



---

Portfolio Media, Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com  
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

---

## NLRB Tells Justices It Has Authority Over Tribal Casinos

By **Andrew Westney**

Law360, New York (May 25, 2016, 8:10 PM ET) -- The National Labor Relations Board urged the U.S. Supreme Court on Tuesday to reject challenges to the agency's authority over labor practices at two Michigan tribal casinos, arguing that the Sixth Circuit correctly ruled that the NLRB can regulate tribes' commercial enterprises and there's no circuit split on the issue.

The Little River Band of Ottawa Indians and the Saginaw Chippewa Indian Tribe's Soaring Eagle Casino and Resort both **filed petitions in February** urging the high court to reverse the circuit's rulings last year upholding NLRB authority over the tribes' employment practices, saying that the tribes' casinos are exempt from the National Labor Relations Act as government employers and that the decisions created a split with the Tenth Circuit.

But the NLRB said in separate but similar briefs responding to the petitions that there was no split on the question presented to the court of whether tribes' casinos are subject to NLRB jurisdiction and that applying the NLRA to the casinos, which mostly employ non-Indians and serve non-Indian customers, is consistent with both the law's purpose and tribal sovereignty.

"While the tribe unquestionably has inherent sovereignty, recognized in [the Indian Gaming Regulatory Act], to establish and operate the casino, it does so subject to Congress's exercise of its power to regulate the commerce in which the tribe has chosen to participate," the NLRB said in its brief in the Soaring Eagle case, mirroring language used in its Little River brief.

On Feb. 12, the Little River Band, whose casino generates about half its revenue and mostly employs non-tribe members, said a Sixth Circuit panel's **June ruling** that the tribe's no-strike law violated the NLRA didn't make sense because the tribal casino is exempt from the law as a public employer. The panel's ruling also clashes with Tenth Circuit precedent, the band said.

The same day, the Saginaw Chippewa tribe's casino filed a high court petition seeking a reversal of a **July ruling** by another Sixth Circuit panel that grudgingly adhered to the circuit precedent set in the Little River decision.

The NLRB argued Tuesday in opposing both petitions that the Sixth Circuit's rulings didn't present a square conflict with a 2002 Tenth Circuit decision in *NLRB v. Pueblo of San Juan*. The Tenth Circuit in that case upheld a tribe's ability to pass a right-to-work law, but it didn't address the general applicability of federal labor law to tribes or the specific issue in the Sixth Circuit cases of how the NLRA applies to a tribe acting as an employer in a commercial enterprise, the NLRB said.

The D.C. Circuit was the only appellate court to address that question prior to the Sixth Circuit, and it similarly backed the NLRB's authority to regulate the San Manuel Indian Bingo & Casino in California in a 2007 decision by distinguishing commercial gaming businesses from tribal self-government activities, the agency said.

In addition, a pending case in the Ninth Circuit addressing NLRB jurisdiction over a casino owned by the Pauma Yuima Band in Southern California presents similar issues to the Sixth Circuit cases, backing the notion that the high court should hold off on any review, the agency said.

And Congress is currently considering the **Tribal Labor Sovereignty Act**, which would moot the question of the NLRB's jurisdiction over tribes by explicitly including tribes and tribal businesses in the NLRA's definition of an employer, the agency said.

While the Supreme Court didn't distinguish between tribes' governmental and commercial functions in its 2014 decision in *Michigan v. Bay Mills Indian Community*, that case dealt with a tribe's sovereign immunity from suit rather than the provisions of applicable federal law, as the Sixth Circuit cases do, the NLRB said.

Tribal casinos operating under IGRA support governmental functions, but "the special status of tribal gaming in this respect does not render the activities associated with operating a casino noncommercial in a sense that would render the NLRA inapplicable or the board's exercise of jurisdiction improper," the agency said.

Tribes have broad power to regulate non-members' activities on tribal land and to enter into agreements with their employees, but employees can't waive their federal labor rights under the NLRA, even if they wanted to, the agency said.

In its brief in the *Soaring Eagle* case, the NLRB addressed issues around the Saginaw Chippewa tribe's treaty rights that aren't present in the *Little River* case — specifically, whether the Saginaw Chippewas' general right to exclude non-members from its reservation prevented the NLRB from exerting its authority there.

The Sixth Circuit correctly found that the tribe didn't have a specific treaty right under its 1855 and 1864 treaties with the federal government that directly conflicted with the NLRA, the NLRB said.

Lloyd B. Miller of Sonosky Chambers Sachse Endreson & Perry LLP, who represents the *Little River Band*, said in an email that it is "difficult to credit the government's new idea" that the Sixth Circuit rulings don't conflict with the Tenth Circuit's decision in the *San Juan* case, since the NLRB and the Sixth Circuit have "both acknowledged the square conflict."

In the NLRA, Congress created a labor regime for the private sector that wasn't intended to apply to a governmental employer, according to Miller.

"Congress left it to governments to decide for themselves how best to balance government workers' rights with the interests of the citizens they serve," Miller said in the email. "This is the case with the federal government, as it is with states, counties and municipalities. Until the board got off track, it was also long the case with Indian tribes, too."

Representatives for the other parties were not immediately available for comment Wednesday.

The *Little River Band* is represented by Carter G. Phillips, Kwaku A. Akowuah and Christopher A. Eiswerth of Sidley Austin LLP and Lloyd B. Miller, Douglas B.L. Endreson and Rebecca A. Patterson of Sonosky Chambers Sachse Endreson & Perry LLP.

Soaring Eagle Casino and Resort is represented by Paul D. Clement of Bancroft PLLC.

The NLRB is represented by U.S. Solicitor General Donald B. Verrilli Jr. and Richard F. Griffin Jr., Jennifer Abruzzo, John H. Ferguson, Linda Dreeben, Meredith Jason and Kira Dellinger Vol of the agency.

The cases are Little River Band of Ottawa Indians Tribal Government v. National Labor Relations Board, case number 15-1024, and Soaring Eagle Casino and Resort v. National Labor Relations Board, case number 15-1034, before the Supreme Court of the United States.

--Additional reporting by Jack Newsham. Editing by Patricia K. Cole.

Correction: An earlier story misstated representatives for one of the tribes. The error has been corrected.