

A Look At 6th Circ. Application Of NLRA To Tribal Casino

Law360, New York (July 9, 2015, 10:20 AM ET) --

Weighing in on a hotly contested issue, a panel of the Sixth Circuit has found that federal labor law applies to Indian tribes' casinos, notwithstanding the tribes' inherent sovereignty. However, the panel only did so because it was bound by an earlier decision from a panel of the same court — showing how closely divided the courts are on this subject. The ruling sets up an opportunity for en banc review at the Sixth Circuit on the specific issue of the applicability of federal labor law to tribal employees, or a petition for certiorari to the U.S. Supreme Court to clarify differing circuit approaches to the general applicability of federal statutes to Indian tribes. The case is *Soaring Eagle Casino and Resort v. National Labor Relations Board*, Nos. 14-2405/2558 (6th Cir. Jul. 1, 2015)(Opinion on Petition for Review and Cross-Applcation for Enforcement of an Order of the National Labor Relations Board).



Toni Everton

Background

The Saginaw Chippewa Indian Tribe of Michigan is a federally recognized Indian tribe with more than 3,000 members. In the 1800s, the tribe granted land to the federal government under two treaties. Under an 1864 treaty, the United States agreed to set apart property in Isabella County, Michigan, as a reservation for exclusive use, ownership and occupancy by the tribe. The treaty also gave the tribe the right to exclude non-Indians from living in the territory. The tribe operates the Soaring Eagle Casino and Resort on its reservation, on land held in trust for the tribe by the United States. Only about 7 percent of the casino's 3,000 employees are tribe members. The casino generates approximately \$250 million in gross annual revenues, constituting nearly 90 percent of the tribe's income. Casino income provides the funding to run the tribe's 37 departments and 159 programs, including health administration, social services, tribal police and fire departments, utilities, a tribal court system and a tribal education system.

The casino's employees must adhere to the policies set forth in its associate handbook. The handbook includes a policy prohibiting solicitation by any employee, including solicitation related to union activities, on casino property and states that any person violating the policy will be subject to discipline up to and including termination. On Nov. 15, 2010, the casino discharged housekeeper Susan Lewis for engaging in union solicitation activities on behalf of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America in violation of the no-solicitation policy.

The National Labor Relations Board Decision

On April 1, 2011, the union filed a charge with the National Labor Relations Board alleging that the tribe's no-solicitation policy violates Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. On March 26, 2012, the administrative judge issued his decision and order finding that the NLRB had jurisdiction over the casino and tribe and that the tribe's no-solicitation policy violated the NLRA.

The AJ determined that:

- Restricting operations at a casino on reservation land does not interfere with the tribe's right of self-governance.
- The applicable treaties only provided for a general right of exclusion (of non-Indians) and did not bar application of an act of general applicability like the NLRA.
- Nothing in the language of the NLRA or its legislative history shows a congressional intent to exclude Indians from its coverage.

The tribe appealed the AJ's decision to the NLRB, which adopted the AJ's decision and order. The tribe then appealed to the U.S. Court of Appeals for the Sixth Circuit.

The Sixth Circuit Decision

On July 1, 2015, the Sixth Circuit issued a lengthy opinion concluding that the NLRA applied to the casino and entered judgment enforcing the NLRB's order and denying the tribe's petition for review. However, the Sixth Circuit's opinion demonstrates a split within the Sixth Circuit and a conflict among the circuit courts regarding the applicability of federal statutes of general applicability to Indian tribes.

Analysis of the NLRA Based on Treaty Language

The Sixth Circuit began its analysis of the applicability of the NLRA to the tribe by reviewing the language of the 1864 treaty and case law from other circuits relative to application of federal statutes of general applicability to Indian tribes. The court noted that the Tenth Circuit refused to apply the Occupational Safety and Health Act to an Indian tribe because the act did not contain a specific congressional statement limiting the applicability of the treaty or overriding the tribe's inherent sovereignty. The Sixth Circuit noted, however, that in two separate cases the Seventh Circuit has applied federal statutes (the Employee Retirement Income Security Act and OSHA) to Indian tribes based on treaty language and the Ninth Circuit has applied OSHA to an Indian tribe. Based on its interpretation of the 1864 treaty language, the Sixth Circuit opined that the general right of exclusion contained in the Soaring Eagle treaty did not bar application of a statute of general applicability and held that the casino was subject to the NLRA.

Analysis of the Tribe's Inherent Sovereignty

The Sixth Circuit's analysis did not end with its review of the treaty language. Next, the Sixth Circuit analyzed whether application of the NLRA to the tribe would encroach on the tribe's inherent sovereignty. The court acknowledged that Indian tribes have inherent sovereignty and stated that a federal statute should have a clear congressional intent to encroach on that sovereignty to be applicable to the tribes. However, on June 9, 2015, a panel of the Sixth Circuit had issued an opinion finding that the NLRB had jurisdiction over the Little River Band of Ottawa Indians' casino based on an analytical framework for generally applicable federal statutes established in a Ninth Circuit case (*Donovan v. Coeur d'Alene Tribal Farm*). The *Coeur d'Alene* case held that general federal statutes do not apply to Indian tribes if:

1. 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.

The Little River court used this analytical framework from the *Coeur d'Alene* case and opined that the NLRA applied to Indian tribal casinos operated on trust land. The *Soaring Eagle* court disagreed with the use of the analytical framework from the *Coeur d'Alene* case and held that the correct framework was set out by the U.S. Supreme Court in the *Montana v. Blackfeet Tribe of Indians* case.

The *Soaring Eagle* court determined that *Montana* "set forth the standards within which to analyze the scope of a tribe's authority to regulate the conduct of nonmembers even in the absence of a treaty granting the tribe reserved rights." *Montana* focused on the status of the parties involved (i.e., a tribal member vs. a nonmember) and the type of land on which the activity occurred (i.e., fee land, land owned by the tribe, or land held in trust for the tribe). The *Montana* court acknowledged the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe, when such activity occurs on land not owned by a member or held in trust for the tribe." The *Soaring Eagle* court noted two exceptions set forth by the *Montana* court, even with respect to activities within the reservation that occur on fee land owned by nonmembers:

1. Consensual commercial relationships between the tribe and nonmembers; or
2. Conduct of non-Indians on lands within its reservation that threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe.

The *Soaring Eagle* court stated, "[i]f one of the exceptions applies, the generally applicable federal statute should not apply to tribal conduct, and Congress must amend the statute for it to apply against the Tribe if Congress so desires." Applying *Montana* to the facts of the *Soaring Eagle* case, the Sixth Circuit panel concluded that under the first *Montana* exception a tribe "has the power to enter into contractual relationships with nonmember individuals and entities for work on reservation property, whether Indian owned or not, and to place conditions on those contracts." Thus, the tribe's no-solicitation policy and its suspension and termination of Lewis fall under *Montana*'s first exception and the NLRA should not be applicable to the casino.

The panel further supported its conclusion that the NLRA is inapplicable to *Soaring Eagle* by noting that the Casino is on trust land and considered a unit of the tribe's government, and the importance of the casino to the tribal government. The panel ultimately stated:

If writing on a clean slate, we would conclude that the Tribe has an inherent sovereign right to control the terms of employment with nonmember employees at the Casino, a purely tribal enterprise located on trust land. The NLRA, a statute of general applicability containing no expression of congressional intent regarding tribes, should not apply to the Casino and should not render its no-solicitation policy void.

But this panel of the Sixth Circuit is bound by the holding in the Little River case, so it ultimately ruled that the NLRA applies to the Soaring Eagle Casino and the NLRB has jurisdiction over the dispute.

Other Circuit Court Opinions

The Sixth Circuit's application of the NLRA to on-reservation casinos operated by Indian tribes joins other circuit courts that have issued similar opinions relating to the applicability of federal statutes to Indian tribes. Specifically, the Second, Seventh, Ninth and Eleventh circuits have applied the analytical framework from the Coeur d'Alene case to determine whether federal statutes of general applicability apply to Indian tribes. However, the Eighth and Tenth Circuits have rejected the Coeur d'Alene analytical framework. For example, in determining an Age Discrimination in Employment Act case, the Eighth Circuit held that laws of general applicability will not be applied to Indian tribes absent a showing of congressional intent to do so.

Conclusion

With regard to treaty language as a basis for applying statutes of general applicability, the circuit courts appear to consistently require specificity in the treaty and conclude that a general right of exclusion, standing alone, does not bar application of a federal statute of general applicability. However, there is a split among the circuit courts (and within the Sixth Circuit) about the proper analytical framework for determining whether a federal statute of general applicability encroaches on an Indian tribe's inherent sovereignty, with some circuits adopting the Coeur d'Alene analytical framework and other circuits rejecting it. Hence, this issue appears ripe for Supreme Court review for the first time since the 1985 Montana decision.

—By Richard A. Duncan, Toni M. Everton and Thomas J. Posey, Faegre Baker Daniels LLP

Richard Duncan is a partner in Faegre Baker Daniels' Minneapolis office. Toni Everton is an associate in the firm's Indianapolis office. Thomas Posey is a partner in the firm's Chicago office.

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