

11 USC § 365(d)(3)
Sovereign Immunity
Waiver

WCI Cable, Inc.
v. Alaska Railroad Corp.,
(In re WCI Cable, Inc.)

Adv. No. 01-3407-rld
Case No. 301-38242-rld11

02/01/02 RLD

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Debtors in these jointly administered chapter 11 cases filed an adversary proceeding to adjudicate disputed issues between the debtors and the Alaska Railroad Corporation ("ARRC") with respect to two Transportation Corridor Permits pursuant to which the debtors, for a substantial fee, use certain rights of way owned by the ARRC in the operation of its 2,000 route-mile fiber optic telecommunications network.

The ARRC moved to dismiss the adversary proceeding on the basis of sovereign immunity. While the court agreed that the ARRC is "an arm of the state" of Alaska, and therefore is entitled to assert sovereign immunity in this adversary proceeding under the Eleventh Amendment to the United States Constitution, the court held that the ARRC waived the defense of sovereign immunity by invoking the jurisdiction of the court in contested matters related to the subject matter of the adversary proceeding. Specifically, the ARRC had filed an objection to the debtors' motions to use cash collateral and to extend time for assumption or rejection of non-residential real property leases. The objection contained requests that the court (1) require the debtors to make "the payments due and owing" under the Permits as a condition to granting the motion to extend pursuant to 11 U.S.C. § 365(d)(3), (2) require the debtor to make the scheduled payments under the Permits as "adequate protection" to the ARRC, and (3) find that unpaid rent or fees under the Permits should be treated as administrative expenses entitled to preferred treatment in the case.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
) No.
WCI CABLE, INC.,) 301-38242-rld11 **LEAD CASE**
WORLD NET COMMUNICATIONS, INC.,) 301-38243-rld11
ALASKA FIBER STAR, L.L.C.,) 301-38244-rld11
ALASKA NORTHSTAR COMMUNICATIONS,) 301-38245-rld11
L.L.C.,)
WCI LIGHTPOINT, L.L.C.,) 301-38246-rld11
WCIC HILLSBORO, L.L.C.,) 301-38247-rld11
)
Debtors-in-Possession.) (Jointly Administered
) Under 301-38242-rld11
_____)
WCI CABLE, INC.,) Adversary No. 01-3407-rld
WORLD NET COMMUNICATIONS, INC.,)
ALASKA FIBER STAR, L.L.C.,)
ALASKA NORTHSTAR COMMUNICATIONS,)
L.L.C.,)
WCI LIGHTPOINT, L.L.C.,)
WCIC HILLSBORO, L.L.C.,)
)
Plaintiffs,)
)
v.)
)
ALASKA RAILROAD CORPORATION;)
ALASKA RAILROAD CORPORATION)
BOARD OF DIRECTORS; PATRICK)
GAMBLE, in his official capacity) MEMORANDUM OPINION
as President and CEO of Alaska)
Railroad Corporation; and JACOB)
ADAMS, EDWARD L. BAUER, JR.,)
JOHNE BINKLEY, JACK BURTON,)
CARL H. MARRS, JOE PERKINS,)
DEBORAH SEDWICK in their)
official capacity as members of)
the Board of the Alaska Railroad)
Corporation,)
)
Defendants.)
_____)

1 "Northern Route") and between Anchorage and Whittier (the "Southern
2 Route") in Alaska pursuant to two "Transportation Corridor Permits"
3 (the "Permits") with the Alaska Railroad Corporation, which owns the
4 rights of way. Under the Permits, the fee for the WCI Group's use
5 of the Northern Route right of way is \$150,220 per month, or a total
6 of \$1,802,640 per year, and the fee for the WCI Group's use of the
7 Southern Route right of way is \$297,320 per year, payable in
8 quarterly installments of \$74,330. The WCI Group's payment
9 obligations under the Permits represent a heavy financial burden
10 that the WCI Group would like to lessen.

11 Pursuant to Alaska Stat. § 42.40.010 et seq. (the
12 "Statutes"), the Alaska Railroad Corporation has required the WCI
13 Group to pay market-based rental or permit fees and to submit to
14 certain other requirements under the Permits. The WCI Group alleges
15 in the Complaint (the "Complaint") filed in the Adversary Proceeding
16 that the fees charged under the Permits and said other requirements
17 are anti-competitive and violate Section 253 of the Federal
18 Telecommunications Act of 1996 (the "Federal Telecommunications
19 Act"). In the Complaint, the WCI Group seeks a declaratory judgment
20 that the Statutes and the Permits are preempted by Section 253 of
21 the Federal Telecommunications Act and injunctive relief to prevent
22 the Alaska Railroad Corporation from enforcing them. In effect,
23 filing the Adversary Proceeding represents a strategic step taken by
24 the WCI Group on the road to hoped-for fee relief under the Permits.

25 The individual members of the WCI Group filed chapter 11
26 bankruptcy petitions on August 20, 2001. Their bankruptcy cases

1 have been administratively but not substantively consolidated.

2 On August 22, 2001, the WCI Group filed a motion for use of
3 cash collateral (the "Cash Collateral Motion") in the WCI Cable,
4 Inc. main case, followed on August 24, 2001, by the filing of a
5 motion to extend the time for assumption or rejection of non-
6 residential real property leases (the "Motion to Extend"). The Cash
7 Collateral Motion and the Motion to Extend are referred to
8 collectively herein as the "Motions." The only reference to the
9 Alaska Railroad Corporation in the Motions is in a footnote to the
10 Cash Collateral Motion that states: "These projections do not
11 include any right of way costs regarding Alaska Railroad
12 Corporation."

13 Nevertheless, on September 13, 2001, the Alaska Railroad
14 Corporation filed with the court its objection to the Motions (the
15 "Objection"), including a request for adequate protection, supported
16 by the Declaration of William Hupprich, Associate General Counsel of
17 the Alaska Railroad Corporation. Specifically, in the Objection,
18 the Alaska Railroad Corporation 1) requested this court to condition
19 the granting of the Motion to Extend on the WCI Group's "making of
20 the payments due and owing" under the Permits (Objection, p. 4); 2)
21 requested the court to "order the [WCI Group] to comply with Section
22 365(d) (3) [of the Bankruptcy Code] as a condition of extending the
23 time to assume or reject" the Permits (Objection, p. 5);¹

24
25 ¹ 11 U.S.C. Section 365(d) (3) provides in relevant part that
26 "[t]he trustee [in chapter 11, the debtor-in-possession] shall
(continued...)

1 3) argued that unpaid rent or fees under the Permits should be
2 treated as costs of administration under Section 503(b) of the
3 Bankruptcy Code by this court (Objection, p. 6);² and 4) requested
4 this court to require the WCI Group "to provide adequate protection
5 [to the Alaska Railroad Corporation] in the form of its contractual
6 payments" under the Permits (Objection, p. 7). The Alaska Railroad
7 Corporation concluded its Objection as follows:

8 The Debtors' requested relief in the [Motion to
9 Extend] and the Cash Collateral Motion should be
10 denied unless the Debtors make the payments under the
11 [Permits] as required under Section 365(d) (3).
12 Alternatively, the Debtors should be required to make
13 such lease payments in order to avoid the accrual of
14 unpaid post petition administrative expenses and as a
15 form of adequate protection.

16 Objection, p. 8.

17 At the initial hearing on the Motions, held on September 19,
18 2001 (the "Initial Hearing"), counsel for the WCI Group stated
19 orally that the WCI Group believed that the Federal Tele-

20 ¹(...continued)
21 timely perform all the obligations of the debtor...arising from and
22 after the order for relief under any unexpired lease of
23 nonresidential real property, until such lease is assumed or
24 rejected...." The position of the Alaska Railroad Corporation in
25 the Objection was that the Permits are "true leases" for purposes of
26 Section 365 of the Bankruptcy Code, and the WCI Group should be
required to pay the "rent" thereunder as a condition to extending
the time to assume or reject the Permits.

² In chapter 11, allowed claims for costs of administration
must be paid in full no later than the effective date of any
confirmed plan of reorganization or liquidation, unless the holder
of such a claim consents to other treatment. 11 U.S.C. Section
1129(a) (9) (A).

1 communications Act provided a defense to requiring that payments be
2 made as provided for under the Permits. Counsel further stated that
3 the WCI Group intended to file an adversary proceeding to pursue
4 such claims. The court set over the hearing on the Alaska Railroad
5 Corporation's request for adequate protection to October 24, 2002.

6 Following the Initial Hearing, the WCI Group and the Alaska
7 Railroad Corporation entered into negotiations and arrived at an
8 interim agreement pursuant to which the WCI Group paid the Alaska
9 Railroad Corporation \$150,220, and the Alaska Railroad Corporation
10 withdrew its objections to the Motions. The Order granting the
11 Motion to Extend that was entered by the court on or about
12 November 2, 2001, contains the following provision:

13 IT IS FURTHER ORDERED that the Debtors' agreement to
14 pay [the Alaska Railroad Corporation] \$150,220 in
15 partial payment of its obligations under the
16 Transportation Corridor Permit for the use of the
17 [Alaska Railroad Corporation] right-of-way from
18 Anchorage to Eielson Air Force Base shall be without
19 prejudice to the rights of [the Alaska Railroad
20 Corporation] or the Debtors to assert any claim,
21 defense, offset or other legal right in relation to
22 the Debtors, [the Alaska Railroad Corporation] or the
23 agreements executed between various Debtors and [the
24 Alaska Railroad Corporation] in the context of future
25 proceedings or motions.

20 At the continued hearing on October 24, 2002, the Alaska
21 Railroad Corporation withdrew the Objection, without prejudice to
22 renewal, and counsel for the WCI Group advised the court that the
23 WCI Group would be filing an adversary proceeding shortly to frame
24 the issues to be resolved between the WCI Group and the Alaska
25 Railroad Corporation. Thereafter, the WCI Group filed their
26 Complaint in the Adversary Proceeding, and the Alaska Railroad

1 Corporation filed the Motion to Dismiss.

2 LEGAL ANALYSIS

3 Sovereign immunity is an affirmative defense, upon which the
4 party seeking its benefits bears the burden of proof by a
5 preponderance of the evidence. See Hill v. Blind Indus. and Servs.
6 of Maryland, 179 F.3d 754 (9th Cir. 1999), amended by 201 F.3d 1186
7 (9th Cir. 2000); ITSI TV Productions, Inc. v. Agricultural Ass'n, 3
8 F.3d 1289, 1291-92 (9th Cir. 1993).

9 The Ninth Circuit has held that the Alaska Railroad
10 Corporation is "an arm of the state" of Alaska and is entitled to
11 assert immunity as a sovereign entity under the Eleventh Amendment
12 to the United States Constitution. See Alaska Cargo Transport, Inc.
13 v. Alaska Railroad Corp., 5 F.3d 378, 380-82 (9th Cir. 1993); Alaska
14 Stat. § 42.40.010:

15 There is established the Alaska Railroad Corporation.
16 The corporation is a public corporation and is an
17 instrumentality of the state within the Department of
18 Community and Economic Development. The corporation
19 has a legal existence independent of and separate from
the state. The continued operation of the Alaska
Railroad by the corporation as provided in this
chapter is considered an essential government function
of the state.

20 However, the defense of sovereign immunity can be waived "by
21 conduct that is incompatible with an intent to preserve that
22 immunity." Hill v. Blind Indus. and Servs. of Maryland, 179 F.3d at
23 758. See also Clark v. Barnard, 108 U.S. 436, 447-48 (1883). I
24 find that the Alaska Railroad Corporation has waived the defense of
25 sovereign immunity with respect to the issues raised in the
26 Adversary Proceeding, based upon the following analysis.

1 Generally, a sovereign entity will be found to have waived
2 its immunity from suit in federal court if it voluntarily invokes
3 the jurisdiction of the federal court or submits a "clear
4 declaration" that it intends to submit itself to federal court
5 jurisdiction. See College Savings Bank v. Florida Prepaid
6 Postsecondary Educ. Expense Bd., 527 U.S. 666, 675-76, 681 n.3
7 (1999), citing Gardner v. New Jersey, 329 U.S. 565 (1947) ("Gardner
8 ... stands for the unremarkable proposition that a State waives its
9 sovereign immunity by voluntarily invoking the jurisdiction of the
10 federal courts."). The Alaska Railroad Corporation has made no
11 clear declaration submitting itself or its officers or directors to
12 the jurisdiction of this court. My finding that the Alaska Railroad
13 Corporation has waived sovereign immunity in this Adversary
14 Proceeding is based on its invocation of the jurisdiction of this
15 court.

16 Certain conduct by states and their instrumentalities has
17 long been held to waive sovereign immunity in the bankruptcy
18 context. By filing a proof of claim, a state waives sovereign
19 immunity with respect to litigation of issues to determine the
20 amount of its claim. See, e.g., Gardner v. New Jersey, 329 U.S. 565
21 (1947); California Franchise Tax Bd. v. Jackson (In re Jackson), 184
22 F.3d 1046, 1048-50 (9th Cir. 1999). The Alaska Railroad Corporation
23 has not filed a proof of claim(s) in the WCI Group chapter 11 cases.
24 However, the Ninth Circuit has held that conduct independent of
25 filing a proof of claim may invoke the jurisdiction of the
26 bankruptcy court and thus waive sovereign immunity.

1 Confederated Tribes of the Colville Reservation Tribal Credit
2 v. White (In re White), 139 F.3d 1268 (9th Cir. 1998), concerned the
3 efforts of an agency ("Colville Credit") of the Confederated Tribes
4 of the Colville Reservation (the "Colville Tribes") to avoid the
5 discharge of a debt of a member of the Colville Tribes in chapter 7
6 bankruptcy. Melvin J. White had borrowed \$340,000 from Colville
7 Credit. Mr. White subsequently filed bankruptcy under chapter 11 of
8 the Bankruptcy Code. While the record discussed in the decision of
9 the Ninth Circuit does not reflect that Colville Credit ever filed a
10 proof of claim in Mr. White's bankruptcy case, Colville Credit did
11 file an objection to Mr. White's chapter 11 plan as a creditor with
12 an unsecured claim and filed ballots rejecting both Mr. White's
13 initial and amended plans. Id. at 1270. Mr. White then converted
14 his bankruptcy case to chapter 7, and Colville Credit filed an
15 adversary proceeding, requesting a determination that Mr. White's
16 debt to Colville Credit was nondischargeable. In a motion for
17 summary judgment in the adversary proceeding, Colville Credit
18 asserted that sovereign immunity precluded the bankruptcy court from
19 taking jurisdiction over its claim and requested the bankruptcy
20 court to remove its name from the list of creditors. Id.

21 There was no dispute that Colville Credit, "as an
22 administrative arm of a tribal sovereign," possessed common law
23 immunity from suit. Id. at 1271. However, the bankruptcy court
24 declined to grant summary judgment in Colville Credit's favor, and
25 the Ninth Circuit affirmed its holding, based upon Colville Credit's
26 conduct waiving its immunity.

1 ... Colville Credit's actions waived its immunity
2 respecting adjudication of its claim to recover
3 White's debts....Colville Credit sought to collect its
4 debt by actively participating in the reorganization
5 court. It acknowledged that it had a claim, objected
6 to confirmation of White's plan of reorganization
7 because it thought it was entitled to more than the
8 plan would have allowed, and it sought relief from the
9 bankruptcy court in the form of an order denying
10 confirmation. It twice voted against plans of
11 reorganization. Having done this, Colville Credit ...
12 "waive[d] any immunity which it otherwise might have
13 had respecting the adjudication of the claim."

14 Id. Cf. Goldberg v. Ellett (In re Ellett), 254 F.3d 1135, 1139 (9th
15 Cir. 2001) ("Accordingly, the threshold question in this case is
16 whether a State that does not consent to a bankruptcy court's
17 jurisdiction by filing a proof of claim or otherwise participating
18 in the bankruptcy proceeding is nonetheless bound by the bankruptcy
19 court's § 524 discharge injunction." [Emphasis added.]).

20 In a later decision, Lazar v. California (In re Lazar), 237
21 F.3d 967 (9th Cir. 2001), the Ninth Circuit elaborated on the scope
22 of such a waiver of immunity. The matters in issue in Lazar related
23 to a fund (the "Fund") established under the Barry Keane Underground
24 Storage Cleanup Trust Fund Act, enacted by the California state
25 legislature to address the problem of leaking underground fuel
26 storage tanks. The Fund is funded by fees imposed on underground
27 storage tank owners for each gallon of gasoline or other petroleum
28 products stored in a permitted underground storage tank. Id. at
29 971-72.

30 In Lazar, the California State Controller and the California
31 State Board of Equalization (the "Board of Equalization") had
32 submitted proofs of claim for unpaid taxes, including taxes payable

1 into the Fund, in the bankruptcy case of Gary and Divine Grace
2 Lazar. Id. at 972. After exhausting administrative remedies at the
3 state level, the Lazars' chapter 7 trustee (the "Trustee") filed a
4 Petition for Peremptory Writ of Administrative Mandamus or Other
5 Appropriate Writ (the "Mandamus Action") against the California
6 State Water Resources Control Board (the "State Board") in the
7 California state courts, which later was removed to the bankruptcy
8 court for the Central District of California. Id. In the Mandamus
9 Action, the Trustee sought an order compelling the State Board to
10 reinstate claims of the Lazars' bankruptcy estate against the Fund
11 so that the estate could use the Fund to demonstrate financial
12 responsibility for operation of underground storage tanks consistent
13 with the requirements of state and federal law. Id. In addition,
14 the Trustee sought "actual damages" in excess of \$2.2 million,
15 reasonable attorney's fees and such "further relief as appears
16 appropriate under the circumstances." Id. In response, the State
17 Board moved for remand, or in the alternative, abstention and
18 remand, based among other things on the bankruptcy court's alleged
19 lack of jurisdiction due to the State Board's sovereign immunity
20 under the Eleventh Amendment. Id. at 972-73.

21 The Ninth Circuit upheld the bankruptcy court's decision,
22 previously affirmed by the district court on appeal, that the state
23 of California had waived its Eleventh Amendment immunity with
24 respect to the Mandamus Action by filing its proofs of claim. Id.
25 at 973, 980, 981. The Ninth Circuit based its holding on its
26 conclusion that the claims asserted by the Trustee against the State

1 Board in the Mandamus Action arose out of the same series of
2 transactions and/or occurrences that resulted in the California
3 state agencies filing their proofs of claim.

4 [W]e hold today that when a state or an "arm of the
5 state" files a proof of claim in a bankruptcy
6 proceeding, the state waives its Eleventh Amendment
7 immunity with regard to the bankruptcy estate's claims
8 that arise from the same transaction or occurrence as
9 the state's claim.

10 Id. at 978.

11 In determining whether the Trustee's claims against the State
12 Board arose out of the same transactions or occurrences that
13 generated the state's proofs of claim, the Ninth Circuit applied the
14 "logical relationship" test of Fed. R. Civ. P. 13(a).

15 A logical relationship exists when the [claim] arises
16 from the same aggregate set of operative facts as the
17 initial claim, in that the same operative facts serve
18 as the basis of both claims or the aggregate core of
19 facts upon which the claim rests activates additional
20 legal rights otherwise dormant in the [opposing
21 party].

22 United States v. Bulson (In re Bulson), 117 B.R. 537, 541 (9th Cir.
23 BAP 1990), aff'd by memorandum, 974 F.2d 1341 (9th Cir. 1992).

24 In Lazar, the Ninth Circuit focused on the facts that
25 approximately \$13 million of the taxes/fees claimed by the Board of
26 Equalization in its proof(s) of claim represented amounts claimed
27 for the Fund, and the Trustee asserted claims in the Mandamus Action
28 for reimbursement of approximately \$4 million from the Fund.
29 Because both the Board of Equalization's claims against the Lazars'
30 bankrupt estate asserted through its proof(s) of claim and the
31 Trustee's claims in behalf of the estate in the Mandamus Action

1 revolved around the Fund, the Ninth Circuit determined that they
2 were logically related and arose out of the same transactions or
3 occurrences. Accordingly, because the Board of Equalization had
4 filed a proof(s) of claim in the Lazars' bankruptcy case that arose
5 out of the same transactions or occurrences as the Trustee's claims
6 against the State Board in the Mandamus Action, the Ninth Circuit
7 held that the state of California had waived its sovereign immunity
8 for purposes of the Mandamus Action.

9 The circumstances of this case fit within the Lazar analysis.
10 The Adversary Proceeding and the prior proceedings in the WCI Cable,
11 Inc. main case involving the Alaska Railroad Corporation are all
12 about money--specifically, whether the WCI Group is required to pay
13 the specified fees or rent under the Permits to the Alaska Railroad
14 Corporation. As opposed to the general appearance of the state of
15 California discussed in the Lazar decision, 237 F.3d at 980 n.14,
16 when the Alaska Railroad Corporation filed its Objection to the
17 Motions, it invoked the jurisdiction of this court specifically to
18 require the WCI Group to make "the payments due and owing" under the
19 Permits both as a condition to granting the Motion to Extend and as
20 required to comply with the provisions of Section 365(d)(3) of the
21 Bankruptcy Code. It further invoked the jurisdiction of this court
22 to require the WCI Group to make the scheduled payments under the
23 Permits in order to provide "adequate protection" to the Alaska
24 Railroad Corporation. In addition, the Alaska Railroad Corporation
25 characterized unpaid rent or fees under the Permits as "costs of
26 administration," entitled to preferred administrative expense

1 treatment upon confirmation of any plan of reorganization or
2 liquidation in the WCI Group chapter 11 cases. See, e.g., 995 Fifth
3 Ave. Assoc. v. New York State Dep't of Taxation and Fin. (In re 995
4 Fifth Ave. Assoc., L.P.), 963 F.2d 503, 506-07, 509 (2d Cir. 1992).

5 The Alaska Railroad Corporation unequivocally determined to seek the
6 assistance of this court through the Objection, as reflected in the
7 Declaration of William Hupprich, the Alaska Railroad Corporation's
8 in-house Associate General Counsel, filed in support of the
9 Objection.

10 The result of the Alaska Railroad Corporation's filing its
11 Objection was exactly what one would expect in a chapter 11 case:
12 The WCI Group agreed to make a substantial interim payment
13 (\$150,220) to the Alaska Railroad Corporation, the Alaska Railroad
14 Corporation withdrew its Objection to the particular limited relief
15 requested in the Motions, and the parties agreed to preserve their
16 more general claims and defenses for assertion in an appropriately
17 framed adversary proceeding.

18 Having seen the Complaint, it is not appropriate now for the
19 Alaska Railroad Corporation to raise the defense of sovereign
20 immunity against having payment issues under the Permits resolved in
21 the Adversary Proceeding that it apparently was eager to have this
22 court address in the context of its Objection. The Alaska Railroad
23 Corporation must "abide by the consequences" of its invocation of
24 this court's jurisdiction and may not evade this court's
25 jurisdiction just because a case has moved in a direction that it
26 does not like, or it perceives that another forum might be more

1 congenial. See Gardner v. New Jersey, 329 U.S. at 573; Confederated
2 Tribes of the Colville Reservation Tribal Credit v. White, 139 F.3d
3 at 1272; United States v. State of Oregon, 657 F.2d 1009, 1014 (9th
4 Cir. 1982).

5 I find that the claims stated in the Complaint in the
6 Adversary Proceeding arise with respect to the same transactions,
7 i.e. the payment obligations of the WCI Group under the Permits,
8 concerning which the Alaska Railroad Corporation invoked this
9 court's jurisdiction in the Objection. Accordingly, I find that the
10 Alaska Railroad Corporation has waived the defense of sovereign
11 immunity with respect to the Adversary Proceeding. The court will
12 enter a separate order denying the Alaska Railroad Corporation's
13 Motion to Dismiss.

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RANDALL L. DUNN
Bankruptcy Judge

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18 cc: Fred M. Granum
Stephen A. McCartin
19 David M. Jacobson
Mary Jo Heston
20 Fredric W. Kessler
David A. Foraker
21 Johnston Mitchell
Leon Simson
22 David Hercher
U.S. Trustee
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25
26