

Federal Labor Law Held Applicable to Tribal Casinos



By Judd H. Lees

On February 9, 2007, the United States Court of Appeals for the District of Columbia Circuit affirmed the National Labor Relations Board's application of federal labor law to the San Manuel Indian Bingo & Casino in California. In doing so, the Appeals Court ruled that application of the National Labor Relations Act to the Casino did not impair the tribal sovereignty of the San Manuel Band of Serrano Mission Indians, which owns and operates the Casino on its reservation in San Bernardino County, California. The decision will have enormous ramifications on tribal efforts in response to the concerted efforts of Unite HERE and other labor organizations to organize unions at casinos.

The case arose as a result of a union organizing effort by Unite HERE (Hotel Employees & Restaurant Employees) to gain access to workers at the San Manuel Indian Bingo & Casino. The Casino is a tribal governmental economic development project wholly owned and operated by the tribe, and the Casino is located entirely within the limits of the San Manuel reservation. The Casino is operated pursuant to tribal law (the San Manuel Gaming Act) and the tribe, through the General Council, established the budgets, wages, salaries, benefits and general working conditions at the Casino. In addition, the tribe adopted a tribal labor relations ordinance governing labor relations at the Casino. While the project is operated by members of the tribe, not all employees are tribal members, and most of the Casino's patrons are non-members who come from outside the reservation.

The unfair labor practice charge arose out of the Casino's allowance of access to the Casino by representatives of the Communication Workers of America and denial of similar access to business agents of Unite HERE. When the General Counsel for the National Labor Relations Board found merit with the charge and issued a complaint, the Casino responded by filing a motion for summary judgment on the grounds that the Board lacked jurisdiction over the San Manuel Tribe's operations due to tribal sovereignty. The Board denied the motion for summary judgment and determined that it had jurisdiction for several reasons.

First, the Board determined that the National Labor Relations Act (NLRA) is a law of general application thus placing the burden on the Tribe to convince the Board that

tribal casinos are expressly excluded from coverage under the NLRA. Based on this burden, the Board determined that nothing in the NLRA suggested that Congress intended to limit the Board from asserting jurisdiction over Indian tribes. Second, according to the Board, application of labor law in this instance would not involve a critical internal matter of tribal self-governance. The Casino represented tribal participation in the economy for commercial purposes, involved the employment of substantial numbers of non-Indians, and catered to non-Indian clients and customers. This participation in interstate commerce warranted federal labor jurisdiction. However, the Board did agree that jurisdiction would not be appropriate in all situations, especially when the tribe is fulfilling "traditionally tribal or governmental functions that are unique to their status as Indian tribes." The Board explained as follows:

Thus, when the Indian Tribes are acting with regard to this particularized sphere of traditional tribal or governmental functions, the Board should take cognizance of its lessened interest in regulation and the tribe's increased interest in its autonomy. In such circumstances, the Board should afford the tribes more leeway in determining how they conduct their affairs by declining to assert its discretionary jurisdiction.

For example, in the companion case of *Yukon Kuskokwim Health Corporation*, the Board determined that it had no jurisdiction to order a union election since the tribal facility in question was a hospital providing free care to tribal members under the Indian Self-Determination Act – even though the vast majority of hospital employees seeking union representation were non-tribal members.

Finally, according to the Board's ruling, application of federal labor law to the Casino would not abrogate any treaty rights. The Board thus rejected the Casino's claim that jurisdiction would interfere with the Indian Gaming Regulatory Act since this Act does not address labor relations. The Board also rejected the Casino's claim that the tribe's sovereign right to exclude non-tribal members from a tribe's reservation precludes the Board's assertion of jurisdiction.

In affirming the Board's ruling, the U.S. Court of Appeals for the District of Columbia agreed that "operation of a casino is not a traditional attribute of self-government," pointing out that many of the Casino's employees and customers were not members of the tribe. The Court's analysis relied on a two-step process. First, the Court examined whether application of the federal labor law to the Casino would impinge upon protected tribal sovereignty. Unlike the Board, the Court was troubled by the

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[T]RIBAL ADVOCATES OBSERVE THAT
 THOSE TRIBES WITH TREATY RIGHTS TO EXCLUDE
 UNWANTED PERSONS FROM THEIR RESERVATIONS
 MAY STILL HAVE THE RIGHT TO DO SO,
 NOTWITHSTANDING THE *SAN MANUEL* DECISION.

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effect of application of federal labor law on the tribal labor ordinance that governs relations with Casino employees. Nevertheless, the Court determined that the resulting impairment of tribal sovereignty was negligible since the San Manuel Tribe's gaming activity was primarily commercial. The tribal labor ordinance in question was thus "ancillary" to the commercial activity.

Second, the Court determined that the Casino fell under the NLRA's definition of "employer" rather than the statutory exception for "any State or political subdivision thereof." The Court determined that the National Labor Relations Board's determination in this respect was a permissible construction of the statute.

As a result of the *San Manuel* decision, application of federal labor law to tribal operations will have to be examined on a case-by-case basis. In the event the tribal activity in question is deemed "commercial" or is Indian gaming, and notwithstanding that fact that such tribal activities are governmental in nature, with all net revenues used for essential governmental services, the Board will probably exercise jurisdiction. In the event the tribe is fulfilling a more "traditional" tribal or governmental function unique to its tribal status – such as the health care facility in the *Yukon Kuskokwim Health Corporation* case – the Board may choose not to exercise its jurisdiction.

In addition, the Act cannot be applied to regulate the relationship between a tribal employer and a tribal member employee since the Board appears to recognize the inherent sovereign right of tribes to self-regulate their relations with tribal member employees. This may then result in exclusion of tribal member employees from federal labor law protection as well as any collective bargaining unit even if the union prevails in its casino organizing efforts. With regard to non-member employees, the Board and Court's analysis may call for recognition of tribal sovereignty in the event the tribe can point to a treaty right that would be abrogated by application of federal labor law.

Moreover, tribal advocates observe that those tribes with treaty rights to exclude unwanted persons from their reservations may still have the right to do so, notwithstanding the *San Manuel* decision.¹ Such exclusion rights, they argue, would allow tribes to exclude union representatives.

Critics of the decision point out that the *San Manuel* decision impinges upon the Indian Gaming Regulatory Act of 1988, which requires Indian casinos to enter into regulatory contracts called "compacts" with the state in which they operate. Some such compacts – e.g., California's master compact – already require tribes to abide by a Tribal Labor Relations Ordinance, which is very similar to the National Labor Relations Act in terms of the protections afforded tribal employees. In addition, critics argue that the Board's and Court's treatment of the NLRA as a law of general application is flawed.

The Court of Appeals' affirmation of the *San Manuel* decision could have an enormous impact on tribes since, unlike many laws for which courts have drawn a distinction between federal agency lawsuits, from which tribes are generally not immune, and private suits, from which tribes are generally immune, the NLRA provides a federal agency forum for private suits by various charging parties – including unions and individuals. All that is necessary for the NLRB to pursue an action is for the private charging parties to demonstrate that their unfair labor practice charges have sufficient merit to proceed to hearing. The NLRB then acts as prosecutor to obtain injunctive relief and/or damages on behalf of the private party labor union or individual.

Labor organizations such as Unite HERE will be emboldened to redouble organizing efforts in the burgeoning Indian gaming labor market. Casino management, which may be understandably unschooled in the vagaries of the National Labor Relations Act, may run afoul of the Act, resulting in potential back pay liability on behalf of the union or employee and, in extreme cases, bargaining orders requiring recognition of a union. Pending federal legislation such as the Employee Free Choice Act, if passed, will only make organized labor's unionization efforts easier.

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1 See Lael Echo-hawk, "San Manuel's 'Treaty Exception': Will the Tribes' Treaty Right to Exclude Preclude Application of the National Labor Relations Act to Tribal Gaming Enterprises," *Indian Law Newsletter* (September 2006), at p. 4.

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Despite the Court of Appeals' failure to address this issue, Tribes and contractors should work together to establish provisions in their contracts that fully describe their intent relating to the independent contractor relationship, whom is in control of the work, and, if sovereign immunity is waived, the extent of such a waiver. Simple

language in a construction contract will adequately address these issues.

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