Case No. 1:09-cv-141-JTN

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

LITTLE RIVER BAND OF OTTAWA INDIANS,

Plaintiff,

v.

NATIONAL LABOR RELATIONS BOARD,

Defendant.

RESPONSE OF THE NATIONAL LABOR RELATIONS BOARD TO THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Over 70 years ago, in *Myers v. Bethlehem Shipbuilding Co.*, 303 U.S. 41 (1938), the Supreme Court held that United States district courts lack subject-matter jurisdiction to review, and therefore to enjoin, the processing of an unfair labor practice case by the National Labor Relations Board. Instead, a party seeking judicial review of an unfair labor practice case must first exhaust administrative remedies before the Board and, thereafter, may petition an appropriate court of appeals for review of a final Board order. Few principles are as firmly established in federal labor law as the *Myers* exhaustion rule. Indeed, this "well-steeped precedent" has been repeatedly followed by the courts of appeals, including the Sixth Circuit. *Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 401 (6th Cir. 2002). The Plaintiff here, the Little River Band of Ottawa Indians, is a charged party in a pending unfair labor practice case and can show no reason why its attempt to circumvent the exhaustion requirement should succeed where others have failed. Accordingly, because the rule of *Myers* embraces this case, the Plaintiff's Motion for Summary Judgment should be denied, and the Amended Verified Complaint must be dismissed for lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

THE PARTIES

The National Labor Relations Board ("NLRB," "the Board," or "the Agency") is an independent federal agency created by Congress in 1935 to administer the National Labor Relations Act ("NLRA" or "the Act"). The Agency's primary duties

are to prevent and remedy "unfair labor practices," as defined by Section 8 of the Act, 29 U.S.C. § 158 (2006), and to conduct union representation elections under Section 9, *id.* § 159. The NLRA, as amended, separates the Agency's prosecutorial and adjudicatory functions. Thus, Section 3(d) of the Act establishes the position of General Counsel and vests him with "final authority, on behalf of the Board, in respect of the investigation of [unfair labor practice] charges and issuance of complaints . . . , and in respect of the prosecution of such complaints before the Board." *Id.* § 153(d).[1] In addition, Section 3(a) of the Act, *id.* § 153(a), creates within the Agency a five-member Board, which is empowered by Section 10(a), *id.* § 160(a), to adjudicate unfair labor practice complaints brought by the General Counsel, and by Section 9, *id.* § 159, to process petitions for union representation elections and to certify the results of such elections.[2]

The Little River Band of Ottawa Indians ("the Band") is a federally recognized Indian tribe, *see* 25 U.S.C. §§ 1300k-1300k-7, located in Michigan. (Amended Verified Complaint ¶¶ 1-2.) Pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, the Band conducts gaming activities on its lands in an establishment known as the Little River Casino Resort ("the Casino"). (*See* Am. V. Compl. ¶¶ 17-19, 23.) Relying on the authority of its tribal constitution, the Band

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[1] The General Counsel has delegated this authority to the Agency's thirty-two Regional Directors, who exercise jurisdiction over defined areas of the country, subject to the General Counsel's ultimate supervision. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 139 (1975) (citing 29 C.F.R. §§ 101.8, 102.10).

[2] For purposes of this brief, "the Board" will refer solely to the Section 3(a) collegial body. The administrative agency as an institutional whole will be referred to as "the NLRB" or "the Agency."

has enacted a law that regulates labor relations at its "subordinate economic organization[s]," which includes the Casino. (*See id.* ¶¶ 12-16, 26.)[3] Notably, the Band's labor law prohibits employees of such tribal enterprises from "engag[ing] in a strike." (*Id.* Ex. B at 20.) Employees who violate the no-strike provision are subject to a civil fine of up to $1,000 and termination of employment. (*Id.* Ex. B at 31.) By contrast, the NLRA explicitly recognizes and protects the right of covered employees to engage in concerted protected activities, including lawful strikes. *See* 29 U.S.C. § 157; *id.* § 163 (stating that the Act shall not be construed "to interfere with or impede or diminish in any way the right to strike," except as expressly stated therein). Covered employers who unlawfully interfere with the exercise of this right commit an unfair labor practice under Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1).

FACTUAL BACKGROUND

On or about March 28, 2008, General Teamsters Union, Local 406 filed an unfair labor practice charge against the Band with the Grand Rapids Resident Office in NLRB Region 7. (Am. V. Compl. ¶ 27; *id.* Ex. E.) The charge identifies the Band as an "employer" whose principal product or service is the operation of a casino. (Am. V. Compl. Ex. E.)[4] The body of the charge alleges that several provisions of the

[3] The Band's constitution was approved by the United States Department of the Interior. (Am. V. Compl. ¶ 7.) The proviso to the Certificate of Approval states "[t]hat nothing in this approval shall be construed as authorizing any action under this document that would be contrary to Federal law." (Am. V. Compl. Ex. A at 17.)

[4] Section 2(2) of the NLRA defines an "employer" as "any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any

Band's tribal constitution violate Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by denying to employees rights that are protected by the NLRA, such as the right to strike. (*Id.*)[5]

Upon the filing of the charge, the NLRB's Resident Office initiated an investigation. (*See* Am. V. Compl. ¶ 29; *id.* Ex. F.) At the request of the Regional Director for Region 7, an administrative subpoena dated May 14, 2008, was served upon the Band's Tribal Council Speaker. (Am. V. Compl. ¶ 31; *id.* Ex. H.) However, the Band refused to comply with the subpoena. (*See* Am. V. Compl. ¶ 32; *id.* Ex. I.) Instead, the Band sent the Regional Director a letter which argued that the Agency does not "ha[ve] jurisdiction to strike down [the Band's] Constitution or laws" and that the charge involved a matter as to which the Agency "plainly lacks jurisdiction." (Am. V. Compl. ¶ 32; *id.* Ex. I.) At the Regional Director's request, two additional administrative subpoenas, both dated November 5, 2008, were served upon the Band's Tribal Council Speaker and the Band's custodian of records. (Am. V. Compl. ¶ 34; *id.* Ex. J.) A cover letter accompanying the November subpoenas limits the scope of the requested information to that relevant to the Casino. (*See* Am. V. Compl. Ex. J.) As before, the Band refused to comply with the

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wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act . . . , or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." Indian tribes are not expressly excluded from this definition. *Cf.* 42 U.S.C. § 2000e(b) (stating that "an Indian tribe" is not a title VII "employer"); *id.* § 12111(5)(B)(i) (same with respect to the Americans with Disabilities Act).

[5] Subsequent investigation revealed that the target of the Teamsters' unfair labor practice charge is the Band's labor law, not its tribal constitution per se.

subpoenas. (*See* Am. V. Compl. ¶ 35; *id.* Ex. K.) In a letter addressed to the Regional Director regarding the November subpoenas, the Band's counsel questioned the Agency's jurisdiction over the Band and suggested that the Band would be "irreparably harmed if it were forced to endure and exhaust NLRB unfair labor practice proceedings." (Am. V. Compl. Ex. K. at 2-3.) In addition, the Band's attorney requested "timely confirmation that [the Teamsters'] Charge will proceed no further." (*Id.* Ex. K at 3.)

In response, the Agency defended the propriety of the Resident Office's investigation, emphasizing two points: first, the unfair labor practice charge at issue challenges the Band's labor law only as applied to the Casino and not other tribal establishments; and second, at this stage of the investigation, the Agency simply seeks to determine whether the Band is actually the employer—or a joint or single employer—of the Casino's employees, and whether Agency jurisdiction over the Band's operation of the Casino is appropriate under the principles of *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055 (2004), *further proceedings*, 345 N.L.R.B. 1047 (2005), *enforced*, 475 F.3d 1306 (D.C. Cir. 2007).[6] Moreover, the

[6] In the 2004 *San Manuel* decision, the Board examined the language of Section 2(2) of the Act, 29 U.S.C. § 152(2), as well as principles of federal Indian law and determined that it was proper to assert jurisdiction over a tribally owned and operated casino that had been named as an "employer" in an unfair labor practice case. The Board also set forth discretionary jurisdictional standards that it would apply in cases involving tribal enterprises. On judicial review, the D.C. Circuit accorded *Chevron* deference to the Board's reading of the term "employer" and enforced the Board's order.

In the pending unfair labor practice case, a conclusion that the Band is acting as an NLRA "employer" of the Casino's employees could support the theory that the

Agency stated that an unfair labor practice complaint against the Band "would likely issue" on the basis of the Teamsters' charge if, at the completion of the Resident Office's investigation, (1) Agency jurisdiction is supported, and (2) reasonable cause exists to believe that the Band's laws, as applied to the labor relations of the Casino, are interfering with rights protected by the NLRA. (*See* Am. V. Compl. Ex. M at 2.)[7]

Based on the foregoing facts, the Band filed the instant, two-count Amended Verified Complaint against the NLRB. The first count of the Complaint alleges that the Agency "threatens coercive action against the Tribe on behalf of the Teamsters to strike down the Constitution or laws of the Tribe by means of an unfair labor practice proceeding." (Am. V. Compl. ¶ 43.) In addition, the Band asserts that it faces "immediate irreparable harm from . . . a protracted, coercive agency proceeding in a matter over which the Defendant patently lacks subject matter jurisdiction." (*Id.* ¶ 46.) Accordingly, the Complaint requests that this Court enjoin the Agency "from proceeding against the Band . . . by any means in furtherance of the Teamsters' Charge." (*Id.* at 14.) Furthermore, the second count requests that

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Band's labor law functions, at least in part, as a work rule that forbids and punishes Casino employee strike activity. Work rules that conflict with rights protected by the Act are properly subject to attack in unfair labor practice proceedings. *See NLRB v. Ohio Masonic Home*, 892 F.2d 449, 450 (6th Cir. 1989). And, as stated, the NLRA protects the right of covered employees to engage in lawful strikes.

[7] The General Counsel previously issued an unfair labor practice complaint against a different Indian tribe for applying its labor law, which "essentially outlawed unions," to a casino owned by the tribe. Mark Ranzenberger, *Tribe Repeals Union Ban*, The Morning Sun, Sept. 29, 2008, *at* http://www.themorningsun.com/articles/2008/09/29/news/srv0000003628333.prt. That case settled after the tribe repealed its labor law. *Id.*

this Court "[i]ssue a declaratory judgment against the [Agency], declaring that it has no authority to proceed against the Band . . . by means of an unfair labor practice case to challenge the Band's Constitution or laws." (*Id.*) The Band also requests its costs and such further relief as the Court deems just or equitable. (*Id.*)

SUMMARY OF ARGUMENT

Pursuant to a properly filed unfair labor practice charge, the Agency is presently investigating whether the Band is an "employer" within the meaning of the NLRA. In that proceeding, the Agency is not attempting a facial challenge to the Band's Constitution or labor law. Rather, the Agency is only concerned with the Band's labor law as it might apply to Casino employees, provided that the Band qualifies as the "employer" of those employees. Thus, the first and—for the Agency—sole issue before this Court is whether the Band can effectively bypass the NLRA's congressionally mandated review procedures by launching a preemptive attack on the Agency's unfair labor practice proceeding in district court.[8]

The Agency submits that the Supreme Court's decision in *Myers v. Bethlehem Shipbuilding Co.*, 303 U.S. 41 (1938), as well as Sixth Circuit and out-of-circuit precedent, preclude this Court from exercising subject-matter jurisdiction over the instant case. Those decisions recognize that the NLRA's statutory review procedures, in particular Section 10(f) of the Act, deny district courts the authority to hear challenges to the commencement, prosecution, or adjudication of unfair

[8] Jurisdiction is not conferred on the district court just because the Band may ultimately be correct about the merits of the underlying proceeding—that is, that the Board cannot assert jurisdiction over the Band as an employer.

labor practice proceedings. Rather, Section 10(f) strictly requires parties to unfair labor practice proceedings to exhaust their administrative and legal remedies before the Board and an appropriate court of appeals. Accordingly, the Band's reliance on general jurisdictional statutes to establish subject-matter jurisdiction in this case is misplaced, the Band's Motion for Summary Judgment should be denied, and the Amended Verified Complaint must be dismissed for lack of subject-matter jurisdiction.

ARGUMENT

"When a defendant moves to dismiss for lack of subject-matter jurisdiction 'the plaintiff has the burden of proving jurisdiction in order to survive the motion.'" *Wisecarver v. Moore*, 489 F.3d 747, 749 (6th Cir. 2007) (quoting *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990)).[9] For the reasons set forth below, the Band cannot sustain this burden, and the instant case should accordingly be dismissed.

I. Well-Established Legal Precedent Deprives This Court of Subject-Matter Jurisdiction Because the NLRA Exclusively Vests the United States Courts of Appeals with the Authority to Review "All Questions of the Jurisdiction of the Board" in Unfair Labor Practice Proceedings.

The jurisdiction of federal district courts is limited, extending only to those subjects over which Congress has granted jurisdiction by statute. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982);

[9] At the Pre-Motion Conference held by this Court on May 22, 2009, it was agreed that this Court could effectively treat the instant Response, to the extent that it challenges this Court's subject-matter jurisdiction, as a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1).

Goldsmith v. Sutherland, 426 F.2d 1395, 1398 (6th Cir. 1970). The Band asserts two separate bases for district court jurisdiction—specifically, general federal question jurisdiction under 28 U.S.C. § 1331 and jurisdiction over "all civil actions[] brought by any Indian tribe or band" that raise a federal question under 28 U.S.C. § 1362. (*See* Am. V. Compl. ¶ 40.) However, as explained below, the Band's reliance on these provisions is misplaced because the NLRA's exclusive review procedures divest this Court—and all district courts—of jurisdiction to consider the Band's claims. Instead, the Band's challenge to the Agency's jurisdiction over the underlying unfair labor practice matter must be presented to the Board in the first instance and thereafter may be raised in an appropriate court of appeals on judicial review of a final Board order.

A. Congress did not grant federal district courts jurisdiction over NLRA unfair labor practice proceedings. Rather, Congress gave the Board—and only the Board—exclusive authority to prevent "any person" from engaging in unfair labor practices, with review jurisdiction lodged in the circuit courts. 29 U.S.C. § 160(a); *see Mayer v. Ordman*, 391 F.2d 889, 891 (6th Cir. 1968) (per curiam) ("The cases are clear that Congress has provided an administrative tribunal, the National Labor Relations Board, to administer the Labor Acts and that, other than final orders from the NLRB, which are appealable to the United States Courts of Appeals, the power of the Board in disputes between labor and management is exclusive.").

Section 10(f) of the NLRA, 29 U.S.C. § 160(f), describes the procedure that aggrieved persons must follow to obtain judicial review in unfair labor practice

cases. Pursuant to that provision, the *only* Agency decisions that are subject to judicial review are "final order[s] of the Board," and then *only* in an appropriate "United States court of appeals." *Id.* As the Supreme Court has noted, Congress designed Section 10(f) to give aggrieved parties "a full, expeditious, and *exclusive* method of review . . . after a final order is made. Until such final order is made the party is not injured, and cannot be heard to complain." H.R. Rep. No. 74-1147, at 24 (1935) (emphasis added) (quoted in *Myers v. Bethlehem Shipbuilding Co.*, 303 U.S. 41, 48 n.5 (1938)).

The Supreme Court's decision in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), applies directly to the instant case and makes clear the preclusive effect that Section 10(f) has on efforts to enmesh district courts in disputes concerning Agency jurisdiction over pending unfair labor practice cases. In *Myers*, a putative NLRA employer against whom an unfair labor practice complaint had issued sought to enjoin an administrative hearing that the NLRB had scheduled before a trial examiner. *Id.* at 46.[10] The company, Bethlehem Shipbuilding, also sought declaratory relief. *Id.* Similar to the Band's position here, Bethlehem Shipbuilding argued that its operations fell outside the Act's lawful scope and that the Agency had acted in excess of its jurisdiction. *Id.* at 47. Indeed, the company maintained that application of the NLRA to its activities would "violate the Federal Constitution." *Id.* at 46. Bethlehem Shipbuilding further argued that the holding of hearings "would result in irreparable damage to the corporation." *Id.* at 47-48.

[10] "Trial examiners" are now referred to as "administrative law judges."

The district court found merit to these arguments and issued a preliminary injunction. *Id.* at 46. The First Circuit affirmed. *Id.* at 46-47.

On review, the Supreme Court reversed. In so doing, the Court emphatically rejected the proposition that district courts have the power to consider challenges to Agency jurisdiction over pending unfair labor practice matters. In an opinion delivered by Justice Brandeis without dissent, the Court held that "[t]he District Court is without jurisdiction to enjoin hearings because the power 'to prevent any person from engaging in any unfair labor practice affecting commerce' has been vested by Congress in the Board and the Circuit Court of Appeals." *Id.* at 48. Because Board orders are not self-enforcing, the Court determined that the review procedures set forth by Section 10(f) provide "an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board." *Id.* Indeed, the *Myers* Court emphasized the comprehensive nature of appellate court review available at the conclusion of Agency unfair labor practice cases: "'*[A]ll questions of the jurisdiction of the Board* and the regularity of its proceedings and *all questions of constitutional right or statutory authority* are open to examination by the court.'" *Id.* at 49 (emphasis added) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937)). Thus, because "the procedure before the Board is appropriate and the judicial review so provided is adequate, Congress had power to vest exclusive jurisdiction in the Board and the Circuit Court of Appeals." *Id.* at 50. For these reasons, district court jurisdiction over matters arising in unfair labor practice cases was found to be incompatible with Congress's statutory design.

B. Significantly, Bethlehem Shipbuilding's assertions of irreparable harm did not alter the Supreme Court's conclusion in *Myers*. As the Court observed, the company's suit for injunctive and declaratory relief inappropriately sought to "substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board *exclusively* should hear and determine in the first instance." *Id.* (emphasis added). The company contended that its attempt to evade the "long-settled rule" of administrative exhaustion was nonetheless permissible because "rights guaranteed by the Federal Constitution [would have] be[en] denied unless it [were] held that the District Court ha[d] jurisdiction to enjoin the holding of a hearing by the Board." *Id.* The company also maintained that an administrative hearing would result in costly litigation expenses and diminished harmony in labor relations. *Id.* at 47. However, the company's attempt to graft an irreparable harm exception onto the administrative exhaustion principle was rejected by the Court: "Obviously, the rules requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of trial to establish the fact." *Id.* at 51-52.

Myers thus made clear the bedrock principle that decides this case—namely, that a charged party in an unfair labor practice case cannot bypass the NLRA's review provisions by challenging the Agency's jurisdiction in an ancillary district

court lawsuit. Rather, pursuant to Section 10(f), an attack on Agency jurisdiction must be advanced in an appropriate court of appeals only after the NLRB's administrative proceedings have culminated in a final Board order. The Band, echoing the company in *Myers*, claims that it cannot be required to follow this "long-settled rule" because exhaustion of administrative remedies before the Board would cause the Band to suffer irreparable harm. Whereas the plaintiff in *Myers* complained of irreparable damage to, inter alia, its constitutional rights, the assertedly irreparable harm here is an ill-defined injury "to the Band's status as an Indian tribal government." (Pl.'s Mot. S.J. at 24.) But nothing in *Myers* indicates that the Court would have reached a different result had a different *kind* of "irreparable harm" been at issue. Rather, the Court recognized that the sufferance of various harms—whether real or imagined, quantifiable or abstract—is an unavoidable consequence of any adjudicatory process.

C. Furthermore, although the NLRB acknowledges and respects the Band's interest in protecting its tribal sovereignty, the abstract "harm" complained of by the Band here is minimal at best. It cannot be overemphasized: Agency proceedings are not coercive, and Board orders are not self-enforcing. Thus, the NLRB has no ability to require the Band to modify its laws or their application to the Casino without first obtaining a decree granting enforcement of a Board order by a court of appeals. *See Myers*, 303 U.S. at 48. And an appellate court will deny a petition for enforcement if it is persuaded that the Agency lacks jurisdiction over the Band's activities. *See Catholic Bishop v. NLRB*, 559 F.2d 1112, 1131 (7th Cir.

1977), *aff'd,* 440 U.S. 490 (1979). Therefore, assuming that the General Counsel issues an administrative complaint on the basis of the Teamsters' charge, the Band need only submit its jurisdictional arguments to the Board for consideration in the first instance in order to preserve them for judicial review. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."). The Band fails to explain how following this modest procedure could result in "irreparable harm" to its sovereignty. *Cf. S.C. State Ports Auth. v. NLRB*, 914 F.2d 49, 52 (4th Cir. 1990) (permitting the Board to hold a representation hearing despite putative employer's claim that it was exempt from the NLRA as a "political subdivision" of a state). Rather, the harm suffered by the Band is "irreparable" only if the Band has sovereign immunity from NLRB unfair labor practice proceedings. But, as the Band itself concedes, "tribes do not have sovereign immunity from suit by the United States or its agencies." (Pl.'s Mot. S.J. at 24 n.21.) Therefore, even aside from the fact that the Band's assertions of irreparable harm are irrelevant to the jurisdictional analysis, those harms are the inevitable consequence of litigation, from which the Band is not immune, and are wholly insufficient to merit a departure from the rule of *Myers*.

By comparison, *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055 (2004), *further proceedings*, 345 N.L.R.B. 1047 (2005), *enforced*, 475 F.3d 1306 (D.C. Cir. 2007), illustrates the proper way for the Band to seek judicial review of its

sovereignty arguments in a manner that respects Congress's choice of federal forum. In that case, the San Manuel Band of Serrano Mission Indians, a California tribe, argued on Section 10(f) review of a final Board order in an unfair labor practice case that the Board lacked jurisdiction over a casino wholly owned and operated by the tribe on its reservation. As here, "the gravitational center" of the San Manuel Band's contest of the Board's jurisdiction "[wa]s tribal sovereignty." 475 F.3d at 1310. The arguments presented in opposition to the Board's jurisdiction were similar to those made here, and the issues were considered at length by both the Board and the D.C. Circuit before the San Manuel Band was directed to alter its management of the casino to satisfy the requirements of the NLRA. The Little River Band can point to no reason why its assertion of tribal sovereignty is entitled to a different, earlier, and statutorily precluded form of federal judicial review that would deny the Board the opportunity to decide its own jurisdiction upon evidence and legal argument presented in an agency-level adversarial proceeding, as dictated by Congress. While the Board has not yet had an opportunity to consider any evidence or the merits of the General Counsel's developing position, this case presents no meaningful distinction from the procedural position of the San Manuel Band when it was pressing its sovereignty arguments. Enactment of an ordinance governing labor relations at its casino no more entitles the Little River Band to sidestep the NLRA's exclusive review procedures than did the San Manuel Band's management of its casino's labor relations in the *San Manuel* case.

D. Since *Myers* was decided, this circuit and others have repeatedly rejected subsequent attempts to enjoin the NLRB from investigating, litigating, or adjudicating unfair labor practice cases. *See, e.g.*, *Amerco v. NLRB*, 458 F.3d 883 (9th Cir. 2006); *NLRB v. Interstate Dress Carriers, Inc.*, 610 F.2d 99, 107 (3d Cir. 1979); *J.P. Stevens Employees Educ. Comm. v. NLRB*, 582 F.2d 326 (4th Cir. 1978); *United Aircraft Corp. v. McCulloch*, 365 F.2d 960 (D.C. Cir. 1966); *Bokat v. Tidewater Equip. Co.*, 363 F.2d 667 (5th Cir. 1966). Two particularly notable cases are discussed here. One is *Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 401 (6th Cir. 2002), a binding decision of the Sixth Circuit that relied heavily on the "well-steeped precedent" of *Myers* to vacate a district court injunction of a then-pending unfair labor practice case. In that case, the district court refused to follow *Myers* because, in the lower court's view, "'it is not enough that a court of appeals can eventually tell the Board that it acted outside its statutory authority; by then the damage would be done.'" *Id.* (quoting the district court). The Sixth Circuit sharply criticized the district court's justification as "without foundation in the jurisprudence," *id.*, noting that "*Myers* [had] expressly rejected this type of reasoning," *id.*

Another instructive case in this long line of authorities is *Grutka v. Barbour*, 549 F.2d 5 (7th Cir.), *cert. denied*, 431 U.S. 908 (1977). In *Grutka*, the Catholic Church sought to have a district court enjoin simultaneous representation and unfair labor practice cases involving a parochial school on the ground that the Agency lacked jurisdiction. Specifically, the Church argued that application of the NLRA to its

parochial school would violate the Religion Clauses of the First Amendment. However, like the Supreme Court in *Myers*, the Seventh Circuit rejected the Church's effort to establish subject-matter jurisdiction, concluding that "[t]he constitutional allegations of this complaint do not confer jurisdiction upon the district court because the statutory review procedures are fully adequate to protect the plaintiff's constitutional rights." *Id.* at 9.

After denying certiorari in *Grutka*, the Supreme Court granted certiorari in a related consolidated case to consider the merits of the Church's same First Amendment argument, but only after the issue had been addressed first by the Board in the underlying unfair labor practice proceedings and then by the Seventh Circuit on judicial review pursuant to Section 10(f). *See NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), *aff'g* 559 F.2d 1112 (7th Cir. 1977), *denying enforcement to* 224 N.L.R.B. 1221, *and Diocese of Fort Wayne-South Bend*, 224 N.L.R.B. 1226 (1976). The Supreme Court ultimately ruled in favor of the Church, concluding that "Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions." *Id.* at 506. Thus, the Supreme Court's dispositions of *Grutka* and *Catholic Bishop* show that even a *meritorious* claim of jurisdictional overreach by the Agency should not alter the *Myers* exhaustion rule. Accordingly, the Band's claim here of jurisdictional overreach in the underlying unfair labor practice case must also fail to establish subject-matter jurisdiction.

E. Contrary to the Band's assumption, subpoena enforcement cases in which district courts have ruled on issues of federal agency jurisdiction provide no support

for the exercise of district court jurisdiction in the different circumstances of this case. Accordingly, the Band is off the mark when it cites three subpoena enforcement cases to support its proposition that "the assertion of agency authority against an Indian tribe in a setting where the agency lacks jurisdiction to proceed constitutes irreparable harm to the tribe." (Pl.'s Mot. S.J. at 24 n.22.)

Pursuant to congressional design, "District Courts . . . have a very very minor role to play in [the NLRA's] statutory structure." *Bokat*, 363 F.2d at 673. As a result, the Act requires the Board to affirmatively avail itself of district court jurisdiction in only two limited circumstances: (1) to obtain judicial enforcement of its administrative subpoenas under Section 11 of the Act, 29 U.S.C. § 161, and (2) to obtain temporary injunctive relief against employers or labor unions under Section 10(j) or (*l*), *id.* § 160(j), (*l*). In either situation, judicial enforcement of the Board's request will mandate a change in the respondent's behavior and carries with it the possibility of contempt sanctions for noncompliance. Therefore, cases arising under those sections sometimes address the antecedent question of Agency jurisdiction over the underlying administrative matter to assure the court that its powers are being legitimately exercised. But even then, the inquiry is quite limited and, at most, focuses on whether NLRB jurisdiction is "plainly lacking," which is not the case here. *See, e.g.*, *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 1002 (9th Cir. 2003) (enforcing Board subpoenas served upon a tribal organization because Agency jurisdiction was not "plainly lacking" under the *Tuscarora/Coeur*

'dAlene framework, which several circuits have adopted to determine whether federal enactments apply to Indian tribes).

Here, however, the NLRB makes no request for this Court to enforce the Board's administrative subpoenas or to enter a temporary injunction against the Band, and it is firmly established that the Band cannot invoke those sources of district court jurisdiction itself. *See Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 516-17 (1955) (noting that only the NLRB may seek injunctive relief under Section 10(j) or (*l*)); *NLRB ex rel. Int'l Union of Elec., Radio & Mach. Workers v. Dutch Boy, Inc.*, 606 F.2d 929, 932 (10th Cir. 1979) (same for subpoena enforcement under Section 11). Accordingly, cases arising under those provisions of the NLRA, where the Board actively invokes district court jurisdiction pursuant to specific grants contained in Sections 10 or 11 of the Act, are inapposite. They do not justify the Band's request that this Court perform an examination of the Agency's general jurisdiction over the pending unfair labor practice case.

Moreover, the cited subpoena enforcement cases lend no support to the Band's previously rebutted argument that the mere assertion of Agency jurisdiction in the pending unfair labor practice case would result in irreparable harm. Unlike those cases, here the Agency is not requesting that this Court exercise its judicial power to compel a party to submit evidence to the NLRB over the party's objections. And, as previously explained, the NLRB cannot, on its own, compel *any* specific remedial conduct by the Band until after a court of appeals considers properly presented arguments, including lack of Agency jurisdiction, and enforces the Board's final

order. Therefore, this court need look no further than *Myers*, which holds that the conduct of litigation to resolve the question of whether the Band is acting as an "employer" within the meaning of the NLRA does not constitute irreparable harm. For these reasons, the Band's attempt to rehabilitate its "irreparable harm" argument using subpoena enforcement cases is unavailing.

* * *

In sum, the Band's effort to secure injunctive and declaratory relief here runs headlong into a multitude of binding and persuasive authorities, which consistently follow *Myers* and hold that Section 10(f) of the NLRA precludes district courts from exercising subject-matter jurisdiction over challenges to Agency unfair labor practice proceedings. Moreover, the Band's request for equitable relief here is, if anything, even more extraordinary than those of its unsuccessful predecessors. In most of the cases cited above, such as *Detroit Newspaper* and *Grutka*, the plaintiffs sought to enjoin the Agency from holding proceedings that were scheduled only *after* the General Counsel had made a prosecutorial determination on the merits of the underlying unfair labor practice charge and had issued an administrative complaint. Here, by contrast, the Band seeks to enjoin the Agency from processing the unfair labor practice charge filed by the Teamsters and to have this Court decide the NLRB's jurisdiction over the Band's Casino-related activities even *before* the General Counsel has formally decided to issue an administrative complaint. (*See* Am. V. Compl. at 13.) This is not only contrary to *Myers*, it also squarely violates the long-settled principle that the General Counsel's prosecutorial

discretion is unreviewable. *See NLRB v. United Food & Comm. Workers Union, Local 23*, 484 U.S. 112, 126 (1987); *Mayer*, 391 F.2d at 889 ("It is well settled that the National Labor Relations Act precludes District Court review of the manner in which the General Counsel of the Board investigates unfair labor practice charges and determines whether to issue a complaint thereon.").[11] Thus, the remedies sought by the Band are not only unprecedented in this context, but are contrary to well-established law, and therefore fall outside this Court's power to grant.

II. Because Neither the General Jurisdictional Statutes Nor the Inapposite Cases Cited by the Band Trump the NLRA's Specific Review Procedures, the Band Has Failed to Prove That Subject-Matter Jurisdiction Exists.

In the absence of a specific statutory grant of jurisdiction, *Myers* and its progeny compel the conclusion that the NLRA's review provisions—in particular, Section 10(f)—divest this Court of jurisdiction to hear the instant case. The Band attempts to satisfy its burden of proving district court jurisdiction by relying on two general jurisdictional statutes, 28 U.S.C. §§ 1331 and 1362. However, as shown below, those provisions do not override Section 10(f)'s specific grant of exclusive review to the courts of appeals and therefore fail to establish the existence of subject-matter jurisdiction in this case.

A. Section 1331 of title 28 gives district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Section 1362 of the same title similarly provides district courts with "original

[11] The NLRB points this out merely to emphasize the extraordinary nature of the Band's request and not to suggest that if the General Counsel were to issue complaint, this Court would then have jurisdiction.

jurisdiction of all civil actions . . . aris[ing] under the Constitution, laws, or treaties of the United States" when brought by a federally recognized Indian tribe or band. As the Supreme Court has observed, "Section 1362 was passed in 1966 in order to give Indian tribes access to federal court on federal issues without regard to the $10,000 amount-in-controversy requirement then included in 28 U.S.C. § 1331, the general federal question jurisdictional statute." *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 561 n. 10 (1983); *see also Oneida Indian Nation v. County of Oneida*, 464 F.2d 916, 920 n.4 (2d Cir. 1972) (Friendly, J.) (noting that the purpose of section 1362 was to overrule a 1964 Ninth Circuit case "involv[ing] a claim that would have been assertable under § 1331 but for the requirement of jurisdictional amount"), *rev'd on other grounds*, 414 U.S. 661 (1974). Since 1980, when Congress repealed section 1331's amount-in-controversy requirement, *see* Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369, the jurisdictional scope of section 1362 has been, at least on its face, coextensive with section 1331 in suits brought by Indian tribes.

"What is striking about this most unremarkable statute [i.e., section 1362] is its similarity to any number of other grants of jurisdiction to district courts to hear federal-question claims." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 784 (1991). Indeed, courts noticing this similarity have classified both sections 1331 and 1362 as general jurisdictional statutes. *See Miami Tribe v. United States,* 198 Fed. Appx. 686, 691 (10th Cir. 2006) (sections 1331 and 1632); *S. Delta Water Agency v. United States*, 767 F.2d 531, 543 (9th Cir. 1985) (section 1362); *Cayuga*

Indian Nation v. Cuomo, 1999 WL 509442, at *4 (N.D.N.Y. 1999) (same); *Poarch Band of Creek Indians v. Alabama*, 776 F. Supp. 550, 555 (S.D. Ala. 1991) (same). General jurisdictional statutes like sections 1331 and 1362 provide no exception to the long-settled limitations on judicial authority over NLRB proceedings. As the Ninth Circuit observed in a case resolving a challenge to agency action where district court jurisdiction was premised on two general jurisdictional provisions:

> "The courts uniformly hold that statutory review in the agency's specially designated forum prevails over general federal question jurisdiction in the district courts." *Specific grants of exclusive jurisdiction to the courts of appeals override general grants of jurisdiction to the district courts.* A contrary holding would encourage circumvention of Congress's particular jurisdictional assignment. It would also result in fractured judicial review of agency decisions, with all of its attendant confusion, delay, and expense.

Owners-Operators Indep. Drivers Ass'n of Am., Inc. v. Skinner, 931 F.2d 582, 589 (9th Cir. 1991) (emphasis added and citations omitted); *see also Louisville & Nashville R.R. Co. v. Donovan*, 713 F.2d 1243, 1245 (6th Cir. 1983) (rejecting arguments that sections 1331, 1337, and 1361 provided the district court with jurisdiction to review the Secretary of Labor's definition of a statutory term because "when Congress designates a forum for judicial review of administrative action, that forum is exclusive" and "Congress has conferred upon this court such sole and exclusive jurisdiction"). By this same reasoning, the Band's reliance on two general jurisdictional statutes to establish district court jurisdiction cannot surmount the NLRA's specific review procedures, which exclusively vest the power of judicial review over NLRB unfair labor practice proceedings in a "specially designated forum"—that is, the courts of appeals.

B. The Band's reliance on a footnote contained in *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), to establish this Court's subject-matter jurisdiction under section 1362 is misplaced. In that footnote, the Court observed that a "[t]ribe, *qua* [t]ribe, had a discrete claim of injury . . . so as to confer standing upon it" to challenge as preempted under section 1362 a state motor vehicle tax imposed on the tribe's members. *Id.* at 469 n.7. The Court noted that a finding of injury to the tribe was "consistent with other doctrines of standing" because "the substantive interest which Congress has sought to protect is tribal self-government." *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975)). By these words, *Moe* simply recognized that federal Indian policy promotes tribal self-government and that impairment of tribal sovereignty caused by the imposition of a preempted state tax scheme creates a cognizable injury for purposes of Article III standing. Indeed, this reading of *Moe* was confirmed by the Eleventh Circuit in *Miccosukee Tribe of Indians v. Florida State Athletic Commission*, 226 F.3d 1226, 1231 (11th Cir. 2000), where the court quoted the relevant portions of the *Moe* footnote in support of its conclusion that "an Indian tribe satisfies Article III's injury requirement by alleging that [a state] tax infringes upon its sovereignty." Thus, contrary to the Band's contention, (*see* Pl.'s Mot. S.J. at 27,) the *Moe* footnote resolves a question of *standing*, not of district court jurisdiction. *Moe* does not hold that protecting Indian sovereignty serves as a basis for conferring automatic

jurisdiction on district courts under section 1362, notwithstanding other restrictions on such jurisdiction.[12]

C. Similarly inapposite is the Band's reliance on an Eleventh Circuit case which holds that section 1331 permitted a state agency to challenge a Board order issued in a *representation case* where the state agency had intervened but lacked the ability to secure judicial review. *See Florida Bd. of Bus. Regulation v. NLRB*, 686 F.2d 1362 (11th Cir. 1982). Representation cases, unlike unfair labor practice cases, do not result in final Board orders. *Am. Fed'n of Labor v. NLRB*, 308 U.S. 401, 409 (1940). As a result, rulings made in representation cases are not subject to direct judicial review, even after the representation case has concluded and the Board has certified the results of the election. *Id.* at 409-11. Instead, such rulings are reviewable "only where the dispute concerning the correctness of the certification eventuates in a finding by the Board that an *unfair labor practice* has

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[12] The Band thus gains no support from its reliance on cases, properly brought under section 1362, where courts have declined to apply abstention doctrines. (*See* Pl.'s Mot. S.J. at 27 (citing *Moe*, *Winnebago*, and *Tohono*).) First, this argument presumes that jurisdiction under section 1362 exists in this case and that the issue here is merely whether this Court should abstain from exercising its jurisdiction. As shown, however, no such jurisdiction exists. Second, the argument fails to appreciate the difference between exhaustion, on the one hand, and abstention on the other. Had the district court in each of the three cited cases been constrained by an abstention doctrine, the tribal plaintiffs would have been relegated to *state* courts—without access, as of right, to a reviewing federal court—for the vindication of their federal rights. Thus, the outcomes in the three cited cases are consistent with Congress's historical reluctance to subject Indian tribes to *state* court jurisdiction for the protection of their federal rights. *See Native Vill. of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 553-54 (9th Cir. 1991) (noting that state courts have "never [been] believed by Congress to be the historical defenders of tribal interests"). Here, by contrast, administrative exhaustion under *Myers* merely requires the Band to first present its arguments to a *federal* agency and delays—but does not deny—the Band's access, as of right, to a reviewing federal court.

been committed as, for example, where an employer refuses to bargain with a certified representative on the ground that the election was held in an inappropriate bargaining unit." *Boire v. Greyhound Corp.*, 376 U.S. 473, 477 (1964) (emphasis added). Thereafter, the review procedures established by Section 10(f) govern. *See* 29 U.S.C. § 159(d).[13]

In *Florida Board*, the NLRB for the first time "ordered a representation election in a unit of employees of a privately owned and operated, and state-regulated, pari-mutuel jai alai business in Florida." 686 F.2d at 1364 (footnote omitted). The State of Florida perceived a potential for conflict between its established regulatory authority over privately owned jai alai frontons and the NLRB's newly asserted authority over the labor relations at those same facilities. Although the State had intervened in the representation case, it could not be assured that the "privately owned and operated" frontons would refuse to bargain with the union, should the employees have voted for union representation in the NLRB-ordered election.

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[13] *Leedom v. Kyne*, 358 U.S. 184 (1958), recognizes a narrow exception to this rule, but that exception has no application here. *Leedom* permits district courts to strike down Board representation case orders "made in excess of [the Board's] delegated powers and contrary to a specific prohibition in the Act," *id.* at 188, when, in the absence of district court jurisdiction, "there would be no remedy to enforce the statutory commands which Congress had written," *id.* at 190. This latter requirement is particularly significant here because the availability of judicial review in unfair labor practice cases "mak[es] district court jurisdiction improper under *Leedom.*" *Detroit Newspaper*, 286 F.3d at 391. Accordingly, the Band does not argue that this case fits within the narrow parameters of the *Leedom* exception, nor could it. As a result, the Band's reliance on the tripartite criteria of *Shawnee Coal Co. v. Andrus*, 661 F.2d 1083, 1093 (6th Cir. 1981), to determine whether administrative action is "so far out of bounds" as to satisfy the first *Leedom* factor is beside the point. *See Detroit Newspaper*, 286 F.3d at 391 (declining to address the applicability of the *Shawnee* criteria in light of the court's conclusion that *Leedom* jurisdiction does not exist to enjoin an unfair labor practice case).

Consequently, there was no guarantee that the election order would have become judicially reviewable in a subsequent unfair labor practice case brought under Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), for refusal to bargain with a certified union.

In these unique circumstances, the Eleventh Circuit concluded "that a plaintiff *who cannot seek review of the Board's order in the Court of Appeals* but who claims that the Board violated his federal rights has the right to repair to the district court under any statute that may grant the district court the power to hear his claim." 686 F.2d at 1370; *cf. Navajo Tribe v. NLRB*, 288 F.2d 162, 165 n.6 (D.C. Cir. 1961) (noting that there was no challenge to the district court's jurisdiction over a request by an Indian tribe to enjoin a Board-ordered representation election to which the tribe was not a party). The distinction between *Florida Board* and this case is obvious. Here, the Band is a charged party in an *unfair labor practice* case and can unmistakably "seek review of the Board's order in the Court of Appeals," 686 F.2d at 1370, under Section 10(f) of the NLRA. This same opportunity was denied to the state in *Florida Board* because that case arose in the context of a *representation proceeding* where the state did not control the employer's decision whether to refuse to bargain with the union. Thus, the Band's attempt to establish subject-matter jurisdiction under the authority of this case also fails.[14]

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[14] *Lipscomb v. FLRA*, 200 F. Supp. 2d 650, 654-56 (S.D. Miss. 2001), *aff'd*, 333 F.3d 611 (5th Cir. 2003), which involved federal public-sector labor law, erroneously relies on *Florida Board* to uphold the availability of declaratory relief in a district court suit brought by a state actor under section 1331, even when the state actor is the purported "employer" in an ongoing representation proceeding and therefore

CONCLUSION

In the end, "neither the National Labor Relations Act itself, nor any authoritative legislative history, . . . nor any other Supreme Court decision, either commands or authorizes the delay inherent in District Court review" of NLRB unfair labor practice cases. *Blue Cross & Blue Shield of Mich. v. NLRB*, 609 F.2d 240 (6th Cir. 1979). To the contrary, the Supreme Court's decision in *Myers v. Bethlehem Shipbuilding* commands federal courts to scrupulously enforce the Act's exhaustion principles by dismissing preemptive actions like this for lack of subject-matter jurisdiction. Accordingly, the Band's attempt to interfere with the pending unfair labor practice case by asking this Court for equitable relief in a case over which it lacks jurisdiction is both inappropriate and contrary to law. It therefore follows that the Band's Motion for Summary Judgment must be denied and that the Amended Verified Complaint must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).[15]

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controls the decision whether to bargain with the union in order to trigger subsequent judicial review. In so ruling, *Lipscomb* overlooks *Florida Board*'s express limitation on the availability of such relief to situations where the plaintiff "cannot seek review of the [agency]'s order in the Court of Appeals." 686 F.2d at 1370. On appeal, the Fifth Circuit affirmed the district court's judgment, but did not address the jurisdictional issue, which the FLRA presumably did not press because it had prevailed below on the merits. *See* Brief for the Appellees, *Lipscomb v. FLRA*, 333 F.3d 611 (5th Cir. 2003) (No. 02-60060), *at* 2002 WL 32255917.

[15] Should this Court decide that it has subject-matter jurisdiction, the Band is still not entitled to the equitable relief that it requests. "A party seeking an injunction must show that irreparable injury will result if the injunction is not granted, for which no adequate legal remedy is available." *City of Parma v. Levi*, 536 F.2d 133 (6th Cir. 1976). As shown, the Band will not be irreparably injured by the investigation, prosecution, or adjudication of an unfair labor practice case grounded

Respectfully submitted,

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in the allegations of the Teamsters' charge. Indeed, until the Board issues a final, reviewable order in an unfair labor practice case, the Band is conclusively "*not injured*, and cannot be heard to complain." H.R. Rep. No. 74-1147, at 24 (emphasis added) (quoted in *Myers*, 303 U.S. at 48 n.5). In addition, "an adequate legal remedy is available to [the] plaintiff[] in the form of judicial review when the [Agency's] proceedings are finally terminated." *Breswick & Co. v. Briggs*, 130 F. Supp. 953, 955 (S.D.N.Y. 1955). Moreover, the Band's request for declaratory relief fares no better. The Supreme Court has strongly admonished litigants that "the declaratory judgment procedure will not be used to preempt and prejudice issues that are committed for initial decision to an administrative body . . . . It would not be tolerable, for example, that declaratory judgments establish that an enterprise is not in interstate commerce in order to forestall proceedings by the National Labor Relations Board . . . ." *Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 246 (1952).