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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITE HERE LOCAL 19,

Petitioner,

v.

PICAYUNE RANCHERIA OF CHUKCHANSI INDIANS; CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY; DOES 1-100,

Respondents.

No. 1:14-CV-01136-MCE-SAB

MEMORANDUM IN SUPPORT OF PETITIONER UNITE HERE LOCAL 19'S MOTION FOR JUDGMENT ON THE PLEADINGS AND TO STRIKE AFFIRMATIVE DEFENSES

Introduction

Petitioner UNITE HERE Local 19 (the "Union") seeks confirmation and enforcement of a labor arbitration award issued pursuant to the arbitration clause in the Union's collective bargaining agreement. Respondents admitted the material factual allegations in the Petition which entitle the Union to confirmation, and, as we show in this brief, the affirmative defenses alleged by Respondents lack merit.

Statement of Undisputed Facts

This a petition to confirm a labor arbitration award pursuant to Section 301 of the Labor

Management Relations Act, 29 U.S.C. § 185. Respondent Picayune Rancheria of Chukchansi Indians is an Indian tribe (the "Tribe") that owns and operates the Chukchansi Gold Resort and Casino in Madera County, California (the "Casino"). Petition, ¶ 3; Answer, ¶ 3. The arbitration award was issued under a collective bargaining agreement that covers employees of the Casino (the "Collective Bargaining Agreement"). Petition, ¶¶ 8-10. 12-15 & Exhs. A & B; Answer, ¶¶ 8-10, 12-15.

The Collective Bargaining Agreement is a labor contract between the Union and the Tribe. Respondent Chukchansi Economic Development Authority ("CEDA") entered into the Collective Bargaining Agreement as the Tribe's authorized agent. CEDA is wholly owned by the Tribe and is controlled by the Tribe's governing body. Petition, ¶¶ 4, 8; Answer, ¶¶ 4, 8.

The Collective Bargaining Agreement contains a grievance procedure that culminates in arbitration before an arbitrator of the Federal Mediation and Conciliation Service. Petition, ¶¶ 8-10 & Exh. A; Answer, ¶¶ 8-10. Pursuant to that procedure, the parties agreed to submit grievances over the terminations of Casino employees Jarrod Woodcock and Mae Pitman to arbitration before Arbitrator Patrick Halter. Petition, ¶¶ 12-14; Answer, ¶¶ 12-14. Arbitrator Halter issued an arbitration award on February 24, 2014 (the "Arbitration Award"), which he served on counsel for the parties by email on the same day. Petition, ¶ 15 & Exh. B; Answer, ¶ 15; Martin Dec., ¶¶2-5.[1] The Arbitration Award provides the following remedy:

> In sum, grievants Woodcock and Pitman were suspended and discharged without just cause. The remedy to cure the numerous violations of the CBA is reinstatement with a make whole remedy that includes backpay with interest, tips for Woodcock, restoration of seniority, contributions to retirement, reimbursement of health insurance premiums and expenses, and any other employment benefits unjustly denied due to their wrongful suspensions and discharges. Front pay is also awarded should the Tribe Employer not reinstate the grievants. In other words, the Union's requested remedy is granted.

Petition, ¶ 16 & Exh. B, at 17; Answer, ¶ 16. Respondents have not complied with the remedy set out in the Arbitration Award. Petition, ¶ 17; Answer, ¶ 17.

[1] Documents referenced in a complaint may be considered on a Rule 12 motion. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994).

Argument

The Union brings this motion for judgment on the pleadings pursuant to Rule 12(c). "Judgment on the pleadings is properly granted when there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law." *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). Respondents have admitted the material facts, as shown by the statement of facts. This brief addresses Respondents' affirmative defenses. If the Court denies judgment on the pleadings, the Union requests that Respondents' affirmative defenses be stricken for the reasons set out in this brief.

Section A addresses the first affirmative defense. It shows that the Petition states a claim under Section 301 of the Labor Management Relations Act even though Respondents are an Indian tribe. Indian tribes that operate commercial businesses, such as a casino, are Section 301 employers.

Section B addresses the second affirmative defense. It shows that this Court has subject-matter jurisdiction, and the Union did not agree to proceed in a different forum. The contrary is true. The Tribe agreed that this suit could be filed directly in federal court without exhausting tribal remedies.

Section C addresses the third, fourth, fifth and sixth affirmative defenses. It explains that Respondent waived these defenses by failing to petition to vacate the award within one hundred days as required by California law.

Second D provides an additional reason why the third affirmative defense – that the Tribe's gaming commission is an indispensable party to this suit – lacks merit. The Tribe argued to Arbitrator Halter that it had cause to discharge Mae Pitman and Jarrod Woodcock because the tribal gaming commission revoked their licenses to work in the Casino, but Arbitrator Halter rejected that defense. The Ninth Circuit will not revisit a defense rejected by an arbitrator.

Finally, Section E addresses the seventh affirmative defense, and explains that confirmation is not premature even though the Arbitrator retained jurisdiction to calculate money damages.

A. The Labor Management Relations Act applies to Indian tribes

Section 301 of the Labor Management Relations Act gives federal district courts jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce". 29 U.S.C. § 185(a) and (c). Section 301 "authorizes district courts to enforce or vacate an arbitration award entered pursuant to a collective bargaining agreement." *Sheet Metal Workers Int'l Ass'n Local No. 359 v. Madison Industries, Inc. of Arizona*, 84 F.3d 1186, 1190 (9th Cir. 1996); *see also United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (enforcing labor arbitration award).

Respondents admitted that the Arbitration Award was issued pursuant to the Collective Bargaining Agreement and that the Union is a "labor organization" within the meaning of Section 301, Petition, ¶¶ 1-2; Answer, ¶¶ 1-2; but denied that they are each an "employer" within the meaning of Section 301. That denial should be disregarded because Respondents admitted facts that show that they are Section 301 employers. Respondents admitted that the Tribe owns and operates the Casino, Answer, ¶ 3; that the Tribe owns and controls CEDA, Answer, ¶ 4; that the Tribe, though CEDA, entered into the Collective Bargaining Agreement covering employees of the Casino, Answer, ¶ 8; and that Jarrod Woodcock and Mae Pitman were employed at the Casino. Answer, ¶ 12. In other words, Respondents employ individuals who work at the Casino.

Respondents' argument might be that the Labor Management Relations Act does not apply to Indian tribes, but that argument would not have merit. As a presumptive matter, federal laws of general applicability apply to equally Indian tribes. *Donovan v. Couer d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985) (citing *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960) for the proposition that it is "well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests"). The *Couer d'Alene Tribal Farm* court recognized three exceptions to the *Tuscarora Indian Nation* rule:

> Statutes of general applicability should not be applied to the conduct of Indian tribes if: (1) the law "touches exclusive rights of self-government in purely

> intramural matters"; (2) the application of the law would abrogate treaty rights; or (3) there is "proof" in the statutory language or legislative history that Congress did not intend the law to apply to Indian tribes.

Id. at 1116. In that case, the Ninth Circuit concluded that OSHA applied to a tribal farm. *Id.* Since then, the Ninth Circuit has followed *Couer d'Alene Tribal Farm* repeatedly, concluding that an array of federal employment laws apply to Indian tribes. *See, e.g.*, *NLRB v. Chapa de Indian Health Program*, 316 F.3d 995, 998 (9th Cir. 2003) (holding that the National Labor Relations Act could be applied to tribes); *Lumber Industry Pension Fund v. Warm Springs Forest Prods. Industries*, 939 F.2d 683, 685-86 (9th Cir. 1991) (holding that ERISA applies to tribal business); *U.S. Dep't of Labor v. OSHA Commission*, 935 F.2d 182, 183 (9th Cir. 1991) (same). *Cf. Solis v. Matheson*, 563 F.3d 425 (9th Cir. 2009) (applying *Couer d'Alene Tribal Farm* to hold that FLSA governs a business on a reservation owned by tribal members).[2]

None of the *Couer d'Alene Tribal Farm* exceptions apply here. There is no evidence in the legislative history of the Labor Management Relations Act that Congress intended to exclude tribes from Section 301. Tribes are not mentioned in the legislative history at all. Application of the Labor Management Relations Act could not abrogate treaty rights because the Tribe does not have any treaty with the federal government. Finally, the exception for laws that "touch exclusive rights of self-government in purely intramural matters" does not apply to tribal casinos.[3] *San*

[2] *Couer d'Alene Tribal Farm* represents the majority view. Other federal appeals courts have followed *Couer d'Alene Tribal Farm* and decided that federal employment laws that are silent as to tribes apply to commercial businesses operated by tribes. *Menominee Tribal Enterprises v. Solis*, 601 F.3d 669, 670-71 (7th Cir. 2010) (OSHA); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 177 (2d Cir. 1996) (OSHA); *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1129-30 (11th Cir. 1999) (ADA); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932 (7th Cir. 1989) (ERISA).

[3] This exception is construed narrowly: "[T]he tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to tribes." *Couer d'Alene Tribal Farm*, 751 F.2d at 1166 (citation omitted). It applies "only in those rare circumstances where the immediate ramifications of the conduct are felt primarily within the reservation by members of the tribe and where self-government is clearly implicated." *Snyder v. Navajo Nation*, 382 F.3d 892, 895 (9th Cir. 2004).

Manuel Indian Bingo & Casino v. NLRB, 475 F.3d 1306, 1314-15 (D.C. Cir. 2007); *Mashantucket Sand & Gravel*, 95 F.3d at 179-81.

B. The Collective Bargaining Agreement expressly provides for confirmation of arbitration awards in federal court

Respondents contend, in their second affirmative defense, that this Court lacks subject-matter jurisdiction because the parties' Collective Bargaining Agreement states in the preamble that "[t]he Employer and the Union agree that the Tribal Labor Relations Ordinance (TLRO) adopted by the Employer as a requirement of the Tribal/State Compact between the Employer and the State of California is the applicable law with regard to labor relations within the jurisdiction of the Employer." Whatever the significance of this statement is, it is not a waiver of the Union's right to petition for confirmation of an arbitration award in federal court.

The Collective Bargaining Agreement specifically provides that a suit to confirm an arbitration award may be filed in federal court. Section 29(6) states:

> For the sole purpose of enabling a suit to compel arbitration or to confirm an arbitration award under this Agreement or the Employer's Tribal Labor Relations Ordinance, the Employer agrees to a limited waiver of sovereign immunity and consents to be sued in federal court, without exhausting tribal remedies.

Petition, Exh. A (page __). Moreover, any waiver of the right to proceed in a court having jurisdiction must be clearly and unequivocally expressed. *Northern California Dist. Council of Laborers v. Pittsburg-Des Moines Steel*, 69 F.3d 1034, 1036-37 (9th Cir. 1995) (holding that a forum selection clauses does not waive jurisdiction unless waiver is clearly expressed); *Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762, 764 (9th Cir. 1989) (same); *see also John Boutari and Son v. Attiki Importers*, 22 F. 3d 51, 53 (2d Cir. 1994) ("[W]here jurisdiction exists, it cannot be ousted or waived absent a clear indication of such a purpose"). The Union did not clearly and unequivocally waive its right to proceed in federal court. It did exactly the opposite.

C. Respondents waived their third, fourth, fifth and sixth affirmative defenses by failing to file a timely petition to vacate the Arbitration Award

Respondents assert, as their third affirmative defense, that the Tribe's gaming commission is an indispensable party that must be joined to this proceedings. The fourth, fifth and sixth

affirmative defenses are all variations on the same defense: that Arbitrator Halter did not have authority to decide the dispute presented to him as he did. The fourth affirmative defense is that the Arbitration Award "is invalid and unenforceable as it is beyond the scope of [Arbitrator Halter's] authority pursuant to Section 29, paragraph 3e of the Collective Bargaining Agreement." The fifth affirmative defense is that "Arbitrator Halter acted outside his jurisdiction and in violation of the Indian Gaming Regulatory Act." The sixth affirmative defense is that the Arbitration Award is "invalid" because "the conduct of both Respondents and/or their agents is subject to and controlled by the Indian Gaming Regulatory Act." Respondents waived all of these defenses because they did not file a petition to vacate the Arbitration Award within the one hundred-day statute of limitations.

"[A] party opposing an arbitration award must move to vacate the award or be barred from further legal action." *Sheet Metal Workers Int'l Ass'n Local No. 252 v. Standard Sheet Metal, Inc.*, 699 F.2d 481, 482 (9th Cir. 1983). Failure to petition to vacate an unfavorable arbitration award within the applicable statutory period bars "all defenses to arbitration awards" in a subsequent proceeding to confirm the award. *Id.* at 483. In prior cases, court have decided that affirmative defenses similar to the ones alleged in the case were foreclosed by the failure timely to petition to vacate an award. *See, e.g., Brotherhood of Teamsters & Auto Truck Drivers Local No. 70 v. Celotex Corp.*, 708 F.2d 488, 490 & n.3 (9th Cir. 1983) (holding that failure to file a timely petition to vacate waived defense that issues addressed in arbitration award were within NLRB's primary jurisdiction); *Truesdell v. Southern Cal. Permanente Medical Group*, 151 F.Supp.2d 1161, 1172 (C.D. Cal. 2001) *aff'd mem. disp.* (9th Cir. 2002) (same for defense that arbitrator exceeded authority to make the award); *SEIU Local 36 v. Office Center Svcs., Inc.*, 670 F.2d 404, 406 n.5 (3d Cir. 1982) (same for defenses that decision-maker acted beyond his jurisdiction, that award did not draw its essence from the agreement, and that compliance with the award was impossible)

In Section 301 cases, the statute of limitations for vacating a labor arbitration award is drawn from state law. *Standard Sheet Metal*, 699 F.2d at 483 n.2. In California, a petition to vacate an arbitration awrd must be served and filed within one hundred days of service of a

signed copy of the award on the petitioner. *See* California Code of Civil Procedure § 1288. Here, the Arbitration Award was issued on February 24, 2014 and served on counsel for Respondents on the same day. Answer, ¶ 15; Martin Dec., ¶¶2-5. To date, Respondents have not filed a petition to vacate the Arbitration Award. As a result, Respondents are barred from raising any of these affirmative defenses.[4]

D. The Tribe's gaming commission is not an indispensable party

There is an additional reason why the Court may disregard Respondents' third affirmative defense, which alleges that the Tribe's gaming commission is an indispensable party to this suit. This defense appears to replicate an argument that Respondents made to Arbitrator Halter. Respondents will likely argue that the gaming commission revoked Pitman's and Woodcock's licenses to work at the Casino and, as a result, Respondents cannot reinstate Pitman and Woodcock to their employment in the Casino without the gaming commission's assent. In other words, Respondents' argument is that with joining the gaming commission to this suit, it will be impossible for Respondents to comply with the Arbitration Award.

The Ninth Circuit will not vacate an arbitration award even when the employer asserts that compliance is impossible. *Pullman Power Prods. Corp. v. Local 403, United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Industry*, 856 F.2d 1211, 1212 (9th Cir. 1988). The *Pullman Power Products* case involved an arbitration award against an employer that operated as a subcontractor on property that the employer did not own. The award directed the employer to pay backpay to discharged employees. The employer sought to have the award vacated on the theory that the employees' continued employment was impossible because the

[4] Even if Respondent had timely moved to vacate the Arbitration Award, these defenses would not have merit. Review of labor arbitration decisions is extremely narrow and highly deferential because "[i]t is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Enterprise Wheel & Car Corp.*, 363 U.S. at 599. "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

general contractor had barred the employees from the property. The Ninth Circuit refused to vacate the award, explaining that "a court could not disagree with an arbitrator's implicit rejection of an impossibility defense." *Id.*

This case is on all fours with *Pullman Power Products*. Just as the employer in *Pullman Power Products* argued that it was impossible for it to continue to employ the discharged employees without the general contractor's assent, the Respondents here argue that they cannot comply with the Arbitration Award without the gaming commission's assent. Here, too, the Arbitrator rejected the Tribe's impossibility defense:

> As presented by the Tribe Employer, since the parties to the CBA agreed in the Preamble "that the [TLRO] … is the applicable law with regard to labor relations within the jurisdiction of the Employer" and the Tribal Gaming Commission (TGC) is not a party to the CBA, TGC decisions are not subject to review under grievance and arbitration procedures. Under the TLRO, TGC's employees are "specifically excluded from the definition of tribe and its agents." Thus, TGC operates independent of the CBA as confirmed in the TLRO at Section 3 which states that "[o]peration of this [TLRO] shall not interfere in any way with the duty of the Tribal Gaming Commission to regulate the gaming operation in accordance with the Tribe's National Gaming Commission-approved gaming ordinance."
>
> TGC is not an independent operation. Rather, TGC's operations are subject to review and oversight by the Tribe through its Tribal Council. The Tribal Gaming Ordinance stipulates that the Tribal Council created the TGC "as a governmental subdivision of the Tribe" and TGC "is under the directive and control of the Tribal Council." [Jt. Exh. 4] TGC's regulations, policies and procedures are subject to review and approval by the Tribal Council. Commissioners at TGC are appointed by the Tribal Council; they meet on a monthly basis with the Tribal Council or more frequently when needed. The Tribal Council intervened and overruled a TGC decision involving labor relations at the Casino and the Union's organizing the bargaining unit. Another example where a TGC decision is final only until the Tribal Council decides otherwise is the matter of Kristen Lowery. TGC issued findings and a decision suspending Lowery's license citing the events of February 27 - 28. This decision was effectively overturned with the reinstatement of Lowery to employment and a make whole remedy of backpay. Finally, TGC's hearing examiners are attorneys that by and large serve the Tribal Council. The attorneys provide advice, counsel and legal representation in a variety of forums to the Tribal Council, Tribal Chairman and CEDA. The Tribe effectively controls the TGC.
>
> TGC and the Tribe are "one and the same" for purposes of labor relations as demonstrated by their concerted action against the grievants and the Union. Specifically, TGC directed the Tribe as Employer at the Casino to cancel the arbitration hearing and withdraw from further participation and the Tribe acted

> accordingly. The Tribe uses the TGC in efforts to evade its contractual obligations under the CBA thereby denigrating the status of the Union in its role as the exclusive representative to represent employees.
>
> There is no provision in the TLRO or TGO that states the Tribe Employer is freed from its contractual obligations under the CBA when it complies with, carries out or implements an order or decision issued by TGC. Tribe Employer - - not TGC - - discharged the grievants and, under the CBA, discharge is a grievable matter subject to arbitration.
>
> TGC carried out its duties and issued its decisions revoking the grievants' licenses. The decision is TGC's final act. There is no wording in the TLRO that states TGC's final decision is excluded from third party review; the Tribe did not negotiate that kind of exclusion to the grievance procedure. The CBA and TLRO do not state that TGC's findings of fact and final decision has a preclusive and binding effect on matters that subsequently arise under the CBA.

Petition, Exh. B, at 12-13.

Respondents' defense that its Tribe's gaming commission is an indispensable party is foreclosed by *Pullman Power Products*. Just as the union in *Pullman Power Products* did not need to secure the general contractor's assent before the award in that case could be confirmed, the Union here does not need to secure the gaming commission's assent in order for the Arbitration Award to be confirmed.

E. Confirmation of the Arbitration Award is not premature

Respondents assert, in the seventh affirmative defense, that confirmation of the award is premature because "[t]he parties agreed during the course of the arbitration that said Arbitrator Halter would retain jurisdiction over the case to determine calculation of damages should liability be determined, which calculation has never occurred to date." This defense should be rejected because an arbitrator's retention of jurisdiction to calculate damages does not forestall judicial review.

When the only issue remaining for the arbitrator is the mathematical plugging in of undisputed numbers to determine damages, the award is final for purposes of review:

> In *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), the Supreme Court reviewed an arbitration award where the arbitrator had ordered reinstatement of wrongfully terminated employees and back pay, minus pay during a ten-day suspension and sums received from other employment. The Court

> reversed the Fourth Circuit's holding that the arbitrator's failure to specify the amounts to be deducted from back pay rendered the award unenforceable. *Id.* at 596. It affirmed the district court's enforcement of the award, and remanded to allow the arbitrator to calculate the amounts due under the award. *Id.* at 599. Notably . . . the arbitrator in *United Steelworkers* had already ordered a remedy at the time enforcement was sought. The Court's opinion, therefore, holds only that the arbitrator need not complete the mathematical computations of the award for the award to be final and reviewable.

Millmen Local 550 v. ells Exterior Trim, 828 F.2d 1373, 1377 (9th Cir.1987); *see also Murray v. Laborers Union Local 324*, 55 F.3d 1445, 1456 (9th Cir. 1995) (denying motion to vacate award brought more than 100 days after the decision was issued and deciding that decision was final because petitioner knew that the award required him to pay costs and "it was a purely technical matter for the union to send its bill for costs"); *Burns Intern. Sec. Services v. Intern. Union UPGWA*, 47 F. 3d 14, 16 (2d Cir. 1994) ("[T]he reservation of jurisdiction over a detail like overseeing the precise amount of back pay owed does not affect the finality of an arbitrator's award."); *Dreis & Krump Mfg. Co. v. Int'l Ass'n of Machinists & Aerospace Workers, District No. 8*, 802 F.2d 247, 251 (7th Cir. 1986) ("[A]ll that was in doubt was the precise amount of backpay, for which the company's records had to be consulted but which once they were consulted would be determined automatically, without an exercise of judgment or discretion. This was, therefore, a 'ministerial' detail, such as would not have prevented the judgment from being deemed final for purposes of appeal.").

Here, all that remains for Arbitrator Halter to do (if the parties cannot agree) is calculate the amount of due Mae Pitman and Jarrod Woodcock in wages and benefits. Respondents concede this in their statement of the seventh affirmative defense. That task does not prevent immediate review. Moreover, the Arbitration Award requires Respondents to pay Pitman and Woodcock front pay if it does not reinstate them. Front pay will continue to mount until the Arbitration Award is confirmed so delaying confirmation until a final amount is calculated would delay confirmation indefinitely.

Conclusion

For all of the foregoing reason, Respondents' affirmative defenses should be stricken;

judgment on the pleadings should be granted in favor of Petitioner UNITE HERE Local 19; and the Arbitration Award should be confirmed and enforced.

Dated: October 8, 2014

Respectfully submitted,

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