

BEFORE THE INDIAN CLAIMS COMMISSION

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| THE CROW TRIBE OF INDIANS, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | Docket No. 54 |
| |) | |
| THE UNITED STATES OF AMERICA, |) | |
| |) | |
| Defendant. |) | |

Decided: December 26, 1962

Appearances:

Ralph G. Wiggerhorn, with whom were John M. Schiltz, John C. Sheehy, George J. Hutton of Billings, Montana and John W. Cragun, Robert W. Barker and Glen A. Wilkinson of Washington, D. C., attorneys for Petitioner.

Maurice H. Cooperman, with whom was Mr. Assistant Attorney General Ramsey Clark, attorneys for Defendant.

OPINION OF THE COMMISSION

Chief Commissioner Watkins delivered the opinion of the Commission.

An appeal from our decision rendered in these proceedings on February 12, 1962, was taken by the attorneys for the Crow Tribe of Indians, plaintiff in this case, to the Court of Claims. The appeal was from our order denying the allowance of attorneys expenses incurred by said attorneys in valuation proceedings in said Docket No. 54.

The appellate court vacated the order, findings, and opinion of the Commission and remanded the case for further consideration in light of this Commission's findings of fact, conclusions and order entered June 14, 1962, in the Northern Paiute Nation et al., v. The United States, Docket No. 87.

We have set forth in full the petition filed by said attorneys in our findings which we have now made and entered upon this remand. The facts are rather extensively set forth in the findings so we shall not restate them, except to call attention to such facts as we may believe should be emphasized in order to present this matter properly.

First we shall briefly review our decision in the Northern Paiute case so that whatever light it may shed on our decision in the instant proceeding will be before us, as we give our reasons as required by Section 19 of the Indian Claims Commission Act, for our findings and conclusions in the instant proceeding.

The Northern Paiute Indians entered into a written contract as required by law, with a firm of expert witnesses to serve them in presenting their claims against the United States to this Commission. The agreement was approved by the Secretary of the Interior and became effective immediately. The witnesses rendered service pursuant to said agreement. A compromise judgment was entered on one division of the claims filed. Congress appropriated the money to pay the judgment and it was paid into the United States treasury under the law to the credit of the Indian tribe, subject to the custodial control by the Secretary of the Interior.

The witnesses' agreement provided with reference to the area involved:

C. For performing and completing the services here undertaken for valuation of the northernmost area, Nathan Associates shall be entitled to receive and shall be paid out of any award, whether by settlement or judgment, made to the northernmost group on account of the taking of the United States of the said northernmost area the sum of twenty thousand dollars (\$20,000).

In addition, the witnesses were, upon proper vouchers submitted, entitled to receive reimbursement for expenses incurred by the witnesses.

The contract also provided:

. . . that in the event no award is made for one or more of the subject areas, Nathan Associates will not be entitled to receive and will not be paid any compensation for, or be reimbursed for expenses in connection with services performed under this contract or for the valuation of any such subject area.

The agreement also provided that the attorneys for the Indians would not be liable in any manner whatsoever, to said witnesses for any services rendered under said contract.

It was also clear that the agreement to pay the witnesses was contingent in nature.

Now in the Paiute case, the attorney of record filed a petition pursuant to Section 15 of the Indian Claims Commission Act (60 Stat. 1049, 1053) which was captioned "Petition For Allowance of Compensation For Expert Services." In this petition the Commission was asked to order the deduction and payment out of the award made to the Paiute Indians, the sum of \$20,000, which sum

. . . was incurred for compensation of Robert R. Nathan, Associates, Inc., for its services rendered on behalf of the petitioners, in accordance with a certain contract made and entered into by Robert R. Nathan Associates, Inc., with the petitioner tribes, as approved by the authorized representative of the Secretary of Interior. (Docket 87, 10 Ind. Cl. Comm. 361, 368)

Attached to the petition and made "Exhibit 1", was a copy of the aforementioned approved contract between Robert R. Nathan Associates, Inc., and the Northern Paiute Indians.

At the hearing on this petition, counsel for the Indians argued that under Section 15 of our Act the Nathan fee was a proper expense incurred

in the prosecution of the claim, and therefore the Commission has the authority and right to order the payment thereof out of the judgment moneys recovered by the Indians.

This Commission, however, ruled to the contrary, and our decision in the Paiute case rested squarely on an interpretation of Section 15 of our Act. We decided that under the provisions of Section 15, this Commission had the authority to allow only those reasonable attorney's expenses actually incurred by him in the prosecution of the claim, that is, expenses which the attorney either paid out of his own pocket or was firmly committed to pay regardless of the outcome of the litigation. Under our ruling therefore, the Nathan contract fee could not qualify as a reimbursable attorney's expense under Section 15. What is more important, we concluded that under our ruling the language of the petition as filed in the Paiute case does not allege a claim upon which any possible relief could be granted by the Commission. We thereupon dismissed the petition on jurisdictional grounds.^{1/}

^{1/} The specific language in our ruling in the Paiute case is as follows:

We therefore conclude that the provisions of Section 15 of the Indian Claims Commission Act, which empower this Commission to fix the Attorney fees and to allow all reasonable expenses advanced by the attorney, or for which he is personally liable, are the clear exceptions to the existing law governing contracts made with the Indian tribes. These exceptions in Section 15 were permitted where the attorney had made advances or personal commitments because of the fact that the impecunious condition of the majority of Indian tribes prevented them from bearing miscellaneous legitimate costs of their litigation prior to judgment. These legitimate expenses incurred in the prosecution of the lawsuit (which were described to the Congress by Mr. Ernest Wilkinson during hearings on the proposed legislation) could be borne by the tribal attorneys, and if reasonable, recouped from the final judgment if the lawsuit was successful. Since the fees and expenses of the Nathan Associates, do not qualify as reimbursable items under our interpretation of Section 15 of our Act, this Commission is without jurisdiction to hear and pass upon the allegations of the instant petition, and therefore said petition should be dismissed. An order will be entered to that effect.

In light of our Paiute decision the contract attorneys in this case are now asking the Commission to dismiss the instant petition on similar jurisdictional grounds.^{2/} We think not, for we find that the petition now before us suffers no such jurisdictional defect, but on its face alleges sufficient facts which indicate a claim by the attorneys for the allowance of reimbursable attorney expenses as within the meaning of Section 15 of our Act as interpreted in our Paiute decision. For the sake of convenience we quote the body of the petition.

Comes now the Attorney of Record in the above-captioned matter and petitions the Commission for an order allowing, as reasonable expenses incurred in the prosecution of the above-entitled matter, the amounts of the respective claims of Mont H. Saunderson and Merrill G. Burlingame hereto attached and made a part hereof, to be paid to the attorney of record herein for the credit respectively of said Mont H. Saunderson and Merrill G. Burlingame.

The facts as stated in the two said respective claims attached are substantially true and are hereby confirmed. Because of the limited finances of the Crow Tribe at the time, the attorneys for the tribe were not able to engage qualified experts for the prosecution of said case except upon the terms as set forth in the attached claims. In each instance the additional compensation sought is reasonable and just under the circumstances in the opinion of the petitioner.

This petition is made under authority of Sec. 15 of the Act of August 13, 1946 (c. 959, 60 Stat. 1053), Sec. 503.34b of the Commission's Rules, and the claims contract between the said Crow Tribe of Indians and Ralph G. Wiggernhorn and Kenneth R. L. Simmons (deceased), now held by Wilkinson, Cragun & Barker and Wiggernhorn, Hutton, Schlitz & Sheehy, as successors.

^{2/} On November 15, 1962, Attorney Wiggernhorn, filed before this Commission a "Praeceptum to Dismiss Petition" in which he asked the Commission to dismiss the petition herein "as voluntarily withdrawn by petitioner as being beyond the jurisdiction of this Commission."

Attached to the petition, and made a part thereof, are the verified statements of witnesses Saunderson and Burlingame which generally indicate the terms of their oral agreements with the tribal attorneys. We have set this out in full in Finding No. 3. Nothing contained in either of the two statements alters the allegations in the petition as filed in that; (1) the attorney of record for himself and his colleagues petitions under Section 15 of our Act for allowance of expenses incurred by the attorney; (2) the attorney is requesting that the amounts allowed be paid to him "for the credit respectively of said Mont H. Saunderson and Merrill G. Burlingame; and (3) the above-mentioned verified statements of the two witnesses clearly indicates that they had oral agreements or understandings to be paid additional compensation with the contract attorneys and not with the Crow Tribe. We therefore find that the Commission has to hear this claim for allowance of expenses incurred by contract attorneys.

We now turn to the evidence in the record offered in support of this petition. In order to determine whether the claim asserted in the petition is in fact a proper reimbursable attorney's expense under Section 15 of our Act, this Commission examined all the contractual arrangements for services made by the two witnesses, Saunderson and Burlingame. We have found that under paragraph six of the approved tribal attorneys' contract with the Crow Tribe, the contract attorneys had the authority to engage expert witnesses, such as they did, and that their expense for fees would become a reimbursable item allowed to the attorney from tribal funds. However, it was also provided that the attorneys may require the expert witnesses so engaged to present their vouchers directly to the tribe

"without requiring that the parties of the second part (contract attorneys) advance the money for the same, whereby said persons may thus be paid and reimbursed directly after approval by the Commissioner of Indian Affairs as hereinafter provided; . . ."

(Finding 2) We gather that the purpose of this particular feature was to expedite payment of witness fees out of available tribal funds by eliminating the need to have the fee payments pass through the contract attorneys' hands as reimbursable expenses before reaching the witnesses. The record in this case shows that both Messrs. Saunderson and Burlingame received directly fee payments out of allocated tribal funds in the manner indicated above, but this did not, in our opinion, relieve the attorneys of their contractual obligations to pay these fees up to the time said payments were actually made.

We are not willing, therefore, to accept petitioner's argument that the several oral agreements under which Messrs. Saunderson and Burlingame were paid for services rendered, were in fact agreements between these witnesses and the Crow Tribe, and that the contract attorneys were merely acting as agents for the tribe. It seems to this Commission that the provisions of Section 81 of Title 25, United States Code, which section governs the writing of service contracts with the Indian tribes, is absolutely repugnant to the validity of any such oral agreements between

Messrs. Saunderson and Burlingame and the Crow Tribe.^{3/}

In our findings we have detailed the several transactions between

3/ § 81. Contracts with Indian tribes or Indians

No agreement shall be made by any person with any tribe of Indians or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void. . .

the expert witnesses and the contract attorneys under which these witnesses received fee payments, and in each instance the basis of the particular transaction is an oral agreement. At no time was there ever submitted to the Secretary of the Interior for his approval any written agreements between these expert witnesses and the Crow tribe. That any such agreements be in writing is the essential requirement of Section 81, but, in addition, any written contract for services such as were performed in this case must contain among other things, the names of all the parties in interest, their occupations and residences, the tribal authority to contract, the purpose of said contract, the things to be done under it, the fees to be paid, and a limitation upon the time said contract is to run.

The Commission is of the opinion that, in absence of any written contracts between the Crow Tribe and Messrs. Saunderson and Burlingame, the oral agreements actually made by these witnesses with the contract attorneys are necessarily theirs alone, and our immediate purpose in considering these transactions in such detail was to determine whether the payments actually made to these witnesses fully covered the services rendered, thus discharging the obligations the contract attorneys had to make such payments. If such payments were in fact inadequate and did not fully compensate these two witnesses for their services, then perhaps the petitioners herein may still be under an obligation to make some additional payments. The contract attorneys have contended in the course of the hearing on the petition filed herein for additional compensation that they

neither advanced to these witnesses any money, nor are they obligated to pay any additional compensation.

In Mr. Saunderson's case we found; that on three occasions he entered into an oral agreement with the contract attorneys to perform certain services; that he satisfactorily performed his services; that his fee on the first occasion was \$5,000 plus \$2,500 for the report and on the next two occasions his fee averaged \$1,250 per month; that each time payment was requested it was certified by the attorney of record, "that the requested fee was reasonable and just for the services rendered as of the date of the particular voucher" that upon filing his third and final voucher, Mr. Saunderson stated that his work was completed; and that on each occasion he was paid directly his requested fee. In all, Mr. Saunderson rendered services under his oral agreements with the contract attorneys for a period of 11 months and 8 days, for which services he received \$14,550 and \$1,436.79 in expenses. Under the circumstances we found the fee payments to Mr. Saunderson full and adequate compensation for the services rendered, and upon receiving such payments the oral contracts between the witness and the contract attorneys were now fully performed.

Any further understanding between Mr. Saunderson and the contract attorneys, that he might receive additional compensation upon a successful conclusion of the Crow case, and that the attorneys would petition the Indian Claims Commission for the same if such be the case, was collateral to the original oral agreements under which Mr. Saunderson was actually paid for his services. This collateral agreement did not create any obligation on the part of the contract attorneys to pay anything further

as compensation to Mr. Saunderson. The demand for \$12,500, which he now seeks as additional compensation, is not an attorney's reimbursable expense as set forth in the petition. It is strictly contingent upon a favorable recovery for the Crow Tribe. The fact that the Crow Indians did recover a considerable judgment, and the fact that these Indians have apparently approved the payment of the \$12,500 additional money to Mr. Saunderson, does not change the claim into a reimbursable attorneys' expense for which recovery is provided under Section 15 of our Act. This Commission does not have the authority to award this money to Mr. Saunderson.

Mr. Burlingame's situation is no different. He entered into an oral agreement with the contract attorneys to perform certain services and he did so perform them. Upon the completion of his work he submitted a voucher asking payment for services at the agreed contract rate of \$30 per day for 28 days and \$100 per day for two days of testimony, plus his expenses. To this voucher was attached Attorney Wiggenhorn's certification that Mr. Burlingame's claim for services rendered was in accordance with his oral agreement with the contract attorneys and "is a reasonable and just charge for such service to the date of said voucher." (Finding 12) Mr. Burlingame also received payment of his requested fee, which was in accordance with his oral agreement with the tribal attorneys, and was full and adequate payment for the services rendered. The payment of his fee completed the performance of his contract, and discharged any obligation the contract attorneys had to pay this witness his fee.

As was the case with Mr. Saunderson, any further understanding between this witness and the contract attorneys, that he might receive some additional compensation if the Crow litigation proved to be successful,

was also collateral to his original agreement to perform services for which he was justly compensated. Indeed, as stated by the witness himself, it was his understanding that ". . . contingent upon a favorable decision, a petition for additional compensation would be reviewed by the Indian Claims Commission." (Finding 3) Thus we find in the claim of Mr. Burlingame for additional compensation that there is no obligation on the part of the contract attorneys to make such additional payment. The requested additional compensation for Mr. Burlingame is not properly a reimbursable attorneys' expense, the recovery for which is provided for in Section 15 of our Act. The Commission has no authority to award Mr. Burlingame his requested additional compensation out of the Crow judgment moneys even though the Crow Tribe may have approved such payment.

In summation, we have found in this case, that like the claims for compensation in the Paiute case, the additional compensation sought herein for Messrs. Saunderson and Burlingame is not a proper reimbursable attorney's expense within the meaning of Section 15 of our Act. In the Paiute case, this Commission dismissed the petition therein on jurisdictional grounds, since we found that the petition on its face alleged a claim that was beyond our authority to consider on the merits. In this case, we have concluded that the language in the petition now before us does meet the jurisdictional requirements, but that the evidence offered in support thereof proves something entirely different from what is alleged. The evidence clearly indicates that the sums sought "to be paid to the attorney of record herein for the credit of Mont H. Saunderson and Merrill G. Burlingame. . ." are not reimbursable items within the meaning of Section 15 of our Act

according to our recent interpretation of this section in the Paiute case. Even if the matter actually proven results in a claim upon which this Commission under its Paiute decision has no jurisdiction to act, we think it does not make the petition jurisdictionally defective. The Commission therefore will deny the relief sought for failure of proof and enter an order in conformity with the findings and opinion herein.

Arthur V. Watkins
Chief Commissioner

We concur:

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner