the land it retained." Pet.App.54-56. She concluded that the Tribe's "power to place conditions on a non-member's entry necessarily includes the power to regulate, without federal interference, the non-member's conditions of employment." Pet.App.57.

* * *

In the end, four of the six judges to consider the relevant issues in this case and *Little River* concluded

that the Board lacks jurisdiction over tribal operations on tribal lands. But through happenstances of timing, the Board effectively prevailed by a 2-4 vote.

Both Petitioner and the Little River Band sought rehearing en banc. The Board agreed that en banc review was appropriate in light of the "extensive critique in *Soaring Eagle* of the panel's rationale." Board Resp. to Pet. for Reh'g at 5, No. 14-2239 (6th Cir. Aug. 28, 2015). Yet, quite remarkably, the Sixth Circuit denied both petitions for rehearing. This Petition followed.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to address two closely related questions about the scope of federal authority over Indian tribes, both of which have divided the lower courts. The Court should grant certiorari on both questions to ensure that it has before it each of the possible defenses to the Board's assertion of jurisdiction over Indian tribes. And the Court should grant certiorari now, before the Board goes any further in balancing away the sovereignty of tribes.

I. First, the Court should grant certiorari to resolve an acknowledged three-way split of authority over whether the NLRA abrogates tribes' inherent sovereign authority to control their own employment decisions on tribal lands. The Tenth Circuit holds that the NLRA does not abrogate tribal sovereignty because nothing in the statute reflects a clear and unambiguous congressional intent to regulate tribes. In stark contrast, the Sixth Circuit now applies the exact opposite presumption, holding that the Board has jurisdiction because nothing in the NLRA

specifically *excludes* tribes. And the D.C. Circuit crafted a third rule, holding that it will evaluate the Board's jurisdiction over tribes on a case-by-case basis depending on that court's perception of the *degree* of intrusion into tribal sovereignty.

The Sixth Circuit's approach to inherent tribal sovereignty is flatly inconsistent with this Court's Indian law jurisprudence. Whereas this Court has repeatedly held that only a clear expression from Congress can *divest* tribes of their inherent sovereignty, the Sixth Circuit has inverted that rule, holding that federal statutes apply to tribes unless Congress has expressly *protected* tribal sovereignty. Under a proper application of this Court's precedents, this should have been an easy case. Nothing in the NLRA even remotely suggests that Congress gave the Board—an agency with no expertise whatsoever regarding Indian law—the power to abrogate tribal sovereignty.

II. Second, the Court should grant certiorari to address the related question of whether and under what circumstances a federal statute may override a treaty-based right to exclude. Many tribes, including the Saginaw Chippewa, have signed treaties with the United States that guarantee the right to determine who may enter the tribe's reservation. This Court has repeatedly emphasized that a tribe's right to exclude necessarily includes the subsidiary power to place conditions on the circumstances in which non-Indians will be allowed to enter and remain within a reservation.

Once again, this Court applies a clear-expression rule *in favor* of tribal sovereignty and against

inadvertent abrogation of treaty obligations. And once again the Sixth Circuit somehow flipped that into a clear-expression rule *against* tribal sovereignty. That holding deepens another circuit split and is an independent ground for decision, as Judge White's dissent demonstrated. The Tenth Circuit properly holds that only a clear expression of congressional intent can abrogate a treaty-protected right to exclude. In stark contrast, the Seventh, Ninth, and now Sixth Circuits hold that even a federal statute that is silent as to Indian tribes can override treaty language. If the decision below stands, the end result will be that the "federal government's agreement with the Tribe is worth no more than the paper on which it was written." Pet.App.58 (White, J., dissenting).

III. Absent this Court's intervention, the Labor Board will continue to usurp Congress' power to regulate Indian affairs and will continue to tinker with Indian law issues and treaty-interpretation questions wholly outside its ken. To be clear, the Board's position is not that all tribes are subject to the NLRA. Rather, the Board reserves the right to draw fine distinctions between tribal functions (with casinos covered but other tribal operations not) and between tribes (based on the nuances of treaty interpretation). This dynamic has nothing to recommend it. Article I of the Constitution grants *Congress*, not the Board, plenary and exclusive authority over Indian affairs. And the application of the NLRA to tribes should turn on statutory or treaty language, not on the happenstance of whether a tribe is located in the Tenth Circuit or on fine distinctions drawn by an administrative agency with no expertise in Indian law.

I. The Sixth Circuit's Holding That The NLRA Displaces Tribes' Inherent Sovereign Authority Deepens An Acknowledged Circuit Split And Is Wrong On The Merits.

A. The Circuits Are Divided Over Whether the NLRA Displaces Inherent Tribal Authority.

In the wake of the Sixth Circuit's decisions in this case and *Little River*, there is a clearly defined three-way split of authority over whether and under what circumstances the Board may exercise jurisdiction over tribes.

1. The Tenth Circuit, sitting en banc, has squarely rejected the Board's attempt to override a labor ordinance enacted by an Indian tribe. In *Pueblo of San Juan*, the tribe adopted a right-to-work ordinance that applied to all "employment on Pueblo lands." 276 F.3d at 1189. The Board brought suit to enjoin that ordinance, arguing that it conflicted with, and was thus preempted by, the NLRA.

The Tenth Circuit disagreed. After carefully examining the relevant precedents from this Court, the Tenth Circuit concluded that divestiture of a tribe's inherent sovereign authority "will only be found where Congress has manifested its clear and unambiguous intent to restrict tribal sovereign authority." *Id.* at 1194. Especially in light of the canon "requiring resolution of ambiguities in favor of Indians," courts "do not lightly construe federal laws as working a divestment of tribal sovereignty," and should do so "*only where Congress has made its intent clear*." *Id.* at 1194-95 (emphasis added).

Applying those principles, the Tenth Circuit had little difficulty rejecting the Board's assertion of jurisdiction. All agreed that "neither the legislative history of the NLRA, nor its language, make any mention of Indian tribes." *Id.* at 1196. And "[s]ilence is not sufficient to establish congressional intent to strip Indian tribes of their retained inherent authority to govern their own territory." *Id.* The Tenth Circuit thus concluded that "Congress did not intend by its NLRA provisions to preempt tribal sovereign authority to enact its right-to-work ordinance." *Id.* at 1200.

2. Whereas the Tenth Circuit applies this Court's presumption that federal statutes that are silent regarding Indian tribes do *not* divest tribes of their sovereign authority, the Sixth Circuit now applies the exact opposite presumption. In its *Little River* decision—which the lower court used to rule against the Tribe in this case—the Sixth Circuit held that "a federal statute creating a comprehensive regulatory scheme *presumptively applies to Indian tribes*." *Little River*, 788 F.3d at 547 (emphasis added). To reach that holding, the court applied "the framework set forth in" the Ninth Circuit's decision in *Coeur d'Alene*. *Id.* at 548; *accord Coeur d'Alene*, 751 F.2d at 1116 (rejecting "the proposition that Indian tribes are subject only to those laws of the United States expressly made applicable to them").

Under that framework, the Sixth Circuit held that the NLRA "applies to the Band's operation of the casino unless the Band can show either that the Board's exercise of jurisdiction 'touches exclusive rights of self-governance in purely intramural

matters' or that 'there is proof by legislative history … that Congress intended [the NLRA] not to apply to Indians on their reservations.'" *Little River*, 788 F.3d at 551 (quoting *Coeur d'Alene*, 751 F.2d at 1116). Finding no clear indication that Congress did *not* intend for the NLRA to apply to Indian tribes, the Sixth Circuit affirmed the Board's jurisdiction over the Little River Band's tribal casino. *Id.* at 551-55.

The Sixth Circuit's approach unquestionably conflicts with the Tenth Circuit's holding in *Pueblo of San Juan*. As Judge McKeague explained in *Little River*, the Tenth Circuit "considered … and definitively rejected" the very same arguments that the Sixth Circuit found controlling. *Id.* at 561 (McKeague, J., dissenting). Similarly, all three Sixth Circuit judges on the panel in this case disagreed with "the *Little River* majority's adoption of the *Coeur d'Alene* framework [and] its analysis of Indian inherent sovereign rights." Pet.App.26. And all three judges further recognized that "[t]he Tenth Circuit … has rejected the *Coeur d'Alene* framework." Pet.App.46. There is no question that this case would have been decided differently if it had arisen in the Tenth Circuit.

3. The D.C. Circuit has taken yet another approach to analyzing whether the Board has jurisdiction over tribes. In *San Manuel*, the Board alleged that a tribe denied union representatives access to a tribal casino in violation of the NLRA. The D.C. Circuit found the issue to be "particularly difficult" in light of "conflicting Supreme Court canons of interpretation" and the fact that a tribal casino was "strongly commercial" but also "in some sense

governmental." 475 F.3d at 1310. The court thus adopted a sliding-scale test under which the "determinative consideration" is "the *extent* to which application of the general law will constrain the tribe with respect to its governmental functions." *Id.* at 1313 (emphasis added). If "such constraint will occur," then "a clear expression of Congressional intent" is needed to displace the Tribe's authority. But if the statute "relates only to the extra-governmental activities of the tribe … then application of the law might not impinge on tribal sovereignty." *Id.*

Conducting its own balancing of the tribe's sovereign interests, the D.C. Circuit concluded (without citation) that allowing the Board to regulate a tribal casino would have an "unpredictable, but probably modest, effect on tribal revenue and the displacement of legislative and executive authority." *Id.* at 1315. The court held that this "limited impact" "does not impinge on the Tribe's sovereignty *enough* to indicate a need to construe the [NLRA] narrowly against application to employment at the Casino." *Id.* (emphasis added).

Thus, whereas the Tenth Circuit applies a presumption in favor of tribal authority and the Sixth and Ninth Circuits apply a presumption against tribal authority, the D.C. Circuit "applies a fact-intensive analysis of the tribal activity at issue and a policy inquiry comparing the federal interest in the regulatory scheme at issue with the federal interest in protecting tribal sovereignty." Pet.App.50. In short, the D.C. Circuit has "steered a middle course" that "depart[s] from established principles of Indian law" but does not go quite as far as the "*Coeur d'Alene*

approach." *Little River*, 788 F.3d at 559-60 (McKeague, J., dissenting).

B. The Sixth Circuit's Holding is Flatly Contrary to this Court's Precedents.

This Court's review is imperative not only because of the three-way circuit split but also because the Sixth Circuit's decision to permit Board jurisdiction over a tribe's on-reservation activities is flatly contrary to an unbroken line of this Court's precedents.

1. This Court has repeatedly reaffirmed, as recently as two years ago, that "[a]lthough Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Bay Mills*, 134 S. Ct. at 2032. It is an "enduring principle of Indian law" that Congress must "unequivocally express" its intent to abrogate tribal sovereignty. *Id.* at 2031-32. Where tribal sovereignty is at stake, courts must "tread lightly in the absence of clear indications of legislative intent." *Merrion*, 455 U.S. at 149.

A tribe's "general authority, as sovereign" includes the power "to control economic activity within its jurisdiction." *Id.* at 137. And this Court has squarely rejected the notion that a tribe's "commercial activities" are distinct from its sovereign interest in "self-governance." *Bay Mills*, 134 S. Ct. at 2037; *accord Kiowa Tribe of Okla. v. Mfg. Techs.*, 523 U.S. 751, 757-58 (1998) (refusing to "draw [a] distinction" between "tribal self-governance" and tribal "commercial activity").

Under those precedents, this should have been an easy case. The Tribe's no-solicitation policy was

designed "to control economic activity within [the Tribe's] jurisdiction," *Merrion*, 455 U.S. at 137, and reflects a sovereign judgment about the operation of tribal businesses on tribal land. And the Casino is integral to the Tribe's sovereignty; it is a tribal-government enterprise that funds 90% of the Tribe's programs and plays a paramount role in tribal governance. But the Board ordered the Tribe to cease and desist from applying tribal law at a tribal casino on tribal land.

Nothing in the NLRA gives even the slightest indication that Congress intended for the Board—which admits it lacks any expertise in Indian law—to intrude upon the Tribe's inherent sovereignty. If Congress wanted to single out tribal casinos for special treatment, it had every opportunity to do so in IGRA. Instead, in both 1935 (when it enacted the NLRA) and 1988 (when it passed IGRA), Congress did not evince the slightest intent to treat sovereign Indian tribes like ordinary private-sector employers.[2] Indeed, given that when Congress squarely considered applying the NLRA to government employers, it expressly exempted them, *see* 29 U.S.C. §152(2), it strains credulity to think that tribes are the *only* sovereigns subject to the Board's jurisdiction.

2. In holding to the contrary, the Sixth Circuit relied heavily on this Court's statement in the 1960

---

[2] Congress is well aware of how to include Indian tribes in a regulatory scheme when it chooses to do so. For example, in the Federal Power Act, Congress granted the power to condemn "'tribal lands embraced within Indian reservations.'" *Tuscarora*, 362 U.S. at 114.

Tuscarora decision 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." *Tuscarora*, 362 U.S. at 116. That reliance was badly misplaced. "While the *Tuscarora* statement has blossomed into a 'doctrine' in some courts … closer inspection of the *Tuscarora* opinion reveals that the statement is in the nature of dictum and entitled to little precedential weight." *Little River*, 788 F.3d at 557 (McKeague, J., dissenting).

The pertinent question in *Tuscarora* was whether the Federal Power Act authorized a power-plant operator to exercise eminent domain power over tribal land. 362 U.S. at 115. That question had a straightforward answer because the definitions in the Federal Power Act expressly encompassed "'tribal lands embraced within Indian reservations.'" *Id.* at 118. Thus, unlike the NLRA, the Federal Power Act gave "every indication that, within its comprehensive plan, *Congress intended to include lands owned or occupied by any person or persons, including Indians*." *Id.* (emphasis added).

Moreover, *Tuscarora* addressed only issues of land ownership, not "questions pertaining to the tribe's sovereign authority to govern the land." *Pueblo of San Juan*, 276 F.3d at 1198. The sentence in *Tuscarora* regarding statutes of general applicability was "made in the context of property rights, and [does] not constitute a holding as to tribal sovereign authority to govern." *Id.* at 1199. Indeed, all three cases that the Court cited in support of that proposition addressed whether federal tax statutes

applied to *individual Indians*.[3] Those cases did not address the very different question of when a federal statute should be construed as displacing a *tribe's* inherent sovereign authority.

In all events, in the fifty-plus years since *Tuscarora* was decided, this Court has never even *cited* that sentence again, much less suggested that it stands for the sweeping proposition embraced by the Sixth Circuit. Instead, this Court has emphasized that *Tuscarora* "expressly reaffirmed" the clear-expression rule *in favor of* Indian sovereignty. *See Cty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 248 n.21 (1985). *Tuscarora* is entirely consistent with this Court's oft-repeated holding that federal statutes should be construed as intruding upon inherent tribal sovereignty only if there is a clear indication that Congress intended that result.

3. Finally, the D.C. Circuit's ad hoc sovereignty-balancing test—a modified version of the test the Board applies—has nothing to recommend it. That approach interprets statutes based on a judicial evaluation of the *degree* of intrusion into the tribe's sovereignty, rather than a proper evaluation of congressional intent. *See San Manuel*, 475 F.3d at 1315.

Moreover, neither the Board nor the D.C. Circuit has specified how much intrusion into tribal sovereignty is "enough" to foreclose application of the NLRA. Indeed, any attempt to balance tribal

---

[3] *See Okla. Tax Comm'n v. United States*, 319 U.S. 598 (1943); *Superintendent of Five Civilized Tribes v. Comm'r*, 295 U.S. 418 (1935); *Choteau v. Burnet*, 283 U.S. 691 (1931).

sovereignty interests against federal labor law policies would "not really [be] appropriate, since the interests on both sides are incommensurate." *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment). Much like "judging whether a particular line is longer than a particular rock is heavy," *id.*, the D.C. Circuit's test is incoherent in theory and unworkable in practice.

II. The Sixth Circuit's Holding That The NLRA Abrogates The Tribe's Treaty-Based Right To Exclude Is Wrong And Conflicts With Other Courts' Approaches To Treaty Rights.

In addition to holding that the NLRA displaces the Tribe's inherent sovereign authority, the Sixth Circuit also held—over a dissent from Judge White—that the NLRA abrogates the Tribe's treaty rights. That ruling is wrong in its own right and also implicates another circuit split over how employment statutes like the NLRA interact with rights of exclusion secured by treaties between tribes and the United States. This Court should grant certiorari to consider both questions presented because they are independently certworthy and because the Tribe's treaty-based rights provide an alternative basis for finding the NLRA inapplicable. As Judge White's dissent makes clear, the Tribe's treaties with the United States would foreclose the Board's jurisdiction even if *Little River* were correctly decided.

A. The Sixth Circuit Failed to Give Proper Weight to the Tribe's Treaty Rights.

1. In the 1800s, the United States entered into treaties with a number of Indian tribes. Those treaties often involved a cession of tribal lands in exchange for

payment from the United States and formal recognition of the tribe's sovereignty over a defined reservation. *See*, *e.g.*, Pet.App.2-3; *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 175 (1999); *United States v. Dion*, 476 U.S. 734, 737 (1986). Many of those treaties also recognized the tribes' unconditional right to exclude non-Indians from tribal lands, as well as the "lesser power to place conditions" on the circumstances in which non-Indians would be allowed to enter and remain within a reservation. *Merrion*, 455 U.S. at 144.

This Court has long protected Indian treaty rights, both out of respect for tribal sovereignty and in recognition that "treaties were imposed upon [tribes] and they had no choice but to consent." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). Three canons of treaty interpretation ensure that Indian treaty rights are not "easily cast aside." *Dion*, 476 U.S. at 739. *First*, this Court "interpret[s] Indian treaties to give effect to the terms as the Indians themselves would have understood them." *Mille Lacs*, 526 U.S. at 196. That is, "[h]ow the words of the treaty were understood by [the Indians], rather than their critical meaning, should form the rule of construction." *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 582 (1832).

Second, treaties involving tribes "are construed more liberally than private agreements," *Choctaw Nation v. United States*, 318 U.S. 423, 431 (1943), with any ambiguous provisions "resolved in [the Indians'] favor," *McClanahan v. Ariz.*, 411 U.S. 164, 174 (1973); *accord Mille Lacs*, 526 U.S. at 200 ("[T]reaties are to be interpreted liberally in favor of the Indians.").

Third, this Court applies a clear-expression rule to protect Indian treaty rights from congressional abrogation. Although Congress has plenary power to abrogate treaties, this Court has repeatedly "required that Congress' intention to abrogate Indian treaty rights be clear and plain." *Dion*, 476 U.S. at 738. Indeed, *only* Congress can divest a tribe of core aspects of its sovereignty such as its land or treaty rights. *See*, *e.g.*, *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) ("[O]nly Congress can divest a reservation of its land and diminish its boundaries."); *United States v. Celestine*, 215 U.S. 278, 285 (1909). And when Congress does choose to abrogate treaty rights, "it must clearly express its intent to do so." *Mille Lacs*, 526 U.S. at 202.

2. In the 1864 Treaty between the Tribe and the United States, the United States agreed to set aside the Reservation for the Tribe's "'exclusive use, ownership, and occupancy.'" Pet.App.3, 121. It is "undisputed" that "the Treaties preserved the Tribe's right to exclude non-Indians from living in the territory." Pet.App.3. And that power to exclude non-Indians "necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct." *Merrion*, 455 U.S. at 144; *see also Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 335 (2008) (tribe's "power to exclude" includes the "power to set conditions on entry").

The Tribe, from 1864 to the present, has shared that understanding of its treaty-based right to exclude. It is undisputed that the Tribe successfully removed an unscrupulous missionary and a federal

agent from its reservation in the 1800s. Pet.App.77-78. And, in modern times, the Tribe enacted laws describing the terms on which it could exclude persons from the Reservation. *Id.* At all times, the Tribe understood that it could impose conditions of entry "on those it permitted to enter." Pet.App.56 (White, J., dissenting); *see* C.A.App. 263-66, 272-74.

Exercising that sovereign right secured by treaty, tribal law unambiguously provides that any person who enters and works within the Reservation "does so only as a guest upon invitation of the Tribe." C.A.App.147. And tribal law provides that a "condition[] … on continued presence," *Merrion*, 455 U.S. at 144, is that invitees who work at the Casino must comply with Tribal law, including the no-solicitation policy. Yet the Board ordered the Tribe to reinstate (*i.e.*, invite back) the employee who had violated tribal law, in direct abrogation of the Tribe's treaty-protected right to exclude.

This Court's cases are clear that only Congress may abrogate rights protected by Indian treaties. *See Celestine*, 215 U.S. at 284. But the NLRA unquestionably lacks a "clear and plain" congressional intent "to abrogate Indian treaty rights," *Dion*, 476 U.S. at 738, as it is "entirely silent with respect to Indians and Indian tribes," Pet.App.18. Indeed, even the majority below conceded that "the Board [failed] to point to any other act of Congress, or even any legislative history, that would demonstrate Congress's intent to abrogate the rights established by the 1855 and 1864 Treaties." *Id.* Judge White correctly treated that silence as outcome-determinative. Pet.App.56.

The panel majority, by contrast, failed to follow this Court's precedent applying a clear-expression rule *in favor of* the Tribe's treaty rights and instead inverted that rule and applied a clear-expression rule *against* treaty rights. According to the panel, the 1864 Treaty's "general right of exclusion" does not shield the Tribe from federal regulation because the Treaty does not "detail with any level of specificity the types of activities the Tribe may control or in which it may engage." Pet.App.23. But that analysis is exactly backwards. Under this Court's precedents, it is the *statute*, not the treaty, that must provide the requisite specificity. The Tribe's treaty right of exclusion remains in force unless and until a statute specifically abrogates it. *See, e.g.*, *Mille Lacs*, 526 U.S. at 203 (finding no "'clear evidence'" of congressional intent to abrogate treaty).

It is thus irrelevant that the Treaty does not specifically address solicitation and does not "expressly state that the NLRA does not apply to the Tribe." Pet.App.55 (White, J., dissenting). Indeed, the panel majority's specificity requirement asks for the impossible. There is little doubt that, under the 1864 Treaty, the Tribe could have—and did—exclude unscrupulous visitors and even federal agents from the Reservation. The Tribe also retained the right to impose and enforce conditions on entry into tribal lands. The Tribe's authority to exclude a worker who enters the reservation as a guest and flagrantly disregards the rules clearly laid out in the handbook is just a modern analog of the treaty-based right to exclude. The Board's demand for more specificity 150 years after the fact would improperly render those

rights a nullity. *See*, *e.g.*, *United States v. Winans*, 198 U.S. 371, 380 (1905).

B. The Circuits Are Divided Over the Test for Determining Whether Treaty Rights Have Been Abrogated.

The decision below deepens a circuit split over whether generally applicable federal employment statutes abrogate treaties protecting tribes' right to exclude non-Indians. Whereas the Tenth Circuit appropriately applies a default rule in favor of treaty rights that can be displaced only by a clear expression from Congress, the Seventh, Ninth, and now the Sixth Circuits apply the opposite default rule. Applying the *Coeur d'Alene* framework in the treaty context, the Sixth, Seventh, and Ninth Circuits presume that generally applicable federal statutes apply to tribes and can be displaced only by treaty language that specifically addresses tribal commercial activities.

In *Donovan v. Navajo Forest Products*, 692 F.2d 709 (10th Cir. 1982), the Tenth Circuit addressed these principles to decide whether the Occupational Safety and Health Act (OSHA) abrogated tribal treaty rights. The treaty at issue—like the one here—protected the Navajo Tribe's broad right of exclusion, providing that "no persons except those herein so authorized … shall ever be permitted to pass over, settle upon, or reside in" tribal lands. *Id.* at 711. OSHA, like the NLRA, is silent regarding its applicability to Indian tribes.

Properly applying this Court's precedent, the Tenth Circuit held that the treaty protected the tribe from federal intrusion into a tribal business enterprise. Any limitations on treaty rights "must be

expressly stated or otherwise made clear from surrounding circumstances and legislative history." *Id.* at 712. Finding no such express statement in OSHA, the court refused to "permit divestiture of the tribal power to manage reservation lands so as to exclude non-Indians from entering thereon merely on the predicate that federal statutes of general application apply to Indians just as they do to all other persons." *Id.* at 714.

The Seventh and Ninth Circuits, like the panel majority below, have applied the exact opposite clear-expression rule. Instead of presuming the vitality of treaty rights and looking for a clear expression of abrogation, those courts assume the applicability of the *statute* and look for a clear expression in the *treaty*. In other words, those courts apply a default rule that "generally applicable statutes typically apply to Indian tribes," *Snyder v. Navajo Nation*, 382 F.3d 892, 895 (9th Cir. 2004), and hold that this default rule can be displaced only for "subjects specifically covered in treaties," *U.S. Dep't of Labor v. Occupational Safety & Health Review Comm'n* ("*U.S. DOL*"), 935 F.2d 182, 186 (9th Cir. 1991).

In *U.S. DOL*, for example, the Ninth Circuit considered whether a tribe must permit OSHA inspectors onto its land despite treaty language setting aside the land for the tribe's "exclusive use." *Id.* at 184. Even though the case dealt with the same statute as *Navajo Forest Products* and with nearly identical treaty language, the Ninth Circuit's analysis and conclusion could not have been more different from the Tenth Circuit's. Instead of searching for a clear statement of abrogation in OSHA, the court

presumed that OSHA applied and searched for a clear exemption in the treaty. Because the treaty (unsurprisingly) did not expressly mention workplace safety issues, the Ninth Circuit refused to recognize a "conflict between the Tribe's right of general exclusion and the limited entry necessary to enforce [OSHA]." *Id.* at 186; *accord Smart v. State Farm Ins. Co.*, 868 F.2d 929, 934-35 (7th Cir. 1989) (holding that ERISA abrogated tribal treaty rights because the treaties did not protect a "specific … right that would be affected by application of ERISA").

* * *

Although the Sixth, Seventh, and Ninth Circuits purported to distinguish the Tenth Circuit's *Navajo Forest Products* decision, that argument does not withstand scrutiny. In all four cases, the tribe possessed a treaty right to exclude unwanted outsiders, and in all four cases, the relevant federal statute said nary a word about Indian tribes. Yet the Tenth Circuit found the treaty language to be controlling and enforceable, while the other three circuits held that the federal statutes trumped any treaty rights.

Judge White's dissent demonstrates the importance of granting certiorari on both issues presented in this petition. While the right to exclude guaranteed to the Saginaw Chippewa in the 1864 Treaty can be construed as part of the sovereign authority of every tribe, the treaty language can also be construed as a wholly independent bulwark against the NLRA's applicability, as Judge White's dissent demonstrates. *See* Pet.App.54-58. If the Court grants plenary review to consider the NLRA's application to

tribes, it should have before it all the alternative theories that could support the Act's inapplicability.

III. Whether The Board Has Authority Over Tribes Is An Important And Recurring Issue That Merits The Court's Immediate Review.

Congress has "'plenary and exclusive'" power to legislate with respect to Indian tribes. *United States v. Lara*, 541 U.S. 193, 200 (2004). This Court has repeatedly recognized that Congress is the branch best-equipped "to weigh and accommodate the competing policy concerns" when deciding whether to limit the sovereignty or treaty rights of Indian tribes. *Bay Mills*, 134 S. Ct. at 2037-38 (quoting *Kiowa*, 523 U.S. at 759). The Board's newfound desire to assert jurisdiction over Indian tribes "encroaches on Congress's exclusive and plenary authority over Indian affairs." *Little River*, 788 F.3d at 556 (McKeague, J., dissenting).

Importantly, the Board has not simply declared that the NLRA applies to all tribal operations. Instead, the Board reserves the right to pick and choose among tribal operations based on its amorphous balancing test and its conception of whether the tribe is engaged in "traditionally tribal or governmental functions" or acting "in a manner consistent with [its] mantle of uniqueness." *San Manuel*, 341 N.L.R.B. at 1063. Employing that balancing test, at least to date, the Board has principally asserted jurisdiction over tribal casinos rather than other types of tribal operations. But that selective enforcement only underscores that the Board has usurped Congress' authority over the tribes. Just as nothing in the text of the NLRA provides any

support for asserting any jurisdiction over tribes, absolutely nothing in the statute authorizes the Board to draw distinctions among tribal operations depending on the Board's understanding of whether the operations are "traditionally tribal."

The Board's effort to single out tribal casinos from other tribal operations is particularly problematic for two reasons. First, Congress itself addressed the specific issue of tribal casinos at length in IGRA. Congress clearly envisioned that tribal gaming would compete with commercial gaming enterprises. Yet nowhere in the host of provisions regulating tribal gaming is there any indication that the NLRA applies to the operations sanctioned by IGRA. In other words, both the NLRA and IGRA are entirely silent about the application of the federal labor laws to tribes and tribal gaming. If there is any cause for treating tribal casinos differently from other tribal operations, that distinction must come from a Congress that has actively considered issues of Indian gaming, not from a specialized labor agency.

Second, the Board's effort to separate tribal casinos from other operations of tribal government betrays the Board's lack of expertise when it comes to Indian law and policy. When Congress enacted IGRA in 1988, it correctly predicted that "the operation of gaming by Indian tribes" would promote "tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. §2702(1). Tribes' gaming operations "cannot be understood as … wholly separate from the Tribes' core governmental functions." *Bay Mills*, 134 S. Ct. at 2043 (Sotomayor, J., concurring). Rather, Indian gaming is often the

revenue source that makes possible the rest of tribal government, including social programs, health care, and education. *See id.*; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218-20 (1987).

The Soaring Eagle Casino is a case in point. The Tribe relies on the Casino "to raise the funds necessary to finance and expand its social, health, education and governmental services programs, increase employment within the Reservation and improve the Tribe's on-reservation economy." C.A.App.60. The myriad governmental programs the Tribe administers today—such as police, fire, social service, and behavioral health programs—are a direct result of the Tribe's gaming operations. C.A.App.222-26, 239, 247-48. The Board's attempt to segregate gaming from tribal governance is an unworkable distinction that this Court has already rejected precisely because Congress has not drawn that line. *See Bay Mills*, 134 S. Ct. at 2037-39.

But the Board is not content just to distinguish among different kinds of tribal operations. It has also drawn distinctions among tribes based on its own interpretation of different Indian treaties. Although the Labor Board was unimpressed with the Saginaw Chippewa's treaty argument (despite unrebutted expert testimony establishing the continuing rights, Pet.App.3), it interpreted the language in the Chickasaw Tribe's treaty with the United States to foreclose application of the NLRA to the Chickasaw Nation (thereby avoiding review in the Tenth Circuit). *See Chickasaw Nation*, 362 N.L.R.B. No. 109 (2015).

Something is profoundly wrong when the Labor Board, an agency with absolutely no expertise in

Indian law, is parsing Indian treaties to deem some tribes exempt and most tribes subject to the NLRA. Indeed, this situation underscores the need for this Court's review. The NLRA's application to tribes should turn on neither the Board's interpretation of Indian law nor on the happenstance of whether a tribe is located within the confines of the Tenth Circuit. Instead, it should depend on clear language in congressional enactments and this Court's interpretative principles.

Unless this Court grants review, the application of the NLRA to a tribe will depend on three factors: (1) whether the tribe can petition for review to the Tenth Circuit; (2) whether the tribe has a treaty with the United States, and if so, how the Labor Board interprets the treaty; and (3) whether the Labor Board determines that the tribe is engaged in "traditionally tribal or governmental functions." *San Manuel*, 341 N.L.R.B. at 1063. This situation has nothing to recommend it. Only this Court can provide a clear and uniform answer that does not depend on a labor agency doing Indian law.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

WILLIAM A. SZOTKOWSKI
JESSICA INTERMILL
HOGEN ADAMS PLLC
1935 W. County Rd. B2
Suite 460
St. Paul, MN 55113
651-842-9100

SEAN REED
GENERAL COUNSEL
SAGINAW CHIPPEWA
INDIAN TRIBE
7070 East Broadway
Mt. Pleasant, MI 48858
989-775-4032

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
MICHAEL D. LIEBERMAN
BANCROFT PLLC
500 New Jersey Avenue, NW
Seventh Floor
Washington, DC 20001
202-234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

February 12, 2016

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 14-2405/2558

SOARING EAGLE CASINO AND RESORT, an Enterprise of the Saginaw Chippewa Indian Tribe of Michigan,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

Filed: July 1, 2015

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

WHITE, DONALD, and O'MALLEY*, Circuit Judges.

OPINION

KATHLEEN M. O'MALLEY, Circuit Judge. This case involves the scope of the National Labor Relations Board's ("Board") jurisdiction over an Indian tribe's operation of a casino on reservation land. The Soaring

---

* The Honorable Kathleen M. O'Malley, Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation.

Eagle Casino & Resort ("Casino"), owned and operated by the Saginaw Chippewa Indian Tribe of Michigan ("the Tribe"), discharged Susan Lewis for violating the Casino's no-solicitation policy. The Board found that the Casino's no-solicitation policy violated sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq*., and ordered the Casino to cease and desist from maintaining a no-solicitation rule and to reinstate Susan Lewis to her former position with back pay and benefits. For the following reasons, we ENTER JUDGMENT ENFORCING the Board's Decision and Order, finding that the Board has jurisdiction over the Casino's employment practices.

I

A

The Tribe is a federally recognized Indian tribe located in Mount Pleasant, Michigan. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 80 Fed. Reg. 1942–02 (Jan. 14, 2015); *Soaring Eagle Casino & Resort,* 359 NLRB 92, 2013 WL 1646049, at *4 (2013). The Tribe is a successor to two treaties between the United States of America and the Chippewa Indians of Saginaw, Swan Creek, and Black River, Michigan, one in 1855 and one in 1864. *See* 14 Stat. 657 (1864); 11 Stat. 633 (1855). The 1855 Treaty involved a land swap—including land in Isabella County, Michigan—between the United States and the Indian tribes, liability releases by the tribes, and support payments from the United States to the tribes for a variety of purposes. 11 Stat. 633. The 1864 Treaty included the release (to the United States) of some of

the property reserved to the tribes in the 1855 Treaty, but, as relevant to the present dispute, also included an agreement by the United States to "set apart for the exclusive use, ownership, and occupancy [by the Tribe]" property in Isabella County as a reservation. 14 Stat. 657. It is undisputed that the Treaties preserved the Tribe's right to exclude non-Indians from living in the territory. *Soaring Eagle*, 2013 WL 1656049, at *4 & n.5. Unsurprisingly, considering the date of the Treaties—in an era before the creation of a federal regulatory structure—the Treaties did not mention application of federal regulations to members of the Tribe or to the Tribe itself.

The property reserved for the "exclusive use, ownership, and occupancy" of the Tribe eventually became the Isabella Reservation, located within Isabella County and Arenac County in central Michigan. *Id.* at *5. The Tribe has over 3,000 members, and is governed by a twelve-person tribal council which is elected by the Tribe. *Id.* The tribal council enacts laws applicable to tribal members, and manages economic development for the Tribe. *Id.* In 1993, under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq*. (2012) ("IGRA"), the Tribe and the State of Michigan entered a compact, subsequently approved by the United States, that allowed the Tribe to conduct gaming enterprises on the Isabella reservation. *Id.* The Tribe opened the Casino on land held in trust for the Tribe by the United States.[1] *Id.* The Tribe enacted its own gaming

[1] Under the General Allotment Act of 1887, ch. 119, 24 Stat. 388, and the Crow Allotment Act of 1920, ch. 224, 41 Stat. 751, reservation land can fall into three categories: trust land; land

code to regulate internal controls and licensing criteria for employees. *Id.* The Tribe also created a regulatory body, the Tribal Gaming Commission, to enforce the gaming code. *Id.*

On November 16, 1993, the Tribe established Soaring Eagle Gaming as a subdivision of the tribal government chartered to operate and manage the Casino. *Id.* The tribal council hires all management-level employees for the Casino, requires frequent reports from managers on the Casino's performance, and approves contracts with outside vendors. *Id.* The tribal council also decides how to distribute the Casino's revenue for tribal functions. *Id.* The Casino is situated on land held in trust for the Tribe by the United States.

Of the Casino's approximately 3,000 employees, 7% are members of the Tribe, as are 30% of all management-level employees. *Id.* at *6. The Casino generates approximately $250 million in gross annual

---

held in fee by individual tribe members; and land held in fee by nonmembers. All reservation land originally was held in trust for the tribe. Individual tribe members, upon satisfaction of certain conditions, could also receive patents in fee for property within the reservation. After holding the fee land for twenty-five years, the member allottees could then alienate the land to nonmembers. *See Montana v. United States*, 450 U.S. 544, 548 (1981). As discussed later, the manner in which the reservation land is held has legal significance. *See, e.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 329 (2008) ("[W]hen the tribe or tribal members convey a parcel of fee land *to non- Indians*, [the tribe] loses any former right of absolute and exclusive use and occupation of the conveyed lands. This necessarily entails the loss of regulatory jurisdiction over the use of the land by others." (internal citations and quotation marks omitted) (second alteration in original)).

revenues and attracts over 20,000 customers per year, many of whom are not members of the Tribe. *Id.* The Casino advertises using billboards, newspapers, radio, and television, and competes with privately-owned casinos throughout Michigan. *Id.* The revenues from the Casino constitute almost 90% of the Tribe's income, providing the vast majority of funding necessary to run the Tribe's 37 departments and 159 programs. *Id.* These programs and departments provide for health administration, social services, tribal police and fire departments, utilities, a tribal court system, and education for members of the Tribe. *Id.* The operation of the Casino allows the Tribe to provide many services previously not available to its members because it lacks access to exploitable natural resources and has an insufficient tax base.

Portions of the Tribe's gaming code relevant to employee conduct are contained in the Soaring Eagle Casino & Resort Associate Handbook ("Handbook"). Section 5.3 of the Handbook, approved by the tribal council on October 13, 2006, includes a no-solicitation policy that prevents any solicitation by employees, including solicitation related to union activities, on Casino property. The Handbook defines "Solicitation" as:

> [A]ny verbal or written communication and the distribution or emails, circulars, handbills or other documents/literature of any kind by any employee or group of employees to another employee or group of employees that encourages, advocates, demands, or requests a contribution of money, time, effort, personal involvement, or

> membership in any fund. . . or labor organization of any kind or type. . . .

Section 5.3 prohibits, *inter alia*, the following actions:

> 2. Employees are prohibited from soliciting in any work area. Employees are also prohibited from soliciting during their assigned working time or soliciting other employees during their assigned working time. . . .
>
> 3. Employees are prohibited from posting notices, photographs, or other written materials on bulletin boards or any other Soaring Eagle premises.

The Handbook further provides that "[a]ny person violating this policy will be subject to disciplinary action up to, and including, termination."

B

Susan Lewis, who is not a member of the Tribe, was intermittently employed as a housekeeper at the Casino beginning on July 13, 1998. *Soaring Eagle*, 2013 WL 1656049, at *8. On September 29, 2009, Lewis engaged in union solicitation activities on behalf of the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("the Union"). *Id.* Lewis's supervisors warned her that such activities violated the Handbook, and informed her that further solicitation could lead to adverse employment actions. *Id.* Lewis nevertheless again engaged in solicitation activities on August 25, 2010. This time Lewis received a written notice informing her of the violation and cautioning her that she could not engage other employees in discussions about union activities. *Id.* Management later observed

Lewis handing out wrist bands stating "BAND TOGETHER 2010" to other housekeepers on October 4, 2010. *Id.* The Casino then suspended Lewis. *Id.*

When Lewis returned to work after her suspension, she again engaged another housekeeper in a discussion about the Union while Lewis and the housekeeper were working. *Id.* at *9. On November 15, 2010, the Casino discharged Lewis for engaging in union solicitation activities in violation of the no-solicitation policy. *Id.*

C

The Union filed a charge with the Board on April 1, 2011, and the General Counsel for the Board issued an amended complaint on October 12, 2011. The Union alleged that the Tribe violated § 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1),[2] by having a no-solicitation policy and banning employee discussion of union activities, and §§ 8(a)(1),(3),[3] 29 U.S.C. §§ 158(a)(1),(3), by suspending and terminating Lewis for engaging in union solicitation activities. *Soaring Eagle*, 2013 WL 1656049, at *4. The Tribe filed its response, contending that the NLRA did not apply to the Tribe's activities as a sovereign, and the Board subsequently held a hearing regarding the Tribe's liability. *Id.*

---

[2] 29 U.S.C. § 158(a)(1)—"It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title[.]"

[3] 29 U.S.C. § 158(a)(3)—"It shall be an unfair labor practice for an employer—(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

The Administrative Judge ("AJ") issued his decision and order on March 26, 2012, finding that the Board had jurisdiction over the Casino and Tribe and that the Tribe violated the NLRA. Citing the Board's holding in *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004) (adopting in part the Ninth Circuit's framework in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985)), *aff'd sub nom. San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007), the AJ determined that the Board had jurisdiction over the Tribe and the Casino. *Soaring Eagle*, 2013 WL 1656049, at *9–13. In particular, the AJ found that: (1) restricting operations at a casino on reservation land does not interfere with the Tribe's right of self-governance; (2) the 1855 and 1864 Treaties only provide for a general right of exclusion, which is insufficient to bar application of an act of general applicability like the NLRA; and (3) nothing in the language of the NLRA or its legislative history shows a congressional intent to exclude Indians from its coverage. *Id.* The AJ then concluded that "the Tribe is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the [NLRA]." *Id.* at *13. Turning to the merits of the complaint, the AJ found that the no-solicitation policy and the ban on discussions among employees about union activity on Casino property violates § 8(a)(1) of the NLRA, and Lewis's suspension and discharge violated §§ 8(a)(1),(3) of the NLRA.[4] *Id.* at *14–18. The AJ ordered the Tribe to cease and desist

[4] According to the AJ, "the Tribe did not refute the testimony and other evidence regarding the merits of the unfair labor practice charges." *Id.* at *13.

its practices involving the no-solicitation policy, and to reinstate Lewis with appropriate back pay and benefits. *Id.* at *18–19.

The Tribe appealed the initial decision to the Board, and a three member panel consisting of Chairman Gaston Pearce and Members Richard Griffin and Sharon Block affirmed the AJ's "rulings, findings, and conclusions," and adopted the Order with minor modifications.[5] *Id.* at *1 (footnote omitted). The Tribe appealed to this Court, requesting that we reverse the Board's jurisdictional analysis, but not challenging the underlying merits decision. On the day of oral argument, however, the Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), holding that certain of President Obama's recess appointments to the Board, including the appointments of Members Griffin and Block, were unconstitutional. At the request of the parties, we delayed oral argument to allow the parties to determine how best to proceed in light of the *Noel Canning* decision. The Board moved to vacate its Order and remand for further consideration. We granted the Board's motion, vacated its initial order, and remanded for further consideration. Order, *Saginaw Chippewa Indian Tribe of Mich. v. NLRB*, Nos. 13-1569, -1629 (6th Cir. Aug. 6, 2014), ECF No. 91. On remand, the Board, consisting of Members Philip Miscimarra, Kent Hirozawa, and Nancy Schiffer, "considered de novo the judge's

[5] The Board "modified the Order and notice to conform to the violations found and to include a remedial provision regarding the tax and social security consequences of making discriminatee Susan Lewis whole . . . ." *Id.* at *1 n.3.

decision and the record . . . . [and] the now-vacated Decision and Order, and [agreed] with the rationale set forth therein." *Soaring Eagle Casino & Resort*, 361 NLRB 73, 2014 WL 5426873, at *1 (2014). The Board again adopted the AJ's Decision and Order with minor modifications, and the Tribe again appealed.

We have jurisdiction over the appeal under 29 U.S.C. § 160(f) (2012).

II

We apply the two-step test of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984), to the Board's interpretation of the NLRA. *NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115, 1119 (6th Cir. 1997) (citing *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996)). Under *Chevron*, we first determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If Congress has spoken directly on the issue, we give effect to that "expression of congressional will." *Painting Co. v. NLRB*, 298 F.3d 492, 499 (6th Cir. 2002); *see also Chevron*, 467 U.S. 842–43. If Congress has not directly spoken on the question at issue, we "review[] the Board's decision solely to assess whether the Board's interpretation is based on a permissible interpretation of the statute." *Painting Co.*, 298 F.3d at 499. "For the Board to prevail, it need not show that its construction is the best way to read the statute; rather, courts must respect the Board's judgment so long as its reading is a reasonable one." *Holly Farms*, 517 U.S. at 409 (emphasis omitted). And, under the Supreme Court's recent decision in *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013), we apply *Chevron* deference to an agency's interpretation of its own

jurisdiction because "the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage."

We, however, review the Board's interpretation of federal Indian law de novo. *See, e.g.*, *Painting Co.*, 298 F.3d at 500 ("[T]his Circuit's historical *de novo* review remains in force for the Board's legal conclusions that do not interpret the NLRA."). We do not defer "to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002). As the D.C. Circuit has noted in considering the application of the NLRA to Indian tribes, "[b]ecause the Board's expertise and delegated authority does not relate to federal Indian law, we need not defer to the Board's conclusion[s]." *San Manuel*, 475 F.3d at 1312. We therefore analyze de novo if the 1855 and 1864 Treaties, or the Tribe's inherent sovereignty rights, prevent application of the NLRA to the Casino. *See id.* ("Therefore, we decide de novo the implications of tribal sovereignty on the statutory construction question before us."). Only if we determine that neither the Treaties nor inherent sovereignty rights prohibit application of the NLRA in these circumstances must we then perform the *Chevron* analysis for the Board's interpretation of § 152(2).

III

We must first decide if the Casino is subject to the NLRA. The Tribe does not dispute that, if it is subject to the Act, its no-solicitation policies and treatment of Lewis would violate provisions in Section 8 of the Act. We thus determine only whether the 1855 and 1864

Treaties, or federal Indian law and policies, prevent application of the NLRA to a tribal-owned casino operated on trust land within a reservation, and, if not, whether the Board's interpretation of "employer" in 29 U.S.C. § 152(2)[6] to include the Casino is a "reasonable one." *Holly Farms*, 517 U.S. at 409.

A

The Tribe first argues that the language of the 1855 and 1864 Treaties prevent application of the NLRA to the Casino's activities. The Tribe claims that certain Indian law canons of construction require that we read the Treaties to bar enforcement of the Act on tribal properties. These canons include: (1) "[h]ow the words of the treaty were understood by [the Indians], rather than their critical meaning, should form the rule of construction," *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832); (2) "the language used in treaties with the Indians *shall never be construed to their prejudice*, if words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of their treaty," *Keweenaw Bay Indian Community v. Naftaly*, 452 F.3d 514, 523 (6th Cir. 2006) (quoting *In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 760 (1866)); and (3) "Congress may abrogate Indian treaty rights, but it

[6] "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." 29 U.S.C. § 152(2).

must clearly express its intent to do so," *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999). Amici also point us towards other canons of construction supporting broad tribal rights, including that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985), and that "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in th[e] area [of Indian affairs] cautions that [courts] tread lightly in the absence of clear indications of legislative intent," *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978)). *See, e.g.*, Brief for the National Congress of American Indians as Amicus Curiae in Support of Petitioner at 5, *Saginaw Chippewa Indian Tribe of Michigan v. NLRB* (6th Cir. 2015) (Nos. 14-2405, -2558).

Next, the Tribe argues that the Casino represents a traditional governmental function, noting that the Supreme Court has recognized previously that tribal gaming forms a central aspect of tribal governance because of its ability to raise needed revenue for tribes. The Tribe claims that, because the Saginaw Tribe believed in 1855 and 1864 that the Treaties would protect the reservation property from government intrusion in perpetuity, the treaties should be interpreted accordingly. The Tribe further argues that the general right to exclude described in the language of the 1864 Treaty includes the lesser right to condition entry onto reservation property by nonmembers of the Tribe. The no-solicitation policy, according to the Tribe, represents a reasonable

assertion of its right to condition entry onto reservation property, and the NLRA contains no express abrogation of that treaty right.

The Board responds that many of the canons of construction noted by the Tribe and Amici are irrelevant to interpretation of the NLRA, which is not a law explicitly directed at Indian affairs. The Board argues that treaties do not create tribal powers, but merely preserve inherent sovereignty not ceded in the treaty. The Board further notes that the language of the 1864 Treaty describes, at best, a broad power to exclude, and not the sort of specific treaty right necessary to abrogate federal statutes of general applicability. And, the Board points to decisions of our sister circuits holding that broad descriptions of a power to exclude in a treaty are insufficient to bar application of generally applicable laws. The Board contends that, if we were to hold that a broad, general treaty right to exclude prevents application of the NLRA to tribal activities, there would be no logical limit to a tribe's use of such treaty language to preclude application of *all* non-specific federal laws on tribal land.

B

Although our analysis differs from that employed by the Board or urged by it on appeal, we ultimately agree with the Board that a general treaty right to exclude, such as the one described in the 1864 Treaty, alone is insufficient to prevent application of the NLRA to the Casino. We first consider the scope of the specific treaty rights at issue here. "[T]he starting point for any analysis of [rights granted by a treaty] is the treaty language itself. The Treaty must be

interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians." *Mille Lacs*, 526 U.S. at 206. Once the scope of rights reserved by a treaty is determined, we look to see whether Congress intended to abrogate those rights. Congress has the power, as the higher sovereign, to abrogate Indian treaty rights, but "[t]here must be clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 202–03 (citations and quotation marks omitted); *see also Santa Clara Pueblo*, 436 U.S. at 60 ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."). "Congress . . . has the power to 'abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so.'" *United States v. Dion*, 476 U.S. 734, 738 (1986) (quoting *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903)).

The Supreme Court demands a clear statement of intent for the abrogation of Indian treaty rights. *Id.* at 739–40; *see also South Dakota v. Bourland*, 508 U.S. 679, 687 (1993) ("Congress has the power to abrogate Indians' treaty rights . . . though we usually insist that

Congress clearly express its intent to do so." (internal citations omitted)).[7]

The Board argues that this analysis is unnecessary because "a general statute in terms applying to all persons includes Indians and their property interests," citing to the Supreme Court's statement to that effect in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). According to the Board, when Congress passes a law of general applicability, no further inquiry into its intent with respect to tribal activities on reservation land is either necessary or appropriate. As other circuits have recognized, however, this language in *Tuscarora* does not require application of a general regulatory statute to tribal activities if doing so would be in derogation of explicit treaty rights. *See, e.g.*, *Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709, 711 (10th Cir. 1982) ("*Tuscarora* did not, however, involve an Indian treaty. . . . The *Tuscarora* rule does not apply to Indians if the application of the general statute would be in derogation of the Indians' treaty rights."); *see also Tuscarora*, 362 U.S. at 124 (holding that application of "the Federal Power Act, to take such of the lands of the Tuscaroras as are needed for the Niagara project do not breach the faith of the United States, or any treaty . . . of the United States with the Tuscarora Indian Nation . . . .").

---

[7] We analyze these treaty rights separately from our analysis of the inherent rights of sovereignty retained by the tribes. *Strate v. A-1 Contractors*, 520 U.S. 438, 449 (1997) ("As the Court made plain in *Montana* [*v. United States*, 450 U.S. 544 (1981)], the general rule and exceptions there announced govern only in the absence of a delegation of tribal authority by treaty or statute.").

In *Mille Lacs*, for instance, the treaty at issue guaranteed to the Chippewa Tribe the "privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded." 526 U.S. at 177 (quoting 1837 Treaty with the Chippewa, 7 Stat. 536). In an 1842 treaty, the Chippewa then ceded additional land to the government in exchange for usufructuary rights.[8] *Id.* When the state of Minnesota sought to enforce its hunting laws on reservation land in the 1990's, the tribe sought a declaratory judgment against the state that, among other things, the tribe retained its usufructuary rights despite Minnesota's admission to the Union. *Id.* at 185. The Supreme Court concluded that the statute admitting Minnesota to the Union, which was silent regarding Indian rights, failed to abrogate the Chippewa's usufructuary rights. *Id.* at 202–06. Because the Act "makes no mention of Indian treaty rights[,] it provides no clue that Congress considered the reserved rights of the Chippewa and decided to abrogate those rights when it passed the Act." *Id.* at 203. The Court made clear that Congress must speak directly when intending to abrogate explicit grants of rights to Indian tribes in treaties. *Id.*; *see also Bourland*, 508 U.S. at 689–93 (stating that, with regard to a "right of absolute and exclusive use and occupation" of land described in the language of a treaty, "Congress'[s] explicit reservation of certain

[8] Usufructuary rights are "right[s] for a certain period to use and enjoy the fruits of another's property without damaging or diminishing it, but allowing for any natural deterioration in the property over time." Black's Law Dictionary 1778 (10th ed. 2014).

rights in the taken area does not operate as an implicit reservation of all former rights.").

We, thus, reject the Board's invitation to ignore the second step of the treaty analysis simply because the NLRA is a statute of general applicability. Turning to the question of congressional intent, both the Board and the Tribe agree that the NLRA is entirely silent with respect to Indians and Indian tribes. The Board also fails to point to any other act of Congress, or even any legislative history, that would demonstrate Congress's intent to abrogate the rights established by the 1855 and 1864 Treaties. Because Congress did not abrogate the terms of those Treaties, the Board cannot rely on abrogation principles to avoid any rights granted in the Treaties. We thus turn to the Treaties to determine what rights were reserved.

The Tribe contends that the right to exclude in the Treaties unambiguously gives it authority to condition the activities of nonmembers on the reservation. There is substantial authority for that proposition. "Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct . . . ." *Merrion*, 455 U.S. at 144; *cf. Bourland*, 508 U.S. at 687–88 (interpreting the "unqualified right of 'absolute and undisturbed use and occupation' of [ ] reservation lands" recognized in a treaty as "embracing the implicit 'power to exclude others'" and including "the authority to control fishing and hunting on those lands." (internal citation omitted)); *Montana v. United States*, 450 U.S. 544, 559

(1981) (same). The Board concedes that—if we reject its argument that treaty rights may be impliedly rejected by the mere passage of a statute of general applicability—detailed and specific treaty language may be enough to reserve to a Tribe the type of authority the Tribe here asserts. The Board contends, however, that the broad, non-specific language of the Treaties at issue is insufficient to bar application of the NLRA to the Casino.

The Supreme Court has not addressed the precise argument the Board presses here. In cases analyzing the extent to which Indian treaty rights have been abrogated, the Court was either faced with circumstances where it found a clear intent by Congress to abrogate whatever rights to exclusion were in the treaties at issue, or considered language discussing very specific tribal rights and activity. *Compare Mille Lacs*, 526 U.S. at 196–201 (upholding the Tribe's specific usufructuary treaty rights absent clear statements by Congress abrogating those rights), *with Bourland*, 508 U.S. at 689–91 (finding that the specific language in the Flood Control Act of 1944 and the Cheyenne River Act of 1954 abrogated explicit treaty rights to exclude by opening the tribal land at issue for public use), *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 421–25 (1989) (opinion announcing in part judgment of the court) (concluding that a treaty granting reservation property to the Yakima Indian Nation for its "exclusive use and benefit" was abrogated by the Indian General Allotment Act, such that the Yakima Indian Nation no longer retained the power to zone property held in fee by nonmembers on the reservation), *and Dion*, 476 U.S. at 738–39 (finding

that Congress abrogated the Yankton Sioux Tribe's treaty right of exclusive control over hunting and fishing on tribal land because Congress expressed, through the Bald Eagle Protection Act, a "clear and plain intent" to negate certain aspects of those rights).

Other circuits have addressed the issue, however. In *Donovan v. Navajo Forest Products Industries*, the Tenth Circuit analyzed whether a treaty providing that "no persons except those herein so authorized to do, and except such officers, soldiers, agents and employees of the government . . . as may be authorized . . . shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article," prevented application of the Occupational Safety and Health Act ("OSHA") against tribal business enterprises operating on a reservation. 692 F.2d at 710–11; *see also EEOC v. Cherokee Nation*, 871 F.2d 937, 938–39 (10th Cir. 1989) (relying on the analysis in *Navajo Forest Products* to conclude that the Age Discrimination in Employment Act did not apply to tribal business enterprise operating on a reservation in light of treaty language). Based on the language of the treaty, providing for specific exclusion rights over all persons, the Tenth Circuit refused to find that OSHA abrogated those rights where Congress had made no explicit statement in those acts limiting application of the treaty or overriding the tribe's retained inherent sovereignty rights. *Navajo Forest Prods.*, 692 F.2d at 711–12; *see also EEOC*, 871 F.2d at 938–39. The Tenth Circuit concluded that:

> Absent some expression of such legislative intent, however, we shall not permit divestiture of the tribal power to manage

> reservation lands so as to exclude non-Indians from entering thereon merely on the predicate that federal statutes of general application apply to Indians just as they do to all other persons (in this case 'employers') unless Indians are expressly excepted therefrom.

Id. at 714 (citing *Merrion*, 445 U.S. at 146–47); *Cherokee Nation*, 871 F.2d at 938–39 (finding no expression of congressional intent to limit tribe's treaty rights of exclusion in the ADEA).

Other circuits have reached the opposite conclusion in the face of less specific treaty language. The Seventh Circuit, in *Smart v. State Farm Insurance Co.*, concluded that ERISA applies to "employee benefits plan[s] established and operated by an Indian Tribe for Tribe employees," even in light of a treaty establishing "lands within the exclusive sovereignty of the [Tribe] under general federal supervision." 868 F.2d 929, 930, 934 (7th Cir. 1989) (internal quotation marks omitted) (second alteration in original). The Seventh Circuit distinguished the Tenth Circuit's analysis in *Navajo Forest Products*, on grounds that the *Navajo Forest Products* court had rejected application of OSHA to a tribal business because "a specific right would be compromised, *viz.*, the right to exclude unwanted federal OSHA inspectors." *Id.* at 935. The treaty at issue in *Smart*, on the other hand, did not "delineate specific rights in a manner comparable to the treaty in *Navajo Forest Products*," and simply conveyed land for the tribe's exclusive use. *Id.* Similarly, in *Menominee Tribal Enterprises v. Solis*, 601 F.3d 669 (7th Cir. 2010), the

Seventh Circuit again found that a broad treaty right did not exempt a tribal business from the application of a federal regulatory statute, this time OSHA. The treaty at issue in *Menominee Tribal Enterprises* stated, in regards to nonmember access to the reservation, that "all roads and highways, laid out by authority of law, shall have right of way through the lands of the said Indians on the same terms as are provided by law for their location through lands of citizens of the United States." *Id.* at 674. Comparing the language of that treaty to the more specific treaty in *Navajo Forest Products*, the court concluded that OSHA applied to the tribal business at issue. *Id.*

The Ninth Circuit has also considered the applicability of OSHA to a tribal enterprise in the face of broad treaty protections. *U.S. Dep't of Labor v. Occupational Safety & Health Review Comm'n*, 935 F.2d 182 (9th Cir. 1991) ("*US DOL*"). The Ninth Circuit found that treaty language, stating that "[a]ll of which tract shall be set apart . . . for their exclusive use; nor shall any white person be permitted to reside upon the same without the concurrent permission of the agent and superintendent," "sets forth a general right of exclusion." *Id.* at 184, 185. Based on its analysis of similar treaties in *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980) (finding that the Organized Crime Control Act applied to tribal enterprises despite a treaty providing for a general right to exclude), and *Confederated Tribes of Warm Springs Reservation v. Kurtz*, 691 F.2d 878 (9th Cir. 1982) (finding that federal tax laws applied to a tribe despite a treaty providing for a general right to exclude), the Ninth Circuit concluded that a general right to exclude, even if ensconced in a treaty, did not

"bar the enforcement of statutes of general applicability," absent a more direct conflict between the right of general exclusion and the entry necessary for enforcement of the statute. *USDOL*, 935 F.2d at 186–87.

Although, given the protective language employed by the Supreme Court when assessing tribal treaty rights, the question is a close one, ultimately we conclude that a general right of exclusion, with no additional specificity, is insufficient to bar application of federal regulatory statutes of general applicability. Unless there is a direct conflict between a specific right of exclusion and the entry necessary for effectuating the statutory scheme, we decline to prohibit application of generally applicable federal regulatory authority to tribes on the existence of such a treaty right alone. *See, e.g.*, *Id.*; *Smart*, 868 F.2d at 935. The 1864 Treaty states that the Isabella reservation land would be "set apart for the exclusive use, ownership, and occupancy [by the Tribe]." 14 Stat. 657. Similar to the treaty language in *US DOL*, the 1864 Treaty language establishes a general right of exclusion for the Tribe. The treaty language does not, however, give the Tribe the specific power to condition authorization and entry of government agents, as in *Navajo Forest Products*. Nor does it detail with any level of specificity the types of activities the Tribe may control or in which it may engage. Thus, as did the Seventh Circuit in *Smart*, we find *Navajo Forest Products* distinguishable. Although, as explained below, the existence of the Treaties remains relevant to our analysis of the Tribe's right of inherent sovereignty, we do not find that the general right to exclude described in the 1855 and 1864 Treaties,

standing alone, bars application of the NLRA to the Casino.

IV

We next turn to whether the Tribe's inherent sovereignty rights preclude application of the NLRA to the on-reservation Casino. The Board again latches on to the general statement in *Tuscarora Indian Nation* that "a general statute in terms applying to all persons includes Indians and their property interests." 362 U.S. at 116. The Board insists that we rely on this Supreme Court pronouncement to authorize the Board to exercise authority over the Casino. Alternatively, the Board urges us to adopt the analytical framework set forth by the Ninth Circuit in *Coeur d'Alene*, which it contends also would lead to the conclusion that the NLRA may be applied to the Casino.

After oral argument in the present appeal, a panel of this Court released a published decision in *NLRB v. Little River Band of Ottawa Indians Tribal Government*, No. 14-2239, 2015 WL 3556005 (6th Cir. June 9, 2015). In *Little River*, the majority held that the NLRB could apply the NLRA "to the operation of a casino resort of the Little River Band of Ottawa Indians" within a reservation on trust land. *Id.* at *1, *5–8. The majority reviewed "the law governing implicit divestiture of tribal sovereignty," *id.* at *5, and concluded that, based on "the *Montana* framework," its analysis was "guided by an overarching principle: inherent tribal sovereignty has a core and a periphery. At the periphery, the power to regulate the activities of non-members is constrained, extending only so far as 'necessary to protect tribal

self-government or to control internal relations.'" *Id.* at *8 (quoting *Montana*, 450 U.S. at 564). The majority adopted the language of *Tuscarora* and the analytical framework of *Coeur d'Alene*, *id.* at *8–10, and found that "the *Coeur d'Alene* framework accommodates principles of federal and tribal sovereignty," *id.* at *12. Under the *Coeur d'Alene* structure, the majority deduced that the NLRA is a statute of general applicability, that the NLRA does not does not fall within any of the three enumerated exceptions of *Coeur d'Alene*, and that the NLRA applies to the Little River casino resort. *Id.* at *13–17 ("In sum, we find that this case does not fall within the exceptions to the presumptive applicability of a general statute outlined in *Coeur d'Alene*. The NLRA does not undermine the Band's right of self-governance in purely intramural matters, and we find no indication that Congress intended the NLRA not to apply to a tribal government's operation of tribal gaming . . . ."). Judge McKeague dissented, arguing that the "majority's decision impinges on tribal sovereignty, encroaches on Congress's plenary and exclusive authority over Indian affairs, conflicts with Supreme Court precedent, and unwisely creates a circuit split." *Id.* at *17 (McKeague, J., dissenting). In particular, Judge McKeague explained that the Board's use of the *Tuscarora-Coeur d'Alene* approach is fraught with problems and inconsistencies—"a house of cards . . . . [that] collapse[s] when we notice what's inexplicably overlooked in the fifty-five years of adding card upon card to a 'thing said in passing.'" *Id.* at *18–21, *26.

We are bound by the published decisions of prior panels of this Court. *Dingle v. Bioport Corp.*, 388 F.3d 209, 215 (6th Cir. 2004); *see also Wynne v. Renico*, 606

F.3d 867, 875 (6th Cir. 2010) (Martin, Jr., J., concurring) ("However, as this panel is bound by the decisions of a prior panel, no matter how illogical, I must concur." (footnote omitted)). The *Little River* majority concluded that the NLRA applies to on-reservation casinos operated on trust land. *Little River*, 2015 WL 3556005, at *13–17. Given the legal framework adopted in *Little River* and the breadth of the majority's holding, we must conclude in this case that the Casino operated by the Tribe on trust land falls within the scope of the NLRA, and that the NLRB has jurisdiction over the Casino.[9] We do not agree, however, with the *Little River* majority's adoption of the *Coeur d'Alene* framework, or its analysis of Indian inherent sovereignty rights. We thus set out below the approach that we believe is most consistent with Supreme Court precedent and Congress's supervisory role over the scope of Indian sovereignty, and why we respectfully disagree with the holding in *Little River*.

A

We begin with what we believe is the analytical framework dictated by the Supreme Court for cases like that before us. Indian tribes have "always been considered as distinct, independent political communities, retaining their original natural rights,"

[9] There was "no treaty right at issue" in *Little River*. 2015 WL 3556005, at *13. As discussed in section III, *supra*, we do not believe that the 1855 and 1864 Treaties are sufficient, standing alone, to prevent application of the NLRA to the Casino. Although the fact of the Treaties remains relevant to the sovereignty analysis and, thus, factually distinguishes this case from *Little River*, that fact cannot compel a contrary conclusion here given the legal framework we are compelled by *Little River* to employ.

and, even with their association under the federal government, did not "surrender [their] independence—[their] right to self government[—]by associating with a stronger [sovereign], and taking its protection." *Worcester*, 31 U.S. (6 Pet.) at 559, 561. The tribes remain "a separate people, with the power of regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381–82 (1886). The Supreme Court has recognized that "Indian tribes do retain elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the Federal Government." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978), *superseded by statute as recognized in United States v. Lara*, 541 U.S. 193, 199–207 (2004). These retained powers inherent to tribal sovereignty are not limited to just those powers explicitly recognized in treaties—the tribes are only "prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *inconsistent with their status*." *Id*. at 208 (internal quotation marks omitted; emphasis in original).

By agreeing to "come under the territorial sovereignty of the United States," Indian tribes are constrained in "their exercise of separate power . . . so as to not conflict with the interests of this overriding sovereignty." *Id.* at 209; *see also Kagama*, 118 U.S. at 381 (stating that tribes are no longer "possessed of the full attributes of sovereignty"); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823). And they have been "necessarily divested [] of some aspects of the sovereignty which they had previously exercised." *United States v. Wheeler*, 435 U.S. 313, 323 (1978),

superseded by statute as recognized in Lara, 541 U.S. at 199–207. "The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2037 (2014). The tribes do retain important inherent rights of sovereignty, however, even after coming under the protective sphere of the federal government. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (noting that the retained sovereignty of the Indian tribes "centers on the land held by the tribe and on tribal members within the reservation"). Among these inherent rights, "unless limited by treaty or statute," is the "power to determine tribe membership; to regulate domestic relations among tribe members; and to prescribe rules for the inheritance of property." *Wheeler*, 435 U.S. at 322 n.18 (internal citations omitted). In summarizing these principles, the Supreme Court has explained that:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

Id. at 323.

In other cases, the Supreme Court has identified areas of inherent tribal sovereignty that go beyond

those specified in *Wheeler*. In *Merrion*, the Court concluded that the power to institute a severance tax on oil and gas removed from reservation land was a "fundamental attribute of sovereignty," and explained that "[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." 455 U.S. at 137 ("This power enables a tribal government to raise revenues for its essential services."). The Court explained that "[t]o presume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head . . . ." *Id.* at 148; *see also Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 652 (2001) (explaining that a tribe's power to tax comes from not only the tribe's power to exclude nonmembers from tribal land, but also from the tribe's "general authority, as sovereign, to control economic activity within its jurisdiction" (quoting *Merrion*, 455 U.S. at 137)). In *Iowa Mutual Insurance Co. v. LaPlante*, the Court reiterated the federal government's "longstanding policy of encouraging tribal self-government," and noted that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." 480 U.S. 9, 14, 18 (1987).

The Court's seminal statement on the extent to which a tribe's sovereignty extends to the conduct of nonmembers on reservation land comes from *Montana*, which the Court itself subsequently described as the "pathmarking case on the subject." *Nevada v. Hicks*, 533 U.S. 353, 358 (2001) (internal quotation marks omitted); *see also Atkinson Trading*,

532 U.S. at 650 (describing *Montana* as "the most exhaustively reasoned of [the] modern cases addressing" an Indian tribe's "retained or inherent sovereignty"). The *Montana* Court analyzed the "sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians." 450 U.S. at 547; *see also Atkinson Trading*, 532 U.S. at 647 ("In *Montana* . . . we held that, with limited exceptions, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian fee land within a reservation."); *Montana*, 450 U.S. at 557 (describing the "regulatory issue before us" as "a narrow one"). There, the Court set forth the standards with which to analyze the scope of a tribe's authority to regulate the conduct of nonmembers even in the absence of a treaty granting the tribe reserved rights. 450 U.S. at 566–67; *see also Plains Commerce Bank*, 554 U.S. at 332 ("*Montana* and its progeny permit tribal regulation of nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests." (emphasis in original)). The Court recognized that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. *Montana*, 450 U.S. at 564 (citing *Wheeler*, 435 U.S. at 323–26). The Court thus acknowledged the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," when such activity occurs on land not owned by a member or held in trust for the tribe. *Id.* at 565. Importantly, the Court identified two exceptions to

this general rule, even with respect to activities within the reservation that occur on fee land owned by nonmembers:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565–66 (internal citations omitted); *see also Plains Commerce Bank*, 554 U.S. at 335 ("[C]ertain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight."). As neither exception applied to nonmember hunting and fishing on nonmember fee land, the Court found that the state was permitted to regulate hunting and fishing on such land. In reaching this conclusion, the Court stressed, however, that the tribe's authority as to nonmember hunting or fishing activities was *not* limited on tribal lands. *See Montana*, 450 U.S. at 557 ("The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or

held by the United States in trust for the Tribe, and with this holding we can readily agree." (internal citation omitted)).

Although it seemed that *Montana* created a bright line distinction between the regulation of nonmember activity when on non-Indian fee land and when on other land within the reservation—implying that tribes retain full sovereign rights to regulate all conduct on the latter[10]—the Supreme Court has since explained that land ownership is but one factor in assessing the scope of a tribe's inherent sovereignty. In *Hicks*, the Court considered whether tribal courts had jurisdiction over claims asserted under 42 U.S.C. § 1983 against nonmember state wardens executing search warrants on trust land within the reservation relating to off-reservation conduct. 533 U.S. at 357. The Court found that the ownership status of the property where the relevant activity occurred—i.e., whether it is owned by a nonmember in fee or in trust for the tribe—is "only one factor to consider in determining whether regulation of the activities of nonmembers is necessary to protect tribal self-government or to control internal relations," albeit an important one. *Id.* at 359–60 (internal quotation marks omitted); *id.* at 370 ("[T]ribal ownership [of land] is a factor in the *Montana* analysis, and a factor significant enough that it 'may sometimes . . . be []

[10] Indeed the United States Solicitor General has recently read *Montana* as creating such a distinction, and allowing tribes virtually unrestricted authority over nonmembers on trust or Indian-owned fee land. Brief for United States as Amicus Curiae on Petition for Writ of Certiorari at 9–12, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians* (U.S. 2015) (No. 13-1496), *cert. granted*, No. 13–1496, 2015 WL 2473345 (U.S. June 15, 2015).

dispositive'" (quoting *Hicks,* 533 U.S. at 360)); *see also Plains Commerce Bank*, 554 U.S. at 331 ("The status of the land is relevant insofar as it bears on the application of . . . *Montana*'s exceptions to [this] case." (internal citations and quotation marks omitted) (alterations in original)); *Hicks*, 533 U.S. at 370. Thus, the Court made clear that, although a significant factor, "the existence of tribal ownership is not alone enough to support regulatory jurisdiction over nonmembers." *Hicks*, 533 U.S. at 360.

Beyond its discussion of the importance of the land's ownership status to the *Montana* analysis, the *Hicks* Court further explained that the first *Montana* exception refers "to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into." *Id.* at 372; *see also Plains Commerce Bank*, 554 U.S. at 332 ("We cited four cases in explanation of *Montana*'s first exception. Each involved regulation of non-Indian activities on the reservation that had a discernible effect on the tribe or its members."). Thus, the Court explained that the *Montana* framework is the governing analysis for determining a tribe's inherent sovereign regulatory powers over nonmembers; that we must consider *both* land status and party status in our analysis of: (1) the scope of the inherent sovereign rights retained by the tribe, and (2) the application of the *Montana* exceptions; and that the ownership status of the land is to receive significant weight with respect to both inquiries. Applying this analysis, the Court concluded that the tribal courts did not have authority to adjudicate the § 1983 claims, finding that, although the searches were conducted on trust land, the law

enforcement officers were nonmembers attempting to address conduct that occurred outside the reservation. *Hicks*, 533 U.S. at 374. And the Court's most recent pronouncement on Indian law, in *Bay Mills*, clarifies that "[a]lthough Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." 134 S. Ct. at 2032.

We believe this Supreme Court precedent clarifies that, absent a clear statement by Congress, to determine whether a tribe has the inherent sovereign authority necessary to prevent application of a federal statute to tribal activity, we apply the analysis set forth in *Montana*. *Iowa Mut.*, 480 U.S. at 18 ("Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute."); *Merrion*, 455 U.S. at 148 n.14 (recognizing that the "Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government . . . ."); *Santa Clara Pueblo*, 436 U.S. at 60 ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."); *Wheeler*, 435 U.S. at 323 ("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.").[11]

---

[11] The Supreme Court has noted that there is no "inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202,

Under *Montana*, we believe our analysis should proceed as follows. We would first determine whether Congress has demonstrated a clear intent that a statute of general applicability will apply to the activities of Indian tribes. If so, we would effectuate Congress's intent, a Congress has the authority, as the superior sovereign, "to legislate for the Indian tribes in all matters." *Wheeler*, 435 U.S. at 319. If Congress has not so spoken, we would then determine if the generally applicable federal regulatory statute impinges on the Tribe's control over its own members and its own activities. *Id.* at 322 n.18; *see also Montana*, 450 U.S. at 564. If it has, the general regulatory statute will not apply against the Tribe as a sovereign. If we find that the generally applicable federal statute does not impinge on the Tribe's right to govern activities of its members—such as those sovereign rights discussed in *Wheeler* and *Merrion*—we would assume that, generally, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. And we would determine, then, whether the Tribe has demonstrated that one of the two *Montana* exceptions to the general rule—consensual commercial relationships between the Tribe and nonmembers, or conduct "that…threatens or has some direct effect on" aspects of tribal

---

214–15 & n.17 (1987); *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330–36 (1983). This case is distinguishable from the state preemption cases, however, as here we must determine the balance of power between a silent greater sovereign and the lesser sovereign, not the balance of power between two sovereigns of similar status attempting to assert jurisdiction over the same conduct.

sovereignty—applies. *Id.* at 565-66; *see also Plains Commerce Bank,* 554 U.S. at 330 ("The burden rests on the tribe to establish one of the exceptions to *Montana's* general rule"). When analyzing the exceptions, we would apply a totality of the circumstances analysis, considering factors such as the member/nonmember distinction, and the location of the conduct at issue (whether on trust or member fee land, or on nonmember fee land). *Hicks*, 533 U.S. at 357-60. If one of the exceptions applies, the generally applicable federal statute should not apply to tribal conduct and Congress must amend the statute for it to apply against the Tribe if Congress so desires. If one of the exceptions does not apply, the Tribe would be subject to the provisions of the federal statute.

We agree with the Board that the NLRA is a statute of general applicability, as the language of the statute indicates that the Act applies generally absent a few specific statutory exceptions. *See, e.g.*, 29 U.S.C. § 152. And, as the AJ correctly noted, neither the NLRA nor its legislative history contains any evidence that Congress intended to either cover or exclude Indians and tribes from the purview of the Act. *Soaring Eagle*, 2013 WL 1656049, at *13. In the present case, Lewis is a nonmember of the Tribe who was suspended and dismissed from her position, so the aspects of inherent sovereignty recognized in *Wheeler* and *Merrion* are not applicable. Accordingly, unless one of the *Montana* exceptions covers the application of the NLRA to a tribal-owned casino on trust property, the NLRA should apply to the Casino and would bar the no-solicitation policy.

We conclude that, under an appropriate analytical framework, the first *Montana* exception concerning consensual commercial relationships between the Tribe and nonmembers should apply to these facts. *See, e.g.*, *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014) (applying the *Montana* framework to conclude that tribal courts have jurisdiction over claims made by a member against a nonmember due to an alleged tort committed at a nonmember-owned Dollar General store situated on trust property), *cert. granted sub nom. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, No. 13–1496, 2015 WL 2473345 (U.S. June 15, 2015). The first *Montana* exception recognizes that, as a sovereign, the Tribe has the power to enter into contractual relationships with nonmember individuals and entities for work on reservation property, whether Indian owned or not, and to place conditions on those contracts. *Montana*, 450 U.S. at 565–66. The Tribe therefore has the power to negotiate for certain conditions in these contracts, with those conditions often representing important policy goals for the Tribe, such as a tribal member employment preference policy. And, the Tribe often must seek the provision of services by nonmembers because the Tribe may have insufficient members to provide all necessary services, or may recognize that it is more efficient to have contractors provide these services. As the Court recognized in *Hicks*, the exception applies "to private individuals who voluntarily submitted themselves to tribal regulatory jurisdiction by the arrangements that they (or their employers) entered into." 533 U.S. at 372. Unlike tribal assertion of criminal jurisdiction over

nonmembers, the first *Montana* exception for civil jurisdiction recognizes that, when a nonmember voluntarily enters into a commercial relationship with the Tribe, the Tribe as a sovereign itself may choose to place conditions on its contractual relationships with those nonmembers, and the courts will not annul the private dealings of the Tribe with nonmembers absent clear statements of Congress's desire to abrogate those dealings.

Under the totality of the circumstances, we would find that the Casino's no-solicitation policy and its suspension and termination of Lewis fall under the first *Montana* exception. The Casino itself is not a purely private venture, but it is an important vehicle for the exercise of tribal sovereignty. The Casino was established as a subdivision of the tribal government, and is managed by the tribal council. *Soaring Eagle*, 2013 WL 1656049, at *5. The Casino requires over 3,000 employees, evidencing a need for nonmember hiring. *Id.* at *6. But it is mainly managed by members, who then report to the tribal council. *Id.* The Casino's revenue constitutes 90% of the Tribe's income, providing for the vast majority of the services provided by the government to tribal members. *Id.* Considering the lack of exploitable natural resources on the Isabella Reservation, the Casino permits the Tribe to provide necessary services for its members without relying on substantial federal assistance. And, as the Supreme Court has recognized in the context of severance taxes, the power and ability of a tribal government "to raise revenues for its essential services" is an important aspect of tribal sovereignty. *Merrion*, 455 U.S. at 137.

As for the location of the tribal enterprise, the Court expressly noted in *Montana* that the tribe has greater powers to exclude and regulate nonmember hunting and fishing on land held by the United States in trust for the tribe, 450 U.S. at 557, and in *Hicks* the Court described the ownership status of the land to be such a significant factor that it may be dispositive, 533 U.S. at 370. Here, the Casino is situated not just on Isabella Reservation property, but on trust property. Although the 1855 and 1864 Treaties are not alone sufficient to block application of the NLRA, the Treaties are relevant to the Tribe's interest in conditioning entry and employment on its own lands. The Tribe considered recognition of its continuing control over entry to its property so important that it was one of the few rights and privileges retained by the Tribe and mentioned explicitly in the Treaty. And, although Lewis's status as a nonmember is relevant to whether her activities encroach upon the sovereignty of the Tribe, that status is precisely what gives rise to an analysis of the *Montana* exceptions—we do not even reach the exceptions unless the tribal policy affects nonmembers. The fact that Lewis was a nonmember only initiates the *Montana* analysis, it does not resolve it.[12]

---

[12] In *Atkinson Trading*, the Court held that the first *Montana* exception included a nexus requirement—"*Montana's* consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." 532 U.S. at 656. It is clear that the nexus requirement of *Atkinson Trading* is met here—the no-solicitation policy is directly related to the employment relationship that Lewis voluntarily entered with the Casino, and her employment was subject to the terms of that policy. 532 U.S. at 656. This is

We believe that the weight of these factors supports our conclusion that the NLRA should not apply to the Casino. We consider relevant: (1) the fact that the Casino is on trust land and is considered a unit of the Tribe's government; (2) the importance of the Casino to tribal governance and its ability to provide member services; and (3) that Lewis (and other nonmembers) voluntarily entered into an employment relationship with the Tribe. We recognize that our determination would have inhibited the Board's desire to apply the NLRA to all employers not expressly excluded from its reach. But Congress retains the ability to amend the NLRA to apply explicitly to the Casino, if it so chooses.[13] *See Bay Mills*, 134 S. Ct. at 2037 ("[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity.") We note, however, that to the extent Congress already has acted with respect to Indian sovereignty and Indian gaming, it has shown a preference for protecting such sovereignty and placing authority over Indian gaming squarely in the hands of

---

not a case where "[a] nonmember's consensual relationship in one area [ ] does not trigger tribal civil authority in another . . . ." *Id.* Lewis entered a contractual relationship with the Casino (and therefore the Tribe), and her violations of the policy-at-issue directly initiated the present complaint before the Board.

[13] The Executive Branch does not appear to agree with the Board's application of the NLRA to tribal activities. In a December 7, 2011 letter to the Board, the Department of the Interior expressed its view that tribal governments, like state and local governments, should be excepted from the NLRA's reach under the employer exception in 29 U.S.C. § 152(2). Letter from Patrice H. Kunesh, Deputy Solicitor–Indian Affairs, U.S. Dep't of the Interior, to Lafe Soloman, Acting General Counsel, Nat'l Labor Relations Bd. (Dec. 7, 2011) (Appellant App. 155–56).

tribes. In the same year Congress enacted the NLRA, it also passed the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 461 *et seq.*, to strongly promote Indian sovereignty and economic self-sufficiency, and to move federal policy away from a goal of assimilation. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 & n.17 (1983) (identifying the IRA, as well as similar statutes like the Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.*, and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et seq.*, as supporting tribal self-government by promoting "tribal self-sufficiency and economic development."); *see also* Brief for the National Congress of American Indians as Amicus Curiae in Support of Petitioner at 11–19, *Saginaw Chippewa Indian Tribe of Michigan v. NLRB* (6th Cir. 2015) (Nos. 14-2405, -2558). Thus, although Congress was silent regarding tribes in the NLRA, it was anything but silent regarding its contemporaneously-stated desire to expand tribal self-governance. And, more recently, Congress enacted the IGRA "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," and "to ensure that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. § 2702; *see also id.* § 2710(b)(2)(B)(i) (requiring that "net revenues from any tribal gaming" are only be used, *inter alia*, "to fund tribal government operations or programs," "to provide for the general welfare of the Indian tribe and its members," and "to promote tribal economic development"); *id.* §§ 2710(b)(2)(F),(d)(1)(A)(ii) (describing required contents of tribal ordinances or tribal-state compacts

regarding employment practices of gaming employers); *Bay Mills*, 134 S. Ct. at 2043 (Sotomayor, J., concurring) ("And tribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases may be the only means by which a tribe can raise revenues." (internal quotation marks omitted)).

For all of these reasons, if writing on a clean slate, we would conclude that, keeping in mind "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area," *Santa Clara Pueblo*, 436 U.S. at 60, the Tribe has an inherent sovereign right to control the terms of employment with nonmember employees at the Casino, a purely tribal enterprise located on trust land.[14] The NLRA, a statute of general applicability containing no expression of congressional intent regarding tribes, should not apply to the Casino and should not render its no-solicitation policy void.

B

As noted, we believe our analysis is in accordance with the Supreme Court precedents on which we rely. We now address the *Little River* majority's decision to adopt a different analytical structure—the one the Board outlined in *San Manuel Indian Bingo & Casino*. In *San Manuel*, the Board reconsidered "whether [it] should assert jurisdiction over a commercial enterprise that is wholly owned and operated by an Indian tribe on the tribe's reservation," in particular, a casino. 341 NLRB at 1055. Prior to *San Manuel*, the

[14] Given our analysis of the first *Montana* exception, we do not reach the second one, despite the Tribe's reliance on it.

Board had established a geographical approach to its jurisdiction over Indian tribes—generally, if the tribal enterprise was located off-reservation, the Board would assert jurisdiction, *see*, *e.g.*, *Sac & Fox Indus., Ltd.,* 307 NLRB 241 (1992), but the Board would not attempt to assert jurisdiction for on-reservation tribal enterprises, even those on non-Indian fee land, *see*, *e.g.*, *Fort Apache Timber Co.*, 226 NLRB 503 (1976). *San Manuel*, 341 NLRB at 1056–57. The Board in *San Manuel* rejected its prior geographical approach, concluding that "[t]he location of a tribal enterprise on an Indian Reservation does not alter our conclusion that [29 U.S.C. § 152(2)] does not compel an exception for Indian tribes." *Id.* at 1058–59. Instead, over a dissent by Member Schaumber, the Board adopted the Ninth Circuit's framework in *Coeur d'Alene* for determining when a statute of general applicability applies to tribal enterprises. *Id.* at 1059–61. The Board also added a discretionary component to the *Coeur d'Alene* analysis for evaluating whether "policy considerations militate in favor of or against the assertion of the Board's discretionary jurisdiction." *Id.* at 1062; *see also id.* ("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."). As in the present appeal, the Board in *San Manuel* found that application of the *Coeur d'Alene* framework justified its assertion of jurisdiction over the Casino. *Id.* at 1063–64.

The *Coeur d'Alene* framework represents the Ninth Circuit's attempt to balance the scope of generally applicable federal regulatory statutes with

the traditional federal concerns of deference to tribal sovereignty. In *Coeur d'Alene*, the Ninth Circuit considered whether OSHA applied to a farm owned and operated by the Coeur d'Alene Tribe in northern Idaho. *Coeur d'Alene*, 751 F.2d at 1114–15. The Ninth Circuit began with what it characterized as the general presumption of *Tuscarora* that "a general statute in terms applying to all persons includes Indians and their property interests." *Id.* at 1115 (quoting *Tuscarora*, 362 U.S. at 116). Though the court recognized that this language from *Tuscarora* may have been dictum, it still adopted the language as its guiding principle. *Id.* The court then identified three exceptions to the *Tuscarora* principle:

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . . ."

Id. at 1116 (quoting *Farris*, 624 F.2d at 893–94). The Ninth Circuit concluded that OSHA was a statute of general applicability, the "tribal self-governance" exception did not include "all tribal business and commercial activity," and there was no treaty or legislative history demonstrating a congressional intent that the statute would not apply to Indian activities. *Id.* at 1116–18. It found, therefore, that

OSHA applied to the tribe's commercial farming operations. *Id.* at 1118. In *U.S. Department of Labor v. Occupational Safety & Health Review Commission*, 935 F.2d 182, 184–87 (9th Cir. 1991), again applying the *Coeur d'Alene* framework, the Ninth Circuit determined that OSHA permitted inspectors to enter tribal property even in light of language in a treaty granting a general right of exclusion to the tribe. And, the Ninth Circuit has held that the NLRA applies to a tribal health services organization, finding the NLRA not materially distinguishable from other federal regulatory statutes of general applicability that the court previously applied to tribal enterprises. *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 998–99 (9th Cir. 2003). Notably, however, the Ninth Circuit did not discuss *Montana* or its exceptions in *Coeur d'Alene*, and did not acknowledge *Hicks* in its *Chapa de Indian Health Program* decision.

As did the *Little River* majority, other circuits also have adopted the *Coeur d'Alene* framework. The Second Circuit adopted the *Coeur d'Alene* framework when also holding that OSHA reached tribal enterprises. *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 177–79 (2d Cir. 1996) (concluding that OSHA applied to a construction business owned by an Indian tribe). And the Eleventh Circuit in *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1128–30 (11th Cir. 1999), used the *Coeur d'Alene* framework to conclude that Title III of the Americans with Disabilities Act applied to a tribal restaurant and gaming facility. Similarly, the Seventh Circuit in *Smart*, under the *Coeur d'Alene* framework, held that the Employee Retirement Income Security Act ("ERISA") applied to tribal

employers. 868 F.2d at 932–36; *see also Menominee Tribal Enters.*, 601 F.3d at 671–74 (describing a framework similar to *Coeur d'Alene* and concluding that OSHA applied to a tribal sawmill).

The Tenth Circuit, on the other hand, has rejected the *Coeur d'Alene* framework. In *NLRB v. Pueblo San Juan*, 280 F.3d 1278 (10th Cir. 2000), the Tenth Circuit concluded that the NLRA did not prevent a tribal council from enacting a right-to-work ordinance. A panel of the Tenth Circuit held that §§ 8(a)(3), 14(b) of the NLRA did not prohibit a tribal right-to-work ordinance because, *inter alia*: (1) the *Tuscarora* presumption does not apply because the NLRA is not a statute of general applicability as it excludes states and territories, and (2) the first *Montana* exception protects a tribe's "inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians engaged in commercial activities on Indian land." *Id.* at 1283–84; *see also id.* at 1285 ("As in [*Navajo Forest Products*], we have been reluctant to apply statutes which regulate the terms and conditions of employment . . . unless the statute expressly includes Indian tribes . . . ."). On rehearing en banc, the full court affirmed the panel's holding that the NLRA did not bar the tribal council's right-to-work ordinance. *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (en banc). The en banc court made clear, however, that "the general applicability of federal labor law is not at issue," but merely whether Congress "divested" the tribe of its inherent sovereign authority to adopt a right-to-work ordinance by enacting §§ 8(a)(3), 14(b) of the NLRA. *Id.* at 1191. The court found no express or implied divestiture of the tribe's authority to enact the right-to-work ordinance

in the NLRA, especially considering the strong presumptions in favor of respecting broad tribal sovereignty in the face of congressional silence. *Id.* at 1194–96 ("The correct presumption is that silence does not work a divestiture of tribal power."). The court also distinguished *Tuscarora* as dealing "solely with issues of ownership, not with questions pertaining to the tribe's sovereign authority to govern the land," and rejected application of the *Tuscarora/Coeur d'Alene* framework when the tribe acts as a sovereign rather than as a property owner. *Id.* at 1198–1200; *see also Merrion*, 455 U.S. at 145–46 n.12 (quoting a treatise on Indian law written by the Department of the Interior that distinguished the rights of tribes as landowners from their rights as sovereigns on reservation property). The Tenth Circuit has since reiterated this approach to federal regulatory statutes of general applicability in *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1283–85 (10th Cir. 2010), where the court considered whether changes to ERISA's preemption for "governmental plan[s]" to include plans established by tribal governments applied retroactively. The Tenth Circuit again noted that "respect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization." *Id.* at 1283.

The Eighth Circuit also seems to reject the *Coeur d'Alene* framework. In *EEOC v. Fond du Lac Heavy Equipment & Construction Co.*, 986 F.2d 246, 248–50 (8th Cir. 1993), the Eighth Circuit analyzed whether the Age Discrimination in Employment Act ("ADEA") applied to a suit brought by a tribal member against a

tribal employer. The Eighth Circuit acknowledged the broad language in *Tuscarora*, but concluded that an internal ADEA dispute with a tribal member affected "the tribe's specific right of self-government" such that the "general rule of applicability does not apply." *Id.* at 249; *see also id.* at 248 ("Specific Indian rights will not be deemed to have been abrogated or limited absent a 'clear and plain' congressional intent." (internal citation omitted)).

The D.C. Circuit, on review of the Board's *San Manuel* analysis, seemed to chart a different course. The D.C. Circuit noted that the question posed was difficult because Congress "in all likelihood never contemplated the [NLRA's] potential application to tribal employers," and the fact that there are "conflicting Supreme Court canons of interpretation [those regarding statutes of general applicability in *Tuscarora* and those in other cases regarding the need to protect Indian sovereignty] that are articulated at a fairly high level of generality." *San Manuel*, 475 F.3d at 1310. The D.C. Circuit explained that the "gravitational center [of its analysis] . . . is tribal sovereignty," and found the *Tuscarora* presumption to be both potentially dictum and inconsistent with the Indian canons of construction. *Id.* at 1311–12. Rather than adopt the *Coeur d'Alene* framework, the D.C. Circuit instead stated its role was to balance the scope of inherent tribal sovereignty with government interests in uniform application of regulatory statutes. *Id.* at 1312–13 ("[A] statute of general application can constrain the actions of a tribal government without at the same time impairing tribal sovereignty."); *see also id.* at 1315 (noting that the *Coeur d'Alene* framework was "different from the one we employ

here"). The D.C. Circuit recognized that tribal sovereignty is at its strongest when explicitly protected by a treaty or involving intramural tribal matters, and is at its weakest for off-reservation activities. *Id.* For situations between those extremes, the court looked to a "particularized inquiry" that determined "the extent to which application of the general law will constrain the tribe with respect to its governmental functions," through consideration of a variety of factors, including the location of the activity in question and the sovereign right at issue. *Id.* at 1313–15 ("In sum, the 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."). The court concluded that application of the NLRA to a casino would not "impinge on the Tribe's sovereignty enough to indicate a need to construe the statute narrowly against application to employment at the Casino," because: (1) operating a casino is a traditionally commercial, not governmental, function; (2) enactment of labor legislation was "ancillary to that commercial activity"; and (3) the majority of the employees were nonmembers. *Id.* at 1314–15. In conducting this analysis, however, the court neither discussed the *Montana* exceptions, nor the Supreme Court's confirmation in *Hicks* that *Montana* was the "pathmarking" case we are to follow in this area. *Hicks*, 533 U.S. at 358.

In sum, the Second, Seventh, Ninth, Eleventh, and now the Sixth, Circuits, apply the *Coeur d'Alene* framework to determine whether statutes of general

applicability apply to Indian tribes, the Eighth and Tenth Circuits reject it, and the D.C. Circuit applies a fact-intensive analysis of the tribal activity at issue and a policy inquiry comparing the federal interest in the regulatory scheme at issue with the federal interest in protecting tribal sovereignty.

We would reject the *Coeur d'Alene* framework for determining the reach of federal statutes of general applicability, instead choosing to structure our analysis on the guidance we glean from *Montana* and *Hicks*. Although we agree with the D.C. Circuit that a regulatory statute's impact on tribal sovereignty requires a fact-based inquiry, we believe the Supreme Court has told us how to balance the competing federal interests at issue—by reference to the *Montana* exceptions, as further explained in *Hicks*.

The *Coeur d'Alene* framework unduly shifts the analysis away from a broad respect for tribal sovereignty, and the need for a clear statement of congressional intent to abrogate that sovereignty, and does so based on a single sentence from *Tuscarora*. Both the *Coeur d'Alene* and *San Manuel* courts recognized that the sentence from *Tuscarora* upon which *Coeur d'Alene* relied may be dictum, and that the Supreme Court has never cited *Tuscarora* for that proposition, including in its more recent decisions discussing the scope of inherent tribal sovereignty in the face of federal regulatory activity. We doubt *Tuscarora* can bear the weight placed on it by the *Coeur d'Alene* framework or the strain of the Court's more recent contrary pronouncements on Indian law. And, on the foundation of this potentially faulty premise, the *Coeur d'Alene* framework structures

three fairly limited "exceptions" it finds adequate to respect tribal sovereignty. The second and third exceptions are fairly obvious and, thus, are less divisive. The Supreme Court case law discussed above explains that we should not read later congressional activity to abrogate a specifically articulated treaty right absent a clear statement by Congress. And, it would make little sense for a court to find that a statute of general applicability would apply in the face of statements by Congress in the legislative history that the statute should *not* apply to Indians. Our concern, instead, is with the first exception, involving "exclusive rights of self-governance in purely intramural matters." *Coeur d'Alene*, 751 F.2d at 1116. Those Circuits adopting the *Coeur d'Alene* framework have read this language restrictively, such that "rights of self-governance" only apply to the limited situations identified in *Wheeler*, 435 U.S. at 322 n.18. But, as discussed above, the Supreme Court has identified categories of sovereignty that go beyond those in *Wheeler*. *See, e.g.*, *Merrion*, 453 U.S. at 137 (the power to tax removal of natural resources from reservation land). And, in *Montana* and *Hicks*, the Supreme Court made clear that a tribe's right to self-governance and its power to regulate the conduct of nonmembers extends to consensual commercial relationships with nonmembers. Despite visiting the question of tribal authority over nonmembers on multiple occasions since *Coeur d'Alene* was decided in 1985, moreover, the Supreme Court has never cited nor endorsed its reasoning. Ultimately, we find that the *Coeur d'Alene* framework, and especially its description of its first exception, overly constrains tribal sovereignty, fails to respect the historic deference that the Supreme Court

has given to considerations of tribal sovereignty in the absence of congressional intent to the contrary, and is inconsistent with the Supreme Court directives in *Montana* and *Hicks*.

Both the *Coeur d'Alene* framework and the D.C. Circuit's analysis in *San Manuel* also appear to create an analytical dichotomy between commercial and more traditional governmental functions of Indian tribes. *See Coeur d'Alene*, 751 F.2d at 1116–17 (differentiating between "tribal self-government" and "commercial activity"); *San Manuel*, 475 F.3d at 1314–15. The *Little River* majority characterizes this distinction as one between "core" tribal concerns and those lying on the "periphery" of tribal sovereignty. 2015 WL 3556005, at *8. We believe this government-commercial or core-periphery distinction distorts the crucial overlap between tribal commercial development and government activity that is at the heart of the federal policy of self-determination. *See Bay Mills*, 134 S. Ct. at 2043 (Sotomayor, J., concurring) ("For tribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core governmental functions."). Indeed, that distinction flies in the face of congressional pronouncements to the contrary in the IGRA. And, it ignores the fact that the Supreme Court famously rejected a similar distinction in connection with federal regulation of states, characterizing this distinction as unworkable. *Compare Nat'l League of Cities v. Usery*, 426 U.S. 833, 840–52 (1976) (proposing a "traditional governmental functions" standard for state governmental immunity from federal regulation under the Commerce Clause), *with Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537–47

(1985) (rejecting the "traditional governmental functions" standard as "unsound in principle and unworkable in practice"); *see also Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758–60 (1998) (declining to draw a distinction between commercial and governmental activities for purposes of tribal sovereign immunity).

Because we do not believe that the *Coeur d'Alene* framework properly addresses inherent tribal sovereignty under governing Supreme Court precedent, we would choose not to adopt that framework here. We would instead employ the fact-intensive analysis dictated in *Montana* and *Hicks* and conclude that the first *Montana* exception bars application of the NLRA to the Casino. And because key aspects of the Tribe's inherent sovereignty would be encroached upon by application of the NLRA to the Casino, we would decline to apply it to the Casino absent an indication of clear congressional intent to do so.

V

Notwithstanding our preferred analytical framework, and in light of our prior panel decision in *Little River*, we are bound to conclude that the NLRA applies to the Soaring Eagle Casino and Resort, and that the Board has jurisdiction over the present dispute. We enter judgment enforcing the Board's order and deny the Tribe's petition for review.

AFFIRMED

CONCURRING IN PART AND DISSENTING IN PART

HELENE N. WHITE, Circuit Judge, concurring in part and dissenting in part. I concur in all but section III(B) of the majority opinion. I agree that *Little River* was wrongly decided, that *Coeur d'Alene* (the reasoning of which *Little River* adopts) is inconsistent with Supreme Court precedent and premised on inapplicable dictum, and that application of the NLRA to the Tribe is inconsistent with traditional notions of tribal sovereignty. I dissent because I believe that this case is distinguishable from *Little River* and *Coeur d'Alene* on the basis that the Tribe here has treaty rights protecting its on-reservation activities.

The 1864 Treaty provides that the United States agrees to set aside the reservation land for the Tribe's "exclusive use, ownership, and occupancy." 14 Stat. 657 (1864). As the majority correctly notes, it is well settled that several interpretive canons inform decision making in this context. Specifically, it is black-letter law that "we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *Choctaw Nation, et al. v. Oklahoma, et al.*, 397 U.S. 620, 631 (1970) ("[T]reaties were imposed upon [the Indians] and they had no choice but to consent. As a consequence, [the Supreme] Court has often held that treaties with the Indians must be interpreted as they would have understood them, and any doubtful

expressions in them should be resolved in the Indians' favor." (internal citations omitted)); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832) (stating that all that matters is "[h]ow the words of the treaty were understood by [the Indians at the time they entered into the treaty]"). Accordingly, "the language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of their treaty." *Keweenaw Bay Indian Cmty. v. Naftaly*, 452 F.3d 514, 523 (6th Cir. 2006); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).[1]

The majority does not dispute these canons or how they apply; rather, it finds the Treaty's general right of exclusion insufficiently specific to support the Tribe's claim. True, the Treaty does not expressly state that the NLRA does not apply to the Tribe; nor does it say that federally recognized labor unions cannot solicit on tribal land, or that federal authorities may not enter onto tribal land. But it does not need to.

We must interpret the Treaty the way a member of the Chippewa Tribe would have understood it in 1864. *See Worcester*, 31 U.S. (6 Pet.) at 582; *see also Mille Lacs*, 526 U.S. at 196. As memorialized in the

---

[1] Of course, "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." *Mille Lacs*, 526 U.S. at 202. This is because "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in th[e] area [of Indian affairs] cautions that [courts] tread lightly in the absence of clear indications of legislative intent." *Merrion*, 455 U.S. at 149 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978)). No one suggests that Congress has expressly abrogated the Tribe's treaty rights in the NLRA.

Treaty, in exchange for "relinquishing . . . several townships" to the federal government, the Tribe secured the "exclusive use, ownership, and occupancy" of the remnant it retained. 14 Stat. 657 (1864). Each and every tribal signatory signed with an "X," indicating, if nothing else, that English was not a well-understood language. Surely, these signatories who just gave up a significant portion of their homeland, would not have understood their right to the "exclusive use, ownership, and occupancy" of their remaining land to be limited, non-specific, or subject to regulation regarding the conditions the Tribe might impose on those it permitted to enter. On the contrary, the Tribe would reasonably have understood this provision to mean that the federal government could not dictate, in any way, what the Tribe did on the land it retained. To parse the specificity of the over 150-year-old Treaty to the Tribe's detriment violates recognized canons of interpretation. *See, e.g.*, *Naftaly*, 452 F.3d at 523. To be sure, Congress could have, and can, expressly abrogate this right, *Mille Lacs*, 526 U.S. at 202, but all agree it has not done so.

Absent Congress's express direction to the contrary, the Tribe's treaty-based exclusionary right is sufficient to preclude application of the NLRA to the Tribe's on-reservation Casino. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), is instructive. Although *Merrion* did not involve a treaty, it exhaustively interpreted the same right at issue here: a tribe's right to exclude non-members from tribal lands. *Id*. at 144. As the majority correctly notes, *Merrion* made crystal clear that "[n]onmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. This power necessarily

includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct. . . ." *Id.* Thus, whether a tribe's right of exclusion is found in its inherent sovereignty or its treaty, a tribe with such a right also necessarily has the "lesser power" to place conditions on a non-member's entry. *See id.*; *cf. South Dakota v. Bourland*, 508 U.S. 679, 687–88 (1993) (interpreting a general right of exclusion as "embracing the implicit power to exclude others"); *Montana v. United States*, 450 U.S. 544, 559 (1981) (same). Here, the lesser power to place conditions on a non-member's entry necessarily includes the power to regulate, without federal interference, the non-member's conditions of employment.

That *Little River* and *Coeur d'Alene* relegate tribal sovereign rights of exclusion to history does not justify the abrogation of treaty-based exclusionary rights as well. Here, the Tribe's treaty-based right of exclusion is especially pertinent given that its sovereign powers have been diminished. Indeed, the very purpose of the Treaty was to operate as a bulwark against any erosion of the Tribe's sovereign rights that might otherwise occur. In *Little River* and *Coeur d'Alene*, the tribes' inherent sovereignty was curtailed notwithstanding the absence of express congressional intent to do so. Where those courts derived the right or authority to make such a finding is not apparent in the reasoning of the opinions themselves, nor is it apparent from Supreme Court precedent. In any event, no treaty was involved in those cases and neither court purported to abrogate a tribe's treaty-based rights. Thus, although *Littler River* is controlling as to the sovereignty issue, it has no bearing on the treaty issue.

In sum, I join in the majority's conclusion that *Little River* is wrongly decided but dictates that the Tribe's inherent sovereignty cannot itself carry the day. However, the Tribe's treaty-based exclusionary right does not suffer the same fate. At bottom, the Treaty matters, and to find otherwise suggests that the federal government's agreement with the Tribe is worth no more than the paper on which it was written. It well may be that when a tribe's inherent sovereignty rights are broadly interpreted, its treaty-based exclusionary right (general or specific) has little work to do. But out of necessity, the treaty-based right assumes a paramount role when a tribe's inherent sovereignty has been judicially narrowed, and the treaty should not be narrowly interpreted. Such is the case here, and thus I respectfully dissent from section III(B) of the majority opinion.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 14-2405/2558

SOARING EAGLE CASINO AND RESORT, an Enterprise of the Saginaw Chippewa Indian Tribe of Michigan,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

Filed: September 29, 2015

WHITE, DONALD, and O'MALLEY*, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

---

* The Honorable Kathleen M. O'Malley, Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/Deborah S. Hunt

Deborah S. Hunt, Clerk

Appendix C

NATIONAL LABOR RELATIONS BOARD

No. 07–CA–053586

SOARING EAGLE CASINO AND RESORT, AN ENTERPRISE OF THE SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN *AND* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

---

Filed: October 27, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

On April 16, 2013, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 92. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Sixth Circuit, and the General Counsel filed a cross-application for enforcement.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning,* 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals vacated the Board's Decision and Order and remanded this case for further

proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning,* supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein. Accordingly, we adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported at 359 NLRB No. 92 (2013), which is incorporated herein by reference.[1]

Dated, Washington, D.C. October 27, 2014

_____

Kent Y. Hirozawa, Member

_____

Nancy Schiffer, Member

---

[1] The Respondent excepted only to the judge's assertion of jurisdiction and not to his unfair labor practice findings. In the absence of exceptions, we find it unnecessary to address the judge's discussion of *Register-Guard*, 351 NLRB 1110 (2007), enfd. in part, review granted in part 571 F.3d 53 (D.C. Cir. 2009), or whether the judge erred by applying *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Consistent with our decision in *Don Chavas LLC d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 (2014), we agree with the modification to the judge's recommended Order to require the Respondent to compensate Susan Lewis for the adverse tax consequences, if any, of receiving a lump-sum

MEMBER MISCIMARRA, concurring.

I concur in this matter and agree with the judge's rulings, findings, and conclusions, and I adopt the judge's recommended Order as modified in accordance with *Don Chavas LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

Contrary to the Respondent, the judge properly found that the Act is applicable to the Respondent's casino operation pursuant to *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), enfd. 475 F.3d 1306 (D.C. Cir. 2007). The Respondent did not file exceptions to the judge's unfair labor practice findings, with which I agree in any event. Thus, the judge properly found that Respondent's no-solicitation policy is facially invalid and overly broad because it prohibits employees from soliciting in any work area—defined as "any place where any employees perform job duties at the Casino"—without distinguishing between working time and nonworking time, and therefore the policy can be read to prohibit solicitation during nonworking time. See, e.g., *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962) (absent special circumstances, employees have a right to engage in solicitation on nonworking time). Further, the judge properly concluded that Respondent violated Section 8(a)(1) by prohibiting employees from discussing unionization in a nonworking area (the employee hallway). Finally, it is undisputed that the

---

backpay award, and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

We shall substitute a new notice in accordance with *Durham School Services,* 360 NLRB No. 85 (2014).

Respondent suspended and discharged employee Susan Lewis for engaging in union solicitation. Accordingly, unlike the judge, in finding that the Respondent violated Section 8(a)(3) and (1) when it suspended and discharged Lewis, I would not apply *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Dated, Washington, D.C. October 27, 2014

_____

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend, discharge, or otherwise discriminate against any of you for supporting the International Union, United Automobile, Aerospace

and Agricultural Implement Workers of America or any other union.

WE WILL NOT maintain and enforce a no-solicitation rule prohibiting employees from (1) soliciting other employees during nonwork time to support the Union or any other labor organization, and (2) distributing union literature or campaign paraphernalia during nonwork time in nonwork areas.

WE WILL NOT tell employees they cannot talk to other employees about the Union in the employee hallway.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the Board's Order, offer Susan Lewis full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Susan Lewis whole for any loss of earnings and other benefits resulting from her suspension and discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Susan Lewis for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Susan Lewis, and WE

WILL, within 3 days thereafter notify her in writing that this has been done and that the suspension and discharge will not be used against her in any way.

WE WILL, within 14 days of the Board's Order, revise or rescind our no-solicitation rule prohibiting employees from (1) soliciting other employees during nonwork time to support the Union or any other labor organization, and (2) distributing union literature or campaign paraphernalia during nonwork time in nonwork areas, and notify our employees in writing that we have done so.

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

Appendix D

NATIONAL LABOR RELATIONS BOARD

No. 07–CA–053586

SOARING EAGLE CASINO AND RESORT, AN ENTERPRISE OF THE SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN *AND* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

---

Filed: April 16, 2013

SUMMARY

The Board found that the employer, an on-reservation, tribally owned and operated casino complex, violated the Act by suspending and discharging an employee for supporting the union, maintaining an overly broad no-solicitation rule, and telling employees they may not talk to one another about the union in the employee hallway. Charge filed by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). Administrative Law Judge Michael A. Rosas issued his decision on March 26, 2012. Chairman Pearce and Members Griffin and Block participated.

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

On March 26, 2012, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief. The Acting General Counsel also filed cross-exceptions and a supporting brief.[1] The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the

---

[1] In addition, the Respondent filed a "Notice of Supplemental Authority," and the Acting General Counsel filed a response to that document. In the notice, the Respondent "suggests" that the Board lacks a quorum because the President's recess appointments are constitutionally invalid. We reject this argument. We recognize that the United States Court of Appeals for the District of Columbia Circuit has concluded that the President's recess appointments were not valid. See *Noel Canning v. NLRB*, ___ F.3d ___ (D.C. Cir. 2013). However, as the court itself acknowledged, its decision is in conflict with at least three other courts of appeals. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied, 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). This question remains in litigation, and until such time as it is ultimately resolved, the Board is charged to fulfill its responsibilities under the Act.

[2] In finding that the Respondent unlawfully discharged employee Susan Lewis, the judge inadvertently mischaracterized the Respondent's burden under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), as showing "that it took the adverse action for a legitimate nondiscriminatory reason." As the judge correctly stated elsewhere in his decision, once the Acting General Counsel showed that protected conduct was a motivating factor in Lewis' discharge, the Respondent's burden was to demonstrate that it would have taken the same action even in

recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Soaring Eagle Casino and Resort, an Enterprise of the Saginaw Chippewa Indian Tribe of Michigan, Mount Pleasant, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, discharging, or otherwise discriminating against any employee for being a member of or for supporting the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America or any other union.

(b) Maintaining and enforcing a no-solicitation rule that prohibits employees from (1) soliciting other employees during nonworktime to support the Union or any other labor organization, and (2) distributing union literature or campaign paraphernalia during nonworktime in nonwork areas.

(c) Telling employees they cannot talk to other employees about the Union in the employee hallway.

---

the absence of her protected conduct. *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

[3] We have modified the Order and notice to conform to the violations found and to include a remedial provision regarding the tax and social security consequences of making discriminatee Susan Lewis whole, in accordance with our decision in *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Susan Lewis full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Susan Lewis whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Susan Lewis for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional

Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days of the date of this Order, revise or rescind its no-solicitation rule prohibiting employees from (1) soliciting other employees during nonworktime to support the Union or any other labor organization, and (2) distributing union literature or campaign paraphernalia during nonworktime in nonwork areas, and notify the employees in writing that it has done so.

(g) Within 14 days after service by the Region, post at its casino and hotel facility in Mt. Pleasant, Michigan, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2010.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 16, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend, discharge, or otherwise discriminate against any of you for supporting the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America or any other union.

WE WILL NOT maintain and enforce a no-solicitation rule prohibiting employees from (1) soliciting other employees during nonwork time to support the Union or any other labor organization, and (2) distributing union literature or campaign paraphernalia during nonwork time in nonwork areas.

WE WILL NOT tell employees they cannot talk to other employees about the Union in the employee hallway.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the Board's Order, offer Susan Lewis full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Susan Lewis whole for any loss of earnings and other benefits resulting from her suspension and discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Susan Lewis for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Susan Lewis, and WE WILL, within 3 days thereafter notify her in writing that this has been done and that the suspension and discharge will not be used against her in any way.

WE WILL, within 14 days of the Board's Order, revise or rescind our no-solicitation rule prohibiting employees from (1) soliciting other employees during nonwork time to support the Union or any other labor organization, and (2) distributing union literature or campaign paraphernalia during nonwork time in nonwork areas, and notify our employees in writing that we have done so.

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

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge.

This case was tried in Mount Pleasant, Michigan, on December 14-15, 2011. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the Union) filed the initial charge on April 1, 2011,[1] and the General Counsel issued the amended complaint on October 12, 2011. The amended complaint alleges that the Soaring Eagle Casino and Resort, an Enterprise of the Saginaw Chippewa Indian Tribe of Michigan (the Tribe), violated: Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining an unlawful no-solicitation policy in its handbook and prohibiting employees from talking about the Union in the employee hallway; and (2) Section 8(a)(3) and (1) of the Act by suspending and then discharging an employee for engaging in union solicitation and distribution activities in the employee hallway and public bathroom in the casino. The Tribe denies the allegations and contends that Federal laws, including the Act, do not apply to a tribal Government's exercise

[1] All dates are in 2011, unless otherwise indicated.

of sovereign authority absent express congressional authorization.

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act. The Tribe, a federally recognized Indian Tribe with an office and facility in Mount Pleasant, Michigan, is engaged in the operation of a hotel and gaming enterprise. During 2010, the Tribe, in conducting said business operations, derived gross revenues in excess of $1,000,000 and purchased and received at its Mount Pleasant facility goods and materials valued in excess of $50,000 directly from points outside the State of Michigan. Notwithstanding such economic activity within the stream of interstate commerce, the Tribe contends that its unique status as a federally recognized Indian tribe immunizes it from the jurisdictional reach of Section 2(2), (6), and (7) of the Act. This question is, indeed, determinative of the outcome of this case.

II. THE SAGINAW CHIPPEWA TRIBE

A. *The 1855 and 1864 Treaties*

The Saginaw Chippewa Tribe (the Tribe), a Federally recognized Indian Tribe,[2] is a successor to the 1855 Treaty with the Chippewa of Saginaw, Swan Creek, and Black River (the predecessor Tribe), 11 Stat. 633, and the 1864 Treaty with the predecessor Tribe, 14 Stat. 637.[3]

---

[2] 75 Fed. Reg. 60,810 (Oct. 1, 2010).

[3] R. Exh. 2-3.

The 1855 Treaty, as amended, affirmed[4] the rights of the predecessor Tribe to the exclusive use, ownership, occupancy, and self-governance of a permanent homeland. It dealt with land allocation, support payment of moneys by the United States Government to the Tribe, and provision of an interpreter for the Indians. The 1864 Treaty provided for the Tribe to relinquish lands reserved to the Tribe under the 1855 Treaty, but allocated land in Isabella County—the Isabella Reservation—for "the exclusive use and occupancy" of the predecessor Tribe as a sovereign nation. It specifically mentioned monetary support by the Federal government for agricultural operations, a school and a blacksmith shop on the reservation. The 1855 and 1864 treaties also included the rights to exclude non-Indians from living on the reservation.[5]

Subsequently, the predecessor Tribe invoked the treaties in order to exclude non-Indians from their lands. In one instance, the predecessor Tribe succeeded in having a Federal agent involved in land fraud removed from their reservation. In another instance, the Tribe succeeded in having the awards of reservation land to a missionary revoked and the

---

[4] The General Counsel did not dispute the opinion of the Tribe's expert that Indian treaties affirm, rather than create, longstanding sovereign rights. (Tr. 70.)

[5] Previous testimony by the Tribe's expert, John Bowes, was accepted as fact regarding the predecessor Tribe's right to exclude. (R. Exh. 4 at 2). In addition, there are several general references to an 1864 "Statement of the Indians" as reinforcing that right. (Jt. Exh. 1.)

missionary excluded from their land.[6] More recently, on August 31, 2011, the Tribe enacted its most recent law excluding non-Indians from the Isabella Reservation.[7] Neither treaty, however, even remotely addresses the future application of Federal regulatory laws to the predecessor Tribe's business operations involving non-Indian employees.[8]

B. The Isabella Reservation

The reservation created by the Treaties of 1855 and 1864 is located primarily within Isabella County, with a portion in Arenac County, Michigan. The Tribe's casino is located entirely within the geographical boundaries of the Isabella Reservation. The City of Mount Pleasant, with its own police, fire, and public safety departments, is located entirely within the geographic boundaries of the reservation. With respect to activities within the reservation,

---

[6] This historical rendition by Bowes was not disputed. (Tr. 88-94.)

[7] Ordinance No. 3, "Code of Conduct and Power to Exclude Non-Members. (R. Ex. 6; Tr. 88-94.)

[8] The testimony of Bowes and the Tribe's other expert in Native American history, Randolph Valentine, was not disputed. Besides providing legal conclusions that the Act does not apply to any of the Tribe's operations, they credibly explained the predecessor Tribe's understanding as to how the treaties related to their sovereign rights. (Tr. 11-46, 67-94; R. Exhs. 1-5.) Valentine's opinion that any ambiguities under treaties with Native American tribes were historically construed in their favor was also not disputed. (Tr. 17-18.) Neither expert provided an explanation, however, as to how the right to exclude non-Indians from reservations lands related to the application of Federal regulatory laws, more than 150 years later, to a tribe's business operation that serves thousands of nontribal members each year.

Mount Pleasant governmental entities have jurisdiction only over nonmembers of the Tribe. They have no jurisdiction at the casino.[9]

The Tribe has approximately 3046 members. Its tribal council is comprised of 12 members elected by the tribal membership and headed by an elected tribal chief. The tribal council enacts laws applicable to tribal members and the Tribe's various enterprises. The council also governs and manages economic development. It holds regular meetings open to tribal members and special sessions to handle contracts, invoices, grants, and vote on proposed motions and resolutions.[10]

On August 20, 1993, in accordance with the Indian Gaming Regulatory Act, a compact between the State of Michigan and the Tribe, approved by the U.S. Government, authorized the Tribe to conduct a gaming enterprise on the reservation. The compact does not give Michigan regulatory authority over the Tribe's gaming enterprise, except for inspection of class III devices and records. The Tribe has its own regulatory body, the Tribal Gaming Commission (the Commission). The Commission consists of a six-member board. They are hired by the tribal council, must be tribal members, and serve 4-year terms. The tribal council enacted a gaming code on October 5, 1993, which is enforced by the Commission. The gaming code establishes internal controls and licensing criteria for casino employees who handle tribal funds. The Commission reports to the tribal

---

[9] GC Exhs. 2-3.

[10] GC Exhs. 2 at 3-4.

council on a monthly basis. It reports formal violations, and gaming licenses that have been issued or removed. No housekeeping employees are issued licenses. On November 16, 1993, the Tribe created Soaring Eagle Gaming as a Governmental entity to operate and manage 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 the casino's vendors. The casino department managers and directors regularly report to the tribal council. The Tribe considers all casino employees to be Governmental employees of the Tribe.[11]

The Tribe's primary source of revenue is generated by its gaming enterprise, with about 90 percent of tribal income derived from the casino operation. The tribal council decides how to distribute gaming revenue to support the Tribe's programs and services. The Tribe has 37 Governmental departments and 159 programs. These departments include behavioral health, community and economic development, education, fire, the gaming commission, health administration, judicial, police, utilities, and the casino. About 90 percent of the departments and programs are funded by revenue generated by the casino. The remainder comes from grants and contracts. The Tribe operates a police department, tribal court system, tribal administration building, and fire department. The Tribe also operates

[11] Id. at 4.

programs that provide health services, behavioral health services and social services to tribal members and members of other tribes.[12]

C. The Casino

The Tribe's casino consists of two buildings located on 121 acres. One building houses bingo and slot machines; the other building includes casino activities, restaurants, bars, entertainment facilities and a hotel. The casino, open 24 hours a day, 7 days a week, is open to non-members of the Tribe. The casino has gross annual revenues of approximately $250 million and draws approximately 20,000 customers per year. Approximately 3000 employees work at the casino; approximately 221, or 7.4 percent, of those employees are members of the Tribe. Of these tribal members, about 65, or 29 percent, are in management positions. The casino's current chief executive officer, Andy Asselin, is not a member of the Tribe. The casino advertises throughout Michigan, including the metropolitan Detroit area, via billboards, newspapers, radio, and television. The casino was economically impacted by the opening of three casinos in Detroit, which is located in southeast Michigan.[13]

The relevant Tribe officials and casino supervisors include: Dennis Kequom-the Tribal chief; Andy Asselin-the casino's chief executive officer; Ben Perez-senior manager, casino housekeeping; Greg Falsetta-the Tribe's director of human resources; Lisa Morris-human resources assistant manager; Carla O'Brien-human resources manager; Greg Lott-

---

[12] Id. at 4.

[13] Id. at 4-5.

supervisor/manager; Dorothy Munro-team leader; Robert Rood-team leader; and Julia St. John-team leader.[14]

The relevant portions of the casino include the employee hallways, an employee break room and the three casino floor bathrooms. The employee hallway is limited to employee access and casino patrons are prohibited from entering that area. There are employee-entrance doors leading from the employee parking lot into the employee hallway area. The employee hallway area consists of two hallways: a "main employee hallway" and a "side employee hallway." The main employee hallway consists of three time clocks; an employee break room, which is a nonworking area; an entrance to the food and beverage service area; and a security stand leading to entry doors out to the main casino. The side employee hallway consists of two time clocks; employee bathrooms; employee locker rooms; a pre-shift meeting room; and security, surveillance, maintenance, and housekeeping offices. Employee activities take place on occasion in the employee side hallway area such as "employee appreciation day" during which employees congregate, play games, and eat food. The most recent employee appreciation days occurred in the employee hallway area in or about October 2009 and October 2011.[15]

---

[14] The Tribe concedes that all of these individuals served as its supervisors and agents within the meaning of Sec. 2(11) and (13) of the Act, respectively, if the Act is found to apply to the Tribe and the Board determined to have jurisdiction over it.

[15] GC Exh. 19, secs. 30, 34-41.

D. Rules and Regulations

The casino's employee rules are contained in the "Soaring Eagle Casino & Resort Associate Handbook." On October 13, 2006, the Tribe promulgated and implemented its no-solicitation policy by formal action of the Tribal Council applicable to Soaring Eagle Casino and Resort (SECR). This no-solicitation policy is contained at Section 5.3.[16] The Tribe's no-solicitation policy states the following:

> 1. Item number 4 under "DEFINITIONS" includes "any place where any employees perform job duties for Soaring Eagle" as a "working area."
>
> 2. Item number 6 under "DEFINITIONS" includes "parking lots and roadways" as "Soaring Eagle premises."
>
> 3. Item number 2 under "PROHIBITED CONDUCT" prohibits employees "from soliciting in any work area."
>
> 4. 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."
>
> 5. 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.
>
> 6. Paragraph two under "ENFORCEMENT AND DISCIPLINE" states that "Any person violating

[16] GC Exh. 4.

this policy will be subject to disciplinary action up to, and including, termination."

On October 24, 2007, after the filing of the petition in Case 7-RC-23147, the tribal council enacted Ordinance 28, the Tribal Government Labor Ordinance, which prohibited employees from forming or joining labor organizations for purposes of collective bargaining or mutual aid. On September 17, 2008, the Tribal Council repealed Ordinance No. 28.[17]

III. THE HISTORY BETWEEN THE TRIBE AND THE UNION

On November 20, 2007, the Regional Director for Region 7 affirmed a hearing officer's rulings and issued a Direction of Election for bargaining unit members represented by Local 486, IBT. The Tribe stipulated to the appropriateness of the petitioned-for unit, but asserted that the petition should be dismissed for lack of jurisdiction. The Tribe argued that the controlling law on whether the Board can assert jurisdiction over a casino on Indian land, *San Manuel Indian Bingo & Casino,* 341 NLRB 1055 (2004), affd. 475 F.3d 1306 (D.C. Cir. 2007), was wrongly decided. Applying the analysis set forth in *San Manuel,* the Regional Director found that the Board had jurisdiction over the Tribe. He further concluded that "[t]he Casino is not an exercise of self-governance or a purely intramural matter. The application of the Act will not abrogate the general right to the exclusive use, ownership and occupancy of land reserved under the Tribe's treaties with the United States. The language and legislative history of

[17] Resolution 08-148. (GC Exh. 18.)

the Act does not establish that Congress intended to exclude Indians' commercial enterprises from the Board's jurisdiction. Finally, the [Tribe] has not raised any other meritorious jurisdictional defenses." On December 19, 2007, the Board denied the Tribe's Request for Review of the Regional Director's Decision and Direction of Election on the ground that it raised no substantial issues warranting review. The Board also denied the Tribe's motion to stay the election.[18]

On November 28, 2007, the International Union, Security, Police and Fire Professionals of America filed a petition to hold a representative election on behalf of the casino's security department. On January 17, 2008, the Regional Director issued a Decision and Direction for Election. On February 13, 2008, the Regional Director for Region 7 approved the SPFPA's request to withdraw the petition and canceled the election. As a result, the Board's Associate Executive Secretary informed the Tribe that the issues in its request for review were moot and would not be forwarded to the Board for consideration.[19]

In a letter to Tribal Chief Fred Cantu, dated July 30, 2009, Union Secretary-Treasurer Elizabeth Bunn requested a meeting to discuss the interest of several employees in organizing a bargaining unit of the Union.[20] Chief Cantu did not respond and, on March

---

[18] *Soaring Eagle Casino & Resort v. Local 286, Teamsters*, Case 7-RC-23147, Nov. 20, 2007. (GC Exh. 2.)

[19] *Soaring Eagle Casino & Resort v. International Union, Security, Police and Fire Professionals of America (SPFPA)*, Case 7-RC-23163, January 17, 2008. (GC Exh. 3.)

[20] GC Exh. 15.

10, 2010, Bunn followed up with a similar request to his successor, Tribal Chief Dennis Kequom. Bunn asserted that the Tribe's management had "initiated an anti-union campaign" ever since the Union reached out to Chief Cantu.[21]

IV. SUSAN LEWIS

Susan Lewis was employed by the Tribe as a housekeeper in the casino's housekeeping department. She was initially hired on or about July 13, 1998. Lewis voluntarily resigned on or about December 10, 2002, but was rehired by the Tribe on about January 26, 2005. Throughout her employment by the Tribe, Lewis worked the second shift from 3:00 to 11:00 p.m. Lewis's performance evaluation for the period of May 6, 2005, to October 30, 2010, indicates that she either met or exceeded performance standards with respect to her job responsibilities, customer service, communication and teamwork, and productivity. With respect to compliance with policies and procedures, Lewis also exceeded performance standards as to two of that category's three criteria. The remaining criteria—"Understands and adheres to Associate Handbook policies and procedures within departmental operating guidelines"—was rated at below performance standards. Her overall rating was 3.4, which fell near the midrange of her performance ratings from the previous 5 years (2.9 to 3.7).[22]

On September 29, 2009, Lewis engaged in union solicitation. The following day, Lott and Munro issued a notice to Lewis informing her that such solicitation

---

[21] GC Exh. 16.

[22] GC Exh. 17.

in the women's restroom, rather than the break room, violated the Respondent's no-solicitation policy. She was warned of the potential disciplinary consequences, including termination, if such activities continued.[23]

On August 25, 2010, Lewis again engaged in union solicitation activities. Five days later, on August 30, Ben Perez, the casino housekeeping department's senior manager, issued her a notice for engaging in union solicitation activities in violation of the Tribe's no-solicitation policy.[24]

In early October 2010, Perez, told Lewis that she could not engage in solicitation activities, including talking to other employees about unions, in the employee hallway. The directive did not, however, deter Lewis. On October 4, 2010, just before clocking out near the end of her shift at 11 p.m., management officials observed Lewis on a surveillance camera in the side employee hallway placing a blue wrist band on another housekeeper. She was also handing out the wrist bands, which stated, "BAND TOGETHER 2010," to other housekeepers. A few weeks later, on October 23, Perez issued a notice to Lewis suspending her for engaging in solicitation activities on October 4 in violation of the Tribe's no-solicitation policy.[25]

On November 7, 2010, Lewis entered bathroom B from her work station in section 2 of the casino and engaged in conversation for about 7 minutes with another housekeeper assigned to work at the same

---

[23] Department Record of Conversation. (GC Exh. 10.)

[24] Fair Action Notice. (GC Exh. 12.)

[25] Fair Action Notice. (GC Exh. 13.)

time in bathroom B on the casino floor. During that conversation, Lewis solicited on behalf of the Union. On November 15, 2010, Perez issued her a notice discharging her for engaging in union solicitation activities in violation of the Tribe's no-solicitation policy.[26]

Except for Susan Lewis, no other employees of the Tribe have been disciplined for violating its no-solicitation policy.

LEGAL ANALYSIS

I. JURISDICTION

The Tribe operates a casino on the Isabella Reservation in Isabella County, Michigan. It is undisputed that the 1855 and 1864 Treaties affirmed the Tribe's rights to the ownership, use and occupancy of land within the Isabella Reservation. The complaint alleges, however, that the Act applies to the Tribe's casino operations because it is not an essential Government operation of the Tribe. The Tribe disagrees, contending that the exclusive use rights in the treaties must be interpreted as applying to all operations of the Isabella Reservation, including the casino. The Supreme Court has long held that statutes of "general application" apply to the conduct and operations of individual Indians and their property interests. *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99, 116 (1960). The Board has found that the Act is a statute of general applicability. *Sac & Fox Indus.*, 307 NLRB 241 (1992). In *San Manuel*, the Board adopted the *Tuscarora* rule and asserted jurisdiction over a gaming facility owned and

[26] Fair Action Notice. (GC Exh. 14.)

operated by a tribal Government located on tribal land. *San Manuel Indian Bingo & Casino (San Manuel I)*, 341 NLRB 1055 (2004), enfd. 475 F.3d 1306 (D.C. Cir. 2007). Neither the Act nor Federal Indian policy requires that the Board decline jurisdiction over commercial enterprises operated by Indian tribes on tribal reservations. Id.

Prior to *San Manuel*, the Board determined whether it had jurisdiction over Indian tribal entities based on the location of the tribal enterprise. Indians and Indian tribal Governments on reservation lands were generally free from state or Federal intervention, unless Congress provided for the contrary. *Fort Apache Timber Co.*, 290 NLRB 436 (1988). The Board could, however, assert jurisdiction where a tribal business was not located on the reservation. See *Sac & Fox Indus.*, 307 NLRB 241 (1992); *Yukon Kuskokwim Health Corp.*, 328 NLRB 761 (1999), vacated on other grounds 234 F.3d 1186 (10th Cir. 2002).

In *San Manuel*, the Board departed from this on/off-reservation dichotomy, concluding that it would consider whether it had jurisdiction on a case-by-case basis. The Board adopted the *Tuscarora* doctrine, and held that statutes of general application apply to the operations of Indian tribes and their enterprises unless: (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. *San Manuel I*, 341 NLRB at 1059 (citing *Donovan v. Coeur d'Alene Tribal Farm*,

751 F.2d 1113 (9th Cir. 1985)). The Board will also analyze whether policy considerations militate in favor of or against the assertion of its discretionary jurisdiction. Id. at 1062.

A. Applicability of the Act to Indian Tribes

The Tribe contends that since neither the Act nor its legislative history mention Indian tribes, it should not be applied to them. It asserts that Federal regulatory schemes are inapplicable to tribes exercising their sovereign authority unless Congress expressly authorized its application. See *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1196 (10th Cir. 2002). In this instance, the Tribe insists that application of the Act to regulate its casino operations infringes on its inherent right to regulate economic activity.

This forum must adhere to applicable case law which neither the Board nor Supreme Court have reversed. See *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963). In *San Manuel I*, the Board concluded that the Act applies to Indian tribes' operations of on-reservation casinos. The Board ruled that the Act is a statute of general applicability, and thus may be applied to Indians and their enterprises provided that none of the *Couer d'Alene* exceptions apply. 341 NLRB at 1063. Accordingly, the allegations in the instant complaint must be analyzed by the framework set forth in *San Manuel*.

B. San Manuel Analysis

1. Self-governance

The General Counsel contends that Federal regulation of the casino does not interfere with the Tribe's right of self-governance of intramural matters on two grounds: (1) the casino operation is a commercial venture; and (2) its regulation does not interfere with internal tribal activity. The Tribe argues that its treaties with the United States affirm its right of self-government, which includes the right to operate a casino on its reservation without interference by the Federal government.

Governance of intramural matters generally involves subject matters such as tribal membership, domestic relations, and inheritance rules. *San Manuel I,* 341 NLRB at 1063 (citing *Coeur d'Alene*, 751 F.2d at 1116). Commercial enterprises that blur the distinction between the tribal Government and private corporations are not activities that are normally associated with self-governance. *San Manuel v. NLRB (San Manuel II)*, 475 F.3d 1306, 1314 (D.C. Cir. 2007). See also *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 181 (2d Cir. 1996) (tribal construction company that worked exclusively on reservation projects was not exempt from OSHA regulations because construction activities were of a commercial, and not Governmental, character). The Act's jurisdiction over on-reservation Indian gaming facilities does not implicate the tribe's self-governance over intramural matters because "operation of the casino is not an exercise of self-governance." *San Manuel I*, 341 NLRB at 1063 (citing *Florida Paraplegic Assn. v. Miccosukee Tribe of Indians of*

Florida, 166 F.3d 1126, 1129 (11th Cir. 1999) ("tribe-run business enterprises acting in interstate commerce do not fall under the 'self-governance' exception to the rule that general statutes apply to Indian tribes").

Operating a casino on tribal land is not an exercise of self-governance of a purely intramural matter. Like the casino in *San Manuel*, the Tribe's casino is a commercial venture that generates income for the Tribe. The casino serves predominantly nontribal customers, competes with nontribal casinos, and employs mostly nontribal members. Moreover, the Tribe's operation of the casino, a commercial enterprise, is not vital to its ability to govern itself. *San Manuel I*, 341 NLRB at 1061. Furthermore, the operation of a casino is not a *purely intramural* matter, as it involves hiring nontribal employees, attracting nontribal customers, and competing with nontribal businesses. Lastly, commercial entities on Indian reservations are subject to various Federal laws. See *San Manuel I*; *Menominee Tribal Enterprises v. Solis*, 601 F.3d 669, 674 (7th Cir. 2010).

It is clear, therefore, that applying the Act to the Tribe's casino operations would not interfere with its rights of self-governance of intramural matters.

2. Abrogation of treaty rights

The General Counsel acknowledges that the Tribe's treaties with the United States give it a general right of exclusion and possession, but contends that this general right of exclusion is insufficient to bar application of the Act. The Tribe disagrees, insisting that application of the Act to its casino operations would prevent it from exercising its

power to remove unwanted intruders, including Federal regulators, from the Isabella Reservation.

General treaty language devoting land to a tribe's exclusive use is insufficient to preclude application of Federal law. See *Menominee Tribal Enterprises v. Solis*, 601 F.3d 669, 674 (7th Cir. 2010); *DOL v. OSHRC*, 935 F.2d 182, 184 (9th Cir. 1991) (treaty language prohibiting "any white person" from residing on tribe's land was a general right of exclusion and insufficient to bar application of OSHA to tribe's sawmill); *U.S. v. Farris*, 624 F.2d 890 (9th Cir. 1980) superseded on other grounds by statute, as noted by *U.S. v. E.C. Investments, Inc.*, 77 F.3d 327, 330 (9th Cir. 1996) ("general treaty language such as that devoting land to a tribe's 'exclusive use' is not sufficient"). But see *Donovan v. Navajo Products Industries*, 692 F.2d 709 (10th Cir. 1982) (tribe whose treaty excluded all persons from reservation lands, but allowed Government officers, agents, and employees to enter as expressly authorized, was exempt from OSHA). Thus, a general right to exclude non-Indians from tribal land, without more, is insufficient to bar the application of Federal laws to commercial entities on Indian reservations. *DOL v. OSHRC,* 935 F.2d at 186.

The treaties affirm the Tribe's right to exclude nontribal members from the Isabella Reservation. The 1864 Treaty "sets apart [tribal land] for the exclusive use, ownership and occupancy" for the Tribe's members. The Tribe's expert witnesses elucidated that, during negotiations over the 1864 Treaty, the predecessor Tribe sought to prevent "white settlers" from living on its reservation. Its expert witness

opined, therefore, that the Saginaw Tribe's power to promulgate and enforce a no-solicitation policy and right to exclude ordinance emanated from its sovereign rights affirmed in the 1855 and 1864 treaties. The Tribe contends that it has exercised these treaty rights by: (1) developing policies that place conditions upon entry for nonmembers and (2) passing an ordinance that codifies the right to remove employees and others from its lands should they violate conditions that the Tribe places upon entry.

These historical facts and current practices, however, do not demonstrate that the treaties granted the Tribe anything more than a general right of exclusion and possession. See *DOL v. OSHRC*, 935 F.2d 182 (treaty language stating that the tribe had exclusive use of reservation lands and that any non-Indian would not be permitted to reside upon the land without permission of the tribe gave the Tribe a general right of exclusion).

Nevertheless, the Tribe contends that its power to enact a no-solicitation policy and right to exclude ordinance emanates from its treaty rights to exclude; thus, application of the Act would infringe on its treaty rights. As previously explained, however, the text of the treaty provides nothing more than a general right of exclusion, which is insufficient to bar application of federal law. It is, therefore, insufficient to bar application of the Act. Notwithstanding the claims of the Tribe's expert witnesses, treaties cannot be "expanded 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 (1942). If

one were to construe a general right of exclusion otherwise, 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. See *DOL*, 935 F.2d at 186.

Therefore, application of the Act does not abrogate the Tribe's treaty right to exclude nontribal members from its land.

3. Proof of Congressional intent

There is no indication in either the language of the Act or its legislative history that Congress intended to exclude Indians or their commercial enterprises from the Act's jurisdiction. *San Manuel I*, 341 NLRB at 1063. Thus, based on the precedent set forth in *San Manuel*, there is no legislative bar toward application of the Act to Indian tribes or their commercial enterprises.

4. Policy considerations

The last factor in the jurisdictional analysis is determining whether policy considerations favor application of the Board's discretionary jurisdiction. *San Manuel I* at 1062. The General Counsel asserts that the operation of a casino on Indian land is not a traditional tribal function. The Tribe, on the other hand, contends that operating a casino is paramount to its treaty-based rights of self-governance and inherent authority to engage in economic activity and fund essential Government functions.

The Board must balance its interest in effectuating the policies of the Act with the need to accommodate the unique status of Indians in our

society. *Yukon Kuskokwim Health Corp.*, 341 NLRB 1075 (2004). When an Indian tribe is fulfilling a traditionally tribal or Government function that is unique to its status, the Board's interest in asserting jurisdiction is lower than when the tribe is acting in a typically commercial matter. *San Manuel I*, at 1062-1063.

The casino operation is a commercial enterprise that competes with nontribal casinos. It is not a traditional tribal or Government function. Unlike in *Yukon Kuskokwim,* where the employer fulfilled a unique Governmental function by providing free healthcare to Native Americans as dictated by the Indian Health Care Improvement Act, the Tribe is not providing a similar tribal or Government function. Rather, it operates a business, one that competes with nontribal businesses and services nontribal customers. Thus, the "special attributes" of the Tribe's sovereignty are not implicated. *San Manuel I*, at 1062. Under the circumstances, the policy considerations weigh in favor of the Board asserting its discretionary jurisdiction over the Tribe.

Based on the foregoing, I conclude that the Tribe is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. MERITS

A. The No-Solicitation Policy

The complaint alleges that the Tribe violated Section 8(a)(1) by maintaining and enforcing an overly broad and unlawful no-solicitation policy. Unlike its vigorous contesting of the jurisdictional issues, however, the Tribe did not refute the testimony and

other evidence regarding the merits of the unfair labor practice charges.

Employees have a right to solicit on company property during their non-working time, absent special circumstances. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962). Solicitation rules prohibiting union solicitation on company property outside working time are an unreasonable impediment to self-organization and, therefore, are discriminatory in the absence of unusual circumstances. *Republic Aviation*, 324 U.S. 793, 803 fn. 10 (1945); *Peyton Packing Co.,* 49 828, 843-844 (1943), enfd, 142 F.2d 1009 (5th Cir.), cert. denied 323 U.S. 730 (1944). See also *NLRB v. Pneu Electric, Inc.,* 309 F.3d 843 (5th Cir. 2002) (employer generally may not issue a blanket statement against solicitation by employees at a worksite, even during nonworking time); *Our Way, Inc.*, 268 NLRB 394 (1983) (rules prohibiting union solicitation or activities during an employee's break times or other nonworking periods are overly broad and presumptively invalid because they could reasonably be construed as prohibiting solicitation at any time). Moreover, an employer must allow solicitation during meals, breaks, and other nonworking time, even if the employees are clocked in. *Pneu Elec., Inc.* 309 F.3d 843. Lastly, no-solicitation policies must be uniformly enforced to retain their validity. *Publix Super Markets,* 347 NLRB 1434 (2006); *Funk Mfg. Co.*, 301 NLRB 111 (1991).

Employers may, however, restrict employee distributions to nonworking areas of the premises. *Stoddard Quirk*. An employer has a property right to "regulate and restrict employee use of company property." *Union Carbide Corp. v. NLRB*, 714 F.2d

657, 663-664 (6th Cir. 1983). See also *Mid-Mountain Foods*, 332 NLRB 229 230 (2000) (no statutory right to use television in breakroom to show a prounion video), enfd. 269 F.3d 1075 (D.C. Cir. 2001); *Eaton Technologies,* 322 NLRB 848, 853 (1997) (no statutory right to use an employer's bulletin board). Employers generally may restrict employee use of company property, but may not promulgate or enforce these restrictions in a discriminatory manner. *Container Corp. of America*, 244 NLRB 318 (1979); *Allied Stores Corp.*, 308 NLRB 184 (1992). Thus, employees have no statutory right to use an employer's equipment or media for Section 7 purposes, provided the restrictions are nondiscriminatory. *The Register Guard*, 351 NLRB 1110 (2007). Discrimination under the Act means drawing a distinction along Section 7 lines. Id.

The General Counsel correctly contends that the Tribe's no-solicitation policy, as contained in the "Definitions" and "Prohibited Conduct" sections of its company rules, is facially invalid and overly broad. The policy prohibits employees from soliciting in any work area and during their working time. The policy defines "working area" as "any place where any employees perform job duties at the Casino." No-solicitation rules that prohibit employee solicitation in working areas during nonworking time, however, are presumptively invalid and unlawfully interfere with Section 7 rights. *Stoddard-Quirk* at 621. Since the Tribe's policy simply bans solicitations in working areas and does not distinguish between working time and nonworking time, the rule can be read to prohibit solicitations during nonworking time. It is, therefore, unlawfully overbroad.

The General Counsel also contends that the Tribe's no-solicitation policy is facially invalid to the extent it restricts use of casino property. An employer's restriction of employee use of company property is legal if done in a nondiscriminatory manner. *Register Guard*, 351 NLRB 1110 (2007). However, the Tribe's enforcement of this policy was unlawful because it was limited to situations involving union solicitation. The Tribe concedes that, except for Lewis, no other employees have been disciplined or discharged for violating its no-solicitation policy. Thus, the Tribe promulgated a discriminatory no-solicitation policy and applied it in a discriminatory manner in violation of Section 8(a)(1).

B. Discussion among Employees about the Union in the Hallway

The complaint alleges that the Tribe violated Section 8(a)(1) when Perez, a statutory supervisor and agent, prohibited Lewis and other employees from discussing Union matters in the employee hallway. The parties stipulated that Perez informed Lewis during October 2010 that she could not talk to other employees about unions in the employee hallway.

Employers cannot place restrictions on employees' rights to discuss self-organization amongst themselves, unless the employer can demonstrate the restrictions are necessary to maintain production or discipline. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). Oral solicitations by employees may be prohibited only during working time. *Valmont Indus. v. NLRB*, 244 F.3d 454 (5th Cir. 2001). A prohibition on communications may not, however, be overly broad so that it prohibits communications

among employees during paid or unpaid nonwork periods. Thus, an employer must allow solicitations during breaks and other nonworking time, even if the employee remains clocked in. Id., citing *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245, 1249 (5th Cir. 1992). Moreover, an employer may not ban employee solicitation in nonwork areas. See *Crowne Plaza Hotel,* 352 NLRB 382 (2008). Any ambiguity in a particular prohibition is construed against the employer which formulated that prohibition. *Altorfer Machinery,* 332 NLRB 130, 133 (2000). See also *Albertson's Inc.*, 307 NLRB 787, 788 fn. 6 (1992).

The parties stipulated that the employee hallway is an employee area of the casino. It consists of multiple time clocks, a break room, entrance to the restrooms, and several employee offices. Nonwork activities, however, take place in the hallway, as employees pass through it to use the bathroom, locker room and food service area. Since the employee hallway is a nonworking area, employees may solicit there in their nonworking time. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

Under the circumstances, the Tribe violated Section 8(a)(1) when it prohibited employees from discussing unionization in the employee hallway, a nonworking area.

C. Suspension/Discharge

The complaint alleges that the Tribe violated Section 8(a)(3) and (1) by: (1) suspending Lewis on October 23 because she solicited on behalf of the Union in the employee hallway on October 4; and (2) and discharging her on November 15 because she solicited on behalf of the Union in the employee hallway on

October 4 and 24, and spoke with an on-duty employee about the Union in bathroom B while off-duty on November 7.

The framework for analyzing alleged violations of Section 8(a)(3) is *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must show, by a preponderance of the evidence, that the employee's protected conduct motivated the employer's adverse action. The prima facie case must establish that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus against the protected activity, and the employer took action because of this animus. If the General Counsel establishes these elements, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399, 403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (per curiam). To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting,* 332 NLRB 1363, 1366 (2000), citing *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984). If, however, the evidence establishes that the reasons given for the employer's action are pretextual, the employer fails by definition to show that it would have taken the same action for those reasons, and thus there is no need to

perform the second part of the *Wright Line* analysis. *United Rentals*, supra at 951-952 (citing *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)).

1. Concerted protected activity

The parties stipulated that Lewis engaged in concerted protected activity while working at the casino. Her union activities began in 2009, when she initiated contact with the Union. She participated in the organizing campaign by attending union meetings, signing and distributing authorization cards, conducting local radio and newspaper interviews, and adding her picture to the organizing campaign's website. Lewis' activities culminated with her attempts to rally other employees in support of the Union in October and November 2010.

2. Knowledge of the activity

Here, again, the parties stipulated that the Tribe was well aware of Lewis' activities in support of the Union prior to her discharge. In March 2010, Lewis and four other employees delivered a letter to Tribal Chief Kequom expressing their desires to organize. Moreover, prior to her suspension, Tribe supervisors issued disciplinary write-ups to Lewis for engaging in union solicitation activities. Indeed, they suspended and ultimately discharged her because she engaged in union solicitation in October and November 2010.

3. Animus

Similarly, the Tribe did not offer any evidence disputing the last element of a prima facie case. It harbored animus against Lewis because she engaged

in protected concerted activity. Lewis's 2009 and 2010 evaluations, issued during the height of the organizing campaign, did not reflect a remarkable decline in her performance ratings. However, she did receive several disciplinary write-ups for violating the Tribe's unlawful no-solicitation policy. Most significantly, aside from Lewis, no other employee has ever been disciplined or discharged for violating the Tribe's no-solicitation policy.

4. The Company's burden of proof

Since the General Counsel established a prima facie violation of Section 8(a)(3) and (1), the burden shifted to the Tribe to show that it took the adverse action for a legitimate nondiscriminatory reason. See *Wright Line*, supra at 1089. Again, the Tribe offered no evidence even remotely suggesting that it discharged Lewis for any reason other than the fact that she engaged in solicitation activities on behalf of the Union in October and November 2010. In any event, the facts would not have supported a contention that the Tribe was justified in disciplining Lewis because she solicited in a working area during work time. As previously discussed, the employee hallway was a non-work area. Similarly, the facts also demonstrated that Bathroom B was not a work area for purposes of determining the validity of the Tribe's no-solicitation rule. The occurrence of work activity incidental to an employer's main function on part of its property does not, by itself, allow an employer to declare its entire property to be a "working area" for the purpose of excluding employee solicitation activity. See *Santa Fe Hotel, Inc.*, 331 NLRB 723, 729 (2000), *US Steel Corp.*, 223 NLRB 1246, 1247-1248

(1976). Moreover, the Board has long compared casinos to retail store floors in upholding bans on employee solicitation in areas frequented by customers, while also finding unlawful similar bans on such activity in adjacent locations, such as restrooms. *Double Eagle Hotel*, 341 NLRB 112, 113 (2004). 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.

Under the circumstances, the Tribe violated Section 8(a)(3) and (1) when it suspended and subsequently discharged Lewis for engaging in union solicitation in the employee hallway and Bathroom B.

CONCLUSIONS OF LAW

1. By promulgating a no-solicitation rule that prohibits employees from (1) soliciting other employees during nonwork time to support the Union or any other labor organization, and (2) distributing union literature or campaign paraphernalia during nonwork time in nonwork areas, the Tribe has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. By telling employees they could not talk to other employees about the Union in the employee hallway, the Tribe violated Section 8(a)(1) of the Act.

3. By disciplining and discharging employee Susan Lewis because she engaged in activities in support of the Union, the Tribe violated Section 8(a)(3) and (1) of the Act.

4. The aforementioned unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Tribe has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Tribe, having discriminatorily disciplined and discharged an employee, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

The Respondent, Soaring Eagle Casino and Resort, an Enterprise of the Saginaw Chippewa Indian Tribe of Michigan, Mount Pleasant, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

---

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Discharging or otherwise discriminating against any employee for being members of or supporting the International Union, United Automobile, Aerospace and Agricultural Implement Workers Of America or any other union.

(b) Promulgating a no-solicitation rule that prohibits employees from (1) soliciting other employees during nonwork time to support the Union or any other labor organization, and (2) distributing union literature or campaign paraphernalia during nonwork time in nonwork areas.

(c) Telling employees they cannot talk to other employees about the Union in the employee hallway, the Tribe violated Section 8(a)(1) of the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Susan Lewis full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Susan Lewis whole for any loss of earnings and other benefits suffered as a result of

the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its casino facility in San Juan, Puerto Rico, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since [*date of first unfair labor practice*].

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 26, 2012

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America or any other union.

WE WILL NOT promulgate a no-solicitation rule prohibiting employees from (1) soliciting other employees during non-work time to support the Union or any other labor organization, and (2) distributing union literature or campaign paraphernalia during non-work time in non-work areas.

WE WILL NOT tell employees they cannot talk to other employees about the Union in the employee hallway.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Susan Lewis full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Susan Lewis whole for any loss of earnings and other benefits resulting from her

suspension and discharge, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the discipline and unlawful discharge of Susan Lewis and WE WILL, within 3 days thereafter notify her in writing that this has been done and that the discharge and other disciplinary action will not be used against her in any way.

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

Appendix E

TREATY WITH THE CHIPPEWA OF SAGINAW, ETC., 1855.

AUGUST 2, 1855

Articles of agreement and convention, made and concluded at the city of Detroit, in the State of Michigan, this second day of August, one thousand eight hundred and fifty-five, between George W. Manypenny and Henry C. Gilbert, commissioners on the part of the United States, and the Chippewa Indians of Saginaw, parties to the treaty of January 14, 1837, and that portion of the band of Chippewa Indians of Swan Creek and Black River, parties to the treaty of May 9, 1836, and now remaining in the State of Michigan.[AB]

In view of the existing condition of the Indians aforesaid, and of their legal and equitable claims against the United States, it is agreed between the contracting parties as follows, viz:

ARTICLE 1

The United States will withdraw from sale, for the benefit of said Indians, as herein provided, all the unsold public lands within the State of Michigan embraced in the following description, to wit:[C]

First. Six adjoining townships of land in the county of Isabella, to be selected by said Indians

---

[A] Ratified Apr. 15, 1856.

[B] Proclaimed June 21, 1856.

[C] Certain lands in Michigan to be withdrawn from sale.

within three months from this date, and notice thereof given to their agent.

Second. Townships Nos. 17 and 18 north, ranges 3, 4, and 5 east.

The United States will give to each of the said Indians, being a head of a family, eighty acres of land; and to each single person over twenty-one years of age, forty acres of land; and to each family of orphan children under twenty-one years of age, containing two or more persons, eighty acres of land; and to each single orphan child under twenty-one years of age, forty acres of land; to be selected and located within the several tracts of land hereinbefore described, under the same rules and regulations, in every respect, as are provided by the agreement concluded on the 31st day of July, A.D. 1855, with the Ottawas and Chippewas of Michigan, for the selection of their lands.[D]

And the said Chippewas of Saginaw and of Swan Creek and Black River, shall have the same exclusive right to enter lands within the tracts withdrawn from sale for them for five years after the time limited for selecting the lands to which they are individually entitled, and the same right to sell and dispose of land entered by them, under the provisions of the Act of Congress known as the Graduation Act, as is extended to the Ottawas and Chippewas by the terms of said agreement.

And the provisions therein contained relative to the purchase and sale of land for school-houses,

---

[D] Grant of land to each of said Indians.

churches, and educational purposes, shall also apply to this agreement.

ARTICLE 2

The United States shall also pay to the said Indians the sum of two hundred and twenty thousand dollars, in manner following, to wit:[E]

First. Thirty thousand dollars for educational purposes, to be paid in five equal annual instalments of four thousand dollars each, and in five subsequent equal annual instalments of two thousand dollars each, to be expended under the direction of the President of the United States.

Second. Forty thousand dollars, in five equal annual instalments of five thousand dollars each, and in five subsequent equal annual instalments of three thousand dollars each, in agricultural implements and carpenters' tools, household furniture and building materials, cattle, labor, and all such articles as may be necessary and useful for them in removing to the homes herein provided, and getting permanently settled thereon.

Third. One hundred and thirty-seven thousand and six hundred dollars in coin, in ten equal instalments of ten thousand dollars each, and in two subsequent equal annual instalments of eighteen thousand and eight hundred dollars each, to be distributed per capita in the usual manner for paying annuities.

[E] Payment to said Indians.

Fourth. Twelve thousand and four hundred dollars for the support of one blacksmith-shop for ten years.

The United States will also build a grist and saw mill for said Indians at some point in the territory, to be selected by them in said county of Isabella, provided, a suitable water-power can be found, and will furnish and equip the same with all necessary fixtures and machinery, and will construct such dam, race, and other appurtenances as may be necessary to render the water-power available: Provided That the whole amount for which the United States shall be liable under this provision, shall not exceed the sum of eight thousand dollars.

The United States will also pay the further sum of four thousand dollars for the purpose of purchasing a saw-mill, and in repair of the same, and in adding thereto the necessary machinery and fixtures for a run of stone for grinding grain — the same to be located on the tract described in clause "second," Article 1.

The United States will also pay the further sum of twenty thousand dollars, or so much thereof as may be necessary, to be applied in liquidation of the present just indebtedness of the said Indians; Provided, That all claims presented shall be investigated under the direction of the Secretary of the Interior within six months, who shall prescribe such rules and regulations for conducting such investigation, and for testing the validity and justice of the claims as he shall deem suitable and proper. And no claim shall be paid except on the certificate of the said Secretary that, in his opinion, the same is justly and equitably due; and all claimants, who shall not present their claims

within such time as may be limited by said Secretary, or, whose claims having been presented, shall be disallowed by him, shall be forever precluded from collecting the same, or maintaining an action thereon in any court whatever; And, provided, also, That no portion of the money due said Indians for annuities, as herein provided, shall ever be appropriated to pay their debts under any pretence whatever; Provided That the balance of the amount herein allowed as a just increase for the cessions and relinquishments aforesaid, after satisfaction of the awards of the Secretary of the Interior, shall be paid to the said Indians, or expended for their benefit in such manner as the Secretary shall prescribe, in aid of any of the objects specified in this treaty.

ARTICLE 3

The said Chippewas of Saginaw, and of Swan Creek and Black River, hereby cede to the United States all the lands within the State of Michigan heretofore owned by them as reservations, and whether held for them in trust by the United States or otherwise; and they do hereby, jointly and severally, release and discharge the United States from all liability to them, and to their, or either of their said tribes, for the price and value of all such lands, heretofore sold, and the proceeds of which remain unpaid.[FG]

And they also hereby surrender all their, and each of their permanent annuities, secured to them, or either of them by former treaty stipulations, including

---

[F] Cession of all the lands heretofore owned by said Indians.

[G] Release of liability.

that portion of the annuity of eight hundred dollars payable to "the Chippewas," by the treaty of November 17, 1807, to which they are entitled, it being distinctly understood and agreed, that the grants and payments hereinbefore provided for, are in lieu and satisfaction of all claims, legal and equitable on the part of said Indians, jointly and severally, against the United States for land, money, or other thing guaranteed to said tribes, or either of them, by the stipulations of any former treaty or treaties.[HIJ]

ARTICLE 4

The entries of land heretofore made by Indians and by the Missionary Society of the Methodist Episcopal Church for the benefit of the Indians, on lands withdrawn from sale in townships 14 north, range 4 east, and 10 north, range 5 east, in the State of Michigan, are hereby confirmed, and patents shall be issued therefor as in other cases.[K]

ARTICLE 5

The United States will provide an interpreter for said Indians for five years, and as much longer as the President may deem necessary.[L]

ARTICLE 6

The tribal organization of said Indians, except so far as may be necessary for the purpose of carrying

---

[H] Surrender of annuities.

[I] Ante, p. 92.

[J] Said grants and payments to be in full of claims.

[K] Certain land entries confirmed.

[L] Interpreter to be provided.

into effect the provisions of this agreement, is hereby dissolved.[M]

ARTICLE 7

This agreement shall be obligatory and binding on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said George W. Manypenny and the said Henry C. Gilbert, commissioners as aforesaid, and the undersigned, chiefs and headmen of the Chippewas of Saginaw, and of Swan Creek and Black River, have hereto set their hands and seals at the city of Detroit, the day and year first above written.

Geo. W. Manypenny, (L.S.)

Henry C. Gilbert, (L.S.)

Commissioners.

Richard M. Smith,

J. Logan Chipman,

Secretaries.

Saginaw Bands:

Ot-taw-ance, chief, his x mark. (L.S.)

O-saw-waw-bun, chief, his x mark. (L.S.)

Nanck-che-gaw-me, chief, his x mark. (L.S.)

Kaw-gay-ge-zhick, chief, his x mark. (L.S.)

Shaw-shaw-way-nay-beece, chief, his x mark. (L.S.)

[M] Tribal organization of said Indians dissolved.

Pe-nay-se-waw-be, chief, his x mark. (L.S.)

Naw-we-ge-zhick, chief, his x mark. (L.S.)

Saw-gaw-che-way-o-say, chief, his x mark. (L.S.)

Naw-taw-way, chief, his x mark. (L.S.)

Wain-ge-ge-zhick, chief, his x mark. (L.S.)

Swan Creek and Black River Band:

Pay-me-quo-ung, chief, his x mark. (L.S.)

Nay-ge-zhick, headman, his x mark. (L.S.)

Caw-me-squaw-bay-no-kay, chief, his x mark. (L.S.)

Pe-tway-we-tum, headman, his x mark. (L.S.)

Kay-bay-guo-um, headman, his x mark. (L.S.)

Pay-baw-maw-she, headman, his x mark. (L.S.)

Aw-be-taw-quot, headman, his x mark. (L.S.)

Aish-quay-go-nay-be, headman, his x mark. (L.S.)

Pay-me-saw-aw, headman, his x mark. (L.S.)

Aw-taw-we-go-nay-be, headman, his x mark. (L.S.)

Pay-she-nin-ne, headman, his x mark. (L.S.)

Maw-che-che-won, headman, his x mark. (L.S.)

Executed in the presence of —

G. D. Williams.

George Smith.

W. H. Collins.

Manasseh Hickey.

P. O. Johnson.

Joseph F. Marsal.

Jno. M. D. Johnston, Interpreters.
Chas. H. Rodd, Interpreters.
L. M. Moran, Interpreters.

Appendix F

TREATY WITH THE CHIPPEWA OF SAGINAW, SWAN CREEK, AND BLACK RIVER, 1864.

OCTOBER 18, 1864

Articles of agreement and convention made and concluded at the Isabella Indian Reservation, in the State of Michigan, on the eighteenth day of October, in the year one thousand eight hundred and sixty-four, between H. J. Alvord, special commissioner of the United States, and D. C. Leach, United States Indian agent, acting as commissioners for and on the part of the United States, and the Chippewas of Saginaw, Swan Creek, and Black River, in the State of Michigan aforesaid, parties to the treaty of August 2d, 1855, as follows, viz:[AB]

ARTICLE 1

The said Chippewas of Saginaw, Swan Creek, and Black River, for and in consideration of the conditions hereinafter specified, do hereby release to the United States the several townships of land reserved to said tribe by said treaty aforesaid, situate and being upon Saginaw Bay, in said State.[C]

The said Indians also agree to relinquish to the United States all claim to any right they may possess to locate lands in lieu of lands sold or disposed of by the United States upon their reservation at Isabella,

---

[A] Ratified May 22, 1866.

[B] Proclaimed Aug. 16, 1866.

[C] Released to the United States of reservation and right to locate and purchase certain lands.

and also the right to purchase the unselected lands in said reservation, as provided for in the first article of said treaty.

ARTICLE 2

In consideration of the foregoing relinquishments, the United States hereby agree to set apart for the exclusive use, ownership, and occupancy of the said of the said Chippewas of Saginaw, Swan Creek, and Black River, all of the unsold lands within the six townships in Isabella County, reserved to said Indians by the treaty of August 2, 1855, aforesaid, and designated as follows, viz:[D]

The north half of township fourteen, and townships fifteen and sixteen north, of range three west; the north half of township fourteen and township fifteen north, of range four west, and townships fourteen and fifteen north, of range five west.

ARTICLE 3

So soon as practicable after the ratification of this treaty, the persons who have heretofore made selections of lands within the townships upon Saginaw Bay, hereby relinquished, may proceed to make selections of lands upon the Isabella reservation in lieu of their selections aforesaid, and in like quantities.[E]

After a reasonable time shall have been given for the parties aforesaid to make their selections in lieu of

---

[D] Certain lands set apart for the Indians in Isabella County.

[E] Mode and order of selections of lands in lieu of those relinquished.

those relinquished, the other persons entitled thereto may then proceed to make their selections, in quantities as follows, viz:

For each chief of said Indians who signs this treaty, eighty acres in addition to their selections already made, and to patents in fee-simple.[F]

For one head-man in each band into which said Indians are now divided, forty acres, and to patents in fee simple.[G]

For each person being the head of a family, eighty acres.[H]

For each single person over the age of twenty-one years, forty acres.[I]

For each orphan child under the age of twenty-one years, forty acres.[J]

For each married female who has not heretofore made a selection of land, forty acres.[K]

And for each other person now living, or who may be born hereafter, when he or she shall have arrived at the age of twenty-one years, forty acres, so long as any of the lands in said reserve shall remain unselected, and no longer.[L]

[F] Chiefs.

[G] Headmen.

[H] Heads of families.

[I] Single persons.

[J] Orphans and children.

[K] Married women.

[L] Other persons.

In consideration of important services rendered to said Indians during many years past, by William Smith, John Collins 1st, Andrew J. Campeau, and Thomas Chatfield, it is hereby agreed that they shall each be allowed to select eighty acres in addition to their previous selections, and receive patents therefor in fee simple; and to Charles H. Rodd, eighty acres, and a patent therefor in fee simple, to be received by said Rodd as a full consideration and payment of all claims he may have against said Indians, except claims against individuals for services rendered or money expended heretofore by said Rodd for the benefit of said Indians.[M]

It is understood and agreed that those Ottawas and Chippewas and Pottawatomies now belonging to the bands of which Metayomeig, May-me-she-gaw-day, Keche-kebe-me-mo-say, and Waw-be-maw-ing-gun are chiefs, who have heretofore made selections upon said reservations, by permission of said Chippewas of Saginaw, Swan Creek, and Black River, who now reside upon said reservation in Isabella County, or who may remove to said reservation within one year after the ratification of this treaty, shall be entitled to the same rights and privileges to select and hold land as are contained in the third article of this agreement.[N]

So soon as practicable after the ratification of this treaty, the agent for the said Indians shall make out a

---

[M] William Smith and others may select lands and receive patents therefor.

[N] Certain Ottawa, Chippewa, and Pottawatomie may select and hold lands.

list of all those persons who have heretofore made selections of lands under the treaty of August 2d, 1855, aforesaid, and of those who may be entitled to selections under the provisions of this treaty, and he shall divide the persons enumerated in said list into two classes, viz: "competent" and "those not so competent."[OP]

Those who are intelligent, and have sufficient education, and are qualified by business habits to prudently manage their affairs, shall be set down as "competents," and those who are uneducated, or unqualified in other respects to prudently manage their affairs, or who are of idle, wandering, or dissolute habits, and all orphans, shall be set down as "those not so competent."[QR]

The United States agrees to issue patents to all persons entitled to selections under this treaty, as follows, viz: To those belonging to the class denominated "competents," patents shall be issued in fee simple,[S] but to those belonging to the class of "those not so competent," the patent shall contain a provision that the land shall never be sold or alienated to any person or persons whomsoever, without the consent of the Secretary of the Interior for the time being.

[O] Agent to make lists.

[P] Two classes.

[Q] Competents.

[R] Those not so competent.

[S] Patents to those of both classes.

ARTICLE 4

The United States agrees to expend the sum of twenty thousand dollars for the support and maintenance of a manual-labor school upon said reservation: Provided, That the Missionary Society of the Methodist Episcopal Church shall, within three years after the ratification of this treaty, at its own expense, erect suitable buildings for school and boarding-house purposes, of a value of not less than three thousand dollars, upon the southeast quarter of section nine, township fourteen north, of range four west, which is hereby set apart for that purpose.[TU]

The superintendent of public instruction, the lieutenant governor of the State of Michigan, and one person, to be designated by said missionary society, shall constitute a board of visitors, whose duty it shall be to visit said school once during each year, and examine the same, and investigate the character and qualifications of its teachers and all other persons connected therewith, and report thereon to the Commissioner of Indian Affairs.[V]

The said Missionary Society of the Methodist Episcopal Church shall have full and undisputed control of the management of said school and the farm attached thereto. Upon the approval and acceptance of the school and boarding-house buildings by the board of visitors, the United States will pay to the authorized agent of said missionary society, for the support and maintenance of the school, the sum of two thousand

---

[T] Manual-labor school.

[U] Buildings.

[V] Board of visitors or such schools.

dollars, and a like sum annually thereafter, until the whole sum of twenty thousand dollars shall have been expended.[WX]

The United States reserves the right to suspend the annual appropriation of two thousand dollars for said school, in part or in whole, whenever it shall appear that said missionary society neglects or fails to manage the affairs of said school and farm in a manner acceptable to the board of visitors aforesaid; and if, at any time within a period of ten years after the establishment of said school, said missionary society shall abandon said school or farm for the purposes intended in this treaty, then, and in such case, said society shall forfeit all of its rights in the lands, buildings, and franchises under this treaty, and it shall then be competent for the Secretary of the Interior to sell or dispose of the land hereinbefore designated, together with the buildings and improvements thereon and expend the proceeds of the same for the educational interests of the Indians in such manner as he may deem advisable.[YZAA]

At the expiration of ten years after the establishment of said school, if said missionary society shall have conducted said school and farm in a manner acceptable to the board of visitors during said ten years, the United States will convey to said society the

---

[W] Control, etc., of school and farm.

[X] Annual appropriation.

[Y] May be suspended.

[Z] If school and farm are abandoned, the rights under this treaty are lost.

[AA] Land and buildings may be sold.

land before mentioned by patent in trust for the benefit of said Indians.[BB]

In case said missionary society shall fail to accept the trust herein named within one year after the ratification of this treaty, then, and in that case, the said twenty thousand dollars shall be placed to the credit of the educational fund of said Indians, to be expended for their benefit in such manner as the Secretary of the Interior may deem advisable.[CC]

It is understood and agreed that said missionary society may use the school-house now standing upon land adjacent to the land hereinbefore set apart for a school-farm, where it now stands, or move it upon the land so set apart.[DD]

ARTICLE 5

The said Indians agree that, of the last two payments of eighteen thousand eight hundred dollars each, provided for by the said treaty of August second, eighteen hundred and fifty-five, the sum[EE] of seventeen thousand six hundred dollars may be withheld, and the same shall be placed to the credit of their agricultural fund, to be expended for their benefit in sustaining their blacksmith-shop, in stock, animals, agricultural implements, or in such other manner as the Secretary of the Interior may deem advisable.

[BB] Lands to be conveyed in fee simple, if, etc.

[CC] If society does not accept trust, etc.

[DD] Present schoolhouse

[EE] Blacksmith shop, stock, tools. etc.

ARTICLE 6

The Commissioner of Indian Affairs may, at the request of the chiefs and head-men, sell the mill and land belonging thereto at Isabella City, on said reservation, and apply the proceeds thereof for such beneficiary objects as may be deemed advisable by the Secretary of the Interior.[FF]

ARTICLE 7

Inasmuch as the mill belonging to said Indians is partly located upon land heretofore selected by James Nicholson, it is hereby agreed that upon a relinquishment of ten acres of said land by said Nicholson, in such form as may be determined by the agent for said Indians, he, the said Nicholson, shall be entitled to select eighty acres of land, subject to the approval of the Secretary of the Interior, and to receive a patent therefor in fee simple.[GG]

ARTICLE 8

It is hereby expressly understood that the eighth article of the treaty of August second, eighteen hundred and fifty-five, shall in no wise be affected by the terms of this treaty.[HH]

In testimony whereof, the said H. J. Alvord and the said D. C. Leach, Commissioners as aforesaid, and the undersigned chiefs and headmen of the Chippewas of Saginaw, Swan Creek, and Black River, have hereto

---

[FF] Mill and land at Isabella City may be sold.

[GG] James Nicholson may select 80 acres, upon, etc.

[HH] Eighth article of former treaty not affected.

set their hands and seals at Isabella, in the State of Michigan, the day and year first above written.[II]

H. J. Alvord,

D. C. Leach,

Special Commissioners.

In the presence of —

Richd. M. Smith,

Charles H. Rodd, United States interpreter,

George Bradley.

S. D. Simonds, chief, his x mark.

Lyman Bennett, headman, his x mark.

Jno. Pay-me-quo-ung, chief, his x mark.

William Smith, headman, his x mark.

Nauck-che-gaw-me, chief, his x mark.

Me-squaw-waw-naw-quot, headman, his x mark.

Thomas Dutton, chief, his x mark.

Paim-way-we-dung, headman, his x mark.

Elliott Kaybay, chief, his x mark.

Solomon Ottawa, headman, his x mark.

Andw. O-saw-waw-bun, chief, his x mark.

Thos. Wain-daw-naw-quot, headman, his x mark.

Naw-taw-way, chief, his x mark.

I-kay-che-no-ting, headman, his x mark.

William Smith, chief, his x mark.

Naw-gaw-nevay-we-dung, headman, his x mark.

[II] Execution.

Naw-we-ke-zhick, chief, his x mark.

I-yalk, headman, his x mark.

Nay-aw-be-tung, chief, his x mark.

Jos. Waw-be-ke-zhick, headman, his x mark.

Saml. Mez-haw-quaw-naw-um, chief, his x mark.

John P. Williams, headman, his x mark.

L. Pay-baw-maw-she, chief, his x mark.

Ne-gaw-ne-quo-um, headman, his x mark.

David Fisher, chief, his x mark.

Waw-be-man-i-do, headman, his x mark.

Ne-be-nay-aw-naw-quot-way-be, chief, his x mark.

Key-o-gwaw-nay-be, headman, his x mark.

In presence of —

Richd. M. Smith,

Charles H. Rodd, United States interpreter.

Amos F. Albright, superintendent mills.

Marcus Grinnell, United States blacksmith.

M. D. Bourassa,

F. C. Babbitt,

George Bradley.

Appendix G

29 U.S.C. §152

When used in this subchapter—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under Title 11, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an

employer subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 158 of this title.

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of

employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 153 of this title.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the

performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.[1]

[1] So in original. Probably should be "persons".

29 U.S.C. §158(a)

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement,

the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a)of this title.