AKIN GUMP
STRAUSS HAUER & FELD LLP
Attorneys at Law

June 10, 2004

NLRB REVERSES 30 YEARS OF PRECEDENT

AGENCY ASSERTS JURISDICTION OVER TRIBAL ENTERPRISE OPERATING ON INDIAN RESERVATION

On May 28, 2004, the National Labor Relations Board (Board) reversed 30 years of precedent and asserted jurisdiction over a tribal enterprise operating on an Indian reservation. *San Manuel Indian Bingo,* 341 NLRB No. 138 (May 28, 2004). The Board overruled its prior cases and established "a new standard for determining the circumstances under which the Board will assert jurisdiction over Indian owned and operated enterprises." *San Manuel*, 341 NLRB No. 138, at *1. The decision marks a dramatic shift in Board practice and promises to create ripples that extend beyond labor law.

The San Manuel Tribe has indicated that it intends to appeal the Board's decision. In the interim, tribal commercial entities must decide whether to comply with *San Manuel* or risk an unfair labor practice charge. The problem is more complex for tribal commercial entities that have independent labor obligations imposed by state compacts or tribal law. In such cases, the compliance with either labor law may very well result in a violation of the other. Thus, tribes will be placed in a difficult position in the years it may take to finally resolve this issue.

The dramatic expansion of tribal gaming in the past decade has brought great scrutiny to tribal commercial operations. The success of tribal gaming organizations has brought to the fore questions about the application of federal labor laws to these tribal commercial entities. The result has been that over the past several years, federal courts have found that various federal labor laws — including the FLSA, OSHA and ERISA — apply to such entities. Title VII and the ADA have not been applied because those statutes specifically exempt Indian tribes from the definition of "employer."

Until *San Manuel*, the Board's respect for tribal sovereignty prevented it from applying the National Labor Relations Act (the Act) to tribal organizations on reservation land. However, in the past few years, the Board's position was brought into question by various groups, primarily labor, and some court decisions. In our March 2003 client alert, we observed that increasing pressure from labor could result in tribal gaming organizations losing their protected status under federal labor law. In our June 2003 client alert regarding the *Inyo County* decision, we further observed that the Supreme Court's willingness to address the commercial nature of Indian enterprises, notwithstanding that the issue was not argued to the lower courts, suggested that tribal organizations increasingly would become subject to federal laws.

The *San Manuel* ruling makes clear that the Board will exercise jurisdiction over tribal commercial enterprises. This decision will disrupt the existing balance of interests reached between tribal gaming organizations, the states and organized labor. Such disruption is not necessarily a negative development, as, by taking proper steps, tribal commercial enterprises can gain greater control over their economic futures.

THE *SAN MANUEL* CASE

San Manuel and Board Precedent

The *San Manuel* case stems from charges filed against San Manuel Indian Bingo and Casino (San Manuel), a "tribal governmental economic development project . . . wholly owned and operated by the tribe." The Hotel Employees & Restaurant Employees International Union (HERE) alleged that San Manuel violated Sections 8(a)(2) and 8(a)(1) of the NLRA "by rendering aid, assistance, and support to the Communications Workers of America (CWA) by allowing CWA agents access to [San Manuel's] facility for organizing purposes, while denying similar access to agents of [HERE]." San Manuel sought to have the complaint dismissed based on existing Board authority holding that the Board did not have jurisdiction over tribal commercial entities on reservation land.

The Board acknowledged that under its prior precedent it would not have exercised jurisdiction over the case. However, rather than dismiss the case, the Board addressed what it saw as the shortcomings of its precedent. In earlier cases, the Board had relied on a broad reading of Section 2(2), which excepts "the United States, any Federal Reserve Bank, or any State or political subdivision" from the definition of employer under the Act. With respect to Indian tribes, the Board historically recognized certain tribal commercial enterprises as equivalent to "political subdivisions" under the Act and, therefore, exempt from the Act.

In *San Manuel*, the Board rejected its historical application of Section 2(2) to tribal entities, reasoning that Section 2(2)'s exemptions are to be construed narrowly. Because neither Section 2(2) nor the legislative history of the Act expressly exempts Indian tribes from the Act's jurisdiction, the Board concluded that "Congress purposely chose not to exclude Indian tribes from the Act's jurisdiction." The Board also found support for this view in the fact that an attempt to amend Section 2(2) of the Act through the Tribal Self-Governance Amendments of 2000 was defeated in Congress. Finally, the Board rejected the claim that the location of an entity on a reservation changed the analysis, holding that "there is nothing in Section 2(2) to suggest that the exemption for 'employer' turns on where the entity is located." *San Manuel*, at *5.

The Board also considered whether Federal Indian Policy should lead it to decline to exercise jurisdiction. As the Board observed, while the Board "acknowledges the Federal Government's superior sovereignty, it does so in a manner that is mindful of the Indian tribes' rightful claim to respect for their unique and important position in our Nation's history." *San Manuel*, at *2. In *Fort Apache Timber Co.,* 226 NLRB 503 (1976), the Board had concluded that at least on reservation lands, tribal organizations generally are free from "Federal intervention, unless Congress has specifically provided to the contrary." *Fort Apache,* 226 NLRB at 505-06.

In *San Manuel*, the Board rejected the *Fort Apache* analysis as inconsistent with Supreme Court precedent. Specifically, the Board observed that "well established" precedent provided that "statutes of 'general application' apply to the conduct and operations, not only of individual Indians, but also of Indian tribes." *Federal Power Comm'n v. Tuscarora Indian Nation,* 362 U.S. 99, 116 (1960).

The Board concluded that because Congress intended the NLRA "to have the broadest possible breadth," it was a statute of general application. The Board then looked to the 9th Circuit decision in *Coeur d'Alene* to determine if any exceptions applied to limit the application of the Act to the San Manuel casino. *San Manuel,* at *5 (*citing Donovan v. Coeur d'Alene*

Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985)). Under *Coeur d'Alene,* "statutes of general applicability should not be applied to the conduct of Indian tribes if: (1) the law touches exclusive rights of self-government in purely intramural matters; (2) the application of the law would abrogate treaty rights; or (3) there is proof in the statutory language or legislative history that Congress did not intend the law to apply to Indian tribes." *San Manuel,* at *5 (*citing Coeur d'Alene,* 751 F.2d at 1115).

Applying this standard, the Board concluded that it was appropriate to assert its jurisdiction over the San Manuel casino. The Board first held that San Manuel was an employer under Section 2(2) of the Act, removing the statutory exemption that historically had shielded tribal commercial entities. The Board then concluded that the *Tuscarora-Coeur d'Alene* analysis did not bar the Board's assertion of jurisdiction because San Manuel's operation of its casino was not an exercise of self-governance. The Board found that none of the additional *Coeur d'Alene* exceptions applied.

The fact that the casino was located on the tribe's reservation was a factor weighing against the Board's assertion of jurisdiction. Nonetheless, this factor was "insufficient to outweigh the others." Rather, the Board appeared more concerned with the broader commercial impact of the casino, observing that the casino affected interstate commerce, employed non-tribal members and was frequented by non-tribal customers. The Board stated that its "interest in asserting jurisdiction is high, especially in light of the keen competition in the gaming industry — the non-Indian sector of which is subject to the Board's jurisdiction." *San Manuel,* at *10.

The Board also refused to exercise its discretion to decline jurisdiction. Under the NLRA, the Board may decline to assert jurisdiction "over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction." NLRA § 14(c). Although the Board in *San Manuel* did not adopt a "blanket assertion of jurisdiction," the self-imposed limitation on its jurisdiction is so narrow that it is likely to apply to a very small group of tribal organizations. The exemption would apply only when "Indian tribes are acting with regard to … traditional tribal or governmental functions, [and in these circumstances] the Board should take cognizance of its lessened interest in regulation and the tribe's increased interest in its autonomy." *San Manuel,* at *9.

According to the Board, its new standard regarding jurisdiction is consistent with the Board's balancing of its "interest in effectuating the policies of the Act with its desire to accommodate the unique status of Indians in our society and legal culture." *San Manuel,* at *8. In balancing these competing interests in the future, the Board will apply the "*Tuscarora-Coeur d'Alene* analysis as a component of consideration." However, the Board will also go beyond such analysis by examining "the specific facts in each case to determine whether the assertion of jurisdiction over Indian tribes will effectuate the purposes of the Act."

Finally, the Board rejected the National Indian Gaming Association's argument that the Board's jurisdiction would conflict with the Indian Gaming Regulatory Act (IGRA). The Board stated that "the purpose of IGRA is to provide a statutory basis for Indian gaming," and since "the Act does not regulate gaming," there is no conflict between the two laws. *San Manuel,* at *10.

IMPLICATIONS OF *SAN MANUEL* FOR INDIAN CASINOS

San Manuel is a substantial change that gives rise to many more questions than it answers. While *San Manuel* holds that the language of Section 2(2) of the NLRA does not exempt tribal organizations, the Board has indicated that it will exercise its discretion to decline jurisdiction in certain cases. The Board, however, provides little guidance as to where it will draw the line, making such general statements as "determining whether to assert jurisdiction will require careful

balancing." Traditional tribal or governmental functions "are less likely than commercial enterprises to involve non-Indians and to substantially affect interstate commerce." *San Manuel*, at *9.

With respect to tribal gaming organizations, the assertion of jurisdiction by the Board raises new questions about the role of labor in compact negotiations and the enforceability of existing labor provisions in gaming compacts. Where the Act applies, it preempts all state laws that attempt to regulate conduct prohibited or protected by the Act. *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 244 (1959). Consequently, any labor obligations imposed or enforced by state law may be preempted in light of *San Manuel.*

Application of the NLRA to tribal gaming organizations also raises a potential conflict between the Act and IGRA. While the Board held that IGRA "does not address labor relations," that conclusion is at odds with the 9th Circuit's statement in *Coyote Valley Band of Pomo Indians v. California,* 331 F.3d 1094, 1110 (9th Cir. 2003), that labor provisions are not "categorically forbidden by the terms of IGRA," and with the practices of the states, which have used IGRA to impose labor obligations on tribal gaming organizations. The potential conflict would be resolved under principles governing the accommodation of federal statutes, which require statutes to be interpreted so as to avoid conflicts. The most logical accommodation of the NLRA and IGRA would be the one reached by the Board, which would preclude states from including labor conditions in compacts negotiated pursuant to IGRA.

Properly managed, *San Manuel* may create new opportunities for tribal gaming organizations. Organized labor has become adept at using the compact negotiation process to obtain concessions from tribal gaming organizations. Not only has labor's role in negotiations often delayed an agreement, but it also has resulted in many tribes being subjected to state mandated labor obligations that are more onerous than the Act. *San Manuel* creates an opportunity to marginalize labor in compact negotiations. It also may present opportunities to adjust existing compacts that contain what may now become impermissible labor obligations.

Of course, application of the Act does create new risks and obligations for tribal gaming organizations. As employers under the Act, tribal gaming organizations can have their conduct challenged as Unfair Labor Practices. In addition, employee selection of a union as a bargaining representative will be governed by the Board's representation processes. In each case, however, well-developed rules will apply, permitting tribal gaming organizations to effectively address labor issues with proper planning.

It is unlikely that the Board decision in the *San Manuel* case will be the last word on this issue. In the meantime, tribal organizations should consider how their relationships with the state, labor and employees will be affected by the developing law.

CONTACT INFORMATION

If you have questions or wish to learn more about this ruling, please contact any of the lawyers listed below:

Donald R. Pongrace .....202.887.4466 .....dpongrace@akingump.com.....Washington
Barry W. Brandon.....202.887.4542 .....bbrandon@akingump.com .....Washington
Joseph A. Turzi .....202.887.4228 .....jturzi@akingump.com.....Washington
Richard J. Rabin .....212.872.1086 .....rabin@akingump.com .....New York