

AFL-CIO

LEGISLATIVE ALERT

January 9, 2018

Dear Representative:

The AFL-CIO urges you to oppose the Tribal Labor Sovereignty Act, H.R. 986, which would deny protection under the National Labor Relations Act (NLRA) to a large number of workers employed by tribal-owned and -operated enterprises located on Indian land. Among these workers are over 600,000 tribal casino workers, the vast majority of whom are not Native Americans. In recent years, the number and type of enterprises affected has grown well beyond the gaming industry, and would now include mining operations, power plants, smoke shops, saw mills, construction companies, ski resorts, high-tech firms, hotels, and spas. Many of these are commercial businesses that compete with non-Indian enterprises. As proposed, the Tribal Labor Sovereignty Act would strip all workers in these enterprises of their rights and protections under the NLRA.

The House bill, introduced by Representative Rokita, would overturn a decision by the National Labor Relations Board (NLRB) in *San Manuel Indian Bingo & Casino*, 341 NLRB No. 138 (2004), which applied the NLRA to a tribal casino enterprise. In *San Manuel*, the NLRB looked to Supreme Court and circuit court precedent to articulate a test for whether the NLRB should assert jurisdiction over tribal enterprises, whether located on tribal lands or outside them. (Before *San Manuel*, NLRB jurisdiction was determined based solely on location: On tribal land, the NLRB would forego jurisdiction; off tribal land, the NLRB would assert jurisdiction. Under the *San Manuel* test, the NLRA will not apply if its application would “touch exclusive rights of self-governance in purely intramural matters.” Nor will the NLRA apply if it would “abrogate Indian treaty rights.” The Board in *San Manuel* also considered other factors, including whether the casino in question was a typical commercial enterprise, employed non-Native Americans, and catered to non-Native American customers.

In *San Manuel*, the Board concluded that applying the NLRA would not interfere with the tribe’s autonomy, and the effects of the NLRA would not “extend beyond the tribe’s business enterprise and regulate intramural matters.” However, the test articulated in *San Manuel* provides a careful balancing of tribal sovereignty interests with the NLRA’s federal labor law protections. In a companion case, *Yukon Kuskokwim Health Corp.*, 341 NLRB No. 139 (2004), the Board tipped the balance the other way and didn’t assert jurisdiction.

American Federation of Labor and Congress of Industrial Organizations

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The AFL-CIO supports the principle of sovereignty for tribal governments, but does not believe that employers should use this principle to deny workers their collective bargaining rights and freedom of association. While the AFL-CIO continues to support the concept of tribal sovereignty in truly internal, self-governance matters, it is in no position to repudiate fundamental human rights that belong to every worker in every nation. Workers cannot be left without any legally enforceable right to form unions and bargain collectively in instances where they are working for a tribal enterprise which is simply a commercial operation competing with non-tribal businesses.

The International Labour Organization (ILO), an agency of the United Nations, has confirmed this view in response to a question about whether excluding (from the NLRA) workers employed on tribal lands would conform with principles of freedom of association. These values are at the core of the ILO Constitution and the ILO's Declaration on Fundamental Principles and Rights at Work. The Director for the International Labour Standards Division wrote that in the absence of tribal ordinances offering full protection of internationally recognized rights, "it is critical that the State (the national authority) takes ultimate responsibility for ensuring respect for freedom of association and collective bargaining rights throughout its territory." In other words, if the tribes themselves don't guarantee these basic rights—and many do not, the U.S. government must not abdicate its responsibility to protect them.

Notwithstanding the importance of the principle of tribal sovereignty, the fundamental human rights of employees are not the exclusive concern of tribal enterprises or tribal governments. In fact, the vast majority of employees of these commercial enterprises, such as casinos, are not Native Americans. They therefore have no voice in setting tribal policy and no recourse to tribal governments for the protection of their rights.

The AFL-CIO opposes any effort to exempt on an across-the-board basis all tribal enterprises from the NLRA, without undertaking a specific review of all the circumstances—as current NLRB standards provide. Where the enterprise employs mainly Native American employees with mainly Native American customers, and involves self-governance or intramural affairs, leaving the matter to tribal governments may be appropriate. However, where the business employs primarily non-Native American employees and caters to primarily non-Native American customers, there is no basis for depriving employees of their rights and protections under the National Labor Relations Act.

Sincerely,



William Samuel, Director
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