Chickasaw Nation Operating Winstar World Casino *and* International Brotherhood of Teamsters Local 886, affiliated with The International Brotherhood of Teamsters. Cases 17–CA–025031 and 17–CA–025121

June 4, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

At issue in this case is whether an Indian tribe, the Chickasaw Nation, in its capacity as operator of the WinStar World Casino, is subject to the Board's jurisdiction and, if so, whether it violated Section 8(a)(1) of the National Labor Relations Act by informing casino employees that because of the Nation's tribal sovereignty, they did not have the protection of the Act. Applying the test established by the Board in *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), enfd. 475 F.3d 1306 (D.C. Cir. 2007), we find that application of the Act would abrogate treaty rights, specific to the Nation, contained in the 1830 Treaty of Dancing Rabbit Creek. As a result, we decline to assert jurisdiction over the Nation, the Respondent here.

I. BACKGROUND

On September 5, 2012, the Board issued an unpublished Order granting a joint motion to approve a stipulation of facts agreed to by the General Counsel, the Respondent, and the Charging Party, and to transfer this proceeding to the Board for issuance of a Decision and Order.[1] The Board issued a Decision and Order on July 12, 2013, which is reported at 359 NLRB 1472. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the Tenth Circuit, and the General Counsel filed a cross-application for enforcement.

At the time of the Order granting the joint motion and of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals vacated the Board's Decision and Order and remanded this case for further proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the joint motion to approve the stipulation of facts and transfer this proceeding to the Board. We grant the motion, and we incorporate that unpublished Order by reference. We have also considered de novo the stipulated record and the briefs filed by the parties and by amicus curiae.[2]

II. FACTS

The Nation is a federally recognized Indian tribe. The Nation has executed a series of treaties with the United States, including the 1830 Treaty of Dancing Rabbit Creek (the 1830 Treaty) and the 1866 Treaty of Washington (the 1866 Treaty).

The Nation originally occupied a large tract of land in what is now the State of Mississippi. The Nation relinquished its rights to this land under the 1830 Treaty.[3] In exchange, the United States granted the Nation an area of land located in what is today the State of Oklahoma. Article 4 of the 1830 Treaty provides:

> The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation

[1] Upon charges initially filed on December 10, 2010, February 22, 2011, and April 8, 2011, by International Brotherhood of Teamsters Local 886 (the Union), the General Counsel of the National Labor Relations Board issued a consolidated complaint alleging violations of Sec. 8(a)(3) and (1) on May 10, 2011, against the Nation. On that same day, the Nation filed a complaint against the Board in the United States District Court for the Western District of Oklahoma (Civil Action No. 5:11-cv-506-W) requesting a preliminary injunction to prevent the Board from applying the Act to it. On July 11, 2011, the District Court entered an order granting the Nation's motion and enjoining the Board from proceeding to hearing on its complaint. The Board appealed to the United States Court of Appeals for the Tenth Circuit (No. 11–6209) and entered into settlement negotiations with the Nation. Pursuant to those negotiations, the Board, the Nation, and the Union agreed to jointly request that the District Court modify its injunction to permit the Board to proceed on the complaint alleging a single violation of the Act. The District Court issued an Order granting the request on June 20, 2012. An amended complaint was issued on July 10, 2012. The Nation filed a timely answer admitting in part and denying in part the allegations of the complaint and asserting as an affirmative defense that the Board lacks jurisdiction in this matter.

On July 19, 2012, the Nation, the Union, and the General Counsel filed with the Board a stipulation of facts. The parties agreed that the complaint, the answer, the stipulation, and the exhibits attached to the stipulation shall constitute the entire record in this proceeding, and they waived a hearing before and decision by an administrative law judge. On September 4, 2012, the Board issued an Order approving the stipulation and transferring the proceeding to the Board for issuance of a Decision and Order. The Board issued a corrected Order on September 5, 2012. The General Counsel and the Nation filed briefs. Amicus curiae briefs were filed by the National Congress of American Indians and the Choctaw Nation.

[2] The Nation has requested oral argument. The request is denied as the stipulated record and briefs adequately present the issues and the positions of the parties and amici.

[3] The original parties to the 1830 Treaty were the United States and the Choctaw Nation. The Chickasaw Nation became a party to the treaty in 1837. See *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 465 fn. 15 (1995).

> . . . the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the [Nation]; . . . the U.S. shall forever secure said [Nation] from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.

Article 18 of the 1830 Treaty provides that "wherever well founded doubt shall arise" concerning the construction of the Treaty, "it shall be construed most favorably towards" the Nation.

III. ANALYSIS

In *San Manuel Indian Bingo & Casino*, supra, the Board set forth its standard for determining when it would assert jurisdiction over businesses owned and operated by Indian tribes on tribal lands. The Board found that the Act is a statute of "general application" that applies to Indian tribes, citing *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). Accordingly, the Board found it proper to assert jurisdiction, unless (1) the law "touche[d] exclusive rights of self-government in purely intramural matters"; (2) the application of the law would abrogate treaty rights; or (3) there was "proof" in the statutory language or legislative history that Congress did not intend the Act to apply to Indian tribes.[4] 341 NLRB at 1059, citing *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985). The Board also held that it would make a further inquiry to determine whether policy considerations militate in favor of or against the assertion of the Board's discretionary jurisdiction. 341 NLRB at 1062. Applying the principles announced in *San Manuel*, the Board recently asserted jurisdiction over tribally owned and operated casinos on Indian lands in *Little River Band of Ottawa Indians Tribal Government*, 361 NLRB No. 45 (2014), and *Soaring Eagle Casino & Resort*, 361 NLRB No. 73 (2014).

We are concerned here only with the second *San Manuel* exception, whether assertion of the Board's jurisdiction would abrogate rights guaranteed to the Nation by treaty. The Nation argues that applying the Act would abrogate two treaty-protected rights: (1) the right to exclude or place conditions on the presence of those permitted to enter tribal territory; and (2) the Nation's treaty right to self-government. The Nation further argues that specific language in the 1830 Treaty exempts the Nation from application of all federal laws except those enacted pursuant to Congress' power to legislate concerning Indian affairs. Amicus curiae Choctaw Nation joins the Nation in arguing that applying the Act to the Chickasaw Nation would abrogate guaranteed treaty rights of self-government and exclusion. It argues that the historical context in which the treaties were made demonstrates that the treaties were intended to assure that the tribes would remain sovereign nations in the western territory to which they had been forcibly removed, and that the Choctaw and Chickasaw Nations agreed to recognize the plenary power of the federal government only with respect to laws regulating Indian affairs.[5]

We find, in agreement with the Nation, that assertion of the Board's jurisdiction would abrogate treaty rights guaranteed to the Nation by the 1830 Treaty. Contrary to the analysis in the Board's now-vacated decision, we further find that the 1866 Treaty does not reflect an agreement by the Nation to be subject to a broader range of Federal laws.[6]

1. The rules of construction favoring Indian Tribes

The Board has no special expertise in construing Indian treaties. We therefore look to the decisions of the federal courts to assist us in determining the extent of the Nation's treaty rights.

The Nation was compelled to enter into both of the treaties involved here and to cede territory to the United States. The history of these treaties is recited at length in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970). As the Supreme Court there observed, "[t]he Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent." Id. at 630–631. For this reason, these treaties must be construed "as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection, and counterpoise the inequality by the superior justice which looks only to the substance of the right, without regard to

[4] In connection with this last exception, the Board found that there was no evidence in the language or legislative history of the Act indicating that Congress did not intend the Act to apply to Indian tribes. Id. at 1058–1059.

[5] Because we decline to assert jurisdiction based on the Nation's treaty rights, we do not address the additional arguments of the Nation and amici.

[6] We reject the argument that assertion of the Board's jurisdiction would abrogate the Nation's treaty-protected right to exclude or place conditions on the presence of those permitted to enter tribal territory. As we found in *Soaring Eagle*, 359 NLRB 740, 746–747 (2013), incorporated by reference at 361 NLRB No. 73 (2014), treaty language devoting land to a tribe's exclusive use or possession is not sufficient to bar application of the Act.

technical rules." *United States v. Winans*, 198 U.S. 371, 380–381 (1905) (internal quotations omitted).

Moreover, it is a settled rule of federal Indian law that treaties with Indian tribes "should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Oneida County, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247 (1985) (internal citations omitted). This rule is rooted in federal policy dating back to the Northwest Ordinance of 1787, which declared the policy of the United States that "[t]he utmost good faith shall always be observed towards the Indians." 32 J. Continental Cong. 340–341 (1787) (quoted in *Cohen's Handbook of Federal Indian Law* § 1.02[3] (Nell Jessup Newton, ed., 2012)) (hereafter "*Cohen's Handbook*").

2. The 1830 Treaty

The 1830 Treaty was signed after years of attempts by the Federal Government to remove Indian tribes, including the Choctaw and Chickasaw Nations, from their ancestral lands.[7] In exchange for the Nation's relinquishing its rights to land in Mississippi, the United States promised to "secure to" the Nation expansive rights over its new territory. See *Atlantic & Pacific Railroad Co. v. Mingus*, 165 U.S. 413, 437 (1897) (stating that the 1830 Treaty granted the Nation "the powers of an almost independent government"). See also *Choctaw Nation v. Oklahoma*, 397 U.S. at 638–639 (Douglas, J., concurring) (explaining that title granted by 1830 Treaty was a fee simple, "not the usual aboriginal Indian title of use and occupancy").

Article 4 reflects the extent of the powers reserved to the Nation under the treaty. Not only does article 4 provide that no State shall ever have a right to pass laws for the government of the Nation, but it also secures the Nation from "all laws . . . except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs." Giving due consideration to the "enlarged rules of construction" to be used in interpreting Indian treaties,[8] recognized in article 18 of the 1830 Treaty itself, we find that this provision forecloses application of the Act, which is not a law enacted by Congress in legislation specific to Indian affairs. Such legislation is authorized by the Indian Commerce Clause of the Constitution, which states: "The Congress shall have Power To . . . regulate Commerce . . . with the Indian Tribes."[9] No party here argues that the Act was enacted pursuant to the Indian Commerce Clause or was passed as legislation over Indian affairs. As a result, we find that assertion of the Board's jurisdiction would abrogate the Nation's treaty right to be "secure" "from and against all laws" except those passed by Congress under its authority over Indian affairs.

3. The 1866 Treaty

We reject the view that however expansive the language of the 1830 Treaty, the Nation's autonomy was significantly curtailed by the later 1866 Treaty. Rather, we find that no provision of the 1866 Treaty undermines the Nation's treaty right to be "secure" "from and against all laws" except those passed by Congress under its authority over Indian affairs.

The Nation sided with the Confederacy during the Civil War, and the 1866 Treaty, signed after the end of the war, provided, essentially, for the surrender of a portion of the land grant and the freeing of the Indians' former slaves. Article 7 of the 1866 Treaty states that the Nation agrees "to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian Territory." For the reasons that follow, we are not persuaded that article 7 of the 1866 Treaty grants the Federal Government broad legislative authority over the Nation or that, as a statute of general applicability, the Act would fall into the category of legislation contemplated under the 1866 Treaty.

The language in article 7 of the 1866 Treaty does not explicitly state that the Nation agrees to be subject to all Federal laws of general applicability. Instead, the Nation agrees to only those laws "that Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian Territory." This language is compatible with the Nation's earlier agreement, in the 1830 Treaty, to be subject to Federal laws enacted by Congress only in legislation specific to Indian affairs; there is nothing in article 7 that compels a reading less favorable to the Nation.

Moreover, article 45 of the 1866 Treaty provides that "all the rights, privileges, and immunities heretofore possessed by [the Nation] . . . or to which they were entitled under the treaties and legislation heretofore made . . . shall be, and are hereby declared to be, in full force, so far as they are consistent with the provisions of this treaty." Citing article 45, the Tenth Circuit has held that the

[7] For more discussion of the history of the 1830 Treaty as well as other removal treaties affecting the Five Civilized Tribes, see *Choctaw Nation v. Oklahoma*, 397 U.S. at 622–628; *Cohen's Handbook* § 1.03[4].

[8] In re *Kansas Indians*, 72 U.S. (5 Wall.) 737, 760 (1866) ("[E]nlarged rules of construction are adopted in reference to Indian treaties.").

[9] U.S. Const., Art. I, Sec. 8, cl. 3.

1866 Treaty "reaffirmed" the obligations of the United States set forth in article 4 of the 1830 Treaty. *Chickasaw Nation v. Oklahoma Tax Commission*, 31 F.3d 964, 978 (10th Cir. 1994), revd. on other grounds sub nom. *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995). These obligations include securing the Nation from and against all laws except (as relevant here) those passed by Congress under its authority over Indian affairs.

Thus, construing both treaties in the manner most favorable to the Nation, we find that the provisions of the 1866 Treaty are compatible with the rights guaranteed in the 1830 Treaty, and that article 45 of the 1866 Treaty strongly suggests that those rights remain in place.

IV. CONCLUSION

The National Labor Relations Act embodies important national policies and objectives, and the Board has broad responsibility to enforce them. We have no doubt that asserting jurisdiction over the Casino and the Nation would effectuate the policies of the Act. However, because we find that asserting jurisdiction would abrogate treaty rights specific to the Nation, we shall dismiss the complaint.

ORDER

The complaint is dismissed.