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A Tale of Two Decisions: Is a Tribal Entity Subject to the NLRA?

6.19.2015

Within a one week time period, two different decisions, issued by two different governing entities, reached two different conclusions as to whether the tribal entity was subject to the National Labor Relations Act ("NLRA"). We will address each of these decisions in chronological order.

NLRB Finds Chickasaw Nation Not Subject to NLRA

On June 4, 2015, the National Labor Relations Board ("NLRB") issued a decision regarding the right of the Chickasaw Nation, a sovereign Indian nation, to operate beyond the jurisdiction of the National Labor Relations Act ("the Act"). The NLRB's decision addressed whether the Chickasaw Nation, in its capacity as operator of the WinStar World Casino, was subject to the NLRB's jurisdiction.

Background

In 2011, the International Brotherhood of Teamsters Local 886 claimed that supervisors of the WinStar World Casino, operated by the Chickasaw Nation, were engaging in threats and surveillance of blackjack dealers that were trying to unionize. The Chickasaw Nation denied the union's claims and subsequently filed a federal lawsuit asserting that, because the Chickasaw Nation is a sovereign tribe, the NLRB does not have jurisdiction over its employment affairs. On Thursday, June 4, 2015, the presiding NLRB panel agreed, concluding the Chickasaw Nation is not subject to its jurisdiction.

NLRB Jurisdiction

Pursuant to its prior decision in *San Manuel Indian Bingo & Casino*, the NLRB has the power to assert jurisdiction over Indian tribes unless (1) the law "touche[d] exclusive rights of self-government in purely intramural matters"; (2) the application of the law would abrogate treaty rights; or (3) there was "proof" in

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the statutory language or legislative history that Congress did not intend the Act to apply to Indian tribes. In this particular case, the NLRB was required to determine whether the application of the Act would abrogate the Chickasaw Nation's treaty rights.

Applicable Treaties

The Chickasaw Nation is a federally recognized Indian tribe that has executed a series of treaties with the United States. Such treaties include the 1830 Treaty of Dancing Rabbit Creek (the 1830 Treaty) and the 1866 Treaty of Washington (the 1866 Treaty).

Under the 1830 treaty, the Chickasaw Nation relinquished its rights to a large area of land in what is now Mississippi in exchange for land in what is now Oklahoma. Containing powerful pro-tribal sovereignty language, Article 4 of the 1830 treaty provides that no State shall ever have a right to pass laws for the government of the Chickasaw Nation, and also secures the Chickasaw Nation from "all laws . . . except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs."

The Decision

The NLRB found that asserting jurisdiction over the Chickasaw Nation would abrogate its treaty right to be "secure" "from and against all laws" except those passed by Congress under its authority over Indian affairs. No party argued that Congress passed the Act under its authority over Indian affairs.

Another applicable treaty, the 1866 Treaty, was signed after the end of the Civil War, and essentially provided for the surrender of a portion of land and the freeing of the Chickasaw Nation's former slaves. Article 7 of the 1866 Treaty explicitly states that the Chickasaw Nation agrees to be subject only to those laws "that Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian Territory." This language is compatible with the 1830 treaty, which demands Indian tribes are subject only to federal laws enacted by Congress within legislation that is specific to Indian affairs.

Concluding that no part of Article 7 compels a reading less favorable to the Chickasaw Nation, the NLRB panel held that no provision of the 1866 Treaty undermines the Chickasaw Nation's right to be "secure" "from and against all laws" except those passed by Congress under its authority over Indian affairs. Ultimately, the NLRB concluded that the Chickasaw Nation is not subject to its jurisdiction.

Sixth Circuit Finds Little River Band of Ottawa Indians Subject To NLRA

On June 9, 2015, the U.S. Sixth Circuit Court of Appeals (which governs Michigan among other states) issued a decision regarding the right of the Little River Band of Ottawa Indians to operate beyond the jurisdiction of the Act. The Sixth Circuit's decision addressed whether the NLRB may apply the Act to the operation of a casino resort of the Little River Band of Ottawa Indians.

Background

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The Little River Band of Ottawa Indians is a federally recognized Indian tribe with indigenous lands in northern Michigan. The tribe operates the Little River Casino Resort in Manistee. The casino has 905 employees, 107 of whom are members of the Little River Band tribe, 27 that are members of other Indian tribes, and 717 that are neither members of the Little River Band nor any other Indian tribe. In 2005, the tribal council enacted the Little River Band's Fair Employment Practices Code ("the FEPC"). Article XVI and Article XVII of the FEPC regulate labor organizing activities and collective bargaining. Article XVI granted the tribe the authority to determine the terms and conditions under which collective bargaining may or may not occur, and prohibited strikes, works stoppages, or slow downs by the tribes employees, specifically casino employees. Article XVI also prohibits the encouragement and support by labor organizations of employee strikes, as well as any strike, picketing, boycott, or any other action by a labor organization to induce the Little River Band tribe to enter into an agreement.

NLRB Jurisdiction

Pursuant to the Ninth Circuit's prior decision in *Donovan v. Coeur d'Alene Tribal Farm*, the NLRB has the power to assert jurisdiction over Indian tribes unless (1) "the law touches exclusive rights of self-governance in purely intramural matters;" (2) "the application of the law would abrogate rights guaranteed by Indian treaties"; or (3) "there is proof by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations." In this particular case, the Sixth Circuit was required to determine whether the Act touches exclusive rights of self-governance in purely intramural matters, and whether there is proof by legislative history or some other means that Congress intended the Act not to apply to Indians on their reservations.

The Decision

The Sixth Circuit concluded that *Coeur d'Alene* framework accommodates principles of federal and tribal sovereignty. The Little River Band was unable to show that application of the Act to the casino undermined tribal self-governance and purely intramural matters. The Sixth Circuit held that the tribal self-governance exception is designed to exempt internal matters—such as the conditions of tribal membership, inheritance rules, and domestic relations—from the general rule that otherwise applicable federal statutes also apply to Indian tribes. The Little River Band argued that application of the Act undermines its right of self-governance because (1) the regulations targeted by the NLRB's order protect the net revenues of the casino which, pursuant to the Indian Gaming Regulatory Act ("the IGRA"), fund its tribal government, and (2) application of the Act would invalidate a regulation enacted by its tribal council. The Sixth Circuit held that Articles XVI and XVII of the FEPC regulate the activities of non-member and non-officer employees, and is therefore beyond the scope of purely intramural matters. The Sixth Circuit also concluded that the IGRA does not render commercial gaming an untouchable aspect of tribal self-governance, and is therefore outside the realm of purely intramural matters.

The Little River Band next argued that Congress intended the Act not to apply to Indian tribes, particularly because Congress chose not to explicitly include Indian nations within section 301 of the Act, which provides a private right of action for "violation of contracts between an employer and a

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labor organization.” The Court held that Congress’s decision not to include Indian nations within section 301 of the Act is not evidence of Congress’s intent that the statute does not impose obligations on Indian tribes, or that those obligations not be enforced by other means, for example, agency action. Ultimately, the Court found that none of the exceptions set forth by *Coeur d’Alene* applied in this case.

The Uncertain Future

The Chickasaw Nation decision was considered to be a favorable development for Indian tribes beyond the Chickasaw Nation (well, at least for a few days) as many tribes have treaties with the United States. However, the Little River Band decision focused on whether the tribal was able to show that application of the Act to the casino undermined tribal self-governance and purely intramural matters.

The ongoing issue of whether the NLRB has jurisdiction over Indian tribes has been a highly litigated topic. With these recent and conflicting decisions, it is likely that jurisdiction over Indian tribes may be settled by either an act of Congress or the Supreme Court in the near future.

If you would like more information, please do not hesitate to contact your Butzel Long Labor and Employment Attorney.

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