

JAMES P. CARROLL
ALAN B. GEORGE
PAUL S. KULIG
THOMAS J. LAYDEN
RICHARD S. SMITH
CHRISTOPHER P. SULLIVAN

KEYSER CROWLEY
A PROFESSIONAL CORPORATION PROVIDING LEGAL SERVICES
29 South Main Street
Rutland, Vermont 05701-5014

Telephone (802) 775-2100 • Telecopier (802) 775-6795

OF COUNSEL
JOHN P. CROWLEY
F. RAY KEYSER, JR.

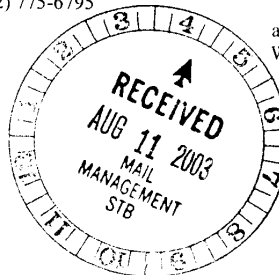
Writer's email address
ageorge@keycrow.com
Writers direct ext. #237

ENTERED
Office of Proceedings

AUG 11 2003

Part of
Public Record

August 8, 2003



208676

VIA FEDEX

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Washington, D.C. 20423

Re: Finance Docket No. 34364
Vermont Railway, Inc. - Town of Wallingford, Vermont's
Response to the Petition for Declaratory Order

Dear Secretary Williams:

Enclosed for filing are the original and ten copies of the Town of Wallingford, Vermont's
Response to the Petition for Declaratory Order filed in this matter.

Thank you.

Very truly yours,

Alan B. George, Esq.

ABG/kcp
Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34364

VERMONT RAILWAY, INC. -
PETITION FOR DECLARATORY ORDER

TOWN OF WALLINGFORD, VERMONT'S RESPONSE TO
THE PETITION FOR DECLARATORY ORDER
BY VERMONT RAILWAY, INC.

RECEIVED
AUG 11 2003
MAIL
MANAGEMENT
STB
ENTERED
AUG 11 2003
Part of
Public Record

TOWN OF WALLINGFORD, VERMONT

By: Alan B. George, Esq.
Keyser Crowley, P.C.
29 South Main Street
Rutland, Vermont 05701-5014
(802) 775-2100 ext. 237
(802) 775-6795 (fax)

Dated: August 4, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34364

VERMONT RAILWAY, INC. -
PETITION FOR DECLARATORY ORDER



TOWN OF WALLINGFORD, VERMONT'S RESPONSE TO
THE PETITION FOR DECLARATORY ORDER
BY VERMONT RAILWAY, INC.

TOWN OF WALLINGFORD, VERMONT

By: Alan B. George, Esq.
Keyser Crowley, P.C.
29 South Main Street
Rutland, Vermont 05701-5014
(802) 775-2100 ext. 237
(802) 775-6795 (fax)

Dated: August 8, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34364
VERMONT RAILWAY, INC. -
PETITION FOR DECLARATORY ORDER

**TOWN OF WALLINGFORD'S RESPONSE TO THE PETITION
FOR DECLARATORY ORDER BY VERMONT RAILWAY, INC.**

I. INTRODUCTION

On June 17, 2003, Vermont Railway, Inc. [VTR or the Company or Petitioner] filed a petition requesting the institution of expedited proceedings for a declaratory order determining that the Interstate Commerce Commission Termination Act [ICCTA], 49 U.S.C. §10101 *et seq.*, preempts state and local laws and regulations which otherwise may pertain to a future proposal by VTR to build and operate a rail-truck salt transload facility in Wallingford, Vermont. The Town of Wallingford respectfully requests that the petition to institute a declaratory order proceeding be denied. This Response is supported by the Verified Statements of Joyce Barbieri (Exhibit No. 1), Robert Inglis (Exhibit No. 2), and Julie Sharon (Exhibit No. 3).

II. BACKGROUND

VTR's Petition describes a salt transload facility to be located on a 39-acre tract formerly used as a rock quarry on Homer Stone Road in the Town of Wallingford, Vermont. The Petition

indicates that VTR “has *undertaken discussions* with a supplier of highway salt *to explore the supplier’s interest* in utilizing...[such a facility].” Petition at 3 (*emphasis added*). VTR does not contend that its exploratory discussions have resulted in a contract or other commitment, but only that the supplier involved in these discussions has “expressed interest” in utilizing a salt transload facility in Wallingford, if built. Petition Exhibit 2, V.S. of J. Hebda ¶ 8. Indeed, VTR does not intend to pursue any commitment with a salt supplier unless and until this Board issues the declaratory order sought by the Petitioner. Petition at 19.

VTR does not claim to have an ownership interest of any kind in the 39-acre parcel described in the Petition; the Company claims only to be “purchasing” that property. *See* Petition Exhibit No. 1, V.S. of P. Craven, ¶ 2. No deed or other instrument purporting to convey an interest to that property to VTR has been received for record by the Town Clerk of Wallingford. V.S. of Joyce Barbieri.

VTR has not submitted an application to the Town of Wallingford for a building, zoning, or other permit to undertake any activity on the property described in the Petition. V.S. of Robert Inglis. VTR notes in the Petition that it has not had the “occasion” to pursue a permit or approval from the Town of Wallingford. Petition at 10. No town official, including the Town Administrator and the Zoning Administrator, had any knowledge or information regarding VTR’s plans to undertake the construction and operation of a salt transload facility in Wallingford, until the Town received a copy of the Petition filed with this Board. V.S. of Julie Sharon; V.S. of Robert Inglis at ¶ 4.

VTR has not only avoided any direct contact with officials of the Town of Wallingford to date, but by its Petition it seeks a declaratory order which would excuse it from having any

meaningful interaction with the Town of Wallingford prior to the commencement and development of its project, except on its own terms. The Petition indicates that VTR intends to take various measures to “mitigate the site’s potential environmental consequences,” [Petition at 5], and to comply with state and local building and electrical codes. *Id.* at 5 & 16. The Company does not claim that state and local laws pertaining to the operation of trucks on state highways and town roads are preempted. *Id.* at 18; V.S. of W. Schroeder at ¶¶ 38-41 at 15-16. VTR expects to have only the responsibility *to advise* the Town of proposed construction beforehand, *to make efforts* to accommodate expressed community concerns, and *to endeavor* to provide that accommodation. Petition at 18-19 (*emphasis added*). The justification for VTR’s position appears to be fear that the Town of Wallingford would be unreceptive to its proposal and either deny VTR authority to construct and operate a rail spur and salt transload facility, or impose conditions on an approval which would preclude the realization of its plans.

Finally, even though VTR has no prior experience in dealing with Wallingford’s permit processes, it forecasts very long, sequentially stacked, and time-consuming procedures, and even longer appeals, resulting in delay that would undermine VTR’s plans and opportunities. Surprisingly, VTR does not reveal a timetable or schedule for the development and the commencement of operation of the facility planned for Wallingford, Vermont. Absent a time frame for measurement, one cannot discern from the Petition and supporting verified statements, a date by which VTR would perceive itself to be “delayed.”

III. PROCEEDINGS BEFORE THIS BOARD WOULD BE PREMATURE

VTR requests that this Board institute proceedings pursuant to 5 U.S.C. § 554(e), which authorizes the issuance of a declaratory order “to terminate a controversy or remove uncertainty.”

The Town of Wallingford respectfully submits that there is no existing controversy between VTR and the Town of Wallingford to terminate, and no uncertainty to remove. VTR has had no direct contact with the Town of Wallingford. The only information the Town has regarding VTR's plans is that which is set forth in its Petition to this Board. The Town has not taken any action which would interfere with or impede VTR's plans for the site in Wallingford. The Town cannot take official action except in accordance with its ordinances and state law, but even if it were authorized to act on VTR's proposal at this time and in this proceeding, it could not because more complete information about the project than that contained in the Petition is necessary to inform the Town's assessment of it. At this time therefore, the Town does not oppose the project and is not unreceptive toward it, but it also is unable to say that VTR's plans are acceptable to the Town and warrant local approval.

Similarly, there is no uncertainty about the preemption decisions of this Board and the courts that have had occasion to address the provisions of 49 U.S.C. §10501(b). As the Petitioner knows, the Vermont Supreme Court has ruled that conditions that purport to regulate the operation of a railroad are preempted, and there can be no doubt that Wallingford is bound to respect that decision. *In re Vermont Railway*, 171 Vt. 496; 769 A.2d 648 (2000). The only uncertainty is with the plans of VTR, and that uncertainty can be removed only by VTR itself, by revealing the details of the project, the time table for the purchase of the property, and for the commencement of construction and of operation of the facility. Contrary to VTR's expectations of Wallingford in its Petition, the Town does understand that it cannot assert regulatory control over the location of the rail spur or the transload facility. The Town also understands that it cannot apply a local land use restriction, or regulation that would "unduly restrict the railroad from conducting its operations, or unreasonably

burden interstate commerce,” but as this Board has said, that “is a fact-bound question.” *Fletcher Granite Company, LLC - Petition for Declaratory Order*, STB Finance Docket No. 34020 (June 25, 2001) at 5; *Joint Petition for Declaratory Order - Boston and Maine Corporation and Town of Ayer, Ma.*, STB Finance Docket No. 33971 (April 30, 2001) at 10. This Board and the courts have taken an eclectic approach to decisionmaking as to whether a particular condition or requirement is preempted. In the *Town of Ayer* matter, this Board commented in a footnote that just because certain “conditions were initially imposed as part of an impermissible permit does not mean that every one of them is preempted.” *Id.* at 12 n.31. This Board also said that “a certain degree of pragmatism on the part of communities and cooperation on the part of railroads is necessary to reach reasonable solutions to state and local concerns that do not unreasonably interfere with interstate commerce,” and made suggestions, the first of which was that railroads should “share their plans with the community, when they are undertaking an activity for which another entity would require a permit.” *Id.* at 12-13. Unfortunately, even though VTR acknowledges that some permits and approvals from the Town of Wallingford will be required [see Petition at 18; V.S. of W. Schroeder at ¶¶ 38-41 at 15-16], it has not shared its plans with the Town.

The failure of VTR to communicate with the Town directly and share its plans has prompted concerns that may have been avoided otherwise. So little is known about the VTR proposal, and the plans as revealed are indefinite and contingent: VTR has no contract with a supplier (and does not intend to seek one unless and until this Board issues a favorable declaratory order). VTR also has no ownership interest in the property upon which it would construct its improvements. The Town wonders: if VTR is granted the relief sought in this case, but then postpones or abandons its plans and does not purchase the 39-acre tract of land, will that property have been preemptively “zoned,”

nevertheless, for VTR's use in the future? That prospect concerns the Town of Wallingford because of the impact it would have on the future use and value of the subject property, and all other properties in the vicinity. Such a question would not have arisen if the Town had learned of VTR's plans from the Company, directly, rather than by receipt of service of a copy of the Petition.

The Petition itself provides only a broad overview of VTR's plans and is ambiguous as to the extent of the preemption ruling sought. For example, VTR requests that the Board conclude that certain, specific transload activities be treated as "closely related to providing direct rail service" and therefore they are preempted from state and local regulation. Petition at 17. These activities are "the unloading of bulk salt from rail cars, the loading of the salt into trucks, and the holding of salt in transitory storage if necessary between rail arrival and truck departure." *Ibid.* In other passages of the Petition, VTR expresses concern over the possibility of conditions restricting "hours of operation, the number of trucks that can exit the transload site with the transload product," [*id.* at 14], and "access to bulk salt at the transload facility or to the volume of salt that can be trucked from the facility," but does not explicitly characterize these activities as "closely related to providing direct rail service." *Id.* at 17. However, VTR's treatment of this Board's decision in *Hi Tech Trans, LLC –Petition for Declaratory Order–Hudson County, NJ*, STB Finance Docket No. 34192 (November 19, 2002) suggests to the Town that the Petition may indeed be seeking a broader declaration, even one that absolutely no local regulation of truck traffic to and from the facility is permitted.

This reading of the Petition is, of course, inconclusive. After all, VTR also says that state and local laws pertaining to the operation of trucks on state highways and town roads are not preempted, including those that regulate truck size and weight. *Id.* at 18; V.S. of W. Schroeder at ¶¶ 40-41 at 15-16. For now the Town will presume that VTR will not claim that regulations of truck

traffic that do not “unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce,” are preempted. The Town also assumes that VTR will want to be a good neighbor if it establishes the facilities described in the Petition, and that it will engage with the Town reasonably in the “fact-bound” evaluation of any proposed restrictions or conditions that are intended to protect public health and safety. In any case, because the Town simply cannot envision the plans and activities contemplated by VTR on the basis of the information presently available to it, and is unsure as to the extent of the preemption ruling sought, it cannot foresee the probable impacts, effects, and ramifications of the declaratory order proposed by VTR, and consequently, cannot take a position at this time in favor or opposed to the order, in whole or in part.

VTR’s anticipation of delay in the process of local review and lengthy appeals is not only speculative and unfounded beyond the personal experience and assumptions of William Schroder, a lawyer with the Vermont law firm representing VTR in this matter, it is a contrived vision of worst-case scenarios. *See, e.g.*, Petition Exhibit 3, V.S. of W. Schroder ¶¶ 23 (admitting that the timetable for the permit described “is not easy to predict,” but estimating 50-100% more time to be required than allowed by statute) & 25 (noting that Wallingford has a shorter time for a “deemed [site plan] approval” than required by Vermont law, but using a longer time for the estimate in ¶ 37). Mr. Schroder’s verified statement does not include any discussion of the prospects for permit processing on a *shorter* schedule than allowed under state law. Mr. Schroder does not claim to have had any personal experience with Wallingford’s permit processes, and the Company concedes that it has had no experience seeking permits or approvals in Wallingford either.

IV. A DECLARATORY ORDER PROCEEDING SHOULD BE DENIED

There is no controversy between VTR and the Town of Wallingford. The present inability

of the Town of Wallingford to fully understand and evaluate VTR's proposal is not a "controversy," and although there is uncertainty about the VTR plans, there is no uncertainty of a kind that can be removed by a declaratory order. Absent a controversy to terminate or uncertainty to remove, this Board should deny VTR's request for a declaratory order proceeding.

In *Fletcher Granite Company, LLC - Petition for Declaratory Order*, STB Finance Docket No. 34020 (June 25, 2001), this Board confronted similar circumstances. In that case the petitioner owned a sidetrack in the Town of Westford, Massachusetts that had not been used for approximately 35 years. The petition sought a declaratory order that, under 49 U.S.C. 10501(b)(2), the Board has exclusive jurisdiction over the resumption of rail service and that any local or state regulation was preempted. Fletcher's concerns were summarized by this Board as follows:

Fletcher is concerned that the resumption of rail service could be delayed or defeated if state and local officials try to regulate the matter. Fletcher claims that its concerns are not speculative, citing negative press coverage and alleged hostility by the local community to development in Westford. It also asserts that part of its right-of-way abuts a brook and wetlands, and that it has been told by local officials that resuming service would entail an environmental permitting process under state law and review by the local Conservation Commission. Fletcher states that it will submit its workplan to the Conservation Commission and will work consistently with applicable environmental standards by, for example, not storing materials in protected wetlands. Nevertheless, Fletcher asserts that, if its proposal comes under Conservation Commission review, it will likely "become involved in extensive, time-consuming hearings that will result in either denial of any permit application or the imposition of such expensive and unwieldy conditions that the project will be unfeasible to complete." Petition at 4 (citation omitted). In any event, Fletcher claims that the permitting process will substantially delay and add cost to the project.

Id. at 2.

This Board held:

Under the Administrative Procedure Act, "the agency, . . . in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. 554(e). See also 49 U.S.C. 721. *It would be premature for*

the Board to institute a declaratory order proceeding at this point, as there is not now, and may never be, a controversy that needs to be terminated. [The Town of] Westford, while filing a notice of appearance, has not submitted any substantive views on this matter. Nor does Westford appear to have taken any official action that would impede the resumption of rail service over Fletcher's track. Fletcher, moreover, has indicated that it will submit workplans and act consistently with applicable environmental standards. Thus, the Board will not attempt to intervene in this matter at this time.

Id. at 2-3 (*emphasis added*).

In this case the Town has filed an appearance and submitted this Response to the Petition, but has not submitted substantive views. The Town has taken no official action that would impede or obstruct VTR's plans. Although VTR has had no contact with the Town, it has indicated that it will submit to some local regulation, provide information to the Town, and provide some accommodation to expressed community concerns. VTR should submit its detailed plans to the Town and explain the project activities and operational needs. A cooperative effort by the Town and VTR can result in a complete accommodation of the interests and concerns of both parties without controversy and the need for intervention by this Board.

Respectfully submitted,

Town of Wallingford, Vermont

by:



Alan B. George, Esq.
Keyser Crowley, P.C.
29 South Main Street
Rutland, VT 05701

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Response to the Petition for Declaratory Order by Vermont Railway, Inc. has, this 8th day of August, 2003, been served by first-class mail, postage prepaid, to the following:

Andrew P. Goldstein
McCarthy, Sweeney & Harkaway, P.C.
Suite 600
2175 K Street, NW
Washington, DC 20037

Michael Pologruto
Vermont Agency of Transportation
133 State Street
Montpelier, Vermont 05633

Eric R. Benson
P.O. Box 65238
Champlain Station
Burlington, Vermont 05406

Melissa Whitmore, Chair
Wallingford Planning Commission
P.O. Box 237
Wallingford, Vermont 05773-0237

Robert B. Luce
Downs Rachlin & Martin
P.O. Box 190
Burlington, Vermont 05402-0190

Elizabeth Lord, Esq.
Agency of Natural Resources
103 S. Main St., Center Building
Waterbury, Vermont 05671-0301

William Burke, Coordinator
District 1 Environmental Commission
440 Asa Bloomer State Office Building
Rutland, Vermont 05701-5903

Bill Loshen, Chair
Town of Wallingford Selectboard
P.O. Box 327
Wallingford, Vermont 05773-0327

Patricia Moulton Powden, Chair
Vermont Environmental Board
Nat'l Life Records Ctr Bldg-Drawer 20
Montpelier, Vermont 05620-3201

Rutland Regional Planning Commission
P.O. Box 965
Rutland, Vermont 05702-0965

Jeanne Elias, Esq.
Assistant Attorney General
109 State Street
Montpelier, Vermont 05609-1001


Alan B. George

BEFORE THE
SURFACE TRANSPORTATION BOARD
FINANCE DOCKET NO. 34364
VERMONT RAILWAY, INC. --
PETITION FOR DECLARATORY ORDER

VERIFIED STATEMENT OF JOYCE BARBIERI

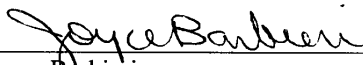
1. My name is Joyce Barbieri. I am the Town Clerk of the Town of Wallingford, Vermont. My office is located in the Town Hall, 75 School Street [P.O. Box 327], Wallingford, Vermont 05773.

2. As the Town Clerk, I am responsible for the recordation of deeds and other instruments pertaining to the ownership or transfer of an interest in real estate located in the Town of Wallingford.

3. My office has not received a deed or other instrument transferring an interest in real estate in the property located on the Homer Stone Road in Wallingford, Vermont described and otherwise referred to in the Petition For Declaratory Order of Vermont Railway, Inc. in this Finance Docket No. 34364.

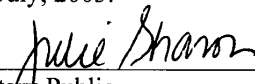
4. The subject property, formerly used as a rock quarry, is owned of record by the Frank W. Whitcomb Construction Corporation.

Dated this 29 day of July, 2003 at Wallingford, Vermont.



Joyce Barbieri

Sworn to before me this 29 day of July, 2003.



Notary Public
My commission expires: 2/10/07

BEFORE THE
SURFACE TRANSPORTATION BOARD
FINANCE DOCKET NO. 34364
VERMONT RAILWAY, INC. --
PETITION FOR DECLARATORY ORDER

VERIFIED STATEMENT OF ROBERT INGLIS

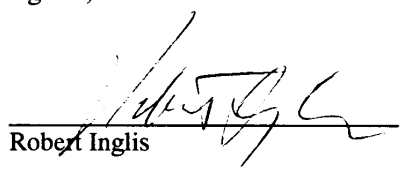
1. My name is Robert Inglis. I am the Zoning Administrator of the Town of Wallingford, Vermont. My office is located in the Town Hall, 75 School Street [P.O. Box 327], Wallingford, Vermont 05773.

2. As the Zoning Administrator, I receive and process all applications for building, zoning and land use permits under and pursuant to the Ordinances of the Town of Wallingford.

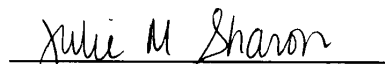
3. Vermont Railway, Inc. has not filed an application for a permit to undertake any activity at the property formerly used as a rock quarry on the Homer Stone Road in Wallingford, Vermont, presently owned of record by the Frank W. Whitcomb Construction Corporation.

4. I have not been contacted by any representative of Vermont Railway, Inc. regarding any plans Vermont Railway, Inc. may have for that property, or to determine whether any local zoning, or land use permits would be necessary to authorize any use or development of that property.

Dated this 4th day of August, 2003 at Wallingford, Vermont.


Robert Inglis

Sworn to before me this 4 day of August, 2003.


Notary Public
My commission expires: 2/10/07

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34364

VERMONT RAILWAY, INC. --
PETITION FOR DECLARATORY ORDER

VERIFIED STATEMENT OF JULIE SHARON

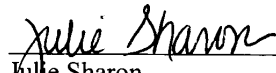
1. My name is Julie Sharon. I am the Town Administrator of the Town of Wallingford, Vermont. My office is located in the Town Hall, 75 School Street [P.O. Box 327], Wallingford, Vermont 05773.

2. When the Town received the Petition For Declaratory Order of Vermont Railway, Inc. in this Finance Docket No. 34364 by mail, addressed to Bill Lohsen, Chairman of the Town of Wallingford Selectboard, I made inquiry of the Town Clerk, the Zoning Administrator, the Zoning Board of Adjustment, the Planning Commission, and the Selectboard as to whether anyone had any knowledge or information with regard to the proposal for the use of property on the Homer Stone Road in Wallingford, Vermont by Vermont Railway, Inc., as described in the Petition For Declaratory Order.

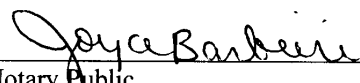
3. No one among these persons had any prior knowledge or information regarding the plans of Vermont Railway, Inc. as described in the Petition For Declaratory Order.

4. Since the receipt of the copy of the Petition For Declaratory Order, no representative of Vermont Railway, Inc. has contacted me or any member of the Board of Selectmen, the Zoning Board of Adjustment, the Planning Commission, the Zoning Administrator or the Town Clerk, with respect to the plans outlined in the Petition.

Dated this 29 day of July, 2003 at Wallingford, Vermont.


Julie Sharon

Sworn to before me this 29 day of July, 2003.


Notary Public
My commission expires: 2/10/07