

LABOR AND EMPLOYMENT ALERT



D.C. CIRCUIT HOLDS THE NATIONAL LABOR RELATIONS ACT APPLICABLE TO TRIBAL GAMING ENTERPRISE

On February 9, 2007, the Court of Appeals for the District of Columbia Circuit decided *San Manuel Indian Bingo and Casino v. National Labor Relations Board* and held that the National Labor Relations Act (NLRA) applied to the tribe's on-reservation gaming establishment. We analyze the D.C. Circuit opinion below. We then discuss the possible next steps in the litigation and discuss certain factors that Indian tribes should consider in light of the decision.

OVERVIEW OF THE CASE

The District of Columbia Circuit held that the National Labor Relations Act applied to the San Manuel Band's tribal gaming operation and that the National Labor Relations Board (NLRB) has jurisdiction over tribal enterprises engaged in commercial activity, whether on- or off-reservation. In doing so, the court rejected arguments by the tribe that tribal sovereignty and the Indian Gaming Regulatory Act (IGRA) barred application of the NLRA without express authorization by Congress. Rather, the court ruled that since the tribe was engaged in a venture traditionally associated with commercial activity, the Act applied to the tribe unless application of the law constrained governmental functions. The court concluded that any impact on the tribe's gaming operation would be minimal and, therefore, the tribe could not overcome the presumption that laws of general applicability also apply to Indian tribes and their property interests.

THE NATIONAL LABOR RELATIONS BOARD DECISION

The case arose when the Hotel Employees & Restaurant Employees International Union filed an unfair labor charge with the NLRB alleging that the tribe gave preferential treatment to a rival union seeking to organize the tribe's gaming enterprise workers, in violation of the NLRA. The tribe challenged the NLRB's jurisdiction over the matter, relying on NLRB precedent that the NLRA did not apply to tribal governments engaged in governmental activities on their reservations. *See Fort Apache Timber Co.*, 226 N.L.R.B. 503 (1976). In the past, the NLRB drew a distinction between on- and off-reservation activity, holding the former outside of the NLRB's jurisdiction. However, in this case the NLRB revisited its earlier decisions regarding Indian tribes and expressly overruled *Fort Apache Timber* and its rationale that focused on the location of the activity. Instead, the NLRB relied on the plain text of the statute and concluded

that the NLRA applied to Indian tribes by its terms and that nothing in the statute or legislative history suggested a tribal exemption. The NLRB then analyzed whether federal Indian policy precluded application of the NLRA to a tribal government's commercial activities, and held that it did not.

In making this determination, the NLRB relied on *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), which held that a statute of general applicability applies to all persons, including Indians and their property interests. The NLRB noted three exceptions to this rule: (i) when the law "touches exclusive rights of self-governance in purely intramural matters," (ii) when the law would "abrogate rights guaranteed by Indian treaties" and (iii) when there is "proof by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations." 341 N.L.R.B. at 1116 (quoting *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985)). The court concluded that none of these were exceptions. Finally, the NLRB considered whether, as a matter of discretion, to excise jurisdiction in light of the "unique status of Indians in our society and legal culture," *id.* at 1062, and concluded that the application of jurisdiction was appropriate because the gaming establishment is a typical commercial enterprise, employs non-Indians and caters to non-Indians.

The case went back to the NLRB, which issued a cease-and-desist order requiring the tribe to give the union access to the casino and to post notices describing the rights of employees under the NLRA. The tribe then petitioned for review.

THE COURT OF APPEALS DECISION

In a unanimous opinion by Judge Janice Rogers Brown, the court upheld the NLRB's decision and ruled that the NLRA applied to the tribe's gaming establishment. The court, however, employed a slightly different analysis than the NLRB to arrive at the same conclusion. According to the court, the central question was not just whether tribal sovereignty would be impacted by application of the NLRA, but rather, that "our resolution of the case depends on how the Supreme Court and Congress have defined the contours and limits of tribal sovereignty." Slip. Op. at 8. Thus, the court framed the inquiry as follows: "(1) Would application of the NLRA to San Manuel's casino violate federal Indian law by impinging upon protected tribal sovereignty? and (2) Assuming the preceding question is answered in the negative, does the term 'employer' in the NLRA reasonably encompass Indian tribal governments operating commercial enterprises?" *Id.* at 8-9.

To answer the first question, the court considered the Supreme Court's treatment of tribal sovereignty in a number of different contexts, finding sovereignty at its strongest when it is explicitly established by a treaty or when a tribal government acts regarding purely intramural tribal matters. Conversely, the court found sovereignty at its weakest when it is engaged in an off-reservation commercial activity. *Id.* at 11-12. Recognizing that many activities fall somewhere in between, the court stated that the key consideration was whether application of the general law will constrain the tribe with respect to its governmental functions. *Id.* at 12. After exploring the different types of activities in which tribes have been engaged in their sovereign capacity, and the varying level of protection of such activities by the Supreme Court, the court concluded that protection of tribal sovereignty is focused on whether the activity is an "act of governance." In doing so, the court surmised that "tribal sovereignty in American law exists as a matter of respect for Indian communities . . . [but that] tribal sovereignty is not absolute autonomy, permitting a tribe to operate in a commercial capacity without legal constraint." *Id.* at 15.

The court then turned its focus to the tribe's gaming enterprise, characterizing it as a commercial activity but recognizing that it was created by the Indian Gaming Regulatory Act (IGRA). Nevertheless, the court cited only the tribe's enactment of a tribal labor ordinance and its compact with the state of California as evidence of governmental

activities. There was no discussion about the broader federal policy of strengthening tribal governments through the Indian Gaming Regulatory Act or the fact that tribal gaming exists solely as a means of generating governmental revenue. Without this context, the court quickly concluded that:

[A]pplication of the NLRA to employment at the Casino will impinge, to some extent, on these governmental activities. Nevertheless, impairment of tribal sovereignty is negligible in this context, as the Tribe's activity was primarily commercial and its enactment of labor legislation and its execution of a gaming compact were ancillary to that commercial activity. The total impact on tribal sovereignty at issue here amounts to some unpredictable, but probably modest, effect on tribal revenue and the displacement of legislative and executive authority that is secondary to a commercial undertaking.

Id. at 15. Accordingly, the court held that the impact on tribal sovereignty was minimal and thus did not demand a restrictive construction of the NLRA.

The court then considered the second question – whether the tribe was an employer for purposes of the statute – and gave deference to the NLRB's decision below, finding it reasonable for the NLRB to conclude that Congress intended no express exception for Indian tribes in the NLRA because none exists in the statute or legislative history. The court also rejected the tribe's argument that IGRA intended to displace the NLRA from the field of gaming and related employment regulation, finding that nothing in IGRA indicated that Congress sought to limit the scope of the NLRA in tribal gaming matters.

NEXT STEPS IN THE LITIGATION AND FOR INDIAN TRIBES IN GENERAL

The San Manuel Band now has the option of seeking a rehearing before the District of Columbia Court of Appeals and/or seeking review by the U.S. Supreme Court. At this early stage, the tribe has not announced whether it will continue to appeal the ruling.

Nevertheless, Indian tribes should now begin to carefully consider the impact of the decision on tribal enterprises, especially ones that are arguably “commercial” in nature. The case was closely followed and the decision widely reported. It is now probably well-known to most of the larger labor unions. Although still potentially subject to judicial review, the decision establishes legal precedent in the D.C. Circuit and national administrative precedent that the NLRB may now assert jurisdiction over Indian tribal enterprises, whether located on-reservation or off-, unless the matter involves “traditional” governmental functions. It should be noted that the legal definition of “commercial” and “governmental” tribal functions is far from clear, for example in the tribal tax-exempt bonding arena.

For Indian tribes facing the prospect of increased union activity at their tribal enterprises, a number of options exist to address efforts to organize employees at tribally owned and operated facilities. In addition to litigation and efforts to amend the NLRA in Congress, Indian tribes could enact carefully tailored tribal laws that regulate labor relations in a manner consistent with tribal custom and policy and in a manner that parallels the way states and the federal government provide for collective bargaining by governmental employees. A tribal right-to-work law, which has been upheld in the 10th Circuit, is one example of tribal law that effectively discourages union activity on Indian reservations.

We caution, however, that each tribe's circumstances are unique and that the treatment of these issues will accordingly require individualized legal advice by attorneys who concentrate in labor law.

CONCLUSION

The court's decision in *San Manuel* is likely to be viewed by labor organizations as an opportunity to pursue union activity at Indian tribal enterprises. Indian tribes should review their individual employment situations and assess the issues raised by the possibility of union presence in light of economic considerations, sovereignty impacts and other tribal policies.

CONTACT INFORMATION

If you have questions about the impact of the D.C. Circuit's decision on Indian tribes, please contact:

Donald R. Pongrace..... 202.887.4466 dpongrace@akingump.com Washington, D.C.

James Meggesto 202.887.4147 jmeggesto@akingump.com..... Washington, D.C.

Austin	Beijing	Dallas	Dubai	Houston	London	Los Angeles	Moscow
New York	Philadelphia	San Antonio	San Francisco	Silicon Valley	Taipei	Washington, D.C.	