

## **H.E.R.E. LOSS IN SENECA NIAGARA CARD CHECK: THE END OF THE BEGINNING**



Late last month, the Hotel Employees and Restaurant Employees Union (H.E.R.E.) fell short in its effort to organize the food and beverage employees of the new Seneca Niagara Casino in Niagara Falls, New York. The loss was a significant setback for the union, which had dedicated considerable resources to the effort, including flying in lead organizers from around the nation. More than anything, though, the H.E.R.E. campaign in Niagara Falls marks the beginning of a new union initiative at Native American casinos—one that will be carried out as much in the hallways of the state legislature as in the workplace. Absent a comprehensive response on the part of Native American casinos, the result in Niagara Falls may prove an exception to a bleaker new general rule.

The union's new approach is a far cry from its traditional approach to Native American casinos. When the first of these casinos opened in the 1980s, H.E.R.E. and other unions protested, fearing competition to the unionized Las Vegas and Atlantic City casinos. Even as the growth of Native American casinos became inevitable, organized labor was tepid in its early organizing efforts, perhaps deterred by legal authority calling into question the applicability of federal labor laws on sovereign Native American lands. Early organizing efforts faltered when casinos asserted sovereign immunity as a defense to union actions.

H.E.R.E.'s recent campaign in Niagara Falls marks a new approach, and an attempted end-run of Native American sovereignty. Rather than relying on traditional organizing tactics and forcing the National Labor Relations Board and the courts to decide the sovereignty issue, H.E.R.E. elevated its campaign to the state legislative level. Through the efforts of its lobbyists, the union was able to hold up passage of the Compact authorizing the Seneca Niagara Casino until the union obtained terms intended to assist its organizing efforts, including a card check process (rather than a traditional secret ballot election) and union on-site access to employees. The authorizing legislation went even further with respect to the casinos to be developed in the Catskills, altogether prohibiting those casinos from opposing the unions' organizing efforts.

As it turned out, H.E.R.E.'s organizing efforts failed despite the card check process and access provisions. The casino's ability to successfully get its message out was one that required extensive efforts that were well-coordinated with the entire management and legal team. Seneca Niagara Casino established at the outset a positive message for casino employees based on the generous wage and benefits package provided and demonstrated management commitment to the entire workforce. Other Native American casinos will need to apply a similarly comprehensive approach to respond to union organizing drives in the future.

First, Native American casinos must take steps early on to counter the unions' effective lobbying force. The key to this is preventing legislatively mandated organizing opportunities that bar management from effectively providing employees with a balanced message regarding the need for union representation. The Seneca Nation was vigilant and active in the protection of both its sovereignty and its future employees' rights, and thereby ensured casino employees the right to make a choice. Casinos that may be established in the Catskills, by contrast, will face a stacked deck, as they are now legislatively required to remain "neutral" in the face of union organizing efforts. Tribes in other states should remain active and vigilant to ensure that they are not placed in a similar position, effectively losing union organizing drives before they ever start.

Second, tribes should ensure that they understand the complex legal backdrop against which organizing drives will take place. The interplay of the National Labor Relations Act, the Indian Gaming Regulatory Act, and Native American sovereignty and treaty issues present both potential advantages for those prepared to capitalize and potential minefields for those who are not. It is crucial that casinos and tribal governments be prepared in this regard.

Finally, regardless of the legislative and legal options available to a Native American casino, the organizing drives themselves will continue to be of critical importance. The best long-term solution for any management team is to help employees understand why unions are not in the best interests of the casino or employees. In Niagara Falls, the management team was able to communicate this message and ensure an open dialogue between employees and management. This allowed the casino to simultaneously defend the organizing drive and maintain the positive workforce attitude critical to the casino's entertainment mission.

## CONTACT INFORMATION

If you have any questions or would like to learn more about this topic, please contact the partner who normally represents you, or any of the lawyers listed below:

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