

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
Southern Division**

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TRACEY CORDES, CLERK
U.S. DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
BY: mrs/

THE LITTLE RIVER BAND OF OTTAWA)
INDIANS, a federally recognized Indian)
tribe with its principal governmental office)
in Manistee County, Michigan,)

Plaintiff)

v.)

THE NATIONAL LABOR RELATIONS)
BOARD, an independent federal agency)
with a regional office in Grand Rapids, Michigan,)

Defendant)

Civil Action No. **1:09-cv-141**
Janet T. Neff
United States District Judge

VERIFIED COMPLAINT

Now comes the Little River Band of Ottawa Indians (*Gaá Čhíng Ziibi Daáwaa Aníshinaábek*) and hereby claims against the Defendant, the National Labor Relations Board as follows:

THE PARTIES

1. Plaintiff, the Little River Band of Ottawa Indians (the “Band,” the “Tribe,” or the “Little River Band”) is a federally recognized Indian tribe, restored to federal recognition by Congress pursuant to 25 U.S.C. §§ 1300k-1300k-7.
2. The Band exercises governmental authority, pursuant to federal law, over lands held in trust by the United States on its behalf in and near Manistee and Mason Counties within the State of Michigan.

3. The Band's principal governmental offices are located in Manistee County within the State of Michigan.
4. The National Labor Relations Board (the "NLRB," the "Board," or the "Defendant") is an independent federal agency created by Congress in 1935 to administer the National Labor Relations Act ("NLRA"), the primary law governing relations between unions and employers in the private sector.
5. The NLRB maintains offices throughout the United States, including in Grand Rapids, Michigan.

BACKGROUND

THE BAND'S GOVERNANCE OF LABOR AND EMPLOYMENT RELATIONS WITHIN ITS JURISDICTION

6. Pursuant to federal Indian common law and its Constitution, the Band exercises inherent authority as a federally recognized Indian tribe over land taken into trust on its behalf by the United States.
7. The Band's Constitution and amendments thereto have been promulgated in accordance with 25 U.S.C. § 1300k-6 and approved by the United States Department of the Interior, pursuant to the Indian Reorganization Act, 25 U.S.C. § 476 (the "IRA"). A true copy of the Band's Constitution is attached hereto as Exhibit A.
8. Pursuant to the Band's Constitution, the Band is governed by an Executive Branch, through the office of the Tribal Ogema; a legislative branch, through the office of the Tribal Council; and a judicial branch, through the Tribal Court.
9. The Band's Constitution provides that "[t]he Tribe's jurisdiction over its members and territory shall be exercised to the fullest extent consistent with this Constitution, the sovereign powers of the Tribe, and federal law."

10. The Band's Constitution empowers the Tribal Council "[t]o exercise the inherent powers of the Little River Band by establishing laws through the enactment of ordinances and adoption of resolutions not inconsistent with the Constitution . . . to govern the conduct of members of the Little River Band and other persons within its jurisdiction."
11. The Band's Constitution further empowers the Tribal Council "[t]o create by ordinance regulatory commissions or subordinate organizations and to delegate to such organizations the power to manage the affairs and enterprises of the Little River Band, provided that no such commission or subordinate organization shall exercise powers of the Tribal Council unless they are expressly delegated by the Tribal Council"
12. Pursuant to its Constitution and inherent authority under federal law, the Band has enacted a Fair Employment Practices Code (the "Band's FEP Code") to govern employment and labor relations within its jurisdiction. A copy of the Band's FEP Code is attached hereto as Exhibit B.
13. The Band's FEP Code governs a variety of rights and remedies for employers and employees within the jurisdiction of the Band, including rights and remedies for employment discrimination and collective bargaining.
14. Pursuant to Article XVI of the Band's FEP Code ("Article XVI"), the Band governs labor relations and collective bargaining within public employers within its jurisdiction.

15. Pursuant to Article XVI, a “Public Employer” is defined as “a subordinate economic organization, department, commission, agency, or authority of the Band engaged in any Governmental Operation of the Band.”

16. Pursuant to Article XVI, “Governmental Operations of the Band” are defined as:

the operations of the Little River Band of Ottawa Indian exercised pursuant to its inherent self-governing authority as a federally recognized Indian tribe or pursuant to its governmental activities expressly recognized or supported by Congress, whether through a subordinate economic organization of the Band or through a department, commission, agency, or authority of the Band including, but not limited to (1) the provision of health, housing, education, and other governmental services and programs to its members; (2) the generation of revenue to support the Band’s governmental services and programs, including the operation of “Class II” and “Class III” gaming through the Little River Casino Resort; and (3) the exercise and operation of its administrative, regulatory, and police power authorities within the Band’s jurisdiction.

17. In 1988, Congress enacted the Indian Gaming Regulatory Act (“IGRA”) to govern the field of Indian gaming in the wake of the Supreme Court’s decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1986). In *Cabazon*, the Supreme Court confirmed that Indian tribes have inherent authority to regulate their gaming operations within their territorial jurisdictions to generate governmental revenues.

18. Tracking *Cabazon*, in IGRA, Congress found that “Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.” See 25 U.S.C. § 2701(5).

19. The Band regulates and conducts gaming activity on its Indians lands (lands held in trust on its behalf by the United States) pursuant to the terms of IGRA, including “Class II” and “Class III” gaming as defined by IGRA. Said regulation includes the

regulation of labor organizations doing business within the Band's gaming facilities on those Indian lands pursuant to Article XVI.

20. Consistent with most public sector labor relations laws within the fifty states and the federal government, Article XVI of the Band's FEP Code prohibits strikes against the governmental operations of the Band.

21. At all material times herein, Article XVI has been in effect.

**THE BAND'S CURRENT GOVERNANCE OF LABOR RELATIONS
INVOLVING TRIBAL AND NON-TRIBAL EMPLOYEES**

22. The Band, through Article XVI currently regulates labor relations involving its own tribal members as well as non-tribal members employed within its governmental operations.

23. In October, 2008, pursuant to an election procedures agreement entered into by the Band and the United Steelworkers of America (the "USW"), a bargaining unit of public employees employed at the Band's IGRA gaming operation, known as the "Little River Casino Resort," elected the USW to be their exclusive bargaining representative.

24. The USW has complied with Article XVI, including the requirement that it have a license to engage in business within the jurisdiction of the Band. A copy of the USW's license to do business within the jurisdiction of the Band is attached hereto as Exhibit C.

25. Since October, 2008, the USW, as the exclusive bargaining representative of said bargaining unit of tribal members and non-tribal members, has invoked the provisions of Article XVI to engage in bargaining and negotiations with managers at the Band's IGRA gaming facility over terms and conditions of employment, including the

negotiation of layoff impacts and the commencement of negotiations of a collective bargaining agreement.

26. The Little River Casino Resort is a subordinate economic organization of the Tribe and at all material times herein has been organized pursuant to the Band's Little River Casino Enterprise Ordinance, a copy of which is attached hereto as Exhibit D.

THE DEFENDANT'S THREATENED COERCIVE ACTION TO CHALLENGE THE BAND'S GOVERNANCE OF LABOR RELATIONS WITHIN ITS JURISDICTION

27. On or about March 29, 2008, the International Brotherhood of Teamsters, through its General Local No. 406 (the "Teamsters"), executed a "Charge Against Employer" before the NLRB (the "Teamsters' Charge"), naming the "Little River Band of Ottawa Indians Tribal Government" as the "employer against whom the charge is brought." A copy of the Teamsters' Charge is attached hereto as Exhibit E.

28. The Teamsters' Charge asserts:

Since on or about January 1, 2008, and prior thereto the respondent the Little River Band of Ottawa Indians Tribal Government has promulgated the Constitution of the Little River Band of Ottawa Indians which on its face preempts the National Labor Relations Act jurisdiction. Said Constitution of the Little River Band of Ottawa Indians among its articles reserves authority to govern labor relations including but not limited to regulating terms and conditions under which collective bargaining agreements may or may not occur. The Constitution of the Little River Band of Ottawa Indians among other illegal articles denies employees the right to strike. By this and other conduct the respondent has intimidated [sic] employees and utilized the Constitution of the Little River Band of Ottawa Indians as a means to deny employees the right to organize as protected by Section 7 of the Act.

29. By a form letter dated March 28, 2008, NLRB Regional Director, Stephen M.

Glasser, wrote to the Band's Tribal Council Speaker, Donald Koon, stating, *inter alia*, that the Teamsters Charge had been filed against the Little River Band of Ottawa

Indians Tribal Government and that the case had been assigned to Board agent, Craig Sizer. A copy of the NLRB's March 28, 2008 letter is attached hereto as Exhibit F.

30. By letter dated May 2, 2008, counsel for the Tribe wrote to Mr. Glasser, stating that

The basis for the charge appears to be that the constitution of the Band is unlawful.

It is the Band's position that such a claim is not properly adjudicated by the Board. Should the International Brotherhood of Teamsters or the Board seek to challenge the constitution or laws of the Little River Band of Ottawa Indians, such a case should be brought in the federal district court. *See, e.g., NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1188 (10th Cir. 2002).

A copy of said letter is attached hereto as Exhibit G.

31. On or about May 14, 2008, the NLRB issued a subpoena to the Band's Tribal Council

Speaker, Don Koon, demanding his appearance to provide signed affidavit testimony in reference to the Teamsters' Charge at the Grand Rapids office of the NLRB on May 22, 2008 at 10:00 am. A copy of the subpoena is attached hereto as Exhibit H.

32. By letter dated May 21, 2008, the members of the Tribal Council of the Band wrote to

NLRB Regional Director, Stephen M. Glasser, in response to the subpoena issued to Speaker Koon, stating:

The "Charge Against Employer," executed by the International Brotherhood of Teamsters, which gives rise to the subpoena, seeks to strike down the Constitution and laws of our Tribe. We do not believe the National Labor Relations Board ("NLRB") has jurisdiction to strike down our Constitution or laws. Outside of the Tribe's own legal institutions, such authority resides only with Congress, or, in rare instances, with the federal judiciary.

We will not subject our tribal government to the burdens of a subpoena issued in a matter over which we believe the NLRB plainly lacks jurisdiction. Thus, the Tribe will not be producing Tribal Council Speaker Koon pursuant to the subpoena.

A copy of the Tribal Council's May 21, 2008 letter to NLRB Regional Director Stephen M. Glasser is attached hereto as Exhibit I.

33. The NLRB did not respond to said May 21, 2008 letter from the Tribal Council to NLRB Regional Director Stephen M. Glasser.
34. By letter dated November 5, 2008, NLRB Agent, Craig Sizer, wrote to the Band's counsel, enclosing subpoenas issued to Tribal Council Speaker Don Koon and to the "Little River Band of Ottawa Indians Tribal Government, Attn: Custodian of the Records" in reference to the Teamsters' Charge. A copy of said letter, together with the subpoenas is attached hereto as Exhibit J. In the November 5, 2008 letter, Mr. Sizer stated:

I will mainly be seeking information from Mr. Koons [sic] relevant to the Board's jurisdiction in this matter and whether the Tribe and the Casino constitute a single employer. Regarding the jurisdiction issue, I will be soliciting information to determine whether the Casino is an exclusively commercial venture generating income for the Tribe from the general public, whether the casino competes in the same commercial arena as other non-tribal casinos, whether it employs a significant number of non-tribal members, and whether it actively markets its operations to the general public. Regarding the single employer issue, I will be soliciting information to determine whether the Tribe and the Casino constitute a single integrated enterprise by virtue of such factors as common ownership, common management, centralized control of labor relations, and interrelation of operations.

The subpoenas, which were subsequently served upon the Band by certified mail, demanded appearances of Tribal Council Speaker Koon and the Tribal Council's Custodian of the Records to provide affidavit testimony and/or documents at the NLRB's Grand Rapids office on November 19, 2008 at 10:00 am. NLRB Agent Sizer later confirmed that the NLRB extended the response date to December 12, 2008.

35. By letter dated December 11, 2008, counsel for the Band wrote to NLRB Regional Director Stephen M. Glasser, stating:

We understand from correspondence and communications with Board Agent, Craig Sizer, that the NLRB has issued the subpoenas in an attempt to establish its jurisdiction to proceed with this Charge. In particular, we understand that the NLRB asserts that it has authority to proceed with this Charge against the Tribal Government if it can establish:

(1) that the Band's gaming operations, through the LRCR, meet the standards for an "employer" set forth in the NLRB's decision in *NLRB v. San Manuel Bingo & Casino*, 341 NLRB 1055 (2004) (as applied in the Decision and Direction of Election in *In re: Soaring Eagle Casino and Resort* (GR-7-RC-23147), and

(2) that the relationship between the Tribal Government and the Band's IGRA gaming operations can be viewed "as a single integrated enterprise" under standards applied by the NLRB to assert authority over two or more private businesses. See *NLRB v. Palmer Donavin Mfg. Co.*, 369 F.3d 954, 957 (6th Cir. 2004).

With respect to the first issue, it is our position that the standards applied by the NLRB in *San Manuel* and *Soaring Eagle* are contrary to principles of federal Indian law. But even if the NLRB could successfully apply those standards to establish that the LRCR should be treated as an "employer" under the NLRA, the Band's promulgation of a Constitution and laws, in accordance with the IRA and federal Indian law principles, could never be deemed the conduct of an "employer" under the NLRA, rendering it subject to an unfair labor practice charge.

Thus, with respect to the second issue, it is the Tribal Government's position that the NLRB is seeking to exercise authority that is patently beyond the scope of its jurisdiction, that its right to do so is a pure question of law, that the NLRB has no expertise with respect this question because it turns on principles of federal Indian law, and that the Tribal Government would be irreparably harmed if it were forced to endure and exhaust NLRB unfair labor practice proceedings. . . .

The letter continued:

The NLRB has a ready avenue to seek to establish that the Band's laws are preempted by the NLRA: an original action in the federal court. See, e.g., *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002); *NLRB v. State of Illinois Dept. of Emp. Security*, 988 F.2d 735 (7th Cir. 1993) But the same cannot be accomplished under a notion that the Tribal Government's promulgation of a Constitution or laws can be deemed to be the conduct of an "employer" and thereby subject to an NLRB unfair labor practice proceeding. The NLRB can no more charge a tribal government with an unfair labor practice for promulgating a constitution or law than it could charge a state government with an unfair labor practice for the same.

Finally, the letter informed the NLRB that the Band was governing labor relations within its jurisdiction and attached copies of its Constitution the Band's FEP Code, and stated:

The Little River Band of Ottawa Indians Tribal Government is concerned that the NLRB's willingness to move forward with this Charge signals that it will continue to exert coercive measures against the Band in order to adjudicate what is, in reality, a preemption claim in the guise of an unfair labor practices proceeding. For the reasons already stated, it the Tribal Government's position that the NLRB is far outside the bounds of its authority in doing so. Thus, it will not be producing Speaker Koon or a Custodian of its Records to respond to the subpoenas. Further, to alleviate the continuing threat of the NLRB's coercive assertion of authority in this matter, the Tribal Government asks that you inform it (through Speaker Koon) that the NLRB has withdrawn the subpoenas and the Charge.

A copy of the December 11, 2008 letter from the Band's counsel to NLRB Regional Director Stephen M. Glasser is attached hereto as Exhibit K (without the enclosures).

36. By letter dated January 15, 2009, the United States Department of the Interior, through its Office of the Solicitor ("DOI"), wrote to Ronald Meisburg, General Counsel for Defendant and John E. Higgins, Jr., Deputy General Counsel for Defendant, stating, in pertinent part, that "DOI takes the position that, as a matter of Federal Indian law, the NLRB cannot charge the Band with an unfair labor practice for its exercise of its sovereign authority in adopting a constitution and enacting tribal labor laws." DOI further urged the Defendant "to put an end to this enforcement action as soon as possible." A copy of DOI's January 15, 2009 letter to the Defendant is attached hereto as Exhibit L.
37. By letter dated January 30, 2009, the Defendant, through its Associate General Counsel, responded to the DOI's letter of January 15, 2009. The Defendant stated that it disagreed with the views of the DOI, and confirmed its assertion that it has

jurisdiction to prosecute the Teamsters' Charge against the Tribe if it can establish that (a) the Tribe can be treated as a "single employer" or "joint employer" with respect to its IGRA gaming operations and (b) those operations can be deemed to be those of an "employer" pursuant the Defendant's position in *NLRB v. San Manuel Bingo & Casino*, 341 NLRB 1055 (2004). A copy of the Defendant's January 30, 2009 letter to DOI is attached hereto as Exhibit M.

38. The Defendant has provided no assurance to the DOI, the Band, or the Band's legal counsel that it will not proceed with coercive measures against the Band or its tribal government officials to prosecute the Teamsters' Charge against the Band in the form of an unfair labor practices proceeding under the National Labor Relations Act.
39. By proceeding with the Teamsters' Charge against the Band, the Defendant threatens to undermine the Band's right of self-government protected by federal law.

JURISDICTION AND VENUE

40. This Court has jurisdiction pursuant to 28 U.S.C. § 1362 (Indian tribes), 28 U.S.C. § 1331 (federal question).
41. Venue is proper in this district because all parties either are resident within or maintain substantial operations within this district.

COUNT I (INJUNCTIVE RELIEF)

42. The Tribe repeats and realleges the above paragraphs as if fully set forth herein.
43. The Defendant threatens coercive action against the Tribe on behalf of the Teamsters to strike down the Constitution or laws of the Tribe by means of an unfair labor practice proceeding under the National Labor Relations Act.

44. Congress never granted the Defendant power to proceed against a federally recognized Indian tribe by means of an unfair labor practice charge in order to strike down a tribal constitution or law, enacted and in accordance with the Indian Reorganization Act and principles of federal Indian law.
45. The Defendant has a readily available means to test a claim that the Tribe's Constitution or laws are preempted by the National Labor Relations Act just as it does if it seeks to challenge a state's law on similar grounds: an original action in the federal courts.
46. The Tribe faces immediate irreparable harm from the Defendant's continuing coercive action and threatened action against the Band, including its imminent prosecution of the Teamsters' Charge in that said prosecution subjects the Band to a protracted, coercive agency proceeding in a matter over which the Defendant patently lacks subject matter jurisdiction.
47. Other than injunctive relief, the Band has no remedy at law.

**COUNT II
(DECLARATORY JUDGMENT)**

48. The Band repeats and realleges all of the above paragraphs as if fully set forth herein.
49. The Defendant claims authority to proceed against the Band to challenge the validity of the Band's Constitution or laws governing labor relations, including the Band's law prohibiting strikes against its governmental operations.
50. The bases for the Defendant's claimed authority under paragraph 49 are that:
- (A) it has jurisdiction to proceed with an unfair labor practices complaint against the Band's IGRA gaming operations unless it decides to forego such jurisdiction, by its own discretion, upon finding that those operations (i) generate income mostly from tribal

members, not from the general public, (ii) do not compete with nontribal commercial gaming operations, (iii) do not actively market to the general public, and (iv) do not employ significant numbers of non-members; and

(B) the Little River Band of Ottawa Indians Tribal Government can be considered an “employer,” subject to the Teamster’s Charge pursuant to the NLRA if said tribal government and the Band’s IGRA gaming operations can be deemed to be a “single employer” or “integrated enterprise,” under the test applied by the NLRB to decide whether separate private sector business entities can be considered so interrelated as to constitute a single employer, subject to the liabilities of the NLRA.

51. Congress did not grant the Defendant authority to prosecute the Teamster’s Charge against the Band or its Tribal Government on the grounds claimed by the Defendant as described in paragraphs 49 and 50.

52. The Band and the Defendant have an actual controversy about whether the Defendant may proceed against the Band through a coercive unfair labor practices case for the purpose of challenging the Constitution or laws of the Band governing labor relations within its jurisdiction.

53. Said controversy is ripe for resolution by this court.

WHEREFORE, the Band respectfully asks this Court to enter judgment in its favor and to:

A. Enjoin Defendant and any of its agents, officers, employees, or representatives from proceeding against the Band, its Tribal Government, or any of the Band’s officials, agents or representatives by any means in furtherance of the Teamster’s Charge;

B. Issue a declaratory judgment against the Defendant, declaring that it has no authority to proceed against the Band, its Tribal Government, or any of the Band's officials, agents or representatives by means of an unfair labor practice case to challenge the Band's Constitution or laws, including Article XVI, governing labor relations within the Band's jurisdiction.

C. Award the Tribe its costs, and such other and further relief as this Court deems just or equitable.


Dated: February 11, 2009



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VERIFICATION OF DONALD KOON

I declare under penalty of perjury that the foregoing Complaint is true and correct.
Executed on February 11, 2009.



Kimberly Alexander, Tribal Council Recorder
Little River Band of Ottawa Indians