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WLF Asks Ninth Circuit To Bring A Runaway Disgorgement Award Back Within Equitable Bounds *(Swinomish Indian Tribal Community v. BNSF)*

“Equity seeks to restore the status quo between the parties, not to exact retribution on one side.”

—Cory Andrews, WLF General Counsel & Vice President for Litigation

WASHINGTON, DC—Washington Legal Foundation (WLF) today urged the U.S. Court of Appeals for the Ninth Circuit to bring a district court’s runaway disgorgement award back within equitable bounds.

The case arises from a suit by the Swinomish Tribe against BNSF Railway, which operates a route over roughly 1,500 miles of track from the middle of the country to refineries in Washington state. The last 0.7 miles of this route trespassed over the Tribe’s land. Rather than claim damages for breach of contract under an easement it had granted to BNSF, the Tribe brought a common-law claim for trespass. The district court awarded the Tribe a staggering \$394,517,169 in disgorgement and refused to allow BNSF to deduct its full costs of running trains from the total amount.

In its amicus brief supporting BNSF, WLF argues that, under binding precedent, disgorgement awards cannot exceed the net profits of the wrongdoer. In fact, disgorgement awards must deduct legitimate expenses. And above all, disgorgement awards may not be so excessive that they cross the line from equity into penalty. The decision here jettisons each of those limits. By disregarding BNSF’s legitimate contributions in calculating its disgorgement award, the district court crossed the line from equity into penalty.

Celebrating its 47th year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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