FALLEN TIMBER: A PROPOSAL FOR THE NATIONAL LABOR RELATIONS BOARD TO ASSERT JURISDICTION OVER INDIAN-OWNED AND CONTROLLED BUSINESSES ON TRIBAL RESERVATIONS

Helen M. Kemp

Follow this and additional works at: http://digitalcommons.law.wne.edu/lawreview

Recommended Citation
Helen M. Kemp, FALLEN TIMBER: A PROPOSAL FOR THE NATIONAL LABOR RELATIONS BOARD TO ASSERT JURISDICTION OVER INDIAN-OWNED AND CONTROLLED BUSINESSES ON TRIBAL RESERVATIONS, 17 W. New Eng. L. Rev. 1 (1995), http://digitalcommons.law.wne.edu/lawreview/vol17/iss1/1
FALLEN TIMBER: A PROPOSAL FOR THE NATIONAL LABOR RELATIONS BOARD TO ASSERT JURISDICTION OVER INDIAN-OWNED AND CONTROLLED BUSINESSES ON TRIBAL RESERVATIONS

HELEN M. KEMP*

INTRODUCTION

In 1937, Congress passed the National Labor Relations Act1 ("NLRA" or "Act") to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."2 The NLRA does not explicitly state that it applies to Indian-owned businesses on or off reservations. Nevertheless, in Navajo Tribe v. NLRB,3 the Court of Appeals for the District of Columbia, basing its holding on an analysis of the policy behind the NLRA, interpreted the Act to apply to a private business employ-

---


For my husband, Arthur L. Handman, in appreciation of his patience, understanding and "personalized" newspaper clipping service.

The author also wishes to thank Dennis Devaney without whose help and suggestions this paper would not have been possible.

ing Indian and non-Indian workers located on a tribal reservation.4

Since that time, the National Labor Relations Board ("NLRB" or "Board") has been inconsistent in its assertion of jurisdiction over tribal employers, basing jurisdiction on considerations such as whether the activity is on or off a reservation;5 whether it involves only Indians,6 or Indians and non-Indians;7 and whether the tribe or another entity controls the labor relations aspects of the enterprise.8 These considerations in turn are based on the fluctuating themes of "tribal sovereign rights" and tribal self-determination.9 Consequently, the results of these cases have been mixed, with no bright-line rule emerging to guide future decisions.

Resolutions of the questions of whether the NLRA applies to Indian-controlled businesses, and whether the Board should assert jurisdiction, are important because of the growth of tribal enterprises in a variety of areas. In their quest for economic self-sufficiency, Indian tribal enterprises frequently become the major employer in their area, often grossing millions of dollars in annual income.10 This Article argues that the NLRA should apply to all tribal enterprises, and, more importantly, that the Board should assert jurisdiction over all tribal businesses whether or not they are located on or off the reservation so long as: (1) the enterprise is not providing or performing a tribal function; (2) the enterprise is not providing or performing a traditional governmental service; and (3) the gross annual revenues exceed one million dollars per year.

Part I of this Article examines the view that general federal statutes implicitly apply to Indian tribes. Part I also determines the appropriate analysis that should be followed in applying general

4. See id. at 164-65.
7. See Devils Lake Sioux Mfg. Co., 243 N.L.R.B. 163 (1979) (tribal council owned 51% of company's stock; company employed over 400 workers of whom 140-170 were members of the Tribe).
8. Compare Fort Apache Timber Co., 226 N.L.R.B. 503 (1976) (tribe controlled labor relations; thus, Board refused to assert jurisdiction) with Devils Lake, 243 N.L.R.B. 163 (private employer controlled labor relations; thus, jurisdiction asserted).
9. See, e.g., Fort Apache, 226 N.L.R.B. at 506 (tribal governments are "created by the Indians themselves as a separate people").
10. For example, the Foxwoods Casino, operated by the Mashantucket Pequot Tribe in Connecticut, is earning profits that are projected to reach $600 million in 1994. Kirk Johnson, An Indian Tribe's Wealth Leads to the Expansion of Tribal Law, N.Y. TIMES, May 22, 1994, Metro Section, at 1, 32.
federal statutes to Indian tribes. Part II describes current Board decisions as they relate to the assertion of jurisdiction over Indian, tribal employers. Part III argues that interpretation of the NLRA and prior Board decisions, in light of the appropriate analysis outlined in Part I, leads to the conclusion that the NLRA and Board jurisdiction applies to tribal-owned or operated businesses located on or off tribal lands. In Part IV, this Article examines various policy reasons the Board should consider in asserting jurisdiction over such enterprises. Finally, in Part V, this Article proposes that because the NLRB decision to assert jurisdiction is discretionary, it should be re-evaluated in light of the changing conditions of Indian employment enterprises.

I. Applicability of General Federal Statutes to Indian Tribes

The decisions of the United States Supreme Court concerning the principles applicable to determining whether the regulation of activities in Indian country is preempted have not been static. Although “[f]ederal treaties and statutes have been consistently construed to reserve the right of self-government to the tribes,”11 recent cases have established a “trend . . . away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption.”12 The goal of any preemption inquiry is “to determine the congressional plan.”13

The right of self government is ultimately dependent on, and subject to, the broad powers of Congress, with “tribal sovereignty . . . dependent on, and subordinate to, only the Federal Government.”14 Most importantly, the Supreme Court has declared that “[t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.”15 "Stressing that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns, the Court . . . [has stated] that the Indian tribes have lost any 'right of governing every person within their limits except

themselves.'"\[16

The Indian tribes retain their inherent power to punish tribal offenders, determine tribal membership, regulate domestic relations among members, and prescribe rules of inheritance for members.\[17 In contrast, "the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.'\[18

It is against this "'backdrop'"\[19 that the issue of the applicability of federal statutes to Indian tribes must be analyzed. It has been settled by many court decisions that a general statute in terms applying to all persons includes Indians and their property interests.\[20 Arguably, this holding from Federal Power Commission v. Tuscarora Indian Nation\[21 is dictum, but it is dictum that has guided many court decisions\[22 in upholding the application of general federal laws to Indian tribes.\[23

In Smart v. State Farm,\[24 the United States Court of Appeals for the Seventh Circuit, citing Donovan v. Coeur d'Alene Tribal Farm,\[25 expanded upon the Tuscarora dictum and outlined the proper analysis for determining the applicability of a federal statute with regard to jurisdiction over Indian tribes. The Smart court employed the following factors as outlined in Donovan:

16. Montana v. United States, 450 U.S. 544, 565 (1981) (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978)) (other citation omitted). Although the Montana Court acknowledged that "Oliphant only determined inherent tribal authority in criminal matters," it held in Montana that "the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Id.


21. Id.

22. See, e.g., United States v. Farris, 624 F.2d 890, 893 (9th Cir. 1980), cert. denied, 449 U.S. 1111 (1981) (holding that "federal laws generally applicable throughout the United States apply with equal force to Indians on reservations").

23. See, e.g., Smart v. State Farm Ins. Co., 868 F.2d 929 (7th Cir. 1989) (holding ERISA applicable to tribes); Confederated Tribes v. Kurtz, 691 F.2d 878 (9th Cir. 1982), cert. denied, 460 U.S. 1040 (1983) (holding tribes and their members are subject to federal excise tax); Fry v. United States, 557 F.2d 646 (9th Cir. 1977), cert. denied, 434 U.S. 1011 (1978) (holding Indian logging operations are subject to federal taxes).

24. 868 F.2d 929 (7th Cir. 1989).

25. 751 F.2d 1113 (9th Cir. 1985).
[a] federal statute of general applicability that is silent on the issue of applicability to Indian Tribes may still not apply to them if [one of three exceptions is met]: (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 apply to Indians on their reservations."26

Thus, the proper analysis to follow in determining the applicability of a federal statute with regard to jurisdiction over Indian tribes is to determine if the statute involved is a general one applying to all persons and, if so, to then determine if any of the Donovan exceptions are met.

II. THE NLRB AND JURISDICTION OVER INDIAN-OWNED BUSINESSES

A. NLRB Decisions Regarding Jurisdiction

In Navajo Tribe v. NLRB,27 the Navajo Tribe sought an injunction preventing the NLRB from holding a representation election at the Texas Zinc Minerals Corporation ("TZM") mining plant located on the Navajo reservation. TZM was a private business employing both Indian and non-Indian workers.28

The Navajo Tribe put forth several reasons why the Board lacked jurisdiction to conduct an election within Navajo land. First, the Tribe argued that it "has plenary authority of self-government with respect to the members of its Tribe and as to all activity conducted upon its reservation, except to the extent that the federal government has expressly limited such authority."29 The Tribe argued that this included the right to exclude outsiders.30 Second, the Tribe put forth that "pursuant to its power of self-government [it] had enacted resolutions forbidding all unionization activities on its reservation."31 Third, the Tribe argued that "the [NLRA] was not

26. Smart, 868 F.2d at 932-33 (quoting Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985) (other citation omitted)).
28. Id. at 163. The mill employed about 87 persons; 47 were members of the Navajo Tribe and 40 were non-Indian. Id.
29. Id.
30. Id. at 164. The Tribe based this argument on the provisions of the Treaty of June 1, 1868, between the Navajo Tribe and the United States Government. Id. (citing Treaty with the Navajo Indians, June 1, 1868, U.S.-Navajo Tribe, 15 Stat. 667).
31. Id.
intended to apply to commerce with an Indian Tribe or resulting from business activities located on an Indian reservation.\textsuperscript{32} In a succinct analysis, citing \textit{Tuscarora}\textsuperscript{33} but basing its findings on analysis of the policy of the NLRA, the Court of Appeals for the D.C. Circuit rejected the Tribe's arguments and held that the national labor policy, subsumed in the NLRA, applied to the employment relationship within tribal lands.\textsuperscript{34}

The \textit{Navajo Tribe} decision appeared to have settled the jurisdictional issue with its broad holding, but the Board had a different interpretation. In \textit{Fort Apache Timber Co.},\textsuperscript{35} the employer was a timber company wholly-owned and operated by the White Mountain Apache Tribe and located within the Apache reservation in Arizona.\textsuperscript{36} Since the Apache Tribe directed the mill manager, set wages and working conditions, and transferred workers among various tribal operations,\textsuperscript{37} the Board found that the Tribe, not the timber company, was the employer.\textsuperscript{38} For these reasons, the Board declined to assert jurisdiction over the employer.\textsuperscript{39}

The Board explained that the jurisdiction issue was different than that in \textit{Navajo Tribe}. The \textit{Fort Apache} decision stated that, in \textit{Navajo Tribe}, "the Board refused to decline assertion of jurisdiction over a non-Indian employer who otherwise met the Board's jurisdictional standards, merely because the company was in part conducting operations on Indian land, which it had leased from the tribe."\textsuperscript{40} In \textit{Fort Apache}, on the other hand, the Tribe itself was the employer. Therefore, the \textit{Fort Apache} issue was whether the NLRA applied to tribal councils as employers.\textsuperscript{41}

In \textit{Fort Apache}, the Board stated that "[i]t is clear that individual Indians and Indian tribal governments, at least on reservation lands, are generally free from state or even in most instances Federal intervention, unless Congress has specifically provided to the contrary."\textsuperscript{42} This interpretation is in direct opposition to that of the

\begin{itemize}
\item\textsuperscript{32} \textit{Id.} at 163.
\item\textsuperscript{33} Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960).
\item For a discussion of \textit{Tuscarora}, see supra notes 19-23 and accompanying text.
\item\textsuperscript{34} \textit{Navajo Tribe}, at 165 & n.4.
\item\textsuperscript{35} 226 N.L.R.B. 503 (1976).
\item\textsuperscript{36} \textit{Id.} at 503.
\item\textsuperscript{37} \textit{Id.} at 504.
\item\textsuperscript{38} \textit{Id.} at 506.
\item\textsuperscript{39} \textit{Id.}
\item\textsuperscript{40} \textit{Id.} at 504 n.4.
\item\textsuperscript{41} \textit{Id.}
\item\textsuperscript{42} \textit{Id.} at 506.
\end{itemize}
Court of Appeals for the D.C. Circuit in *Navajo Tribe* which rejected the Tribe's argument that absent *express* limitation of Federal authority, jurisdiction could not be asserted. In any event, the Board concluded that because the Tribal Council performed as a "government," it was specifically excluded from the NLRA's definition of employer.

In *Devils Lake Sioux Manufacturing Corp.*, the Board confronted another set of similar facts. The employer, Devils Lake, was a joint venture between the Sioux Indian Tribal Council and the Brunswick Corporation. The Tribe owned fifty-one percent and Brunswick owned forty-nine percent of the employing enterprise which was located within the tribal reservation. The union involved in *Devil's Lake* argued that this case could be distinguished from *Fort Apache* because (1) Brunswick, not the Tribal Council, established and controlled the enterprise's labor relations, policies, and practices, and (2) the Tribe only owned fifty-one percent of Devils Lake, it was not a "wholly owned" tribal enterprise. Based upon these arguments, the Board agreed that this case was inapposite to *Fort Apache* and asserted jurisdiction.

The Board both confirmed and broadened its *Fort Apache* criteria for jurisdiction in *Southern Indian Health Council, Inc.* The employer in this case was a health care clinic operated by a consortium of Indian tribes, located on the Barona Indian Reservation in San Diego County. It differed, however, from *Fort Apache* in that a board of directors (whose members were appointed by the tribes) and not a tribal government had operated the enterprise, "the [e]mployer ha[d] a separate payroll from the tribes[,] and working conditions [were] set by the program director and the department heads, who [were] not members of the consortium tribes." The Board held that, although the program directors controlled the day-to-day operations, it was the board of directors who

---

44. *Fort Apache*, 226 N.L.R.B. at 506. The NLRA provides that governments and "political subdivisions" are exempt from the Act. 29 U.S.C. § 152(2) (1988). The text reads in pertinent part: "The 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." *Id.*
46. *Id.* at 163.
48. *Id.* at 436-37.
established and controlled the "significant employment policies," the Directors were controlled by the member tribes, and that the separate payroll was not a "significant difference." In this case, the Board concluded that the consortium of tribes, asserted to be an employer, are *implicitly* exempt as governmental entities within the meaning of the Act.

The Board policy to this point was arguably the following: the Board declined to assert jurisdiction in situations where an Indian tribe, and not a private employer, controlled the labor relations aspect of the enterprise. Until *Southern Indian Health Council, Inc.*, the Board cases had only dealt with situations where an enterprise was located on tribal lands. There had been no case involving a situation where an Indian tribe controlled the employment aspect of a business located off tribal lands. In *Sac and Fox Industries*, this issue was finally addressed.

Sac and Fox Industries ("SFI") is a non-profit corporation which the Sac and Fox Indian Tribe of Oklahoma owns in its entirety. By the end of September 1989, SFI had secured a defense department contract worth nearly thirty million dollars. In performance of this contract, SFI acquired or opened facilities, off tribal lands, in four Oklahoma communities. There was little doubt in the Board's mind that the Sac and Fox Indian Tribe owned the enterprise and controlled the labor relation policies of SFI. The issue for the Board was then whether the policies behind *Fort Apache* and *Southern Indian* were "directly controlling in this case where the subject facilities are located well outside the Tribal reservation."

The Board revisited *Navajo Tribe* and determined that the NLRA "is a statute of general applicability" whose "jurisdictional definitions . . . are of 'broad and comprehensive scope,' containing only a few specified exemptions." The Board stated that "[n]owhere in the list of exemptions or elsewhere in the statute is there any mention of Indians or their off-reservation enterprises.

49. *Id.* at 437.
50. *Id.* (citing *Fort Apache Timber Co.*, 226 N.L.R.B. 503, 506 n.22 (1976)).
52. *Id.* at 241.
53. *Id.*
54. *Id.* at 241-42.
55. *Id.* at 243.
56. *Id.*
57. *Id.* (quoting *Navajo Tribe v. NLRB*, 288 F.2d 162, 165 n.4 (D.C. Cir.), cert. denied, 366 U.S. 928 (1961)).
Thus, the *Tuscarora* rule clearly applies." The Board then undertook an analysis utilizing the *Donovan* exceptions to determine if the situation in *Sac and Fox* met one of the three exceptions listed.59

The Board concluded that asserting jurisdiction would not "interfere with the . . . rights of self-government in purely intramural matters,"60 the first exception under the *Donovan* analysis. The Board found that SFI was "engaged in a normal manufacturing operation at [the] facilities"61 and that the majority of the employees had been previously employed by the non-tribal employer.62 The Board also stated that "the NLRA encourages the practice and procedure of collective bargaining, . . . it does not . . . actually compel any agreement . . . nor does it regulate the substantive terms incorporated in an agreement."63 Thus, the NLRA would not actually usurp the Tribe's decision making powers.64 Finally, purely intramural affairs (tribal membership, inheritance rules, and domestic relations) would not be subject to regulation by the NLRA.65

As to *Donovan's* second exception, "[w]hether application of the NLRA would 'abrogate rights guaranteed by Indian treaties,'"66 neither SFI nor the Board could discern any "specific provision in any of the numerous treaties that would prohibit application of the NLRA" in this situation.67 Lastly, the Board reviewed the legislative history of the NLRA pursuant to analyzing the third *Donovan* exception—"whether Congress intended the NLRA not to apply to an off-reservation tribal enterprise"—and concluded that Congress did not so intend. The current Board noted that their decision in *Fort Apache* had indicated otherwise, but limited that holding to

58. *Id.* The *Tuscarora* rule is in essence "that a general statute in terms applying to all persons includes Indians and their property interests." *Id.* (quoting Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960)). For a discussion of *Tuscarora*, see supra notes 19-23 and accompanying text.

59. *Id.* at 243-45 (citing Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985)). For the *Donovan* exceptions, see supra note 26 and accompanying text.

60. *Id.* at 244.

61. *Id.*

62. *Id.*

63. *Id.* (citing NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 402 (1952)) (obligation is only to bargain in good faith).

64. For example, in *Warm Springs Forest Prods.*, No. 36-5889, 1988 WL 228400 (N.L.R.B.G.C.), the union agreement recognized that tribal members were given hiring preference. *Id.* at *1.

65. *Sac and Fox*, 307 N.L.R.B. at 244.

66. *Id.* (emphasis omitted) (citation omitted).

67. *Id.*
enterprises located directly on the reservation. Even so, the Board appeared to “open the door,” and impliedly rejected the notion that they would never assert jurisdiction over enterprises on reservations.

Thus, with its Sac and Fox decision, the Board’s policy regarding jurisdiction narrowed to the assertion of jurisdiction in all situations except where the tribal employer controls the labor relations policies of the enterprise and where the enterprise is located on tribal land.

B. The “Hawkins Test” and Its Role in the NLRB Decisions Regarding Jurisdiction

Although specifically mentioned in only two of the NLRB decisions regarding tribal employers, the “Hawkins Test,” which is used to determine if the entity involved is a “political subdivision,” and thus outside the reach of the NLRB, has been an influential factor in the NLRB’s determination of whether or not to assert jurisdiction in cases involving tribal employers. The precise legal issue presented in many of these tribal employer decisions is whether a tribal entity is an “employer” within the meaning of section 2 of the NLRA and therefore within the NLRB’s jurisdiction, or, conversely, whether the tribal entity involved is a “political subdivision” and thus outside the reach of the NLRB.

The term “political subdivision” is not defined in the Act. In Hawkins County, the Supreme Court followed the Board’s definition that the term includes those “entities that are either (1) created directly by the state, as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or the general electorate.” The second part of the “Hawkins Test” requires that “an entity . . . demonstrate that its policy-making officials have ‘direct personal accountability’ to public officials or to the general electorate.”

68. Id.
69. Id. “Even assuming arguendo that our dissenting colleague is correct that the Board would not assert jurisdiction over SFI at such on-reservation facilities, this is not a basis for declining jurisdiction over SFI at its off-reservation Commerce facility.” Id.
70. Id. at 246 (Devaney, dissenting); Fort Apache Timber Co., 226 N.L.R.B. 503, 504 n.5 (1976).
public.”

The Board first applied the “Hawkins Test” to tribal employers in *Fort Apache* and concluded that a tribal council which is the governing body of a tribe is a “[g]overnment both in the usual meaning of the word, and as interpreted and applied by Congress, the Executive and the Courts.” Thus, based upon this analysis, the Board has routinely exempted tribal owned and controlled employers from their jurisdiction.

Recently, however, there appeared to be a shift in the Board’s interpretation of *Hawkins County* and its dispositive applicability to tribal employers. The holding of both *Fort Apache Timber Co.*** and *Southern Indian Health Council*** is that tribal enterprises were found to be exempt as government entities within the meaning of section 2(2) of the Act under the “Hawkins Test.” Thus, the controlling issue was simply to determine whether or not the enterprise was owned or managed by the tribe in question. Under the “Hawkins Test” the actual location of the enterprise did not matter as long as the tribe itself owned or controlled the enterprise.

In *Sac and Fox*, the Board modified the “Hawkins Test” with regard to tribal employers. Ownership or management of the enterprise by a Tribe was determined to be insufficient by itself to preempt Board jurisdiction; rather the actual location of the enterprise (i.e., on or off tribal land) became the dispositive issue with regard to asserting jurisdiction. Thus, the import of the “Hawkins

---

73. Cape Girardeau Care Ctr., Inc., 278 N.L.R.B. 1018, 1019 (1986) (quoting Truman Medical Center v. NLRB, 641 F.2d 570, 573 (8th Cir. 1981)).

74. *Fort Apache*, 226 N.L.R.B. at 506 (footnotes omitted). The Board, utilizing the “Hawkins Test,” concluded “that the Fort Apache Timber Company is an entity administered by individuals directly responsible to the Tribal Council . . . hence exempt as a governmental entity.” *Id.* at n.22.

75. See, e.g., *Southern Indian Health Council, Inc.*, 290 N.L.R.B. 436 (1988). The Board, citing *Fort Apache*, determined the Health Council to be “implicitly exempt” from the provisions of the Act. In *Sac and Fox Indus.*, 307 N.L.R.B. 241 (1992), the majority found tribal employers exempt as a governmental entity only when the tribal enterprises were located on the reservation. *Id.* at 245.


78. NLRB member Dennis Devaney, dissenting in *Sac and Fox*, 307 N.L.R.B. 241, opined that the “Hawkins Test” “focuses on the identity of the party controlling the enterprise,” *id.* at 246, and that “[l]imiting this inquiry to enterprises geographically located on tribal land does not give sufficient deference to the self government policy.” *Id.*

79. See *id.* at 245. The majority opinion stated that *Sac and Fox* was “distinguishable” from both *Fort Apache* and *Southern Indian* as in those cases “tribal enterprises were located on the reservation, a fact repeatedly stressed by the Board in finding that
Test" in the decision to assert jurisdiction over tribal employers has been eroded with the holding of Sac and Fox.

III. WHETHER THE NLRA APPLIES TO INDIAN BUSINESSES LOCATED ON RESERVATIONS OR TRIBAL LANDS

In Sac and Fox, the dissent concluded that "[f]rom my perspective it does not make practical sense for the Board to assert jurisdiction with respect to the Commerce, Oklahoma facility when it is not asserting jurisdiction over similar facilities with identical ownership and control solely on the basis of geographical location."80 Although the dissent was arguing that the Board should not assert jurisdiction over tribal employers, this reasoning is equally appropriate for the proposition that the Board should assert jurisdiction over tribal owned and controlled enterprises. There is no doubt that the NLRA is a general statute; "its jurisdictional provisions, and its definitions of 'employer,' 'employee,' and 'commerce' are of broad and comprehensive scope."81 Thus, the Donovan analysis should be applied to determine if the NLRA permits the Board to assert jurisdiction over tribal employers located on tribal lands.

A. Jurisdiction over Employers Located on Tribal Lands Would Not Touch the Exclusive Rights of Self-Governance in Purely Intramural Matters

In Sac and Fox, the Board concluded, after careful analysis, that assertion of jurisdiction over a tribal enterprise located off tribal lands did not touch the "exclusive rights of self-governance in purely intramural matters."82 This conclusion, however, did not address the issue of jurisdiction over a tribal enterprise located on a reservation in which other tribal rights are recognized (e.g., exclusion of non-Indians from tribal lands).

It is arguable that later court cases overruled Tuscarora at least to the extent that Tuscarora allows Congress to silently infringe on sovereign tribal rights to exclude non-Indians from tribal lands. In Merrion v. Jicarilla Apache Tribe,83 the United States Supreme

---

80. Id. at 247 (Devaney, dissenting).
82. Sac and Fox, 307 N.L.R.B. at 244 (quoting Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985)).
83. 455 U.S. 130 (1982).
Court recognized that "a hallmark of Indian sovereignty is the power to exclude non-Indians from Indian lands." Merrion, however, can be distinguished as it arose in a context different from the one presented by the NLRA. Merrion discussed the tribal power to tax non-Indians who enter reservations for commercial purposes. It did not address Congress' ability to modify those rights through the exercise of its plenary powers. There was no statute of general applicability that appeared to modify the Tribe's sovereign power to tax or exclude.

Additionally, in Navajo Tribe, the Court of Appeals for the D.C. Circuit, addressing the issue of the Tribe's right to exclude outsiders, stated that "[t]he circumstances that the Corporation's plant is located on the Navajo Reservation cannot remove it or its employees—be they Indians or not—from coverage of the Act." Finally, other court decisions have also held that federal statutes of general applicability apply to tribal enterprises located on tribal lands.

B. Application of the NLRA Would Not Abrogate Rights Guaranteed by Indian Treaties

In Sac and Fox, the Board concluded that SFI failed to identify any specific provision in any of its treaties with the federal government that would preclude them from asserting jurisdiction over the enterprise. This Article proposes that, even in situations where treaties include such provisions, the Board could still assert jurisdiction unless there was a direct conflict between the provision and the application of the NLRA by the Board.

Under the Constitution, a treaty has the same status as an act of Congress and that body may, by enactment of a subsequent law, abrogate or modify a prior treaty. A later statute must be harmonized, to the extent possible, and "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress."
This does not mean, however, that congressional intent may be ignored when it is apparent from both the subject matter and language of the statute.91

There must be a direct, rather than attenuated, conflict to prevent the application of a general federal statute to Indians.92 This requirement is reflected in United States Supreme Court decisions determining whether the statute abrogates treaty rights.93 That a statute must do more than "modify" a treaty right in order to exempt Indians is evidenced by the fact that on several occasions courts have applied general federal statutes to the Indians. Application of the NLRA to Indian tribes will have no greater effect on treaty rights than does the application of other federal regulatory statutes, such as ERISA and OSHA, which the courts have already upheld.94

In Navajo Tribe,95 there was a treaty which granted the Tribe the right of self-government. The Tribe contended that application of the NLRA would conflict with that treaty. The court held that:

Forceful as [the Tribe's arguments] are, we are constrained to disagree. When the Treaty of 1868 was adopted, tribal control of such labor problems as may then have existed on the Tribal Reservation may well have been expected, at least to the exclusion of interference by the several States. Since then, however, Congress has adopted a national labor policy, superseding the local policies of the States and the Indian tribes, in all cases to which the National Labor Relations Act applies.96

---

92. Id.
93. Id. (holding that the Eagle Protection Act abrogates treaty rights to hunt eagles).
94. See, e.g., Smart v. State Farm Ins. Co., 868 F.2d 929 (7th Cir. 1989) (applying ERISA to an Indian enterprise); Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985) (applying OSHA).
96. Id. at 164 (footnote omitted). The Supreme Court also recognizes the existence of national policy in legislative acts such as the NLRA. See Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 735 (1981) ("The national policy favoring collective bargaining and industrial self-government was first expressed in the National Labor Relations Act of 1935.").
C. *The Legislative History of the NLRA Does Not Indicate that Congress Intended the Act Not To Apply*

In *Sac and Fox*, the Board concluded:

SFI has not referred us to, and we are not aware of, any discussion whatsoever in the legislative history of the NLRA dealing with Indians. Nor is there any basis in the language of the Act itself for inferring a congressional intent to exempt Indians or their off-reservation tribal enterprises.97

While, once again, this conclusion appears limited to situations where the enterprise is located off tribal lands, a closer reading indicates that there is nothing in the Act which demonstrates that Congress intended to exempt Indians or their enterprises, on or off the reservation.

In *Navajo Tribe*, the Court of Appeals for the D.C. Circuit stated the following with regards to the Tribe’s argument that absent express limitation of federal authority jurisdiction could not be asserted:

Congress need not cite or purport to rely on all its powers, when reliance on a single power is ample to sustain its mandate. Nor is its failure to mention its power over commerce with the Indian tribes any indication that it intended to narrow its action with respect to interstate commerce.98

This holding by the Court of Appeals for the D.C. Circuit indicates that NLRB jurisdiction over tribal employers need not be expressly stated, and that all employers operating on tribal lands are subject to the provisions of the NLRA.

IV. *WHY THE BOARD SHOULD ASSERT JURISDICTION OVER TRIBAL-CONTROLLED ENTERPRISES ON TRIBAL LANDS*

A. *Growth of Tribal Enterprise*

Resolution of whether the Board should assert jurisdiction is important because of the growth of tribal enterprises in a variety of areas. A 1985 directory lists more than five thousand businesses in the fifty states, the District of Columbia, and Puerto Rico; many of which are identified as tribal or inter-tribal owned.99 Mississippi’s Choctaw are the 15th largest employer in the state, having built a

---

98. *Navajo Tribe*, 288 F.2d at 165.
half dozen factories since 1979. In 1989, SFI, a corporation wholly owned by the Sac and Fox Indian Tribe of Oklahoma, held a thirty million dollar defense department contract for the manufacture of chemical resistant suits.

Maine's Penobscot and Passamaquoddy Tribes are engaged in leveraged buy-outs of corporations. In 1980, the Maine tribes received compensation of $81.5 million for the loss of about two-thirds of the land which comprises the state of Maine, through a series of illegal transactions extending over the course of 200 years. "With the help of investment bankers, the Tribes . . . parlay[ed] the money into factories on their reservations, as well as off-reservation cement plants, radio stations[,] and a food processing company.” Their example encouraged the eastern band of Cherokees in North Carolina to purchase a thirty million dollar mirror manufacturing plant which today is the country's largest mirror manufacturing facility. "Similarly, the Lac du Flambeau Chippewa tribe in Wisconsin bought a [twenty-four million dollar] electronics company that was threatening to” leave the area.

A recent article on tribal economic development cites other examples “of Indian political power successfully evolving into economic power.” The Quinault, Lummi, Swinomish, and other tribes own and operate fish canneries in the Northwest and Alaska. The Blackfeet are “a major player in the market for writing instruments.” The Oneidas, Gilas and other tribes own and operate office and industrial parks which serve major cities. Southern California tribes are “embracing lucrative businesses” from campgrounds to sand and gravel operations. Similarly,
many tribes gross millions of dollars in annual income from a variety of agriculture and logging operations.\textsuperscript{114}

It is in the area of large stakes gambling, however, that tribes are entering into the economic mainstream. The Mashantucket Pequot Indian Tribe in Connecticut employs approximately 8,350 people in its gaming enterprise, making the Tribe “one of the biggest private employers in the state.”\textsuperscript{115} The Mashantucket Pequot gaming enterprise has a projected annual employment payroll of between thirty-five and forty million dollars.\textsuperscript{116}

In Michigan, the Sault Ste. Marie Chippewa Tribe’s two casinos employ 3,000 people.\textsuperscript{117} When the K.I. Sawyer Air Force Base closes in 1995, the Chippewa Tribe will be the largest employer in Michigan’s Upper Peninsula.\textsuperscript{118} Through its casino profits, the Sault Ste. Marie Tribe owns a construction company, a bookkeeping business, a janitorial service, two convenience stores, three hotels, shares in a new shopping mall, an auto parts factory, and a hotel supply business.\textsuperscript{119}

To be sure, not all Indian businesses are profitable. Some tribes have had motives other than profit in conducting enterprises such as improving the economic and social conditions of the people of the reservations.\textsuperscript{120} Others have tribal policies that distribute profits directly to tribal members rather than reinvesting them in near El Cajon, (96 members) averages a $300,000 \textit{monthly} profit from its gaming enterprise; the Chemehuevi Tribe (500 members) near Lake Havasu, grosses $4 million in annual revenue from the operation of its resort; and the La Jolla Tribe (500 members), north of Escondido, has an annual budget of $1.2 million to operate its campground, water slide, and general store. \textit{Id.}

\textsuperscript{114} \textit{Bureau of Indian Affairs, American Indians} 40-42 (1984). The Bureau of Indian Affairs has collected statistics on such businesses. The Gila River Indian Community in Arizona “has 63,000 acres of irrigated farm land, which averages about $17 million in annual gross sales.” \textit{Id.} at 40. The “Passamaquoddy Tribe of Maine used $2.1 million ... from a land claims settlement to purchase a 5,800-acre blueberry farm. In the three years the Tribe has owned the land, it has harvested a $4.3 million return from the berries sold.” \textit{Id.} at 41. “The Colorado River Indian Tribes in Arizona operate a 6,200-acre farm enterprise which grosses about $3 million annual income.” \textit{Id.} at 42.

\textsuperscript{115} \textit{See} Johnson, \textit{supra} note 10.


\textsuperscript{117} Tina Lam, \textit{Expansion Is Spreading: Hotels and Golf Courses Are on the Table for Thriving Reservations}, \textit{Detroit Free Press}, Sept. 26, 1993, at 4F.

\textsuperscript{118} \textit{Id.}

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} \textit{See generally} Donovan v. Coeur d’Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985).
the businesses or into additional ventures.\textsuperscript{121} In addition, some Indian businesses "failed because of mismanagement and interference from tribal politicians."\textsuperscript{122} However, having a policy which requires gross operating revenues of one million dollars or more before jurisdiction can be asserted will act as an economic yardstick to separate profitable businesses from those being poorly operated.

B. \textit{Employees of Indian Businesses Have No Guaranteed Right to Collective Bargaining}

As tribal nations develop economically, they will continue to create more employment opportunities and, thus, more opportunities for employment and labor disputes. Tribal employees, however, seem to have no right to collective bargaining on either a tribal level or under state or federal statutes, unless the Board asserts jurisdiction over the enterprise.

Section 2(2) of the NLRA exempts the "United States . . . or any State or political subdivision thereof" from the list of employers under the Act.\textsuperscript{123} Since \textit{Fort Apache}, the NLRB, utilizing the "Hawkins Test," has considered Indian tribal councils as being analogous to "governments," and has refused in many cases to assert jurisdiction over tribal employers.\textsuperscript{124} The significance of the political subdivision exemption with regard to Indian tribal employers is that unlike their state and federal counterparts, there is no guarantee of full collective bargaining rights for Indian tribal employees.

It is well settled that employees of an exempt governmental entity are not protected by the NLRA due to section 2(2) which provides that governments and political subdivisions are exempt from the Act.\textsuperscript{125} When workers are classified as "public" employees, their rights are no longer governed by the NLRA, but are, in-

\textsuperscript{121} See McGregor, \textit{supra} note 100. Maine's Penobscot and Passamaquoddy Tribes discontinued their usual practice of distributing land settlement money to tribal members, and instead—with the help of investment bankers—purchased factories and businesses. \textit{Id.} at 1B, 4B.

\textsuperscript{122} \textit{Id.} The Oglala Sioux Tribe (Pine Ridge Reservation, South Dakota), with an estimated unemployment rate of 85%, had a history of failed private enterprise. "Factories that made such products as fishing lures and moccasins failed because of mismanagement and interference from tribal politicians." \textit{Id.}


\textsuperscript{124} In \textit{Fort Apache}, the Board stated that "the governing body on the reservation—is a government both in the usual meaning of the word, and as interpreted and applied by Congress, the Executive and the Courts." \textit{Fort Apache Timber Co.}, 226 N.L.R.B. 503, 506 (1976) (footnotes omitted).

\textsuperscript{125} 29 U.S.C. § 152(2).
stead, controlled by state and federal labor policy. Consequently, the basis for public employee bargaining rights is a statutory one.

Federal employees can now exercise collective bargaining rights under Title VII of the Civil Service Reform Act of 1978. The majority of states have granted, through their political processes, full bargaining rights for public employees. The difficulty arises because Indian tribes, as sovereign governments, have been exempted from most federal and state employment laws. From these exemptions, it appears that employees who work in businesses owned or controlled by Indian tribes can only receive employment protection through actions brought under the Indian Civil Rights Act ("ICRA") which requires that tribes afford equal protection and due process rights to people in their employ. Alternatively, protection may be formally offered through tribal laws or informally through a business' personnel policies or procedures.

---

131. Id.
132. However, such personnel manuals must be examined to determine if they waive the sovereign immunity of the tribe. That statements in personnel manuals may bind a tribe has analogy in federal and state law under which personnel manuals may
procedures in tribal codes or manuals that state standards to which employees will be held, define behavior that warrants discipline, and set out procedures under which employees can address decisions they believe unfair or unwarranted.  

The difficulty arises because formal “employee-grievance” actions are heard in tribal courts or forums. Unfortunately, many ICRA suits are dismissed by tribal courts and aggrieved tribal employees find themselves either with no forum or with a forum they perceive as biased. “Bias” is perceived because, in most of the employment suits brought against tribes by employees who allege violations of employment policies, tribal forums are often confronted by and sustain the defense of sovereign immunity, thus ruling against the employee no matter how valid the grievance.


133. See, e.g., NAVAJO TRIB. CODE tit. 2 app. (1977 & Supp. 1982-83). These types of codes are called “Preference in Employment Codes” and are discussed in more detail infra, Part IV, Section D.

134. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) (holding that “[t]ribal forums are available to vindicate rights created by the ICRA”).

135. See Frank Pommersheim, The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay, 18 N.M. L. REV. 49, 65 (1988). Pommersheim views the tribal courts as using “the shield of sovereign immunity” to such an extent in these cases that the use of the tribal forum “prevents any resolution of claims involving individual rights on their merits and further inhibits the growth of legitimacy.” Id. at 86.

and tribal "preference in employment" codes\textsuperscript{137} indicates that tribal employers have virtually ignored the rights of tribal employees, Indian or otherwise, to organize, to bargain collectively, to negotiate the terms and conditions of their employment, and, most importantly, to provide access to impartial determinations of controversies and grievances.

Rather than guaranteeing such basic rights, tribal employers often exhibit anti-union animus\textsuperscript{138} and retaliate against employees who attempt to organize\textsuperscript{139} or who participate in economic strikes.\textsuperscript{140} In addition, even in situations where tribal employers

\textsuperscript{137} "Preference in employment" codes are general labor codes which require employers to give preference in hiring to members of the tribe, develop job descriptions, establish wage rates, etc. \textit{See}, e.g., 15 NAVAJO TRIB. CODE, Title 601-619 (Supp. 1984-85) (general labor code). \textit{See also} Section IV of Vicki J. Limas, \textit{Employment Suits Against Indian Tribes: Balancing Sovereign Rights and Civil Rights}, 70 DENV. U.L. REV. 359, 385 (1993).

\textsuperscript{138} In \textit{Navajo Tribe v. NLRB}, the Tribe, "pursuant to its power of self-government, had enacted resolutions forbidding all unionization activities on its reservation." 288 F.2d 162, 163 (D.C. Cir.), cert. denied, 366 U.S. 928 (1961).

\textsuperscript{139} \textit{See} Toiyabe Indian Health Project, No. 31-19604, 1993 WL 255247 (N.L.R.B.G.C. May 28, 1993). In \textit{Toiyabe}, the employer was wholly owned and operated by a consortium of seven Indian tribes and two Indian groups not yet given recognition by the federal government. \textit{Id.} at *1. "Victoria Dubiel was employed by Toiyabe as a dental hygienist and was president of United Toiyabe Employees Association, an organization that sought recognition as the exclusive bargaining representative of Toiyabe's employee." \textit{Id.} In 1992, Dubiel was discharged from her position at Toiyabe and filed NLRA § 8(a)(1) and (3) charges, "alleging that Toiyabe discharged her because of her protected concerted activities on behalf of United Toiyabe Employees Association." \textit{Id.} The Region concluded that, if the Board had jurisdiction, the instant charge had merit. \textit{Id.} The Associate General Counsel determined that Toiyabe was exempt as an employer within the meaning of the Act. \textit{Id.} at *2. \textit{See also} Nielsens, Inc. and Navajo Eng'g Constr. Auth., No. 28-7410, 1983 WL 29421 (N.L.R.B.G.C. June 23, 1983). In this case, the Region determined that if jurisdiction could be asserted, then the discharge of the charging party, LaLora C. Roy was violative of § 8(a)(1). \textit{Id.} at *1 n.1. The Counsel in this case also held that jurisdiction should not be asserted. \textit{Id.} at *3.

\textsuperscript{140} \textit{Warm Springs Forest Prods., No. 36-5889, 1988 WL 228040 (N.L.R.B.G.C. Dec. 23, 1988).} In this case, the enterprise was wholly owned by the Warm Springs Tribe of Oregon and located on their reservation. \textit{Id.} at *1. "In 1969, the employer recognized the union following a Board-conducted election pursuant to an Agreement for Consent Election." \textit{Id.} at *2. The labor agreement expired "[o]n June 30, 1988 and on August 8, 1988, the Union began an economic strike against the [e]mployer. Pickets were located at the two entrances to the mill. Several times during the day, tribal police came to the scene and told the pickets that they were creating a safety hazard and that they should leave. By the end of the day, the police had arrested three of the Indian pickets..." \textit{Id.} The \textit{non-Indian} pickets were cited and excluded from the reservation, pursuant to a tribal ordinance adopted by the tribal council. The Union filed a charge, alleging the Employer had violated § 8(a)(1), (3) and (5) of the Act in certain respects. \textit{Id.} It was concluded that NLRB jurisdiction should not be asserted over the employer because it was owned and controlled by the tribal council of an Indian tribe. \textit{Id.}
recognize and bargain with a union for a number of years, at any
given time and without notice, the tribal employer may assert jurisdic­
tional issues and simply refuse to bargain over subsequent
agreements.141

C. Asserting Jurisdiction Would Effect and Further the Purpose
of the Act

When Congress enacted the National Labor Relations Act,142 it
specifically indicated that “[t]he denial by some employers of the
right of employees to organize and the refusal by some employers
to accept the procedure of collective bargaining lead to strikes and
other forms of industrial strife or unrest.”143 Congress also de­
clared that it was the policy of the United States to alleviate these
problems “by encouraging the practice and procedure of collective
bargaining and by protecting the exercise by workers of full free­
dom of association, self-organization, and designation of representa­
tives of their own choosing, for the purpose of negotiating the
terms and conditions of their employment or other mutual aid or
protection.”144 The United States Supreme Court acknowledged
the propriety of this theme when it sustained the constitutionality of
the NLRA:

Long ago we stated the reason for labor organizations. We said
that they were organized out of the necessities of the situation;
that a single employee was helpless in dealing with an employer;
that he was dependent ordinarily on his daily wage for the main­
tenance of himself and family; that if the employer refused to pay
him the wages that he thought fair, he was nevertheless unable to
leave the employ and resist arbitrary and unfair treatment; that

141. Id. In Warm Springs, the Union argued that although the employer was an
Indian tribe, it was estopped from asserting that the Board lacked jurisdiction because it
had recognized and bargained with the union for 20 years, pursuant to the Board's
certification of the union. The Counsel “note[d] that the general rule is that the estop­
apel theory does not operate to preclude the intended beneficiary of the statutory provi­sion from asserting their rights thereunder,” id., and thus the employer was not
estopped from raising the question of jurisdiction at any time. Counsel noted that where
“there is no statutory jurisdiction, estoppel cannot be used to vest the Board with juris­
diction that it does not have.” Id.

the Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257,
V 1993).


144. Id.
union was essential to give laborers opportunity to deal on an
equality with their employer.\textsuperscript{145}

There exists a dearth of information available as to what the
employees of tribal enterprises were seeking with regard to wages
or terms and conditions of work when they sought union represen-
tation. In \textit{Sac and Fox}, SFI did not yet offer its employees any life
or health insurance, retirement plans, vacations, or other kinds of
fringe benefits\textsuperscript{146} which may have been a factor in the employees' attempt for union representation. In \textit{Nielsons, Inc. and Navajo En-
gineering and Construction Authority} ("NECA"), it was noted that
at least on one occasion, NECA had reduced the employees' wage
rate.\textsuperscript{147} From these examples, it is argued that these employees
were simply seeking the basic NLRA right\textsuperscript{148} to influence their
wages,\textsuperscript{149} hours, and employment conditions \textsuperscript{149} through the collective bargaining process.

The policy behind the Act becomes the impetus for asserting
jurisdiction over tribal employers whether or not the enterprise is
located on or off the reservation. While the tribal court forum pro-
vides a mechanism for employee grievances, a tribe that values
profits more than economic parity may not allow bargaining as en-
visioned under the Act.\textsuperscript{150} Therefore, the current "tribal forum"

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{145} NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).
\item \textsuperscript{146} Sac and Fox Indus., 307 N.L.R.B. 241, 242 n.9 (1992).
\item \textsuperscript{147} Nielsons, Inc. and Navajo Eng'g Constr. Auth., No. 28-7410, 1983 WL 29421
\item \textsuperscript{148} With regard to the employees at the Foxwoods Casino, Local 217 of the Ho-
tel and Restaurant Employees and Bartenders Union, maintains the two issues are
wages and job protection. According to Warren Heyman, an organizer for the union, a
starting bartender at Foxwoods makes $7.50 an hour, more than a dollar less than his
Atlantic City counterpart. The Atlantic City bartender can expect his salary to increase
\item \textsuperscript{149} At the Foxwoods Casino, there have been reports of not one, but two, preg-
nant workers who had their water break while working their shift at the casino because
management refused to relieve them from their post stating they did not have anyone to
"cover" them. \textit{Id}. A former employee stated that she had trouble even getting the
casino to acknowledge that she was being let go. She was simply told not to come
around anymore. It was reported she said, "I want to see my records," and they said,
"[y]ou can't see those records, this is a sovereign nation." \textit{Id}.
\item \textsuperscript{150} Indians who profit from reservation businesses may be more interested in
retaining those profits than with bargaining wages. In Castaneda v. Partida, 430 U.S.
482 (1977), the Court noted that members of a minority do not necessarily protect the
best interests of other people of the same minority. The Court found intentional dis-
crimination against Mexican-Americans in grand jury selection in a county in which
three of the five jury commissioners were Mexican-Americans. \textit{Id.} at 499-500.
\end{enumerate}
\end{footnotesize}
system provides inadequate protection for employees of Indian businesses.

D. Tribal "Preference in Employment" Codes and Private Enterprise Contracts

Another concern with the NLRB’s refusal to assert jurisdiction involves situations in which a non-Indian corporation contracts with an Indian tribe for the production of parts, components or other goods. This area has expanded in recent years and is likely to expand even further in the near future.

In the late 1970s, hoping to cut costs and compete with the Japanese, General Motors’ Packard Electric Division accepted an invitation from the Mississippi Choctaw Tribe to open a plant on the Choctaw’s reservation.151 “In 1979, a tribal-owned factory, financed with federal loans and grants, opened to make auto wiring systems for Packard Electric.”152 Two years later, a greeting card factory opened. This was followed by two more auto wire facilities and plants which manufacture stereo speakers for cars and electronic circuit boards.153 By 1987, Oklahoma’s Cherokee Tribe was making circuit boards for IBM; Arizona’s Navajo Tribe was assembling electronic parts for General Dynamics; and North Dakota’s Chippewa and Sioux Tribes were manufacturing trailers, camouflage nets, and helmets for the army.154

The NLRB’s policy is to decline jurisdiction over “joint employers” comprised of a private employer and a public employer. Joint employers are those who share control over basic bargaining subjects so that meaningful bargaining cannot take place without the presence of each.155 The Board has declined to assert jurisdiction in those circumstances where a private employer’s labor relations policy is so controlled by an exempt institution that effective collective bargaining has been precluded.156

This policy has been extended to tribal employers who control the labor relations policy of otherwise private employers located on tribal lands.157 This Article maintains, however, that such a policy

151. McGregor, supra note 100.
152. Id.
153. Id.
154. Id.
156. Id.
157. See Navajo Tribe v. NLRB, 288 F.2d 162 (D.C. Cir.), cert. denied, 366 U.S. 928 (1961); Fort Apache Timber Co., 266 N.L.R.B. 503 (1976). In Navajo Tribe, the
is ineffectual in light of present contractual practices between Indian tribes and private employers, or subcontractors, and thus it should be revised. Companies who wish to contract, or subcontract, with Indian tribes must very often deal with a tribal “Preference in Employment Code” (“PEC”) which establishes prevailing wage rates, preferences in employment and other requirements applicable to employers on tribal lands. In essence, these codes require that employers who wish to employ persons (both Indian and non-Indian) within tribal lands give labor relations control to the tribe upon whose land the enterprise is located.

Because of the control retained by the tribe under these PECs, it is doubtful that the Board would exercise jurisdiction over these businesses under the Navajo Tribe-Fort Apache Timber standard. The overriding consideration with regard to joint enterprises is which entity controls and establishes labor relations practices and policies. It is arguable that under PEC contracts, the labor relations

---

158. The “Navajo Preference in Employment Act” (“NPEA”) is typical. The NPEA was adopted on August 1, 1985 by Navajo Tribal Council Resolution CAU-63-85 and codified at 15 NAVAJO TRIB. CODE tit. 601-619 (Supp. 1984-85). NPEA is a general labor code that supplanted the Navajo Nation labor policy adopted in 1958. It provides for Navajo supervisors to determine working schedules and to transfer and terminate employees. It also provides for an appeal procedure for adverse actions against employees which culminates in a hearing before a grievance committee, composed in actuality, of Navajo tribal members. Id.

Over 100 tribes including the Sioux, the Chickasaw, the Cheyenne, the Comanche, the Creek and the Choctaw enforce employment laws and ordinances similar to the NPEA. See, e.g., LAW AND ORDER OF THE CHEYENNE RIVER Sioux, ch. VIII, § 1-8-4 (1978); CHOCTAW TRIBAL CODE, ch. 5, § 1-5-4 (1981); LAW AND ORDER CODE OF THE CHIPPEWA-CREE TRIBE, ch. 3, § 3.3 (1987). For more information with regard to tribal codes, see INDIAN TRIBAL CODES (R. Johnson, ed. 1988); see also National Indian Law Library, Boulder, Colorado (microfiche collection) which was used by Johnson as a basis for his work.

159. One interesting jurisdictional aside concerns the “prevailing wage” rates established by many tribal employers. In recent cases, courts have held that the NLRA may preempt state and local government enactments that provide for the establishment and payment of prevailing wage rates usually at construction job sites within their jurisdiction. See Associated Builders & Contractors v. Baca, 769 F. Supp. 1537, 1544 (N.D. Cal. 1991) (holding that negotiation of wage rates is a mandatory subject of bargaining under NLRA and state interference with this process also interferes with the § 7 rights of employees); see also Bechtel Constr., Inc. v. United Bhd. of Carpenters, 812 F.2d 1220 (9th Cir. 1987). It is thus arguable that as the NLRB has equated a tribal council to a “government” that Indian “prevailing wage” laws may also be preempted by federal labor laws as embodied in the NLRA.
policies and practices are essentially controlled by the tribe, and, thus, the Fort Apache standard would always apply. While there is no evidence to indicate that private employers contract with Indian tribes to avoid the payment of union wages, the processing of grievances and the transactional costs of bargaining may become a concern when economic pressure to cut costs is present.

This issue of the jurisdiction of the Board over "joint ventures" will be of even greater importance in the future. Section 13321 of the Revenue Reconciliation Act of 1993\(^{160}\) is designed to provide significant tax incentives for businesses that operate on Indian reservations. Under the new tax law, depreciable property used in connection with certain trades or businesses located on Indian reservations and placed into service on or after January 1, 1994,\(^{161}\) and before December 31, 2003, will be eligible for accelerated depreciation value.\(^{162}\)

V. UNDER THE "HAWKINS TEST" THE BOARD'S DECISION TO ASSERT JURISDICTION IS DISCRETIONARY AND MAY BE CHANGED TO REFLECT CHANGING CONDITIONS OR TO EFFECTUATE THE PURPOSE OF THE ACT

This Article maintains that the NLRB's decision not to assert jurisdiction over Indian employers on tribal lands is discretionary and not statutory\(^ {163}\) and as such, the Board, to effect the purposes of the Act, should depart from its previously established guidelines with regard to Indian employers. The Supreme Court "has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause."\(^ {164}\) The Board's rulings on its own statutory jurisdiction are entitled to great weight\(^ {165}\) and it is allowed broad discretion in choosing whether or not to exercise its statutory jurisdiction.\(^ {166}\)


\(^{162}\) § 168(j)(8).

\(^{163}\) See 29 U.S.C. § 152(2) (1988). Congress particularly excepted some employers, e.g., "any State, or political subdivision thereof." Id. These are the statutory exceptions. The Board also has discretion to decline or assert jurisdiction, where the purposes of the Act would be furthered. See 29 U.S.C. § 164(c)(1) (1988).

\(^{164}\) NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963); see also NLRB v. Mars Sales & Equip. Co., 626 F.2d 567, 575 (7th Cir. 1980).


\(^{166}\) Herbert Harvey, Inc. v. NLRB, 424 F.2d 770, 780 (D.C. Cir. 1969).
The Board’s policy of declining jurisdiction over tribal-controlled enterprises on tribal lands is a discretionary limitation on the Board’s jurisdiction. The Board should treat similar cases in a similar manner, but it may depart from previously established guidelines when to do so will, in the Board’s judgment, effect the purpose of the Act. As an administrative agency, the Board is allowed substantial flexibility to adapt its standards to changing conditions. It is not an abuse of discretion for the Board to change its policy with respect to matters within its jurisdiction. As tribal enterprises become economically competitive, it becomes a matter of fairness and equity to regulate such enterprises according to the same government regulation as non-tribal employers. This would allow businesses of a similar nature to compete on a “level playing field” with regard to operational and transactional costs—including all costs concerning labor relations.

CONCLUSION

The NLRA is a general statute which applies to Indian businesses on reservations. This interpretation both effects the broad purposes of the Act and is consistent with the Donovan exceptions. The changing conditions with regard to tribal enterprises, the instances of blatant anti-union animus and retaliatory behavior by Indian tribes, and the erosion of the validity of the “Hawkins Test” with regard to Board decision-making in this area, necessitate that

167. Id.
168. See NLRB v. Children’s Baptist Home, 576 F.2d 256, 260 (9th Cir. 1978).
169. Id.
170. NLRB v. Kent County Ass’n for Retarded Citizens, 590 F.2d 19, 23 (1st Cir. 1978).
171. For example, the Foxwoods Casino operated by the Mashantucket Pequot Tribe, is earning profits that are projected to reach $600 million in 1994. See Johnson, supra note 10, at 1, 32.
172. David Lightman, Indian Gaming Issues Becoming More Work for Lobbyists, The Hartford Courant, Oct. 10, 1993, at A1 (quoting Roger J. Stone). Roger J. Stone served as counsel for Donald Trump at congressional hearings before the House Native Americans Affairs subcommittee. Stone made the following statement: “we want a level playing field. The Indian casinos should get the same level of scrutiny, the same tax rates, the same law enforcement as everyone else.” Id.
173. Analogous to the present situation, it has been NLRB policy not to allow commercial enterprises owned by foreign governments to gain an advantage in competing with private sector companies. See State Bank of India, 273 N.L.R.B. 267 (1984), enforced, 808 F.2d 526 (7th Cir. 1986), cert. denied, 483 U.S. 1005 (1987). With regard to Indian tribes, the Board in Sac and Fox Indus., has declined to endorse the proposition that “unlike foreign governments, Indian tribes are entitled to an advantage in competing with private companies.” 307 N.L.R.B. 241, 245 (1992).
the Board re-evaluate its position with regard to the assertion of jurisdiction over tribal employers. Congress did not intend to make tribal members "supercitizens" who could trade and interact in interstate commerce free from all but self-imposed regulation. Board jurisdiction will enable both employer and employee to diffuse and resolve disputes in a neutral arena and its jurisdiction will not impair any rights granted or reserved by federal law.