

CROW COURT OF APPEALS

IN AND FOR THE CROW INDIAN RESERVATION

CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 94-31

**ESTATES OF RED WOLF, and BULL TAIL,
Plaintiffs/Respondents**

vs.

**BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,
Defendant/Appellant.**

Decision Entered Feb. 21, 1996

[Cite as 1996 CROW 3]

Before Watt, J.

OPINION & ORDER

[¶1](#) Defendant Burlington Northern Railroad Company (the "Railroad") appeals from the February 9, 1996 Order of the Crow Tribal Court (Arneson, J.), denying the Railroad's motion for stay of execution on the \$250 million judgment entered against it on February 6, requiring the Railroad to post a supersedeas bond pursuant to Crow R. Civ. P. 18(b), and setting a hearing for approval of the Railroad's proposed bond for February 20, 1996. In addition, Railroad applies to this Court for a stay of the judgment and a waiver of the requirement to post a surety bond pursuant to the guidance provided by Fed. R. App. P. 8(a).

¶2 Shortly after filing this appeal and application on February 12, the Railroad also filed an action in the U.S. District Court for the District of Montana, Cause No. CV 96-17-BLG-JDS. That Court on February 15, 1996, granted a Temporary Restraining Order enjoining Judge Arneson and the plaintiffs from enforcing the judgment and ordering them to appear for a hearing on a permanent injunction on February 26, 1996. This is the second federal court TRO enjoining the conduct of Judge Arneson's duties since the beginning of the year issued upon the application of a litigant that was also pursuing its appellate review rights in this Court. See Big Horn County Electric Cooperative, Inc. v. Adams, et al., Cause No. CV 95-194-BLG-JDS (TRO issued January 3, 1996; case dismissed February 15, 1996).

¶3 In support of its appeal and application, the Railroad argues that this case presents important questions of Tribal tort law, and under the Indian Civil Rights Act, (25 U.S.C. § 1302 et seq.), which should be briefed and decided "without the distraction of collateral enforcement litigation." The Railroad also argues that a bond is not warranted because of its obvious ability to pay the judgment, as evidenced by the financial statements attached to the Affidavit of Gary L. Crosby which was presented to the Tribal Court. Mr. Crosby is the Vice-President--Litigation for Burlington Northern Santa Fe Corporation, which owns Burlington Northern Inc., which in turn owns Burlington Northern Railroad Company and its subsidiaries. According to the Form 10Q filed with the Securities Exchange Commission for the period ending September 30, 1995, the Railroad had net assets of \$3.36 billion and year-to-date revenues of \$4 billion and net income of \$431 million. Crosby Aff. Exh. B. The Railroad rests its primary contention on the "well-settled" principle in the federal system that requiring it to post a bond in these circumstances amounts to an abuse of discretion by the lower court.

¶4 The plaintiffs filed an opposition to the Railroad's application on February 15, pointing out that it was premature because no notice of appeal had been filed, and that Railroad has not made a showing of its inability to obtain a bond. Plaintiffs urge this Court defer to the Tribal Court's discretion in this matter and acquire the Railroad to post a bond to ensure payment of the judgment.

¶5 This application also constitutes the third time the Railroad has sought interlocutory relief in this Court since January 3, 1996. Prior to this application, its concurring appeal of the Tribal Court's denial of Bonnie Little Nest's motion to intervene was dismissed as untimely; and its motion for emergency stay of proceedings, appealing several of the Tribal Court's pre-trial rulings, was dismissed on January 29, 1996, for lack of appellate jurisdiction over a final order or judgment. This application, too, must be denied as premature.

¶6 As a threshold matter, the Crow Rules of Appellate Procedure do not contain a rule expressly authorizing the Court of Appeals to stay a judgment or approve a supersedeas bond, as does Fed. R. App. P. 8(a). We approve the policy embodied in Rule 8, and followed by the judgment debtor here, of seeking relief in the first instance in the Tribal Court. We have also followed the provision in Fed. R. App. P. 8(a) allowing consideration of this application by a single judge of the Court of Appeals in these exceptional circumstances. In the case of a final judgment which is the subject of a pending appeal before this Court, the

Tribal Court's final orders relating to stay of the judgment, and to the bond or other security given as a condition of the stay, are final orders subject to review by the Court of Appeals for abuse of discretion pursuant to Crow Tribal Code § 3-1-103(2) and Crow R. App. P. 1 and 3 (a).

¶7 In this case, the judgment was not the subject of a pending appeal when the applications for stay were filed with the Tribal Court or this Court, or when the U.S. District Court issued its TRO at the Railroad's request. The provisions for staying the judgment and posting bond in Fed. R. Civ. P. 62(c) and Fed R. App. P. 8 presuppose the existence of a valid appeal. 9 Moore's Federal Practice ¶ 208.06 at 8-16 (2d ed. 1995), citing Century Laminating Ltd. v. Montgomery, 595 F. 2d 563 (10th Cir. 1979). The Railroad has since tendered a notice of appeal dated February 16, 1996, which the Clerk duly filed on February 20.

¶8 Assuming the existence of a valid appeal, the Tribal Court's order lacks finality because the Tribal Court has not yet had the opportunity to exercise its discretion in approving a specific bond or in setting its amount. Moreover, the Railroad has not yet offered any evidence concerning the cost of a bond or its inability to obtain a bond of this size, nor has it proposed other forms or combinations of security for the Tribal Court's consideration. Even under the federal rules, "Rule 8 may not be used as a means of appealing a determination by the district court pursuant to Civil Rule 62, to which the appeals court will defer absent an abuse of discretion." 9 Moore's Federal Practice ¶ 208.04 at 8-13 (2d ed. 1995-96 Supp.). "We shall not use Rule 8 to undermine the district judge's discretion." Lightfoot v. Walker, 797 F. 2d 505, 507 (7th Cir. 1986). Adhering to this wise principle, the Court declines to review the Tribal Court's Order dated February 9, or to consider the Railroad's application for stay and waiver of bond until after the Tribal Court has entered final orders concerning the specific security required as a condition of a stay of the judgment.

¶9 Although we decline to review the Tribal Court's order at this time, because of the unusual size of the judgment and both parties' important interests in promptly resolving these issues, we provide general guidance in this opinion for the Tribal Court's further deliberations with respect to requiring security for the judgment during the pendency of the appeal.

¶10 As the Tribal Court noted, Rule 18(b) of the Crow Rules of Civil Procedure by its terms requires an appellant to post surety bond on or before the date of filing an appeal as a condition for obtaining a stay of execution of the judgment. In federal practice, too, posting a supersedeas bond in the amount of the judgment, plus interest, costs on appeal, and damages for the delay, is the normal requirement. Poplar Grove, Etc. v. Bache Halsey Stuart, Inc., 600 F.2d 1189, 1191 (5th Cir. 1979) (reversing the district court's requirement for a \$10,000 bond on a \$270,000 judgment and remanding to "establish some type of positive protection of the judgment creditor's rights" or to vacate the reduced bond). The purpose of the bond is to protect the non-appealing party against any loss sustained as a result of having to forego execution of the judgment pending the appeal. Id. It also allows the judgment creditor to "avoid the risk of satisfying the judgment only to find that

restitution is impossible after reversal on appeal." Id. Thus, the ability to post a bond is a "privilege extended the judgment debtor," who in turn bears the burden to objectively demonstrate the reasons for departing from the requirement for a full security bond. Id. See also, International Wood Processors v. Powder Dry, Inc., 102 F.R.D. 212 (D.S.C. 1984) (requiring \$2.8 million bond for amount of judgment when appellant did not present financial information and most assets were located outside the district).

¶11 The federal courts have exercised discretion in reducing the amount of the bond, or providing for other forms of security, when circumstances warrant. See 9 Moore's Federal Practice ¶ 28.06[2] at 8-18. In Poplar Grove, the Fifth Circuit provided the following direction to the district court on remand:

If a judgment debtor objectively demonstrates a present financial ability to facilely respond to a money judgment and presents to the court a financially secure plan for maintaining that same degree of solvency during the period of an appeal, the court may then exercise a discretion to substitute some form of guaranty of judgment responsibility for the usual supersedeas bond. Contrariwise, if the judgment debtor's present financial condition is such that the posting of a full bond would impose an undue financial burden, the court similarly is free to exercise a discretion to fashion some other arrangement for substitute security through an appropriate restraint on the judgment debtor's financial dealings which would furnish equal protection to the judgment creditor.

Poplar Grove, supra, 600 F.2d at 1191. Under this guidance from the Fifth Circuit, the judgment creditor is entitled to some effective form of security even if the district court decides to waive the requirement for a bond.

¶12 Other federal courts have waived the bond for solvent defendants in certain circumstances without requiring security. In Federal Prescriptive Service v. American Pharmaceutical Assn., 636 F.2d 755, 760-61 (D.C. Cir. 1980), the court construed Fed. R. Civ. P. 62(g) and Fed. R. App. P. 8(a) to authorize an unsecured stay of a \$102,000 judgment when (1) both parties were appealing on the merits, (2) the judgment debtor's net worth of \$4.8 million was about 47 times the amount of the judgment, and (3) the judgment debtor was a long-time District resident. As noted above, the Crow Tribal Code does not contain similar provisions to the federal rules relied on in that case.

¶13 The Seventh Circuit has developed a five-part test for waiving the bond requirement. See Dillon v. City of Chicago, 866 F.2d 902, 904-905 (7th Cir. 1988). (The Tribal Court considered this test in reaching its February 9 Order requiring a bond.) The court in Dillon reversed the district court's requirement to transfer funds to the Clerk of Court in the full amount of the \$115,360 employment discrimination judgment against the City of Chicago, having been persuaded that the City's previously appropriated \$454 million payroll fund together with procedures which would normally ensure payment of the judgment within 30 days were sufficient security without the need for posting a bond. Id. at 905.

¶14 In another case arising in the Seventh Circuit, the district court in In re Oil Spill by

the Amoco Cadiz, 744 F. Supp. 848, 850 (N.D. Ill. 1990), waived the bond requirement for Amoco and the Republic of France. With respect to Amoco, the court based its waiver on the evidence that Amoco's quarterly net income was 3 times the amount of the judgment, and many of its assets were located within the United States. The court also noted that Amoco promised to file quarterly reports to assure the court of its continued ability to respond to the judgment. Id. at 850 n. 2. With respect to France, the court observed that bond was not necessary on the \$35 million judgment in favor of Amoco, because France also had a \$100 million judgment against Amoco that could be used to offset its liability. Id. In contrast, the court required the other judgment debtor, Astilleros Expanole, to post a bond because it had no assets within reach of the federal court, and had consistently refused to recognize the court's jurisdiction during the course of proceedings in that case. Id. at 850-51. This latter holding was relied upon by the Tribal Court in its February 9 order.

¶15 In other cases involving judgment debtors with large assets, the Seventh Circuit has insisted on a bond or other adequate security. In Lightfoot v. Walker, 797 F.2d 505, 506 (7th Cir. 1986), the court required the State of Illinois to post a full bond on a \$710,501 attorneys' fee judgment when the procedure for collecting a judgment against the state was cumbersome, time-consuming and uncertain, since it could not be paid until the legislature appropriated the funds. The court also observed that the only offsetting concern was the cost of the bond, usually one percent or \$7,000, which was only "a modest amount." Id. at 507.

¶16 In Olympia Equipment v. Western Union Telegraph Co., 786 F.2d 794 (7th Cir. 1986), Judge Posner, writing for the court, affirmed the district court's waiver of bond on a \$36 million judgment against Western Union when the district court provided for adequate alternate security arrangements. Western Union Telegraph, the principal subsidiary of Western Union Company (similar to the relationship between the Railroad and Burlington Northern Inc. in this case), had total assets worth \$2 billion, but was financially distressed and illiquid, and claimed it was unable to obtain a bond. Id. at 796. The alternate security arrangements consisted of pledges of (1) \$10 million in cash, (2) \$10 million in accounts receivable, and (3) a security interest in some of the company's physical assets purportedly worth \$70 million. Id. Before turning to the fundamental issue of the adequacy of the alternate security, the Court of Appeals questioned the company's inability to obtain a bond if it had offered to pay more than the customary 1% fee, and likewise questioned the parties' failure to explore the possibility of a partial bond that would secure only the compensatory damages portion of the judgment (e.g., \$12 million). Id. at 797. The court then noted a more serious problem with the district court allowing the telegraph company to transfer cash to its parent, who ordinarily would not be liable to the judgment creditor. Id. at 798. In light of a pending sale of a division of the telegraph company, the court modified the district court's order and forbid any cash transfers to the parent unless the parent agreed to be bound on the judgment to the extent of the transfers (or the parent posted its own bond in this regard). Id. at 799.

¶17 In a case involving one of the largest federal court judgments in its time, the U.S. District Court for the Southern District of New York in 1970 allowed alternate security as a condition for staying TWA's \$145 million antitrust default judgment against Hughes Tool Co.

See Trans World Airlines, Inc. v. Hughes, 515 F.2d 173, 175 (2d Cir. 1975). The course of the proceedings to determine the form of security may be instructive in this case. In Hughes, the court held a "number of hearings at which TWA and Toolco [Hughes] expressed their diametrically opposed positions with respect to the need for a bond to protect the judgment pending appeal." Id. at 176. Hughes, with a \$500 million net worth, argued against any bond, and offered instead to create a lien on specific property valued at \$45 million (the amount of the compensatory damages). Id. TWA insisted upon a bond in the full amount of \$161 million as provided by the local rules. Id. at 176-177. After concluding that posting the full supersedeas bond was not practicable under the circumstances, the district court allowed alternate security arrangements in the form of (1) a \$75 million letter of credit in favor of TWA (in lieu of a bond), and (2) the \$86 million balance secured by Hughes' commitment to maintain Toolco's net worth at three times that amount (or \$335 million). Id. at 177. Compliance with this latter commitment would be certified by quarterly audited balance sheets. Id. At the court's direction, and "[a]fter the usual sparring," the parties came up with the details of this alternate security arrangement. Id.

¶18 The Second Circuit's decision in Trans World Airlines v. Hughes, supra, stands for the proposition that it is not always to the Appellees' advantage to insist on a large bond regardless of Appellant's cost. See also, 9 Moore's Federal Practice ¶ 208.06[2] at 18-19. After the Hughes defendants obtained a reversal by the U.S. Supreme Court, the district court awarded as costs on appeal, pursuant to Fed. R. Civ. P. 39(a) and (e), the \$1,015,625 fee incurred by the Hughes defendants for the \$75 million letter of credit (at one-half percent per annum). Hughes 515 F. 2d at 175. On appeal, the Second Circuit also allowed as costs taxable against TWA the \$617,765 charges incurred for the quarterly audits, because they represented a cost-effective substitute security for the \$86 million balance secured by the company's net worth, and this alternative was cheaper than the premium for a supersedeas bond or the fee for a letter of credit. Id. at 177-78. Although we are not called upon here to speculate as to the possibility of a discretionary award of costs on appeal under Crow R. App. P. 15 if the judgment is reversed or modified, it is worth noting that plaintiffs/appellees in this case bear some degree of exposure to liability for reimbursing some of the Railroad's costs of providing adequate security for the judgment.

¶19 Finally, the federal courts' treatment of security for Pennzoil's \$11.1 billion judgment against Texaco awarded by the state district court in Houston, Texas, bears mentioning. See Pennzoil Company v. Texaco, Inc., 481 U.S. 1, 4 (1987). In that case, even before the Texas court's judgment was entered, Texaco filed a separate action in the U.S. District Court for the Southern District of New York to enjoin enforcement of the judgment. Id. at 6 n. 5. Texaco argued that the apparently mandatory bond requirements of Texas law, together with other rights of a Texas judgment creditor, violated various federal statutes and its constitutional rights. Id. at 6. The district court accepted jurisdiction and granted a preliminary injunction, but conditioned the injunction on Texaco's posting a bond in the amount of \$1 billion. Id. at 8 n. 7. Thus, although it only partially secured the judgment, a bond of this size was authorized by a federal district court even when it found that Texaco's appeal had a reasonable probability of success, id. at 8, and Texaco's assets were admittedly sufficient to satisfy the judgment without liens or a bond, id. at 19-20 (Brennan, J., concurring). The Second Circuit subsequently affirmed, but the Supreme Court reversed, holding that the federal courts should have deferred to the interests of allowing state courts

to enforce their own judgments, based on principles of comity. Id. at 17.

¶20 Applying these teachings to the facts developed thus far in the instant case, we find that it is not at all "well settled" that the Railroad would be entitled to a waiver of the supersedeas bond under federal law. The Railroad's reported net assets as of September, 1995, were to 13 times the amount of the judgment. Crosby Aff. Exh. B (\$3.36 billion divided by \$250 million). Its average quarterly net income during 1995 was less than 60% of the amount of the judgment, and the \$29 million in cash and cash equivalents reported on its balance sheet represents less than 12% of the amount of the judgment. Id. These ratios are substantially less than the ones involved in Federal Prescriptive Service (net assets of 47 times the judgment), Dillon (\$454 million payroll fund to satisfy \$115,000 judgment), and Amoco Cadiz (quarterly net income of 3 times amount of judgment), supra, in which the federal courts waived the requirement for a supersedeas bond. Of particular concern is the Railroad's failure to explain in even general terms how it would come up with an additional \$220 million in cash to pay the judgment (plus costs and postjudgment interest).

¶21 The Railroad is part of a complicated corporate structure involving multiple layers of subsidiaries, Crosby Aff. Exh. B, in an industry that has undergone substantial restructuring (witness BN's recent merger with Santa Fe). Against this backdrop, the Railroad has not made any representations about maintaining its net worth or its liquidity to pay the judgment, nor has it offered any protections against large amounts of its assets being transferred to its parent or some other entity in connection with a merger or acquisition. In this rapidly-changing world, it would be naive to blindly assume that the Railroad will necessarily have sufficient assets reasonably available to respond to a judgment of this size if the judgment is ultimately affirmed after what could be several years of further litigation. In these circumstances, the federal courts have required varying degrees of assurances in lieu of posting the full amount of the bond. See Amoco Cadiz (quarterly financial statements), Olympia Equipment (pledges of specific property and cash transfers to parent conditioned on assuming liability for judgment), and Hughes (quarterly certifications that net worth continued to exceed 3 times the amount of judgment), supra.

¶22 Finally, based on the record before us, the Tribal Court's concerns with the Railroad's refusal to recognize its jurisdiction do not appear to be unreasonable. Rather than offering any assurances of payment in lieu of a bond, the Railroad in its application to this Court has remained extremely equivocal about the plaintiffs' ability to enforce its Tribal Court judgment in the other courts of the land:

It is not uncommon for litigants to attempt to enforce tribal judgments in either state or federal courts and thus, the assets of Burlington Northern may be within reach of this court if the judgment is enforced in either federal or state court.

Railroad's Application dated February 12, 1996 at 6 (emphasis added). Judge Hatfield's recent decision in Wilson v. Marchington and Inland Empire Shows, 20 Mont. Fed. Repr. 297 (Jan. 24, 1996), may help alleviate this concern, but leaves plenty of room for further argument under the specific facts of each case. The Railroad's obtaining a TRO from the U. S. District Court before it had even perfected its appeal suggests that it intends to make use

of every possible opportunity to resist execution of the judgment should it be sustained on appeal.

[¶23](#) In view of the foregoing, we provide the following guidance to the Tribal Court with respect to further proceedings on adequate security arrangements as a condition of the stay requested by the Railroad:

1. Rule 18(b) of the Crow Rules of Civil Procedure by its terms requires Railroad to post a surety bond "sufficient to guarantee performance of the judgment, and payment of costs on appeal." In view of the size of this judgment, however, and the possible unavailability or prohibitive costliness of obtaining a bond, the Tribal Court should consider some combination of a bond and adequate alternate security. These could include a properly structured letter of credit, posting of cash or negotiable government securities, pledges of specific physical assets, express guaranty of payment, maintenance of a specified net worth, and/or protections against transfers of liquid assets, as described in the cases, [supra](#). In any event, we believe that Rule 18(b) requires that at least a substantial portion of the judgment should be secured by a supersedeas bond, and the remainder of the judgment should be fully secured. The Railroad bears the burden of demonstrating that alternate forms of security will provide protections equivalent to those afforded by a surety bond.

2. Upon a proper showing by the Railroad of the cost and difficulty in obtaining a bond, the Tribal Court should conduct such further hearings as are reasonably necessary to determine adequate security arrangements. Stipulations by the parties as to the details of those arrangements should be encouraged. However, since delay in posting security works to the disadvantage of plaintiffs, an immediate partial bond should be the prerequisite for extending the stay until all the security arrangements are resolved.

3. The Tribal Court's ultimate determinations on the stay and security arrangements will be treated with great deference by this Court.

4. Based on principles of comity, the Tribal Court should stay all proceedings to actually execute on the judgment and any requirement for actually posting security during the pendency of any restraining orders issued by the U.S. District Court. However, we do not read that Court's TRO as preventing the Tribal Court from conducting further proceedings to determine the form of security. In fact, since the TRO has the effect of staying the judgment without any security, the Tribal Court should proceed to make its determinations so that the security arrangements (at least a substantial partial bond) may be implemented immediately upon the lifting of any restraining orders by the U.S. District Court.

IT IS HEREBY ORDERED that the Railroad's application for stay of judgment and waiver of supersedeas bond is **DENIED**.

¶5	¶10	¶15	¶20
--------------------	---------------------	---------------------	---------------------