

NLRB Asserts Jurisdiction in Indian Country

San Manuel Indian Bingo,

341 NLRB No. 138 (May 28, 2004)¹

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Executive Summary:

In a 3-to-1 May 28, 2004 decision, a four-member panel of the National Labor Relations Board (NLRB or Board) overruled 28 years of NLRB precedent holding that the NLRB had discretionary jurisdiction over "commercial enterprises" owned and operated by Indian tribes even when the commercial enterprise was located on the Tribe's reservation. The Board's ruling established a new standard for determining when the National Labor Relations Act³ (NLRA or Act) applied to Indian tribes. Under the Board's new standard, the NLRA will apply to Tribal employers, whether located physically on or off the reservation, unless: (1) the Act touches exclusive rights of self-government in purely intramural matters or application of the Act would abrogate treaty rights; or (2) policy considerations weigh against the assertion of the Board's discretionary jurisdiction.

Under the *San Manuel* holding, tribal owned and operated businesses considered "commercial enterprises" by the NLRB will generally have to comply with the NLRA and accommodate union activity protected by the Act. The ruling will force such commercial enterprises to comply with the Act vis-à-vis union organizing efforts, possibly negotiating and entering into collective bargaining agreements with unions, allowing strikes and picketing, and providing information requested by a union that is needed for the union to adequately represent its members. Following *San Manuel*, tribal employers and counsel representing them must incorporate labor law considerations into their employment and business strategy or risk having a union file an unfair labor practice (ULP) charge, possibly followed by an NLRB complaint and adjudication under NLRB rules and precedent.⁴

Facts and Procedural History:

The San Manuel Band of Serrano Mission Indians is an Indian tribe located on a reservation in San Bernardino County, California. The tribe operates a casino entirely within the limits of its reservation through a tribal government economic development project that is wholly owned and operated by the tribe. The Respondent employer in this case is the tribal government economic development project. The tribe operates and regulates the casino pursuant to its own legislation and sets all significant policies and working conditions including wage, salary and benefit scales, vacation and leave policies, and general working conditions for employees. The tribe has a tribal labor relations ordinance that regulates labor relations at the casino project. Members of the tribe hold all key positions in the project and tribal members are involved in every facet of the project. However, not all employees are tribal members and many of the casino's patrons are non-members who come from outside the reservation.

Multiple unfair labor practice charges were filed with the NLRB on January 8, 1998 by the Hotel Employees and Restaurant Employees International Union (HERE or the Union). An order consolidating multiple complaints was issued on September 30, 1999. The consolidated complaint alleges that the Respondent violated Section 8(a)(2) and (1)⁵ of the Act by assisting and supporting

¹ Full text of the *San Manuel* decision is available at:
http://www.nlr.gov/nlr/shared_files/decisions/341/341-138.pdf.

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³ 29 U.S.C. §§ 151-169.

⁴ The *San Manuel* ruling will be binding precedent in all NLRB cases nationwide. It is not known at this time whether the ruling will be appealed through the courts or whether the tribes will propose legislation for Congress to consider.

⁵ 29 U.S.C. § 158(a)(2) and (1).

the Communication Workers of America (CWA) and by allowing CWA agents access to Respondent's casino for organizing purposes, while denying access to agents of the Hotel Employees & Restaurant Employees International Union.

The Respondent filed an answer denying wrongdoing and asserted that the Board lacked jurisdiction over its operations as an affirmative defense. On January 18, 2000, the Respondent moved to dismiss the complaint for lack of jurisdiction. On January 27, 2000 the case was transferred to the Board⁶ and a Notice to Show Cause why the Respondent's motion should not be granted was issued. Twenty amicus briefs were filed in support of the motion. The NLRB General Counsel, the Union, and the State of Connecticut, intervenor, filed briefs opposing the motion and briefs in response to the amicus briefs.

The Board's decision on May 28, 2004 denied Respondent's motion to dismiss the complaint, overruled 28 years of Board precedent concerning jurisdiction over Indian tribes, and specified an analytical framework for the Board to use in asserting jurisdiction over Indian tribe owned commercial enterprises.

Board's Decision

Existing Precedent

Under existing precedent, the Board would have declined to exercise jurisdiction and dismissed the complaint because the San Manuel Casino was located entirely on the reservation and operated by the tribe. This precedent was based on the Board's holding in *Fort Apache*, 226 NLRB 503 (1976), that "an Indian tribal governing council *qua* government, acting to direct the utilization of tribal resources through a tribal commercial enterprise on the tribe's own reservation,' was not an employer within the meaning of Section 2(2) of the Act."⁷ The Board's reasoning in *Fort Apache* was that a tribal council was a government and that commercial enterprises run by a tribal council were governmental entities analogous to political subdivisions of a state, which are excluded from coverage under Section 2(2)⁸ of the Act. In *Southern Indian*, 290 NLRB 436 (1988), the Board reached a similar conclusion concerning a tribal operated nonprofit health care clinic located on a reservation.

Sac & Fox, 307 NLRB 241 (1992) was the next case that confronted the Board with a jurisdictional question concerning an Indian-owned enterprise. In *Sac & Fox*, the enterprise was a manufacturing corporation providing chemical resistant suits under a Department of Defense contract and was located off the reservation. The Board exercised jurisdiction in *Sac & Fox*, based primarily on the fact that the enterprise was located off the reservation. The Board further concluded that its prior precedent only applied in cases where the tribal enterprise was located on the reservation. Since the Board found that the Act did not expressly exclude a tribal enterprise from its jurisdiction, the Board found the Act to be a "statute of general applicability" and therefore applied to Indians under *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) and *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985).

Finally, in *Yukon Kuskokwim Health Corp.*, 328 NLRB 761 (1999), the Board was presented with a fact situation essentially the same as *Southern Indian* except that the enterprise in question was in Alaska, which has no Indian reservations. Because the clinic was not located on a reservation, the Board asserted jurisdiction rejecting the tribe's argument that the nature of the enterprise should be considered not just its location. Thus, Board precedent was firmly established that the location of the enterprise was the determinative factor in considering whether a tribal enterprise was subject to jurisdiction under the Act.

⁶ The complaint was initially filed in NLRB Region 31 (Southern California). Cases are heard by an Administrative Law Judge (ALJ) in the region where the complaint was filed. Cases can be transferred to Washington, D.C. where they can be reviewed by either the full five member Board or a panel of three members. The NLRB's case handling procedures are available at <http://www.nlr.gov/nlr/legal/manuals/chm1.asp>.

⁷ *San Manuel Indian Bingo*, 341 NLRB No. 138 at 2 (May 28, 2004).

⁸ 29 U.S.C. § 152(2).

Reassessment of Board Precedent

Although the Board could have declined to exercise jurisdiction in *San Manuel*, it decided to address inadequacies in balancing the “competing goals of Federal labor policy and the special status of Indian tribes in our society and legal culture.”⁹ First, the Board stated that “[t]he Supreme Court ‘has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause.’”¹⁰ Second, the Board looked at Section 2(2) of the Act and concluded that Indian tribes were not *expressly excluded* from the Act’s jurisdiction. Third, the Board concluded that Indian tribes did not meet either of the two exemptions in Section 2(2) since they were not Federal Government entities and did not “meet the Board’s or reviewing courts’ traditional definition of a State or political subdivision thereof.”¹¹ Fourth, the Board concluded that exemptions of Section 2(2) were to be narrowly construed. Finally, the Board noted that Congress had expressly excluded Indian tribes in other workplace statutes and concluded that “Congress purposely chose not to exclude Indian tribes from the Act’s jurisdiction.”¹² Based on this reasoning, the Board held that there were no implicit exemptions in the Act that precluded the Board from asserting jurisdiction over a tribal enterprise and expressly “overrule[d] prior precedent to the extent that it holds otherwise.”¹³

Impact of Federal Indian Policy

Having concluded that the Act did not preclude the Board from asserting jurisdiction over tribal enterprises, the Board then addressed the question of whether Federal Indian policy required the Board to decline jurisdiction. The Board concluded that Federal Indian policy did not preclude the Board from asserting jurisdiction primarily on the premise that the Act was a statute of general application and “statutes of ‘general application’ apply to the conduct and operations, not only of individual Indians, but also of Indian tribes.”¹⁴ Next, the Board noted that the Ninth Circuit had enumerated several exceptions limiting jurisdiction over Indian tribes¹⁵ since the broad principle in *Tuscarora* would result in an “expansive application of jurisdiction”.¹⁶ Finally the Board concluded that its *Tuscarora–Coeur d’Alene* analysis in *Sac & Fox* was the correct analysis to assess whether Federal Indian law and policy precluded jurisdiction and explicitly overruled prior precedent that the analysis was improper in on-reservation cases.

Discretionary Jurisdiction

The last stage in the Board’s discussion was to add an additional step to the *Tuscarora–Coeur d’Alene* analysis – specifically “to determine whether policy considerations militate in favor of or against the assertion of the Board’s discretionary jurisdiction.”¹⁷ The result of this last step is that the Board will determine whether to assert jurisdiction on a case-by-case basis by weighing a number of factors.

Application of the San Manuel Framework

To date, the Board has used its new analytical test for deciding whether to assert jurisdiction in cases in *San Manuel* and a companion case, *Yukon Kuskokwim*,¹⁸ decided the same day as *San Manuel*. In *San Manuel*, the Board first applied the *Tuscarora–Coeur d’Alene* analysis, deciding that

⁹ *San Manuel Indian Bingo*, 341 NLRB No. 138 at 2 (May 28, 2004).

¹⁰ *San Manuel Indian Bingo*, 341 NLRB No. 138 at 3 (May 28, 2004) (citing *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224,226 (1963)).

¹¹ *San Manuel Indian Bingo*, 341 NLRB No. 138 at 4 (May 28, 2004).

¹² *Id.*

¹³ *Id.* at 5.

¹⁴ *Id.* (citing *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960)).

¹⁵ *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985).

¹⁶ *San Manuel Indian Bingo*, 341 NLRB No. 138 at 5 (May 28, 2004).

¹⁷ *Id.* at 8.

¹⁸ *Yukon Kuskokwim Health Corporation*, 341 NLRB No. 139 (May 28, 2004). Full text of the decision is available at: http://www.nlr.gov/nlr/shared_files/decisions/341/341-139.pdf,

application of the Act to the casino would not “touch exclusive rights of self-governance in a purely intramural matter,”¹⁹ and since the Respondent did not allege the existence of any treaties, application of the Act would not abrogate any treaty rights. Next, the Board looked at policy considerations favoring the assertion of jurisdiction. The Board found that the casino was a commercial enterprise, employed non-Indians, catered to non-Indian customers, and concluded that “assertion of jurisdiction would not unduly interfere with the tribe’s autonomy.”²⁰ The Board found that “the only factor weighing against assertion of jurisdiction is that the casino is located on the tribe’s reservation,”²¹ noting that the location factor was not sufficient to outweigh the others. The Board disagreed with Respondent’s argument that its casino, like a state lottery, was a governmental function stating that they rejected the notion that gambling was a traditional government function. The Board also rejected the argument that the Indian Gaming Regulatory Act (IGRA)²² conflicted with or preempted the Act.

In *Yukon Kuskokwim*, a non-profit corporation was formed in 1969 to provide a tribal health services program. Members elected by the tribal governments of 58 Alaskan Native tribes operate the program. Only one or two employees of approximately forty employees are Native Alaskans. Approximately ninety-five percent of the patients are Native Alaskans. The corporation does not charge Native Alaskans for the services provided because of federal funding involved and pursuant to the Federal Government’s responsibility to provide health care.

Initially, the Board rejected the assertion that the non-profit corporation was a federal entity. The Board had earlier concluded that application of the *Tuscarora–Coeur d’Alene* analysis established no barrier to the Board’s assertion of jurisdiction.²³ Next, the Board examined policy considerations weighing for and against asserting its jurisdiction. The Board found that the health care services program was a “unique governmental function” and not a typical commercial enterprise. Further, the Board found that since ninety-five percent of the patients were Native Alaskans from the local area, it had limited impact on interstate commerce and did not compete with other hospitals in the area that were subject to the Act’s jurisdiction. Since the non-profit corporation was not on a reservation, the Board noted that would be a factor weighing for assertion of jurisdiction but, since there are no reservations in Alaska, the factor was given less weight. The fact that the majority of employees were non-Native Alaskans would also weigh in favor of asserting jurisdiction but that factor was also given less weight because the makeup of the workforce was expected to change. The result was that the Board exercised its discretion not to assert jurisdiction in the case, overruling its previous decision and dismissing the complaint.

Future Implications

The most common ULPs implicate protected, concerted activity (also known as Section 7²⁴ rights). Since tribal entities have not generally been subject to NLRB jurisdiction before, they generally have little knowledge about these rights and the applicable NLRB case law. Activities such as picketing in support of discharged workers or discussions between employees about wages or benefits for the “mutual aid and protection of co-workers” that tribes might have dealt with previously without consideration of the NLRA would, under *San Manuel*, draw an unfair labor practice charge. After an investigation, it is then likely that an NLRB complaint would issue. Once the complaint issues, the tribal entity will find itself defending a full-fledged lawsuit before a federal administrative agency and defending its actions in front of an NLRB Administrative Law Judge.

Unfair labor practices are also common where employers have overly broad no-access or non-solicitation policies. The ability of tribal entities to keep out both employee or non-employee union

¹⁹ *San Manuel Indian Bingo*, 341 NLRB No. 138 at 9 (May 28, 2004).

²⁰ *Id.*

²¹ *Id.* at 10.

²² 25 U.S.C. § 2701 *et. seq.*

²³ *Yukon Kuskokwim Health Corporation*, 328 NLRB 761, 764 (1999).

²⁴ 29 U.S.C. § 157.

supporters or discharging or refusing to hire union "salts"²⁵ would also most likely draw an unfair labor practice charge followed by an NLRB complaint.

As a result of this decision, tribal commercial enterprises, particularly casinos, can expect increased activity by unions now that the NLRB's jurisdictional barrier concerning tribes has been removed. Attorneys who provide regular advice to tribal entities would be well advised to consult with a qualified labor law attorney, especially when formulating policies and procedures or when faced with union organizational activity or employee discipline issues.

²⁵ Union "salts" are individuals, often paid union organizers, who seek employment with a non-union employer for the purpose of organizing its employees into a union.