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March 11, 2004

FD 34487

ENTERED
Office of Proceedings

MAR 22 2004

Fax Only

Nancy Beiter, Esq.
Surface Transportation Board
Washington, DC 20423

Part of
Public Record

Re: Groome Enterprises et al. v. Greenville County Economic Development Corporation

Dear Ms. Beiter:

You may recall my previous conversations with you in which, among other things, we discussed the fact that the plaintiffs in the above case have filed an action in South Carolina state court in which Mr. Groome and his company seek to have the state court adjudicate under 49 U.S.C. §11101(a) whether Greenville County Economic Development Corporation ("GCEDC") is obligated to provide railroad service to plaintiffs and, if so, whether the state court should award damages to plaintiffs under 47 U.S.C §11704. Based on my review of post-1995 case law and federal statutes, it is GCEDC's view that the Interstate Commerce Commission Termination Act ("ICCTA") contains a federal preclusion which divests the state court of jurisdiction of those two issues and which vests exclusive jurisdiction of those issues with the Surface Transportation Board ("STB"). Based on our previous discussions, I understand that you also share my view of the jurisdictional issue, and I might also add that Mr. Dan Saphire, in-house counsel for the American Association of Railroads, has confirmed to me by telephone that he also shares our view.

Enclosed is a letter which Mr. Melvin Clemens recently sent to Mr. Groome's legal counsel. Please be advised that Mr. Groome's legal counsel is using STB communications such as this to argue to the state court that the STB is implicitly endorsing and legitimizing the pending state court action and that such communications of the STB are evidence that the *STB does not believe that it has exclusive jurisdiction of §§11101(a) and 11704 and that the STB concurs in Mr. Groome's view that the state court has concurrent jurisdiction of those statutes.*

I also understand that Mr. Clemens may appear in court during the week of March 22 to testify on behalf of Mr. Groome.

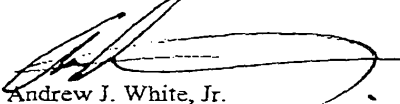
I would greatly appreciate your calling me at your earliest convenience to discuss the above matters. Among other things, I would like you and Mr. Clemens to consider whether he should supplement his February 24 letter with a letter which explicitly states the STB's position regarding exclusive jurisdiction of the above statutes and advises that communications from the STB should not be construed in any way to endorse Mr. Groome's position on concurrent jurisdiction. If this is not done, the court may erroneously conclude that the STB supports Mr. Groome's view of the jurisdictional issue.

My concerns in this matter are not fantasies. Enclosed is a copy of the court's recent order which denied summary judgment for Groome, but which also made the following statement regarding the STB's recent dismissal of GCEDC's petition for discontinuance:

It is significant that the STB has made it's (sic) ruling dismissing the carrier's action with full knowledge of the pending state court litigation. The clear implication from the failure of the STB to assert primary jurisdiction over this matter is that the STB does not find the state court litigation to be offensive and apparently does not intend to preempt the jurisdiction of the state court in this matter. (see second full paragraph on page 5 of Judge Miller's order).

Does the STB believe that under the ICCTA state judges across the country can decide whether and under what circumstances a shipper is entitled to receive rail services or damages for not receiving rail services? Such actions would effectively gut the legislative purpose of the ICCTA to federalize the nation's rail system under the exclusive control of the STB. This is a fundamental jurisdictional issue which affects all railroads operating in the United States, and it is ironic that the STB's own letters and rulings in the Groome matter are being used to advance a view which I believe the STB totally opposes.

Sincerely yours,



Andrew J. White, Jr.

Enclosure



Surface Transportation Board
Washington, D.C. 20423-0001
February 24, 2004

SCANNED

Office of Compliance and Enforcement

1925 K Street, N.W., Suite 780
Washington, DC 20423-0001

202-565-1573
FAX 202-565-9011

Mr. Jason Elliott
Law Offices of John S. Simmons, L.L.C.
1711 Pickens Street
Post Office Box Five
Columbia, South Carolina 29202

RECEIVED
FEB 27 2004
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Re: Areas of inquiry involving: (1) the effectiveness of railroad embargoes with respect to the issuing entity and any notice requirements, and the duration of such embargoes. (2) the status of Greenville County Economic Development Corporation's obligation as a rail common carrier, and future enforcement actions by this office based on the Board's recent dismissal of Greenville County's petition to discontinue service on its rail line.

Dear Mr. Elliott:

This responds to your February 9th letter to me seeking guidance on the above questions involving the Greenville County Economic Development Corporation (GCEDC).

First, regarding railroad embargoes, let me try and explain the embargo process in terms of their placement and effective period, and whether a particular embargo (e.g. embargo CPDR 1-97 effective December 4, 1997 involving the rail line serving Travelers Rest) which was placed by the Carolina Piedmont Division of the South Carolina Central Railroad Company, the carrier from whom the GCEDC purchased the unabandoned rail line serving Travelers Rest (see STB Finance Docket No. 33752 served June 3, 1999), remains in effect today. Embargoes are issued by railroads through the Association of American Railroads (AAR), which are signatories to the AAR's Car Service and Car Hire Agreement (Agreement). Once a railroad notifies the AAR of an embargo, the AAR circularizes the embargo to all signatories of the Agreement, giving the rail industry effective notice of the out-of-service condition. In addition, while the AAR gives notice to the STB of embargoes issued on behalf of the rail industry, STB approval of the issuance of embargoes is not required. Under the terms of the AAR's rules (Circular TD-1), an embargo can remain in effect for 1-year unless, upon expiration, the embargo is extended by the issuing railroad for an additional 1-year period. The embargo noted above (CPDR 1-97 issued 12/4/97 copy enclosed) expired on 12/4/98 and was not extended by the issuing railroad. Therefore, the embargo was no longer in effect when GCEDC purchased the CPDR line in June of 1999, and could not have been extended by GCEDC because they never became a railroad or a signatory to the requisite Agreement, and thus lacked a basis upon which to issue any railroad embargo. With respect to GCEDC's claimed embargo, their actions could be the subject of a formal complaint to the Board challenging the reasonableness of those actions as an unlawful abandonment and possibly seeking damages.

Letter to Jason Elliott, Page 2.

Second, you have asked about this office's position with respect GCEDC's continuing common carrier obligation under 49 U.S.C. 11101. As I expressed to GCEDC in previous correspondence regarding their failure to initiate service on the unabandoned rail line they purchased, with that purchase they acquired a common carrier obligation to operate the line and have been in violation of that obligation since the acquisition. Based on my earlier actions, GCEDC sought to extinguish their obligation through a notice of exemption to the Board seeking to discontinue the service obligation which they never initiated (see STB Docket No. AB 490X). The Board's decisions in that proceeding stayed the effectiveness of the notice and subsequently dismissed their notice on complaint. Therefore, it is my position that it is incumbent upon this office to continue to seek compliance by GCEDC with their common carrier obligation, which remains in place, and I intend to do that.

I appreciate the opportunity to be of assistance and I hope this information is helpful.

Sincerely,



Melvin F. Clemens, Jr.
Director

Enclosure

To: Rob Laseter at UP
 To: Charles T. Schramm at UP

ASSOCIATION OF AMERICAN RAILROADS
 EMBARGO NOTICES FOR December 4, 1997
 CONSECUTIVE SHEET 243

Number & Issuing Agency	Commodity	Destination Gateway or Territory	Consigned or Reconsigned To or Intended For
CPDR Carolina Piedmont Division, South Carolina Central RR Emb. No.1-97 EFFECTIVE 12-4-97	All traffic	To, from or via the following stations located on the GRN Sub- division (former Greenville & Northern Railway) located in the state of South Carolina: Berea Fentress Montague North Greenville Travelers Rest	

CAUSE: Damage to bridges.

EXCEPTION: None.

BNSF Burlington Northern Santa Fe Rwy. Co. Emb. No.25-97 CANCELLED 12-4-97	All traffic	CANCELLATION Destined Brownsville, TX.	
	NOTE:	Original Emb. on Consecutive Sheet #222, 10-29-97.	

BNSF Burlington Northern Santa Fe Rwy. Co. Emb. No.26-97 CANCELLED 12-4-97	All traffic	CANCELLATION Routed from BNSF to TM at Corpus Christi, TX and Flatonina, TX destined to Laredo, TX.	
	NOTE:	Last shown on Consecutive Sheet #230, 11-13-97	

J. J. Carroll

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

Groome & Associates, Inc. and Lee)
 K. Groome,)

C.A. No.: 01-CP-23-2351

Plaintiffs,)

v.)

ORDER

Greenville County Economic)
 Development Corporation,)

Defendant.)

FILED CLERK OF COURT
 GREENVILLE, S.C.
 PAUL B. MCNEIL
 2004 FEB 13 P 12:09

This matter is before the Court pursuant to Plaintiff's Motion for Summary Judgment under Rule 56 of the South Carolina Rules of Civil Procedure. A hearing was held on Wednesday, January 28, 2004. John S. Simmons of Simmons, Griffin and Lydon appeared on behalf of the Plaintiff and Andrew J. White, Jr. appeared on behalf of the Defendant. Upon consideration of the arguments of counsel, the evidence presented and the applicable law, the motion is denied.

STANDARD OF REVIEW

Summary judgment is appropriate where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. S.C.R.C.P. 56 (c). In determining whether any genuine issues of fact exist, the court must view the evidence and all reasonable inferences drawn from it, in the light most favorable to the non-moving party. *Lanham v. Blue Cross and Blue Shield of South Carolina, Inc.*, 349 S.C. 356, 563 S.E. 2d 331 (2002). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Id.*

FACTS

The plaintiff owns and operates a business in Greenville County, South Carolina located adjacent to a railroad line. The plaintiff's business depended, in part, upon the railroad line as a method of shipping the goods manufactured at the above location. The subject railroad line is governed by the South Carolina Public Service Commission and the Surface Transportation Board (hereinafter STB) of the federal government. The defendant purchased the subject railroad line and received approval to assume ownership and possession of the line by order of the STB in June of 1999. The line was subject to an embargo¹ at the time of purchase which temporarily suspended service on the line. This embargo was terminated in December of 1999. Thereafter, pursuant to federal and state law, the defendant was obligated to provide rail service on the subject line. Plaintiff alleges in the Complaint that, despite repeated requests made to the defendant, and assurances given by the defendant to the plaintiff that service would be restored, rail service has never been re-established and that plaintiff has been damaged thereby.

A chronological review of pertinent events in this case reveals:

1. 1992 plaintiff purchases property adjacent to rail line;
2. May 21, 1999 defendant files a verified notice with the STB and defendant acknowledges that they would assume common carrier status upon purchase of the rail line;
3. June, 1999 defendant purchases rail line;
4. December, 1999 defendant assures plaintiff that rail service would be restored;
5. January 2000 through March, 2001 defendant unsuccessfully makes efforts to obtain financing to restore rail service;
6. April 17, 2001 plaintiff files suit in state court;

¹ "An "embargo" is a carrier initiated measure, executed by the filing of public notice with the Interstate Commerce Commission, which relieves a carrier temporarily from providing service when such performance is precluded by "compelling circumstances not within the control of the carrier." 49 C.F.R. §1006.1(a)." *Interstate Commerce Commission v. Chicago and Northwestern Transportation Company*, 533 F.2d 1025 (1976); *Chicago & North Western Transportation Company v. Kalo Brick & Tile Company*, 450 U.S. 311, 101 S.Ct. 11245 (1981).

7. February 28, 2003 STB responds to plaintiff's STB complaints by writing letter stating that defendant was a common carrier and required to provide rail service;
8. March 31, 2003 defendant requests additional time to respond to STB inquiry and opines that defendant does not have funds to restore service and wishes to discontinue service on a temporary basis and not seek permanent abandonment;
9. April 3, 2003 the STB replies to defendant and instructs them of their obligation to provide service to defendant, the proper procedures for pursuing abandonment or discontinuance of service, and the potential liability for failure to provide service;
10. April 14, 2003 to May 16, 2003 defendant and STB correspond and defendant indicates it's intent to seek authority to discontinue service; STB replies with specific instructions on procedure for pursuing that authority;
11. June 30, 2003 defendant files a verified notice of exemption with the STB seeking authority to discontinue service (and not an abandonment of the line);
12. August 12, 2003 plaintiff's attorney sends lengthy correspondence to STB objecting to defendant's request to discontinue service; plaintiff informs STB of the pending state court lawsuit and lays out a detailed history of the controversy;
13. August 15, 2003 the STB, in response to plaintiff's attorney's letter, suspends defendant's efforts to discontinue service, which had previously been scheduled to have an effective date of August 17, 2003;
14. January 29, 2004 the STB dismissed defendant's notice of exemption which had sought discontinuance of service; the STB's Decision specifically mentions plaintiff's pending state court action in finding it in appropriate to grant the relief requested by the defendant (a copy of the STB Decision of January 29, 2004 is attached hereto).

At the hearing, counsel for the defendant averred to the Court that the failure of the defendant to provide rail service from the time of its' initial ownership was the result



of an "embargo", and was therefore justified. Defendant's counsel further asserted that this embargo was the result of a lack of funds that prevented the defendant from complying with the law. It is clear from the STB's January 29, 2004 Decision that there was, in fact, no such "embargo". However, there was no evidence presented at the hearing which confirmed that the original "embargo", which was incontrovertibly in place, at the time of the defendant's purchase had ever been lifted. The legal operating status of the rail line, from June 1999 until February 2003, has not been established.

ISSUES PRESENTED

A. JURISDICTION

Despite the fact that the sole matter before the Court was plaintiff's S.C.R.C.P. Rule 56 motion for summary judgment, counsel for defendant insisted on arguing that federal law preempted the state court action and that the Court did not have jurisdiction to hear the matter. The jurisdictional issues had been previously argued and ruled upon by Order of this Court dated June 19, 2003. The Court revisits this issue briefly in light of the decision rendered by the STB dated January 29, 2004.

This is an action for damages claimed by the plaintiff as a result of the defendant's failure to abide by its obligation to provide rail service as part of its duty as a common carrier, as designated by federal law. The purpose of this lawsuit is not to insinuate the plaintiff into the regulation of rail service, nor to ask the state to regulate this rail line. Rather, the plaintiff seeks to redress its' grievances caused by the failure of the defendant to abide by federal and state law since June of 1999. The relevant South Carolina code sections, relied upon by the plaintiff, are: 58-17-310, 58-17-3950 and 58-17-3980. These sections do not act as an impediment to the "accomplishment and execution of the full purposes and objectives of Congress," *Hayfield Northern Railroad Company, Inc. v. Chicago and Northwestern Transportation Company*, 104 S.Ct. 2610 (1984); nor do they interfere with the laws of Congress.

Chicago and North Western Transportation Company v. Kalo Brick and Tile Company, 450 U.S. 311, 101 S.Ct. 1124 (1981) dealt with a similar conflict between the state of Iowa and the Interstate Commerce Commission. *Chicago v. Kalo* held that the

"Interstate Commerce Act precludes a shipper from pressing a state-court action for damages against a regulated carrier when the Interstate Commerce Commission, in approving the carrier's application for abandonment, reaches the merits of the matters the shipper seeks to raise in state court." *Id* at 331. The Supreme Court additionally held that a determination, as to preemption, in these type cases would be made on a case by case basis, after reviewing the individual facts.

The present case is factually distinguishable from *Chicago v. Kalo*. *Chicago v. Kalo* involved the advent of a state court action, subsequent to a properly filed action to effect abandonment before the appropriate federal regulatory agency. The Supreme Court found that the state court action was an attempt to impose sanctions on the carrier that could only be properly imposed by the federal agency. Here, there has never been filed a proper action to discontinue rail service. The current litigation does not challenge the lawfulness of the actions of the carrier to go forward before the federal regulatory agency.

This lawsuit significantly predates any action of the carrier to seek relief from the STB, and was only filed after the plaintiff had made significant efforts to get the carrier to move forward to address the plaintiff's grievances. It is significant that the STB has made it's ruling dismissing the carrier's action with full knowledge of the pending state court litigation. The clear implication from the failure of the STB to assert primary jurisdiction over this matter is that the STB does not find the state court litigation to be offensive and apparently does not intend to preempt the jurisdiction of the state court in this matter.

B. RULE 56 S.C.R.C.P.

There remains a genuine issue of fact as to the legal operating status of the rail line before and during the pendency of this action. It is for a jury to determine whether the defendant had fully complied with its' common carrier obligations to provide rail service on the contested line. The status of the original "embargo", whether it was lawfully lifted or not, is a material fact that remains in issue. Consequently, the plaintiff's Motion for Summary Judgment is hereby denied.

