Insight

IN-DEPTH DISCUSSION

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The Sixth Circuit Extends the NLRA's Reach to Tribal-Owned Casinos

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The extent of the National Labor Relations Act's application to tribal-owned and operated enterprises on reservations is an open question in many circuits. Recently, two Sixth Circuit decisions resolved the question in favor of the Act's application to tribal casinos. On June 9, 2015, in *NLRB v. Little River Band of Ottawa Indians Tribal Government*, a Sixth Circuit panel concluded that the inherent sovereignty possessed by the Little River Band of Ottawa Indians did not preclude the NLRA's application to a tribe-owned casino on tribal trust land. Less than a month later, in *Soaring Eagle Casino and Resort v. NLRB* (July 1, 2015), another Sixth Circuit panel held that the NLRA applied to a casino owned and operated by the tribe on trust lands within the reservation, notwithstanding the tribe's inherent sovereignty and a treaty-based right to exclude. These decisions are among the latest in a recent, rapid shift in the law towards applying the NLRA to businesses on tribal lands.

Evolution of the Issue

It is a touchstone principle of federal Indian law that tribes, as quasi-sovereign nations, possess the inherent right to self-govern, generally to the exclusion of state and federal laws. Also well established is Congress's ability to legislate for Indian Country and to extinguish these rights by expressing a clear and unambiguous intent to do so. These principles give rise to the question of how courts should construe the scope of federal statutes of broad and general application that, like the NLRA, are silent regarding their application to tribes.

The National Labor Relations Board has long maintained that the NLRA applies to non-tribal-owned businesses operating on reservations. However, until recently, the NLRB took the position that tribal-owned and run enterprises on reservations fell under the NLRA's exception for branches of government, so long as they were, in fact, properly considered part of the tribal government.

This began to change in 2004 when the NLRB reversed its position with respect to the exemption and asserted jurisdiction to enforce the NLRA against on-reservation, tribal employers engaged in "commercial activities."[1] In support of the Act's application, the NLRB appropriated the Ninth

1 The NLRB's current policy with respect to its jurisdiction in Indian Country is: "The Board asserts jurisdiction over the commercial enterprises owned and operated by Indian tribes, even if they are located on a tribal reservation. But the Board does not assert jurisdiction over tribal enterprises that carry out traditional tribal or governmental functions." https://www.nlrb.gov/rights-we-protect/jurisdictional-standards

Circuit's analysis in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), that held that "a general statute in terms applying to all persons includes Indians and their property interests," unless:

> (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . . ."

Relying on this framework, the Board held that the NLRA applied to a tribal-owned and operated on-reservation casino.

The NLRB's reversal generated discord between the D.C. and Tenth Circuits. In *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007), the court affirmed the NLRB's holding with respect to its jurisdiction, but rejected the *Coeur d'Alene* analysis. Instead, the court created its own test for determining when laws of general application would apply on reservations: If a law of general application constrains tribal self-government, it would be inapplicable absent an expression of congressional intent. Conversely, "if the general law relates only to the extra-governmental activities of the tribe, and in particular activities involving non-Indians," it might apply despite congressional silence. To determine the outcome of this analysis, the court engaged in a fact-intensive analysis that weighed the casino's role in funding "traditional" governmental functions against the interests supporting the NLRA's application.

In *NLRB v. Pueblo of San Juan*, 280 F.3d 1278 (10th Cir. 2000), the court concluded that the NLRA did not preempt a right-to-work tribal ordinance applicable to employees of a non-Indian company engaged in commercial activities on a reservation pursuant to an agreement with the tribe. Because the case was framed as a question about the reach of tribal ordinances to non-members on the reservation, the court applied the test coined in *Montana v. United States*, 450 U.S. 544 (1981), rather than *Coeur d'Alene*. The *Pueblo of San Juan* court's holding conflicts with *San Manuel's* because, while *San Manuel* found that the NLRA would apply to tribes, *Pueblo of San Juan* concluded that tribal ordinances could displace the Act.

Little River Band of Ottawa Indians v. NLRB

In *Little River Band*, the NLRB challenged a tribal labor ordinance that the Board deemed in violation of the NLRA as applied to the Band's on-reservation casino. Among other things, the ordinance included a right-to-work provision and a clause limiting employees' ability to participate in investigations initiated by non-tribal authorities, such as the NLRB. The casino, owned by the Band and operated on the reservation, employs primarily non-tribal members.

A majority of the Sixth Circuit panel agreed with the Board both that the NLRA applies and that the NLRB has jurisdiction to enforce it. In reaching this conclusion, however, the court accorded no deference to the NLRB's finding of jurisdiction because it was based on an analysis of Indian law. Reviewing the question de novo, the court adopted the *Coeur d'Alene* framework, concluding that the NLRA was a law of general application that, as applied to casinos, did not undermine "tribal self-governance in purely intramural matters," and the Act's silence with respect to tribes was not sufficient evidence that Congress intended that it not apply. As no treaty right was at stake, none of the three *Coeur d'Alene* exceptions were met. Therefore, the NLRA applied and the NLRB could assert jurisdiction.

The dissent challenged the majority's reliance on the presumption that laws of general application should also ordinarily apply to tribes, arguing that "the majority's decision impinges on tribal sovereignty, encroaches on Congress's plenary and exclusive authority over Indian affairs, conflicts with Supreme Court precedent, and unwisely creates a circuit split." Therefore, because Congress has not acted to extend the NLRA to tribes, it would not apply.

Soaring Eagle Casino & Resort v. NLRB

The facts in *Soaring Eagle* were similar to those in *Little River Band*. A non-member employee of the tribal-owned, on-reservation casino filed an unfair labor practice charge with the NLRB challenging the tribe's non-solicitation ordinance, claiming it conflicts with the NLRA. On appeal, the tribe argued that tribal sovereignty precluded the Act's application. Unlike in *Little River Band*, the tribe also relied on two treaties that reserved the tribe's rights to exclusive use, ownership and occupancy of its lands.

A different Sixth Circuit panel nonetheless concluded that the tribe's treaty rights did not preclude the NLRA's application. Specifically, the court determined it was bound by the *Little River Band* court's holding that tribal sovereignty would not bar the NLRA's application, and it had no choice but to rule against the tribe.

Despite following *Little River Band*, this panel strongly disapproved of the decision's reasoning and outcome. Echoing the dissent in *Little River Band*, the court argued that "[t]he *Coeur d'Alene* framework unduly shifts the analysis away from a broad respect for tribal sovereignty, and the need for a clear statement of congressional intent to abrogate that sovereignty." It also criticized the "analytical dichotomy between commercial and more traditional governmental" functions presumed by both *Coeur d'Alene* and *San Manuel* because such a distinction, "distorts the crucial overlap between tribal commercial development and government activity that is at the heart of the federal policy of self-determination."

Instead, the court maintained that absent clear congressional intent, a statute of general application would not apply if it impinges a tribe's control of its own members and activities. The court found that the situation of an employee working for a tribal-owned and operated casino presents a "consensual commercial relationship." Therefore, these employees are subject to the conditions the tribe placed on the relationship, including the non-solicitation ordinance. The court found support for this conclusion in the voluntariness of the employment relationship, the casino's location on trust lands and function as a unit of government, and the casino's importance to tribal governance and member services. If not for the binding decision in *Little River Band*, the court would have ruled for the tribe on these grounds.

Impact of *Little River Band* and *Soaring Eagle*

Little River and *Soaring Eagle* dictate that, within the Sixth Circuit, the NLRA applies to casinos on Indian lands absent a more specific treaty-based right of exclusion. They also require that, for now, courts in the Sixth Circuit apply the *Coeur d'Alene* framework to cases challenging the reach of the NLRA and likely all statutes of general application. Given their broad focus, these decisions may well impact a much wider range of issues. This could mean that such employment laws as OSHA, the ADEA, and ERISA, all of which are silent with respect to tribes, could be found to apply to casinos and other tribal organizations.

In cases involving the NLRA, *Little River Band* and *Soaring Eagle* leave room for different outcomes under several circumstances. Most clearly, courts could reach different conclusions in the presence of more specific treaty rights. Certainly, a court also could determine that an enterprise other than a casino qualifies for one of *Coeur d'Alene's* exceptions, or even find that a tribal-owned and operated casino that employs primarily tribal members is exempt from the NLRA.

Nor do the *Little River Band* and *Soaring Eagle* decisions serve to clarify the state of the law. A clear circuit split remains, and the split seems bound for resolution by the Supreme Court. Alternatively, U.S. Senate Bill 248—The Tribal Labor Sovereignty Act of 2015—would, if passed, resolve this question against the NLRA's application to any enterprise or institution owned and operated by an Indian tribe and located on its lands. SB 248 was introduced on January 22, 2015 and is currently in Committee.