

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

## Advice Memorandum

DATE: December 3, 2010

TO : Stephen Glasser, Regional Director  
Region 7

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Little River Band of Ottawa Indians           220-7600  
Tribal Government                                   260-3360-3333  
Case GR-07-CA-51156

An October 22, 2008 Advice Memorandum in this case found that there was no impediment to asserting jurisdiction over the charged party Indian tribe and that, if the Tribe's employer status vis-à-vis casino employees were conclusively established, several provisions of the Tribe's employment ordinance (FEP) violated Section 8(a)(1). Those provisions prohibited strikes and regulated labor relations and "the terms and conditions under which collective-bargaining may or may not occur"; required unions to have tribal-issued licenses; prohibited bargaining about union security agreements; and prohibited bargaining about employment preferences for tribal members. The FEP was most recently amended, and some sections were changed and/or renumbered, on July 28, 2010.<sup>1</sup> Based upon certain information contained on the Tribe's website and evidence submitted by the Tribe in its federal lawsuit (W.D. of Michigan, Case No. 1:09-CV-141) seeking to enjoin ULP proceedings, we now conclude that the Tribe is the Employer of the Casino's employees. In this regard, the Tribe solely owns and operates the Casino and has established a regulatory commission that, among other things, "hire[s] and match[s] employees in accordance with the Tribe's personnel ordinances or regulations."

Accordingly, absent settlement, the Region is authorized to issue complaint alleging, for the reasons set forth in our prior Advice memorandum, that FEP Sections 16.01 (tribal preemption/preclusion of access to Board), 16.02 (strike prohibition and licensing requirement),

---

<sup>1</sup> All FEP section numbers refer to the most recently amended ordinance, including those containing language which we found unlawful in our 2008 memorandum.

16.06(b) and (c) (explicit strike prohibitions), 16.08 (explicit license requirement), and 16.24 (injunctive relief and fines for violating no-strike and licensing provisions) violate Section 8(a)(1) of the Act. Moreover, 16.06(a) is unlawful since it prohibits interference with the "Governmental Operations of the Band", which specifically includes under the definitions in 16.03 the "generation of revenue ... through the Little River Casino Resort" and, as reasonably construed, covers temporary work stoppages, taking up management time by attempting to discuss grievances, and other various concerted activities to deal with employee terms and conditions of employees. However, as Section 16.05 no longer prohibits bargaining over union security, but rather recognizes the parties' right to bargain over "fair share" provisions under 16.13, this aspect of the FEP is no longer unlawful. Similarly, because the prohibition of bargaining over tribal employment preferences in the former Section 16.09 has been eliminated and 16.02 simply states the Tribe's lawful policy of protecting such preferences, the provision found unlawful in our prior Advice memorandum no longer exists.

We further conclude that the following aspects of the Tribe's FEP violate Section 8(a)(1):

- 16.12(a)(1)(B) precludes bargaining over the mandatory subjects of hiring, layoff, recall and reconstituting duties.
- 16.12(b) precludes bargaining over any subjects in conflict with provisions of tribal law and, thus, is an unlawful assertion of tribal supremacy over the bargaining rights and obligations established by the NLRA.
- 16.13(e) limits the amount of time that employees may file a deauthorization petition to the first 3 months of a contract, and thereby interferes with their right under Section 9(e) of the Act to file such a petition during the entire term of the contract.
- 16.15(b) prohibits unions from calling for any action that interferes in any way with Employer operations. This would include strikes and other concerted activity that does not leave Employer free to do business in any way it chooses.
- 16.15(b)(5) reiterates the prohibition on, and subjects unions to civil penalties for, strike activity.

- 16.16 not only unlawfully precludes arbitral review by the Board and courts and limits review to the Tribal Council, but also mandates that any alleged unfair labor practice must first be the subject of written communications and an attempt to resolve the dispute (including the furnishing of requested relevant information) between the employer and union. Only then does it permit resort to an outside forum, and therefore unlawfully imposes an unlawful exhaustion requirement before seeking access to the Board.
- 16.17 permits contractual interest arbitration but precludes review of an allegedly unlawful award (e.g. one containing "2nd-generation" interest arbitration, overly broad solicitation clauses under Magnavox, etc.) by the Board or courts. Precluding resort to the Board for a peaceful resolution of a dispute cognizable under the Act is unlawful. There is no justification for precluding review of arbitral awards even if employees have the right to strike, since encouraging resort to economic weapons is directly contrary to the Act's preference of peaceful dispute resolution over disruptions to interstate commerce.
- 16.18 mandates that collective-bargaining agreements have terms of 3 years or less, and therefore unlawfully restricts bargaining over a mandatory subject.
- 16.20 specifically excludes alcohol and drug abuse policies from collective bargaining, and therefore unlawfully prohibits bargaining over a mandatory subject.
- 16.24(a) and (c) constitute the unlawful provision of fines and injunctive relief for violating the strike prohibitions and union licensing requirements of Section 16.
- 16.24(d) unlawfully limits access to the Board. Although there is nothing illegal about setting forth an optional Tribal dispute resolution system for resolving bargaining and contractual disputes, as provided in subsections (a) and (b) here, subsection (d) makes the resolution by the Local Tribunal final.
- Finally, Article XVII(1)(c) purports to be concerned with the "integrity" of the entire FEP, and states that integrity is threatened if parties "invoke procedures or remedies outside of this Code for controversies that this Code is designed to address and resolve in accordance with the unique public policies of the Band." This constitutes an unlawful

Case

- 4 -

reiteration/reaffirmation/explanation of Section 16.01, which unlawfully precludes application of the NLRA.

In sum, absent settlement, the Region is authorized to issue complaint against the Tribe as the Employer of the Casino employees, alleging that the above-mentioned portions of the FEP interfere with employee rights in violation of Section 8(a)(1) for the reasons set forth herein and in our October 22, 2008 Advice Memorandum.

B.J.K.

ROF-0

ADV.07-CA-51156.Response.LittleRiverBand.<sup>(b) (6), (b) (7)</sup>.doc