

My name is Richard Hankins of the law firm of Kilpatrick Stockton. I and my partner, Alston Correll represent the Mashantucket Pequot Tribal Nation and the Mashantucket Pequot Gaming Enterprise, which operates Foxwoods Resort Casino.

The Tribal Nation and the Gaming Enterprise appear before you today subject to complete reservation of their objections to the National Labor Relations Board's exercise of jurisdiction in this case. We note briefly that it is a fundamental policy of the United States to encourage tribal self-government, and every U.S. President since Richard Nixon has instructed federal agencies to engage in government to government consultation and actions to preserve the prerogatives and authority of Indian tribes. That consultation has not occurred in this matter, and it is the position of the Mashantucket Pequot Tribal Nation that NLRB jurisdiction is inappropriate.

The Tribal Nation has a detailed labor relations statute that protects employees' rights to join labor unions and to engage in collective bargaining, and that statute alone should govern the Gaming Enterprise. But until there is a final ruling on the jurisdictional issue, the Nation, in the spirit of government to government relations, has cooperated with the agency and participated in these proceedings to protect its interests and the interests of employees of the Gaming Enterprise.

In representation proceedings under the National Labor Relations Act, it is the sole duty of the National Labor Relations Board to protect the rights of workers and to ensure a fair election. I have practiced before this Agency for over 20 years, and I have a tremendous amount of respect for it. I have appeared before over half of the Regional offices, and I am convinced that Region 34 is among the very best. I have great respect and admiration for Regional Director Hoffman, Assistant Regional Director Cotter, and the numerous Region 34 agents and attorneys who administered the election at Foxwoods. In many ways, the handling of this election was their finest hour. Regrettably, however, in some respects, decisions made about the conduct of this election violated due process and deprived workers of their rights to a fair election. It is ironic that this agency apparently decided that it was better qualified to conduct this election than the Mashantucket Pequot Tribal Nation, but it is the Tribal Nation that must point out the catastrophic errors that the agency refuses to acknowledge.

Over 2,600 employees were eligible to vote in this election. Approximately 28% - more than 700 – are Asian.

The Tribal Nation and the Gaming Enterprise requested that the official notices and the ballots be printed in English and two Chinese written languages. The Region printed the notice in one Chinese language but, curiously, refused to print the ballots in any language except English.

If the Board is going to maintain its position that the National Labor Relations Act applies to tribal employers to the same extent as it would apply to private employers, then at very least the Board must provide those tribal employers and their employees with the same fairness and due process that the agency provides to other entities.

It is significant to note that in the last five years, Region 34 has conducted twenty-four elections in which it has provided official notices in languages other than English. In twenty-three of those elections, the ballot was also translated into multiple languages. The only exception was the one involving the Gaming Enterprise in this case. Are not the employees at Foxwoods entitled to the same fairness as employees of the other twenty-three entities?

In 2003, Region 34 used multi-lingual ballots in elections involving employees of Waste Management of Connecticut, Inc., The Arrow Line, Inc., and Thames Valley Council for Community Action, Inc. The Arrow Line election had only nine voters, yet Region 34 felt the need to translate the ballots so the voters could read them. Why aren't the 2,600 dealers at Foxwoods entitled to the same respect?

In 2004, Region 34 used multi-lingual ballots in elections for Human Resources Agency of New Britain, the New Haven Register, Barker Steel Company, Inc.,

Wild Oats Market, R&R Pool and Patio, Inc. d/b/a Patio.com, Consolidated Container Company, LP, and Volume Services of America d/b/a Centerplate Management, Inc. The Barker Steel election involved only eleven employees.

There were eleven more multi-lingual elections conducted in 2005 and 2006.

Region 34 had no problem translating ballots in those cases.

Even another election in 2007, one involving just seven employees of Control Building Services, Inc., warranted multi-lingual ballots. Why aren't Asian employees of Native American enterprises afforded the same fairness and due process?

There are less than 100 words on an NLRB ballot. How much trouble would it have been to put those ballots in a language that employees could understand? Would the cost of translating those words have been so burdensome to deny due process to a significant number of voters?

The Region may say that the Gaming Enterprise did not prove that they were necessary. The evidence will show that my clients did provide sufficient information, which I will detail in a moment. Under the National Labor Relations Act, which the agency is attempting to apply, the obligation to provide a fair election rests solely on the National Labor Relations Board.

If the burden of a fair election is going to be put on the Tribal Nation, the NLRB should step aside and let the Nation do the job under its own laws. If the Board is going to insist that the application of the NLRA is appropriate, the agency has an obligation to conduct an election under the same standards that it used for every other entity over the last five years.

Here is what the Region was told prior to making the decision not to translate the ballots.

On November 1, 2007, Region 34 Assistant Regional Director John Cotter was advised by the Tribal Nation that ballots and official election notices would be needed in English, Spanish, Creole, Cantonese (traditional written Chinese) and Mandarin (simplified written Chinese).

In a telephone conversation on November 1, Mr. Cotter expressed concern with so many languages and asked for evidence that the Gaming Enterprise communicated with employees in those languages. So, that same day, Mr. Cotter was sent three emails with examples of such communications.

The first email contained five copies of a two page employee recruiting brochure – one each in English, Spanish, Creole, Cantonese (traditional written Chinese) and Mandarin (simplified written Chinese).

The second email contained five copies of an eight page brochure that is given to new hires describing their fringe benefits – one each in English, Spanish, Creole, Cantonese (traditional written Chinese) and Mandarin (simplified written Chinese).

The third email contained five copies of an employee newsletter – one each in English, Spanish, Creole, Cantonese (traditional written Chinese) and Mandarin (simplified written Chinese). That email also stated: “Please let me know if you would need more examples.”

Mr. Cotter did not request additional examples of multi-lingual communications. He had, however, asked about whether dealers were required to take a licensing exam in English only. Mr. Cotter was informed by email that:

the licensing process is nothing more than an application, which someone may fill out on their own or with the help of their employer. Is that not consistent with your information?

Mr. Cotter had expressed concern about the number of languages requested, so the Gaming Enterprise made some inquiries and determined that Creole and Spanish might not be necessary, but Mandarin and Cantonese were absolutely necessary.

Mr. Cotter did not request any additional documents or suggest that there was some licensing documentation that could not be completed with assistance. He simply raised the bar.

His next communication was to ask how many employees spoke only Chinese and not English. Mr. Cotter was informed that an exact number was not known, but the number was significant and that management used translators and interpreters every single day to communicate with Asian employees. No further information was sought from the Nation or the Gaming Enterprise. The Regional Director later announced that the notices would be printed in one Chinese language and that the ballots would be in English only.

While most dealers speak enough English to deal at the gaming tables, there is a difference between being able to speak a language and being able to read it. The only real way to know how many employees don't read any English at all would be to administer a written fluency test to every single employee. That appears to be the only thing that would have satisfied the Region in this case. But that, of course, would be unreasonable.

Perhaps someone will ask the Region to demonstrate what proof was presented in the other twenty-three cases.

Many of us have some familiarity with other languages. We may be able to get around in Mexico or in Europe. We may be able to ascertain the meaning of some written materials in other languages. But how many Americans would be comfortable signing a contract or marking an official election ballot in a language other than our own? Important communications such as legal documents and election ballots must be presented in the native tongue to be fully understood without assistance.

The Gaming Enterprise uses interpreters every day to help communicate important information to employees. You will hear testimony about this and you will see piles of documents that are translated into numerous languages. Yet Region 34 was unwilling to translate less than 100 words for the Asian employees at Foxwoods.

Section 11315.1 of the NLRB Casehandling Manual indicates that the Regional director should consider three factors in deciding whether translated ballots are necessary:

- (a) the portion of the voting group which speaks a foreign language and does not read English
- (b) the number of foreign language translations that would be required to accommodate these voters
- (c) whether written communication between the employer and these employees is in English or their native language.

Region 34 was told that the number was significant. Region 34 was told that two foreign languages would suffice. Region 34 was given several examples of

foreign language communications between the Gaming Enterprise and its employees. Region 34 was advised that even the union communicated with Asian employees in multiple languages, including Chinese.

While the Casehandling Manual requires the employer to notify the Region that translation is necessary, ultimately it is the agency that is tasked with ensuring a fair election. That is not an employer's responsibility. An unscrupulous employer could lie and say that no translation is necessary, even though it would deny employees a fair election.

Clearly, in this case, there was nothing that was going to convince the Region. The Region moved the bar beyond reach. The Region seemed to be trying to shift its burden to the Tribal Nation. If that burden is going to be placed on the Nation, the federal government should defer to the tribal system and let the Nation run the election.

Interestingly, the Casehandling Manual describes three possible options for dealing with multi-lingual elections.

One such option is to translate only the side panels of the official election notice and to print the ballot in English. This is exactly what was done here. But the Casehandling Manual explains that the circumstances under which this option would work are very limited. Section 11315.2(a) explains that:

In small elections, or where there are only a few foreign language voters, this partial translation may suffice, if the circumstances are such that the Regional Director concludes the affected voters will thereby be fully informed as to the election. For example, the Regional Director may conclude that most employees, regardless of their native language, will receive information orally about the date, time and place of the election.

Of course, this was not a case where there were only a few foreign language voters. Approximately 28% of the 2,600 voters were Asian and a significant percentage of those voters need written communications in Chinese.

Section 11315.2(c) provides for a translated sample ballot to be included on the official notice with a notation that the ballot used in the election would be English only. That did not happen here either. The sample ballot used on the official notice was in English, and there was nothing on the translated notice that explained what the ballot meant.

A third option was for the Region to make interpreters available at the polling place. That did not happen either.

There are numerous other concerns about this election.

The translation provided by the agency was inaccurate. Among other things, the translation indicated to voter that observers would inspect their ballots. is the

notice provides no assurance of a secret ballot. This is something that can cause great concern to voters, especially those who have immigrated from communist countries.

Employees will testify that they were threatened and intimidated by agents of the union. One such threat was made in the presence of a voter's 12 year old son. Others took place in front of casino patrons. One employee who publicly expressed opposition to unionization was chased by car out of the employee parking lot and almost forced into a concrete barrier. There are others as well.

Union agents engaged in unlawful electioneering just a few feet from the polling area. Other union agents stationed themselves not far from the voting area and asked people how they voted and wrote the responses on a pad of paper. This alone is unlawful, but when coupled with numerous threats of retaliation against non-supporters, it unquestionably taints the entire process.

The evidence in this case will show that the election was not a fair one and that in important ways the agency failed to provide due process in the conduct of the election. The Tribal Nation maintains that the Board lacks jurisdiction and given the serious concerns with the conduct of the election, the Tribal Nation reiterates its invitation to the agency to decline to exercise the jurisdiction it has determined

it has and work with the Tribal Nation on a government to government basis to allow an election to be conducted under the tribal system.

Thank you.