Published on *The National Law Review* https://natlawreview.com

Intersection of Federal Labor Law, Tribal Gaming and a Deep Division Within Two Sixth Circuit Three-Judge Panels

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Two separate three-judge panels of the United States Court of Appeals for the Sixth Circuit have rendered labor law decisions concerning Indian casinos in ***Michigan*** only 22 days apart. While each of the panels ruled that the ***National Labor Relations Board ("NLRB")*** can assert jurisdiction over tribal casinos, the situation can best be described as "unsettled or even confusing."

While each of the panels ruled against the tribal casinos, four of the six judges states clearly that they disagreed with that conclusion as a matter of law.

Given the development of these parallel rulings and the fact that a majority of judges disagreed with the decisions rendered, it seems inevitable that at least one (if not both) of these cases will be heard by the full Sixth Circuit in an *en banc* review and decision.

The first case involved the NLRB and Little River Band of Ottawa Indian Tribal Government and was decided on June 9 in a 2-1 split of the panel. The second case involved the Soaring Eagle Casino and Resort, an enterprise of the Saginaw Chippewa Tribe, and was decided on July 1 in another 2-1 split. However, the current debate arising from these two decisions springs from the fact that of the six judges who heard the two cases, four of them expressed serious doubts about the legal rationale for the decisions and, consequently, the outcome.

Two judges on the Little River court ruled that the casino operated on tribal lands falls within the scope of the National Labor Relations Act and, consequently, under NLRB jurisdiction. This litigation followed enactment by the tribal council of an ordinance to regulate employment and labor-organizing activities of its employees, including casino employees, most of whom are not tribal members. However, the rationale for the decision was disputed in a lengthy dissent written by the third panel member, who emphasized that the NLRB was clearly impinging on the Tribe's sovereignty and called attention to the absence of any Congressional intent, either express or implied, to authorize such interference with tribal rights.

The result of the Soaring Eagle court should have gone the other way, since all three judges of that panel declared their belief that the tribal casino was established as a subdivision of the Tribe and managed by the Tribe's governing body, which in turn should dictate that the enterprise was subject to tribal laws. The two judges explained that while they disagreed with the result of the Little River

decision, they were obligated to follow that ruling until it is overturned by either the Sixth Circuit *en banc* or the U.S. Supreme Court.

The critical statute in these cases is the National Labor Relations Act of 1935 ("NLRA"). And, as the two dissents make clear, these two decisions are ostensibly at odds with the Indian Reorganization Act of 1934 ("IRA"), which enacted comprehensive provisions governing Indians and Indian tribes. Yet, despite the then-brand new law rewriting previous Indian law across the board, the NLRA made no mention of Indian tribes or businesses owned and operated by them. And this omission was the foundation for the concerns expressed by four of the six judges.

To be fair to the Little River panel majority, the two judges rejected the Tribe's claim that its inherent tribal sovereignty precluded application of the NLRA to tribal businesses, including casinos, noting that there is no exception in that law for Indian tribes and tribal businesses. They also rejected the Tribe's claim that it has a right to exclude the NLRB from its businesses by virtue of the tribal understanding in execution of treaties with the United States in 1855 and 1853. This claim was predicated upon application of the so-called Indian Canon of Construction, which provides that interpretation of treaties must follow the understanding of treaty tribes at the time of treaty execution. Thus, the majority concluded that the NLRA applies to on-reservation casinos operated on trust land.

The Soaring Eagle panel declared that it was bound by the prior ruling, but it did not agree with the analysis of inherent sovereignty rights. The majority then proceeded to explain why they believed that the prior decision was wrong. Indeed, the court noted that "although Congress was silent regarding tribes in the NLRA, it was anything but silent in its contemporaneously-stated desire to expand tribal self-governance [in enacting the IRA the year before]." It even went further in noting the 1988 enactment of the Indian Gaming Regulatory Act "'to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments,' and 'to ensure that the Indian tribe is the primary beneficiary of the gaming operation'."

As stated above, the stage is set for the issue to be heard by the full Sixth Circuit. The ultimate determination is important for many reasons. When four of six judges disagree with the results of these two cases, all elements of the gaming industry – both Indian as well as non-tribal – have a stake in securing a final resolution of what at best is an unclear state of the applicable law.

National Law Review, Volumess V, Number 209