



LEGAL ALERT

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Indian Casinos

On February 9, 2007, the U.S. Court of Appeals for the District of Columbia denied the San Manuel Tribe's appeal and affirmed the National Labor Relations Board (NLRB) 2004 decision which, for all practical purposes, brought Indian casinos within the jurisdiction of NLRB.¹ The NLRB is a federal agency charged by Congress with enforcing and administering the National Labor Relations Act (the Act). 29 U.S.C. § 151 et. seq. The Act encompasses the basic labor-management relations policy of the United States. Its goal is to mitigate and eliminate obstructions to the free flow of commerce arising out of industrial strife.

In essence, the Act seeks its goals through two methods - the encouragement of collective bargaining, and the protection of workers' exercise of full freedom of association, self-organization and designation of representatives.²

The D.C. Circuit agreed with the NLRB that, since Indian tribes are not specified in the statute as entities that are not covered by the NLRA, and since Congress, through the NLRA, gave the NLRB the broadest jurisdictional authority permitted by the commerce clause, the NLRB interpretation of its jurisdictional authority as encompassing Indian casinos is a "permissible construction

of the statute."³ The Court also agreed with the NLRB that operation of a casino is not a traditional attribute of self-government but, rather, it is a typical commercial enterprise. In the Court's view, while application of the NLRA to employment at Indian casinos may impinge, to some extent, on tribal governmental action (e.g., application of the tribes' labor ordinances), the impairment on tribal sovereignty is negligible in the context of Indian casinos, which are primarily commercial enterprises.

The San Manuel Tribe's argument that Congress intended for labor relations at Indian casinos to be regulated through the Indian gaming acts and the required tribal-state contracts was rejected. The Court responded that it could not conclude that Congress had intended federal agencies to have no role in regulating employment issues that arose in the context of tribal gaming.

What this means for Indian casinos is that the NLRB union election and unfair labor practice proceedings are available to employees and to labor unions seeking to organize casino employees.

In order to protect the workers' right to designate a representative of their own choosing for the

¹San Manuel Indian bingo and Casino, 341 NLRB 1055 (2004).

²How to Take a Case Before the NLRB, 7th Ed. ABA Section of Labor and Employment Law.

³Under the NLRB's formulation, the NLRA's law and procedures apply to Indian casinos and other commercial enterprises located on tribal lands, unless: 1) application of the law "touches exclusive rights of self-government in purely intramural matters"; 2) 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.



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purpose of collective bargaining with their employers, the Act and the rules and regulations issued by the NLRB set forth detailed procedures, which employees may use to exercise their right to select or reject a collective bargaining representative.

The heart of the NLRB representation procedures is the election by secret ballot. Under the Act, the NLRB controls the procedural conduct of elections and the substantive contents of the campaigns, typically conducted by employers and labor unions that precede such elections.⁴

It is well established that the NLRB has very broad discretion in establishing and enforcing the procedures necessary to ensure the fair and free choice of bargaining representatives by employees.⁵ The NLRB has delegated authority in the representation area to its regional directors. Regional directors are the chief officers in each of the 33 regions in which the country is divided for purposes of administering the Act.

Each region has an office with a staff, which, in addition to the regional director, includes regional attorneys, field examiners and field attorneys. Regional directors and their agents bear the primary responsibility for the administration and enforcement of representation procedures, including the proper conduct of the secret ballot elections.

The decision of the D.C. Circuit is a significant development for indian casinos. One should expect unions to focus on organizing their employees. Snell & Wilmer attorneys are available to assist indian casinos with union organizing issues, including training their supervisors regarding NLRB procedures, the impact of unionization on their operations, and the tactics that unions use to organize employees. Our attorneys have represented employers in hundreds of cases involving union organizing efforts. For more information, please contact the attorney with whom you regularly work, Jerry Morales at 602-382-6362; e-mail: jmorales@swlaw.com, or Heidi Studenmaier at 602-382-6366; e-mail: hstudenmaier@swlaw.com.

⁴Id. at 245.

⁵NLRB v. A. J. Tower Company, 329 U.S. 324 (1946).

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