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CIVIL RIGHTS OR SOVEREIGNTY RIGHTS? UNDERSTANDING THE HISTORICAL CONFLICT BETWEEN NATIVE AMERICANS AND ORGANIZED LABOR¹

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ABSTRACT: Unions have played important roles in Indigenous struggles in Latin America and in campaigns that fueled civil rights movements in the United States, including efforts to organize agricultural, hospitality, and health care workers. But, Native Americans have had less of a connection with organized labor. Indeed, in the current climate, labor and tribes seemed to be locked in an adversarial relationship. Tribal leaders see unions as a threat to their sovereignty. Unions, such as Unite-HERE and the United Food and Commercial Workers, clearly see their rights to organize as part of a larger civil rights struggle. Examining struggles between tribal governments and unions (that largely represent workers of color) reveals how distinct historical experience produced divergent types of political strategies and notions of citizenship.

Keywords: Native American sovereignty, gaming, labor

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Thanks to a growing number of tribal histories published in the last twenty years, those of us interested in the history of capitalism in North America know a bit more about the role played by Native American workers in its development. We now have studies of Native workers in timber, agriculture, and mining, as well as histories of indigenous people making a living in tourism and cultural performance. We understand how Indigenous workers sometimes subverted the

colonial intent of federal work policies by working for wages, but not necessarily trading in their cultural identities, kinship relationships, or land to do so. In fact, historians have found that some Native workers, such as the Ojibwe in the Great Lakes region and Indigenous communities along the Pacific Northwest, incorporated wages into their seasonal round, adapting wage work into their semi-subsistence economies when needed. For some, wages provided the means to stay and

rebuild their communities at a time when the federal government favored detribalization.²

We know less about the relationship between Native Americans and unions. By the mid 20th century, most Native Americans had become wage workers, albeit often employed in precarious jobs, such as commercial agriculture, and railroad work or living in communities suffering from high unemployment. Given those conditions, it would seem that Native Americans would welcome unions. But, the connections between the labor movement and Native communities in the United States are strained. As Native Americans entered the wage labor market, unions, even those in the social movement tradition, failed to make significant alliances with Native workers and their tribal governments. Indeed, particularly with the rise in the Indian gaming industry, the relationship between unions and tribal governments remains tense, at best.

Indigenous peoples elsewhere, particularly in Latin America, have connected with unions or working-class mass movements to improve their economic conditions. There have been a few notable alliances in the past, particularly, in the 1980s between Chico Mendez, the leader of the Rubber Tappers' union and the Indigenous peoples of the Amazon in Brazil. In Latin American countries, such as Bolivia, Mexico, and Ecuador, struggles over class and land issues remain tightly linked. Indigenous peoples played important roles in revolutionary peasant movements and called for dramatic land reform and changes in other social policies, not necessarily related to work and wages. In Canada, First Nations peoples formed workers' associations to protect their places in timber and fishing trades. And, as Suzanne Mills and Tyler McCreary have observed, Canadian unions that have historically advocated for social change, beyond workplace issues, have, at times, aligned themselves with First Nations anti-colonial movements.³

Native Americans in the United States have been less enthusiastic about the promise of organized labor. Certainly, racism explains much of the tension. Unions have historically guarded their power to control the shop floor and hiring processes rather than confront racial discrimination among their members and segregation in the structures of their industries. Particularly in the building trades, unions have notoriously excluded people of color from their ranks, until the rise of industrial unions forced many labor leaders to put an end to segregated locals and begin to embrace civil rights goals.

Despite the racism they experienced in unions and the workplace, Black and Latino workers pushed for change and transformed their unions into social justice movements. As a result, they developed a much stronger link between their unions, workplace issues, and broader community-wide struggles. Even though class exploitation cuts across racial divisions, it also reifies racial categories, allowing some workers to claim white privilege over their nonwhite counterparts. So, for non-Native workers of color, working to end racial discrimination in the name of civil rights, helped to remove obstacles to class solidarity, and to improve their access to better jobs and higher wages. Civil rights unionism may also allow some access to state power and improve their communities as a whole. For non-Native workers of color, labor rights have become synonymous with civil rights.⁴

Sovereignty rights, not civil rights, have been the focus of Native American social movements. Mills and McCreary argue that the difference between Native and non-Native workers collective resistance strategies can be traced to the source of their poverty. Where non-Native workers see exploitation in the wage system, Native Workers point to colonialism and their systematic land dispossession as the central problem. As a result, Native American activists tend to mobilize around collective, tribal issues rather than making class-based demands.⁵

Before the development of the Indian gaming industry, unions did not have much luck organizing on reservations, except for a few notable exceptions, such as the United Mine Workers on the Navajo Nation. Tribal governments passed resolutions to ban unions on the Navajo and the Shoshone-Bannock Nations in the 1950s and others enacted tribal "Right-to-Work" laws. Tribal leaders worried that unions would assert undue influence over their economies and that they would place their own, non-Indian members in jobs over tribal members. Those battles between unions and tribes might be seen as part of a larger anti-colonial struggle to gain more control over their natural resources. Largely extractive industries, the enterprises were often not owned or operated by tribal governments. They primarily received royalty payments, and the promise of employment for their members.⁶

But, gaming is a different story. It is one of the first industries developed by tribal governments that has yielded significant capital for their communities.⁷ Tribal government opposition to unions in this context might be similar to Native leaders struggling against

extractive industries for control over their wealth and environments. Yet, tribal governments wield more control over casinos, than they did over coal, oil and timber companies. In this context, Native governments manage the operations, and in some significant examples, the work force is largely made up of non-Native workers, many of them workers of color.

Because of this paradigmatic impasse over competing types of rights, the relationship between unions and tribal governments has become decidedly adversarial. In the Indian gaming industry, the battle is between states and tribal governments over who has the legal right to regulate casinos. To settle that conflict, Congress passed the Indian Gaming and Regulatory Act in 1988 (IGRA). That legislation required states, which allowed any kind of legal gambling within its borders, to negotiate agreements – pacts – with tribes that wanted to develop casinos. Those pacts determined the numbers of games, machines, and how casino profits would be distributed, including the percentage paid to the states.

IGRA was meant to provide structures that would allow states and tribes to negotiate. But it did not outline how the workplace would be regulated. Some states, such as California, included labor protections in the pacts they negotiated with tribes.⁸ But tribal governments objected, citing their sovereign right to regulate their own operations. In a series of complicated legal battles in California, Michigan, Oklahoma, and Connecticut, tribes insisted that their enterprises were not subject to the laws established under the National Labor Relations Act of 1935. Three cases, including the San Manuel Band of Mission Indians (the Yuhaaviatam Clan of the Serrano People) from the San Bernardino Highlands; the Chickasaw near Oklahoma City; and the Mashantucket Pequot in southeastern Connecticut, demonstrate how tribes have navigated the legal landscape, and created new tribal institutions in response to growing pressure from organized labor.⁹

In Southern California, in the summer of 1998, a turf war was brewing between two unions at the San Manuel Casino. The Communications Workers of America (CWA) had been collecting signatures from workers, indicating their support for the union.¹⁰ They had recently conducted a successful campaign at the Viejas Casino, 32 miles Northeast of San Diego, where the tribal government agreed to recognize the union based on a card count. The San Manuel tribe was planning a similar arrangement. The San Manuel tribal leadership had allowed the CWA access to the workplace, and even permitted them to park a trailer on the property. The

Hotel Employees and Restaurant Employees Union (HERE) objected.¹¹ HERE had aggressively organized casino workers throughout the United States and considered hospitality workers as their constituency. They filed an unfair labor practice complaint with the NLRB, arguing that the tribe was not allowed to give preference to one union over the other. HERE leader, Jack Gibbons, who also directed the "no on 5" campaign, was incensed. He argued that "workers in an Indian casino to be able to have their choice of a union, or not having a union or a particular union. The CWA approach is to have the employer choose. That's absurd, in our mind."¹²

This conflict unfolded in the middle of a heated ballot initiative campaign, proposition 5, meant to force Governor Pete Wilson to negotiate with California tribes. CWA supported the measure and HERE mobilized voters to defeat it. Perhaps that explains why the tribes were happy to accommodate the CWA. But, according to Deron Marquez, who led the San Manuel tribe during this rocky period, the tribes were impressed with the union's understanding of sovereignty. As he explained, "they respect[ed] it and wanted to figure out how they can live within it. And so tribes naturally started to move towards them; they reciprocated and started supporting our movement."¹³

In contrast to the CWA, HERE leaders found the sovereignty argument meaningless. From their perspective, San Manuel and its casinos were just another corporation. The union believed their workers deserved the same protections promised under the National Labor Relations Act of 1935. Moreover, their case hinged on dismissing the concept of Native American sovereignty altogether. Unite-HERE's international counsel stated in a supporting brief,

"... First, there is no doctrine of Indian sovereignty vis-à-vis the federal government. Such a doctrine has not existed and could not exist. . . . When the Native American nations were conquered, it was inconceivable that they could be given sovereignty co-equal with that of the federal government. If the tribes were allowed to operate large-scale enterprises in interstate commerce subject only to tribal law, the situation would eventually become intolerable, politically, for the supremacy of the federal government would be impaired."¹⁴

The NLRB case and the tribe's eventual appeal would send shockwaves through Indian Country. The board rejected San Manuel's claims that the NLRB did not have jurisdiction over tribally owned and operated

enterprises. The US District court of appeals confirmed that decision in 2007, ruling that Indian casinos were subject to the NLRA. Judge Janice Brown's commentary was particularly biting. According to Brown, tribes could exercise their sovereignty "to maintain traditional customs and practices," but not to operate a successful enterprise outside the grasp of US law.¹⁵ San Manuel had previously created its own Tribal Labor Relations Ordinance that guaranteed workers the right to organize unions. Much like states that restricted the activities of public employee unions, the code also restricted the workers' right to strike only after the union and management has reached an impasse within specified arbitration procedures. And picketing on reservation land was prohibited. The 2007 decision seems to have rendered that type of tribal governmental institution building irrelevant.¹⁶

The San Manuel decision opened the door for unions to organize Indian Casinos. The decision clarified the legal landscape for unions who were reluctant to organize in a climate where workplace rules remained unclear. After 2007, unions including UNITE-HERE, the Teamsters, the United Auto Workers (UAW), and the United Food and Commercial Workers Union (UFCWU) initiated campaigns in Oklahoma, Michigan, and Connecticut. While the way seemed clear, the conflict between workers' rights and sovereignty rights remained unsettled.

The UAW was the first union to launch a successful campaign organizing blackjack dealers, under the NLRB, at the Mashantucket Pequot Foxwoods Casino in Connecticut. Like San Manuel, the Mashantucket Pequot objected, claiming the NLRB did not have jurisdiction over its enterprises. But, rather than fighting it out in the courts, the tribe negotiated with the union, and agreed to a compromise. The Mashantucket Pequot leaders recognized the UAW and the union agreed to negotiate according to new tribal labor codes administered by the Mashantucket Employment Rights Office (MERO). Instead of relying on the NLRB, the workplace would be governed by tribal law. Similar to the arrangement between Southern California Gaming tribes and the CWA, the UAW was willing to acknowledge the sovereignty of the Mashantucket Pequot in exchange for the right to represent workers according to its laws.¹⁷

That compromise was not easily maintained. Soon thereafter, in 2010, the UFCWU started organizing at Foxwoods. The union's organizers hoped they would follow the same process established by the UAW campaign. But the brief conciliatory moment seemed

to have passed. The cocktail waitresses, bartenders and other hospitality workers were reluctant to organize under MERO rules. According to organizers, they lost their first election when the Mashantucket Pequot changed the voting rules at the last minute. Under new guidelines, the union was supposed to win a majority of votes within the total number of workers' in the unit, not simply the majority who voted. Changing the rules in the middle of the election increased the workers suspicion of casino management and further eroded morale in the workplace. They demanded a new election, but this time under the NLRB's supervision. They were starting to see the NLRB election as a civil right.¹⁸

The Foxwoods Casino was in financial trouble. Management had already started cutting workers' benefits and experimenting with new management practices meant to make the casino more appealing to high end gamblers. They were imposing new work rules on the floor staff, including policing their work attire, and changing their assigned work areas. The Mashantucket Pequot were also trying to balance their massive debt with the costs of a large-scale expansion of the casino in the midst of a historic economic recession. Servicing that debt required that they halt per capita payments to their members.¹⁹

Non-Native workers were concerned with this shift in per-capita policy. Tribal hiring preference codes had not worried them before, since few tribal members worked in service jobs in the casino. But now they were anxious that with the cut in payments, tribal members might take their jobs, and most importantly, according to union activists, they were going to upend the seniority system. After the per-capita announcement, the campaign descended into a nasty battle centered on race. The tribe filed an unfair labor practice, accusing the union of deploying racial language to stir up support for the election. Union members were mortified and defended themselves against those charges. The NLRB eventually dismissed the tribe's complaint and the union won their election.²⁰

Remarkably, UFCWU leaders encouraged their members to reconsider their commitment to the NLRB and file for another election under MERO rules. In a rather pragmatic move, they urged their members to hold another election under the Mashantucket Pequot labor code in 2010. Finally, after years of fighting, they eventually won their election, and in 2013, through an arbitration procedure outlined in tribal code, managed to negotiate a contract.²¹

Meanwhile, in Oklahoma, blackjack dealers were organizing the Chickasaw's WinStar Casino. In October 2010, they met with Teamster organizers in secret, across state lines in Texas, to plan a union drive. They worried about losing their jobs or suffering other types of workplace reprisals if management found out they were attending union meetings. Like the Foxwoods union activists, they were angry about changes in their working conditions. WinStar managers had significantly changed the tip structure, forcing blackjack dealers to deposit all tips in a common "tote" which was then redistributed and the end of the shift. But, when the dealers started receiving less than they would normally take home if they kept their own tips, they became suspicious that the casino was taking a cut. They also worried about favoritism in shift assignments, and the precarious way that their health insurance was linked to the number of hours they worked.²²

But, unlike the Mashantucket Pequots or San Manuel, the Chickasaws refused to compromise and resisted the union's efforts to organize. In response, the union filed an unfair labor practice, accusing the Chickasaw for "unlawful surveillance of union activities, interrogation of employees regarding union activity, and an unlawful no-solicitation policy."²³ The NLRB ruled in the union's favor and ordered the tribe to allow the union access to its workers. In a shrewd legal move, the Chickasaws petitioned for an injunction against the NLRB in federal court.²⁴ Like the San Manuel and the Mashantucket Pequot, they argued that the NLRB did not have jurisdiction over enterprises on Chickasaw land. In an ironic twist, they also stressed that their treaty rights superseded the NLRA. The court agreed. According to the judges in the US Court of Appeals for the 10th District, two removal treaties, the 1830 Treaty of Dancing Rabbit Creek and the 1866 Treaty of Washington, secured Chickasaw sovereignty rights over NLRB jurisdictional claims. The decision acknowledged the removal of the Chickasaws from their lands in Mississippi and argued that this treaty was distinctly "promised 'to secure' the Nation expansive rights over its new territory." Citing case law that demonstrated the unique nature of treaty rights, they argued that the "[t]reaty granted the [Chickasaw] Nation 'the powers of an almost independent government.'" According to the judicial argument, the Chickasaw land "was a fee simple, not the usual aboriginal Indian title of use and occupancy." As a result, the court upheld the Chickasaw's claim that the NLRB did not have jurisdiction.²⁵

After struggling for five years over NLRB jurisdictional

issues, the Teamsters could not continue their campaign. In 2012, when I interviewed union activists, they held out distant hope that the Supreme Court would finally settle the question since there seemed to be a split decision in the district courts. The 6th district court in Michigan ruled in favor of the NLRB, over the Saginaw and the Little River Ottawas. In the 10th district court in Oklahoma, the court ruled in favor of the Chickasaw Nation over the NLRB. According to legal expert, Kaign Smith, the courts' decisions seem to reflect their regional histories, particularly their experience in labor and tribal law. Unfortunately for the Teamsters, the Supreme Court refused to settle the split decision, and let the rulings stand. Perhaps Congress will have the last word. Legislators have been introducing bills that specifically exempt the NLRB from tribally owned and operated enterprises since 1998.²⁶

So, what do we make of these three cases? Perhaps, the tribal governments' reaction is merely a reflection of American's growing distrust of organized labor. Or perhaps, their anti-union stance might be interpreted as evidence that they have adopted the business ethics of other American corporations. But, the Indian gaming industry is not like other American corporations. Casinos are owned by Native Nations, not individuals. Their profits are used for investment in tribal infrastructure and for some, redistributed to tribal members, according to the terms negotiated with states in gaming pacts. The development of these casinos, and the subsequent legislation that emerged to regulate their growth, drew tribes and states into a relationship, as Anthropologist David Kamper has termed, "interdependent self-determination."²⁷

This economic structure might help to explain why tribal members see unions as an anathema to their communities. Non-Native workers of color see unions as their advocates, who protect them from companies whose economic interests do not necessarily align with their own. But, tribal members have more at stake with the overall economic success of the casino. They are not only workers, they are owners, and receive part of the casinos' profits, in addition to wages, directly through per capita payments, or indirectly, through the services provided by the tribe.

Some scholars have argued that Indian casinos represent an alternative type of economic organization; tribal capitalism as sociologist Duane Champagne has called it.²⁸ While that economy offers promise to Native communities, it continues to fuel the struggle between two competing notions of rights. Non-Indian workers

feel disenfranchised because they are powerless to influence the laws that govern their workplaces. Tribal governments feel their sovereignty rights threatened if their legal institutions are overturned by federal or state governments. The simple moral of this story, at least in the short run, is that unions need to figure out how to work within this new economic structure.²⁹ Future research needs to examine what Native casino workers think and what capitalism and a labor movement looks like when there is conflict between Native management, tribal officials and Native workers. My guess is that as more tribes begin to accumulate capital, they will be developing institutions like MERO, to govern the emergence of Native working-class organizations.

Endnotes

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- 22 Oral interview with Ron Cobb and anonymous Teamster organizer by author, August 14, 2012. Oklahoma City, OK. Recording and Transcript in author's possession. Used with permission
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