

## Bills Propose to Reverse National Labor Relations Board Jurisdictions over Indian Tribal Governments

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***The National Labor Relations Act (“NLRA”)*** was enacted by Congress in 1935. The Act, also known as the Wagner Act after its champion, New York Senator Robert F. Wagner, passed the Senate in May 1935, the House in June 1935, and was signed into law by President Roosevelt on July 5, 1935. The Act’s purpose was to encourage workers’ collective bargaining rights and protect them from retribution for organizing unions. The Act created the *National Labor Relations Board* (“NLRB”), a new agency, to enforce the new policy.

Despite the fact that Congress had enacted sweeping pro-Indian legislation in the form of the Indian Reorganization Act of 1934 in the previous year, the NLRA did not mention Indian tribes at any point. Until 2004, Indian tribes and tribally-owned businesses were generally assumed to be beyond the jurisdiction of the labor legislation with few exceptions.

In 2004, the NLRB reversed that assumption with a ruling that it had jurisdiction over the San Manuel Casino pursuant to the NLRA. The matter originated from a complaint filed with the NLRB by UNITE HERE! a large California hotel and restaurant workers’ union, which complained that the Tribe had allowed a competing union, the Communication Workers of America, access to the casino to organize its employees while denying UNITE HERE! representatives access to the site. The Tribe moved to dismiss the proceeding for lack of jurisdiction.

The NLRB held that it had jurisdiction, reasoning that (1) the NLRA applies to tribal governments by its terms, despite any express reference to Indian tribes, (2) the legislative history of the NLRA did not suggest a tribal exception, and (3) federal Indian policy did not preclude the application for the NLRA to the commercial activities of tribal governments. The board found an unfair labor practice and ordered the Tribe to allow UNITE HERE! access to the casino workers.

The Tribe appealed the ruling to the United States Court of Appeals for the District of Columbia Circuit. UNITE HERE! intervened as a defendant. The Court determined that the question of the NLRA’s application to Indian tribes turned on two related questions: (1) whether application of the NLRA to San Manuel’s casino would violate federal Indian law by impinging upon protected tribal sovereignty, and (2) whether the term “employer” in the NLRA reasonably encompasses Indian tribal governments operating commercial enterprises.

In resolving these questions, the D.C. Circuit recognized the tension between the Supreme Court's 1960 holding in ***Federal Power Commission v. Tuscarora Indian Nation***, that "a general statute in terms applying to all persons includes Indians and their property interests," and other Supreme Court precedents favoring tribal sovereignty, including the 1978 ***Santa Clara Pueblo v. Martinez*** holding that any impairment of tribal sovereignty required a clear expression of tension by stating that "if the general law relates only to the extra-governmental activities of the tribe, and in particular activities involving non-Indians, then application of the law might not impinge on tribal sovereignty." Ultimately, the Court held that the impact of NLRB jurisdiction on the Tribe's sovereignty was "negligible in this context, as the Tribe's activity was primarily commercial," that the Board's decision as to the scope of the term "employer" in the NLRA was permissible, and affirmed the Board's jurisdiction over the casino.

More recently, in Michigan, the Saginaw Chippewa Indian Tribe has appealed an NLRB ruling that the Tribe violated the NLRA. In October 2014, the NLRB ordered the Saginaw Chippewa Tribe to reinstate an employee allegedly fired for union organizing at the Tribe's casino. The Tribe appealed to the Sixth Circuit Court of Appeals. If that Court rules that the NLRB lacks jurisdiction over the Tribe that decision would create a circuit split and likely end up before the United States Supreme Court.

The NLRB states "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."

In January, Kansas Republican Senator Jerry Moran introduced S.248, the "***Tribal Labor Sovereignty Act of 2015***." The Bill would amend that NLRA to exclude "any enterprise or institution owned and operated by an Indian tribe and located on its Indian lands." At its February 2015 Executive Council Winter Session, the National Congress of American Indians, the largest Native American policy organization, passed a resolution in support of the bill. A similar bill has been introduced in the House of Representatives. The Senate Indian Affairs Committee will hold a hearing on the bill later this month.

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National Law Review, Volume V, Number 132

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