



## Organized Labor Strategies for Tribal Enterprises

By D. Michael McBride III and Susan E. Huntsman

THE THREE KINGS, MCCONKIE RANCH SITE, VERNAL, UTAH. PHOTO BY LAWRENCE BACA.

In February 2007, the D.C. Circuit Court upheld a decision made by the National Labor Relations Board (NLRB) that reversed 28 years of precedent and held that the National Labor Relations Act<sup>1</sup> (NLRA) applies to a tribal enterprise that generates government revenue and operates on an Indian reservation.<sup>2</sup> (Under prior decisions, the act applied only to tribal enterprises operating outside tribal land.) This sharp about-face subjects tribes to federal labor laws and invites labor organizations to organize tribal commercial operations, particularly casinos. Federal, state, and local governments enjoy exemptions under the act, but tribal governments now must put up with new con-

straints on their ability to regulate revenue-generating sources. As a result, tribes should prepare for a new era of labor and employment relations.

### Case Background

The San Manuel Band of Serrano Mission Indians operates a casino located an hour's drive from Los Angeles. Like many California tribes, the San Manuel Band's history is one of relocation and lost land, with the tribe ending up on one square mile of inhospitable land in 1891. Like all tribal governments, the San Manuel tribe cannot collect property or income taxes, and, before the casino was

opened, the tribe's citizens subsisted in deplorable social and economic circumstances. Under the Indian Gaming Regulatory Act,<sup>3</sup> the San Manuel Band (like many tribes) established a gaming enterprise, but its revenues can be used only for governmental and public purposes.<sup>4</sup> As with many tribes, the San Manuel Band's commercial enterprises are closely intertwined with its governmental services; if the casino fails, the tribe's government cannot deliver those services.

Prior to opening the casino, the tribe and California negotiated a compact that addressed labor relations and required the tribe to bargain collectively with employees. The tribe entered a collective bargaining agreement with the Communications Workers of America. A rival union, the Hotel Employees and Restaurant Employees International Union, filed a complaint with the National Labor Relations Board, asserting unfair labor practices. The NLRB decided that, contrary to prior decisions, it did have jurisdiction<sup>5</sup> and issued a cease-and-desist order to the tribe.<sup>6</sup>

Since the D.C. Circuit upheld *San Manuel*, unions have increasingly targeted tribal casinos, including the Mashantucket Pequot's Foxwoods Resort Casino and the Saginaw Chippewa's Soaring Eagle Casino, and the NLRB has asserted jurisdiction over both. While tribes continue to dispute that the act applies to their government-run casinos, which are often their primary source of governmental revenue, tribes must simultaneously prepare to deal with unions under the act.

### The National Labor Relations Act

At its essence, the National Labor Relations Act promises employees the right to self-organize; to form, join, or assist labor organizations; to bargain collectively through their chosen representatives; and to engage in other collective activities for mutual aid or protection—or to do none of the above.<sup>7</sup> The NLRA also bars “unfair labor practices,” which include interference in employees' rights to organize.<sup>8</sup> Other unfair labor practices prohibited by the NLRA include the following:

- threatening employees with lost jobs or benefits if they join or vote for a union;
- interfering with the formation or operation of any labor organization;
- discriminating in hiring or terms of employment to encourage or discourage membership in a labor organization;
- discharging or discriminating against an employee for filing charges or giving testimony under the act; and
- refusing to bargain collectively with employees' representatives.

### The Union's Demand for Recognition

Often, by the time employers discover that activities are taking place to organize unions, the union is well on its way to an election. However, given the nature of tribal relations, employers in tribal casinos typically discover these activities earlier than non-Indian employers do.

Early signs of union activity might include unusual gatherings of people; changes in employees' behavior; card signing; the use of phrases like “concerted activity,” “duty to bargain,” “economic pressure,” or “rights of representation”; pro-union graffiti; and the like.<sup>9</sup> Employers should train managers to recognize early signs of union activity and take proactive steps to protect against the initial lure of unions—namely, employers should maintain a workplace environment that instills satisfaction among workers.<sup>10</sup> Managers should train employees to report even the smallest matters to the Human Resources Department.

Normally, management learns of the union's claim by an unannounced visit, letter, or telephone call from the union representative. Sometimes this initial communication will come from the National Labor Relations Board after the union has filed a petition to hold an election.

Employers' first contact with a union is a critical time. Employers are invariably surprised and often feel hurt, angered, and betrayed by the employees' desire to organize. Tribal employers should consult with expert advisers at the earliest signs that employees are organizing so that management can prepare for the potential of an election and understand successful electioneering.<sup>11</sup>

Employers should respond to the union's communication within a reasonable time, but they should not act hastily. Management should avoid meeting with an unannounced union representative until it has consulted with qualified advisers and has had time for calm reflection. Instead of hasty reactions, the enterprise should request a written statement explaining the nature of the union representative's business with management. Under no circumstances should management examine union authorization cards or make other efforts to determine employees' preferences at this time.

When approached by a purported union representative, tribal management should respond by indicating something along the following lines: “We have a good faith doubt that you represent an uncoerced majority of our employees.” Tribal managers should also note that they cannot deal directly with the union representative and advise him or her to approach the NLRB and seek an election. (The act prohibits a company from dealing directly with a minority union, and it is likely that tribal management will not know whether or not the union represents a majority.)

The union usually approaches the employer with a demand for recognition based on some evidence that the union represents a majority of the company's employees—often in the form of cards signed by the employees, which purport to give the union either the power to act as the bargaining agent for the employees or the power to request an election on the employees' behalf. Other recognized items used to prove majority status include check-off cards, membership application cards, a strike or no-strike vote, or a list of union members.

Tribal managers should not look at any list of employees or cards provided by a union representative or any documents a union representative gives them, especially a

labor agreement. Managers should never agree to discuss employees' complaints or grievances with union representatives. Tribal managers and supervisors must understand that they represent the employer, which in this case is the tribe. Anything managers and supervisors say or do could end up binding the tribe later, particularly allegations of unfair labor practices.

### **Suggested Strategies for Avoiding Unionization in Tribal Casinos**

Certain pre-emptive actions may help a tribe avoid unionization, and tribes, with their inherent sovereignty, should have more options than a private business owner has. The Native American Rights Fund and the National Congress of American Indians have formed a Tribal Labor Ordinances Workgroup to address actions that tribes can take to protect their sovereign authority on labor and employment issues.<sup>12</sup> Some of the group's recommendations are included in this article.

#### **Right to Work**

The 1947 amendments to the NLRA allow for certain "right-to-work" laws. By 2003, 22 states had right-to-work laws that give employees the option of employment without joining or contributing to a union—even one that has been selected as the employees' lawful collective bargaining representative.

As a separate sovereign, tribes can include a right-to-work provision in their tribal codes, but a union will naturally prefer to organize in a jurisdiction that lacks such provisions. The NLRB, however, has recently tended to ignore other tribal labor laws, as is evident in the cases involving the San Manuel, Mashantucket Pequot, and Saginaw Chippewa tribes. In addition, tribes should consider Indian preference or tribal preference laws, which have been upheld by the Supreme Court as they relate to the Bureau of Indian Affairs.<sup>13</sup> Several tribes have adopted well-crafted "tribal employment rights ordinances" to protect a tribe's citizens and Indians who are married to members of a tribe or are living near a tribal lands.

"No-strike" laws are common among non-Indian local government agencies, particularly with police, fire protection forces, and sometimes with schools. If gaming revenue stops abruptly, many tribes would not have large reserves to fall back on and could become incapacitated quickly, justifying calls for a no-strike rule at the tribe's revenue centers. Other options include allowing the permanent replacement of all striking employees (not just economic strikers) and prohibiting the collection of dues for nonrepresentational purposes.

Tribes may require licensure for all representatives of employees as a way to control the spread of corruption and organized criminal activity within the casino environment, something the Indian Gaming Regulatory Act is expressly intended to prevent.<sup>14</sup> Tribes should also consider adopting or amending "exclusion" laws so that undesirable persons can be expelled from the premises. Even though exclusion is a basic attribute of tribal sovereignty that is frequently included in tribal treaties, the NLRA

could require additional due process, including potential "reinstatement."

In addition to reworking their labor laws, tribes should also review their election codes. Unions are politically active and may seek to influence tribal politics. Tribes may adopt or amend existing election laws to address reporting requirements and campaign financing. Regulating such political activity is a core exercise of tribal sovereignty.

#### **No-Solicitation Rules**

In addition to the governmental approaches outlined above, tribal enterprises may also pursue strategies that are familiar to private employers. For example, employers often promulgate rules that prohibit solicitation by organizations on company property in order to maintain efficient working conditions. The NLRB often fears that employers will use such seemingly legitimate business policies to discourage organizational campaigns; therefore, the board has promulgated several standards to test the validity of no-solicitation rules.

If the no-solicitation rule governs nonworking hours—such as rest periods or lunch breaks—the rule is presumed to be unreasonable, and the employer must show a rational business justification for such a broad standard. On the other hand, a rule prohibiting union solicitation during working hours is presumed to be valid in the absence of some evidence of a discriminatory purpose.<sup>15</sup>

Discriminatory enforcement of an otherwise valid rule can cause the rule to become invalid.<sup>16</sup> Some exceptions can be allowed, however. For example, no-solicitation rules are not invalid merely because an exemption is given to requests for charitable solicitations, as long as they are not too frequent.<sup>17</sup> Moreover, the NLRB generally has allowed employers to ban employee leafleting (as opposed to oral solicitations) both during work time and in work areas.<sup>18</sup>

Not only is the substance of a no-solicitation rule important, but the timing is also relevant.<sup>19</sup> Strict enforcement of an existing rule or promulgation of a new one during a union organizing campaign can be evidence of illegal conduct,<sup>20</sup> but this evidence may be offset by showing an objectively observable decline in productivity caused by either the solicitation or the campaign.<sup>21</sup> Moreover, implementing an otherwise lawful rule to coincide with unionizing activity can be lawful when "the surrounding context is devoid of unlawful activity."<sup>22</sup>

In the gaming context, tribal managers may have trouble addressing solicitations that are done by individuals who are not employees. Casinos, by their very nature, invite members of the public to visit and engage in gaming activities in close contact with employees, with thousands of people invited to come every day. Spotting and denying entry to solicitors who are not employees is challenging, and management must be careful to enforce no-solicitation tribal laws and policies in a nondiscriminatory way.

#### **Training of Supervisory Personnel**

Many unfair labor practices occur at the lowest super-

visory level and often result from ignorance of the rules. Therefore, it is critical that supervisors be trained in T.I.P.S., an acronym for the four major prohibitions concerning employers' conduct: an employer cannot threaten, interrogate, promise, or spy.

1. Conduct related to threats: Supervisors may not—
  - discontinue benefits to cause employees to refrain from participating in union activities;
  - threaten employees with job loss or wage reductions or use intimidating language to influence an employee's support of a union;
  - tell employees that the union will have to strike in order to win concessions;
  - tell employees that the company will close its doors or move if the union wins; or
  - discriminate against employees who take part in union activities by separating them from other employees or transferring them and applying stricter rules.
2. Conduct related to interrogation: Supervisors may not—
  - ask employees about their union sentiments or activities;
  - distribute buttons that say "Vote No";
  - require job applicants to disclose their union membership;
  - ask employees about their own or other employees' opinions about the union; or
  - visit employees at their homes to urge them to vote against the union.
3. Conduct related to promises: Supervisors may not—
  - promise employees benefits in return for rejecting the union; or
  - promise employees pay increases, promotions, improved working conditions, additional benefits, or special favors on condition that the employees refuse to join the union or vote against it.
4. Conduct related to spying: Supervisors may not—
  - spy on or surveil employees who are engaging in union activities; or
  - engage in surveillance of employees while they are receiving union handbills or attending union meetings or give the impression that supervisors are doing so.

#### Other Helpful Steps

Many employees join labor unions, because the employees feel that they are not considered important. Anything that educates employees about a tribe's culture and history or encourages employee participation should help relations between employees and employers of tribal establishments. Therefore, tribal management should educate supervisors not only on the legal requirements listed above but also on ways to improve their relations with employees.

Helpful actions can be as simple as suggestion programs or as sophisticated as focus groups. Management may host periodic question-and-answer sessions or dis-

tribute employee newsletters highlighting company benefits and employee recognition programs. The employee handbook and newsletters should include a "Union-Free Statement," and employers may lawfully communicate facts, opinions, and examples through informational campaigns.

Tribal managers should consider several questions related to unions. For example, do the casino managers and employees know the tribe's position on unions? Tribal managers can tell employees that they do not have to sign union cards or talk to union organizers and can point out some of the risks or disadvantages of unionization, including the cost of strikes to tribal government, the cost of unionizing, and the lack of any guarantee that wages or other benefits will improve—or even remain the same—after unionization.

Other questions relate to employees who are not Indians. The National Indian Gaming Association estimates that, of approximately 670,000 employees of tribal casinos, 75 percent are not Indians. Thus, the question arises: Do non-citizen Indians and non-Indian employees know the tribe's unique history, cultural practices, treaty rights, and unique status under federal law? Do these employees understand tribal employment preference laws? Do they understand the tribe's historic struggles or the federal policies that have vacillated over the centuries like a swinging pendulum? Do they understand how the tribe is structured and governed? Do they understand that the tribal government's purpose is to ensure the welfare of tribal citizens? Do these employees know how the tribe assists the surrounding non-Indian community with donations, assistance, or other specific help? Teaching cultural and tribe-specific sensitivity could go a long way in fostering understanding, acceptance, and respect for the tribe. Tribal management can also scrutinize the hiring process and hire only those who understand and accept this cultural sensitivity.

Before any union activity is initiated, tribal managers should conduct a formal survey, which provides an unbiased opportunity to learn about employees' attitudes, to get a sense of the pulse of the organization, and to improve practices that affect employee morale and organizational well-being. The results of the survey can suggest a framework for dealing with issues involved in employee relations issues and provide legal protection if unions later attempt to organize.

Finally, it is critical for supervisors to periodically discuss non-work topics with their employees. Showing sincere interest in others' lives demonstrates respect and care, and managers should consider whether they can help employees achieve their goals and dreams. If managers show this kind of dedication and concern, employees are likely to do whatever it takes to help the organization realize its goals. **TFL**

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#### Endnotes

<sup>1</sup>29 U.S.C. §§ 151–159 (2000).

<sup>2</sup>*San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007), *reh'g en banc denied* (June 8, 2007) (affirming the jurisdictional findings of *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055 (2004)), enforcing *San Manuel Indian Bingo & Casino*, 345 N.L.R.B. No. 79 (Sept. 30, 2005).

<sup>3</sup>25 U.S.C. §§ 2701–2721; 18 U.S.C. §§ 1166–1168 (2000).

<sup>4</sup>25 U.S.C. § 2710(b)(2)(B).

<sup>5</sup>341 N.L.R.B. 1055.

<sup>6</sup>345 N.L.R.B. No. 79.

<sup>7</sup>29 U.S.C. § 159.

<sup>8</sup>29 U.S.C. § 158.

<sup>9</sup>Kevin J. Allis, *The NLRB San Manuel Indian Bingo & Casino Fallout: Dealing with Union Organizational Efforts*, 17 INDIAN GAMING 28, 28–29 (May 2007), available at [www.indiangaming.com/istore/May07\\_Allis2.pdf](http://www.indiangaming.com/istore/May07_Allis2.pdf) (last visited Dec. 4, 2007).

<sup>10</sup>For more information and strategies, see Philip B. Wilson, *THE NEXT 52 WEEKS: ONE YEAR TO TRANSFORM YOUR WORK ENVIRONMENT* (2004), available at [www.lrim.com/contact-us.html](http://www.lrim.com/contact-us.html) (last visited, Nov. 25, 2007).

<sup>11</sup>For strategies, see generally, Donald P. Wilson, *TOTAL VICTORY! THE COMPLETE MANAGEMENT GUIDE TO A SUCCESSFUL NLRB REPRESENTATION ELECTION* (2d ed., 1997), available at [www.lrim.com/contact-us.html](http://www.lrim.com/contact-us.html) (last visited, Nov. 25, 2007).

<sup>12</sup>For more information about this effort, readers may contact Richard Guest at [richardg@narf.org](mailto:richardg@narf.org) or John Dossett at [jdossett@ncai.org](mailto:jdossett@ncai.org).

<sup>13</sup>*Morton v. Mancari*, 417 U.S. 535 (1974).

<sup>14</sup>25 U.S.C. § 2702(2).

<sup>15</sup>*Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

<sup>16</sup>*Serv-Air Inc. v. NLRB*, 395 F.2d 557 (10th Cir. 1968); *TRW Inc. v. NLRB*, 393 F.2d 771 (6th Cir. 1968); cf. *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949) (denying use of a meeting hall was not a violation).

<sup>17</sup>See *Hammary Mfg. Corp.*, 265 N.L.R.B. 57 (1982), amending 258 N.L.R.B. 1319 (1981).

<sup>18</sup>*Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615 (1962).

<sup>19</sup>For example, *Gallup Inc.*, 334 N.L.R.B. 366 (2001), *enforced*, 62 F. App'x 557 (5th Cir. 2003).

<sup>20</sup>For example, *Cannondale Corp.*, 310 N.L.R.B. 845 (1993).

<sup>21</sup>For example, *Bankers Club*, 218 N.L.R.B. 22 (1975).

<sup>22</sup>For example, *F.P. Adams Co.*, 166 N.L.R.B. 967, 968 (1967).

## ICRA continued from page 35

al governments to assure that protections of individual rights are consistent with those afforded by the U.S. Bill of Rights. As a matter of perspective, the ICRA can be seen as positive or negative for Native people, and, depending on what circumstances one faces at a given time, the ICRA can be one's friend or one's enemy.

Today, a revitalization of indigenous justice systems is taking place within various tribal nations. Peacemaking processes like those found among the Navajo Nation, as well as other forms of indigenous dispute resolution systems, are gaining new life after being suppressed by assimilation policies. These indigenous processes are successful because they rely on cultural values to restore harmony to troubling situations. Moreover, tribal courts are using customary law as a tool of adjudication that is strengthening their court systems. Hope is coming to tribal nations that are coping with devastating problems, and it is coming in the form of indigenous jurisprudence. The ICRA has lent its hand to the fight, but as tribal nations find their way back to indigenous justice, they

are realizing that the solutions to many of their problems have always been with them. **TFL**

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#### Endnotes

<sup>1</sup>Indian Civil Rights Act, 25 U.S.C. §§ 1301–1303.

<sup>2</sup>*Talton v. Mayes*, 163 U.S. 376 (1896).

<sup>3</sup>Indian Reorganization Act, 25 U.S.C. 478.

<sup>4</sup>Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights At Thirty Years*, IDAHO L. REV. 469 (1998).

<sup>5</sup>ICRA, *supra* n. 1 at § 1302.

<sup>6</sup>*Id.* at § 1303.

<sup>7</sup>*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

<sup>8</sup>*Duro v. Reina*, 495 U.S. 676 (1990).

<sup>9</sup>*U.S. v. Lara*, 541 U.S. 193 (2004).