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THE DAY AFTER TOMORROW: NLRB'S *SAN MANUEL* DECISION CREATES BROAD CHALLENGES TO TRIBAL SOVEREIGNTY

On May 28, 2004, the National Labor Relations Board (NLRB or Board) decided *San Manuel Indian Bingo*, 341 N.L.R.B. No. 138, which reversed long-standing Board precedent in holding that the National Labor Relations Act (NLRA or Act) did not apply to a tribal enterprise operating on an Indian reservation. Much has been discussed about the validity of the *San Manuel* decision. Overlooked in the discussion are the extensive rights that the NLRA grants private parties – rights that create a direct and serious conflict with fundamental principles of sovereignty.

SAN MANUEL AND BOARD PRECEDENT

Prior to the *San Manuel* decision, the Board's long-standing position was that the NLRA did not apply to a tribal entity operated on tribal land, as the tribal business was, in effect, a "governmental entity" excluded from the coverage of the Act. Accordingly, businesses run by tribes on tribal reservations, including casinos, were not subject to the Act's requirements, including procedures and prohibitions as to unionization and labor relations.

This year, the Board reversed its prior position in *San Manuel Indian Bingo*. In *San Manuel*, the Board held that the NLRA is a law of general applicability, and that nothing in the Act indicates that it was intended to exempt tribal operations from its coverage. The Board consequently held that tribal entities are subject to the NLRA.

The Board's decision in *San Manuel* is discussed in our newsletter dated June 10, 2004, additional copies of which are available upon request or on our Web site at http://www.akingump.com/docs/publication/680.pdf.

TRIBAL ORGANIZATIONS IN THE CROSSFIRE

The result of the *San Manuel* decision is that tribal commercial enterprises will be treated like any other private commercial enterprise by the NLRB. For tribes that have adopted their own labor legislation or that have negotiated labor obligations in state compacts, *San Manuel* creates a dilemma. While the issues raised in *San Manuel* crawl their way through the trial and appeal process, tribes with preexisting labor obligations are caught between potentially conflicting obligations.

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A fundamental question raised by *San Manuel* is whether federal labor law supersedes any tribal labor law or obligation imposed by compact. In a 1954 decision applying the NLRA to a tribal organization, the Board held that the NLRA preempted a tribal ordinance that prohibited compelling Indians from joining any organization in order to work on projects within the reservation boundaries. *See J.R. Simplot Co.*, 107 N.L.R.B. 1211 (1954). The Board held that the NLRA, as a statute of the United States, preempted any ordinance passed by the tribal council. *Id.* at 1220. Even where the labor obligations are imposed through a negotiated compact, rather than a tribal ordinance, it is likely that federal labor law would control.

The preemption analysis is somewhat complicated by the fact that tribal labor laws and compact obligations have been adopted pursuant to the federal Indian Gaming Regulatory Act. As a result, the pre-existing labor obligations of tribes arguably arise out of IGRA, creating a conflict between the NLRA and IGRA. Because one federal statute cannot preempt another, the courts will be compelled to accommodate the competing interests served by the two statutes. In such an analysis, a statute specifically dealing with an issue, such as the NLRA and labor, will control over a more general statute. *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961); *Furnco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222, 228-29 (1951).

If federal labor law is applicable, compliance with the requirements of tribal law or compacts may result in actions that are a violation of federal labor law. For example, under the Tribal Labor Relations Ordinance adopted by California gaming tribes, unions are required to be licensed before they may organize employees. Such a restriction on union organizing is likely to be found to be an improper restriction on employee rights under Section 8(a)(1) of the NLRA.

On the other hand, a tribe attempting to exercise its rights under federal labor law may find itself charged with a violation of a tribal labor ordinance or compact. Unions may seek to enforce these tribal obligations because tribal laws and compacts often contain far more favorable provisions to labor than does the NLRA. Although the obligations differ from state to state, pro-labor provisions include neutrality, card checks, union access and union posting rights. One provision in the Tribal Labor Relations Ordinance in California that grants the unions substantial economic leverage is the right to engage in secondary boycotts in support of bargaining demands. The secondary boycott is such a powerful weapon that the practice was outlawed under the NLRA. 29 U.S.C. §§ 158(b)(4) and (e). While these provisions also should be preempted if federal labor law applies, unions can be expected to argue that these tribal labor laws and compact provisions constitute lawful waivers of rights under federal labor law.

Unless and until the Board's decision in *San Manuel* is overturned, the NLRA is applicable to tribal gaming organizations, and tribal organizations must carefully consider these potential conflicts when choosing a course of action.

SAN MANUEL AND THE CONFLICT WITH TRIBAL SOVEREIGNTY

The *San Manuel* decision applying the NLRA to tribal organizations will have far-reaching consequences for those organizations. In addition to providing for union organizing, the NLRA also contains in Section 8(a), 29 U.S.C. § 158(a), a laundry list of activities by management that are illegal, or "Unfair Labor Practices" in the parlance of the Act. What may not be obvious is that because of the unique structure of federal labor law, these provisions may impose unexpected restrictions on tribal sovereignty.

For example, the NLRA grants union organizers certain substantive rights. Off-duty employee organizers have the right to access their employer's property under certain circumstances. As many tribal organizations are on reservation, it is possible

that the Board would force tribes to allow employees on reservation lands. In addition, if the Board deems "on reservation" employees to be inaccessible, it may compel the tribe to grant professional union organizers access to tribal lands for the purpose of organizing. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533-34 (1992).

The NLRA also may be a vehicle to impose obligations on tribes far beyond those normally considered to be labor law obligations. For example, the Board has held that sexual harassment or discrimination prohibited under Title VII can also constitute a violation of the NLRA. *See Olympic Steamship Co.*, 233 N.L.R.B. 1178 (1977). As tribes are exempt under Title VII, the Board's position creates the paradox that statutory obligations from which the tribes are expressly exempted under Title VII may now become actionable as unfair labor practices under the NLRA.

The right of tribal organizations to protect their records from public disclosure also is subject to challenge under the NLRA. Over the years, unions have perfected the art of filing unfair labor practice charges that would put financial information at issue so that they can subpoena such information. Where unions have established a bargaining relationship, they use information requests in bargaining to obtain information. While there are limits on the information to which a union is entitled, those issues will be decided on a case-by-case basis by the Board and the federal courts.

In sum, tribal organizations are at a crossroads. Important issues of sovereignty and conflicts of laws will be litigated as the unions ramp up their organizing and litigation operations in the wake of *San Manuel*. Careful consideration of these complex issues and advance planning will be necessary for tribal organizations to turn back this latest incursion into their sovereignty.

CONTACT INFORMATION

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