APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASINO PAUMA, an Enterprise of the Pauma Band of Luiseno Mission Indians of the Pauma and Yuima Reservation, a federally recognized Indian Tribe, *Petitioner*, v. NATIONAL LABOR RELATIONS BOARD, *Respondent*, UNITE HERE INTERNATIONAL UNION, *Intervenor*.	No. 16-70397 NLRB No. 21-CA-125450
NATIONAL LABOR RELATIONS BOARD, *Petitioner*, v. CASINO PAUMA, an Enterprise of the Pauma Band of Luiseno Mission Indians of the Pauma and Yuima Reservation, a federally recognized Indian Tribe, *Respondent*.	No. 16-70756 NLRB No. 21-CA-125450 OPINION

App. 2

On Petition for Review of an Order of the
National Labor Relations Board

Argued and Submitted November 9, 2017
Pasadena, California

Filed April 26, 2018

Before: Richard Linn,* Marsha S. Berzon, and Paul J. Watford, Circuit Judges.

Opinion by Judge Berzon

COUNSEL

Cheryl Ann Williams (argued) and Kevin M. Cochrane, Williams & Cochrane LLP, Temecula, California, for Petitioner.

Heather Stacy Beard (argued), National Labor Relations Board, Washington, D.C.; Kristin L. Martin (argued) and Richard G. McCracken, McCracken Stemerman & Holsberry LLP, San Francisco, California; for Intervenor.

Linda Dreeben, Deputy Associate General Counsel; John H. Ferguson, Associate General Counsel; Jennifer Abruzzo, Deputy General Counsel; Richard F. Griffin Jr., General Counsel; Heather S. Beard, Attorney; Jill A. Griffin, Supervisory Attorney; National Labor Relations Board, Washington, D.C.; for Respondent.

---

* The Honorable Richard Linn, United States Circuit Judge for the U.S. Court of Appeals for the Federal Circuit, sitting by designation.

Lloyd B. Miller and Rebecca A. Patterson, Sonosky Chambers Sachse Miller & Munson LLP, Anchorage, Alaska; Frank S. Holleman, Sonosky Chambers Sachse Endreson & Perry LLP, Washington, D.C.; for Amici Curiae Fort Peck Assiniboine and Sioux Tribes, Port Gamble S'Klallam Tribe, Puyallup Tribe, and Quinault Indian Nation.

Dorothy Alther and Mark Radoff, California Indian Legal Services, Escondido, California; Denise Turner Walsh, Attorney General, Rincon Band of Luiseño Indians, Valley Center, California; for Amici Curiae California Nations Indian Gaming Association, Southern California Tribal Chairmen's Association, California Association of Tribal Governments, and Rincon Band of Luiseño Indians.

OPINION

BERZON, Circuit Judge:

We consider whether the National Labor Relations Board ("NLRB" or "the Board") may regulate the relationship between employees working in commercial gaming establishments on tribal land and the tribal governments that own and manage those establishments. After addressing various preclusion questions, we uphold the Board's conclusion that it may apply the National Labor Relations Act ("NLRA") to that relationship, in accord with its usual process. We also consider whether the Board permissibly applied the rule regarding employee solicitation established in

Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793, 798 (1945), to customer-directed union literature distribution, and we hold that it did.

I.

The Pauma Band of Mission Indians ("Pauma Band" or "Tribe") owns Casino Pauma, located on the Tribe's reservation in Pauma Valley, California. About 2,900 customers visit Casino Pauma each day. The Casino employs 462 employees, five of whom are members of the Pauma Band; the parties stipulated that "[t]he vast majority of [Casino Pauma's] employees and managers are not members of any Native American Tribe."

In 2013, UNITE HERE ("Union") began an organizing drive at Casino Pauma. Over the course of a day in December 2013, nine Casino Pauma employees distributed Union leaflets to customers at the casino's front entrance. Some of the employees stood on the sidewalk at the entrance to the casino's valet driveway, and some at the exit, all facing the casino's customer parking lot. Several times during the day security personnel for Casino Pauma told the employees that they could not distribute flyers near the valet driveway, directing them instead to distribute flyers at the back of the casino, near the employee-only entrance. When the leafleting employees asked what would happen if they stayed at the valet entrance, the security employees told them they would be reported to human resources and disciplined, and that they could potentially lose their jobs. Each group of employees stopped

distributing leaflets after being told to do so. In the afternoon, a security guard took a picture of two leafleting employees.

The next month, in January 2014, another Casino Pauma employee handed out Union flyers to several employees waiting to clock out at the end of their shifts. The time clock was located in a hallway near the employee cafeteria. The leafleting employee was on her break. The three employees to whom she gave flyers had not yet clocked out for the end of their shift, but were standing in line to do so; all three clocked out within "about 30 seconds" of receiving the flyers. In March, Casino Pauma issued the leafleting employee a disciplinary warning for distributing the flyers.

The General Counsel of the NLRB filed several complaints concerning the literature distribution incidents.[1] The complaints were consolidated, and an

---

[1] Specifically, the General Counsel alleged that Casino Pauma violated NLRA section 8(a)(1), 29 U.S.C. § 158(a)(1): "(1) [by] maintaining a rule in its employee handbook prohibiting distribution of literature in 'working or guest areas' at any time; (2) by interfering with the distribution of union literature by employees near the public entrance to its casino; (3) by threatening employees with discipline for distributing union literature at that location; (4) by taking a photograph of an employee who was distributing union literature; (5) by interrogating an employee about her union activity; and (6) by directing an employee to keep a discussion about possible discipline as confidential." The complaint also alleged that Casino Pauma committed unfair labor practices under NLRA sections 8(a)(1) and 8(a)(3) by (7) "issuing a written disciplinary warning to an employee for engaging in union activity"—in particular, distributing union literature near the employees' time clock.

Administrative Law Judge ("ALJ") presided over a three-day trial. The ALJ held that Casino Pauma violated the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, in most of the ways the General Counsel alleged—in particular, it committed unfair labor practices by trying to stop union literature distribution in guest areas at the casino's front entrance and in non-working areas near its employees' time clock. A three-member panel of the Board affirmed the ALJ's rulings and findings and adopted a slightly modified version of the ALJ's order. *Casino Pauma* (*Casino Pauma II*), 363 N.L.R.B. No. 60 (Dec. 3, 2015).

In so doing, the Board relied on a jurisdictional finding involving the same parties it had made earlier that year in *Casino Pauma* (*Casino Pauma I*), 362 N.L.R.B. No. 52 (Mar. 31, 2015), a Board decision from which neither party sought judicial review. In *Casino Pauma I*, which concerned other unfair labor practices that took place at the same casino in April 2013, the Board rejected Casino Pauma's argument that it was a government entity not subject to the NLRA. *Id.* at 1 n.3; 3–4. Although Casino Pauma renewed this argument in *Casino Pauma II*, the case now before this panel, the Board held that "the doctrine of issue preclusion . . . forecloses the Respondent from arguing that the Board lacks jurisdiction." *Casino Pauma II*, 363 N.L.R.B. No. 60 at 1 n.1.

After the Board issued its decision in *Casino Pauma II*, it timely petitioned this court for enforcement of its order, 29 U.S.C. § 160(e), and Casino Pauma filed a separate petition for review, 29 U.S.C. § 160(f).

We consolidated the two petitions. UNITE HERE intervened in opposition to Casino Pauma. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers, Local 283 v. Scofield*, 382 U.S. 205, 208 (1965).

II.

Casino Pauma argues that the Board misinterpreted the NLRA and principles of federal Indian law by adjudicating unfair labor charges against it in light of its status as a tribally-owned business operating on tribal land. Before addressing this argument, we consider whether Casino Pauma is precluded from making it.[2]

The Union, but not the Board, contends that Casino Pauma is issue-precluded from arguing before us that it may not be regulated by the Board under the NLRA. The Union notes that the issue was resolved by the NLRB in a previous decision, *Casino Pauma I*, and that the Casino did not seek judicial review of that decision.

The Union is correct that collateral estoppel, also known as issue preclusion, "is not limited to those situations in which the same issue is before two *courts*.

---

[2] We do not discuss here the application of preclusion doctrines *within* administrative proceedings before the NLRB, *i.e.*, we do not consider the Board's application of preclusion doctrines to prevent a party from re-arguing an issue before it that the party had already argued in an earlier Board proceeding. Instead, our focus is on the application of issue preclusion in *court*, *i.e.*, in the adjudication of petitions for review and enforcement.

Rather, where a single issue is before a court and an administrative agency, preclusion also often applies." *B & B Hardware v. Hargis Indus.*, 135 S.Ct. 1293, 1303 (2015). Generally speaking, so long as "an administrative agency is acting in a judicial capacity and resolv[ing] disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate," *United States v. Utah Const. & Mining Co.*, 384 U.S. 394, 422 (1966), "the federal common law rules of preclusion . . . extend to . . . administrative adjudications of legal as well as factual issues, even if unreviewed," *Guild Wineries & Distilleries v. Whitehall Co.*, 853 F.2d 755, 758–59 (9th Cir. 1988). Further, this court has held that preclusion "doctrines apply to administrative determinations . . . of the [National Labor Relations] Board." *Bldg. Materials & Constr. Teamsters v. Granite Rock Co.*, 851 F.2d 1190, 1195 (9th Cir. 1988); *see Granite Rock Co. v. Int'l Bhd. of Teamsters*, 649 F.3d 1067, 1070 (9th Cir. 2011); *Paramount Transp. Systems v. Chauffeurs, Teamsters & Helpers, Local 150*, 436 F.2d 1064, 1065–66 (9th Cir. 1971).

In considering the issue-preclusive effect of NLRB rulings, we have not before addressed the proposition, put forth by the Board at oral argument in explanation of its omission of a preclusion argument from its briefing in this court, that preclusion doctrines do not apply to Board orders as to which the Board has declined to seek judicial enforcement. There may indeed be good reason not to apply preclusion principles to unenforced Board orders. Unlike other federal administrative determinations, the Board's orders do "not have the force

of law." 2 John E. Higgins, Jr., *The Developing Labor Law* 2990 (6th ed. 2012). "If the party or parties against which a Board order has been issued refuse to obey, the Board has no authority to compel compliance or punish noncompliance" unless it "appl[ies] to an appropriate U.S. court of appeals" for an order of enforcement. *Id.; see* 29 U.S.C. § 160(e). Orders not enforced by the Board thus do not share the same status as many other administrative matters "already resolved as between . . . [the] parties" by the time they arrive at the courthouse; until enforced by the courts, the Board's orders may not be fully "resolved" for preclusion purposes. *Utah Constr. & Mining Co.*, 384 U.S. at 422 (footnote omitted). A litigant may, for example, legitimately wish to settle a case even if there is no enforceable order, to save either time or money. Applying preclusion to an unenforced order would discount the opportunity presented in the NLRA's enforcement scheme by encouraging litigants to seek review where even minor unfair labor practices, with minimal relief, are at stake.

But we need not resolve the preclusive effect in court of unenforced NLRB determinations. Even if issue preclusion principles fully applied to the NLRB's unenforced decision in *Casino Pauma I*, Casino Pauma would not be precluded from making its arguments before us.

Issue preclusion is a waivable defense. *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1321 (9th Cir. 1998); *Clements v. Airport Auth. of Washoe Cty.*, 69 F.3d 321, 329 (9th Cir. 1995). The Board has affirmatively

waived any preclusion defense before this court, deciding instead to litigate the question of its ability to regulate tribes under the NLRA on the merits.

When a party "entitled to raise a preclusion defense fails to do so, it may be concluded that a third party cannot undo the waiver." 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4405 (3d ed. 2017). So here. We are disinclined to allow the Union to supply a preclusion defense on behalf of the Board through the Union's status as an intervenor. The Union was not a party to the administrative proceedings now on review; the Board, which *was*, may legitimately wish for a resolution in the courts of the jurisdictional issue advanced in the administrative proceedings, so as to have it settled for other cases and circumstances that it, but not the Union, will face in the future.

The Board has intentionally relinquished any preclusion defense, even though the primary burden of litigating the issue before us falls on it. Although "we have the ability to overlook waiver" when it comes to preclusion, *Clements*, 69 F.3d at 329, we will not do so here. We proceed to the merits.

III.

Casino Pauma first challenges as unreasonable the Board's interpretation of the NLRA under which it has adjudicated unfair labor charges against tribal employers. Second, it vigorously argues that the Ninth Circuit's precedents concerning the applicability of federal statutes to Indian tribes are wrong and

outdated—but also, if those precedents had been properly applied here, the Board would have found Casino Pauma not an NLRA-covered employer.

We disagree on all counts. Although the NLRA is ambiguous as to its application to tribal employers, the Board's determination that such employers are covered by the Act is a "reasonably defensible" interpretation of the NLRA. *United Nurses Ass'ns. of Cal. v. NLRB*, 871 F.3d 767, 777 (9th Cir. 2017) (internal quotation marks omitted). And, contrary to Casino Pauma's contentions, application of federal Indian law does not produce a different result in this case.

A.

The National Labor Relations Board is authorized to resolve NLRA-covered disputes concerning employers engaged in unfair labor practices "affecting commerce." 29 U.S.C. § 160(a). In the NLRA, as relevant here, "[t]he 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. . . ." 29 U.S.C. § 152(2). The statute thus exempts federal and state governments from its application but is silent as to Indian tribes.

San Manuel Indian Bingo and Casino, 341 N.L.R.B. 1055 (2004), the Board's controlling interpretation of the NLRA's application to tribes, held that the term "employer" in the NLRA includes tribal

employers, subject to certain prudential limits not here relevant. As the Board acknowledged in *San Manuel*, it had earlier taken several different approaches to the NLRA's coverage of tribal employers. First, in the 1970s and 1980s, the Board held that tribal employers were completely excluded from the NLRA. Then, in the 1990s, the Board determined that tribal employers *were* subject to the NLRA as long as the tribal enterprise was not located on tribal land. *San Manuel*, 341 N.L.R.B. at 1056–57 (citing *Fort Apache Timber Co.*, 226 N.L.R.B. 503 (1976); *S. Indian Health Council*, 290 N.L.R.B. 436 (1988); *Sack & Fox Indus.*, 307 N.L.R.B. 241 (1992); *Yukon Kuskoswim Health Corp.*, 328 N.L.R.B. 761 (1999)).

After summarizing these zigzagging precedents, *San Manuel* concluded that the Board's "jurisprudence in this area during its 30 years of development has been inadequate in striking a satisfactory balance between the competing goals of Federal labor policy and the special status of Indian tribes in our society and legal culture," and that "[a]s a result, the Board's assertion of jurisdiction has been both underinclusive and overinclusive." *San Manuel*, 341 N.L.R.B. at 1056. In particular, *San Manuel* noted that the NLRA's definition of an employer "[o]n its face . . . does not expressly exclude Indian tribes from the Act's jurisdiction." *Id.* at 1058. "[T]ribes are not a corporation of the Government and they are not a Federal Reserve Bank," "[n]or do Indian tribes meet the Board's or reviewing courts' traditional definition of a State or political subdivision thereof." *Id.* Recognizing that "[t]he

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 permissible under the Commerce Clause,'" *id.* at 1057 (quoting *N.L.R.B. v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (emphasis in original)), *San Manuel* held that section 152(2)'s exemptions "are to be narrowly construed," and should not be read to exempt an unmentioned type of governmental entity. *Id.* at 1058.

San Manuel further noted that no historical or other considerations suggest that tribes are exempt from the Act. Congress apparently did not discuss the NLRA's application to tribes when adopting the Act, nor do any statutes addressing tribal self-government mention the NLRA. *Id.* Additionally, other federal employment statutes, such as Title VII of the Civil Rights Act of 1964 and Title I of the Americans with Disabilities Act, do define the word "employer" to exclude Indian tribes; the absence of that exclusion in the NLRA is reasonably given effect by *including* tribes, the Board indicated. *Id.*

We have held plausible—but did not have occasion definitively to rule upon—this same understanding of the NLRA. In *N.L.R.B. v. Chapa-De Indian Health Program, Inc.*, 316 F.3d 995, 997 (9th Cir. 2003), the NLRB had issued a subpoena to a tribal organization and sought to enforce it in district court. Courts enforce such subpoenas unless "the NLRB 'plainly lacks' jurisdiction." *Id.* So the question before this court was

whether Indian tribes are "plainly" not employers under the NLRA.

In *Chapa-De*, we recognized that "Indian tribes are not expressly exempted from the scope of the NLRA's definition of 'employer.'" *Id.* at 1001. And we were persuaded that the NLRA *could* be interpreted to apply to tribal employers, as the tribal organization there did not identify any consideration that "indicate[d] that Congress intended the NLRA not to apply to Indian tribes. . . ." *Id.* Our conclusion was that the NLRB did not "plainly lack[]" jurisdiction over the tribal employer, and that the subpoena was therefore enforceable. *Id.*

Unlike *Chapa-De*, this case requires us directly to address the NLRA tribal coverage issue. Doing so, we uphold *San Manuel*'s determination that tribal employers are subject to the NLRA.

"The *Chevron* doctrine requires that this court defer to the NLRB's interpretation of the NLRA if its interpretation is rational and consistent with the statute." *SEIU, United Healthcare Workers-West v. NLRB*, 574 F.3d 1213, 1214 (9th Cir. 2009) (internal quotation marks omitted). *San Manuel*'s holding that tribal employers are within the NLRA's coverage meets that standard, as it is a "reasonably defensible" interpretation of the statute's definition of "employer." *United Nurses*, 871 F.3d at 777 (internal quotation marks omitted). The absence of tribal governments from the "employer" definition's list of exclusions, the NLRA's silence otherwise as to any exception for the

statute's application for tribes, and the comparison made in *Chapa-De* to otherwise similar employment definitions in various federal employment statutes that explicitly exclude tribes from their application all strongly support the Board's construction of the NLRA as reaching tribes sufficiently engaged in interstate commerce.

Casino Pauma, and its amici Fort Peck Assiniboine and Sioux Tribes, *et al.*, disagree. They maintain that the Board could not reasonably interpret the NLRA as covering tribes, for two reasons: because the NLRA generally "draw[s] a sharp distinction between private and public employers," and because the Board has long had a regulation defining a "State" to include "the District of Columbia and all States, territories, and possessions of the United States," 29 C.F.R. § 102.1(g), entities as to which, the amici maintain, tribes are analogous.

Perhaps it would be reasonable to read the NLRA's exclusions of many public employers to extend to *all* public employers, including tribes, given the law's focus on private employment. And perhaps it would be reasonable to view the NLRA's silence as to tribes as without import, given the broad definition the Board has given to the term "State" in the "employer" definition's list of exclusions. But those possibilities do not mean that the Board's contrary interpretation of the Act's silence as to tribes is unreasonable. Although the Board once found arguments similar to amici's persuasive and thus excluded tribes from the NLRA's reach, *see Fort Apache*, 226 N.L.R.B. at 505–06, "a Board rule

is entitled to deference even if it represents a departure from the Board's prior policy." *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990); *see Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005). Under these circumstances—in which both the Board and the parties present reasonable interpretations of an ambiguous provision in the NLRA—the court must defer to the Board's conclusions respecting the meaning of federal labor law. *United Nurses*, 871 F.3d at 777 (citing *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398–99 (1996)).

B.

We turn to whether the Board's approach is unacceptable as a matter of federal Indian law. We review de novo the Board's conclusions as to federal Indian law, as Indian law is "outside the NLRB's 'special expertise.'" *NLRB v. Int'l B'hd of Elec. Workers, Local 48*, 345 F.3d 1049, 1054 (9th Cir. 2003); *cf. Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143–44 (2002).

Casino Pauma contends that the Board's reasoning must be trumped by competing principles of federal Indian law—principles, it argues, the Board failed fully to consider in its adoption and application of *San Manuel*'s tribal coverage holding. That argument lacks merit.

Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985), established a three-part test

for determining when a federal law of "general applicability" applies to tribes:

> 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. . . .' In any of these three situations, Congress must *expressly* apply a statute to Indians before we will hold that it reaches them.

Id. (internal citation omitted).

Applying this test, *Coeur d'Alene* held that the Occupational Safety and Health Act ("OSHA") applied to a tribe-owned farm located on tribal land, as the tribe had failed to prove any of the three circumstances that justify excluding it from OSHA. As to the tribe's main argument—that OSHA would interfere with tribal self-government—we observed that "the tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes." *Id.* And we went on to hold that "[b]ecause the Farm employs non-Indians as well as Indians, and because it is in virtually every respect

a normal commercial farming enterprise, . . . its operation free of federal health and safety regulations is 'neither profoundly intramural . . . nor essential to self-government.'" *Id.*

In the decades that followed, "[w]e have consistently applied *Coeur d'Alene* and its progeny to hold that generally applicable laws may be enforced against tribal enterprises." *CFPB v. Great Plains Lending, LLC*, 846 F.3d 1049, 1053 (9th Cir. 2017); *see also Solis v. Matheson*, 563 F.3d 425, 429–37 (9th Cir. 2009); *United States v. Baker*, 63 F.3d 1478, 1484–86 (9th Cir. 1995); *Lumber Indus. Pension Fund v. Warm Springs Forest Products Indus.*, 939 F.2d 683, 685–86 (9th Cir. 1991). While so doing, we have been particularly careful to distinguish tribal enterprises from tribal entities engaging in self-government. *See Snyder v. Navajo Nation*, 382 F.3d 892, 895–96 (9th Cir. 2004) (holding a tribal law enforcement agency exempt from the Fair Labor Standards Act); *EEOC v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1079–80 (9th Cir. 2001) (holding a tribal housing authority exempt from the Age Discrimination in Employment Act); *see also United States ex rel. Cain v. Salish Kootenai Coll., Inc.*, 862 F.3d 939, 943 (9th Cir. 2017) (holding that a tribe-related college may or may not be exempt from the False Claims Act, depending on further factual development).[3]

---

[3] We are not alone in our adoption and application of the *Coeur d'Alene* factors, although our legal framework is not without its critics. "[T]he Second, Seventh, Ninth, Eleventh, and now Sixth, Circuits, apply the *Coeur d'Alene* framework to determine whether statutes of general applicability apply to Indian tribes,

In this case, as in those just discussed, we deal with a law of general applicability. *Chapa-De* so recognized, noting that "the NLRA is not materially different from the statutes that we have already found to be generally applicable," and "conclud[ing] that just as OSHA, ERISA and [the Contraband Cigarette Trafficking Act] are statutes of general applicability, so too is the NLRA." 316 F.3d at 998.

Nor are any of the *Coeur d'Alene* exceptions here pertinent. The Pauma Band has no treaty at all with the federal government, so there can be no treaty violation in applying the NLRA to the Tribe. As we have discussed, there is no proof one way or the other that Congress meant to preclude the NLRA's application to tribes. And, most important, the NLRA's application to a tribe-owned casino such as Casino Pauma does not affect "purely intramural matters" or the Tribe's "self-government." *Coeur d'Alene*, 751 F.2d at 1116. Casino Pauma is not "the tribal government, acting in its role as provider of a governmental service"; rather, "[i]t is . . . simply a business entity that happens to be run by a tribe or its members." *Karuk Tribe*, 260 F.3d at 1080. The labor dispute that gave rise to this case is not an "intramural" one "between the tribal government and a member of the Tribe," *id.* at 1081, but rather one between a tribe-owned business and its employees, "[t]he

---

the Eighth and Tenth Circuits reject it, and the D.C. Circuit applies a fact-intensive analysis." *Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648, 673 (6th Cir. 2015); *see* Cohen's Handbook of Federal Indian Law § 21.02[5][c], p. 1337 (2012) (noting that courts "frequently invoke" *Coeur d'Alene* in the labor and employment context).

vast majority" of whom "are not members of any Native American Tribe." In this regard, Casino Pauma is much like the tribe-owned farm in *Coeur d'Alene*—a business that "employs non-Indians as well as Indians," and "is in virtually every respect a normal commercial . . . enterprise," such that "its operation free of federal [labor law] is 'neither profoundly intramural . . . nor essential to self-government.'" 751 F.2d at 1116.

In sum, federal Indian law does not preclude the Board's application of the NLRA to Casino Pauma.

Not surprisingly, Casino Pauma disagrees with this conclusion, maintaining that the *Coeur d'Alene* Congressional intent prong is flipped in the wrong direction. Under the sovereign immunity principles outlined in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and affirmed in *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014), Casino Pauma maintains, generally applicable laws may be enforced against tribes only if an intent to do so is clear, rather than if there is no clear intent to the contrary.

Casino Pauma is, of course, correct that "considerations of Indian sovereignty [serve] as a backdrop against which . . . applicable federal statute[s] must be read." *Santa Clara Pueblo*, 436 U.S. at 60 (original alterations and quotation marks omitted). That is why, in both *Santa Clara Pueblo* and *Bay Mills*, the Supreme Court concluded that suits brought by a private party and a state, respectively, failed in light of Congress's silence as to whether those suits were authorized against tribes. *See id.* at 59, 70; *Bay Mills*, 134 S.Ct. at 2039.

Even so, the sovereign immunity cases upon which Casino Pauma relies do not counsel against the enforcement of the NLRA here. Those cases focus on disputes between *non-federal* parties and tribes and so are not directly relevant. From the outset, this case, like all other NLRA unfair labor practice cases, was brought by a federal governmental actor, the General Counsel of the National Labor Relations Board—first before the Board, and now for enforcement of the Board's order in this court.[4] The NLRB General Counsel "seeks enforcement [of the NLRA] as a public

[4] "Enforcement of the NLRA's prohibition against unfair labor practices is accomplished through a split-enforcement system, assigning all prosecutorial functions to the General Counsel of the NLRB and all adjudicatory functions to the Board." *Beverly Health & Rehab. Servs. v. Feinstein*, 103 F.3d 151, 152 (D.C. Cir. 1996). "[T]he process of adjudicating unfair labor practice cases begins with the filing by a private party of a 'charge.' " *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975). The General Counsel reviews and investigates the charge, and private parties "participate in this investigatory process only to the extent of furnishing facts . . . and informally presenting their theories." Higgins, Jr., *The Developing Labor Law* at 2858.

"Congress has delegated to the Office of General Counsel . . . the unreviewable authority to determine whether a complaint shall be filed. . . . In those cases in which he decides not to issue a complaint, no proceeding before the Board occurs at all." *Sears, Roebuck & Co.*, 421 U.S. at 138–39 (internal quotation marks and citations omitted); *see* 29 U.S.C. § 153(d). "In those cases in which he decides that a complaint shall issue, the General Counsel becomes an advocate before the Board in support of the complaint." *Id.* The General Counsel can dismiss or settle the unfair labor practice claim without the charging party's consent. *See* Higgins, Jr., *The Developing Labor Law* at 2859–64. The charging party may only participate in unfair labor practice hearings as a separate party, and is not represented by the General Counsel. *Scofield*, 382 U.S. at 217–21; *see* 29 C.F.R. §§ 102.1(h), 102.38.

agent," not on behalf of any private party or private right. *Amalgamated Utility Workers v. Consol. Edison Co. of N.Y.*, 309 U.S. 261, 269 (1940).

Unlike state governments and private parties, "the United States may sue Indian tribes and override tribal sovereign immunity." *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986); *see* Cohen's Handbook of Federal Indian Law § 7.05[1][a], p. 637 (2012) ("Indian nations are not immune from lawsuits filed against them by the United States"). "We know of no principle of law (and the Tribe does not cite any) that differentiates a federal agency . . . from 'the United States itself' for the purpose of sovereign immunity analysis." *Karuk Tribe Housing Auth.*, 260 F.3d at 1075 (applying "the clear rule" that, like states, "Indian tribes do not enjoy sovereign immunity against suits brought by the federal government"). As the NLRB General Counsel brings suit on behalf of the NLRB, an agency of the United States, to enforce public rights, the sovereign immunity and concomitant statutory interpretation considerations applicable to suits brought against tribes by non-federal parties, private and governmental, do not apply.[5]

---

[5] Further, although Casino Pauma does not acknowledge it, there is a conceptual distinction between the procedural question whether tribal sovereign immunity bars a lawsuit and the substantive question whether a federal law applies to a tribe. "To say substantive . . . laws apply . . . is not to say that a tribe no longer enjoys immunity from suit. . . . There is a difference between the right to demand compliance with . . . laws and the means available to enforce them." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998).

We note, finally, that both of the other circuit courts to consider the issue have upheld the Board's determination that tribe-owned casinos can be NLRA-covered employers. *See San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1308 (D.C. Cir. 2007); *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 555–56 (6th Cir. 2015). After reviewing our NLRA case law, the statute, and federal Indian law principles as enunciated in the applicable precedents, we agree with those Circuits and hold that the NLRA governs the relationship between Casino Pauma and its employees.

C.

In a final attempt to limit the NLRA's application, Casino Pauma vaguely suggests—and amici California Nations Indian Gaming Association *et al.* argue somewhat more fully—that we must take into account the labor provisions of Casino Pauma's compact with California under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710(d). *See In re Indian Gaming Related Cases*, 331 F.3d 1094, 1095–1106 (9th Cir. 2003); *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. California*, 813 F.3d 1155, 1159–63 (9th Cir. 2015). Amici contend, in particular, that IGRA's provisions, as implemented through a California-Tribe compact providing for a labor dispute resolution mechanism, are "in direct conflict with many provisions of the NLRA."

We have not uncovered any conflict between the NLRA and IGRA. Under IGRA, a certain class of gaming, including that class historically offered at Casino Pauma, *see Pauma Band*, 813 F.3d at 1160-62, is "lawful on Native American lands only if such activities are conducted pursuant to a Tribal-State Compact entered into by the tribe and a state that permits such gaming, and the Compact is approved by the Secretary of the Interior," *id.* at 1160; *see* 25 U.S.C. § 2710(d). IGRA provides in relevant part that "[a]ny Tribal-State compact . . . may include provisions relating to . . . the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity." 25 U.S.C. § 2710(d)(3)(C). Through this compact system, IGRA constitutes "an example of 'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme." *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 715 (9th Cir. 2003) (internal quotation marks omitted).

At the same time, IGRA "does not . . . immunize the operation of Indian commercial gaming enterprises from the application of other generally applicable congressional statutes." *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 553 (6th Cir. 2015). There is no IGRA provision stating an intent to displace the NLRA—or any other federal labor or employment law, for that matter. IGRA's general allowance that state-tribe compacts "may include provisions

relating to . . . the application of . . . civil laws" in no way signifies that compacts *must* include certain state labor law provisions—or that, if the compacts do, those provisions trump otherwise applicable federal laws. 25 U.S.C. § 2710(d)(3)(C). As the D.C. Circuit put the matter, "IGRA certainly permits tribes and states to regulate gaming activities, but it is a considerable leap from that bare fact to the conclusion that Congress intended federal agencies to have no role in regulating employment issues that arise in the context of tribal gaming." *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1318 (D.C. Cir. 2007); *accord Little River*, 788 F.3d at 553-54.

We conclude that Casino Pauma's compact with California does not displace the application of the NLRA to its activities.[6]

IV.

On the merits of the unfair labor charge complaint, the Board held that Casino Pauma violated section 8(a)(1) of the NLRA by disciplining an employee

[6] For similar reasons, we reject Casino Pauma's request to stay the Board's petition for enforcement and its petition for review pending resolution of a contract case it filed against the Union, *Pauma Band of Luiseno Mission Indians of Pauma & Yuima Reservation v. UNITE HERE*, No. 16-02660 (S.D. Cal.). Casino Pauma argues that the district court in that case will be presented with more relevant evidence concerning the relationship between the NLRA and the California-Tribe compact made pursuant to IGRA. There is no need for, and no precedent supporting, staying these petitions for review and enforcement pending resolution of a district court case against the Union concerning IGRA.

"for distributing Union literature [i]n a non-working area during non-working time;" "[b]y maintaining and enforcing a rule in its employee handbook prohibiting the distribution of literature in 'guest areas;' by interfering with the distribution of Union literature by employees in these areas, including the public or guest entrances to its casino; by threatening to discipline employees who distributed Union literature in these areas; and by photographing employees who distributed Union literature in these areas." *See* 29 U.S.C. § 158(a)(1). The Board ordered Casino Pauma to take a variety of actions to remedy these NLRA violations.

A.

First, some procedure. Under section 10(e) of the NLRA, we have jurisdiction only to consider arguments raised before the NLRB "absen[t] . . . 'extraordinary circumstances.'" *N.L.R.B. v. Legacy Health Sys.*, 662 F.3d 1124, 1126 (9th Cir. 2011) (quoting 29 U.S.C. § 160(e)). "The purpose of this provision is to ensure that the Board is given the opportunity to bring its expertise to bear on the issue presented so that we may have the benefit of the Board's analysis when reviewing the administrative determination." *NLRB v. Int'l Bhd. of Elec. Workers, Local 952*, 758 F.2d 436, 439 (9th Cir. 1985).

The Board and Union argue that Casino Pauma did not exhaust before the Board the principal merits argument it makes before us—that, under *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793 (1945), Casino

Pauma did not violate NLRA section 8(a)(1) by preventing employees from distributing union literature to customers in front of the casino. We hold that there is no exhaustion bar to our consideration of the Casino's main *Republic Aviation* argument.

Casino Pauma's exceptions to the ALJ's order were indeed quite general. But the General Counsel sufficiently understood Casino Pauma to be making an argument concerning the proper scope of *Republic Aviation* as applied to literature distribution rights outside casinos to make a specific counter-argument on that issue in its brief to the Board. And the Board also got the gist of the argument: it approved the ALJ's holding that, in light of *Republic Aviation*, "It is by now well-settled that employees are allowed, absent unusual or special circumstances, to distribute union literature on their employer's premises during nonwork time in nonwork areas." *See also* Concurring Opn. of Member Miscimarra (noting his "agree[ment] with the judge and his colleagues that the Respondent violated Sec. 8(a)(1) by maintaining a rule prohibiting employees from distributing literature in 'guest areas,'" but noting that he "would not find, in every case, that the area immediately outside a hotel entrance is a nonwork area").

"Ordinarily, when an agency has actually addressed an issue, the policies underlying the exhaustion doctrine . . . are satisfied." *W. Radio Servs. Co. v. Qwest Corp.*, 530 F.3d 1186, 1203 (9th Cir. 2008) (citing *Abebe v. Gonzales*, 432 F.3d 1037, 1041 (9th Cir. 2005) (en banc)). So here: the NLRB's consideration of the

issue was sufficient for purposes of exhaustion, and this panel has jurisdiction to consider the merits.

B.

Section 7 of the NLRA establishes, as relevant here, employees' "right to self-organization, to form, join, or assist labor organizations . . . , and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." 29 U.S.C.§ 157; *see also* 29 U.S.C.§ 158(a)(1). Casino Pauma's central merits contention is that the Board misapplied the NLRA in determining that its employees had a section 7 right to distribute union literature to patrons on the front driveway of its casino.

Under well-established law, this contention about the reach of NLRA section 7's protection gives rise to two questions. "The first is whether, apart from the location of the activity, [literature] distribution" to consumers "is the kind of concerted activity that is protected from employer interference by §§ 7 and 8(a)(1) of the National Labor Relations Act." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 563 (1978). The second is "whether the fact that the activity takes place on petitioner's property gives rise to a countervailing interest that outweighs the exercise of § 7 rights in that location." *Id.*

The answer to the first question is evident. Section 7 has long been understood to protect as concerted activity appeals to the public for support of employees' workplace controversies. "Section 7 protects the right

of employees 'to improve terms and conditions of employment . . . through channels outside the immediate employee-employer relationship.'" *Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1153 (9th Cir. 2003) (quoting *Eastex*, 437 U.S. at 565). Employees thus have an "undisputed right to make third party appeals in pursuit of better working conditions," *Sierra Publ'g Co. v. NLRB*, 889 F.2d 210, 217 (9th Cir. 1989) (discussing *N.L.R.B. v. Local Union No. 1229* (*Jefferson Standard*), 346 U.S. 464 (1953), and its progeny), including the right to engage in "picketing and handbilling truthfully to inform customers" about an employer's labor practices, *NLRB v. Calkins*, 187 F.3d 1080, 1089 (9th Cir. 1999).

The second question, concerning the import of the employees' location while distributing literature, is only slightly less straightforward. We start with the principle that the NLRA "left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." *Republic Aviation*, 324 U.S. at 798. So, in reviewing solicitation and distribution rules established by the Board, "[t]he judicial role is narrow: The rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978) (footnote omitted).

Republic Aviation approved a Board baseline rule for the location of workplace union solicitation and literature distribution protected by section 7:

> Since "working time is for work," a rule prohibiting employee solicitation and distribution of literature during work time is presumed to be valid. On the other hand, "the time outside (work), whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint," even though he is on company property. Therefore, a rule prohibiting employee solicitation or distribution of literature during non-working time in nonwork areas is presumptively invalid unless special circumstances warrant the adoption of the rule.

NLRB v. Silver Spur Casino, 623 F.2d 571, 582 (9th Cir. 1980) (summarizing *Republic Aviation*, 324 U.S. at 803 n.10).

Republic Aviation, and much of its progeny, concerned employee solicitation of and literature distribution to fellow employees. Here, the leafleting occurred in areas frequented by casino customers and was directed at those customers. But, as the D.C. Circuit has noted, "neither [the] court[s] nor the Board ha[ve] ever drawn a substantive distinction between solicitation of fellow employees and solicitation of non-employees." *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003); *accord New York-New York, LLC v. NLRB*, 676 F.3d 193, 196–97 (D.C. Cir. 2012). Nor is there any basis for such a distinction: the balancing of

interests accomplished in *Republic Aviation* accounts for an employer's "property right . . . in preventing employees from bringing literature onto its property and distributing it there—not in choosing which distributions protected by § 7 it wishes to suppress." *Eastex*, 437 U.S. at 573 (footnote omitted).[7]

We cannot identify, and the parties have not raised, any reason to require the Board to treat section 7 protected solicitation differently with regard to location or timing based on the intended audience. The rationales for *Republic Aviation*'s principle—that "[t]he freedom to communicate is essential to the effective exercise of organizational rights," and that "the time outside (work), . . . is an employee's time to use as he wishes without unreasonable restraint, even though he is on company property," *Silver Spur*, 623 F.2d at 581–82—apply to solicitation of customers as well as to solicitation of fellow employees. And the employment site "is a particularly appropriate place for the distribution of § 7 material," *Eastex*, 437 U.S. at 574, as to both employees and customers; for both audiences, the employment site is the most convenient and logical

---

[7] By contrast, *non-employee* union organizers may be excluded from soliciting employees on an employer's property under the separate rule established in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), and applied in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). That rule "[s]trike[s] a balance between § 7 organizational rights and an employer's right to keep strangers from entering on its property," while, under *Republic Aviation*, "[a] wholly different balance [is] struck when the organizational activity [is] carried on by employees already rightfully on the employer's property." *Eastex*, 437 U.S. at 571–72.

place to encounter the intended audience and to discuss labor matters.

We conclude that the Board properly interpreted *Republic Aviation*'s holding concerning section 7 to reach employees' customer-directed union literature distribution on non-work time in non-work areas of the employer's property.

As to the particular application of *Republic Aviation* here, the Board reasonably applied to Casino Pauma its literature distribution rules concerning casinos. "The Board has special rules to determine what constitutes a working area for each industry. In a retail store, for example, the working area is the selling floor where the employer makes retail sales, but not the other public spaces." *New York-New York*, 676 F.3d at 197 (internal citations omitted). In hotels and casinos, "the Board has long concluded that the working areas are the hotel rooms and gaming areas because a hotel-casino's main function is to lodge people and permit them to gamble." *Id.* (internal citations and quotation marks omitted).

A trio of Board cases were the source of the delineation summarized in *New York-New York: Dunes Hotel*, 284 N.L.R.B. 871 (1987), *Flamingo Hilton-Laughlin*, 330 N.L.R.B. 287 (1999), and *Santa Fe Hotel, Inc.*, 331 N.L.R.B. 723 (2000). Those cases reasoned that entrances to hotels and casinos, along with certain other "guest" areas incidental to the businesses' main operations, are non-work areas in which non-working

employees may distribute literature to guests and other non-employees.

The case most closely on point is *Santa Fe Hotel*. There, the Board concluded that because "the main function of the Respondent's hotel-casino is to lodge people and permit them to gamble," "[t]he 'work activity' . . . at the hand-billed entrances outside its hotel-casino—including security, maintenance, and gardening—is incidental to this main function. To hold that this is a work area (where handbilling cannot occur) would . . . effectively destroy the right of employees to distribute literature." *Santa Fe Hotel*, 331 N.L.R.B. at 723 (internal quotation marks and footnote omitted).

Applying those cases to Casino Pauma, the ALJ determined, and the Board agreed, that "the valet driveway leading to the public entrance to the Respondent's casino was a non-working area." Because Casino Pauma's main function is to provide space for its patrons to gamble, space near its front driveway and entrance is "incidental to this main function." *Id.* Addressing nearly identical facts, the D.C. Circuit approved the *Santa Fe Hotel* holding concerning leafleting of customers at the front driveway and entrance to a hotel, "[i]n light of . . . the deference we owe to the Board on a question of this kind." *New York-New York*, 676 F.3d at 197.

Casino Pauma nonetheless maintains that we should disapprove the Board's cases concerning which areas of hotels and casinos are non-work spaces for

purposes of *Republic Aviation.* But, again, "it is the Board upon whom the duty falls in the first instance to determine the relative strength of the conflicting interests and to balance their weight." *Beth Israel*, 437 U.S. at 504. Casino Pauma does not point to any evidence in the record suggesting that the Board's standards inappropriately balance employees' section 7 rights against the employer's interests in managing its business, or preclude the employer from assuring its customers' safety and freedom from harassment.

Additionally, in a variant of its Indian law-based jurisdictional argument, Casino Pauma suggests that its sovereign interests as a tribe include a *sovereign* right to exclude non-Indians from its property that transcends the property rights of other employers, and should have been factored into the Board's *Republic Aviation* analysis. This suggestion misconceives the nature of the right actually at issue in this variety of case. "Here, as in *Republic Aviation*, petitioner's employees are 'already rightfully on the employer's property,' so that in the context of this case it is the 'employer's management interests rather than [its] property interests' that primarily are implicated." *Eastex*, 437 U.S. at 573 (quoting *Hudgens v. NLRB*, 424 U.S. 507, 521 n.10 (1976)). As a proprietor of a commercial enterprise, the Tribe's management interests do not differ from those of other employers; we so concluded in applying the *Couer* [sic] *d'Alene* standards to Casino Pauma.

Finally, and most ambitiously, Casino Pauma argues that the Board should reconsider its application

of *Republic Aviation*, and perhaps *Republic Aviation* itself, in light of its employees' alternative, easier means of distributing union literature using modern tools of communication such as social media. But, pursuant to another long-established interpretation of the NLRA we have already discussed, *see* n.7, "inquiry into such considerations [of alternative forms of communication] is made only when *nonemployees* are on the employer's property." *ITT Indus., Inc. v. NLRB*, 413 F.3d 64, 76 (D.C. Cir. 2005) (internal quotation marks and citations omitted); *see Babcock & Wilcox*, 351 U.S. at 113. We have no reason to require the Board to abandon this long-established, reasonable premise, long ago approved by the Supreme Court. Again, the *Republic Aviation* rule is grounded in the recognition that employers have little interest in requiring employees legitimately on the premises and not working to advance their organizational interests somewhere else.

As to Casino Pauma's valet driveway, each of the Board's holdings involved a reasonable application of its literature distribution jurisprudence to facts supported by substantial evidence here: Casino Pauma's literature distribution rule in its handbook was applied to prevent literature distribution in the nonworking area of the casino's valet entrance, and thus violated section 8(a)(1);[8] Casino Pauma's prevention of

[8] The Board found that Casino Pauma's literature distribution rule violated section 8(a)(1) for two alternative reasons: "employees would reasonably construe the rule to restrict Section 7 activity," and "because the rule was in fact applied to restrict the lawful exercise of Section 7 rights." After this case was argued, the Board revised its test as to when employee handbook rules

nonworking employees from handing out union literature at the entrance violated section 8(a)(1); and its employees' photographing of others handing out union literature constituted inappropriate surveillance and violated section 8(a)(1).

The Board's holding that Casino Pauma violated sections 8(a)(1) and 8(a)(3) by disciplining an employee because she distributed union literature near the casino's time clock was also reasonable. The employee was on a break, and did not interfere with other employees' working time or working space. The "employees who received the flyers clocked out within 30 seconds or so," and were located "immediately outside the employee break room/cafeteria, in an area removed from the gaming areas or other places that customers or clients have access to." Under these circumstances, the Board reasonably found that Casino Pauma violated the employee's right to distribute union literature in non-working spaces at a non-working time.

In short, the Board's conclusion that Casino Pauma violated its employees' NLRA right to distribute union literature was adequately supported, both by

---

violate section 8(a)(1) and abandoned the "reasonably construe" standard it applied in this case. *See Boeing Co.*, 365 N.L.R.B. No. 154, 1–5 (2017). Here, however, Casino Pauma's literature distribution rule was *actually* applied to restrict section 7 rights. The Board's order that Casino Pauma "[c]ease and desist from . . . [m]aintaining a rule that prohibits employees from distributing literature in 'guest areas'" is therefore enforceable without consideration of the Board's alternative, "reasonably construed" rationale.

the applicable legal principles and the record. We therefore enforce the Board's order.

V.

We **GRANT** the National Labor Relations Board's petition for enforcement and **DENY** Casino Pauma's petition for review.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD

Casino Pauma *and* Unite Here International Union. Cases 21–CA–125450, 21–CA–126528, and 21–CA–131428

December 3, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

On June 4, 2015, Administrative Law Judge Ariel L. Sotolongo issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

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,[1] and

---

[1] We adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by disciplining employee Audelia Reyes for distributing union literature in a nonworking area and during nonworking time. We find it unnecessary to pass on the judge's finding that the discipline also violated Sec. 8(a)(3), as the additional finding would not materially affect the remedy. Member Hirozawa would adopt the additional violation.

Although the judge states that the "issue of jurisdiction is res judicata," we note that it is the doctrine of issue preclusion that forecloses the Respondent from arguing that the Board lacks jurisdiction. See *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 fn. 1 (1984) (explaining that the application of *res*

judicata in a "narrow sense" refers only to claim preclusion, which forecloses relitigation of matters that should have been raised in an earlier action but were not, while collateral estoppel, or issue preclusion, refers to the effect of a judgment in foreclosing relitigation of a matter that has already been decided).

In the absence of exceptions, we adopt the judge's dismissal of the 8(a)(1) allegations that the Respondent unlawfully interrogated Reyes and instructed her to keep confidential her conversation with Human Resources about her discipline. In the absence of exceptions, we also adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by photographing employees who were engaged in distributing union literature. The Respondent excepts to the judge's remedy for the photography violation. We adopt the judge's remedy, which is consistent with the Board's standard remedial language.

Member Miscimarra agrees with the judge and his colleagues that the Respondent violated Sec. 8(a)(1) by maintaining a rule prohibiting employees from distributing literature in "guest areas." He has expressed disagreement, however, with the current Board standard regarding alleged overly broad rules and policies, which is set forth as the first prong of the test in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004) (finding rules and policies unlawful where "employees would reasonably construe the language to prohibit Section 7 activity"), and he advocates that the Board formulate a different standard in an appropriate future case. See, e.g., *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 1 fn. 3 (2015); *Conagra Foods, Inc.*, 361 NLRB No. 113, slip op. at 8 fn. 2 (2014); *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 10 fn. 3 (2014), affd. sub nom. *Three D, LLC v. NLRB*, Nos. 14–3284, 14–3814, 2015 WL 6161477 (2d Cir. Oct. 21, 2015). In addition, Member Miscimarra would not find, in every case, that the area immediately outside a hotel entrance is a non-work area. In his view, whether or not such an area is nonworking depends on the facts in each case. See *Sheraton Anchorage*, 362 NLRB No. 123, slip op. at 5 (2015) (Member Miscimarra, concurring in part and dissenting in part). He agrees with the judge's finding, based on the record evidence here, that the valet driveway leading to the public entrance to the Respondent's casino was a non-working area.

conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that Respondent, Casino Pauma, Pauma Valley, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule that prohibits employees from distributing literature in "guest areas."

(b) Interfering with the distribution of union literature by employees in nonworking public or guest areas of the hotel.

(c) Threatening employees with discipline if they engage in protected concerted activities.

(d) Placing employees under surveillance while they engage in union or other protected concerted activities.

(e) Creating the impression that it is engaged in surveillance of its employees' union or other protected concerted activities.

(f) Disciplining employees because they engage in protected concerted activities.

---

[2] We have modified the judge's recommended Order and substituted a new notice consistent with this decision and to conform to the Board's standard remedial language and the violations found.

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

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

(a) Revise or rescind its rule that prohibits employees from distributing literature in "guest areas."

(b) Furnish employees with an insert for the current employee handbook that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplinary warning issued to Audelia Reyes, and, within 3 days thereafter, notify her in writing that this has been done and that the warning will not be used against her in any way.

(d) Within 14 days after service by the Region, post at its facility in Pauma Valley, California, copies of the attached notice marked "Appendix."[3] Copies of the

---

[3] 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

notice, on forms provided by the Regional Director for Region 21, 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 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 September 1, 2011.

(e) 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. December 3, 2015

Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) 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 maintain a rule that prohibits employees from distributing literature in "guest areas."

WE WILL NOT interfere with the distribution of union literature by employees in nonworking public or guest areas of the hotel.

WE WILL NOT threaten employees with discipline for engaging in protected concerted activities.

WE WILL NOT place employees under surveillance while they engage in union or other protected concerted activities.

WE WILL NOT create the impression that we are engaged in surveillance of employees' union or other protected concerted activities.

WE WILL NOT discipline employees because they engage in protected concerted activities.

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 revise or rescind our rule prohibiting employees from distributing literature in "guest areas."

WE WILL furnish employees with an insert for the current employee handbook that (1) advises that the unlawful provision has been rescinded, or (2) provides a lawfully worded provision on adhesive backing that will cover the unlawful provision; or WE WILL publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provision, or (2) provide a lawfully worded provision.

WE WILL, within 14 days from the date of the Board's order, remove from our files any reference to

the unlawful disciplinary warning issued to Audelia Reyes, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the warning will not be used against her in any way.

The Board's decision can be found at www.nlrb.gov/case/21-CA-125450 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[QR Code Omitted]

Irma Hernandez, Esq., for the General Counsel.
Scott A. *Wilson, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARIEL L. SOTOLONGO, Administrative Law Judge. I presided over this trial in Temecula, California, on December 15, 16, and 17, 2014. On July 24, 2014 the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued an order consolidating cases, consolidated complaint and notice of hearing in the above-captioned cases. The consolidated complaint alleges that Casino Pauma (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: (1) maintaining a rule in its employee handbook prohibiting distribution of literature in

"working or guest areas" at any time; (2) by interfering with the distribution of union literature by employees near the public entrance to its casino; (3) by threatening employees with discipline for distributing union literature at that location; (4) by taking a photograph of an employee who was distributing union literature; (5) by interrogating an employee about her union activity; and (6) by directing an employee to keep a discussion about possible discipline as confidential. The complaint additionally alleges that Respondent violated Section 8(a)(3) and (1) of the Act by issuing a written disciplinary warning to an employee for engaging in union activity. Respondent thereafter filed a timely answer to the complaint.

I. JURISDICTION

At the outset, I note that on March 31, 2015, the Board issued a decision involving this same Respondent in *Casino Pauma*, 362 NLRB No. 52 (2015), affirming the decision of administrative law judge Jeffrey D. Wedekind that the Board had jurisdiction over Respondent pursuant to the Board's ruling in *San Manuel Indian Bingo & Casino*, 341 NLRB 1005 [sic] (2004), enfd. 475 F.3d 1306 (D.C. Cir. 2007).[1] In *Casino Pauma*, the Board also cites *Little River Band of Ottawa Indians Tribal Government*, 361 NLRB No. 45 (2014), and *Soaring Eagle Casino & Resort*, 361 NLRB No. 73

[1] The Board also affirmed Judge Wedekind's findings that Respondent violated Section 8(a)(1) of the Act by, inter alia, interfering with its employees' wearing of union pins and other conduct.

(2014), in support of its finding that the Board has jurisdiction over Indian casinos, including Respondent. The Board additionally rejected Respondent's argument, which it again makes in this case, that the Supreme Court has implicitly overruled the Board's *San Manuel* decision in *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014).

I also note that the parties have stipulated that the same facts that underlie and support the jurisdictional findings in the prior case before Judge Wedekind also exist and are applicable in the present case, to wit:

- That Respondent operates a gaming and entertaining establishment (the Casino) in Pauma Valley, California, and that the Casino has slot machines, gaming tables and several restaurants;
- That Respondent is owned [sic] the Pauma Band of Mission Indians (the Tribe), but that there is no evidence of any Tribal involvement in the day-to-day operation of the Casino;
- That Respondent operates 24 hours a day, 7 days a week, to members of the public, and that the vast majority of its customers are not members of the Tribe or of any other Native American Tribe;
- That the vast majority of Respondent's employees, security guards, supervisors and managers are not members of the Tribe or any other Native American Tribe, and that of the 236 members of the Tribe, only 5 are employed by Respondent;

- That Respondent advertises its Casino using multiple sources, including website, television, radio, mail, and mobile billboards on buses, and advertises in various California counties, including San Diego, Riverside, San Bernardino, Orange, and Los Angeles. (See Jt. Exh. 1)[2]

Additionally, I note that the parties stipulated that in calendar year 2013, Respondent had revenues of at least $50,000,000 (Tr. 19–20), and that in its answer to the complaint Respondent admitted that: (1) during the 12-month period ending on June 30, 2014, it had gross revenues in excess of $500,000; and (2) that (during the same period) it purchased and received at its Pauma Valley, California facility goods valued in excess of $50,000 directly from points outside California (GC Exh. 1(o)). Finally, I note that in its answer to the complaint Respondent admitted that there is no Federal treaty between the Tribe and the Federal government (GC Exh. 1(o)).

In light of the above facts, which have not changed since Judge Wedekind issued his decision in the prior case, I conclude that pursuant to the Board's recent decision in *Casino Pauma*, the issue of jurisdiction is res judicata. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of

---

[2] Joint Exhibits will be referred to as "Jt. Exh.(s);" General Counsel's exhibits will be referred to as "GC Exh.(s);" and Respondents exhibits will "R Exh.(s)." The transcript will be referenced as "Tr.," followed by applicable page number(s).

Section 2(2), (6), and (7) of the Act, and that the Board therefore has jurisdiction over Respondent.

During the trial, as well as in its post-hearing brief, Respondent advances arguments against the Board exercising jurisdiction, including arguments that it apparently did not raise in the prior case. Briefly, Respondent first argues that the Supreme Court in *Bay Mills*, id., impliedly overruled the Board's ruling in *San Manuel*, an argument that the Board specifically rejected in footnote 3 of *Casino Pauma*, supra. While Respondent's arguments in that regard may ultimately be found valid by a circuit court, or even the Supreme Court, I am bound by the Board's recent ruling, and therefore reject it.

Secondly, Respondent argues that in 2000, Respondent entered into a Tribal State Compact with the State of California (the Compact), under the auspices and provisions of the Indian Gaming Regulatory Act (IGRA) (25 U.S.C. §2710(d)(3)(B)). The Compact provides for certain union organizing rights under its provisions, including the Tribal Labor Relations Ordinance, which Respondent argues should be controlling in this case, and not the Act.[3] Such argument would have been valid prior to the Board's 2004 decision in *San Manuel*, pursuant to which the Board for the first time opted to exercise jurisdiction over Indian casinos, which it had previously declined to do for the historical and policy reasons discussed at length in that decision.

---

[3] A copy of the Compact, and its addendums, appears on the record as R. Exh. 4.

Once the Board opted to exercise jurisdiction over Indian casinos, however, the doctrine of Federal preemption applied, thus preempting the Compact and any other State laws or regulations that govern matters over which the Board has exclusive jurisdiction. *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 773–774, 746 (1947); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242–243 (1959); *Machinists Lodge 76 v. Wisconsin Employment Relations Comission* [sic], 427 U.S. 132, 150–151 (1976). Accordingly, I do not find merit in Respondent's arguments, and as stated above, conclude that the issue of jurisdiction in this case is *res judicata* and thus a settled matter pursuant to the Board's ruling in *Casino Pauma*.

II. THE FACTS

A. Background

As reflected above, Respondent operates a gaming establishment, which the parties stipulated consists of 35,000 square feet of gaming area, with a total of 7 buildings housing different aspects of Respondent's operations and a parking lot that can accommodate approximately 859 vehicles, 5 bus parking places, and 24 RV parking places (Jt. Exh. 1). Aerial (or satellite) photos of Respondent's property were introduced as joint exhibits, which provide a good perspective of the size of the facility and overall property, as well as the

location of various areas where some of the activities at issue herein took place.[4]

As described in Judge Wedekind's prior decision, UNITE HERE International Union (the Union) has been conducting an organizing campaign among Respondent's employees since at least early 2013. It is the conduct of Respondent's employees as part of this campaign, and Respondent's response to such conduct, as described below, that is at issue in the present case, just as it was in the prior case.

Additionally, at issue is language contained in Respondent's employee handbook, which the parties stipulated to and introduced as Joint Exhibit 4. The

[4] Thus, Jt. Exh. 3A is a photograph taken from above showing the two main white-roofed buildings housing Respondent's casino, including its restaurants, and part of the parking lot closest to the casino. To the left of the building in the center of the photo is a crescent (or half-moon) shaped driveway, which is the valet entrance to the casino, where the main doors are located (below the bronze-colored roof). This is the public entrance to the casino, and part of the public parking lot can be seen. The second white-roofed building (connected to the first and similar in shape and size) that appears closer to the edge of the photograph is the back side of the casino, and an area immediately outside the building where blue-colored awnings can be seen is where the employee (non-public) entrance to the casino is located. A second photograph from a higher perspective and showing a wider field was introduced an [sic] admitted as Jt. Exh. 3B. An additional 4 photographs taken from a ground perspective and showing the valet (or public) entrance to the casino were also introduced as Jt. Exhs. 2A through 2D. It is at this location where the leafleting activities described below took place.

language (rule) in question appears on page 24 of the handbook and reads as follows:

> Circulation of Petitions
>
> No one shall be allowed to distribute literature in working or guest areas at any time. Team Members may not solicit other Team Members for any purpose during scheduled work time. Work time does not include break time. In addition a Team Member who is on his/her break may not solicit or distribute literature of any kind to a Team Member who is working.

It was Respondent's enforcement of this rule which gave rise to some of the allegations of the consolidated complaint discussed below.

B. The Events of December 14, 2013

It is undisputed that on December 14, 2013, a number of Respondent's employees, at various times of the day, distributed union leaflets at the valet entrance of the casino, which is on the front or "public" side of the casino, facing and immediately adjacent to the visitor parking lot. Based on undisputed testimony from witnesses, the evidence indicates that the location where the employees distributed leaflets was approximately 75–100 feet from the front doors of the casino (Tr. 102, 236).[5] It is undisputed, and indeed admitted by Respondent, that Respondent's security personnel

[5] The parties agreed that the main entrance doors of the casino were about 80–90 feet from the location where the leaflets were being distributed (Tr. 138–139).

approached these employees on each occasion they were distributing flyers and informed them that they were prohibited from doing so in that area of the property, and informed the employees that they could be disciplined if they continued to do so.[6] Finally, I note that there is no evidence, or allegations, that the employees distributing the union leaflets/flyers were littering, obstructing foot or vehicular traffic, or harassing casino customers in any manner. The testimony about the events of December 14 was as follows:

Victor Diaz Huerta (Huerta), an employee of Respondent for 8 years, testified that on December 14, starting at approximately 11:30 a.m., he and fellow employees Maria Ponce, Guadalupe Piñeda,[7] and Raul Marquez began distributing union leaflets by the entry and exit points at the valet driveway in the front or public entrance of the casino. These employees stationed themselves strategically so that any customer walking into the casino from the public parking lot on the front (or public) side of the casino would have to walk past them, and could thus be handed a leaflet.[8]

---

[6] As described below, it is also undisputed that on several occasions the security personnel informed the employees that they were allowed to distribute the leaflets on the "back" or employee entrance of the casino.

[7] Although the transcript reflects the name as "Pineda," the correct Spanish spelling of the employee's name is "Piñeda," and the transcript shall thus be corrected.

[8] Much testimony and time was devoted to describing the precise spots by the valet driveway where the employees were standing while they distributed leaflets, and indeed photographs were introduced to mark these spots. Thus, for example, Jt. Exh. 2A shows the "exit" side of the crescent-shaped valet driveway

Although Huerta could not specifically recall if the flyer introduced into evidence as General Counsel Exhibit 2 was the one he distributed on that day, other witnesses confirmed that this leaflet was indeed the one they distributed on that day, and the parties stipulated that General Counsel Exhibit 2 was the flyer distributed by the union to the employees that day to pass out (Tr. 49–56, 290).[9]

Huerta testified that he positioned himself on the sidewalk on the exit side of the valet driveway, with Ponce directly across the driveway from him on same side, while Piñeda and Marquez positioned themselves across each other on the entry side of the valet driveway. About ten minutes after Huerta started distributing leaflets, Jacob Hanson, Respondent's security director, approached him. Hanson told Huerta, in

---

(also shown in the aerial photographs in Exhs 3A and 3B), and Jt. Exh. 2C shows the entrance of that driveway. *All* the employees who testified about having distributed leaflets on December 14 testified that they stationed themselves on the sidewalk on either side of the entrance or the exit of such driveway. As previously discussed, it is undisputed that these spots were located about 75–100 feet from the main doors of the casino, that the employees were on the sidewalk and not blocking foot or vehicular traffic, and that neither they nor the customers were littering or otherwise throwing leaflets on the ground. In light of these undisputed facts, the *exact* location of each employee distributing the leaflets has no legal significance, and henceforth I will simply describe their location by indicating that they were stationed by the valet driveway.

[9] GC Exh. 2 is a double-sided flyer, in English on one side and Spanish on the other, containing the photograph of employees in the union organizing committee, and exhorting customers of the casino to support the employees' organizational activities.

English (which Huerta understands), that he could not distribute flyers there, adding that he could distribute the flyers in the back (of the casino), by the employee entrance. Huerta asked Hanson what would happen if he continued to distribute flyers at the present location, and Hanson responded that he could report him to Human Resources (HR), which could result in disciplinary action. Huerta added that just as Hanson was approaching him, Ponce crossed the driveway and joined them as their conversation was occurring. (Tr. 59–67, 93–96.)

Hanson, Huerta and Ponce then walked to the entry side of the valet driveway where Piñeda and Marquez were distributing leaflets, and Huerta noticed that two security guards, Max Ortiz and Ricardo ("Ricky") Torres had also approached that location.[10] According to Huerta, "Max" Ortiz told Piñeda and Marquez, in Spanish (which Huerta speaks), that they could not distribute flyers in that area, but could do so in the "back," by the employee entrance. Huerta also testified that Piñeda asked Ortiz what would occur if they did not stop distributing flyers at that location,

[10] The parties stipulated to the names of the security guards as well as to their status as agents of Respondent. Undisputed testimony by various witnesses also established that Respondent's security guards or personnel wore distinguishable clothing that identified them as members of the security staff, many of whom were well-known to the employees.

and that Ortiz replied that they would be reported to HR for disciplinary action.[11] (Tr. 68–72.)

Ponce and Piñeda corroborated Huerta's testimony, whom I found to be credible (Tr. 118–125, 129–134, 135–139, 159–163, 170–173). Indeed, Respondent's security director, Hanson, admitted that he told Huerta and the others that they could not distribute flyers at the location where they were, pursuant to Respondent's employee handbook, which prohibited distribution of literature in "public" (the term used by Hanson) areas of the casino, as quoted above.[12] Moreover, Hanson admitted that he instructed his security personnel not to permit such distribution of flyers in the public areas, and admitted that his personnel had multiple encounters throughout that day with employees distributing literature in these areas, which they stopped. (Tr. 370–375.)

---

[11] Almost every employee who testified about these encounters asked the same question as to what would occur if they did not stop distributing flyers at this location, and they all testified receiving the same replies. Apparently, the employees were coached by the Union to ask such question, and Respondent's security personnel obliged them with the same replies. Indeed, the Union gave the employees a printed card that spelled out what their rights were, including their right to distribute union literature in the public areas and parking lots pursuant to cited Board cases, and requested them to give out these cards to any security personnel that tried to stop them (See GC Exh. 3). The employees attempted to give these cards to the guards, which in most cases declined to take them.

[12] It appears Respondent uses the terms "guest areas" and public areas" [sic] to mean the same.

In light of Hanson's admission, there can be no dispute that the other encounters later on the same day occurred as described by the union witnesses (and as alleged in the complaint), with one limited exception involving the alleged taking of a photograph by a security guard, which as discussed below, is disputed.

Thus, employee James Bayton testified that approximately at 12:20 p.m. on the same day, he and fellow employees Alvaro and Maria Bolanos (husband and wife) started distributing union leaflets (GC Exh. 2) at the same location(s) by the valet driveway previously described above. About 10 minutes after they started distributing the flyers, security guard Gene Oseguera, approached Bayton and told him and the Bolanos, who had also approached, that they could not distribute the flyers at that location. Bayton asked Oseguera what would happen if they did not stop, and Oseguera replied that he would take their names and report them to the HR department. (Tr. 224–232)[13] In his testimony, Oseguera confirmed that he instructed individuals distributing flyers at the valet entrance, which he described as the "guest entrance," to stop doing so, but his account varies from Bayton's in two respects. First, he testified that he was on a bike when he approached, not on foot. Second, he testified that he approached a man and a woman whom he recognized as employees, and as he was telling them they could not distribute flyers at that location they were

[13] Bayton testified that Oseguera approached on foot, not on a bike. He had seen Oseguera patrolling on a bike before, but not on this occasion.

approached by another "older" white male who told Oseguera that he was wrong and that they could distribute the flyers anywhere. Oseguera testified that this man had no employee identification, so he asked him to leave the property. (Tr. 393–398.)[14]

Employee Maria Tavarez testified that at approximately 1:00 p.m. on the same day she and fellow employee Maria Alba were distributing union flyers at the valet entrance previously described. A few minutes after they started, two security guards whom she recognized (and whose identities were stipulated to by the parties), Gene Oseguera and Jesus Solis, approached her on foot. As they did, Alba came over to where the three of them were. Solis, in Spanish, told them they could not distribute flyers in this location. Just as this

[14] The identity of this "older" man was never clearly established, although it is not ultimately important. In this regard, I conclude that I need not make any credibility determinations regarding this encounter except as discussed below, because Oseguera admitted the main allegation: that he instructed the individuals distributing the flyers to stop, and did not deny threatening to report them to HR if they did not stop. The dispute as to whether he was on foot or on a bike is important, however, because it impacts testimony regarding another encounter that Oseguera allegedly had later that afternoon with other employees distributing flyers. I credit Bayton's testimony that Oseguera was on foot, not on a bike, because another employee testified that Oseguera was on foot at an encounter shortly thereafter, as described below, and because an "Incident Report" introduced by Respondent describing the encounter at approximately 12:24 p.m. makes no mention of Oseguera being on a bike (R. Exh. 2). Indeed, contrary to Oseguera's testimony, the incident report describes him encountering two *women* distributing leaflets, not a man and a woman as he testified.

was occurring, a third security guard arrived on a bike and approached the group. Tavarez testified that she did not know the name of the security guard on the bike, but that she's seen him before both inside the casino floor as well as patrolling in the parking lot on a bike. This security guard also told them, in Spanish, that they could not distribute flyers at that location. Tavarez then handed him a copy of the "union rights" card (GC Exh. 3) that the Union had given them to pass out to anyone who tried to stop them from distributing flyers, and she asked this guard what would happen if they did not stop doing so. According to Tavarez, the guard on the bike pointed at Tavarez' employee badge and stated that he would report them to HR, and then took a photo of Tavarez and Alba (who was standing next to Tavarez) with a camera, whose "flash" caught Tavarez' eye. Alba was not called to testify by the General Counsel, but neither was Solis nor the unidentified guard on the bike called to testify by Respondent. Oseguera testified about an earlier incident, as described above, but did not testify about this encounter occurring at 1 p.m. Tavarez' testimony is thus uncontradicted, and I credit it. (Tr. 193–205, 207, 214)[15]

---

[15] There are additional reasons for crediting Tavarez' version, while discrediting Respondent's assertion that it was Oseguera who was on the bike during this encounter (see, e.g., Tr. 212–213). Oseguera had denied taking any photos at the 12:24 p.m. encounter described earlier, but said nothing about 1:00 p.m. encounter with Tavarez and Alba, despite the "incident report" submitted by Respondent confirming that Oseguera was indeed present at the 1:00 p.m. encounter (R Exh. 3). Tavarez, who knew Oseguera and provided a description of him which differed from that of the guard on the bike, was positive that Oseguera was **not**

Finally, employees Catalina Gutierrez and Olivia Garcia, who corroborated each other's testimony, testified that around 4:20–4:30 p.m. that day, they along with fellow employee Andreas Ramirez, were distributing union flyers (GC Exh. 2) at the same area by the valet driveway described earlier. A few minutes after they started distributing the flyers, they were confronted by security guard Brian Linderman, who needed to call on a second security guard, Antonio

---

on a bike, and was positive that it was a third guard on a bike who showed up (Tr. 214). Moreover, as described earlier by Bayton, who had an encounter with Oseguera about 30 minutes before, Oseguera was not on a bike that day, contrary to Oseguera's testimony, but on foot. Finally, Respondent refused to comply with the subpoena duces tecum issued by the General Counsel requesting, inter alia, photos of all the guards employed by or performing services for Respondent that day, despite my order directing that it do so in response to a Motion to Revoke subpoena filed by Respondent. I concluded such photos were relevant and necessary because they could have helped Tavarez identify the security guard on the bike, who was the subject of an allegation of the complaint denied by Respondent. Accordingly, I draw an adverse inference against Respondent, and conclude that had such photos been made available, Tavarez would have positively identified a third guard (on the bike) present at this encounter. See, e.g., *Metro–West Ambulance Service,* 360 NLRB No. 124, slip op. at 2–3 (2014). In that regard, I note that Respondent did not comply with the subpoena on the grounds that it would have to seek authorization from the "Tribal Gaming Authority" to release the photos of the guards, but failed to demonstrate any diligence on its part in trying to obtain such authority—assuming that such authority is necessary, a doubtful proposition in the face of a Federal subpoena. Accordingly, I conclude that Respondent failed to provide a valid reason for its failure to comply with the subpoena, and that the adverse inference described above is proper.

Alcaraz to translate into Spanish for him.[16] Through Alcaraz, Linderman told Gutierrez, Garcia and Ramirez that they could not distribute flyers to customers at that location, because the customers "did not need to know the problems of the casino." Linderman added that they could distribute flyers in the "back," at the employee entrance to the casino. Linderman also told them that he would report them to management if they did not stop, and that they could lose their jobs. (Tr. 242–248, 267–272, 274–276.) Neither Linderman nor Alcaraz testified, and I credit the testimony of Garcia and Gutierrez, which is uncontradicted.

Accordingly, the above facts show that on 4 separate occasions on December 14, 2013, Respondent's security personnel stopped employees from distributing union flyers at or near the public entrance of Respondent's casino, threatened them with discipline if they persisted, and on one occasion took a photograph of two of the employees distributing the flyers.

C. The Disciplinary Warning Issued to Audelia Reyes

Audelia Reyes has worked for Respondent since 2003 as a buffet attendant, normally working in the 8 a.m. to 4 p.m. shift. She has been an active participant in the Union's organizing activities, having distributed Union flyers at the "back" or employee entrance of the casino in plain sight on a number of occasions, and

[16] The parties stipulated to the identity of these 2 security guards. (Tr. 273–274).

having worn a union pin or button during working hours.[17] According to the testimony of Reyes, which was uncontradicted in this regard, employees are normally given 2 half-hour breaks during their working hours. During the time at issue, in January 2014, employees were allowed to decide for themselves when to take their breaks, which employees did sequentially, so that when one finished his/her break another employee would then go on break.[18] This meant that employees would take their breaks at different times, and sometimes the last employee taking his/her break would not do so until the last half hour of their work shift. (Tr. 303–308, 311, 314–316, 320–323.)

On January 24, 2014, Reyes took her second (or afternoon) break between 3:30 p.m. and 4 p.m., which happened to be at the end of her work shift. About 1 to 2 minutes before 4 p.m., employees whose shift ended at 4 p.m., including Reyes, started gathering in a hallway outside the employee cafeteria where the time clock where they "clock" or "punch" in/out" [sic] is located. Apparently taking advantage of a "captive" audience, Reyes gave out Union flyers to 3 employees standing in line at the time clock, starting about 45 seconds prior to 4:00 p.m., the exact time when Reyes clocked

---

[17] Reyes is also one of about a dozen employees who appear on a photograph contained in the union flyer that was distributed on December 14, 2013, discussed above (GC Exh. 2).

[18] Employees would thus relieve one another to go on break, without having to obtain permission from, or even having to notify, a supervisor before doing so. This policy was apparently changed thereafter, so that employees had to "punch out" on their time cards when going on break. (Tr. 320, 322–323.)

out (GC Exh. 5). At the time Reyes gave out the flyers (introduced into evidence as General Counsel Exhibit 6 [sic], neither she nor the 3 employees had yet clocked out, but all did so within about 30 seconds. The exact timing of these events was captured in a security video that was played during the trial and introduced into evidence (GC Exh. 9; Tr. 318–321, 324).

Almost a month later, on February 20, 2014, Respondent's Human Resources (HR) director, Annabelle Lerner, summoned Reyes to a meeting in the HR office, also attended by Director of Food & Beverage Department Jorg Limper and HR Assistant Maria Perez, who acted as a Spanish interpreter. Lerner, through Perez, asked Reyes if she was authorized to distribute information in the casino.[19] Reyes initially replied "No," apparently unsure of what Lerner was referring to. After Lerner reminded Reyes that there were many surveillance cameras in the casino, and suggesting that being untruthful could have serious consequences, Reyes realized that Lerner was referring to her distribution of flyers by the time clock a month before. Reyes then admitted she had distributed flyers on that occasion, by the "punch machine," and said that the Union had authorized her to do so. Lerner then asked Reyes if she was familiar with the no solicitation/distribution policy of Respondent, which Reyes had acknowledged receiving when she was hired—although she stated that

[19] Reyes initially testified that the question Lerner asked was if she was authorized to give information in the casino (Tr. 327), but later testified that the question was "who authorized me to give information . . . " (Tr. 329–330).

it was in English so she had not understood. Reyes, however, acknowledged that she knew which areas she was allowed to distribute literature in, including the employee cafeteria, outside of work, and in the parking lot. Lerner then played a video of the incident by the time clock for Reyes on a computer, which they watched together. Reyes then apologized and said that it had been a mistake to give out flyers before she had punched out, but added that she had been on break at the time. Lerner then asked Reyes to write a statement describing what she had done, and Reyes went to a separate room where she wrote a short statement in Spanish, which she then gave to Lerner.[20] Lerner thanked Reyes for her honesty and said that if there was anything else, she would call Reyes. According to Reyes, Lerner then said "And everything that we spoke about will stay here. Everything is confidential. Nothing else should be said outside." The meeting ended at this point. (Tr. 304–308, 311, 316–322, 324–326, 328–334).

Neither Lerner nor Limpert testified, but Perez, who had translated during the meeting, testified as a witness for Respondent. Perez testified that she translated at a meeting that took place in March 2014 (not February, as testified by Reyes). Perez was not asked any details as to what happened at the meeting, except she was specifically asked if Lerner had said anything

[20] The original statement in Spanish was introduced as Jt. Exh. 7A, and the translation in English as Jt. Exh 7B, which reads as follows: "On January 24, I am aware that I passed out information to like three people. I apologize because the truth is I had not clocked-out yet. I was on my break. Like you say that it was still work time, I know I made a mistake."

to Reyes about keeping the meeting confidential. Perez replied "No. I don't recall. No." Asked if she heard Lerner say to Reyes that Reyes had to keep the meeting confidential, Perez testified: "No, I don't recall." I asked if she had served as translator at other disciplinary meetings with employees, and Perez replied that she had. I asked if employees are told in these meetings to keep things confidential, and she replied "No, they are told that it's kept confidential as a policy within the HR department . . . It is a policy to be kept confidential within the HR department." She clarified that the HR department has a policy not to "distribute publicly" issues of employee discipline. (Tr. 403–406).

While I generally credit Reyes, who gave a far more detailed account of the meeting in question, which I conclude occurred in February and not March 2014, I do not discredit Perez, whom I also found was being truthful during her testimony.[21]

---

[21] In that regard, I conclude that when Perez testified "No, I don't recall. No" when asked if Lerner had directed Reyes to keep what occurred at the meeting confidential, she was not indicating that she had no recollection of what was said, as suggested by the General Counsel, but rather that she does not remember that particular statement being made. Moreover, I do not draw any negative inferences from the fact that Perez was not asked any questions as to what else occurred at the meeting, since apparently Respondent does not otherwise factually contest Reyes' account of what transpired during the rest of this meeting. For the same reason, I do not draw any negative inferences as to Lerner's failure to testify, As I will discuss below, some of the statements that were made during the course of this meeting can reasonably be interpreted differently than the General Counsel suggests.

It is undisputed that on March 6, 2014 Respondent issued Reyes a disciplinary warning, admitted as a joint exhibit (Jt. Exh. 6), for her conduct in distributing flyers by the time clock on January 24, 2014. The warning quotes Respondent's "No Solicitation or Distribution Policy," contained on page 24 of Respondent's employee handbook (Jt. Exh. 4) as follows:

> Casino Pauma wants to protect its Team Members from annoying interruptions, and to promote a proper and litter-free working environment. Therefore:
>
> - Solicitation of any type by Team Members during working time is prohibited.
> - Distribution of literature of any type or description by Team Members during working time is prohibited.
> - Distribution of literature of any type or description in working areas is prohibited.
>
> Violation of any of the above rules will result in immediate disciplinary action up to and including termination of employment.

Respondent has not disciplined any other employee for violating it's no solicitation/no distribution policy, and thus did not produce any such disciplinary warnings subpoenaed by the General Counsel, because it claims no other violations of this rule have occurred. (Tr. 23.)

III. DISCUSSION AND ANALYSIS

A. The Rule Regarding "Circulation of Petitions"

The General Counsel alleges that Respondent's rule (Jt. Exh. 4), which prohibits distribution of literature in working *or guest areas* (emphasis supplied) within Respondent's property is overbroad and thus unlawful, because it prohibits distribution of literature in areas where work is not being performed and where Respondent has no compelling interest to suppress or control activities protected by Section 7 of the Act. For the following reasons, I agree with the General Counsel.

In determining the validity of the work rule, the Board's decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), directs me to first determine if the rule in question explicitly restricts activities protected by Section 7. If so, the rule is unlawful. If the rule does not explicitly restrict Section 7 rights, I must next examine the following criteria: (1) whether employees would reasonably construe the language to prohibit (or restrict) Section 7 activity; (2) whether the rule was promulgated in response to union activity; (3) whether the rule has been applied to restrict the exercise of Section 7 rights. *Lutheran Heritage*, at 647. See also, *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007). If any of the above 3 criteria is met, there would likewise be a violation of the Act.

Since Respondent's rule does not explicitly restrict protected Section 7 activity, I must apply the above-enumerated criteria to determine its validity under the Act. First, I note there is no evidence that Respondent promulgated the rule in response to union or protected activity, so it is clear that criteria 2 does not apply. The validity of the rule thus turns upon the application of the first and third criteria. Regarding the first criteria, whether employees would reasonably construe the language of the rule to restrict Section 7 rights, such determination rests on the clarity or vagueness of the language that prohibits distribution of literature in "working or *guest* areas," with emphasis on the word *guest.* The restriction on distribution on "working" areas is reasonably clear, and I conclude that any reasonable person would understand that such prohibition only applies to areas were [sic] work is normally performed—a prohibition that presumably does not violate the Act.[22] The dispute in this case stems from the application of the no-distribution/solicitation rule in *guest* areas, which is not only vague and ambiguous in its meaning and definition, but which apparently applies to areas beyond traditional or normal working areas. It is by now well-settled that employees are allowed, absent unusual or special circumstances, to distribute union literature on their employer's premises during nonwork time in nonwork areas. *Republic*

[22] Such rule could be unlawfully applied, however, if the employer allowed other types of distribution or solicitation in working areas but prohibited the distribution of union literature. There is no evidence of such disparate treatment in this case, however.

Aviation Co. v. NLRB, 324 U.S. 793,803–804 (1945); *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 110–111 (1956); *Santa Fe Hotel & Casino*, 331 NLRB 723 (2000). No unusual or special circumstances have been shown to exist in the present case.

With regard to the third criteria under *Lutheran Heritage*, at issue in this case is also the *application* of the no distribution rule to the area of the valet driveway near the entrance to the casino as well as the public parking lot. This rule could arguably apply to other areas as well, such as restrooms, which may not be considered working areas but may be considered "guest" areas. The Board's rulings in *Santa Fe Hotel & Casino*, supra, *Dunes Hotel,* 284 NLRB 871, 875 (1987) (cited in *Santa Fe*), and *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 (1999) are dispositive of this issue. In *Santa Fe*, the Board, citing *Dunes Hotel* and other cases, held that casinos are analogous to retail stores when evaluating the legality of no-solicitation/no-distribution rules, and while these rules can be enforced in gaming areas (the equivalent of a retail's [sic] store's selling floor), prohibition in other areas such as restrooms and parking lots is unlawful. See also, *Double Eagle Hotel*, 324 NLRB 112, 113 (2004). In *Santa Fe*, the Board found that restricting off-duty employees from distributing literature at the main entrance to the facility—as employees in the present case did—violated Section 8(a)(1) of the Act. Likewise, in *Dunes Hotel,* the Board held that a rule prohibiting off-duty employee distribution of literature in "areas open to the guests or the public" to be unlawful. In *Flamingo*

Hilton, the Board similarly found unlawful a rule prohibiting off-duty employee distribution in "public areas" of the employer's facility other than gambling areas.

Accordingly, I find that Respondent's rule prohibiting solicitation or distribution of literature in *guest* areas violates Section 8(a)(1) of the Act and is unlawful both because it runs afoul of the first criteria under *Lutheran Heritage* (employees would reasonably construe the rule to restrict Section 7 activity), and because it also runs afoul of the third criteria under that case, because the rule was in fact applied to restrict the lawful exercise of Section 7 rights, as discussed below.

B. Respondent's Conduct on December 14, 2013

As described in the Facts section, on December 14, 2013 Respondent's security personnel confronted employees who were distributing union flyers on the side of the valet driveway by the public entrance to the casino. On at least 4 separate occasions that day, security personnel instructed the off-duty employees to stop distributing flyers and threatened that discipline might result if they did not stop such activity. In light of the cases cited above, including *Santa Fe*, *Dunes Hotel* and *Flamingo Hilton* (and cases cited therein), employees had the right under Section 7 to distribute union literature in this public, nonworking area of the casino, and Respondent's interference with such activity violated Section 8(a)(1) of the Act. Likewise, the

threat to impose discipline for engaging in such activity constitutes a separate violation of Section 8(a)(1).[23]

As also described in the Facts section, one of the security officers, on a bike, who confronted off-duty employees Maria Tavarez and Maria Alba at approximately 1 p.m., took a photograph of them after directing them to stop distributing flyers and threatening them with discipline. It is well established that the photographing of employees engaged in protected activity by an employer has a chilling and coercive effect, and thus violates Section 8(a)(1) of the Act. *Sprain Brook Manor*, 351 NLRB 1190, 1205 (2007); *Clock Electric, Inc.*, 328 NLRB 932 (1999); *F.W. Woolworth Co.*,

[23] Respondent's defense mainly consists of again arguing that Indian casinos are not subject to Board jurisdiction, or to argue that even if they are, special rules are applicable to them, allowing Indian casinos to protect their "economic interests" by barring unions, their agents, members or sympathizers from engaging in conduct that is otherwise protected when other employers are involved. There is simply no support for this proposition under Board law, and as previously stated, the issue of Board jurisdiction over Indian casinos and specifically over Respondent is *res judicata.* In this regard, I note that during the trial Respondent asked many questions as to how the employees distributing union flyers arrived at or departed Respondent's property. It is undisputed that in many instances the employees engaged in distributing flyers were driven to Respondent's parking lot and picked up there afterwards by a union representative, a fact that Respondent attempts to argue is legally significant for the reasons described above. While in some circumstances non-employee union representatives may be barred from entering an employer's property, such issue has no bearing on the right of employees to be present at Respondent's property during their non-work time. Simply put, how employees arrived at Respondent's premises is completely irrelevant in the present circumstances.

310 NLRB 1197 (1993). Accordingly, and in the absence of any valid justification for the taking of such photograph, I conclude that Respondent violated Section 8(a)(1) of the Act by the conduct of the security officer in [sic] the bike.

C. Respondent's Conduct During the February 20, 2014 Meeting with Employee Reyes

As described in the Facts section, on February 20, 2014, after apparently watching Reyes on a security video passing out flyers by the time clock area shortly before her work shift ended on January 14, 2014, HR Director Lerner held a *Weingarten*-type investigatory interview with Reyes.[24] Lerner asked Reyes if she was authorized (or who had authorized her) to pass out information in "the casino." The General Counsel asserts that this question posed of Reyes violated Section 8(a)(1) of the Act because it was a coercive interrogation regarding Reyes' union activity. For the following reasons, I disagree.

It is well settled that in determining whether a statement is coercive and thus unlawful, the test is whether such statement, from the standpoint of the employee, has a reasonable tendency to interfere with, restrain or coerce the employee in the exercise of protected rights. *American Freightways Co.*, 124 NLRB

[24] Also present at this meeting was Food and Beverage Director Jorg Limper and HR Assistant Maria Perez, who is fluent in Spanish and translated for Lerner and Reyes. Neither Lerner nor Limper testified.

146, 147 (1959); *Double D Construction Group, Inc.*, 339 NLRB 303 (2004); *NLRB v. Okun Bros. Shoe Store, Inc.*, 825 F. 2d 102, 105 (6th Cir. 1987). As the General Counsel correctly points out, in making this determination the Board looks at the totality of the circumstances. Among the factors that the Board considers are the following: the employer's history of hostility (toward the union); the nature of the information sought; the identity and position of the questioner; the place and method of interrogation; and whether the interrogated employee was an open union supporter. *Rossmore House*, 269 NLRB 1176, 1178 (1978), affd. 750 F.2d 1006 (9th Cir. 1985).

While it is true that the questioner in this case was a high-ranked official of Respondent (its HR Director), and that questioning took place in her office, the other factors discussed above do not favor the General Counsel's position. First, contrary to the General Counsel, who argues that Respondent had no legitimate reason to question Reyes, I conclude that Respondent did in fact have a legitimate reason to question her about the circumstances surrounding the events of January 24. Respondent has a valid no-solicitation/distribution rule, to the extent that it prohibits employees from distributing literature in working areas during working time, and General Counsel has not alleged, nor contends, that such rule is invalid. At the time Lerner questioned Reyes, there were legitimate questions as to whether Reyes had complied with Respondent's valid rule. Lerner was not aware that Reyes had been on "break," at the time she

distributed the flyers, because this information was not provided by Reyes until later in the interview. Thus, potentially, Reyes could have been in violation of a valid rule, and Respondent therefore had valid reasons to inquire about her status at the time. Moreover, the employees to whom she distributed the flyers might arguably have been on "working time" as well, since they had not yet "clocked out," and Respondent could therefore have reasonably inquired about their status and about the location where Reyes distributed the flyers.[25] Thus, Respondent was clearly conducting a legitimate investigation of conduct that *might* have violated a valid work rule. Accordingly, it is incorrect to argue that Respondent had no valid reason to ask Reyes about the circumstances surrounding her distribution of literature.[26]

Secondly, the manner of the interrogation was not inherently coercive. Lerner did not ask Reyes about her views or support for the Union, or about others' support for the union, or anything directly regarding her motives or about the union campaign.[27] Rather,

---

[25] This issue will be discussed further below.

[26] Whether or not I ultimately conclude that Reyes violated Respondent's valid rule does not affect the legitimacy of Respondent's inquiry at the time.

[27] Thus, the cases cited by the General Counsel, including *Observer & Eccentric Newspapers, Inc.*, 340 NLRB 124, 125 (2003), enfd. 136 Fed. Appx. 720 (6th Cir. 2005); *Dealers Mfg. Co.*, 320 NLRB 947, 948 (1996); and *Cumberland Farms*, 307 NLRB 1479, 1479–1480 (1992), enfd. 984 F.2d 556 (1st Cir. 1993), are clearly distinguishable. In each of those cases, the employees

Lerner asked Reyes if she had been authorized to pass out "information" at that time and in that area—the "casino." If, for example, a supervisor had authorized Reyes' activity (unlikely as that might be), and Reyes so informed Lerner, that might have provided a valid explanation for her conduct that would have undermined any potential discipline and satisfied the purpose of the disciplinary interview. To be sure, Lerner's question was phrased awkwardly, perhaps as a result of a poor translation, but if the question had been phrased slightly differently, such as "were you authorized to distribute flyers while working," or "did a supervisor authorize you to pass out information at that time (or place)," such question would not have been coercive, in my view. I conclude this is what Lerner was trying to establish. Thirdly, as the General Counsel concedes—and indeed points out in its argument—Reyes was a well-known an [sic] open union supporter, which is another factor weighing against the General Counsel's theory. Simply put, Respondent had little to gain by specifically interrogating Reyes about her union activities, activities that were no secret and unlikely to be deterred.

Finally, I disagree with the General Counsel's characterization of Respondent as having a "history of hostility" toward the Union or its supporters, at least not in the manner that such term is generally defined when taking this factor into consideration. In *Casino Pauma*, supra, the Board found that Respondent had

---

were *specifically* asked about their views about the union, or other employees' views, or asked how the union campaign was going.

violated Section 8(a)(1) of the Act by enforcing an invalid rule concerning the wearing of union pins, and by issuing a warning to an employee who was wearing one. In the present case, I have similarly found that Respondent was unlawfully enforcing an overly broad no-solicitation/distribution rule. Thus, the disputes so far have centered on the validity and enforcement of work rules and other similar issues, rules that were in place long before the Union's campaign. Although Respondent has been found to have violated Section 8(a)(1) of the Act by maintaining and enforcing some of these rules, such conduct does not represent evidence of a virulent reaction against union organizing. While it can hardly be said that Respondent has embraced the Union, its conduct has not been egregious or represented the type of "hallmark" or significant violations that would render all of its conduct inherently suspect.[28] It is therefore not accurate or valid to characterize Respondent as having a "history of hostility" toward the union or union activity.

Accordingly, considering all the above factors and the totality of the circumstances, I conclude that

[28] Indeed, the evidence indicates, for example, that even as Respondent's security personnel were stopping the distribution of union flyers at the front or "public" entrance to the casino, they informed the employees that they could distribute such flyers in the "back" side of the casino, at the employee entrance. This suggests that Respondent was primarily concerned with enmeshing customers in its labor dispute and perhaps trying to avoid embarrassment, rather than being virulently opposed to any type of union activity. Moreover, I note that there is no evidence of a history of interrogations of employees regarding their union or protected activity, which has now been taking place for a couple of years.

Lerner's questioning of Reyes during the February 20 2014 interview about the January 24 events was not coercive, and did not violate Section 8(a)(1) of the Act. I thus recommend that this allegation of the complaint be dismissed.

With regard to the complaint's allegation that on [sic] the same meeting Respondent violated Section 8(a)(1) of the Act by directing Reyes to keep everything discussed at this meeting confidential, it is well settled that this conduct would violate the Act, if indeed that is what occurred. The right of employees to discuss these types of matters, such as disciplinary problems, amongst themselves goes to the very core of Section 7, which guarantees employee rights to act in concert for mutual aid and protection. See, e.g., *Westside Community Mental*, 327 NLRB 661 (1999), and cases cited therein. As discussed in the Facts section, however, I have credited Maria Perez's testimony as to what occurred at this meeting. Perez, who acted as the translator during the meeting, testified that what Lerner said at the meeting was that *the HR Department* would keep what was learned during the meeting as confidential, not that Reyes was directed to do so. Indeed, Perez credibly testified that this is something that is routinely said to employees at meetings where she has served as translator, which is apparently often. While I do not discredit Reyes, who was generally a credible witness, I believe she misunderstood the import of what Lerner said, perhaps because of the hazards of translation or because she was understandably anxious given the circumstances. Inasmuch the General

Counsel bears the burden of proof in establishing that the Act was violated, I conclude that it has not met its burden of proof in this regard. Accordingly, I recommend that this allegation of the complaint be dismissed.

D. The disciplinary Warning Issued to Reyes on March 6, 2014.

On March 6, 2014, apparently as the result of what it learned at the February 20 investigatory meeting with Reyes, Respondent issued her a disciplinary warning for violating its no-solicitation/no-distribution rule on January 24, 2014. As described earlier, Reyes' conduct consisted of distributing union flyers to three employees, who along with Reyes, were waiting by the time clock getting ready to clock-out at the end of their work shifts at 4 p.m. As also described earlier, Reyes was on her afternoon 30-minute break at the time, not having had the chance to take her break earlier, and her distribution of the flyers—which was captured by a security video—occurred within the last 30 seconds or so prior to the employees clocking out for the day.

Since Reyes was indisputably on her break at the time, the question of whether she violated a valid work rule—and therefore the lawfulness of the discipline itself—must turn on whether the employees whom she distributed the flyers to were on "working time" and/or were in a "working area." With regard to the issue of "working time," I first note that in the very preamble of Respondent's "No Solicitation or Distribution Policy"

it states that "Casino Pauma wants to protect its Team Members form [sic] annoying *interruptions,* and to promote a proper and litter free work environment." (Jt. Exh. 4, emphasis supplied.) Accordingly, it is reasonable to presume that the intent behind Respondent's rule is not to have its employees' *work* disrupted or interrupted by solicitations or distribution of literature or other materials, which is a reasonable and perfectly valid goal. By that standard, however, it cannot be said that the employees who received the flyers from Reyes were *working* or *performing work* under any reasonable definition of such terms. Indeed, they had completely ceased working and were lined up at the time clock ready to "punch out" at their quitting time, which was 4 p.m. The evidence shows that Reyes and all three employees who received the flyers clocked out within 30 seconds or so of the time when the flyers were handed out. Thus, the perfunctory act of clocking out, under the circumstances, should not serve as the rigid demarcation line for determining whether the solicited employees were actually on "working time" pursuant to Respondent's rule. I conclude they were not.[29] *Eastex, Inc.*, 215 NLRB 271, 274-275 (1974), enfd. 550 F.2d 198 (5th Cir. 1977), aff'd. 437 U.S. 556 (1978); *Essex International, Inc.*, 211 NLRB 749 (1974); *ESB, Inc.*, 177 NLRB 778, 785 fn. 25 (1969).

---

[29] Nor was the intent or spirit of the rule, as stated in the preamble, of maintaining a litter-free work environment violated, since there is no evidence that any of the employees in question littered by throwing out the flyers.

Likewise, the area where the distribution of the flyers took place, by the time clock, cannot reasonably be considered to be a "working area." The time clock is immediately outside the employee break room/ cafeteria, in an area removed from the gaming areas or other places that customers or clients have access to, and where no "work" is apparently performed. Accordingly, I conclude that this was not a "working area" under any reasonable definition of the term, and that by distributing flyers in that area Reyes did not violate Respondent's rule. *Eastex, Inc.*, supra. Accordingly, Respondent's defense—that it issued Reyes a warning because she breached a valid work rule—is both factually and legally invalid. Thus, Reyes was engaged in activity protected by Section 7 when she handed out union flyers to fellow employees on January 24, an activity that was the sole basis of the warning issued to her by Respondent on March 6, 2014.

In light of the above, it is clear that by issuing Reyes a written warning on March 6, 2014, for engaging in union activity on January 24, 2014, Respondent violated Section 8(a)(1) and (3) of the Act, as alleged in the complaint.

CONCLUSIONS OF LAW

1. Casino Pauma (Respondent) is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining and enforcing a rule in its employee handbook prohibiting the distribution of

literature in "guest areas;" by interfering with the distribution of Union literature by employees in these areas, including the public or guest entrances to its casino; by threatening to discipline employees who distributed Union literature in these areas; and by photographing employees who distributed Union literature in these areas, Respondent, has interfered with, restrained and coerced employees in the exercise of their rights, in violation of Section 8(a)(1) of the Act.

3. By issuing employee Audelia Reyes a written disciplinary warning on March 6, 2014, for distributing Union literature on a non-working area during non-working time, Respondent violated Section 8(a)(1) and (3) of the Act.

4. Respondent did not otherwise violate the Act as alleged in the consolidated complaint.

REMEDY

The appropriate remedy for the Section 8(a)(1) and (3) violations I have found is an order requiring Casino Pauma (Respondent) to cease and desist from such conduct and take certain affirmative action consistent with the policies and purposes of the Act.

Specifically, Respondent will be required to rescind the rule in its employee handbook prohibiting distribution of literature in its "guest areas," and to notify employees that this language in the handbook has been rescinded and is no longer valid. Additionally, Respondent will be required to stop enforcing this rule by

interfering with distribution of literature by employees in these areas, and to cease and desist from engaging in surveillance or the appearance of surveillance of employees, by taking photographs of such employees or other such activity. Respondent will also be required to rescind the disciplinary warning issued to employee Audelia Reyes on March 6, 2014, and to expunge all references to such warning from Reyes' personnel records. Moreover, Respondent will be required to post a notice to employees, in both English and Spanish, assuring them that it will not violate their rights in this or any other related matter in the future Finally, as Respondent communicates with its employees by email, it shall also be required to distribute the notice to employees in that manner, as well as any other electronic means it customarily uses to communicate with employees.

Accordingly, based on the forgoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended [sic].[30]

ORDER

The Respondent, Casino Pauma, Pauma Valley, California, its officers, agents, successors, and assigns, shall

---

[30] 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.

1. Cease and desist from

(a) Maintaining or enforcing a rule in its employee handbook that prohibits the distribution of literature in "guest areas;"

(b) Interfering with the distribution of literature by employees in these areas including the public or guest entrance of its casino;

(c) Threatening employees with discipline for distributing literature in these areas;

(d) Engaging is surveillance or in creating the impression of surveillance by taking photographs of employees engaged in the distribution of literature;

(e) Issuing disciplinary warnings to employees for distributing literature in nonwork areas during nonworking time.

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

(a) Rescind the rule prohibiting the distribution of literature by employees in guest areas;

(b) Furnish all current employees with inserts for their current employee handbooks that will (1) advise that the unlawful rule has been rescinded, or (2) provide a lawfully worded rule on adhesive backing that will cover the unlawful rule; or publish and distribute to all current employees revised employee handbooks that (1) do not contain the unlawful rule, or (2) provide a lawfully worded rule.

(c) Within 14 days of the Board's order, rescind and remove from its files any reference to the March 6, 2014 disciplinary warning issued to its employee Audelia Reyes, and within 3 days thereafter, notify Reyes in writing, in both English and Spanish, that this has been done and that such warning 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 backpay and/or other compensation due under the terms of this Order.

(e) Within 14 days after service by the Region, post at all its facility in Pauma Valley, California where notices to employees are customarily posted, copies of the attached notice marked "Appendix" in both English and Spanish.[31] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for

[31] If this Order is enforced by a Judgment of the 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."

60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to 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 facilities 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 December 14, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 21, 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. June 4, 2015

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 maintain rules prohibiting employees from distributing literature in "guest areas at any time."

WE WILL NOT prohibit our off-duty employees from distributing union-related literature to patrons in nonworking areas of our facility, including outside the customer main entrance.

WE WILL NOT threaten you with reporting you to human resources, discipline and discharge for your activities related to Unite Here International Union or any other union.

WE WILL NOT photograph employees engaged in union activity without proper justification.

WE WILL NOT discipline you for engaging in union and/or other protected concerted activity.

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

WE WILL rescind and/or revise the rule prohibiting employees from distributing literature in "guest areas at any time," and WE WILL, within 3 days thereafter, notify our employees in writing that this has been done.

WE WILL remove from our files all references to the warning of Audelia Reyes and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the warning will not be used against her in any way.

CASINO PAUMA

APPENDIX C

NATIONAL LABOR RELATIONS BOARD

Casino Pauma *and* UNITE HERE International Union. Cases 21–CA–103026 and 21–CA–114433

March 31, 2015

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND MCFERRAN

On June 25, 2014, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief and the Charging Party filed a brief in opposition to the Respondent's exceptions. The General Counsel also filed cross-exceptions and a supporting brief.

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

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,[1]

[1] We find no merit in the General Counsel's cross-exception that the judge erred by failing to rule on its motion to strike the declaration of Attorney Scott Wilson and attached exhibits, which the Respondent submitted with, and cited in, its posthearing brief. The Respondent requested that the Board take judicial notice of these nonrecord documents to show that the Board should decline jurisdiction based on the Respondent's [sic] owner's history of severe poverty and dependence on the Respondent's revenue to fund the owner's governmental operations. We agree with the

findings,[2] and conclusions,[3] and to adopt the

judge that it is unnecessary to rule on the motion to strike because, even assuming that judicial notice is appropriate as to some of the documents, taking notice of the facts alleged therein would not affect the result in this case.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In finding that the Act applies to the Respondent's casino operation, the judge correctly relied on *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), enfd. 475 F.3d 1306 (D.C. Cir. 2007). He also relied on a trio of Board cases applying *San Manuel* to casino operations on other tribal lands: *Little River Band of Ottawa Indians Tribal Government*, 359 NLRB No. 84 (2013), *Soaring Eagle Casino & Resort*, 359 NLRB No. 92 (2013), and *Chickasaw Nation Casino*, 359 NLRB No. 163 (2013). The Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), rendered each of those Board decisions invalid. However, a properly constituted Board has considered *Little River Band* and *Soaring Eagle* de novo and, in agreement with the rationale of the prior decisions, which were incorporated by reference, asserted jurisdiction over the respondents pursuant to *San Manuel*. See *Little River Band of Ottawa Indians Tribal Government*, 361 NLRB No. 45 (2014), and *Soaring Eagle Casino & Resort*, 361 NLRB No. 73 (2014). However, *Chickasaw Nation Casino* is still pending before the Board on de novo review. We therefore do not rely on the prior Board decision in that case in affirming the judge's jurisdictional finding.

For the reasons stated by the judge, we find no merit in the Respondent's contention that *San Manuel* was wrongly decided, or that it has been implicitly overruled by the Supreme Court in *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014).

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by maintaining a rule prohibiting union buttons, we do not rely on *Target Corp.*, 359 NLRB No. 103 (2013).

recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Casino Pauma, Pauma Valley, California, its officers, agents,

---

The General Counsel cross-excepts to the judge's failure to address the complaint allegation that the Respondent violated Sec. 8(a)(3) by its April 18, 2013 email to employee Victor Huerta, who was seen wearing the union button, warning that he could be suspended if he ever did so again. In his conclusions of law, the judge found that the email violated Sec. 8(a)(1) inasmuch as the Respondent was enforcing an unlawful rule prohibiting the wearing of buttons by threatening to suspend or terminate employees who wore a union button. Further, the judge's remedy and Order require the Respondent to rescind the email, remove any reference to it from its files, and notify Huerta that it will not be used against him. We agree with the judge that it is unnecessary to pass on whether the Respondent's email also violated Sec. 8(a)(3), because finding that additional violation would not materially affect the remedy. See generally *Sunshine Piping, Inc*., 350 NLRB 1186, 1186 fn. 2 (2007) (affirming the judge's finding that the employer violated Sec. 8(a)(1) by verbally counseling or warning an employee for wearing union insignia); *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 403 (1993) (employer violated Sec. 8(a)(1) by issuing a conference report to an employee for complaining about various employment conditions as the report would inhibit the employee's protected right to criticize management).

[4] We shall modify the judge's recommended Order by adding the customary provision that the Respondent cease and desist from violating the Act in any like or related manner. We shall also substitute a new notice to conform to the Order as modified and in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following as paragraph 1(d).

"(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. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. March 31, 2015

Kent Y. Hirozawa,	Member
Harry I. Johnson, III,	Member
Lauren McFerran,	Member

(SEAL) 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 maintain or enforce a rule that prohibits you from wearing any union buttons or insignia.

WE WILL NOT threaten to discipline you, either orally or in writing, for wearing any union buttons or insignia.

WE WILL NOT watch or monitor you to see if you are wearing any union buttons or insignia.

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 rescind our handbook rule banning employees from wearing any union buttons or insignia.

WE WILL furnish you with an insert for your current employee handbook that (1) advises that the unlawful rule has been rescinded, or (2) provides a lawfully-worded rule on adhesive backing that will cover the unlawful rule; or publish and distribute to you a revised employee handbook that (1) does not contain the unlawful rule, or (2) provides a lawfully-worded rule.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the April 18, 2013 email we sent to employee Victor Huerta about violating the rule, and, WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the email will not be used against him in any way.

CASINO PAUMA

The Board's decision can be found at www.nlrb.gov/case/21-CA-103026 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

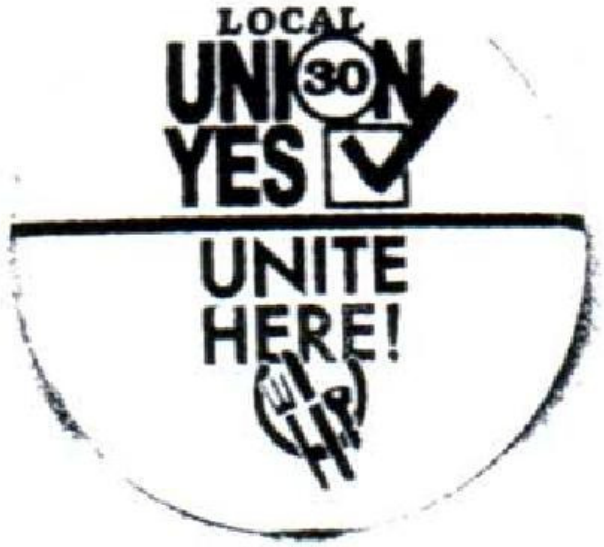
[QR Code Omitted]

Robert MacKay, Esq., for the General Counsel.
Scott A. Wilson, Esq., for the Respondent Casino.

Kristin L. Martin, Esq. (Davis, Cowell & Bowe, LLP),
for the Charging Party Union.[1]

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. In April 2013, various unrepresented employees of Casino Pauma—including two food servers and a kitchen worker, housekeeper, slot machine technician, and lead engineer—began wearing a small white UNITE HERE button on their uniforms in support of the Union's organizing campaign (shown below).



[1] Cheryl Williams, Esq. (Williams & Cochrane, LLP), made a limited appearance on behalf of the Pauma Band of Mission Indians solely to object to the subpoenas served on the tribe.

The Casino responded by distributing a memo to all employees reminding them that the personnel handbook prohibited wearing "any badges, emblems, buttons or pins on their uniforms" other than their ID badge, and that they could be disciplined for doing so. The Casino also verbally threatened to suspend or terminate the employees who wore the union button if they did not remove it, and actually sent an email to one employee who was seen wearing the button (lead engineer Victor Huerta) warning that he could be suspended if he ever did so again. Finally, the Casino instructed its managers, supervisors, and other agents to "visually inspect" employees to ensure that they did not wear any pins or stickers on their uniforms or ID badges in the future. UNITE HERE timely filed unfair labor practice charges against the Casino, and the General Counsel subsequently issued the instant complaint. The complaint alleges that all of the Casino's foregoing actions violated Section 8(a)(1) of the National Labor Relations Act (NLRA), which prohibits employers from interfering with, restraining, or coercing employees in the exercise of their right to form, join, or assist labor organizations.[2]

The Casino denies that it violated the NLRA as alleged. It contends that the statute does not even

---

[2] The charges were filed on April 16 and September 30, 2013, and the consolidated complaint issued on November 22, 2013. The complaint was subsequently amended at the outset of the hearing in certain minor respects (Tr. 15–16), and again on the third day of hearing to specifically allege that the Casino's handbook rule is unlawfully overbroad on its face to the extent it prohibits union buttons (Tr. 324–325).

apply to the facility, as it is undisputedly owned and operated by the Pauma Band of Mission Indians and is located on the tribal reservation.[3] Alternatively, it contends that, even if the statute does apply, there was no violation under Board and circuit court precedent as the Casino's policy disallowing union buttons is nondiscriminatory and necessary to protect its public image.

Following several pretrial conferences, a hearing on the foregoing issues was held on February 10–12 in Temecula, California. The parties thereafter filed posthearing briefs on April 25. Having fully considered the briefs and the entire record, for the reasons set forth below, I find that the Board has jurisdiction over the dispute and that the Casino violated the Act as alleged.[4]

---

[3] The tribe is also sometimes referred to in the record as the Pauma Band of Luiseno Mission Indians, or the Pauma Band of Luiseno Indians. However, all parties agreed to refer to the tribe as the Pauma Band of Mission Indians (Jt. Exh. 1; Tr. 259).

[4] Specific citations to the transcript, exhibits, and briefs are included where appropriate to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant and appropriate factors have been considered, including the demeanor and interests of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences which may be drawn from the record as a whole. See, e.g., *Daikichi Corp*., 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997). Where appropriate, language and translation difficulties have also been taken into account, as well as the effects

I. JURISDICTION

The Board has repeatedly asserted jurisdiction over casinos notwithstanding that they are owned and operated by tribal governments and located on reservation lands. See *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), reaffd. 345 NLRB 1047 (2005), enfd. 475 F.3d 1306 (D.C. Cir. 2007); *Little River Band of Ottawa Indians Tribal Government*, 359 NLRB No. 84 (2013), pet. for rev filed No. 13–1464 (6th Cir. April 15, 2013); *Soaring Eagle Casino & Resort*, 359 NLRB No. 92 (2013), pet. for rev filed No. 13–1569 (6th Cir. May 3, 2013); and *Chickasaw Nation Casino*, 359 NLRB No. 163 (2013), pet. for rev filed No. 13–9578 (10th Cir. July 23, 2013).[5]

There is no basis in the record to distinguish these prior cases. The Casino is likewise a commercial gaming and entertainment enterprise, with gross revenue of over 50 million in 2013,[6] and the vast majority of its employees and customers are not members of the Pauma Band or any other Native American tribe. Indeed, of the Casino's 450–500 employees, only 5 are

---

of age and time on memory, particularly of details such as dates that would have no importance to the witnesses themselves.

[5] See also *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 1002 (9th Cir. 2003) (affirming district court order enforcing Board subpoena against respondent tribal organization, as jurisdiction was not plainly lacking).

[6] The Casino declined to stipulate to the exact amount of its annual revenues. However, there is no dispute, and the record establishes, that the casino's gross revenues and interstate transactions satisfy the Board's commerce standards for asserting jurisdiction. See GC Exh. 1(m), and Tr. 22–28.

members of the Pauma Band. And the Casino draws over 10 times more customers every day on average (2900) than the Tribe's total membership (236).

Further, there is no evidence that applying the NLRA would abrogate any treaty rights. In fact, there is no treaty whatsoever between the U.S. Government and the Pauma Band (Jt. Exh. 1; Tr. 33–35). Moreover, the Casino repeatedly assured its employees, in writing, both before and during the relevant events here, that they were "protected" by federal law and the NLRA. The Casino even gave employees the address and telephone number of the Board's regional office in San Diego to learn about their "rights" (CP Exhs. 6–9).[7]

Nevertheless, the Casino now argues that the Board should decline jurisdiction, citing the Pauma Band's history of severe poverty and total dependence on the Casino's revenue to fund the tribe's governmental operations. As factual support for this history, the Casino's posthearing brief references and attaches

[7] There is no contention that the Casino is equitably estopped, by its prior assurances to employees, from now challenging the Board's exercise of statutory or discretionary jurisdiction to address and remedy the alleged unfair labor practices. However, pursuant to FRE 801(d)(2), the Casino's prior statements admitting jurisdiction, which were offered by the Union and received into evidence without objection (Tr. 255), may properly be considered in evaluating the Casino's contrary arguments here. See 2 McCormick on Evidence Sec. 256 (7th ed., database updated March 2013), and cases cited there, including *Russell v. UPS, Inc*., 666 F.2d 1188, 1190 (8th Cir. 1981) (prior statements or admissions of a party may properly be received and considered under FRE 801(d)(2) even if in the form of an opinion or a conclusion of law).

various nonrecord documents (34 in all), including federal and state government reports, newspaper articles, an American Gaming Association report, the Pauma Band's own website and correspondence, and a Wikipedia page. The Casino asserts that these documents are publicly available on the internet and that the facts therein are appropriate for judicial notice under FRE 201 (Judicial Notice of Adjudicative Facts).[8]

Such judicial notice might well be appropriate with respect to the truth of statements contained in the cited federal and state government reports, to the extent they are not subject to reasonable dispute as required by FRE 201 and fall within the hearsay exception for public records under FRE 803(8) or are corroborated. See, e.g., *San Manuel*, 341 NLRB at 1055 fn. 3 (taking administrative notice, based in part on reliable government sources, that the casino there was located on the reservation). However, as indicated by the General Counsel and the Union, judicial notice is clearly not appropriate with respect to the uncorroborated hearsay statements contained in the cited newspaper articles, American Gaming Association report, and Wikipedia page, absent a showing or basis to conclude that the statements properly fall within an exception to the hearsay rule and/or are free from reasonable dispute, i.e. that the stated facts are

[8] The Casino does not contend that the facts in the attached documents may properly be noticed as legislative or "background" facts, which are not subject to the requirements of FRE 201. See Advisory Committee's Note to FRE 201(a), and Graham, 21B Fed. Prac. & Proc. Evid. Sec. 5103.2 (2d ed. database updated April 2014).

generally known or their accuracy can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. See *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016, 1022 (9th Cir. 2009), cert. denied 131 S.Ct. 3055 (2011); and *McCrary v. Elations Co*., 2014 WL 1779243 at *1 fn. 3 (C.D. Cal. Jan. 13, 2014) (unpub.). See also *Rivas v. Fischer*, 687 F.3d 514, 520 fn. 4 (2d Cir. 2012); and *American Prairie Construction Co. v. Hoich*, 560 F.3d 780, 797 (8th Cir. 2009), and cases cited there.

Given the Pauma Band's ownership and operation of the Casino, judicial notice is also inappropriate with respect to reasonably disputable statements from the tribe's website and correspondence supporting the Casino's position. Cf. *Passa v. City of Columbus*, 123 Fed. Appx. 694, 698 (6th Cir. 2005) (judge improperly took notice of city attorney's website to establish the truth of an adjudicative fact supporting the city's position given that the city attorney was a part of the city).[9]

In any event, it is ultimately unnecessary to decide whether it is appropriate to take FRE 201 judicial notice of any or all of the 34 documents for the truth of one or more of the statements therein. Even if such

[9] As noted by the General Counsel and the Union, judicial notice of such documents is also inappropriate here, at least to the extent they address how the Casino's revenues are distributed, given Attorney Wilson's statements at the hearing, during discussions about unresolved subpoena compliance issues, that the Casino would not be putting on any such evidence because it is irrelevant. See Tr. 21–29, 36, 256–258. However, I would reach the same conclusion regardless.

notice were taken over the objections of the General Counsel and the Union as requested by the Casino, the prior Board decisions would still be factually indistinguishable. See *San Manuel* (tribe had no resources for many years prior to the casino); and *Soaring Eagle* (casino revenues constituted 90 percent of tribal income), above. See also *Chickasaw Nation*, 359 NLRB No. 163 at fn. 4; and *Little River Band*, 359 NLRB No. 84 at fn. 5 (tribe's reliance on casino revenues to fund its governmental operations and programs does not make the casino's operations governmental as well).[10]

The Casino also argues that the Board's prior decisions are simply wrong, citing the Supreme Court's recent opinion in *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (May 27, 2014).[11] However, as the Casino acknowledges, the Court in *Bay Mills* reaffirmed its earlier precedents (which the dissenting Justices would have overruled) addressing tribal

---

[10] It is therefore likewise unnecessary to rule on the General Counsel's and the Union's motions to strike Attorney Wilson's declaration and attached exhibits, which the Casino submitted with and cited in its posthearing brief in support of its request for judicial notice.

[11] The General Counsel's motion to strike the Casino's June 2 notice of the Court's *Bay Mills* opinion is denied. The Casino's notice is somewhat lengthy (5 pages), and thus fails to comport with the 350-word limitation announced in Reliant Energy, 339 NLRB 66 (2003), governing such postbriefing notices filed with the Board on exceptions to an ALJ's decision. However, it consists mostly of excerpts from the Court's majority and concurring opinions. While it also contains brief explanations why the excerpts are significant, the explanations were helpful in understanding and addressing the Casino's position.

sovereign immunity from lawsuits by states. The Board was well aware of those precedents and distinguished them. See, e.g., *San Manuel*, 341 NLRB at 1063 fn. 22 (distinguishing the Court's prior opinion in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), one of the principal precedents the Court cited and followed in *Bay Mills*).[12]

Accordingly, consistent with *San Manuel* et al., I find that the NLRA applies and that the Board has jurisdiction over the dispute. See generally *Pathmark Stores, Inc*., 342 NLRB 378 fn. 1 (2004).

II. THE ALLEGED UNFAIR LABOR PRACTICES

It is well established that employees have a right under the NLRA to wear union insignia, particularly during an organizing campaign, and that a rule prohibiting them from doing so is unlawful unless the employer can show special circumstances justifying the restriction. *Republic Aviation Corp*., 324 U.S. 793

---

[12] As indicated by the following excerpt, the Board majority in *San Manuel* also found some support in the Court's opinion:

> *Oklahoma Tax Commission* [ ], upon which our dissenting colleagues relies [sic], is distinguishable. At issue in that case is amenability of a tribe to suit by a *State* government to collect a tax on commercial transactions on a reservation; whereas, in the instant case, the *Federal* Government's regulatory power is at issue. Moreover, the Court found that the State could hold the tribe liable for taxes on sales by Indians to non-Indians because such liability imposed only a minimal burden on the tribe. [485 U.S.] at 512–515.

(1945); *Pay 'n Save Corp. v. NLRB*, 641 F.2d 697, 700 (9th Cir. 1981); and *Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939 (D.C. Cir. 1999). See also *NLRB v. Starbucks Corp*., 679 F.3d 70, 77 (2d Cir. 2012); *Meijer, Inc. v. NLRB*, 130 F.3d 1209, 1214 (6th Cir. 1997); and *NLRB v. Malta Construction Co*., 806 F.2d 1009, 1022 (11th Cir. 1986). The Board has found such special circumstances in various situations, including where the button would unreasonably interfere with the public image the employer had established through appearance rules as part of its business plan. See *W San Diego*, 348 NLRB 372, 377 (2006) (hotel's ban on any adornments other than minimal jewelry, pursuant to its business plan to create a distinct, trendy, and chic "wonderland" atmosphere, was lawful to the extent it applied to servers who wore professionally designed all-black uniforms and a small "W" pin while in public areas).[13]

As indicated above, the Casino's handbook appearance rule here broadly prohibits employees from wearing "any badges, emblems, buttons or pins on their uniforms" other than their ID badge. Thus, it plainly encompasses union buttons and is presumptively unlawful. Further, although many employees wear uniforms, unlike in W San Diego the Casino does not contend that the rule is intended to prevent any

[13] As discussed in the above cited cases, the Board has also found special circumstances in other situations not relevant here, such as where the employer showed that the size or placement of the buttons could be unsafe or cause damage, or the wording or message on the buttons could exacerbate employee dissension.

variation in employee appearance or create a distinct or unique look in general. Indeed, the uniforms themselves vary; some employees are given white shirts, some are given brown shirts, and some are given purple and gray striped shirts. In addition, employees are expressly permitted by the rule to wear other "casual business attire"—which "includes, but is not limited to: slacks, khakis, sport shirts, skirts and dresses, turtlenecks, and sweaters"—and they frequently wear their own pants, socks, and shoes. Employees are likewise permitted by policy or practice to sport other items, including decorative badge clips and frames of any color (including hot pink) or design (including zebra or leopard stripes).[14]

Nevertheless, the Casino argues that its rule is justified because union or other "emblematic" buttons containing a political or religious message might offend its customers. The Casino asserts that, while it has permitted other, decorative items, it has consistently required employees to remove any such "emblematic" buttons or pins, including those supporting U.S. Troops or celebrating U.S. holidays such as Independence Day (July 4th) and Christmas.[15]

However, there are two significant problems with this argument. First, it is contrary to the evidence, which indicates that the Casino has allowed employees

---

[14] R. Exh. 2; GC Exhs. 4, 7, 11; Tr. 60, 72, 82–85, 99, 102–103, 113–114, 119–121, 155, 164–165, 171, 174–177, 180, 200–201, 235–240, 308–309, 338–341, 356.

[15] See Tr. 301, 314–315, 302 [sic], 334.

to wear a variety of holiday pins on the casino floor over the last several years.[16] Moreover, the rule applies to all employees, even though some do not work on the casino floor or around customers.[17]

Second, even assuming the argument was supported by the facts, it is contrary to law. The Board has repeatedly held that employer bans on all buttons or emblems, including union buttons, are not justified merely because employees have contact with customers. See, e.g., *Target Corp*., 359 NLRB No. 103, slip op. at 28 (2013); *P.S.K. Supermarkets, Inc*., 349 NLRB 34,

---

[16] See, in addition to the record citations in fn. 14 above, Tr. 92–93, and 200–227. I discredit the testimony of the Casino's general manager and HR director that they simply did not notice such items being worn by employees around customers. The general manager admitted that he is on the casino floor for 16 hours every Friday and Saturday night, is "very aware" of employees, and is "very hands on" (Tr. 313). The HR director likewise admitted that she walks through the casino at least twice a day and sees a lot of employees (Tr. 354). See also Tr. 335 (everyone in supervision is supposed to enforce the rule); and GC Exh. 5 (acknowledging that standards and policies had been "relaxed" prior to April 2013).

[17] See Tr. 307 (rule applies regardless of where employee works); and Tr. 179, 181–196 (rule was enforced against pantry attendant who wore union button even though she works in the kitchen all day and does not go on the casino floor). The record indicates that employees might occasionally be seen walking to or from their cars by customers who sometimes park in the designated employee parking area on the far side of the casino, near the rear employee entrance (R. Exh. 1; Tr. 281–284, 294). However, there is no evidence that the Casino bars employees from having stickers or emblems on their cars. Nor is there any evidence that customers have complained about seeing employees wearing emblematic buttons in the parking lot.

35 (2007); *Ark Las Vegas Restaurant*, 335 NLRB 1284, 1288 (2001); *Mauka, Inc.*, 327 NLRB 803, 809–810 (1999); and *Nordstrom, Inc.*, 264 NLRB 698, 701–702 (1982). See also *Pay 'n Save*, above (rejecting employer's similar argument that its button ban was meant to avoid the appearance of an endorsement of a controversial position that might offend customers). Further, there is nothing remarkable about the union button here that might arguably justify the Casino banning it from public areas. As indicated above, the button is relatively small and does not contain any vulgar or offensive language or images.[18]

Accordingly, consistent with the above-cited precedent, I find that the Casino violated Section 8(a)(1) of the Act as alleged.[19]

---

[18] Compare *Leiser Construction, LLC*, 349 NLRB 413 (2007), and cases cited therein. The Union presented evidence that similar inoffensive union buttons are commonly worn by represented employees who work in public areas at other casinos in California and Nevada (Tr. 368–412; CP Exhs. 1–5, 19–21). I credit this evidence, but would reach the same conclusion without it based on the Board and court decisions cited above.

[19] It is either stipulated or undisputed that the Casino took the alleged actions previously described above. See Jt. Exh. 1; GC Exhs. 3, 5, 10, 13; CP Exh. 7; Tr. 42, 67–68, 91–92, 103, 116–118, 162–164, 188–195, 234, 247–248, 303–304. Although the complaint alleges that the Casino's April 18, 2013 email to Huerta also violated Section 8(a)(3) of the Act, it is unnecessary to address this additional allegation as it would not materially affect the remedy. See *Fairfax Hospital*, 310 NLRB 299 fn. 4 (1993).

CONCLUSIONS OF LAW

1. Casino Pauma is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining a handbook rule prohibiting employees from wearing any union buttons, and enforcing that rule by threatening to suspend or terminate employees who wore a union button and instructing its managers, supervisors, and agents to surveil employees to see if they were wearing a union button, Casino Pauma has interfered with, restrained, and coerced employees in the exercise of their rights, in violation of Section 8(a)(1) of the Act.

REMEDY

The appropriate remedy for the violations found is an order requiring the Casino to cease and desist and to take certain affirmative action. Specifically, the Casino will be required to rescind the subject handbook rule and advise the employees that this has been done in the manner set forth in *Target Corp*., above. The Casino will also be required to rescind the April 18, 2013 email it sent to Huerta about violating the rule, and to notify him in writing that this has been done and that it will not be used against him in any way. In addition, the Casino will be required to post a notice to employees, in both English and Spanish, assuring them it will not violate their rights in this or any like or related manner in the future. Finally, as the Casino communicates with employees by email, it shall also be required to distribute the notice to employees in that manner,

as well as by any other electronic means it customarily uses to communicate with employees.[20]

Accordingly, based on the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[21]

ORDER

The Respondent, Casino Pauma, Pauma Valley, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing a rule that prohibits its employees from wearing any union buttons or insignia.

(b) Threatening to discipline employees, either orally or in writing, for wearing any union buttons or insignia.

(c) Surveilling employees to see if they are wearing any union buttons or insignia.

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

---

[20] The Union's additional request for litigation costs is denied. See *Waterbury Hotel Mgmt*., 333 NLRB 482 fn. 4 (2001).

[21] 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) Rescind its handbook rule banning employees from wearing any union buttons or insignia.

(b) Furnish all current employees with inserts for their current employee handbooks that (1) advise that the unlawful rule has been rescinded, or (2) provide a lawfully worded rule on adhesive backing that will cover the unlawful rule; or publish and distribute to all current employees revised employee handbooks that (1) do not contain the unlawful rule, or (2) provide a lawfully worded rule.

(c) Within 14 days of the Board's order, rescind and remove any reference from its files to the April 18, 2013 email it sent to employee Victor Huerta about violating the rule, and, within 3 days thereafter, notify Huerta in writing that this has been done and that the email will not be used against him in any way.

(d) Within 14 days after service by the Region, post at its facility in Pauma Valley, California copies of the attached notice marked "Appendix" in both English and Spanish.[22] Copies of the notice, on forms provided by the Regional Director for Region 21, 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

---

[22] If this Order is enforced by a judgment of a 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."

posted. In addition to physical posting of paper notices, the notices shall be distributed by email, as well as by 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 April 1, 2013.

(e) 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. June 25, 2014

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 maintain or enforce a rule that prohibits you from wearing any union buttons or insignia.

WE WILL NOT threaten to discipline you, either orally or in writing, for wearing any union buttons or insignia.

WE WILL NOT watch or monitor you to see if you are wearing any union buttons or insignia.

WE WILL rescind our handbook rule banning employees from wearing any union buttons or insignia.

WE WILL furnish you with an insert for your current employee handbook that (1) advises that the unlawful rule has been rescinded, or (2) provides a lawfully-worded rule on adhesive backing that will cover the unlawful rule; or publish and distribute to you a revised employee handbook that (1) does not contain the unlawful rule, or (2) provides a lawfully-worded rule.

WE WILL rescind and remove any reference from our files to the April 18, 2013 email we sent to employee Victor Huerta about violating the rule.

CASINO PAUMA

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-103026 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

[QR Code Omitted]

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CASINO PAUMA, an Enterprise of the Pauma Band of Luiseno Mission Indians of the Pauma and Yuima Reservation, a federally recognized Indian Tribe, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent, UNITE HERE INTERNATIONAL UNION, Intervenor.	No. 16-70397 NLRB No. 21-CA-125450 National Labor Relations Board ORDER (Filed Aug. 7, 2018)

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. CASINO PAUMA, an Enterprise of the Pauma Band of Luiseno Mission Indians of the Pauma and Yuima Reservation, a federally recognized Indian Tribe, Respondent.	No. 16-70756 NLRB No. 21-CA-125450 National Labor Relations Board

Before: LINN,* BERZON, and WATFORD, Circuit Judges.

Judge Berzon and Judge Watford have voted to deny the petition for rehearing en banc. Judge Linn recommends that the petition be denied.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

No petitions for panel rehearing or further petitions for rehearing en banc will be entertained.

* The Honorable Richard Linn, United States Circuit Judge for the U.S. Court of Appeals for the Federal Circuit, sitting by designation.

APPENDIX E

TRIBAL-STATE COMPACT

BETWEEN

THE STATE OF CALIFORNIA

AND THE

PAUMA BAND OF MISSION INDIANS

TABLE OF CONTENTS

[1] TRIBAL-STATE GAMING COMPACT
Between the PAUMA BAND OF MISSION INDIANS,
a federally recognized Indian Tribe,
and the
STATE OF CALIFORNIA

This Tribal-State Gaming Compact is entered into on a government-to-government basis by and between the Pauma Band of Mission Indians, a federally-recognized sovereign Indian tribe (hereafter "Tribe"), and the State of California, a sovereign State of the United States (hereafter "State"), pursuant to the Indian Gaming Regulatory Act of 1988 (P.L. 100-497, codified at 18 U.S.C. Sec. 1166 et seq. and 25 U.S.C. Sec. 2701 et seq.) (hereafter "IGRA"), and any successor statute or amendments.

PREAMBLE

A. In 1988, Congress enacted IGRA as the federal statute governing Indian gaming in the United States. The purposes of IGRA are 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; to provide a statutory basis for regulation of Indian gaming adequate to shield it from organized crime and other corrupting influences; to ensure that the Indian tribe is the primary beneficiary of the gaming operation; to ensure that gaming is conducted fairly and honestly by both the operator and players; and to declare that the establishment of an independent federal regulatory authority for gaming on Indian lands, federal standards for gaming on Indian lands, and a National Indian Gaming Commission are necessary to meet congressional concerns.

[Sections B and C of Preamble omitted]

* * *

[32] [Sections 10.4 through 10.6 omitted]

Sec. 10.7. Labor Relations.

Notwithstanding any other provision of this Compact, this Compact shall be null and void if, on or before May 5, 2000, the Tribe has not provided an agreement or other procedure acceptable to the State for addressing organizational and representational rights of Class III Gaming Employees and other employees associated with the Tribe's Class III gaming enterprise, such as food and beverage, housekeeping, cleaning, bell and

door services, and laundry employees at the Gaming Facility or any related facility, the only significant purpose of which is to facilitate patronage at the Gaming Facility.

[Sections 10.8 to 10.8.2(a)(4) omitted]

* * *

[37] Sec. 15.6. Representations.

By entering into this Compact, the Tribe expressly represents that, as of the date of the Tribe's execution of this Compact: (a) the undersigned has the authority to execute this Compact on behalf of his or her tribe and will provide written proof of such authority and ratification of this Compact by the tribal governing body no later than May 5, 2000; (b) the Tribe is (i) recognized as eligible by the Secretary of the Interior for special programs and services provided by the United States to Indians because of their status as Indians, and (ii) recognized by the Secretary of the Interior as possessing powers of self-government. In entering into this Compact, the State expressly relies upon the foregoing representations by the Tribe, and the State's entry into the Compact is expressly made contingent upon the truth of those representations as of the date of the Tribe's execution of this Compact. Failure to provide written proof of authority to execute this Compact or failure to provide written proof of ratification by the Tribe's governing body will give the State the opportunity to declare this Compact null and void.

IN WITNESS WHEREOF, the undersigned sign this Compact on behalf of the State of California and the Pauma Band of Mission Indians.

STATE OF CALIFORNIA	**PAUMA BAND OF MISSION INDIANS**
/s/ Gray Davis	/s/ Ben Magante
By Gray Davis Governor of the State of California	By Ben Magante Chairperson of the Pauma Band of Mission Indians
Executed this 1st day of May, 2000, at Sacramento, California	Executed this 27th day of April, 2000, at PAUMA VALLEY, California.

ADDENDUM "B" TO TRIBAL-STATE GAMING COMPACT BETWEEN THE PAUMA BAND OF MISSION INDIANS AND THE STATE OF CALIFORNIA

In compliance with Section 10.7 of the Compact, the Tribe agrees to adopt an ordinance identical to the Model Tribal Labor Relations Ordinance attached hereto, and to notify the State of that adoption no later than May 5, 2000. If such notice has not been received by the State by May 5, 2000, this Compact shall be null and void. Failure of the Tribe to maintain the Ordinance in effect during the term of this Compact shall constitute a material breach entitling the State to terminate this Compact. No amendment of the Ordinance shall be effective unless approved by the State.

Attachment: Model Tribal Labor Relations Ordinance.

IN WITNESS WHEREOF, the undersigned sign this Addendum on behalf of the State of California and the Pauma Band of Mission Indians.

STATE OF CALIFORNIA	**PAUMA BAND OF MISSION INDIANS**
/s/ Gray Davis	/s/ Ben Magante
By Gray Davis Governor of the State of California	By Ben Magante Chairperson of the Pauma Band of Mission Indians
Executed this 1st day of May, 2000, at Sacramento, California	Executed this 27th day of April, 2000, at PAUMA VALLEY, California.

####

Governor Gray Davis
State Capitol
Sacramento, California

Re: Notice of Adoption Of Tribal Labor Relations Ordinance

Dear Governor Davis:

Pursuant to Section 10.7 of the Tribal-State Gaming Compact entered into by the Pauma Band of Mission Indians, I hereby notify you that the Pauma Band of Mission Indians adopted the Tribal Labor Relations Ordinance pursuant to Section 10.7 of the Tribal-State Gaming Compact on April 27, 2000.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 27th (Day) day of April (Month), ~~1999~~ 2000, at PAUMA VALLEY (City), California.

Ben Magante
(Signature)

Ben Magante
(Print Name)

Chairman
(Title)

P.O. Box 369
Pauma Valley, CA 92061
(Address)

April 27, 2000
(Date)

ATTACHMENT TO ADDENDUM B

TRIBAL LABOR RELATIONS ORDINANCE
September 14, 1999

Section 1: Threshold of applicability

(a) Any tribe with 250 or more persons employed in a tribal casino and related facility shall adopt this Tribal Labor Relations Ordinance (TLRO or Ordinance). For purposes of this ordinance, a "tribal casino" is one in which class III gaming is conducted pursuant to a tribal-state compact. A "related facility" is one for

which the only significant purpose is to facilitate patronage of the class III gaming operations.

(b) Any tribe which does not operate such a tribal casino as of September 10, 1999, but which subsequently opens a tribal casino, may delay adoption of this ordinance until one year from the date the number of employees in the tribal casino or related facility as defined in 1(a) above exceeds 250.

(c) Upon the request of a labor union, the Tribal Gaming Commission shall certify the number of employees in a tribal casino or other related facility as defined in 1(a) above. Either party may dispute the certification of the Tribal Gaming Commission to the Tribal Labor Panel.

Section 2: Definition of Eligible Employees

(a) The provisions of this ordinance shall apply to any person (hereinafter "Eligible Employee") who is employed within a tribal casino in which Class III gaming is conducted pursuant to a tribal-state compact or other related facility, the only significant purpose of which is to facilitate patronage of the Class III gaming operations, except for any of the following:

(1) any employee who is a supervisor, defined as any individual having authority, in the interest of the tribe and/or employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility 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;

(2) any employee of the Tribal Gaming Commission;

(3) any employee of the security or surveillance department, other than those who are responsible for the technical repair and maintenance of equipment;

(4) any cash operations employee who is a "cage" employee or money counter; or

(5) any dealer.

Section 3: Non-interference with regulatory or security activities

Operation of this Ordinance shall not interfere in any way with the duty of the Tribal Gaming Commission to regulate the gaming operation in accordance with the Tribe's National Indian Gaming Commission-approved gaming ordinance. Furthermore, the exercise of rights hereunder shall in no way interfere with the tribal casino's surveillance/security systems, or any other internal controls system designed to protect the integrity of the tribe's gaming operations. The Tribal Gaming Commission is specifically excluded from the definition of tribe and its agents.

Section 4: Eligible Employees free to engage in or refrain from concerted activity

Eligible Employees shall have the right to self-organization, to form, to join, or assist employee organizations, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.

Section 5: Unfair Labor Practices for the tribe

It shall be an unfair labor practice for the tribe and/or employer or their agents:

(1) to interfere with, restrain or coerce Eligible Employees in the exercise of the rights guaranteed herein;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it, but this does not restrict the tribe and/or employer and a certified union from agreeing to union security or dues checkoff;

(3) to discharge or otherwise discriminate against an Eligible Employee because s/he has filed charges or given testimony under this Ordinance;

(4) to refuse to bargain collectively with the representatives of Eligible Employees.

Section 6: Unfair Labor Practices for the union

It shall be an unfair labor practice for a labor organization or its agents:

(1) to interfere, restrain or coerce Eligible Employees in the exercise of the rights guaranteed herein;

(2) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a primary or secondary boycott or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce or other terms and conditions of employment. This section does not apply to section 11;

(3) to force or require the tribe and/or employer to recognize or bargain with a particular labor organization as the representative of Eligible Employees if another labor organization has been certified as the representative of such Eligible Employees under the provisions of this TLRO;

(4) to refuse to bargain collectively with the tribe and/or employer, provided it is the representative of Eligible Employees subject to the provisions herein;

(5) to attempt to influence the outcome of a tribal governmental election, provided, however, that this section does not apply to tribal members.

Section 7: Tribe and union right to free speech

The tribe's and union's expression of any view, argument or opinion or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of interference with, restraint or coercion if such expression contains no threat of reprisal or force or promise of benefit.

Section 8: Access to Eligible Employees

(a) Access shall be granted to the union for the purposes of organizing Eligible Employees, provided that such organizing activity shall not interfere with patronage of the casino or related facility or with the normal work routine of the Eligible Employees and shall be done on non-work time in non-work areas that are designated as employee break rooms or locker rooms that are not open to the public. The tribe may require the union and or union organizers to be subject to the same licensing rules applied to individuals or entities with similar levels of access to the casino or related facility, provided that such licensing shall not be unreasonable, discriminatory, or designed to impede access.

(b) The Tribe, in its discretion, may also designate additional voluntary access to the Union in such areas as employee parking lots and non-Casino facilities located on tribal lands.

(c) In determining whether organizing activities potentially interfere with normal tribal work routines,

the union's activities shall not be permitted if the Tribal Labor Panel determines that they compromise the operation of the casino:

(1) security and surveillance systems throughout the casino, and reservation;

(2) access limitations designed to ensure security;

(3) internal controls designed to ensure security;

(4) other systems designed to protect the integrity of the tribe's gaming operations, tribal property and/or safety of casino personnel, patrons, employees or tribal members, residents, guests or invitees.

(d) The tribe shall provide to the union, upon a thirty percent (30%) showing of interest to the Tribal Labor Panel, an election eligibility list containing the full first and last name of the Eligible Employees within the sought after bargaining unit and the Eligible Employees' last known address within ten (10) working days. Nothing herein shall preclude a tribe from voluntarily providing an election eligibility list at an earlier point of a union organizing campaign.

(e) The tribe agrees to facilitate the dissemination of information from the union to Eligible Employees at the tribal casino by allowing posters, leaflets and other written materials to be posted in non-public employee break areas where the tribe already posts announcements pertaining to Eligible Employees. Actual posting of such posters, notices, and other materials, shall be by employees desiring to post such materials.

Section 9: Indian preference explicitly permitted

Nothing herein shall preclude the tribe from giving Indian preference in employment, promotion, seniority, lay-offs or retention to members of any federally recognized Indian tribe or shall in any way affect the tribe's right to follow tribal law, ordinances, personnel policies or the tribe's customs or traditions regarding Indian preference in employment, promotion, seniority, lay-offs or retention. Moreover, in the event of a conflict between tribal law, tribal ordinance or the tribe's customs and traditions regarding Indian preference and this Ordinance, the tribal law, tribal ordinance or the tribe's customs and traditions shall govern.

Section 10: Secret ballot elections required

(a) Dated and signed authorized cards from thirty percent (30%) or more of the Eligible Employees within the bargaining unit verified by the elections officer will result in a secret ballot election to be held within 30 days from presentation to the elections officer.

(b) The election shall be conducted by the election officer. The election officer shall be a member of the Tribal Labor Panel chosen pursuant to the dispute resolution provisions herein. All questions concerning representation of the tribe and/or Employer's Eligible Employees by a labor organization shall be resolved by the election officer. The election officer shall be chosen upon notification by the labor organization to the tribe

of its intention to present authorization cards, and the same election officer shall preside thereafter for all proceedings under the request for recognition; provided however that if the election officer resigns, dies or is incapacitated for any other reason from performing the functions of this office, a substitute election officer shall be selected in accordance with the dispute resolution provisions herein.

(c) The election officer shall certify the labor organization as the exclusive collective bargaining representative of a unit of employees if the labor organization has received the majority of votes by employees voting in a secret ballot election that the election officer determines to have been conducted fairly. If the election officer determines that the election was conducted unfairly due to misconduct by the tribe and/or employer or union, the election officer may order a re-run election. If the election officer determines that there was the commission of serious Unfair Labor Practices by the tribe that interfere with the election process and preclude the holding of a fair election, and the labor organization is able to demonstrate that it had the support of a majority of the employees in the unit at any point before or during the course of the tribe's misconduct, the election officer shall certify the labor organization.

(d) The tribe or the union may appeal any decision rendered after the date of the election by the election officer to a three (3) member panel of the Tribal Labor Panel mutually chosen by both parties.

(e) A union which loses an election and has exhausted all dispute remedies related to the election may not invoke any provisions of this labor ordinance at that particular casino or related facility until one year after the election was lost.

Section 11: Collective bargaining impasse

Upon recognition, the tribe and the union will negotiate in good faith for a collective bargaining agreement covering bargaining unit employees represented by the union. If collective bargaining negotiations result in impasse, and the matter has not been resolved by the tribal forum procedures sets [sic] forth in Section 13(b) governing resolution of impasse within sixty (60) working days or such other time as mutually agreed to by the parties, the union shall have the right to strike. Strike-related picketing shall not be conducted on Indian lands as defined in 25 U.S.C. Sec. 2703(4).

Section 12: Decertification of bargaining agent

(a) The filing of a petition signed by thirty percent (30%) or more of the Eligible Employees in a bargaining unit seeking the decertification of a certified union, will result in a secret ballot election to be held 30 days from the presentation of the petition.

(b) The election shall be conducted by an election officer. The election officer shall be a member of the Tribal Labor Panel chosen pursuant to the dispute resolution provisions herein. All questions concerning the

decertification of the labor organization shall be resolved by an election officer. The election officer shall be chosen upon notification to the tribe and the union of the intent of the employees to present a decertification petition, and the same election officer shall preside thereafter for all proceedings under the request for decertification; provided however that if the election officer resigns, dies or is incapacitated for any other reason from performing the functions of this office, a substitute election officer shall be selected in accordance with the dispute resolution provisions herein.

(c) The election officer shall order the labor organization decertified as the exclusive collective bargaining representative if a majority of the employees voting in a secret ballot election that the election officer determines to have been conducted fairly vote to decertify the labor organization. If the election officer determines that the election was conducted unfairly due to misconduct by the tribe and/or employer or the union the election officer may order a re-run election or dismiss the decertification petition.

(d) A decertification proceeding may not begin until one (1) year after the certification of a labor union if there is no collective bargaining agreement. Where there is a collective bargaining agreement, a decertification petition may only be filed no more than 90 days and no less than 60 days prior to the expiration of a collective bargaining agreement. A decertification petition may be filed anytime after the expiration of a collective bargaining agreement.

(e) The tribe or the union may appeal any decision rendered after the date of the election by the election officer to a three (3) member panel of the Tribal Labor Panel mutually chosen by both parties.

Section 13: Binding dispute resolution mechanism

(a) All issues shall be resolved exclusively through the binding dispute resolution mechanisms herein, with the exception of a collective bargaining negotiation impasse, which shall only go through the first level of binding dispute resolution.

(b) The first level of binding dispute resolution for all matters related to organizing, election procedures, alleged unfair labor practices, and discharge of Eligible Employees shall be an appeal to a designated tribal forum such as a Tribal Council, Business Committee, or Grievance Board. The parties agree to pursue in good faith the expeditious resolution of these matters within strict time limits. The time limits may not be extended without the agreement of both parties. In the absence of a mutually satisfactory resolution, either party may proceed to the independent binding dispute resolution set forth below. The agreed upon time limits are set forth as follows:

(1) All matters related to organizing, election procedures and alleged unfair labor practices prior to the union becoming certified as the collective bargaining representative of bargaining unit employees, shall

be resolved by the designated tribal forum within thirty (30) working days.

(2) All matters after the union has become certified as the collective bargaining representative and relate specifically to impasse during negotiations, shall be resolved by the designated tribal forum within sixty (60) working days;

(c) The second level of binding dispute resolution shall be a resolution by the Tribal Labor Panel, consisting of ten (10) arbitrators appointed by mutual selection of the parties which panel shall serve all tribes that have adopted this ordinance. The Tribal Labor Panel shall have authority to hire staff and take other actions necessary to conduct elections, determine units, determine scope of negotiations, hold hearings, subpoena witnesses, take testimony, and conduct all other activities needed to fulfill its obligations under this Tribal Labor Relations Ordinance.

(1) Each member of the Tribal Labor Panel shall have relevant experience in federal labor law and/or federal Indian law with preference given to those with experience in both. Names of individuals may be provided by such sources as, but not limited to, Indian Dispute Services, Federal Mediation and Conciliation Service, and the American Academy of Arbitrators.

(2) Unless either party objects, one arbitrator from the Tribal Labor Panel will render a binding decision on the dispute under the Ordinance. If either party objects, the dispute will be decided by a three-member panel of the Tribal Labor Panel, which will

render a binding decision. In the event there is one arbitrator, five (5) Tribal Labor Panel names shall be submitted to the parties and each party may strike no more that two (2) names. In the event there is a three (3) member panel, seven (7) TLP names shall be submitted to the parties and each party may strike no more than two (2) names. A coin toss shall determine which party may strike the first name. The arbitrator will generally follow the American Arbitration Association's procedural rules relating to labor dispute resolution. The arbitrator or panel must render a written, binding decision that complies in all respects with the provisions of this Ordinance.

(d) Under the third level of binding dispute resolution, either party may seek a motion to compel arbitration or a motion to confirm an arbitration award in Tribal Court, which may be appealed to federal court. If the Tribal Court does not render its decision within 90 days, or in the event there is no Tribal Court, the matter may proceed directly to federal court. In the event the federal court declines jurisdiction, the tribe agrees to a limited waiver of its sovereign immunity for the sole purpose of compelling arbitration or confirming an arbitration award issued pursuant to the Ordinance in the appropriate state superior court. The parties are free to put at issue whether or not the arbitration award exceeds the authority of the Tribal Labor Panel.

APPENDIX F

CULINARY WORKERS UNION, LOCAL 326 [LOGO]

Affiliate with UNITE HERE INTERNATIONAL UNION

1630 SOUTH COMMERCE STREET LAS VEGAS, NEVADA 89102-2705 (702) 365-2131

May, 25, 2012

To the Tribal Leadership of
Pauma Band of Luiseño Indians,
Chairman Randall Majel

Dear Mr. Randall Majel:

UNITE HERE notifies the Pauma-Yuima Band of Mission Indians that an unfair labor practice has been committed and submits the dispute to binding dispute resolution under Article XIII of the Tribal Labor Relations Regulation. Specifically, on or about May 24, 2012, the Tribe suspended employees because the employees wore union buttons. This constitutes interference with, restraint and coercion of Eligible Employees in the exercise of their rights under the Tribal Labor Relations Regulation. The first level of binding dispute resolution is submission to a designated tribal forum,

which shall resolve the dispute within thirty (30) working days.

/s/ [hand written signature]

Ted Pappageorge
Director of California Tribal Gaming Organizing
UNITE HERE
tpappageorge@culinaryunion226.org
(702) 386-5234 (office)

TP/em

DAVIS, COWELL & BOWE LLP

Counselors and Attorneys at Law

[Names And Offices Omitted]

July 12, 2012

Via E-Mail and U.S. Mail

Joan Markoff
Paul Starkey
Department of Personnel Administration
Legal Division
1515 "S" Street North Building, No. 400
Sacramento, CA 95811

Re: *Pauma Band of Mission Indians and UNITE HERE*

Dear Ms. Markoff and Mr. Starkey:

I write regarding a dispute between The Pauma Band of Mission Indians and UNITE HERE under the Tribal Labor Relations Ordinance.

Article V of the Tribal Labor Relations Ordinance provides: "It shall be an unfair labor practice of the tribe and/or employer or their agents: A. To interfere with, restrain or coerce Eligible Employees in the exercise of the rights guaranteed herein. . . ." Article 13 of the TLRO, which is entitled "Binding Dispute Resolution Mechanism," provides:

> A. All issues shall be resolved exclusively through the binding dispute resolution mechanisms herein, with the exception of a collective bargaining negotiation impasse, which

shall only go through the first level of binding dispute resolution;

B. The first level of binding dispute resolution for all matters related to organizing, election procedures, alleged unfair labor practices, and discharge of Eligible Employees shall be an appeal to a designated tribal forum such as a Tribal Council, Business Committee, or Grievance Board. The parties agree to pursue in good faith the expeditious resolution of these matters within strict time limits. The time limits may not be extended without the agreement of both parties. In the absence of a mutually satisfactory resolution, either party may proceed to the independent binding dispute resolution set forth below. The agreed upon time limits are set forth as follows:

1. All matters related to organizing, election procedures and alleged unfair labor practices prior to the union becoming certified as the collective bargaining representative of bargaining unit employees, shall be resolved by the designated tribal forum within thirty (30) working days; and

* * *

C. The second level of binding dispute resolution shall be a resolution by the Tribal Labor Panel, consisting of ten (10) arbitrators appointed by mutual selection of the parties which panel shall serve all tribes that have adopted this regulation. . . .

On May 25, 2012, UNITE HERE submitted a dispute involving an alleged violation of Section V.A to the first level of dispute resolution. A copy of that submission is enclosed. The Tribe responded by letter dated July 6, 2012 but did not resolve the dispute to UNITE HERE's satisfaction. Thirty working days since May 25 have passed. Therefore, UNITE HERE submits this dispute to the second level of binding dispute resolution. We request that the State, as the administrator of the Tribal Labor Panel, promptly appoint an arbitrator from the Tribal Labor Panel to hear this dispute, or direct the parties on the steps they are to take to select an arbitrator.

The Tribe has previously asserted that the 1999 Compact (and TLRO) should be followed instead of the 2004 Compact (and TLRO). That objection is irrelevant to this dispute because the provisions cited above appear in both versions of the TLRO. Therefore, we assume that the Tribe will not object to proceeding immediately to the second level of binding dispute resolution.

The Pauma Band of Mission Indians is represented by David Clifford of Shanker & Kewenwyouma, 700 East Baseline Road, Suite C1, Tempe, AZ 85234; david@hsrklaw.com.

Thank you for your attention.

Sincerely,

/s/ Kristin L. Martin

Kristin L. Martin

KLM:ys
Enclosure

cc: Clients
David Clifford
Pauma Band of Mission Indians

Cc: Whitehead, Renee
Subject: Pauma Band of Mission Indians and UNITE HERE

August 4, 2012

Dear Representatives:

Regarding the above matter, this confirms the parties, through their representatives, have selected an arbitration panel by striking names. The arbitrator panel is comprised of: Sarah Adler, Catherine Harris, and John Kagel. Our office has contacted the arbitrators for available dates. However, to facilitate that process, please confer and let this office know (1) the desired location of the arbitration hearing and (2) the number of hearing days required. Ms. Whitehead, my secretary, who is being copied on this email, will then coordinate with the arbitrators on the panel.

Thank you.

Paul M. Starkey
Assistant Chief Counsel
California Department of Human Resources (CalHR)
www.calhr.ca.gov
(916) 324-4062 (desk phone)

---

intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message.

DAVIS, COWELL & BOWE LLP

Counselors and Attorneys at Law

[Names And Offices Omitted]

November 29, 2012

Via e-mail only (tatump@adr.org)

Patrick Tatum
American Arbitration Association
6795 N. Palm Avenue, 2nd Floor
Fresno, CA 93704

Re: Pauma Band of Mission Indians and UNITE HERE

Dear Mr. Tatum:

UNITE HERE withdraws its request for arbitration in this matter.

Thank you.

Sincerely,

/s/ Kristin L. Martin

Kristin L. Martin

KLM/dl

cc: Paul Starkey
Scott Wilson

APPENDIX G

INTERNET FORM NLRB-501 (2-08)	UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD **CHARGE AGAINST EMPLOYER**	FORM EXEMPT UNDER 44 U.S.C. 3512

DO NOT WRITE IN THIS SPACE	
Case 21-CA-126528	Date Filed 4-11-14

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT		
a. Name of Employer Casino Pauma		b. Tel. No. 877-687-2862
		c. Cell No.
d. Address *(Street, city, state, and ZIP code)* 777 Pauma Reservation Road P.O. Box 1067 Pauma valley, CA 92061	e. Employer Representative Annelle Lerner, HR Director	f. Fax No. 760-742-8677
		g. e-Mail
		h. Number of workers employed
i. Type of Establishment *(factory, mine, wholesaler, etc.)* Casino	j. Identify principal product or service Food, beverage, hotel rooms, gambling	

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* (3) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

During the past six months, the above-named employer coerced, restrained, and interfered with employees in their exercise of §7 rights by issuing a written warning to Audelia Reyes for distributing leaflets to coworkers and telling Audelia Reyes not to tell anyone about the warning.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*

UNITE HERE International Union

4a. Address *(Street and number, city, state, and ZIP code)*	4b. Tel. No. 212-265-7000
275 Seventh Avenue New York, NY 10001-6708	4c. Cell No.
	4d. Fax No. 212-265-3415
	4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*

UNITE HERE International Union

6. DECLARATION	Tel. No. 415-597-7200
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	Office, if any, Cell No.
By Kristin Martin *(signature of representative or person making charge)* Kristin L. Martin – Davis, Cowell & Bowe *(Print/type name and title or office, if any)*	Fax No. 415-597-7201
Address 595 Market St., Ste. 1400, San Francisco, CA 94105 4/7/2014 *(date)*	e-Mail klm@dcbsf.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

[**PRIVACY ACT STATEMENT OMITTED**]

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER
First Amended

FORM EXEMPT UNDER 44 U.S.C. 3512

DO NOT WRITE IN THIS SPACE	
Case 21-CA-125450	Date Filed 5-30-14

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer Casino Pauma		b. Tel. No. 877-687-2862
		c. Cell No.
d. Address *(Street, city, state, and ZIP code)* 777 Pauma Reservation Road P.O. Box 1067 Pauma valley, CA 92061	e. Employer Representative Annelle Lerner, HR Director	f. Fax No. 760-742-8677
		g. e-Mail
		h. Number of workers employed
i. Type of Establishment *(factory, mine, wholesaler, etc.)* Casino	j. Identify principal product or service Food, beverage, gambling	

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

During the past six months, the above-named employer interfered with, restrained and coerced employees in the exercise of their Section 7 rights, including but not limited to, by:

1. Prohibiting employees from distributing leaflets to customers on non-work areas of the casino property, and threatening employees for doing so, including but not limited to threatening them with reporting them to human resources, discipline, termination and unspecified consequences and problems.

2. Prohibiting employees from soliciting customers and distributing leaflets to customers on the casino's shuttle buses and bussing [sic] programs.

3. Maintaining in effect a rule that prohibits employees distributing literature and solicitation in "guest areas."

4. Conducting surveillance of employees engaged in Section 7 protected activity and/or creating the impression that such activity was under surveillance.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)* UNITE HERE International Union	
4a. Address *(Street and number, city, state, and ZIP code)* 275 Seventh Avenue New York, NY 10001-6708	4b. Tel. No. 212-265-7000 4c. Cell No. 4d. Fax No. 212-265-3415 4e. e-Mail
5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)* UNITE HERE International Union	
6. DECLARATION I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief. By Kristin Martin *(signature of representative or person making charge)* Kristin L. Martin – Davis, Cowell & Bowe *(Print/type name and title or office, if any)* Address 595 Market St., Ste. 1400, San Francisco, CA 94105 5/29/2014 *(date)*	Tel. No. 415-597-7200 Office, if any, Cell No. Fax No. 415-597-7201 e-Mail klm@dcbsf.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

[**PRIVACY ACT STATEMENT OMITTED**]

INTERNET FORM NLRB-501 (2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 44 U.S.C. 3512

DO NOT WRITE IN THIS SPACE	
Case 21-CA-131428	Date Filed 6-24-14

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer Casino Pauma		b. Tel. No. 877-687-2862
		c. Cell No.
d. Address *(Street, city, state, and ZIP code)* 777 Pauma Reservation Road P.O. Box 1067 Pauma valley, CA 92061	e. Employer Representative Annelle Lerner, HR Director	f. Fax No. 760-742-8677
		g. e-Mail
		h. Number of workers employed
i. Type of Establishment *(factory, mine, wholesaler, etc.)* Casino	j. Identify principal product or service Food, beverage, hotel rooms, gambling	

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

During the past six months, the above-named employer coerced, restrained, and interfered with employees in the exercise of their Section 7 rights by interrogating employees about activity protected by Section 7.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*

UNITE HERE International Union

4a. Address *(Street and number, city, state, and ZIP code)*	4b. Tel. No. 212-265-7000
275 Seventh Avenue New York, NY 10001-6708	4c. Cell No.
	4d. Fax No. 212-265-3415
	4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*

UNITE HERE International Union

6. DECLARATION	Tel. No. 415-597-7200
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.	Office, if any, Cell No.
By Kristin Martin *(signature of representative or person making charge)* Kristin L. Martin – Davis, Cowell & Bowe *(Print/type name and title or office, if any)*	Fax No. 415-597-7201
Address 595 Market St., Ste. 1400, San Francisco, CA 94105 6/23/2014 *(date)*	e-Mail klm@dcbsf.com

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

[**PRIVACY ACT STATEMENT OMITTED**]

APPENDIX H

RICHARD G. McCRACKEN, SBN 062058
JONI S. JACOBS, SBN 178936
DAVIS, COWELL & BOWE, LLP
100 Van Ness Avenue, 20th Floor
San Francisco, CA 94102
Tel. (415) 626-1880

Attorneys for Intervenor
HERE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE INDIAN GAMING RELATED CASES	Case No.: 97-04693
CHEMEHUEVI INDIAN TRIBE, COYOTE VALLEY BAND OF POMO INDIANS, ELK VALLEY RANCHERIA, HOOPA VALLEY INDIAN TRIBE, HOPLAND BANK [sic] OF POMO INDIANS, REDDING RANCHERIA, and SMITH RIVER RANCHERIA, Plaintiffs, v.	This document relates to: No. C-98-1806 CW **DEFENDANT INTERVENOR HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' PRIMA FACIE SHOWING THAT THE STATE OF CALIFORNIA DID NOT NEGOTIATE A COMPACT IN**

THE STATE OF CALIFORNIA,	**GOOD FAITH UNDER IGRA**
Defendants.	Date: February 25, 2000 Time: 10:00 a.m. Courtroom: 2 Hon. Claudia Wilkins
/	(Filed Feb. 2, 2000)

* * *

enterprises are "government" operations and therefore exempt. Although it confined this ruling to the case before it, involving an off-reservation operation, *Yukon* shows that the current Board has not retreated from *Sac & Fox'* effective abandonment of *Ft. Apache.*

C. The Compact Provisions Would Not Be Preempted if the NLRA Were Held To Apply To Indian Casinos.

The Supreme Court and the Labor Board regard agreements containing provisions about union organizing, such as rights of access, employees' names and addresses, arbitration of disputes – and even recognition by counting authorization cards instead of an NLRB-conducted election – as lawful and enforceable. In *Retail Clerks Local 128 v. Lion Dry Goods, Inc.*, 369 U.S. 17, 25-27, 82 S.Ct. 541, 546-547 (1962), the Court held that an agreement between a food employer and two unions granting union access, reinstating strikers, establishing employment terms, and limiting the parties rights to demand an NLRB election, 369 U.S. at 20

n.4, 82 S.Ct. at 544-545 n.4, was enforceable even though the unions acknowledged that they were not yet entitled to recognition. Id., 369 U.S. at 20-21, 82 S.Ct. at 544-545. Following *Lion Dry Goods*, the courts have enforced organizing agreements just like the agreement the Union sought here. *Hotel & Restaurant Employees Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 567, 143 Lab. Rel. Rep. (BNA) 2586, 2590 (2d Cir. 1993); *Hotel & Restaurant Employees Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1468, 140 Lab, Rel. Rep. (BNA) 2192 (9th Cir. 1992). The Labor Board not only regards these agreements as lawful, but gives very nearly the same effect to recognition achieved under these arrangements as to certification flowing from a Labor Board-conducted election. *NLRB v. Tahoe Nuggett, Inc.*, 584 F.2d 293, 297 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); *MGM Grand Hotel*, 329 NLRB No. 50 (1999); *Smith's Food & Drug*, 320 NLRB 844 (1996).

The ultimate outcome of the question whether there is NLRB jurisdiction over the Indian casinos will not be known for years, but in the end it really doesn't matter with respect to the Compact, because its provisions are entirely proper and enforceable under the NLRA.

II. CONCLUSION

For all of the foregoing reasons, the Court should find that because labor relations is a proper subject for Indian gaming compact negotiations, plaintiffs have

not made a *prima facie* showing that the State of California did not negotiate the Compact in good faith.

Dated: February 1, 2000

DAVIS, COWELL & BOWE, LLP

By: /s/ Richard G. McCracken
RICHARD G. McCRACKEN
JONI S. JACOBS
Attorneys for Intervenor
HERE

APPENDIX I

Richard G. McCracken, SBN 062058
Elizabeth A. Lawrence #111781
DAVIS, COWELL & BOWE, LLP
100 Van Ness Avenue, 20th Floor
San Francisco, CA 94102
Tel. (415) 626-1880

Attorneys for *Amicus Curiae*
Hotel Employees and Restaurant Employees
International Union, AFL-CIO

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE INDIAN GAMING RELATED CASES

Case No.: 97-04693

This document relates to:
No. C-98-1806 CW

CHEMEHUEVI INDIAN TRIBE, COYOTE VALLEY BAND OF POMO INDIANS, ELK VALLEY RANCHERIA, HOOPA VALLEY INDIAN TRIBE, HOPLAND BANK [sic] OF POMO INDIANS, REDDING RANCHERIA, and SMITH RIVER RANCHERIA,

Plaintiffs,

v.

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION'S BRIEF *AMICUS CURIAE* IN OPPOSITION TO PLAINTIFF COYOTE VALLEY'S RECONSIDERATION OF ORDER DENYING COYOTE VALLEY'S MOTION FOR AN

THE STATE OF CALIFORNIA,

Defendants.

/

ORDER PURSUANT TO 25 U.S.C. §§2710(D)(7)(B)(3)(iv)

The Honorable Claudia Wilken

(Filed Feb. 21, 2001)

* * *

III. THE COURT'S ORDER IS NOT UNDERMINED BY THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS IN *PUEBLO OF SAN JUAN*; INSTEAD, IT IS IN ACCORD WITH THE GREAT WEIGHT OF FEDERAL AUTHORITY, INCLUDING THE CONTROLLING DECISIONS IN THIS CIRCUIT.

A. <u>Pueblo of San Juan does not hold what the tribes claim, and its actual holding (even if it were correct) has no bearing on the issues in this case</u>.

Coyote Valley and Agua Caliente assert that the Court's Order is undermined by the decision of the Tenth Circuit Court of Appeals in *National Labor Relations Board v. Pueblo of San Juan*, 2000 WL 1410839 (CA 10 2000). There are many reasons why this is not so.

First, this court did not hold that the National Labor Relations Act applies to on-reservation tribal enterprises. It held that a tribe's labor relations with its employees in its casino and closely-related enterprises

is directly related to gaming operations. It held that consequently, it was not bad faith for the state to negotiate for a TLRO that substitutes for the National Labor Relations Act. Indeed, the State's proposal presupposes the inapplicability of the NLRA. Therefore, a holding that the NLRA does not apply raises no doubts about the Order. This is true with respect to the entirety of the Order, including this court's discussion of the standard of "good faith" to be applied. The court made it clear that it was only borrowing the jurisprudence under the National Labor Relations Act about the meaning of this term, not that it was being applied *ex proprio vigore. In re Indian Gaming Related Cases*, at pages 6-7.

Second, the decision in *Pueblo of San Juan* does not go as far as Coyote Valley and, especially, Agua Caliente suggest. Agua Caliente represents that the Court of Appeals held "that the NLRA does not even apply to tribal labor relations." Agua Caliente Amicus Brief, page 6:16-17. The reasoning in the Tenth Circuit decision lacks clarity and its reasoning shifts but nowhere is this stated or held. The court itself stated its holding as follows:

> We hold that the NLRA does not preempt the tribal government from the enactment and enforcement of a right-to-work tribal ordinance applicable to employees of a non-Indian company who enters into a consensual agreement with the tribe to engage in commercial activities on a reservation.

* * *

IV. CONCLUSION

Coyote Valley and Agua Caliente have shown no grounds for the court to reconsider its decision. Indeed, examination of the arguments they advance reinforces the validity of the court's reasoning. The motion for reconsideration should be denied.

DATED: February 20 2001

Respectfully submitted,

DAVIS, COWELL & BOWE, LLP

By: /s/ Elizabeth Lawrence
Richard G. McCracken
Elizabeth A. Lawrence

100 Van Ness Avenue, 20th Floor
San Francisco, California 94102
(415) 626-1880; Fax: (415) 626-2860

Attorneys for *Amicus Curiae* Hotel Employees & Restaurant Employees Internat'l Union, AFL-CIO