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Colorado & S. Ry. Co. v. District Court In and For Tenth Judicial Dist.

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IN THE SUPREME COURT OF THE STATE OF COLORADO
SUPREME COURT
OF THE STATE OF COLORADO

DEC 17 1971

Richard D. Lurelli

THE COLORADO AND SOUTHERN RAILWAY)
COMPANY, INC. and the ATCHISON)
TOPEKA AND SANTA FE RAILWAY)
COMPANY a/k/a SANTA FE RAILWAY)
COMPANY, a corporation,)

Petitioners,)

vs.)

THE DISTRICT COURT IN AND FOR THE)
TENTH JUDICIAL DISTRICT OF THE)
STATE OF COLORADO: HONORABLE S.)
PHILIP CABIBI, DISTRICT JUDGE IN)
AND FOR THE TENTH JUDICIAL DISTRICT)
STATE OF COLORADO; THE COLORADO AND)
WYOMING RAILWAY COMPANY, INC.;)
CF&I STEEL CORPORATION, a corporation;)
MARINE MIDLAND BANK-NEW YORK and)
MILTON G. JANACEK as TRUSTEES)
UNDER A CERTAIN INDENTURE FOR THE)
USE AND BENEFIT OF BOND HOLDERS OF)
CF&I STEEL CORPORATION, a)
corporation,)

Respondents.)

MOTION TO DISMISS
"PETITION IN THE
NATURE OF A WRIT
OF PROHIBITION,"
TO VACATE ORDER TO
SHOW CAUSE AND TO
VACATE STAY OF
PROCEEDINGS.

Respondents, The Colorado & Wyoming Railway Company
and CF&I Steel Corporation, by their attorneys, move this Court
to dismiss forthwith the "Petition in the Nature of a Writ of
Prohibition" and to vacate the Order to Show Cause and the stay
of proceedings before the Honorable S. Philip Cabibi, and as
grounds for this motion show unto the Court as follows:

1. The petition herein cites as a basis therefor that
"there is a temporary restraining order and preliminary injunction
of the United States District Court, District of Colorado, in
the case of The Colorado and Southern Railway Company v. The
Colorado & Wyoming Railway Company (Civil Action No. C-3445)
directing and ordering the C&W to desist in building or constructing
its track (Exhibit "E")." On December 2, 1971 The Colorado &
Wyoming Railway Company filed with the United States Court of
Appeals for the Tenth Circuit a Motion for a Limited Stay of
Preliminary Injunction. On December 14, 1971, the day before

the petition was filed herein, said Motion for a Limited Stay was argued by counsel for petitioner, The Colorado and Southern Railway Company, and counsel for respondent, The Colorado & Wyoming Railway Company, before the said Court of Appeals and taken under advisement. Said stay was granted by the Court of Appeals at approximately 10:00 A.M. on December 15, 1971, the day the Petition was filed herein. Said stay permitted The Colorado & Wyoming Railway Company to continue the building and construction of its track and removed the injunction against such building and construction. A copy of said stay is attached hereto as Exhibit 1.

2. Attached to this Motion as Exhibit 2 is a copy of a letter of November 22, 1971 from the law firm of Welborn, Cook, Phipps & Brown, representing The Colorado & Wyoming Railway Company, to Mr. Willard L. Peck, counsel representing The Colorado and Southern Railway Company, reciting the understanding as to the effect of the aforesaid preliminary injunction in regard to the proceedings before Judge Cabibi. On that letter is the signature of Mr. Peck indicating his approval of the statements made therein. A copy of said letter, together with the remarks of Judge Arraj supporting the statements made therein, was delivered to Judge Cabibi before he set for December 17, 1971 the hearing on the question of immediate possession, which hearing is referred to in the petition herein and was stayed by this Court on December 17, 1971.

3. The petition herein is premature in that it is based on the contention that at a hearing to be held on December 17, 1971, immediate possession will be granted to The Colorado & Wyoming Railway Company. The petitioners well know that The Colorado & Wyoming Railway Company has stated and recognizes that it must go to the Public Utilities Commission of Colorado after the right to take immediate possession is granted but before

possession is actually taken. Furthermore, said petition assumes a certain ruling will be made by a judge, and such assumption is not warranted in any case.

4. Petitioners have failed to show that this matter is appropriate for relief in the nature of prohibition.

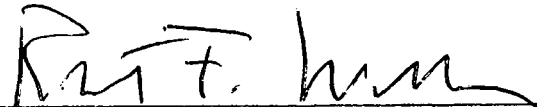
5. The petition in this matter was filed in this Court on December 15, 1971. None of the attorneys for any of the respondents received a copy of said petition or were notified of said petition as of the morning of December 17, 1971, although the hearing before Judge Cabibi on the matter of the right to immediate possession was set for the morning of December 17, 1971.

WHEREFORE, respondents, The Colorado & Wyoming Railway Company and CF&I Steel Corporation, respectfully move this Court to dismiss forthwith the petition herein and to vacate the Order to Show Cause and the stay of proceedings before Judge Cabibi which were entered on the basis of said petition. This motion is filed to raise the threshold issues above stated. The movants do not waive the right to file subsequent motions or responses raising issues as to the propriety of this proceeding in other respects and, of course, as to the merits.

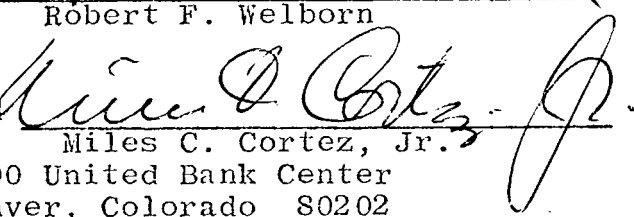
Respectfully submitted,

WELBORN, COOK, PHIPPS & BROWN

By


Robert F. Welborn

and


Miles C. Cortez, Jr.

1100 United Bank Center
Denver, Colorado 80202
244-6013

Attorneys for Respondents

NOVEMBER TERM - DECEMBER 15, 1971

Before Honorable Robert H. McWilliams, Honorable James E. Barrett,
and Honorable William E. Doyle, Circuit Judges

THE COLORADO AND SOUTHERN RAILWAY
COMPANY, a corporation,

Plaintiff-Appellee,

v.

THE COLORADO & WYOMING RAILWAY COMPANY,
a corporation,

Defendant-Appellant.

No. 71-1725

This matter comes on for consideration of appellant's motion for limited stay of preliminary injunction pending appeal and of appellant's supplemental memorandum in support of said motion. The appellee responded in opposition to said motion and the matter was orally argued and submitted to the Court on December 14, 1971 and taken under advisement.

Upon consideration whereof, being advised in the premises, it is the ORDER of the Court that the motion is granted and that the preliminary injunction heretofore entered by the United States District Court for the District of Colorado on November 19, 1971, is stayed for the limited purpose only of permitting appellant The Colorado and Wyoming Railway Company, to complete construction of the track in question over land on which it owns an easement from the Colorado and Southern Railway Company right-of-way to the Comanche Plant.

This limited stay of the preliminary injunction is conditioned upon appellant's posting a good and sufficient corporate surety bond in the sum of Five Thousand Dollars (\$5,000.00) as a protection

to appellee against damages, if any, arising out of this limited stay or out of the completion of construction.

Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

A true copy

Teste

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Ninth Circuit

Heide Barthel
Deputy Clerk

ROBERT F. WELBORN
JOSEPH E. COOK
DAVID R. PHIPPS
THOMAS G. BROWN
DAVID W. FERGASON
WILLES C. CORTEZ, JR.

WELBORN, COOK, PHIPPS & BROWN

ATTORNEYS AT LAW

1100 UNITED BANK CENTER
DENVER, COLORADO 80202

TELEPHONE
(303) 244-6013

November 22, 1971

Willard L. Peck, Esq.
The Colorado and Southern
Railway Company
650 Johnson Building
Denver, Colorado 80202

Re: The Colorado and Southern Railway Company vs.
The Colorado & Wyoming Railway Co., No. C-3445

Dear Mr. Peck:

This will confirm our agreement that Judge Arraj on November 19, 1971, in connection with defendant's oral motion to stay the preliminary injunction entered in the above matter, orally clarified such preliminary injunction by stating that the continued prosecution by C&W of pending condemnation proceedings against C&S and others in the Pueblo District Court would not constitute a violation by C&W of such preliminary injunction.

Very truly yours,

WELBORN, COOK, PHIPPS & BROWN

Thomas G. Brown
Thomas G. Brown

TGB:bh

11/29/71
Approved
W. L. Peck

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
C-3445

THE COLORADO AND SOUTHERN RAILWAY)
COMPANY, a corporation,)
Plaintiff,)
vs.)
THE COLORADO AND WYOMING RAILWAY)
COMPANY, a corporation,)
Defendant.)

OFFICIAL TRANSCRIPT

Proceedings before the HONORABLE ALFRED A. ARRAJ,
Chief Judge, United States District Court for the District
of Colorado, beginning at 4:00 o'clock p.m., on the 19th day
of November, 1971, in Courtroom A, United States Courthouse,
Denver, Colorado.

APPEARANCES:

WILLARD PECK, Attorney at Law, Denver, Colorado
appearing for the Plaintiff.

THOMAS G. BROWN, MILES-CORTEZ and DAVID FURGASON,
Attorneys at Law, Denver, Colorado, appearing for the
Defendant.

1 ~~THE COURT: And it doesn't make any -- I mean I don't~~
2 see why it doesn't make sense here. I am not fixing a price
3 that you will pay or anything. I am just suggesting that you
4 well, I am going to direct that you try to work out something.
5 If you can't, then I will rule. I think that's fair enough.
6 Sit down, you gentlemen and your clients, and see if you can't
7 work out something whereby pending the appeal of my decision
8 you can go ahead without great undue delay, and make it very
9 clear in the stipulation that this is without prejudice to --

10 MR. BROWN: You mean you want us to report back to
11 you whether or not we have been able to work something out?

12 THE COURT: Well, yes, and then I will have to make
13 ~~a decision on your request, if you don't, about the stay.~~

14 MR. BROWN: There is an even more immediate problem
15 with the stay. I don't know whether this is a problem. I
16 have to anticipate what counsel for C & S is going to do. We
17 are as a phase of this litigation prosecuting at the moment a
18 condemnation proceeding in Pueblo in order to acquire a right
19 to cross over the C & S lines. As you recall, we are 15 feet
20 to the west, and we have to get on the east side.

21 THE COURT: Yes.

22 MR. BROWN: Hearing was held on that matter the 11th
23 and 12th of November. All of the testimony as I understand it
24 was taken except for one matter. The C & S wants to present
25 one more witness, who is an employee of Public Service Company,

1 and he wasn't available and we were unable to stipulate as to
2 what his testimony would be, and therefore that hearing is
3 going to be resumed on Tuesday of next week.

4 Now, we don't feel by your order that we are precluded
5 from further prosecution of that condemnation action. On the
6 other hand, we don't like to be in contempt of court, Your
7 Honor, and we don't know whether they are going to argue that
8 point, either here or down there, or what, but on that basis
9 also we would like to have the injunction stayed. We know we
10 can't construct and we know we can't operate, but we think with
11 the order based upon the motion as it was drafted that we can
12 condemn.

13 THE COURT: Well, I am not going to -- under the
14 pleadings as they are now formulated -- I am not going to
15 enjoin you from going into another court on another proceeding.
16 I have got enough troubles.

17 MR. BROWN: All right.

18 THE COURT: Over in this Court.

19 MR. PECK: I think that's the question that has to
20 be decided by the District Judge in Pueblo County as to whether
21 he is going to recognize your decision today or not.

22 THE COURT: Well, I am not going to tell him not to.

23 ~~MR. BROWN: You are not going to put M. Fargason in~~
24 jail. I am not going down there.

25 ~~THE COURT: Well, first, let me say this. Now, Mr.~~