

**UNITED STATES OF MERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD WASHINGTON, D.C.**

**CHICKASAW NATION operating
WINSTAR WORLD CASINO**
Respondent

and

Cases 17-CA-025031
17-CA-025121

**INTERNATIONAL BROTHERHOOD
OF TEAMSTERS LOCAL 886,
affiliated with THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**
Charging Union

**COUNSEL FOR THE DEPUTY GENERAL COUNSEL'S
STATEMENT OF POSITION**

This case requires the Board to decide, as it has in the past, whether to assert jurisdiction over an Indian tribe's operation of a gaming casino. *See, e.g., San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2005), *enforced* 475 F.3d 1306 (D.C. Cir. 2007); *Foxwoods Resort Casino*, 352 NLRB 771, 772 n.1 (2008) (noting that Board had asserted jurisdiction by denying employer's exceptions to decision and direction of election). Although this case, unlike *San Manuel* and *Foxwoods*, involves a tribe that has entered into treaties with the United States, those treaties do not defeat Board jurisdiction here.

This purely legal question reaches the Board on a Joint Motion to Transfer Proceeding to Board on Stipulated Record. Initially, upon charges brought by Teamsters Local 886 (Charging Union), a Consolidated Complaint alleging various violations of the Act issued against the Respondent in the above-captioned cases on May 10, 2011. Respondent disputed the Board's jurisdiction and quickly sued the Board and obtained a district court injunction prohibiting the Board from proceeding to hearing on the Consolidated Complaint. *Chickasaw Nation v. NLRB*,

No. 11-506 (W.O. Okla. July 11, 2011) (order granting preliminary injunction). While an appeal of the injunction was pending, the parties to that action reached a settlement. Pursuant to that settlement, and upon the parties' joint motion, the district court granted partial relief from the injunction so that the Board could proceed to consider one particular allegation of unlawful conduct in the Consolidated Complaint as well as the Board's own jurisdiction over Respondent, while permitting the parties to bypass an evidentiary hearing before an administrative law judge by proceeding on a stipulated record. Thereafter, Respondent executed a stipulation and waiver pursuant to *Jefferson Chemical Co.*, 200 NLRB 992 (1972), and an Amended Consolidated Complaint issued that contains only a single allegation of unlawful conduct: that Respondent violated Section 8(a)(1) by informing employees of its WinStar World Casino facility (Casino) that they are not protected by the National Labor Relations Act because of tribal sovereignty. Respondent has filed an Answer, and the parties have stipulated to a factual record.

It is Counsel for the Deputy General Counsel's understanding that Respondent admits the conduct alleged in the Amended Consolidated Complaint, and does not contest that such conduct would violate Section 8(a)(1) of the Act so long as the Board has jurisdiction over Respondent's operation of the Casino.¹ Accordingly, the only disputed issue raised now is whether the Board has such jurisdiction.

The Board's decision in *San Manuel Indian Bingo & Casino* provides the legal basis for asserting jurisdiction over Respondent's operation of the Casino. In *San Manuel*, the Board announced that it would analyze whether to assert jurisdiction over a tribal enterprise by using two tests—one legal and one discretionary. 341 NLRB at 1059-63. The legal test is the so-

¹ Consistent with the district court injunction, the parties' agreement, and the *Jefferson Chemical* waiver, the other allegations of the Consolidated Complaint remain outstanding but are not at issue in the Amended Consolidated Complaint.

called *Tuscarora-Coeur d'Alene* framework, which has been widely adopted by courts to assess the jurisdictional breadth of other federal statutes. As applied to commercial gaming casinos, the *Tuscarora-Coeur d'Alene* framework would exempt an Indian tribe from Board jurisdiction only if the assertion of jurisdiction would abrogate treaty rights. *See id.* at 1063. Respondent points to several nineteenth-century treaties it entered into with the United States, but none of those treaties preclude the Board from exercising jurisdiction over Respondent's Casino. In addition, under its discretionary test, the Board will decline to assert jurisdiction "when the Indian tribes are acting with regard to th[e] particularized sphere of traditional tribal or governmental functions." *Id.* But because the Casino here is "a typical commercial enterprise, it employs non-Indians, and it caters to non-Indian customers," the discretionary test favors the Board's assertion of jurisdiction in this case, just as it did in *San Manuel*. *Id.*

It is the position of the Deputy General Counsel that the analysis set forth in *San Manuel* is appropriate here; that the Board has jurisdiction over Respondent's Casino because the assertion of jurisdiction would not abrogate Respondent's treaty rights, and because policy considerations favor the assertion of discretionary jurisdiction; and that therefore Respondent violated Section 8(a)(1) of the Act by informing employees of the Casino that they did not have the protections of the NLRA. The Deputy General Counsel seeks an order asserting Board jurisdiction over Respondent and requiring Respondent to recognize and respect the Section 7 rights of its Casino employees, and to remedy its violation of the Act.

Respectfully submitted on August 25, 2014

/s/ Susan A. Wade- Wilhoit

Counsel for the Deputy General Counsel

**Cases 17-CA-025031
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STATEMENT OF SERVICE

I hereby certify that I have this date served copies of the foregoing Counsel for the Deputy General Counsel's Statement of Position on all parties listed below pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with the Office of the Executive Secretary of the National Labor Relations Board and by electronic mail to Counsel for Respondent, Counsel for the Charging Party Union, Respondent, Charging Party and the amici.

Dated: August 25, 2014

/s/ Susan A. Wade-Wilhoit
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