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

July 12, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

At issue in this case is whether the Respondent, Chickasaw Nation (the Respondent or the 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.[1] Applying the analysis in *San Manuel Indian Bingo & Casino*, 341 NLRB 1055 (2004), affd. 475 F.3d 1306 (D.C. Cir. 2007), rehearing en banc denied (2007), we find it appropriate to assert jurisdiction over the casino. Because the Nation does not dispute that, if it is subject to the Act, its statements to employees were unlawful, we find that the Nation violated the Act as alleged.[2]

I. JURISDICTION

The Nation, a federally recognized Indian tribe, with an office and facilities in Thackerville, Oklahoma, operates a licensed gaming facility, the WinStar World Casino (the Casino). During 2010, the Nation, in conducting its business operations, derived gross revenues in excess of $500,000, and purchased and received at its Thackerville facilities supplies and services valued in excess of $50,000 directly from points outside the State of Oklahoma for use in connection with the Casino.

For the reasons discussed below, we find that the Nation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties stipulated, and we find, that the Union, International Brotherhood of Teamsters Local 886, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. Facts

The Chickasaw Nation is a federally recognized Indian tribe that has executed a series of treaties with the United States. The Nation is governed by a citizen-elected government in accord with the Chickasaw Nation Constitution, which establishes executive, legislative, and judicial

[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 Acting General Counsel of the National Labor Relations Board issued a consolidated complaint alleging violations of Sec. 8(a)(1) and (3) 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 Acting 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 Acting General Counsel and the Nation filed briefs. Amicus curiae briefs were filed by the National Congress of American Indians and the Choctaw Nation.

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.

The Nation filed a "Notice of Supplemental Authority," in which it "suggests" that the Board lacks a quorum because the President's recess appointments are constitutionally invalid and that the Board is without authority to decide these cases until it attains a duly appointed quorum. We reject this suggestion. We recognize that the United States Court of Appeals for the District of Columbia Circuit has concluded that the appointments of two of the current Board Members were not valid, see *Noel Canning v. NLRB,* 705 F.3d 490 (D.C. Cir. 2013), cert. granted 81 U.S.L.W. 3695 (U.S. June 24, 2013) (No. 12-1281), and that the Third Circuit has concluded that the Constitution's Recess Appointments Clause permits only intersession appointments, albeit using a different analysis from that of the District of Columbia Circuit, see *NLRB v. New Vista Nursing & Rehabilitation,* 2013 WL 2099742 (3d Cir. May 16, 2013). However, as the D.C. Circuit itself acknowledged, its decision conflicts with rulings of at least three other courts of appeals, see *Evans v. Stephens,* 387 F.3d 1220 (11th Cir. 2004) (en banc), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley,* 751 F.2d 1008 (9th Cir. 1985) (en banc); *U.S. v. Allocco,* 305 F.2d 704 (2d Cir. 1962), and the subsequent Third Circuit decision is in conflict with *Evans*, supra. This question remains in litigation and the Supreme Court has granted the Board's petition for certiorari in *Noel Canning*. Pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act. See *Belgrove Post Acute Care Center,* 359 NLRB No. 77, slip op. at 1 fn. 1 (2013).

[2] The Nation's defense rests entirely on its challenge to the Board's assertion of jurisdiction.

branches. The executive branch is organized into departments, and all departments, including the division of commerce, are overseen by the office of the governor.

The Nation operates several gaming facilities within its jurisdiction in accordance with Federal and tribal law, including the Indian Gaming Regulatory Act (IGRA), the Nation's Tribal Gaming Compact with the State of Oklahoma (2004), the Nation's Tribal Internal Control Standards (revised June 4, 2010), the Chickasaw Nation Gaming Commission Technical Standards, and the Chickasaw Nation Gaming Commission regulations. The division of commerce oversees all of the Nation's tribal gaming activities.

Net revenues generated by the Nation's gaming activities are used exclusively by the Nation to fund tribal government operations or programs, including programs that protect public safety, provide health care and educational support, and enhance understanding of Chickasaw history and culture. A majority of the Nation's work force at the Casino is non-Indian, as are a majority of its patrons. The Nation engages in advertising both within and outside of its jurisdictional area in connection with the Casino.

On or about December 18, 2010, the Nation, acting through its supervisor and/or agent, Bill Foley, informed employees working at the WinStar World Casino facility that they did not have the protections of the Act because of the Nation's sovereignty.

B. Contentions of the Parties and Amici

The Acting General Counsel contends that the Board's exercise of jurisdiction over the Nation is appropriate under the principles set forth in *San Manuel*, supra. Thus, the Acting General Counsel argues that the operation of a casino employing a predominantly non-Indian work force and catering to a predominantly non-Indian clientele is commercial—not governmental—in nature. Accordingly, the Acting General Counsel asserts that the Board would not impinge on the Nation's right of self-government by asserting jurisdiction over the Casino's operations. In addition, the Acting General Counsel argues that application of the Act to the Casino would not abrogate treaty rights because the Nation's treaties were designed to shield the Nation from State, and not Federal, regulation and application of the Act would not jeopardize any specific right secured by a treaty. On the merits, the Acting General Counsel contends that the Nation's statement that employees do not have the protection of the Act because of tribal sovereignty violates Section 8(a)(1).

As stated, the Nation does not argue that its statement was lawful if, in fact, the Board has jurisdiction and the Act applies. The Nation's defense rests entirely on its jurisdictional challenge. The Nation thus argues that application of the Act would impermissibly interfere with its treaty-protected rights to exclude or place conditions on the presence of those permitted to enter tribal territory and to govern itself.

The Nation also argues that the Board should overrule *San Manuel,* supra. For example, the Nation argues that (1) *San Manuel* wrongly found that gaming operations, conducted to raise revenue for essential government services, are not a function of its sovereign authority; (2) the Board misread controlling Supreme Court precedent; (3) the commercial-governmental distinction on which *San Manuel* relies is unworkable because it does not provide a sufficient organizing principle for categorizing services provided by governments; and (4) contrary to *San Manuel*, Indian tribes like the Nation are excluded from jurisdiction under the Act's exemption for sovereign entities.

Finally, the Nation argues that the Tenth Circuit does not apply Federal regulatory schemes to tribal governments exercising their sovereign authority absent express congressional authorization, citing *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010). The Nation argues that, because gaming is an exercise of its sovereign authority, express congressional authorization is necessary to apply the Act to it and that such authorization is not contained in the Act. The Nation also argues that its right of self-government "is sufficiently specific to bar the application of a statute that is silent with respect to Indian tribes. . . ."

Amicus curiae Choctaw Nation joins the Nation in arguing that applying the Act to the Chickasaw tribal government 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 by the Choctaw and Chickasaw to assure that the tribes would remain sovereign nations and that they agreed to recognize the plenary power of the Federal Government only with respect to laws regulating Indian affairs.

Amicus curiae National Congress of American Indians (NCAI) argues that asserting jurisdiction over tribal governments is inconsistent with the historical context and purpose of the NLRA as well as with the subsequent development of Federal Indian law.[3] NCAI argues that tribal governments are not "employers" as defined in Section 2(2) of the Act and that the Board erred in finding the opposite in *San Manuel*. NCAI argues that at the

[3] The NCAI is an association of Indian tribal governments whose mission is to inform the public and all branches of the Federal Government about tribal self-government, treaty rights, and a broad range of Federal policy issues affecting tribal governments.

time the Act was passed, Congress thought of Indian tribes as governments in the process of reconstruction and that, since the Act was enacted, the Federal Government has strengthened the policies of tribal self-determination and economic self-sufficiency and consistently treated Indian tribes as governments. NCAI argues further that any ambiguity about the Act's coverage should be resolved in favor of exclusion, because "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit and because a clear expression of Congressional intent is necessary before a federal statute may impair tribal sovereignty." Further, NCAI argues that, even if the Board has statutory jurisdiction, it should decline to exercise that jurisdiction and should instead collaborate with tribes to identify and pursue common goals on a government-to-government basis.

III. ANALYSIS

A. Jurisdiction

1. Assertion of jurisdiction is appropriate under current Board law

a. San Manuel analysis

Current Board law on the assertion of jurisdiction over businesses owned and operated by Indian tribes on tribal lands is established in *San Manuel*, supra, in which the Board asserted jurisdiction over a casino that was owned and controlled by an Indian tribe and located entirely on reservation land. In *San Manuel*, 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) ("*Tuscarora*"). 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 law to apply to Indian tribes. 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. Because it found that none of the *Coeur d'Alene* exceptions to *Tuscarora* applied, and that policy considerations favored the assertion of jurisdiction, the Board found it proper to assert jurisdiction over the Indian casino in that case. Applying the principles announced in *San Manuel*, we recently asserted jurisdiction over tribally owned and operated casinos on Indian lands in *Little River Band of Ottawa Indians Tribal Government*, 359 NLRB No. 84 (2013), and *Soaring Eagle Casino & Resort*, 359 NLRB No. 92 (2013).

Consistent with the reasoning in *San Manuel*, *Little River*, and *Soaring Eagle*, we find that neither the first nor the third *Coeur d'Alene* exception to *Tuscarora* is present here. Thus, as in each of those cases, we find that application of the Act to the Nation would not interfere with its exclusive rights of self-government in purely intramural matters. See *San Manuel*, supra, 341 NLRB at 1063; *Little River*, supra, 359 NLRB No. 84, slip op. at 3; *Soaring Eagle*, supra, 359 NLRB No. 92, slip op. at 7. Like the casinos in those cases, the gaming facility here is a typical commercial enterprise operating in, and substantially affecting, interstate commerce, and the majority of the Casino's employees and patrons are non-Indians. *See San Manuel,* 341 NLRB at 1061.[4] And, as the Board found in *San Manuel*, nothing in the statutory language or the legislative history of the Act suggests that Congress intended to foreclose the Board from asserting jurisdiction over Indian tribes. *San Manuel*, supra, 341 NLRB at 1058–1059.

b. Assertion of jurisdiction will not impair the Nation's treaty rights

The Nation argues, however, that the second *Coeur d'Alene* exception applies here: that is, that application of the Act would abrogate rights protected by the Nation's treaties with the United States. We disagree.

(1) Relevant treaty language

The Nation relies on language from three relevant treaties: the 1830 Treaty of Dancing Rabbit Creek, the 1855 Treaty of Washington, and the 1866 Treaty of Washington.

In the Treaty of Dancing Rabbit Creek, the Choctaw Nation[5] agreed to cede to the United States all lands occupied by the Choctaws east of the Mississippi River. In exchange, the United States granted to the Choctaw an area of its western territory that encompasses what is today approximately the southern third of the State of Oklahoma. The United States promised to convey the land "in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it. . . ." Article 2. Article 4 of the Treaty provides that:

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

[4] Contrary to the Nation's contention, the fact that revenues generated by the Casino are used to defray the costs of tribal governmental programs does not mean that the Casino's operations are also governmental. *San Manuel*, supra, 341 NLRB at 1063.

[5] The Treaty of Dancing Rabbit Creek is between the Office of the President and the Choctaw Nation. It is undisputed that the treaty applies to the Chickasaw Nation as well.

> . 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 Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U.S. shall forever secure said Choctaw 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 [sic] over Indian Affairs.

Article 12 confirms the power of the Choctaw to exclude nonmembers from tribal lands. Article 18 provides for a survey of the lands granted and that "surveyors may enter the Choctaw Country for that purpose, conducting themselves properly and disturbing or interrupting none of the Choctaw people. But no person is permitted to settle within the nation, or the lands to be sold before the Choctaws shall remove." Article 18 also says that any doubts concerning the meaning of the treaty "shall be construed most favorably towards the Choctaws."

The 1855 Treaty of Washington was signed to settle a dispute regarding the western boundary of the land grant. Article 7 of the treaty says:

> So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits; excepting, however, all persons, with their property, who are not by birth, adoption, or otherwise citizens or members of either the Choctaw or Chickasaw tribe, and all persons, not being citizens or members of either tribe, found within their limits, shall be considered intruders, and be removed from, and kept out of the same . . . .

The Choctaw and Chickasaw Tribes allied themselves with the Confederacy during the Civil War. The 1866 Treaty of Washington was signed after the end of the war and provided, essentially, for the surrender of a portion of the land grant and the loss of the Indians' former slaves. In addition, article 7 says that:

> The Choctaws and Chickasaws agree 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; provided, however, Such legislation shall not in anywise interfere with or annul their present tribal organization, or their respective legislatures or judiciaries, or the rights, laws, privileges, or customs of the Choctaw and Chickasaw Nations respectively.

Article 8 of the 1866 Treaty provides that "No law shall be enacted inconsistent with the Constitution of the United States or the laws of Congress, or existing treaty stipulations . . . ."

Article 45 says that:

> All the rights, privileges, and immunities heretofore possessed by said nations or individuals thereof, or to which they were entitled under the treaties and legislation heretofore made and had in connection with them, shall be, and are hereby declared to be, in full force, so far as they are consistent with the provisions of this treaty.

The Nation, relying on language from all three treaties, 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 Treaty of Dancing Rabbit Creek exempts the Nation from application of all Federal laws except those enacted pursuant to Congress' power to legislate concerning Indian affairs. We consider each of these arguments in turn.

(2) General treaty rights of exclusion and self-government

Most of the treaty language cited by the Nation and amici involve general rights to exclusion and self-government. As indicated above, for example, the 1830 Treaty of Dancing Rabbit Creek secures "jurisdiction and government of all the persons and property that may be within their limits . . ." and contains an exclusion clause. The 1855 Treaty of Washington similarly secures the "unrestricted right of self-government and full jurisdiction . . ." and reaffirms the Nation's power to exclude.

The argument that the assertion of jurisdiction would abrogate general treaty rights of exclusion and self-government was rejected by the Board in *Soaring Eagle*, supra.[6] There, in a decision that we adopted without comment, the judge found that the treaties executed between the United States and the Saginaw Chippewa Indi-

[6] No treaties were at issue in *Tuscarora*, *Coeur d'Alene*, *San Manuel*, or *Little River*.

an Tribe of Michigan granted the tribe only a general right of exclusion and possession, which was insufficient to preclude application of Federal law. 359 NLRB No. 92, slip op. at 7. As a result, the judge found that the treaties did not exempt the tribe from application of the Act. General treaty rights of exclusion and self-government are analogous to the Nation's inherent sovereign rights, which exist independent of express treaty language. *U.S. Dept. of Labor v. Occupational Safety & Health Review Commission*, 935 F.2d 182 (9th Cir. 1991) (*OSHRC*). As discussed in *San Manuel*, inherent sovereign rights of exclusion and self-government are not sufficient to bar our assertion of jurisdiction. *San Manuel*, supra, 341 NLRB at 1061. We agree with the Ninth Circuit that the outcome should not be any different when the asserted rights are grounded in general treaty language rather than recognized, inherent sovereign rights. See *OSHRC*, supra, 935 F.2d at 186. Construing these treaty rights to preclude the Board's assertion of jurisdiction would mean that "the enforcement of nearly all generally applicable federal laws would be nullified, thereby effectively rendering the *Tuscarora* rule inapplicable to any Tribe which has signed a Treaty containing a general exclusion provision." Id. at 187.[7] That result is untenable.

(3) Specific treaty language addressing Federal law

There is one specific treaty provision that arguably supports the Nation's contention that it is not subject to the Act. Article 4 of the 1830 Treaty of Dancing Rabbit Creek says that ". . . the U.S. shall forever secure said Choctaw Nation from and against, 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 [sic] over Indian Affairs." In isolation, this provision could be read to say that the treaty exempts the Nation from *all* laws (not just State and territorial), with the exception of laws passed by Congress in legislating over Indian affairs.[8] No party argues here that the National Labor Relations Act was passed as legislation over Indian affairs. Under this reading, then, the exception would not apply and the United States would be bound by the treaty to protect the Nation from the requirements of the Act ("all laws").

But those provisions of the 1830 Treaty of Dancing Rabbit Creek cannot be read in isolation. Such language was typical of treaties signed at that time. The U.S. Government's primary purpose in signing treaties with Indian tribes was to obtain Indian lands, and treaties entered into from 1776 to 1849 left internal matters to the tribes. *Cohen's Handbook of Federal Indian Law* § 1.03[1] (Nell Jessup Newton ed., 2012) (*Cohen's Handbook*). From approximately 1849 until the end of the treaty-making period in 1871, however, treaties "increasingly encroached upon the autonomy of tribes." Id. As especially relevant here, treaties signed by the "Five Civilized Tribes" (Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles) after the Civil War "granted a large measure of control over the tribal governments" to the Federal government. Id. at §1.03[8]; §4.07[1][a].[9]

This trend toward increasing Federal control and decreasing tribal autonomy is reflected in the treaties at issue here, most notably in the 1866 Treaty of Washington, which sharply increased the relative authority of the Federal Government. In article 7 of the 1866 Treaty, the Chickasaw "agree[d] 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."[10] We read this language as clearly permitting the United States to exercise broad legislative authority over the Nation. It gives Congress and the President seemingly unlimited discretion to determine whether and when Federal legislation—which *they* "may deem neces-

[7] See also *Smart v. State Farm Insurance Co.*, 868 F.2d 929, 935 (7th Cir. 1989) (Employee Retirement Income Security Act (ERISA) applies to an Indian tribal employer because the treaties to which the tribe was a party simply conveyed land within the exclusive sovereignty of the tribe and did not delineate any specific right that would be violated by the application of ERISA); *U.S. v. Farris*, 624 F.2d 890, 893 (9th Cir. 1980), superseded on other grounds by statute as recognized in *Solis v. Matheson,* 563 F.3d 435, 437 (9th Cir. 2009) (in order to oust Federal jurisdiction, "there would have to be specific language permitting gambling or purporting to exempt Indians from the laws of general applicability throughout the United States regardless of the situs of the act") (internal quotations and citations omitted).

[8] Art. 4 also contains an exception for laws passed by the Nation that are "not inconsistent with the Constitution, Treaties, and Laws of the United States." That exception is not relevant here because there is no tribal law at issue.

[9] Treaty-making with Indian tribes ended in 1871, with the passage of a law expressly validating existing treaties, but terminating the U.S. Government's ability to sign future treaties. Act of Mar. 3, 1871, § 1, 16 Stat. 544 (codified at 25 U.S.C. § 71). From this point on, decisions concerning Indian affairs were made through unilateral legislation by Congress. See *U.S. v. Kagama*, 118 U.S. 375, 381 (1886) ("[A]fter an experience of a hundred years of the treaty-making system of government, congress has determined upon a new departure, to govern them by acts of congress").

[10] That provision is remarkably similar to language in several 1851 treaties, cited by Cohen as an example of clauses that expanded the authority of the Federal executive branch:

> Rules and regulations to protect the rights of persons and property among the Indians, parties to this Treaty, and adapted to their condition and wants, may be prescribed and enforced in such manner as the President or the Congress of the United States, from time to time, shall direct.

Cohen's Handbook § 1.03[1].

sary"—should be applied to the Nation. Nor is such legislation limited to any particular type of enactment, such as legislation regulating Indian affairs. Rather, the treaty refers sweepingly to enactments which are "deem[ed] necessary for the better administration of justice and the protection of the rights of person and property." Statutes of general applicability such as the National Labor Relations Act would seem to fall easily within that category.[11]

Thus, viewing the three treaties in chronological order demonstrates the increase in Federal authority over time and shows that, however expansive the language of the 1830 Treaty of Dancing Rabbit Creek may have been, the Nation's autonomy was, in the end, significantly curtailed by the 1866 Treaty. We therefore find that none of the treaty language cited by the parties confers on the Nation a specific right to be free of the application of Federal statutes of general applicability, such as the Act.

c. Policy considerations support assertion of jurisdiction

Finally, the Nation offers no basis to distinguish the policy considerations discussed in *San Manuel*, and we find that those considerations weigh in favor of the Board asserting its discretionary jurisdiction in this case. See 341 NLRB at 1063; *Little River*, supra, 359 NLRB No. 84, slip op. at 4; *Soaring Eagle*, supra, 359 NLRB No. 92, slip op. at 8.

2. Assertion of jurisdiction is consistent with Tenth Circuit precedent

The parties have agreed that any appeal from our decision will be heard by the United States Court of Appeals for the Tenth Circuit. The Nation contends that Tenth Circuit precedent compels a finding that the Casino is not subject to the Board's jurisdiction. We disagree.

Like the Board, the Tenth Circuit has adopted the *Tuscarora* presumption that generally applicable Federal statutes also apply to Indians and their property. *Phillips Petroleum Co. v. U.S. Environmental Protection Agency*, 803 F.2d 545, 556 (10th Cir. 1986).[12] However, the court holds that *Tuscarora* applies only when a tribe is exercising its property or proprietary rights, not when a tribal government is acting in its sovereign capacity. *Dobbs v. Anthem Blue Cross & Blue Shield*, supra, 600 F.3d at 1283 fn. 8; *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1199 (10th Cir. 2002).[13] Thus, in *Pueblo of San Juan*, the court held that the NLRA did not preempt a tribal "right to work" ordinance, which was enacted in the tribe's capacity as sovereign. 276 F.3d at 1199.[14]

By contrast, in operating the Casino, the Nation clearly is acting in its proprietary, not its sovereign, capacity. As discussed in *San Manuel*, the operation of a casino is not, in our view, an exercise of the Nation's sovereign authority. The Nation's casino activities at issue are commercial in nature, and the operation of a casino that employs significant numbers of non-Indians and caters to a largely non-Indian clientele "can hardly be described as vital to the tribes' ability to govern themselves or as an essential attribute of their sovereignty." 341 NLRB at 1061 (internal quotations omitted).

The Board and every court of appeals to consider such contentions in the context of businesses owned and oper-

[11] Citing *Ex Parte Crow Dog*, 109 U.S. 556 (1883), and *Atlantic & Pacific R.R. Co. v. Mingus*, 165 U.S. 413 (1897), Amicus Choctaw Nation argues that the language in the 1866 Treaty of Washington stating that the Choctaw and Chickasaw Nations are subject to such laws "as Congress and the President may deem necessary for the better administration of justice and the protection for the rights of persons and property within the Indian Territory" (and similar language in the Treaty of Dancing Rabbit Creek and the 1855 Treaty of Washington), cannot be construed to express an intent that the Nations be subject to Federal laws of general application. We find the Choctaw Nation's reliance on *Crow Dog* and *Mingus* to be misplaced. In *Crow Dog,* the Court held that treaty language stating that the Sioux Nation "shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life" did not implicitly repeal statutory language excluding from Federal jurisdiction crimes committed in Indian country by one Indian against another. In so finding, the Court relied on the principle that "[i]mplied repeals are not favored. . . . . There must be a positive repugnancy between the provisions of the new laws and those of the old." 109 U.S. at 570. In *Mingus*, the question presented was whether a statute conveying land to a railroad company on the condition that it complete a railroad within a certain time period required the Federal Government to extinguish the Cherokee, Choctaw, and Creek Nations' title to lands guaranteed them by various treaties, without the consent of the Nations. The Court held that such an interpretation was inconsistent with the treaties and the land grant statute at issue, which provided that Congress would extinguish Indian title to the lands only "as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession." 165 U.S. at 437. As is evident from the descriptions above, *Crow Dog* and *Mingus* did not involve an asserted conflict between a Federal statute of general applicability and Indian treaty rights. The cases are therefore irrelevant to the issues presented here of whether the Nation's treaties with the United States can be construed to permit application of the NLRA to the Nation's commercial activities, or whether such application would impair the Nation's treaty rights of exclusion and self-government.

[12] The presumption can be overcome where a specific right under a treaty or statute is in conflict with general law. *Phillips Petroleum*, supra, 803 F.2d at 556.

[13] In the latter instance, the court finds Federal regulatory schemes applicable only when the Federal statute expressly authorizes the application or it is otherwise clear from the surrounding circumstances and legislative history that Congress intended to limit tribal sovereign authority. See *Dobbs*, supra, 600 F.3d at 1283; *Pueblo of San Juan*, supra, 276 F.3d at 1199. It is uncontested that neither of those circumstances exists here. Whatever practical differences may exist between the Board's approach in this area and that of the court, they are irrelevant to this case, where the Nation is not acting in its sovereign capacity.

[14] The court in *Pueblo of San Juan* explicitly noted that the general applicability of Federal labor law was not at issue and that the tribal ordinance did not attempt to nullify the NLRA or any other provision of Federal labor law. 276 F.3d at 1191.

ated by Indian tribes on tribal lands have rejected them.[15] The Tenth Circuit's position is in accord with the prevailing view. In *Pueblo of San Juan*, supra, the court characterized Indian tribes as acting in a proprietary capacity when they function as an "employer or landowner." 276 F.3d at 1199. The court cited, as examples of tribal governments acting in "proprietary capacities," a tribe's operation of a restaurant and gaming facility, see *Florida Paraplegic Assn. v. Miccosukee Tribe,* supra; a construction business, see *Reich v. Mashantucket Sand & Gravel*, supra; and a logging and wood products manufacturing enterprise, see *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir. 1982). 276 F.3d at 1199. Accordingly, there is no merit in the Nation's argument that gaming is an exercise of its sovereign authority under Tenth Circuit law and that the Act cannot be applied to it without express congressional authorization.

For the reasons discussed above, then, our finding that the Act applies to the Nation's casino does not conflict with current Tenth Circuit precedent. We nevertheless recognize that two of the court's earlier decisions, neither of which has been explicitly overruled, suggest that the court might take a different view.

In *Donovan v. Navajo Forest Products Industries*, supra, the court held that applying the Occupational Safety and Health Act (OSHA) to an Indian tribal business would abrogate an article of a (Navajo) treaty which the court found unambiguously provided for the exclusion of all non-Indians except for those expressly authorized to enter the reservation. 692 F.2d at 712. The court also found that the application of OSHA would dilute principles of tribal sovereignty and self-government recognized in the treaty. Id. Similarly, in *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989), the court held that the Equal Employment Opportunity Commission (EEOC) did not have jurisdiction over the Cherokee Nation pursuant to the Age Discrimination in Employment Act (ADEA). Citing *Navajo Forest Products*, supra, the court found that enforcing the ADEA would directly interfere with the tribe's "treaty-protected right of self-government." Id. at 938.

Insofar as the court's holdings turned on the specific facts of those cases, we find them distinguishable from the present case. In *Navajo Forest Products*, unlike here, there was specific treaty language limiting access to the reservation to non-Indians with express authorization. Also, there, unlike here, only a small minority of the enterprise's employees (25 out of 350) were non-Indians. 692 F.2d at 710. And in *Cherokee Nation*, the employees to whom the ADEA would have applied appear to have been employees of the tribal government itself; at least there is no indication that they were employed by a tribal commercial enterprise such as the Nation's casino.[16]

To the extent that the Tenth Circuit's decisions in *Navajo Forest Products* and *Cherokee Nation* might be applied to the facts here, they reflect an overly broad construction of the Supreme Court's decision in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982). In *Navajo Forest Products*, the court cited *Merrion* for the proposition that "an Indian tribe's power to exclude non-Indians from tribal lands is an inherent attribute of tribal sovereignty [i.e., not dependent on specific treaty provisions], essential to a tribe's exercise of self-government and territorial management." 692 F.2d at 712. In the court's view, "*Merrion* . . . limits or, by implication, overrules *Tuscarora* . . . at least to the extent of the broad language . . . contained in *Tuscarora* that 'it is now well settled . . . that a general statute in terms applying to all persons includes Indians and their property interests.'" Id. at 713. Accordingly, the court construed *Merrion* as precluding the application of general Federal statutes to Indians absent some expression of congressional intent to divest the tribes of their sovereignty. Id. at 714. The court adhered to this reasoning in *Cherokee Nation*. 871 F.2d at 939.

We do not think that *Merrion* should be construed so broadly. The issue before the Supreme Court in *Merrion* was whether a tribe had the right to impose a severance tax on nonmembers' oil and gas operations on tribal

[15] See *Menominee Tribal Enterprises v. Solis*, 601 F.3d 669, 674 (7th Cir. 2010) ("[T]he sawmill is not part of the Menominee's governance structure; it is just a sawmill.") (OSHA); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 180 (2d Cir. 1996) ("When all is said and done, MSG is in the construction business; and its activities are of a commercial and service character, not a governmental character (citation omitted).")(OSHA); *Florida Paraplegic Assn. v. Miccosukee Tribe of Indians of Florida,* 166 F.3d 1126, 1129 (11th Cir. 1999) ("The . . . Tribe's restaurant and gaming facility is a commercial enterprise open to non-Indians from which the Tribe intends to profit. The business does not relate to the governmental functions of the Tribe[.]")(ADA); *Coeur d'Alene*, supra, 751 F.2d at 1116 ("The operation of a farm that sells produce on the open market and in interstate commerce is not an aspect of tribal self-government.") (OSHA).

In light of these precedents, the Nation's contention that the distinction between tribal commercial and governmental operations is "unworkable" is obviously without merit. The courts have had no difficulty in distinguishing between the two categories, and neither do we.

[16] When employees of an Indian tribe are exercising governmental functions, the tribe's inherent sovereignty and ability to govern itself are directly implicated. See *Reich v. Great Lakes Indian Fish & Wildlife Commission*, 4 F.3d 490, 495 (7th Cir. 1993) (law enforcement officers employed by an Indian tribe exempt from Fair Labor Standards Act (FLSA) because law enforcement employees exercise governmental functions).

lands.[17] Notably, the Court never discussed *Tuscarora*, and with good reason. The non-Indian petitioning party in *Merrion* could point to no Federal statute of general applicability that even arguably divested the tribe of its rights to exclude or to tax nonmembers' oil and gas operations on tribal land. Moreover, the rights that were the subject of the Supreme Court's observations were the tribe's rights to exclude private citizens, not the Federal Government. Accordingly, we disagree with the suggestion that *Merrion* implicitly overruled *Tuscarora* (or, indeed, even called into question its continued viability). And, consistent with *Tuscarora,* we reject the implication, based on *Merrion*, that Federal statutes do not apply to Indian tribes absent an express indication of congressional intent to that effect.[18]

B. The Unfair Labor Practice Issue

As stated, the Nation does not dispute that, if it is found to be subject to the Act, its statement informing employees that they did not have the protection of the Act because of tribal sovereignty is unlawful as alleged. Because we have found that the Nation is subject to the Act, we find that the Nation has violated the Act, as alleged in the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has interfered with, restrained, and coerced employees of the WinStar World Casino in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, by informing employees that they did not have the protection of the Act because of the Respondent's tribal sovereignty.

4. The unfair labor practice set out in paragraph 3 affects commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Chickasaw Nation operating WinStar World Casino, Thackerville, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that that they do not have the protection of the Act because of tribal sovereignty.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Thackerville, Oklahoma facility, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees of the WinStar World Casino are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 18, 2010.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 17 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 12, 2013

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[17] It is well settled, and the Board has recognized, that the power to tax is an essential component of tribal sovereignty. *San Manuel*, 341 NLRB at 1061 (citing *Merrion*).

[18] The Ninth Circuit has reached the same conclusion, for the same reasons. See *Coeur d'Alene*, supra, 751 F.2d at 1117.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted and Mailed by Order of the National Labor Relations Board" shall read "Posted and Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT inform you that you do not have the protection of the Act because of tribal sovereignty.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

CHICKASAW NATION OPERATING WINSTAR WORLD CASINO