UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

SOARING EAGLE CASINO AND RESORT, A WHOLLY OWNED GOVERNMENTAL SUBDIVISION OF THE SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN[1]

Employer

and **Case GR-7-RC-23163**

INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA)

Petitioner

APPEARANCES:

Sean Read, Attorney, of Mt. Pleasant, Michigan, and Henry Buffalo, Joseph F. Halloran, and Peter G. Griffin, Attorneys, of St. Paul, Minnesota, on brief, for the Employer
Scott A. Brooks, Attorney, of Detroit, Michigan, for the Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[2] in this proceeding,[3] the undersigned finds:

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[1] The Employer's name appears as amended at the hearing.
[2] At hearing, the hearing officer granted the parties' joint motion that the hearing officer take administrative notice of the record in Case GR-7-RC-23147. I find that the granting of that motion was appropriate. Accordingly, the record in that case, which includes the petition, the transcript in the pre-election hearing, exhibits, briefs, the Regional Director's Decision and Direction of Election, the Employer's request for review, and the Board order denying review have been considered.
[3] The Employer filed a brief which was carefully considered.

1. The hearing officer's rulings are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.[4]

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Overview

The Soaring Eagle Casino and Resort ("Employer" or "Casino") is a governmental subdivision of the Saginaw Chippewa Indian Tribe of Michigan ("the Tribe"). It is engaged in the operation of a hotel, restaurant, entertainment and gaming complex located at 6800 Soaring Eagle Boulevard on the Federal Government-recognized Isabella Indian Reservation in Mt. Pleasant, Michigan. Petitioner seeks to represent a unit of approximately 170 security guards at the Employer. Although the Employer stipulated to the appropriateness of the petitioned-for unit, it argues that the petition should be dismissed for lack of jurisdiction. Specifically, the Employer argues that the controlling law on whether the Board (sometimes referred to as NLRB) can assert jurisdiction over a casino on Indian land, ***San Manuel Indian Bingo and Casino***, 341 NLRB 1055 (2004), affd. 475 F.3d 1306 (D.C. Cir. 2007), was wrongly decided. The Employer argues that application of the National Labor Relations Act ("Act") to the casino is an affront to its sovereign immunity and abrogates its treaty rights. The Employer also argues that even under ***San Manuel,*** the Board should not assert jurisdiction over it.

In Case GR-7-RC-23147 (***Soaring Eagle I***), filed on October 12, 2007, Local 486, International Brotherhood of Teamsters sought to represent a unit of approximately 300 housekeeping employees employed by the Employer. The only issue in that case also was jurisdiction. On November 20, I issued a Decision and Direction of Election finding the assertion of jurisdiction to be proper. The Employer filed a timely request for review of the decision. By Order dated December 19, the Board denied the request. Local 486 lost the subsequent election that was held and a certification of results of election issued on December 28. As noted in footnote 2, administrative notice of the record in ***Soaring***

[4] The Employer filed a motion to dismiss the petition for lack of jurisdiction. Since jurisdiction is the only matter at issue here, the Employer's motion is also resolved herein.

Eagle I has been taken. As a result, the parties relied on that record and little additional evidence was adduced.[5]

Applying the analysis set forth in ***San Manuel***, and consistent with the Board's denial of the Employer's request for review in ***Soaring Eagle I***, I find that the Board has jurisdiction over the Employer. The 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 the Act does not establish that Congress intended to exclude Indians' commercial enterprises from the Board's jurisdiction. Finally, the Employer has not raised any other meritorious jurisdictional defenses.

Tribal Government and Gaming

The Tribe has approximately 3,046 members. It is a successor to the Treaty with the Chippewa Indians of Saginaw and of Swan Creek and Black River, August 2, 1855, 11 Stat. 633, and the Treaty between the United States and the Chippewa Indians of Saginaw, Swan Creek, and Black River, Michigan, October 18, 1864, 14 Stat. 657. Only the 1864 treaty was placed in the record in ***Soaring Eagle I***. This four-page treaty deals with land allocation, support and maintenance of a school on the reservation, and sustaining a blacksmith shop. It sets apart land for "the exclusive use, ownership, and occupancy" of the Tribe. This land, the reservation, is located primarily within Isabella County, with a portion in Arenac County, Michigan. The Casino is located entirely within the geographical boundaries of the Tribe's Isabella Reservation. The city of Mt. Pleasant is also within the reservation's boundaries. The city has its own police, fire, and public safety departments. These Mt. Pleasant entities do not have jurisdiction within the reservation except over their nontribal citizens. They have no jurisdiction at the Casino.

The Tribe is governed by a tribal council comprised of 12 members elected by the tribal membership and headed by an elected tribal chief, in accordance with the Tribe's constitution, which was enacted on November 4, 1986. The tribal council enacts laws which apply to tribal members and the Tribe's various enterprises. The council also governs and manages economic development. It holds monthly meetings open to tribal members and special sessions, usually weekly, to handle contracts, invoices, grants, and to vote on proposed motions and resolutions.

[5] The Employer introduced four documents into the record: 1) a 1855 Annual Report of the Commissioner of Indian Affairs; 2) a February 15, 1864 letter to the President of the United States from the chiefs and headmen of the Chippewa Indians of Saginaw and Chippewa Indians of Swan Creek and Black River; 3) an April 16, 1871 petition from Isabella Chippewa chiefs to U.S. Indian agent Jas. Long; and 4) December 27, 1889 meeting minutes from a meeting of the board of Indians belonging to the Chippewa of Saginaw, Swan Creek and Black River.

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, provided for the conduct of tribal class III gaming by the Tribe. The compact does not give the State of 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 four-year terms. The tribal council has enacted a gaming code which is enforced by the Commission. The gaming code establishes internal controls and licensing criteria for key persons employed at the Casino who handle tribal funds. The Commission reports to the tribal council on a monthly basis. It reports formal violations, and gaming licenses that have been issued or removed.

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

The Tribe's primary source of revenue is generated by its gaming enterprise, with about 90% of tribal income derived from the operation of the Casino. The tribal council decides how to distribute gaming revenue to support the Tribe's programs and services. The Tribe has 37 governmental departments and 159 tribal 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% of the departments and programs are funded by revenue generated by the Tribe's gaming enterprise. The remaining 10% comes from competitively-awarded grants and contracts. The Tribe operates its own police department, tribal court system, tribal administration building, and fire department. It has a health clinic which provides health services exclusively to the Tribe's members. The Tribe operates a behavioral health program which provides services to Tribal members and members of other tribes. It also provides social services to its members.

On October 24, 2007, after the filing of the petition in GR-7-RC-23147, the tribal council enacted the Tribal Government Labor Ordinance, which prohibits employees from forming or joining labor organizations for purposes of collective bargaining or mutual aid.

The Casino and Resort

The Casino is situated on 121 acres and consists of two buildings: a smaller 73,745 square foot building used for bingo and slots, and a larger building that houses the 217,660 square foot casino, a 71,547 square foot entertainment venue, and a 403,217 square foot hotel with 520 rooms. It is owned and managed by the Tribe. Within the Casino are approximately 4,000 slot machines, 3 restaurants, and 3 bars. The Casino remains open 24 hours a day, 7 days a week, and is open to nontribal members of the public. The Casino has gross annual revenues of approximately $250 million and, according to Federico Cantu, Jr., Tribal Chief, approximately 20,000 visitors per year.[6] Cantu could not estimate how many of the visitors are tribal members. Approximately 3,000 employees work at the Casino, of whom about 221, or 7.4%, are tribal members. Of those tribal members, about 29%, approximately 65, are in management positions. While approximately 79% of upper management[7] positions in the Tribe's 37 departments are tribal members or members of other tribes, the record does not disclose what that percentage is at the Casino. The current chief executive officer of the Casino is not a tribal member. The record is devoid of evidence on how many employees in the petitioned-for unit are tribal members. The Casino advertises throughout Michigan, including the metropolitan Detroit area, and possibly outside the State, via billboards, newspapers, radio, and television. The Casino was economically impacted by the opening of three casinos in Detroit, which are approximately 155 miles to the southeast.[8]

In addition to the Casino, the Tribe operates Soaring Eagle Inn, a hotel separate from Soaring Eagle Resort, a Shell gas station, Eagle Bay Marina in Standish, Michigan, and Sagamok of Saganing gas station. All of these enterprises are on reservation land.

Analysis

Applicable Law

In ***San Manuel Indian Bingo & Casino***, 341 NLRB 1055 (2004), the Board set forth the standard for determining whether it has jurisdiction over enterprises associated with Indian tribes. The Board initially noted that "statutes of 'general application' apply to the conduct and operation, not only of individual Indians, but also of Indian tribes." ***Id.*** at 1059, citing ***Federal Power Commission v. Tuscarora Indian Nation***, 362 U.S. 99, 116 (1960) (assertion of eminent domain over tribal lands under same terms as non-Indian owned land appropriate where Congress has not expressly carved out an exemption for Indians). The Board concluded that because Congress intended the Act to have the broadest possible jurisdictional breadth permitted under the Constitution, the Act

[6] This number of annual visitors appears underestimated. If accurate, on average the Casino would be visited by only 55 customers a day, who would each spend $12,500 per visit.
[7] That term is not defined in the record.
[8] That mileage was obtained from the website *mapquest.com*.

is a statute of general application. ***Id.***, citing ***NLRB v. Reliance Fuel Oil Corp.***, 371 U.S. 224, 226 (1963).

The Board then held that there are three exceptions, set forth in ***Donovan v. Coeur d'Alene Tribal Farm***, 751 F.2d 1113 (9th Cir. 1985), that dictate when a statute of general application should not apply to the conduct of Indian tribes:

> (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***, supra. at 1059.

If none of the exceptions applies, "the final step in the Board's analysis is to determine whether policy considerations militate in favor of or against the assertion of the Board's discretionary jurisdiction." ***Id.*** at 1062. The purpose of this final step is "to balance the Board's interest in effectuating the policies of the Act with its desire to accommodate the unique status of Indians in our society and legal culture." ***Id.***

I shall now examine whether any of the three exceptions apply in the instant matter and, if not, whether policy considerations militate in favor of or against the assertion of jurisdiction.

> *Whether application of the law "touches exclusive rights of self-government in purely intramural matters"*

With regard to the first exception, the Board held in ***San Manuel*** that a tribe's operation of a casino is not an exercise of self-governance or a purely intramural matter. ***Id.*** at 1063. The Board specifically rejected the argument that operation of a casino is vital to a tribe's ability to govern itself or is an essential attribute of its sovereignty. ***Id.*** at 1061. It further noted that intramural matters generally involve topics such as "tribal membership, inheritance rules, and domestic relations." ***Id.*** at 1063, quoting ***Coeur d'Alene***, supra at 1115. A casino that employs mostly non-Indians and hosts mostly non-Indian customers is a typical commercial enterprise operating in, and substantially affecting, interstate commerce. It is not an intramural matter. Further, the Board in ***San Manuel*** expressly rejected the argument that because the profits derived from the operation of the casino funded the tribe's intramural needs, it should, by extension, constitute an intramural matter over which the Board would be prohibited from exercising jurisdiction. The Board reasoned that such a broad interpretation of intramural

would have the anomalous result of the exception swallowing the rule that statutes of "general application" apply to Indian tribes. ***Id.***

Here, like in ***San Manuel***, the Tribe operates a commercial casino on tribal lands substantially affecting interstate commerce. Similarly, it overwhelmingly employs nontribal members and caters to a nontribal customer base. Although the Tribe enacted its own labor regulations, so did the tribe in ***San Manuel***. I see no basis from departing from the Board's conclusion in ***San Manuel*** that such "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." ***Id.***, quoting ***Florida Paraplegic Assn. v. Miccosukee Tribe of Indians of Florida***, 166 F.3d 1126, 1129 (11th Cir. 1999). Accordingly, I find the first exception does not preclude the Board's assertion of jurisdiction.

Whether the application of the law would abrogate treaty rights

The Employer agues that application of the Act would abrogate the rights contained in the 1864 treaty between the Saginaw Chippewa and the United States. No treaty was in place in ***San Manuel***. Thus, in that decision the Board did not consider whether the application of the Act would abrogate the rights set forth in any Indian treaty. However, in ***Soaring Eagle I***, the Board had in front of it the Employer's arguments regarding the Saginaw Chippewa treaty rights when it considered and denied the Employer's request for review. In its denial, the Board specifically stated that the review was denied "as it raises no substantial issues warranting review."

Two courts, the Seventh and Ninth Circuits, that have considered whether the application of other Federal statutes would abrogate Indian treaty rights have applied the analysis set forth in ***Tuscarora*** and ***Coeur d'Alene***. They found that the statutes did not abrogate treaty rights.[9] In ***Smart v. State Farm Ins. Co.***, 868 F.2d 929 (7th Cir. 1989), the Seventh Circuit found that treaties setting apart a reservation "for the use of" the Chippewa Indians and according them "the right of hunting on the ceded territory, with the other usual privileges of occupancy until required to remove by the President of the United States" did not preclude application of ERISA to find a tribal employer failed to pay a member-employee's insurance claim. In ***United States Dep't of Labor v. Occupational Safety & Health Review Comm'n***, 935 F.2d 182 (9th Cir. 1991), the Ninth Circuit held that a treaty providing "nor shall any white person be permitted to reside upon" the tribe's reservation merely set forth a general right of exclusion and did not preclude application of OSHA to an on-reservation sawmill owned and operated by the tribe. Earlier, in ***Confederated Tribes of Warm Springs v. Kurtz***, 691 F.2d 878 (9th Cir.

[9] The Second Circuit has adopted the ***Coeur d'Alene*** exceptions to the ***Tuscarora*** rule, but has not decided a case involving a treaty abrogation defense. See ***Reich v. Mushantucket Sand & Gravel***, 95 F.3d 174 (2nd Cir. 1996) (OSHA did not affect the tribe's exclusive rights of self-government in purely intramural matters and it applied to the tribal construction business).

1982), cert. denied, 460 U.S. 1040 (1982), that court found that a treaty providing "nor shall any white person be permitted to reside upon" a reservation set aside for the tribe's exclusive use did not bar application of the Federal tax laws to the tribe. The court noted that the treaty did not contain a specific provision exempting the tribe from the tax laws and the general right of exclusion set forth in the treaty was insufficient to establish an exception. ***Id.*** at 882.

Under those courts' analyses, the mere existence of a treaty will not compel a conclusion that a statute of general application is not binding on an Indian tribe. The critical issue is whether the application of the statute would jeopardize a specific right that is secured by the treaty. See ***Smart v. State Farm Ins.,*** supra at 934-935 (treaties with the Chippewa simply conveyed land within the exclusive sovereignty of the Tribe; neither the tribe nor the court was able "to uncover a single specific treaty or statutory right that would be affected" by the application of ERISA); ***United States Dep't of Labor v. Occupational Safety & Health Rev. Comm'n***, supra at 186-187 (the conflict between a statute and a treaty must be "direct" rather than attenuated to prevent the application of a general Federal statute to the Indians). A treaty that confers only a general right of possession of, or exclusion of non-Indians from, tribal land will not be abrogated by Federal regulation because such a general right is analogous to the inherent right discussed and held insufficient to bar application of OSHA in ***Coeur d'Alene***. See ***United States Dep't of Labor v. Occupational Safety & Health Rev. Comm'n***, supra at 185-186 (the "identical right should not have a different effect because it arises from general treaty language rather than recognized, inherent sovereign rights").

The Employer argues that the tide has shifted and circuits are abandoning or questioning the application of ***Tuscarora*** and ***Coeur d'Alene***. Thus, the Employer argues that in ***Reich v. Great Lakes Indian Fish and Wildlife Commission***, 4 F.3d 490 (7th Cir. 1993), the Seventh Circuit abandoned the ***Tuscarora*** and ***Coeur d'Alene*** approach of evaluating whether the application of the statute would jeopardize a specific right that is secured by a treaty that it had applied in ***Smart v. State Farm Ins.,*** supra. The Employer misreads ***Reich***. In ***Reich***, the Seventh Circuit considered the application of a statute to employees engaged in law enforcement who, if they had been employed by a state or local government, would be exempt from the law. The ***Reich*** court differentiated such employees performing work of a governmental character from employees "engaged in routine activities of a commercial or service character." The court specifically stated that its holding was limited to employees of Indian agencies exercising governmental functions that when exercised by employees of other governments are exempt. That is not the situation here.

Likewise, the Employer argues that the Third Circuit explicitly rejected in ***Lazore v. C.I.R.***, 11 F.3d 1180 (3rd Cir. 1993), the "specific right" analysis adopted by the Ninth Circuit in ***Kurtz*** as not properly taking into account Supreme Court precedent interpreting treaties. This is a mischaracterization. The ***Lazore*** court, in fact, applied the ***Coeur***

d'Alene/Tuscarora analysis to find that tax laws did not abrogate a specific treaty right. The ***Kurtz*** court's error, according to the ***Lazore*** court, was in requiring a "definitely expressed exemption" in a treaty to the application of tax laws in order to confer a specific right. ***Lazore***, supra at 1185.

The Employer also argues that the Eighth Circuit no longer follows the ***Tuscarora*** approach, citing ***EEOC v. Fond du Lac Heavy Equipment and Construction Co.***, 986 F.2d 246 (8th Cir. 1993). In doing so, the Employer reads ***Fond du Lac*** too broadly. The court in ***Fond du Lac*** considered whether the Age Discrimination in Employment Act applied to an Indian applicant and an Indian tribal employer. The court found it did not, since "the facts in this case reveal that this dispute involves a strictly internal matter." The court noted that "[s]ubjecting such an employment relationship between the tribal member and his tribe to federal control and supervision dilutes the sovereignty of the tribe." Moreover, the court recognized that "[f]ederal regulation of the tribal employer's consideration of age in determining whether to hire the member of the tribe to work at the business located on the reservation interferes with an intramural matter that has traditionally been left to the tribe's self-government." Because the tribe's right of self-government, under those particular facts, would be affected, the ***Fond du Lac*** court held the general rule of applicability under ***Tuscarora*** did not apply. The circumstances at issue in the instant case are not analogous. This case does not involve a strictly internal matter. It involves a tribal employer whose employees and customers are primarily non-tribal members.

One court, the Tenth Circuit, takes a different view in considering the abrogation of treaty rights. In ***Donovan v. Navajo Forest Products Industries***, 642 F.2d 709, 711-713 (10th Cr., 1982), a case relied upon by the Employer, the court concluded that applying OSHA to a sawmill on the Navajo reservation would abrogate the principles of tribal sovereignty and self-government inherent in a treaty provision that generally barred unauthorized persons from "pass(ing) over, settl(ing) upon, or resid(ing) in" the Navajo reservation. Based upon the Board's denial of the Employer's request for review in ***Soaring Eagle I***, it is evident that the Board does not adopt that approach. Further, in ***San Manuel***, the Board specifically noted that the Tenth Circuit's interpretation of ***Tuscarora*** stands in contrast to that of the other courts of appeal that have examined the issue. ***Id.*** at 1060 n.16.

The treaty at issue here sets apart land for "the exclusive use, ownership, and occupancy" of the Tribe. It confers only a general right of possession and exclusion. No specific right is set forth in the treaty language which would be affected by the application of the Act. Accordingly, and consistent with the Board's denial of the Employer's request for review in ***Soaring Eagle I***, I find that the second ***Coeur d'Alene*** exception does not apply.

Whether there is "proof" in the statutory language or legislative history that Congress did not intend the law to apply to Indian tribes

The Board in ***San Manuel*** held that the third ***Coeur d'Alene*** exception was inapplicable because neither the language nor the legislative history of the Act showed that Congress intended to exclude Indians or their commercial enterprises from the Board's jurisdiction. ***San Manuel***, supra at 1063. I cannot, and find no reason to, depart from the Board's conclusion.

Whether policy considerations militate in favor of or against the assertion of the Board's discretionary jurisdiction

Since I have found that none of the three ***Coeur d'Alene*** exceptions preclude the assertion of the Board's jurisdiction, the final step is to determine whether policy considerations militate in favor or against exercising discretionary jurisdiction.

The Employer argues that policy considerations weigh against the assertion of jurisdiction. It contends that the assertion of jurisdiction would interfere with tribal independence and self-government, and contradict the long-standing rule of construction with regard to Federal statutes affecting Indians. It also contends that the location of the Casino on tribal land argues against the assertion of jurisdiction.

In ***San Manuel***, the Board found that policy considerations favored the exercise of discretionary jurisdiction. The Board noted that the casino was "a typical commercial enterprise," employing non-Indians and catering to non-Indian customers. Contrary to the Employer's position that assertion of jurisdiction would interfere with tribal independence and self-government, the Board found that the assertion of jurisdiction would not unduly interfere with a tribe's autonomy. It noted that "the Act would not broadly or completely define the relationship between [the tribe] and its employees . . . or regulate intramural matters." ***Id.*** at 1063-64.

As to the issue of statutory construction, it is true, as argued by the Employer, that ambiguous statutes and treaties are to be construed in favor of Indians. ***Choate v. Trapp***, 224 U.S. 665, 675 (1912). However, "wishing" an ambiguity does not make it so. ***Confederated Tribes of Warm Springs v. Kurtz***, supra at 881. The Board considered the issue of statutory construction in ***San Manuel***. It noted that the Supreme Court "has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally possible under the Commerce Clause." ***NLRB v. Reliance Fuel Oil Corp.***, 371 U.S. 224, 226 (1963) (emphasis in original). The Board stated that the language of Section 2(2) of the Act "vests jurisdiction in the Board over any 'employer' doing business in this country save those Congress exempted with careful particularity." ***San Manuel***, supra, at 1057, quoting ***State Bank of India v. NLRB***, 808 F.2d 526, 531 (7th Cir. 1986), cert. denied 483

U.S. 1005 (1987). The Board then found that on its face, Section 2(2) of the Act defining "employer" does not expressly exclude Indian tribes from the Act's jurisdiction, tribes are not a corporation of the Government or a Federal Reserve Bank, and do not meet the traditional definition of a State or political subdivision thereof. Finally, the Board declared that there was nothing in the Act's legislative history that suggested Congress intended to foreclose the Board from asserting jurisdiction over Indian tribes. ***San Manuel***, supra at 1057-1058.

As in ***San Manuel***, the only factor here militating against the assertion of jurisdiction is that the Employer is located on tribal land. The Board found that is not enough to outweigh the other factors and defeat the assertion of jurisdiction. ***Id.*** at 1064.

The Casino is an exclusively commercial venture generating income for the Tribe from the general public, most of whom are not tribal members. In addition, the Casino competes in the same commercial arena as other nontribal casinos, overwhelmingly employs nontribal members, and actively markets its gaming, hotel, restaurants, entertainment, and other retail ventures to the general public. Thus, as in ***San Manuel***, the impact on interstate commerce is such that the exercise of discretionary jurisdiction is appropriate. ***Id.*** at 1062-63.

The Employer's asserted sovereign immunity from these proceedings

The Employer argues that as a sovereign, federally-recognized Indian tribe, it has immunity from unconsented proceedings. In so arguing, it cites ***Federal Marine Comm'n v. South Carolina State Ports Auth.***, 535 U.S. 743, 760 (2002), which held that state sovereign immunity bars a Federal administrative agency from adjudicating a private citizen's claim against a state agency.

The Board has rejected the argument that exercising jurisdiction, in the appropriate circumstances, is an affront to a tribe's sovereign immunity. ***San Manuel***, supra at 1061. As the Board noted, Indian tribes have no sovereign immunity against the United States. See ***Florida Paraplegic Assn. v. Miccosukee Tribe of Indians of Florida,*** 166 F.3d at 1135 (immunity doctrines do not apply to the Federal Government); ***Reich v. Mashantucket Sand & Gravel***, 95 F.3d 174, 182 ("tribal sovereignty does not extend to prevent the federal government from exercising its superior sovereign power"). The NLRB is an arm of the U.S. Government.

The Employer argues that its immunity from this proceeding is not governed by ***San Manuel*** because that proceeding was a Board-initiated unfair labor practice proceeding whereas the instant case was initiated by a private party, the Petitioner, seeking private redress. It cites to the NLRB Casehandling Manual, Part Two Representation Proceedings, Section 11002.2, which specifies that a representation petition may be filed by "an employee or a group of employees, an individual or a labor

organization acting on their behalf, or by two or more labor organizations acting jointly." The Employer points out that the United States is not identified among the "people" eligible to file a representation petition. The Employer is wrong in its attempt to distinguish between representation and unfair labor practice proceedings so as to preclude the assertion of jurisdiction in the former. Unfair labor practice cases also are not initiated by the Board. They are initiated by "any person or organization." NLRB Casehandling Manual, Part One, Unfair Labor Practice Proceedings, Section 10018.2; see also Board's Rules and Regulations, Section 102.9. In addition, a representation proceeding does not seek private redress. It is a public mechanism which advances employees' right of self-organization as mandated by federal law. Further, a dichotomy in the assertion of jurisdiction over Indian casinos for the purpose of representation proceedings and unfair labor practice proceedings would be untenable and unworkable. If employees do not have the right to organize at Indian casinos, there would be no basis for the Board to enforce Section 8(a) of the Act through unfair labor practice proceedings. There would be nothing to enforce.

Next, the Employer erroneously represents that the Board, in its decision in ***San Manuel***, implies that a tribe constructively waives its sovereign immunity from private actions under the Act by engaging in commercial activities. The Board does not accept the argument that cases before it are "private actions." As stated above, the Board has rejected arguments of tribal sovereign immunity because Indian tribes do not possess immunity against the United States. Further, the significance of a tribe's engagement in interstate commerce in the Board's analysis is not in evaluating whether a tribe has waived sovereign immunity, but in evaluating whether application of a federal statute "touches exclusive rights of self-government in purely intramural matter" under ***Couer d'Alene***.

Finally, the Employer relies upon ***Aldrich v. Saginaw Chippewa Indian Tribe of Michigan***, Case No. 07-12801 (E.D. Mich. Oct. 4, 2007) for the proposition that the assertion of jurisdiction is improper under the principles of tribal sovereign immunity when there is not an express waiver by the tribe or authorization of suit by Congress. ***Aldrich*** involved an individual's lawsuit pursuant to the Family and Medical Leave Act (FMLA) filed against the Tribe. The district court granted the Tribe's motion to dismiss based on sovereign immunity. However, in analyzing the plaintiff's arguments against dismissal, the district court noted that plaintiff was relying on cases involving suits filed against Indian tribes by the United States of America. The court asserted that tribal sovereign immunity does not apply where suit is brought by the "superior sovereign." ***Id.*** at 4, quoting ***Equal Employment Opportunity Comm'n v. Karuk Tribe Housing Authority***, 260 F.3d 1071, 1075 (9th Cir. 2001) (differentiating between sovereign immunity to private lawsuits and susceptibility to suit brought by the Federal

Government).[10] As a Federal agency, the NLRB is an arm of the U.S. Government and the "superior sovereign."[11]

Conclusion

Based on the foregoing and the record as a whole, and consistent with the Board's holding in ***San Manuel*** and its denial of the Employer's request for review in ***Soaring Eagle I***, I find assertion of jurisdiction over the Employer to be proper. The Act is a statute of general application, and none of the three ***Coeur d'Alene*** exceptions apply. Further, policy considerations favor the Board's assertion of discretionary jurisdiction. Accordingly, I shall direct that an election be held and the Employer's motion to dismiss is denied.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time armed and unarmed security officers performing guard duties as defined in Section 9(b)(3) of the National Labor Relations Act, employed by the Employer at its facilities located at 6800 Soaring Eagle Boulevard, Mt. Pleasant, Michigan, but excluding all office clerical employees, casino surveillance employees, Saginaw Chippewa Indian Tribe tribal police officers, professional employees, supervisors as defined in the Act, and all other employees.

Those eligible to vote shall vote as set forth in the attached Direction of Election.

Dated at Detroit, Michigan, this 17th day of January 2008.

(SEAL)

/s/ [Stephen M. Glasser]
Stephen M. Glasser, Regional Director
National Labor Relations Board, Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

[10] The Employer's reliance on ***Piro-Harabedian***, 2005 WL 3163395, is also inapposite. That case considered the sovereign immunity of an Indian tribe under the Federal Foreign Sovereign Immunities Act, 28 U.S.C. §§1330(a) and 1605(a)(5), in a civil case brought by individuals in which the tribe was named as a defendant. As set forth above, courts have differentiated between sovereign immunity to private lawsuits and suits brought by the United States Government.

[11] The Employer makes two other arguments attacking the Board's findings in ***San Manuel***. It argues the Tribe is a government exempt from the Board's jurisdiction and contends the Board's reliance on ***Tuscarora*** is misplaced. The Board addressed those arguments and explained its reasoning in its decision. ***San Manuel***, supra at 1057-1058 and 1060-1061. I cannot, and find no reason to, depart from the Board's findings in that case.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA).** The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have quit or been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. ***Excelsior Underwear, Inc.*** 156 NLRB 1236 (1966); ***NLRB v. Wyman-Gordon Company***, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. ***North Macon Health Care Facility***, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on

the list should be alphabetized (overall or by department, etc.). I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **January 24, 2008**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency website, **www.nlrb.gov**,[12] by mail, or by facsimile transmission at **313-226-2090**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two (2)** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Posting of Election Notices

Section 103.20 of the Board's Rules and Regulations states:

a. Employers shall post copies of the Board's official Notice of Election on conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sunday, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. [This section is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election

[12] To file the list electronically, go to **www.nlrb.gov** and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the **File Documents** button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the **Accept** button. The user then completes a form with information such as the case name and number, attaches the document containing the request for review, and clicks the **Submit Form** button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under **E-Gov** on the Board's web site, **www.nlrb.gov**.

that it has not received copies of the election notice. ***Club Demonstration Services***, 317 NLRB 349 (1995).]

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.69 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001**. This request must be received by the Board in Washington by **January 31, 2008**. The request may be filed electronically through E-Gov on the Board's website, **www.nlrb.gov**,[13] but may **not** be filed by facsimile.

[13] Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**.

To file the request for review electronically, go to **www.nlrb.gov** and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the **File Documents** button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the **Accept** button. Then complete the E-Filing form, attach the document containing the request for review, and click the **Submit Form** button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under **E-Gov** on the Board's web site, **www.nlrb.gov**.