Fort Apache Timber Company *and* Construction, Building Materials and Miscellaneous Drivers Local No. 83, an Affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 28–RC–3068

October 19, 1976

DECISION ON REVIEW AND ORDER

BY MEMBERS FANNING, JENKINS, AND WALTHER

On December 24, 1975, the Regional Director for Region 28 issued his Decision and Direction of Election in the above-entitled proceeding in which he directed an election among certain employees of the Employer, contrary to the Employer's contention that the National Labor Relations Board lacked jurisdiction over it.

Thereafter, the Employer, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, filed a timely request for review of the Regional Director's decision with a supporting brief, contending, *inter alia,* that the Board precedent relied on by the Regional Director is not dispositive of the issue presented in the instant case, that the Board lacks statutory jurisdiction over the Employer herein, and that even were the Board to find that it could exercise jurisdiction over this Employer it should decline to do so as a matter of policy and discretion.

By telegraphic order dated January 19, 1976, the National Labor Relations Board granted the request for review and stayed the election pending decision on review.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this proceeding, including the Petitioner's and the Employer's briefs with respect to the issues under review, and makes the following findings:

Fort Apache Timber Company is an entrepreneurial enterprise owned and operated by the White Mountain Apache Tribe. It has its principal office and place of business located at the tribal headquarters at White River, Arizona, which is situated within the confines of the Fort Apache Indian Reservation. During the year preceding the hearing, the White Mountain Apache Tribe, doing business under the name of the Fort Apache Timber Company, sold and shipped goods valued in excess of $50,000 directly to customers located outside the confines of the Fort Apache Reservation, and outside the State of Arizona.

The Fort Apache Indian Reservation occupies approximately 2,600 square miles, located in east central Arizona. The Reservation was originally established "for use and occupancy of Apache Indians" by executive order of President Grant in November 1871. By act of Congress of June 7, 1897, the then White Mountain Indian Reservation was divided into the present Fort Apache Indian Reservation and the San Carlos Reservation. The White Mountain Apache Tribe [1] is organized under the provisions of the Indian Reorganization Act.[2] A tribal constitution was ratified by members of the tribe on August 15, 1938, and a revised constitution and bylaws was ratified June 27, 1958. In approving ratification of the revised constitution and bylaws in 1958, the Department of the Interior provided that, upon ratification, all rules and regulations promulgated by the Department or by the Bureau of Indian Affairs would henceforth be inapplicable to the White Mountain Apache Tribe, insofar as they were incompatible with any of the provisions of the revised constitution and bylaws, except where the rule or regulation expressly indicated otherwise. All officers and employees of the Interior Department were ordered by said rules and regulations to abide by the provisions of the revised constitution and bylaws.

The constitution of the Tribe tracks the statutory language in providing that the authority of the Tribe shall extend to "all territory within the boundaries of the Fort Apache Indian Reservation as well as to such other lands as the United States might acquire for the tribe or which the tribe might acquire for itself." It describes the relationship of the Apache to the United States Government and provides that internal affairs shall be managed insofar as it does not conflict with the laws of the United States, by a governing body known as the White Mountain Apache Tribal Council. The Council is composed of a chairman and vice chairman, elected by popular vote of the Tribe, and nine Council members popularly elected from four districts. In addition to all powers vested in the Tribal Council by existing law, the constitution also provides that the Council shall exercise certain additional powers subject only to limitations imposed by other constitutional statutes of the United States. Included, *inter alia,* is the power to represent the Tribe and act in all matters that concern the welfare of the Tribe; to negotiate, make, and perform contracts and agreements with any person, association, corporation, municipality, county, State,

[1] Hereinafter also called the Tribe

[2] Act of June 18, 1934, 48 Stat 984, as amended by act of June 15, 1935, 49 Stat 378

or the United States, including agreements with the State of Arizona for rendition of public services; to veto the sale, disposition, lease, or encumberance of tribal lands or other tribal assets authorized by any agency or employee of the Government; to manage all economic affairs and enterprises of the Tribe; to borrow money and pledge or assign tribal income as security; to enact ordinances covering the granting of both surface and subsurface leases; to levy and collect taxes and impose licenses; to enact ordinances establishing and governing tribal courts and law enforcement; and to exercise the powers of removal or exclusion from the reservation of any nonmember of the Tribe whose presence may be considered injurious to the people of the reservation.[3]

Fort Apache Timber Company is one of several enterprises owned by the White Mountain Apache Tribe and operated by its governing Tribal Council. Mr. Hal Butler, the mill manager, testified that he is a temporary employee of the Tribe, was hired by the Tribal Council, and works under its direction. Fort Apache Timber Company *per se* has no employees. Like all of the workers engaged under any of the tribal enterprises, they are employees of the Central Tribe, and are paid through a central tribal fund; Mr. Butler merely indicates the number of hours worked by those at Fort Apache Timber Co. Wages and working conditions are set by the Tribal Council, which also passes on the budget for the various enterprises. Employees of the Tribe may request transfers to different job classifications and to other tribal enterprises. Such transfers are frequent, and tribal employees retain their seniority, benefits, and other privileges as employees regardless of the enterprise under which they may be working.

The Tribe by its counsel entered a special appearance only in the proceedings herein, without prejudice to its position that the National Labor Relations Board has no jurisdiction over an Apache Nation and that such nation or its Tribal Council cannot be an employer within the meaning of the Act. The Tribe also contends that tribal businesses are unique and that a congressional purpose to subject them to the National Labor Relations Act should not be presumed. It also argues that even if the Board should find that it has statutory jurisdiction in this area it should for various reasons exercise its discretion and decline to assert such jurisdiction. The Regional Director found that the fact that the enterprise involved was owned and controlled by the Tribe and operated on its own reservation "does not impose an impediment to the assertion of jurisdiction by the Board. See *Navajo Tribe* v. *N.L.R.B.* 288 F.2d 162 (C.A.D.C., 1961), cert. denied 366 U.S. 928." In the *Navajo* case the tribe sought an injunction to prevent the Board holding a representation election among employees in a mining plant located on the reservation but leased by the tribe to the non-Indian employer. The court of appeals held that the Act applied to Texas-Zinc Minerals Corporation and that the Board was not precluded from acting "with respect to a plant located within an Indian reservation, or one employing Indians." It stated that it was expressing no opinion on the wisdom of the Board "in entering the order."

Consistent with the recent Supreme Court decision in *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164 (1973), analyzing the categories of relationship between Indians and the Federal Government, we are not here treating with Indians "who have either left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government." Nor are we concerned here with the activity undertaken by individual reservation Indians operating primarily on nonreservation lands, nor the exercise of jurisdiction over non-Indian employers who may undertake activity on leased land located within an Indian reservation.[4] Rather, we are confronted with the question of jurisdiction over activity undertaken by Indians on the reservation. Thus, the initial question presented here is one of first impression for the Board: whether an Indian tribal governing council *qua* government, acting to direct the utilization of tribal resources through a tribal commercial enterprise on the tribe's own reservation, is an "employer" within the meaning of the Act.[5]

[3] The Tribal Council is also authorized to appoint and regulate subordinate organizations for economic and other purposes, and to exercise such further powers as may be delegated to the Council by members of the Tribe, the Secretary of the Interior, or other duly authorized official or agency. No tribal member may become a member of the Tribal Council or serve on any board of directors or other committee or board if he or she is employed by the Bureau of Indian Affairs or any other Federal Government agency Law and order on the reservation is maintained by a police force under the Tribal Council. Offenses are dealt with by the Tribal Court with the exception of the "major crimes" which are by statute cognizable in Federal Court

[4] Thus, *Texas-Zinc Minerals Corporation,* 126 NLRB 603 (1960), in effect enforced in *Navajo Tribe* v *N L R B*, 288 F.2d 162 (C A.D C., 1961), cert. denied 366 U S 928, cited by the Regional Director herein, is apposite. See also *J R Simplot Company, d/b/a Simplot Fertilizer Company,* 107 NLRB 1211 (1954), 100 NLRB 771 (1952) In those cases, the Board refused to decline assertion of jurisdiction over a non-Indian employer who otherwise met the Board's jurisdictional standards, merely because the Company was in part conducting operations on Indian land which it had leased from the tribe. The issue presented in the present case is significantly different Does the Act apply to Tribal Council enterprises as employers?

[5] The term "employer" under the Act excludes "the United States or any wholly owned government corporation or any state or political subdivision thereof " The Supreme Court in the leading case of *N L R B.* v. *The Natural Gas Utility District of Hawkins County, Tennessee,* 402 U.S 600 (1971), considered the identification of governing Federal law with respect to the term "political subdivision " The Court noted that. "The term 'political subdivision' is not defined in the Act and the Act's legislative history does not disclose that Congress explicitly considered its meaning. The legislative history does reveal, however, that Congress enacted the § 2(2) exemption to except from Board cognizance the labor relations of federal, state,

The status of Indian Americans as individuals, and particularly those on their own reservations, is unique *vis-a-vis* the Federal and state governments. However, the principles governing resolution of the Indian sovereignty question are not new. To the contrary, "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history." [6] Mr. Chief Justice Marshall first articulated the Supreme Court's policy in 1832 in holding that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." [7] From this concept of Indian reservations as separate though dependent nations, it followed that state law could have no role to play within the reservation boundaries. In dealing with attempts to impose a land tax on reservation Indians, the Court held that "If the tribal organization . . . is preserved intact, and recognized by the political department of the [Federal] Government as existing, then they are a people distinct from others, capable of making treaties, separated from the jurisdiction of Kansas . . . . reservation Indians are a separate people to whom state jurisdiction may not extend." [8]

In striking down an attempt to tax a trading company doing business within the confines of an Indian reservation as inconsistent with Federal statutes applicable to the Indians on the Navajo Reservation, the Court held the tax invalid noting that "from the very first days of our Government the Federal Government had been permitting the Indians largely to govern themselves, free from state interference. . . ." [9] The status of Indian nations or tribes preserving their political entity under the decisions of the Supreme Court has been summed up in Felix S. Cohen's Handbook of Federal Indian Law,[10] p. 122, as follows:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

In judging whether an action impinges on the independence of individual Indians on a reservation or on the governing body of the tribe, the test is the same. As Mr. Justice Marshall recently observed for a unanimous Supreme Court, the question has always been whether the action "infringed on the right of *reservation Indians* to make their own laws and be ruled by them." [11]

Not only do Indian tribes on reservations retain their powers of internal sovereignty, but the ordinances passed by the governing body and the decisions of the tribal courts are usually not reviewable in either state or Federal courts—even though a United States constitutional issue is raised.[12] Moreover, Indi-

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and municipal governments . . ." The Court there described the test at least with respect to state subdivisions as being whether the entity is either "(1) created directly by the State, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate"

[6] *Rice* v. *Olson, Warden,* 324 U.S. 786, 789 (1945)

[7] *Samuel A Worcester* v *State of Georgia,* 6 Pet 515, 557 (1832)

[8] *The Kansas Indians,* 5 Wall. 737, 755 (1866).

[9] *Warren Trading Post Co* v. *Arizona Tax Commission,* 380 U.S. 685, 686 (1965)

[10] Now revised by the United States Department of the Interior, Federal Indian Law, United States Government Printing Office, 1958

[11] *McClanahan* v *Arizona State Tax Commission,* 411 U S 164, 181 (1973), quoting from *Williams* v. *Lee, d/b/a Ganado Trading Post,* 358 U S 217, 220 (1959) In *McClanahan,* the Court struck down an attempt by the state to impose its income tax on Indians living on a reservation In so doing, the Court reaffirmed the unique governmental status of Indian tribes (at 172–173)

> It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own government. Indians today are American citizens. They have the right to vote, to use state courts, and they receive some state services. But it is nonetheless still true, as it was in the last century, that "[t]he relation of the Indian tribes living within the borders of the United States . [is] an anomalous one and of a complex character They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided"

[12] See, for example, *Native American Church of North America* v. *Navajo Tribal Council,* 272 F 2d 131 (C.A. 10, 1959) There, plaintiff attempted to enjoin enforcement of an ordinance adopted by the Navajo Tribal Council making it an offense to introduce in Navajo country the peyote bean which was used by plaintiff church in connection with its religious ceremonies. In dismissing plaintiff's contention, the court noted that:

> The Constitution is, of course, the supreme law of the land, but it is nonetheless a part of the laws of the United States. Under the philosophy of the decisions, it, as any other law, is binding upon Indian nations only where it expressly binds them, or is made binding by treaty or some act of Congress. No provision in the Constitution makes the first amendment applicable to Indian nations nor is there any law of Congress doing so. It follows that neither, under the Constitution or the laws of Congress, do the Federal courts have jurisdiction of tribal laws or regulations even though they may have an impact to some extent on forms of religious worship.

The court of appeals quoted from *Williams* v *Lee,* 358 U S. 217 (1959), where the Supreme Court, speaking of the Navajo Nation, said: "Implicit

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an nations, as an attribute of their quasi-sovereignty, are immune from suit in either state or Federal courts, without congressional authorization.[13] It is clear that individual Indians and Indian tribal governments, at least on reservation lands, are generally free from state or even in most instances Federal intervention, unless Congress has specifically provided to the contrary.[14]

Tribal governments such as the one here involved resemble a State in many ways but are not precisely so defined. Rather, they are political governments created by the Indians themselves as a separate people, in conjunction and affiliation with the United States Government, whether by treaty, congressional enactment, or executive order.[15]

Thus, we note that Indian tribes have been described, *inter alia,* as the equivalent of a State; or of a territory,[16] as more than a State [17] or territory, as independent or dependent nations, as a distinct political entity, as a separate political community, as quasi or semi-sovereign nations, and as a separate people, "not brought under the laws of the Union or the State" [18] when they preserved their tribal relations. And, as this Board observed in the *Texas Zinc* case, "It is well established that the Indian tribes in America are deemed to have many of the attributes of a nation. Thus, although their external sovereignty has been extinguished, their internal sovereignty is preserved. . . ." 126 NLRB at 604.

Regardless of the particular label applied, however, it is clear beyond peradventure that a tribal council such as the one involved herein—the governing body on the reservation—is a government [19] both in the usual meaning of the word, and as interpreted and applied by Congress, the Executive, and the Courts.[20]

Consistent with our discussion of authorities recognizing the sovereign-government character of the Tribal Council in the political scheme of this country it would be possible to conclude that the Council is the equivalent of a State, or an integral part of the government of the United States as a whole,[21] and as such specifically excluded from the Act's Section 2(2) definition of "employer." We deem it unnecessary to make that finding here, however, as we conclude and find that the Tribal Council, and its self-directed enterprise on the reservation that is here asserted to be an employer, are implicitly exempt as employers within the meaning of the Act.[22]

Accordingly, we shall dismiss the petition herein.[23]

ORDER

The petition herein shall be, and it hereby is, dismissed.

. . was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed," and went on to say (272 F 2d at 134)

> No law is cited and none has been found which undertakes to subject the Navajo tribe to the laws of the United States with respect to their internal affairs, such as police powers and ordinances passed for the purposes of regulating the conduct of the members of the tribe on the reservation. It follows that the Federal courts are without jurisdiction over matters involving ordinances passed by the Navajo legislative body for the regulation of life on the reservation.

[13] *United States* v *United States Fidelity & Guaranty Co,* 309 U S 506 (1940), *Thomas Iron Crow* v *The Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota,* 231 F.2d 89, 92 (C.A 8), *Maryland Casualty Co* v *Citizens National Bank of West Hollywood,* 361 F.2d 517, 520 (1966)

[14] See fn 8, *supra* As noted above, even the Department of the Interior, which is by law charged with the administration of Indian affairs and Indian reservations, provides that organization of a tribe and approval of its constitution, i e., formal establishment of the tribal government as a separate governing entity, render the Department's own rules and regulations inapplicable to the tribe or reservation, unless the rule or regulation *specifically* states otherwise And see Federal Indian Law, *supra,* 395, *et seq*

[15] Federal treaty making with the various Indian tribes was discontinued by 1871 Thereafter, dealings with the various tribes were either by congressional enactment or by executive order. As a practical matter, all three forms now have the same effect See United States Department of the Interior, Federal Indian Law, United States Government Printing Office, 1958, p. 207–214. See also *Arizona* v. *California,* 373 U.S 546 (1963), where the Court summarily rejected plaintiff's argument that a reservation created by executive order does not attain the same status as that created by treaty or congressional act

[16] See, e.g , Federal Indian Law, *supra,* 471.

[17] *Native American Church, supra,* 272 F 2d 131, 134

[18] *United States* v. *Kagama,* 118 U S. 375, 381–382

[19] See fns 7 and 10, *supra,* and accompanying text. While the particular status of Indian governments in this country may under some circumstances be rationalized differently for different purposes, there is no doubt that they are in fact governments, with most of their powers of sovereignty still intact See, generally, Federal Indian Law, *supra,* Chap. VI, especially pp. 395–412 and 468–476 And see Jurisdiction Over Indians and Indian Reservations, 6 Arizona L Rev , 1965, p 237

[20] As a unanimous Court stated in *Williams* v *Lee, supra,* "the cases in this Court have consistently guarded the authority of Indian governments over their reservations " Tribal governments are also considered governments within the meaning of Federal statutes Federal Indian Law, *supra,* 411

[21] Indian tribes have been held to be "Agents," and "instrumentalities of the United States" for certain purposes, as well as municipalities See Federal Indian Law, *supra,* 472–473

[22] As set forth in fn 5, above, in *N L R B* v *Natural Gas Utility District,* 402 U.S 600, 604 (1971), involving a utility district formed by private individuals under state law, the Supreme Court noted the lack of legislative history concerning "political subdivision" in Sec 2(2) of the Act, and then said· "The legislative history does reveal, however, that Congress enacted the § 2(2) exemption to except from Board cognizance the labor relations of federal, state, and municipal governments, since governmental employees did not usually enjoy the right to strike." The Court concluded that the utility district in question was an entity administered by individuals responsible to public officials—consistent with the Board's own test—hence exempt as a political subdivision of a State. So here we conclude that the Fort Apache Timber Company is an entity administered by individuals directly responsible to the Tribal Council of the White Mountain Apache Tribe, hence exempt as a governmental entity recognized by the United States, to whose employees the Act was never intended to apply.

[23] In view of our disposition of the case on this ground, we do not reach the Tribe's assertion that the Board should in any event exercise its discretion to decline jurisdiction over the Tribe on various other grounds, e g., certain statutory provisions granting Indians preference in employment, which are construed as exceptions to Civil Rights Act (see 29 U.S. Code 46, 25 U.S C 44, *et seq* , and *Mancari* v. *Morton,* 94 S.Ct. 2474, and the Tribe's right to exclude nonmembers of the tribe from the reservation, coupled with its power to regulate activities on the reservation through passage of ordinances which may not be reviewable in Federal courts.