IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE CHICKASAW NATION,
a federally-recognized Indian Tribe,

Plaintiff,

v.

NATIONAL LABOR RELATIONS BOARD, and in their official capacities as members of the Board, WILMA B. LIEBMAN, Chairman, CRAIG BECKER, MARK G. PEARCE, and BRIAN HAYES,

Defendants.

Case No. CIV-11-506-W

ORDER

On July 8, 2011, the parties presented oral arguments concerning the Chickasaw Nation's Complaint for Immediate Injunctive and Declaratory Relief (docket entry no. 1) and the National Labor Relations Board et al.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction (docket entry no.28). Both matters have been fully briefed and the Court has carefully considered both the written submissions and oral presentations.

The National Labor Relations Board (the "NLRB") is an independent federal agency created by Congress in 1935 to administer the National Labor Relation Act (the "NLRA" or "the Act"). The NLRB's primary duties are to prevent and remedy "unfair labor practices," as defined by Section 8 of the NLRA, 29 U.S.C. §158, and to conduct union representation elections under Section 9 of the Act, *id.* §159.

The Chickasaw Nation ("the Nation") is a federally recognized American Indian tribe that holds a series of treaties with the United States and is governed by its citizen-elected government in accord with the Chickasaw Nation Constitution. The Nation's Constitution was originally ratified in 1856 and was subsequently reformed by the Chickasaw citizens, as approved by the United States, in 1983, and has thereafter from time to time been amended. Generally, the Nation's Constitution sets up a classic separation of powers between the executive branch, the legislative branch, and the judicial branch. *See* Stipulation (docket entry no. 37) at ¶ 1. The Nation's executive branch operates under the authority of the Chickasaw Nation. The Office of the Governor exercises direct supervisory authority over all executive branch departments of the Nation, including the Chickasaw Nation Division of Commerce. Stipulation at ¶ 2.

The Chickasaw Nation Division of Commerce (CNDC) conducts all tribal gaming activities of the Chickasaw Nation. The Nation operates its gaming facilities in accordance with a comprehensive body of federal and tribal law, including the Indian Regulatory Gaming Act ("IGRA"); the Nation's Tribal Gaming Compact with the State of Oklahoma, executed by the Nation on November 23, 2004, and approved by the United States Department of Interior on January 12, 2005; the Nation's Tribal Internal Control Standards, revised as of June 4, 2010; The Chickasaw Nation Gaming Commission Technical Standards; and the Chickasaw Nation Gaming Commission regulations ("IGRA gaming"). *See* Stipulation at ¶ 3.

The Nation conducts IGRA gaming at several tribal gaming facilities within the Nation's jurisdiction, each of which is operated pursuant to location-specific licenses issued and overseen by the Chickasaw Nation Office of the Gaming Commissioner (CNOGC). Each licensed gaming location is situated on tribal trust property within the Nation's treaty boundaries, and one of those locations is the WinStar World Casino ("the Casino") located on Nation trust lands outside of Thackerville Oklahoma. All licensed gaming locations are managed centrally from CNDC offices that are located on Nation trust lands in Ada, Oklahoma. Stipulation at ¶ 4.

Revenues generated by the Nation's IGRA gaming are used exclusively by the Nation to fund Tribal government operations or programs, or to provide for the general welfare of the Nation and its citizens, consistent with the requirements of IGRA. These functions and purposes include but are not limited to healthcare, education, law enforcement, youth and family services. Stipulation at ¶ 5.

On or about December 10, 2010, the NLRB served the Casino with a charge that it had engaged in violations of the NLRA. On or about April 8, 2011, the NLRB filed a second charge against the Casino. The Nation maintained that the Casino is a tribal government enterprise and that, as a matter of tribal sovereignty, the NLRA has no application. The Regional Director for the NLRB consolidated the two charges, issued an amended complaint, and scheduled an administrative hearing for June 1, 2011. The Nation filed its complaint in

this Court and moved for a temporary restraining order and/or preliminary injunction. The NLRB postponed further proceedings until after this Court's July 8, 2011 hearing.

In support of its motion for a temporary restraining order and/or preliminary injunction ("the Nation's Motion"), the Nation contends that its unique treaty rights and inherent powers as a sovereign protect the Nation from the NLRB's assertion of authority under the NLRA. The Nation alleges that the NLRB seeks to apply the NLRA to regulate and control the Nation's relationship with employees of the Executive Branch agency through which the Nation conducts gaming operations. It claims that under the Nation's law, that relationship is governed by the Personnel Code, Chickasaw Nation Code §§ 2-550.01 to 2-550.04, regulated by the Public Gaming Act of 1994, Chickasaw Nation Code §§ 303101 to 3-3610, and subject to regulatory oversight by the Chickasaw Nation Office of the Gaming Commissioner in accordance with the Chickasaw Nation – State of Oklahoma Gaming Compact and the IGRA. The Nation argues that allowing the NLRB to exercise authority over the Nation under the NLRA "would interminably and unlawfully interfere with the Nation's Treaty rights and inherent powers, including the right to make its own laws and be governed by them." Nation's Reply Brief (docket entry no. 31) at p. 2.

The Nation finds support for its argument in a deep body of Tenth Circuit law expressing extreme deference to tribal sovereignty. Because of the extraordinary number of tribes located within its jurisdiction, the Tenth Circuit is uniquely experienced in the application of the canons of Indian law. The Tenth Circuit has has clearly held that "federal

regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization." Dobbs v. Anthem Blue Cross and Blue Shield, 600 F.3d 1275, 1283 (10th Cir. 2010); *see also* NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1196 (10th Cir. 2002). Such Tenth Circuit authority is in accord with the United States Supreme Court's holding that before a treaty right will be abrogated, there must be a "clear and plain" expression of Congress' intention to do so. United States v. Dion, 106 S.Ct. 2216, 2220 (1986). It is also in accord with the Supreme Court's pronouncement that a statute that is silent with respect to Indians does not divest a tribe of its sovereign authority. *See* Iowa Mut. Ins. Co. v. LaPlante, 107 S.Ct. 971, 977-78 (1987).

It is undisputed that the NLRA makes no explicit reference to Indian tribes. Furthermore, the NLRB has pointed to nothing in the Act's legislative history indicating that Congress intended to abrogate tribal sovereignty. Rather, the NLRB argues that pursuant to 29 U.S.C. § 160 (a), Congress vested the NLRB with primary competence to determine whether the Act applies to the tribes, and thereby divested the district courts of subject matter jurisdiction over the question. The pertinent portion of § 160 (a) provides that "[t]he Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise..."

The NLRB cites Myers v. Bethlehem Shipbuilding Corp., for the proposition that in § 160 (a), Congress vested in the NLRB and Circuit Courts of Appeal exclusive power to prevent any person from engaging in any unfair labor practice affecting commerce. *See* 58 S.Ct. 459, 462 (1938). In Myers, a shipbuilding company brought suit to enjoin the NLRB from holding hearings. The company argued that it was not involved in interstate or foreign commerce, and that hearings would impair the efficiency of its operations. The Supreme Court rejected that argument finding the NLRA provided for appropriate procedures before the NLRB and also provided for adequate judicial protection by the Circuit Court of Appeals. The district court, therefore, lacked subject matter jurisdiction to enjoin the NLRB's hearing *Id.* at 48.

Myers did not address a situation where tribal sovereignty and treaty rights were at stake. There would appear to be a considerable distinction between a private company's claim that it will be inconvenienced by disruption to its manufacturing activities and a federally-recognized Indian tribe's claim that its sovereignty will be irreparably compromised by the a federal agency's unlawful exercise of authority under a statute to which the tribe is not subject.

In advocating that its holding be broadly construed, the NLRB points out that Myers has been applied to overrule constitutional objections, Grutka v. Barbour, 549 F.2d 5 (7th Cir. 1977), as well as objections arguably arising from concerns over a foreign government's sovereignty, Goethe House New York, German Cultural Center v. N.L.R.B., 869 F.2d 75

(2nd Cir. 1989). However, in Grutka, the court "assumed that a fortiori a district court could enjoin an exercise of Board jurisdiction which was unconstitutional as a matter of law." 549 F.2d at 8. The court reasoned, that where constitutionality can only be measured against a developed factual record, an NLRB proceeding is especially appropriate forum for developing such a factual record. *Id.*

In Goerthe House, the court noted vague foreign sovereign immunity concerns that arose due to the appellee non-profit organization's partial ownership by the German government. The court concluded that the district court had no jurisdiction where the NLRB's orders would not encroach upon the prerogatives of a German union and would not violate German law. *Id.* at 78-79.

Neither of these cases support the NLRB's position that the district court is stripped of jurisdiction to hear a federally-recognized Indian tribe's claims arising from the tribe's inherent rights as a sovereign. This Court recognizes, however, that such a result was reached by the Western District of Michigan in Little River Band of Ottawa Indians v. NLRB, 747 F.Supp.2d 872 (W.D.Mich. 2010). There the court concluded that Myers required a tribe to exhaust NLRB remedies and seek review in the Circuit Courts should the NLRB find that the Act was applicable to the tribe. The Nation points out that the Little River Band did not urge rights under unique treaties such as those governing the Chickasaw Nation. In any event, this Court does not believe that the conclusion drawn by the court in Little River Band is tenable under Tenth Circuit authority. In Little River Band, the court

conceded that the NLRA is silent as to whether Congress intended for the act to include Indians or Indian enterprises. *Id.* at 887. It nonetheless proceeded to find that the term "person," as used in the Act, reasonably encompassed Indian tribes. While the court found support for its ruling in San Manuel Indian Bingo & Casino, 475 F.3d 1306 (D.C.Cir. 2007), such a conclusion is directly contrary to clearly established Tenth Circuit law.

In San Manuel, the D.C. Circuit noted that pursuant to longstanding principles, ambiguities in a federal statute must be resolved in favor of Indians. *Id.* at 440, citing County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 112 S.Ct. 683 (1992); Montana v. Blackfeet Tribe of Indians, 105 S.Ct. 2399 (1985); Bryan v. Itasca County, 96 S.Ct. 2102 (1976); McClanahan v. Ariz. State Tax Comm'n, 176, 93 S.Ct. 1257 (1973); Squire v. Capoeman, 76 S.Ct. 611 (1956); City of Roseville v. Norton, 348 F.3d 1020, 1032 (D.C.Cir.2003). The court also noted the well-established principle that a clear expression of congressional intent is necessary before a court may construe a federal statute so as to impair tribal sovereignty. San Manuel, 475 F.3d at 440-41, citing White Mountain Apache Tribe v. Bracker, 100 S.Ct. 2578 (1980); Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670 (1978). The court found, however, that those considerable precedents were in conflict with Federal Power Commission v. Tucsarora Indian Nation, 80 S.Ct. 543 (1960). In Tuscarora, the Supreme Court stated that "a general statute in terms applying to all persons includes Indians and their property interests." *Id.* at 553. While the Seventh Circuit conceded that the Tuscarora pronouncement was of questionable significance and appeared

to be dicta, it nonetheless employed that statement as a foundation for constructing a detailed balancing of the interests of the tribes against other public interests.

The Tenth Circuit firmly disavowed the reasoning employed in San Manuel. It examined Tuscarora, noting that it dealt solely with issues of land ownership, not with questions pertaining to the tribe's sovereign authority to govern the land. The Tenth Circuit concluded that proprietary interests and sovereign interests are separate; Tuscarora governed only those situations where the tribe was exercising mere proprietary or property rights. Pueblo of San Juan, 276 F.3d at 1198-99. In situations where the tribe acts in its capacity as a sovereign, a well-established canon of Indian law dictates that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.* at 1191-92, *quoting* Montana v. Blackfeet Tribe, 105 S.Ct. 2399, 2403 (1985). "Doubtful expressions of legislative intent must be resolved in favor of the Indians." *Id.*, *quoting* South Carolina v. Catawba Indian Tribe, 106 S.Ct. 2039 at 2044 (1986). The canon applies even to statutes that do not mention Indians at all, and requires that Congress make plain its intent to abrogate tribal rights before such an abrogation will be found. *Id.* at 1191-92

Based upon the foregoing, the Court finds it has jurisdiction to temporarily enjoin the NLRB from proceeding with its hearing on the complaint against the Nation. The Court therefore considers whether the nation has established that it is entitled to preliminary injunctive relief.

In order to secure preliminary injunctive relief, a party must show "(1) that it has a substantial likelihood of prevailing on the merits; (2) that it will suffer irreparable harm unless the [restraining order] is issued; (3) that the threatened injury outweighs the harm the [restraining order] might cause the opposing party; and (4) that the [restraining order] if issued will not adversely affect the public interest." Prairie Band of Potowatomi Indians v. Pierce, 253 F.3d 1234 at 1246 (10th Cir. 2001); *see also* Wyandotte Nation v. Sebelius, 443 F.3d 1247, 1254-55 (10th Cir. 2006). In light of Tenth Circuit authority, the Court finds that the Nation is substantially likely to prevail on the merits of its claim for a declaratory judgment that it is not subject to the provisions of the NLRA. The Tenth Circuit has already held that the NLRA did not preempt a tribal government from enacting its own right-to-work ordinance. *See* Pueblo of San Juan, 276 F.3d 1186. Furthermore, the court has announced that "in this circuit, respect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization." Dobbs at 1283. Adopting the Tenth Circuit's great deference for tribal sovereignty, courts within this circuit have consistently held that silence is not sufficient to establish congressional intent to strip Indian tribes of their retained inherent authority to govern their own territory. *See e.g.*, Kerr-McGee Corp. v. Farley, *aff'd* 115 F.3d 1498 (10th Cir.1997), *cert. denied*, 118 S.Ct. 880 (1998)

The Court further finds that the Nation will suffer irreparable harm should it be made to submit to the authority of the NLRB absent any indication that Congress intended such a

result. Applying certain federal regulatory schemes to Indian tribes impinges upon their sovereignty by preventing tribal governments from freely exercising their powers, including the sovereign authority to regulate economic activity within their own territory. Dobbs at 1284; Pueblo of San Juan, 276 F.3d at 1192-93. The Tenth Circuit has held, therefore, that the improper exercise of jurisdiction over a tribe to constitute an irreparable injury to the tribe's inherent sovereign authority. *See* Wyandotte Nation v. Sebelius, 443 F.3d 1247, 1255 (10th Cir. 2006); Prairie Band of Potowatomi Indians v. Pierce, 253 F.3d 1250 (10th Cir. 2001). While those cases involved improper exercise of state authority, the Court finds that the unlawful exercise of federal agency authority over a tribe is similarly injurious, and the injury is not readily remedied.

The threatened injury to the Nation's sovereignty outweighs any possible injury to the NLRB. The NLRB has full recourse to appellate review of any preliminary injunctive relief entered by this Court. If on appeal the NLRB is found to have power to enforce the NLRA against the Nation, it will be free to continue its proceedings. In addition, it appears that the NLRB has itself sought out the jurisdiction of the federal district courts in matters affecting labor relations. *See* Pueblo of San Juan, 276 F.3d 1275 (NLRB brought suit in district court to enjoin tribe from enforcing its right-to-work provision).

Finally, the granting of injunctive relief to the Nation will not adversely affect the public interest. In fact, the Tenth Circuit has concluded that the support of tribal self-governance is a matter of public interest. Prairie Band of Potowatomi Indians, 253 F.3d at

1253. The public has a "genuine interest in helping to assure Tribal self-government, self-sufficiency and self-determination." Sac and Fox Nation of Missouri v. LaFaver, 905 F.Supp. 904, 907-08 (D. Kan. 1995). The injunctive relief requested by the Nation is appropriate and necessary.

Conclusion

The Nation has established that this Court has jurisdiction to hear its claim for injunctive relief. In addition, the Chickasaw Nation has established that it is entitled to the injunctive relief which it seeks.

Accordingly, the Court:

1. GRANTS the Chickasaw Nation's Motion for a preliminary injunction;

2. ENJOINS the NLRB from proceeding with hearing on its complaint against the Chickasaw Nation; and

3. DENIES the NLRB's motion to dismiss.

ENTERED this 11th day of July, 2011.

LEE R. WEST
UNITED STATES DISTRICT JUDGE