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June 29, 2006



VIA FEDERAL EXPRESS

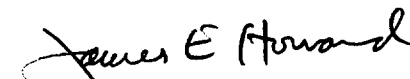
Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Buffalo Southern Railroad, Inc.--Acquisition and Operation
Exemption--Line in Croton-on-Hudson, New York
Finance Docket No. 34903

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are the original and 10 copies of the "Motion of Buffalo Southern Railroad, Inc. to Dismiss Verified Notice of Exempt Transaction." If you have any questions or need additional information, please contact me. Thank you very much for your attention to this matter.

Very truly yours,


James E. Howard

Enclosures

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Office of Proceedings

JUN 30 2006

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Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34903



BUFFALO SOUTHERN RAILROAD, INC.--ACQUISITION AND
OPERATION EXEMPTION--LINE IN CROTON-ON-HUDSON, NEW YORK

MOTION OF BUFFALO SOUTHERN RAILROAD, INC.
TO DISMISS VERIFIED NOTICE OF EXEMPT TRANSACTION

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Dated: June 29, 2006

BEFORE THE
SURFACE TRANSPORTATION BOARD

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BUFFALO SOUTHERN RAILROAD, INC.--ACQUISITION AND
OPERATION EXEMPTION--LINE IN CROTON-ON-HUDSON, NEW YORK

MOTION OF BUFFALO SOUTHERN RAILROAD, INC.
TO DISMISS VERIFIED NOTICE OF EXEMPT TRANSACTION

Buffalo Southern Railroad, Inc. ("BSOR"), a Class III rail carrier, has filed a Verified Notice of Exempt Transaction to acquire and operate a line located in Croton-on-Hudson, New York. The Verified Notice is scheduled to become effective on July 6, 2006. For the reasons stated below, the Board should determine that the line is an excepted track within the meaning of 49 U.S.C. 10906 and that the Board therefore has no authority over the acquisition and operation of the line. As a result of these determinations, the Verified Notice should be dismissed.

FACTUAL BACKGROUND¹

BSOR is a Class III rail carrier that conducts rail operations at several locations. Since 1982, BSOR has leased and operated a 32 mile line between Buffalo and Gowanda, New York. BSOR also provides private switching services at Tonawanda, New York. In March, 2006, BSOR entered into a lease permitting it to operate as a common carrier on

¹ The facts are also set forth in detail in the Decision and Order of the United States District Court for the Southern District of New York (attached hereto as Exhibit A), the BSOR complaint (Exhibit B) and the affidavits of Albert Feasley (Exhibits C and D).

approximately .3 miles of track (the "Croton Track") and approximately 10 acres of real property adjacent to the Croton Track in the Village of Croton-on-Hudson, New York (the "Village"). The property includes a building that was used prior to BSOR's acquisition for transloading construction and demolition debris and that is now used by BSOR for transloading other commodities. The Croton Track connects with the Hudson line of Metro North, over which CSX Transportation, Inc. ("CSX") has rights to operate freight service.

Since March, 2006, BSOR has been holding itself out to provide common carrier rail transportation service to any customer that has materials or commodities that can be feasibly handled on the Croton Track.² For example, BSOR has been marketing its transloading and switching services at the Croton Track. In particular, BSOR has solicited and has been contacted by customers that wish to ship sand and other building materials and various other commodities by rail into the Westchester County area for transloading and delivery by truck. The efforts of BSOR have been successful in that several customers and potential customers have expressed an interest in using such services. One customer, Coastal Distribution, has shipped 3 carloads of sand and precast concrete building materials for delivery to BSOR at the Croton Track.³

At the same time, the Village was threatening to acquire the Croton Track and the related property through eminent domain proceedings. In addition, the Village, through its elected officials, was announcing that it would attempt to regulate any activities, including rail transportation, at the Croton Track and related property. In response to

² BSOR has not attempted to provide private switching services on the Croton Track. Indeed, private switching is not even an option, because there is no shipper or receiver located on the property adjacent to the Croton Track.

³ As described in more detail below, the 3 cars have not been delivered by CSX.

these threats and in order to continue its common carrier rail activities, BSOR initiated a lawsuit against the Village and certain of its employees and agents in order to enjoin any eminent domain proceedings or other interference with rail operations. Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson, et al., 06 Civ. 3755 (CM) (S.D.N.Y. 2006).

In opposition to the motion of BSOR for a preliminary injunction, the Village argued that the Croton Track was excepted track within the meaning of 49 U.S.C. 10906 and that BSOR could not "legally" provide common carrier service on the Croton Track without Board authorization. Although not a party in the litigation, CSX wrote the Court, (attached hereto as Exhibit E) advising that CSX also believed that the Croton Track was excepted within the meaning of 49 U.S.C. 10906 and that, absent clarification by the Court or authorization for BSOR to operate the Croton Track as a line of railroad, CSX would not interchange with BSOR at Croton.

In a Decision and Order dated June 12, 2006 (the "Decision", attached hereto as Exhibit A), Judge Colleen McMahon of the United States District Court for the Southern District of New York entered a preliminary injunction prohibiting the Village from attempting to condemn the Croton Track and related property and from interfering with rail operations by BSOR. The Court held that BSOR is a rail carrier that is holding itself out to provide common carrier rail transportation for compensation at the Croton Track. Consequently, the efforts of the Village to interfere with such transportation activities are preempted pursuant to 49 U.S.C. 10501. Moreover, the Court held that preemption applies whether or not BSOR's operations are, as the Village contended, "illegal" absent

authorization by the Board or whether, as BSOR maintained, such operations at Croton are beyond the authority of the Board pursuant to section 10906. Decision at 14-17.

ARGUMENT

I. The Croton Track is Excepted Track Within Section 10906.

A. The Criteria for Deciding Line of Railroad-Excepted Track Disputes are Well Known.

As the Board is well aware, it has licensing authority with respect to "lines" of railroad. For example, a person may provide transportation over an extended or additional railroad line or, in the case of a person other than a rail carrier, acquire a line or acquire or operate an extended or additional line only if the STB issues a certificate authorizing such activity. 49 U.S.C. 10901. Moreover, a Class III rail carrier may acquire or operate an extended or additional rail line only if the STB authorizes such a transaction. 49 U.S.C. 10902.

By contrast, although the Board has exclusive jurisdiction over section 10906 tracks, the STB is expressly precluded from regulating the acquisition or operation of such tracks. Specifically, section 10906 provides that the Board "does not have authority under this chapter [including sections 10901-10907] over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks."

On its face, section 10906 presents an apparent anomaly: the STB has jurisdiction over, but lacks regulatory authority with respect to, such tracks. This "tension" has been recognized and harmonized by the Board and the courts. For example, the Seventh Circuit has stated that the "no-authority language [of section 10906] means no *authority*, not no *jurisdiction*. These sorts of transactions involving spur track do not call for the

Board authorization which is required for construction, acquisition, or operation of extended or additional rail line under section 10901 and section 10902, but the Board nonetheless retains exclusive jurisdiction under section 10501(b)(2)." United Transportation Union-Illinois Legislative Board v. Surface Transportation Board, 183 F.3d 606 (7th Cir. 1999). See also, Flynn v. Burlington Northern Santa Fe Corporation, 98 F. Supp. 2d 1186 (E.D. Wash. 2000); Cedarapids, Inc. v. Chicago, Central & Pacific Railroad Company, 265 F. Supp. 2d 1005 (N.D. Iowa 2003); CSX Transportation, Inc.--Petition for Declaratory Order, STB Finance Docket No. 34662, decision served March 14, 2005; Joint Petition for Declaratory Order--Boston and Maine Corporation and Town of Ayer, Massachusetts, STB Finance Docket No. 33971, decision served May 1, 2001.

The Board and its predecessor, the Interstate Commerce Commission, have frequently been called upon to determine whether a particular track is a section 10906 track or a line of railroad. In general terms, a section 10906 track is one that is used for loading, unloading, switching or other activities connected with or incidental to through service between origin and destination. A line of railroad, on the other hand, is a track that is used to provide through service between shipper and receiver. Nicholson v. Interstate Commerce Commission, 711 F.2d 364 (D.C. Cir. 1983). In Nicholson, for example, the court explained that "Congress intended to subject to the requirements of [ICC regulation] so-called main or branch lines of railroad, that is, lines designed and used for continuous transportation service by through, full trains between different points of shipment or travel, and to exclude from the operation of the statute all of that mass of 'tracks' (as distinguished from 'lines') naturally and necessarily designed and used for loading, unloading, switching, and other purposes connected with, and incidental to, but

not actually and directly used for, such transportation service." Stated somewhat differently, the difference between switching operations and through movements is that switching operations "involve the discreet movement of groups of cars for assembling with or disassembling from entire trains; the movements take place largely, if not exclusively, within a terminal area; and they occur before or after entire trains make their continuous long-haul journeys between terminal points." Brotherhood of Locomotive Engineers v. United States, 101 F.3d 718, 730 (D.C. Cir. 1996).

In making such determinations, the courts, the STB and the ICC have reviewed the facts on a case-by-case basis and have focused primarily on the intended or future use of the track in question, rather than on the current or prior use of the track or its nominal designation. Nicholson, 711 F.2d at 367; Brotherhood of Locomotive Engineers, 101 F.3d at 726-27. The ICC and the STB have noted that a variety of factors will be considered in applying this test to determine whether a track is a line of railroad or a section 10906 track, including the following: the length of the track; the number of customers served by the track; whether the track is stub ended; whether the track was built to invade the territory of another rail carrier; whether there is regularly-scheduled service on the track; the volume of traffic; whether the rail carrier or the customer owns or maintains the track; the weight of the rail; the condition of the track; and whether there are stations on the track. Battaglia Distributing Company, Inc. v. Burlington Northern Railroad Company, STB Finance Docket No. 32058, decision served June 18, 1997; Chicago, South Shore & South Bend Railroad--Petition for Declaratory Order, STB Finance Docket No. 33522, decision served December 16, 1998; Grand Trunk Western Railroad, Inc.--Petition for Declaratory Order, STB Finance Docket No. 33601, decision

served July 26, 1998; Chicago and North Western Transportation Company--Abandonment Exemption--in McHenry County, Illinois, 3 I.C.C. 2d 366 (1987).

The courts and the Board have articulated a caveat to the "intended use" test pursuant to which the "purpose and effect" of the transaction are also evaluated. More specifically, a track might be considered an excepted track based upon its intended use and the various criteria described above, but it may nonetheless be classified as a line of railroad if the "purpose and effect" of the acquisition or operation of the track are to extend substantially the line of the carrier into new territory. See, e.g., United Transportation Union-Illinois Legislative Board v. Surface Transportation Board, 183 F.3d 606; Brotherhood of Locomotive Engineers v. United States, 101 F.3d 718.

This "purpose and effect" qualifier is based upon Texas & Pacific Railway Company v. Gulf, Colorado & Santa Fe Ry. Co., 270 U.S. 266 (1926), a case in which one rail carrier built a 7 mile line into territory that it had not previously served in order to compete with another rail carrier that already served many customers in that territory. Although the Supreme Court noted that the track in question had certain characteristics of a branch line, the Court held that the purpose and effect of the transaction was to extend into territory that was not previously served by the carrier that constructed the line and that was already served by another rail carrier, thereby invading the territory of the other rail carrier and making the transaction an extension of a line of railroad that Congress intended to be subject to regulation.⁴

⁴ The Board has recognized that the terms "extension" and "additional railroad line" are not statutorily defined but rather, as interpreted in Texas & Pacific, are "tracks that enable a railroad to penetrate or invade a new market." North San Diego County Transit Development Board--Petition for Declaratory Order, STB Finance Docket No. 34111, decision served August 21, 2002.

B. The Croton Track Meets the Criteria of Excepted Track.

The Croton Track was built on property owned by a noncarrier without any STB authorization. The Croton Track was used by a prior tenant of the property for transloading materials from trucks to rail cars and switching the rail cars to and from through trains operated by CSX. The Croton Track was never used for through freight movements; rather, it was used to load and switch cars incidental to through movement by CSX and other line haul carriers. Furthermore, the Croton Track is relatively short (.3 miles) and stub ended, and the weight of the rail is less than the weight of the connecting CSX mainline.

The operations of BSOR on the Croton Track are similar to the prior operations with one significant exception. BSOR is transloading and switching cars and attempting to interchange them with CSX, but, unlike the prior tenant, BSOR is a rail carrier holding itself out as a common carrier to provide service to any rail customer that has commodities that can reasonably be handled at Croton. In doing so, BSOR is not invading the territory of another rail carrier; rather, it is switching cars that are to be interchanged with CSX, the trunk line carrier that has always handled through movements to and from the Croton Track. The "purpose and effect" of the operations of BSOR are in no way analogous to the extension of a line of railroad within the meaning of Texas & Pacific.

Significantly, the Village has recognized that the Croton Track is an excepted track. In connection with proceedings before the STB in 2005, the Village argued that the STB had no authority to permit Northeast Interchange Railway, LLC ("NIR"), a noncarrier, to acquire and operate the Croton Track as a common carrier, because the

track was excepted within the meaning of section 10906. Northeast Interchange Railway, LLC--Lease and Operation Exemption--Line in Croton-on-Hudson, New York, STB Finance Docket No. 34735.⁵ In addition, as noted above, the Village argued in the proceedings before the District Court that the Croton Track was an excepted track under section 10906.

All of the criteria, with the exception that there is more than one customer that will be served on the Croton Track, indicate that the Croton Track is a section 10906 track. The intended use is for transloading, switching and storage; the Croton Track is not used for through movements. Furthermore, BSOR provides service as needed, not on a regular schedule, and there are no stations on the Croton Track. Finally, the Croton Track was not built to, nor does it, compete with another rail carrier that already serves customers in the area. Rather, BSOR is working--or, more accurately at this point in time, trying to work--cooperatively with CSX to move rail traffic jointly. As a consequence, BSOR's acquisition of and common carrier operations on the Croton Track are not within the licensing authority of the STB.

This conclusion is supported by a number of decisions by the courts, the ICC and the STB. For example, in New York City Economic Development Corp.--Petition for Declaratory Order, STB Finance Docket No. 34429, decision served July 15, 2004, the STB considered the request of the owner of a branch line for a declaratory order to the effect that construction of an additional 6,700 feet of track at the end of the branch would not require STB authorization. The STB determined that the new track would be used to assemble and disassemble trains incidental to line haul movements and that the physical

⁵ BSOR and NIR are not affiliates.

characteristics of the line (for example, stub ended, 1.3 miles long) indicated that the track would be an excepted switching track within section 10906.

In Brotherhood of Locomotive Engineers v. United States, 101 F.3d 718, the court reviewed several ICC decisions relating to trackage rights and leases that the parties had entered into without prior ICC authorization. Even though the tracks in question were indisputably lines of railroad from the perspective of the owner, the court held that the ICC had correctly determined that the tenant or user was conducting only switching operations and that, therefore, the track was excepted under section 10906. See, also, Battaglia Distributing Company, Inc. v. Burlington Northern Railroad Company, STB Finance Docket No. 32058, decision served June 18, 1997; Chicago, South Shore & South Bend Railroad--Petition for Declaratory Order, STB Finance Docket No. 33522, decision served December 16, 1998; and Grand Trunk Western Railroad, Inc.--Petition for Declaratory Order, STB Finance Docket No. 33601, decision served July 26, 1998.

II. The Common Carrier Status of BSOR is Beyond Challenge.

As described above, the Decision adjudicated the issue whether BSOR is a rail carrier providing common carrier rail transportation service at the Croton Track by deciding the question in the affirmative. As a consequence, the parties to that action are barred by the doctrines of res judicata and collateral estoppel should they attempt to oppose this Motion to Dismiss on the basis of arguments grounded on determinations already made by Judge McMahon in the Decision. As discussed in more detail below, even if those parties were not so barred, there is no basis for any potentially interested party to attack the common carrier status of the rail transportation operations of BSOR at the Croton Track.

For example, any notion that might be advanced to the effect that BSOR is not a "legal" rail carrier unless authorized by the Board can be promptly dispatched. A "rail carrier" is a "person providing common carrier railroad transportation for compensation." 49 U.S.C. 10102(5). Judge McMahon has already held that BSOR is a "rail carrier", because it is holding itself out to provide common carrier service. This holding is entirely consistent with the Board's own view.

As the Board has noted, there is no statutory definition of "common carrier", but the term "is a well-understood concept arising out of common law, and it refers to a person or entity that holds itself out to the general public as engaged in the business of transporting persons or property from place to place for compensation." American Orient Express Railway Company LLC--Petition for Declaratory Order, STB Finance Docket No. 34502, decision served December 29, 2005 (citations omitted). Consequently, so long as a rail carrier is holding itself out to provide transportation to the public, it is a common carrier whether or not the Board authorizes its operation on a line of railroad or does not have the ability to authorize operation because a section 10906 track is involved. Indeed, even rail carriers that have obtained STB authority to operate a line might not be considered common carriers unless they are also holding themselves out to the public. SMS Rail Service, Inc.--Petition for Declaratory Order, STB Finance Docket No. 34483, decision served January 24, 2005 (Norfolk Southern improperly refused to recognize the common carrier status of a shortline that had obtained STB authorization, because, contrary to the assertion of Norfolk Southern, the shortline was holding itself out to the public to provide service); Arkansas Central Railway Company, Inc.--Operation Exemption--Line of Herzog Stone Products, Inc., ICC Finance Docket No. 31405,

decision served April 7, 1995 (a rail carrier that received regulatory authority to operate a "line of railroad" at a certain location, but that had not in fact held itself out to provide common carrier service, is not considered a common carrier).

It follows that common carrier status does not automatically accrue to a rail carrier by means of Board authorization to acquire or operate a line of railroad. Instead, common carrier status depends on the actions of a rail carrier to hold itself out to provide rail transportation service to the public. Thus, the BSOR operations at the Croton Track are not analogous to the many cases in which section 10906 track is acquired by a noncarrier that seeks Board authorization to "convert" the track into a line of railroad. Rather, BSOR is holding itself out as a common carrier on excepted track without seeking to change the status of the section 10906 track.

Conversely, a common carrier operating on section 10906 track does not "convert" such track into a line of railroad. It is the norm, rather than the exception, for a common carrier to operate on excepted track without STB authorization and without thereby converting the track into a line of railroad. New York City Economic Development Corp.--Petition for Declaratory Order, STB Finance Docket No. 34429, decision served July 15, 2004; Green Mountain Railroad Corp. v. Vermont, 404 F.3d 638 (2d Cir. 2005).

III. If the Motion is Not Granted, the Verified Notice Should Remain In Effect.

If the Board determines, contrary to the arguments set forth above, that the Motion to Dismiss should not be granted, the Board should permit the Verified Notice of Exempt Transaction to become and remain effective. Should any interested party attempt to stay or vacate the Verified Notice by alleging that the notice constitutes an abuse of the

exemption procedures or is "controversial" and requires extended analysis, any such allegations should be quickly rejected. As shown below, the Verified Notice and the transaction are neither an abuse of the procedures nor controversial.

To the extent that there was any controversy concerning the rail operations of BSOR on the Croton Track, the Decision has put this to rest. Specifically, the District Court held that BSOR is a common carrier providing rail transportation service at the Croton Track and is, therefore, entitled to the benefit of the preemption of state and local regulation. Furthermore, the preliminary injunction granted by the Decision is conditioned upon BSOR not handling solid waste at the Croton Track, thereby removing the basis of a prior alleged "controversy" when NIR, a noncarrier, filed a notice of exemption that contemplated handling construction and demolition debris as part of the proposed rail operations at the Croton Track.

Likewise, there can be no credible contention that the Verified Notice abuses the Board's exemption procedures. Under any analysis, the Verified Notice describes a transaction by an existing Class III rail carrier seeking to provide traditional rail transportation services at another location. Such a transaction is well within the parameters of transactions that the exemption procedures were specifically intended to accommodate.

IV. In All Events, the Board Should Direct CSX to Interchange With BSOR.

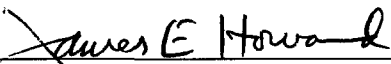
Whether the Motion to Dismiss is granted or not, the Board should clarify the obligations of CSX to interchange traffic with BSOR at Croton. Although CSX advised the District Court that it would "comply with whatever decision [the] Court or the STB makes about Buffalo Southern's status" and that it would "treat with Buffalo Southern at

Croton as a common carrier entitled to interchange rights if that is the decision", CSX has been unwilling to recognize BSOR's status as a common carrier and to enter into an interchange agreement.⁶ In the meantime, 3 loaded cars destined for delivery to a BSOR customer at the Croton Track have been withheld and not delivered by CSX since May 24, 2006 even though the cars are within a stone's throw from the Croton Track.

Whatever the outcome of this Motion, the Board should clarify that CSX must interchange with BSOR at Croton. The refusal of CSX to interchange flouts the Decision ("Notwithstanding its belief that BSOR requires STB authorization, CSX states that it does not seek to intervene in this matter and will abide by the ultimate decision of this Court regarding BSOR's operations." Decision at 9, fn. 4) and is contrary to CSX's own representations to the Court. The actions of CSX frustrate the movement of traffic in interstate commerce and should not be permitted to continue.

Respectfully submitted,

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Dated: June 29, 2006

Attorneys for Buffalo Southern Railroad, Inc.

⁶ This is not a situation in which 49 U.S.C.10742 is relevant, because there is no issue whether CSX should provide reasonable interchange facilities; rather, due to the track configuration, only BSOR can provide a track for an interchange.

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

BUFFALO SOUTHERN RAILROAD Inc.,

Plaintiff,

- against -

06 Civ. 3755 (CM)

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A. W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as Member of the Village Planning Board; VINCENT ANDREWS, as Member of the Village Planning Board; FRANCES ALLEN, as Member of the Village Planning Board; ROBERT LUNTZ, as Member of the Village Planning Board; KATHLEEN REIDY, as Member of Village Zoning Board of Appeals; RHODA STEPHENS, as Member of Village Zoning Board of Appeals; RUTH WAITKINS, as Member of Village Zoning Board of Appeals; WITT BARLOW, as Member of Village Zoning Board of Appeals; and PAUL ROLNICK, as Member of Village Zoning Board of Appeals,

Defendants.

-----X

DECISION AND ORDER GRANTING PLAINTIFF'S
MOTION FOR A PRELIMINARY INJUNCTION

McMahon, J.:

Introduction

Plaintiff is a common carrier by rail in western New York. In March 2006, it entered into a lease for the property located at 1A Croton Point Avenue in Croton-on-Hudson ("the Yard").

Plaintiff's stated intention is to use the site to expand its business to the Westchester area by converting it into a transloading facility (a site where the contents of rail cars are loaded and unloaded).

For many years prior to 2006, the Yard housed a controversial recycling and waste management center. The Village of Croton-on-Hudson has been involved in litigation against a number of enterprises who own or have operated out of the Yard, including Greentree Realty (the owner), Northeast Interchange Railway, and Metro Enviro Transfer LLC. Plaintiff's lease was signed only a month after the Village Board commenced consideration of the possible condemnation of the site via its power of eminent domain.

And only weeks after two key events – a decision by a Justice of the New York State Supreme Court enjoining waste transfer operations on the site without the Village's consent, and the Village's announcement that acquisition of the site was financially feasible – Plaintiff (whose existence and lease were theretofore unknown to Village officials) filed a complaint in this Court, seeking to enjoin the Village from commencing any eminent domain proceeding and from enforcing other local zoning and building requirements, on the grounds that the Interstate Commerce Commission Termination Act of 1995 preempted all state and local regulation of the site while it is being used in transportation by rail carrier.

The Village contends that plaintiff is not entitled to an injunction, because BSOR has not applied for, let alone acquired, the necessary certificates from the federal Surface Transportation Board that would allow the Yard to be used for common carriage rail operations.

For the reasons set forward below, plaintiff's motion is granted, on conditions set forth below.

Facts

The Yard is a triangular parcel of land approximately ten acres in size. It is bounded by property of Metro-North Railroad to the west, by property owned by Croton-on-Hudson and New York State Route 9 to the east, and by privately held land to the north. Affidavit of Albert Feasley, Ex. A. The Yard contains a spur of dead-end track, 1600 feet in length, that intersects a main line of track passing through town at the edge of the Yard. Id. The main line is owned by CSX, a larger rail carrier. Feas. Aff. ¶¶ 5, 12. The Yard also contains a warehouse facility that is connected to the spur, which allows the spur to be used for unloading the contents of rail cars onto trucks and vice versa (termed a “transload facility”), several storage yards, a one-story office building, a parking lot, and small areas of land used for drainage and storing debris.

Since 1979, the Yard has been zoned “L-1” under the Village Zoning Law – permitting “Light manufacturing, assembly, converting, altering, finishing, cleaning or any other processing or storage of products.” Zoning Code § 230-18B(2).

A. History

In the 1970s and 1980s, the Yard was owned by a series of private individuals, who used it as a construction yard, a lot for storing sand, and a truck repair depot.

Since at least 1984, the Yard has been used by successive owners and lessees as a waste transfer station and wood recycling center. Each was required to get a permit from the Village to operate the Yard as a waste storage facility.

In 1997, the Yard was sold to Greentree Realty, Inc., who in turn leased it to Metro Enviro LLC. One year later, on May 4, 1998, Metro Enviro LLC received a permit from the

Village to operate a recycling center there. Affidavit of Marianne Stecich ¶ 10. Over the next few years, Metro Enviro allegedly violated several conditions of the permit, such as accepting more than the permitted amount of waste and failing to adequately train employees. Id. ¶¶ 10-11; see also Matter of Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson, 5 N.Y.3d 236, 239, 800 N.Y.S.2d 535 (2005). In 2001, when the permit expired, the town undertook an extensive review of the site and Metro Enviro's operations there. On January 27, 2003, the Village Board voted not to reissue the permit. Stec. Aff. ¶ 11.

Metro-Enviro LLC sought an Article 78 review of the Village's decision in the Supreme Court in Westchester County. Justice Francis Nicolai ultimately found in favor of the company and ordered the Village to issue the permit. On appeal, the Second Department overturned Judge Nicolai's decision and upheld the Village's determination. Matter of Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson, 7 A.D.3d 625 (2d Dept. 2004), aff'd 5 N.Y.3d 236, 800 N.Y.S.2d 535 (2005).

On July 18, 2005, the Village passed a resolution prohibiting Metro Enviro's facility from accepting new waste – essentially halting its operations. Stec. Aff. ¶ 14. Greentree Realty LLC (owner of the Yard) and Metro Enviro Transfer LLC (successor to Metro Enviro LLC) sought to enjoin enforcement of the resolution, on the grounds that the use of the Yard as a recycling center was a prior non-conforming use under the Zoning Code. Justice Nicolai denied Metro Enviro's motion for a preliminary injunction. See Greentree Realty LLC v. Village of Croton-on-Hudson, No. 11872/05 (Westchester Cty. Sup. Ct. August 25, 2005).

Around the same time, a separate but related entity, Northeast Interchange Railway LLC ("NIR"), reached an agreement to take over Metro Enviro's lease and operations and begin its

own waste management and recycling operation from the Yard. It applied to the New York State Department of Environmental Conservation and to Westchester County for permits to handle solid waste. Stec. Aff. ¶ 22. In December 2005, these permits were granted, along with a permit allowing the operation of a waste processing facility in the Yard. Stec. Aff. ¶ 25.

NIR also filed a Notice of Exemption Transaction with the federal Surface Transportation Board (“STB”) seeking STB approval to operate as a common carrier by rail over the 1600-foot stretch of track in the Yard. Stec. Aff. Ex. 4. Prior to this point, there is no evidence of the Yard’s being used in this fashion; the state court decisions dealt only with the site of a recycling center.

The Village opposed NIR’s application, leading the STB to stay the effectiveness of NIR’s Notice of Exemption.¹ Northeast Interchange Ry., STB Fin. Docket No. 34734 (S.T.B. August 5, 2005). After additional review, NIR’s Notice of Exemption was formally rejected. The STB held that the abbreviated review procedures available in notice of exemption proceedings were inappropriate for the substantial scope of NIR’s request (NIR never previously having engaged in common carrier operations). Northeast Interchange Ry., STB Fin. Docket No. 34734 (S.T.B. November 17, 2005). NIR was granted leave to resubmit a full application or a formal petition for exemption. Id.

On February 6, 2006 – apparently before any such application was made – the Village of Croton-on-Hudson commenced public hearings pursuant to New York Eminent Domain Procedure Law § 201, to begin consideration of condemning the Yard. The Village’s stated

¹ Notices of Exemption before the STB, as a procedural matter, become effective if they are not affirmatively stayed. See Stec. Aff., Ex. 6 at 2.

intent was to use the property for municipal office space and as a storage lot for salt, sand, and municipal vehicles. Stec. Aff. ¶ 30, Opp. at 3. The Village commissioned an appraisal of the site, to ascertain what a fair acquisition price would be.

On March 3, unbeknownst to the Village, R.S. Acquisition Inc., as lessee of the property from Greentree, subleased the site to plaintiff. See infra.

In April 2006, Judge Nicolai issued an injunction in favor of the Village, prohibiting NIR's proposed use of the Yard as a waste transfer station without the appropriate Village permits. Decision, Village of Croton-on-Hudson v. Northeast Interchange Ry. LLC & Greentree Realty, LLC, No. 22176/05 (Westchester Cty. Sup. Ct. April 27, 2006). Plaintiff's existence was still a secret, so it was not a party to that proceeding.

On or around April 18, 2006, the town released the results of its appraisal of the site, which indicated that the site could be acquired for approximately \$5 million, a "doable number" according the Village Mayor, Gregory Schmidt. Robert Marchant, Buyout of Croton Waste Facility Estimated to Cost \$5M, Journal News, April 18, 2006.

To date, the Village has not made a final decision on whether to acquire the Yard. Stec. Aff. ¶ 33. The entry of a temporary restraining order by this court has, of course, stayed the running of the 90 day period after the public hearing within which the Village is statutorily require to publish its determinations and findings pursuant to N.Y. EDPL § 204.

B. Buffalo Southern Railroad

Buffalo Southern Railroad (BSOR) is a common carrier by rail in western New York, engaged in the transportation of freight. Affidavit of Albert Feasley, ¶ 3. It owns a stretch of

track near Buffalo, and it has entered into “interchange agreements” with other rail carriers allowing it to ship freight by rail across the state. It is designated as a Class III rail carrier by the STB, which means that it has annual revenues of under \$20 million. Id. ¶ 2; see also 49 C.F.R. § 1201 1-1. BSOR avers that it has not heretofore transported solid waste as a regular part of its business.

On March 3, 2006, one month after the Village started investigating the possibility of eminent domain, BSOR leased the Yard from RS Acquisition Co., which in turn had leased it from Greentree. Feas. Aff. Ex. B. NIR, the prior tenant, had apparently abandoned its interest in the Yard, although when and how it did so is unexplained. BSOR’s stated purpose for acquiring the Yard was to expand its service area from western New York to the Westchester area. Id. ¶ 10. It now holds itself out as a common carrier at the Yard, including offering transloading and switching services there. Id. ¶ 11. It has never sought STB approval to operate as common carrier at or from the Yard, and alleges that it need not do so.

Plaintiff has commenced some operations in the Yard, though they have been minimal to date.² On March 30, 2006, it permitted CSX to use the Yard to load 14 rail cars for shipment via CSX tracks. Second Affidavit of Albert Feasley, ¶¶ 5, 9. Coastal Distribution LLC, a construction firm, has signed an agreement with BSOR for the shipment of construction materials from western New York to Westchester, to be offloaded in the Yard. Affidavit of Joseph Rutigliano, ¶¶ 6-7. At least one other enterprise, Hanson Aggregates Inc., has expressed interest in using common carrier services at the Yard once the legal status of the Yard is

² According to nearby observers, there is no staff or train traffic at the Yard on weekdays. Affidavit of Charles Kane, ¶¶ 6-7.

resolved. Affidavit of Daniel M. Meehan, ¶ 8.

As of the date of this opinion, plaintiff has not reached an interchange agreement with CSX, the owner of the main rail line through town.³ 2d Feas. Aff. ¶ 4. Absent such an agreement, BSOR's carriage of freight starts and stops within the confines of the Yard.

C. The Instant Action

On May 17, 2006, BSOR filed suit against the Village of Croton-on-Hudson and various Village employees, seeking to enjoin the Village's incipient eminent domain proceeding and to bar the enforcement of Village regulations against the Yard. BSOR claims that both the Interstate Commerce Commission Termination Act, 49 U.S.C. §§ 10101-11908 (2000) ("the ICCTA") and the dormant Commerce Clause preempt state action against BSOR's operations.

Until the filing of this lawsuit, the Village was unaware that BSOR had leased the Yard. Stec. Aff. ¶ 5. To date, the Village has not attempted to enforce any Village regulation against the Yard. Id.

On May 24, 2006, BSOR attempted to ship three rail cars containing building materials for Coastal LLC to the Yard. When the cars arrived at the CSX-owned track, CSX refused to deliver the cars to the Yard because plaintiff had no interchange agreement with CSX. Letter

³ An interchange agreement is an agreement between two rail carriers agreeing to offer joint common carrier services at a given location. Even absent an interchange agreement, BSOR asserts that CSX is nonetheless obliged to accept BSOR shipments under its statutory obligation as a common carrier (49 U.S.C. § 11101) and under the terms of the Association of American Railroads (AAR) Interchange Rules. 2d Feas. Aff. ¶ 5. CSX contests these assertions. Letter from Paul Hitchcock dated May 31, 2006 at 2.

from Peter McManus Dated May 30, 2006, at 1-2.⁴

Discussion

In order to obtain a preliminary injunction, an applicant must show (1) that s/he is likely to suffer irreparable injury if such relief is denied and (2) there is either a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation, with a balance of hardships tipping decidedly in the applicant's favor. See In re Feit & Drexler, Inc., 760 F.2d 406, 415 (2d Cir. 1985).

Additionally, where, as here, a private party seeks to enjoin enforcement of state power, the public interest must be balanced against the private interest asserted by the plaintiff. Brody v. Village of Port Chester, 261 F. 3d 288 (2d Cir. 2001).

⁴ This Court has received a letter dated May 31, 2006, from CSX's general counsel Paul Hitchcock, regarding this incident. Counsel asserts that, in his opinion, "There is no basis for CSX to recognize [BSOR's] alleged status [as a common carrier by rail at the Yard] absent some direction from the STB or this Court." Letter from Paul Hitchcock Dated May 31, 2006 at 2. According to counsel, common carrier status requires certification from the STB; BSOR's current operations at the Yard are no more than "industrial switching" operations. Id. at 1-2. CSX is presently willing to deliver these three cars on an ad hoc basis if the STB grants its permission for such an arrangement. Alternatively, it will enter into something called a "sidetrack agreement," without prejudice to BSOR's legal position, pending resolution of its status. Id. at 3. Notwithstanding its belief that BSOR requires STB authorization, CSX states that it does not seek to intervene in this matter and will abide by the ultimate decision of this Court regarding BSOR's operations. Id.

As stated at oral argument, the Court credits CSX's assertion that it is a neutral third party and that the actions described in the text were not dictated by the Village. Given the possibility of third party liability for aiding and abetting violations of Chapter 109 of the ICCTA (see below), CSX's position is perfectly understandable and is in its self-interest. Plaintiff's hypothesis of a "conspiracy" between CSX and the Village is simply not credible.

A. Irreparable Injury

BSOR contends that the Village's eminent domain proceedings against the Yard would foreclose BSOR's ability to do business in the area entirely. Furthermore, it asserts that any delay in its operations would cause the loss of potential business and customer goodwill, including its arrangement with Coastal LLC. Such factors have been held to constitute irreparable injury in an analogous case. Coastal Distribution LLC v. Town of Babylon, No. 05 Civ. 2032, 2006 WL 270252, *3-4 (E.D.N.Y. Jan. 31, 2006).

B. Likelihood of Success on the Merits

Plaintiff's principal argument is that the I.C.C. Termination Act ("ICCTA") preempts any action that might constitute state or local regulation of a common carrier by rail. The ICCTA, in relevant part, vests exclusive jurisdiction over "transportation by rail carriers," which includes the yards and facilities used by such carriers in providing rail transport, in the federal Surface Transportation Board.⁵ 49 U.S.C. § 10501(b)(1) (2000). It further gives the STB exclusive

⁵ Section 10501 states in full:

The jurisdiction of the Board over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

jurisdiction over “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities.” 49 U.S.C. § 10501(b)(2) (2000).

In Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 645 (2d Cir. 2005), the Second Circuit held that the ICCTA preempted the enforcement of local zoning ordinances against a rail carrier seeking to construct a rail yard on land abutting a line of track. “The plain language of section 10501 reflects clear congressional intent to preempt state and local regulation of integral rail facilities.” Id. However, the court held that local authorities may continue to exercise “traditional police powers,” provided that:

the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions.

Id. at 643. “Electrical, plumbing and fire codes, direct environmental regulations enacted for the protection of the public health and safety, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption.” Id.

It is against the backdrop of Green Mountain that I consider this application for injunctive relief.

1. Local Regulation of the Yard, Including The Exercise of the Power of Eminent Domain, Is Preempted by the ICCTA.

According to plaintiff, the Village’s exercise of its eminent domain power against the Yard is barred by the terms of section 10501. What case law there is on the matter supports this argument: the ICCTA has been held to preempt eminent domain proceedings where the state

49 U.S.C. § 10501(b) (2000).

action would “prevent or unreasonably interfere with railroad operations.” Maumee & W. R.R. Corp., STB Fin. Docket No. 34354 (S.T.B. March 3, 2004); accord Dist. of Columbia v. 109,205.5 Square Feet of Land et al., No. Civ.A. 05-202, 2005 WL 975745, *3 (D.D.C. Apr. 21, 2005). Even state action couched as an effort to protect the health and safety of local residents is preempted by the broad scope of federal preemption in this area. See Wisc. Cent. Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009 (W.D. Wisc. 2000).

The Village contends, correctly, that whether a certain state action is preempted requires a fact-specific inquiry. However, under the standard set out in Maumee and District of Columbia, there is no question that the Village’s intended exercise of its eminent domain power exceeds what is permitted under the ICCTA. The Village is threatening to acquire the entire parcel of land in fee simple. It is not looking for an easement over some small area, as was the case in District of Columbia. Given that the use of the Yard as a transloading facility requires at least a portion of the ten acre tract – the 1600-foot spur of track, the offloading facility itself, storage facilities, roads, and parking – acquisition of the entire parcel by eminent domain would plainly interfere with BSOR’s operations.

Dakota, Minn. & E. R.R. Corp. v. South Dakota, 236 F. Supp. 2d 989, 1005 (D.S.D. 2002), *rev’d on other grounds*, 362 F.3d 512 (8th Cir. 2004), does not compel a different result. That case stands only for the proposition that a state may delegate its eminent domain authority to a federally regulated railroad without running afoul of the ICCTA. However, it says nothing regarding federal preemption of state eminent domain action *against* railroad property.

Were the Village to acquire the entire site under New York’s Eminent Domain Procedures Law, (N.Y. EDPL §§ 101-709), it would interfere with BSOR’s operation of a rail

facility on the site. The exercise of the power of eminent domain against the Yard is thus preempted by the ICCTA as it is currently on the books. See p. 21 *infra*.

Plaintiff also asks for an injunction halting the enforcement of Village “zoning laws, permitting and pre-clearance requirements, and other local ordinances and regulations” that could interfere with its operations the Yard.

The Second Circuit has plainly held that a municipality’s zoning and pre-construction permit ordinances cannot be enforced against facilities for transportation by rail. See Green Mountain, 404 F.3d at 640. It has also held that neutral health and safety rules that can be enforced without any exercise of discretion (like fire safety codes) are enforceable in spite of STB preemption. Id. at 643.

As the Village points out, it has not yet attempted to enforce any permit or zoning regulations against BSOR. Its sole concern to date has been halting recycling and waste management operations at the Yard. However, because the Village’s ability to regulate the site is limited by the contours of Green Mountain, an appropriate injunction would bar enforcement of any local law or regulation except those that “protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions.” Id. What those exceptional regulations might be would no doubt have to abide the Village’s attempt to exercise its authority over the Yard, and this Court will not try to predict how the Village might choose to do that.

2. The Legality of BSOR’s Operations Does Not Affect Federal Preemption

The Village acknowledges STB preemption and the Second Circuit's decision in Green Mountain. But it argues that preemption does not apply in this case, because BSOR's operations as a common carrier by rail at the Yard are unlawful unless the STB grants plaintiff a license (in the form of a certificate pursuant to 49 U.S.C. § 10902) to operate as a common carrier in Westchester County.

BSOR, for its part, contends that (a) its operations are in compliance with the ICCTA, and (b) even if they were not, the ICCTA still preempts local authority over the tracks and their associated buildings and other facilities in the Yard.

BSOR's argument about the legality of its operations presents an interesting, if not entirely novel, question, one that is probably best resolved by the agency in charge of the nation's rail system: the Surface Transportation Board.

BSOR's contention that the Village's argument is irrelevant to the application of ICCTA preemption, however, is a question of law – one that no other case addresses, as far as I know, but a question of the sort that is ordinarily resolved by courts, not administrative agencies.

I conclude that BSOR is likely to prevail on the issue of whether ICCTA preemption applies, because the question about the legality of its operation does not affect the STB's exclusive jurisdiction over the site under § 10501 of the ICCTA. I thus reject the Village's argument that preemption is dependent on the legality of BSOR's operation.

a. Whether or Not It Is Operating Legally, BSOR Is a "Rail Carrier" Within the Meaning of the ICCTA, So ICCTA Preemption Applies.

Section 10501 gives the Board exclusive jurisdiction over "transportation by rail carriers" (including "yards and facilities" of such carriers) and "the.....operation, abandonment or

discontinuance of spur...or side tracks, or facilities, even if the tracks are located.....entirely in one State.” 49 U.S.C. § 10501(b) (2000).

Both parties agree that, for the ICCTA’s preemption provisions to apply, BSOR must be a “rail carrier” that provides “transportation.” And both parties agree that, if BSOR is a rail carrier engaged in the provision of transportation, then the ICCTA preempts local regulation of plaintiff’s facilities.

“Transportation” is “the movement of passengers or property, or both, by rail.” 49 U.S.C. § 10102(9) (2000). For reasons best known to the drafters of the law, the term “transportation” also includes certain things used in the “movement of passengers or property... by rail,” including “yards, property, and facilities.” Id. The Yard itself is plainly a “yard [or] facility” used for the transportation of property, which means it falls under the definition of “transportation.” Id.

Under the ICCTA, a “rail carrier” is simply a “a person providing common carrier railroad transportation for compensation, [excluding local mass transit operations].” 49 U.S.C. § 10102(5) (2000). Under the literal terms of that definition, BSOR is a rail carrier. Indeed, it is classified as a Class III Rail Carrier by the STB. It provides common carrier railroad transportation for compensation in Buffalo and its environs. And it holds itself out as providing common carriage – and if the evidence is to be believed, it has on one or two occasions provided common carriage – in Westchester County. Therefore, it is a rail carrier.

The provisions of § 10501(b) are clear enough, and they clearly apply to the operations of a rail carrier. There would seem to be nothing more to be said.

But the Village nonetheless contends that the preemption provisions of § 10501(b) do not

because BSOR's provision of common carriage out of Croton-on-Hudson is unlicensed, and therefore illegal. That, it argues, means that BSOR is not really a "rail carrier" – at least, not in this part of the world.

The argument goes something like this: Chapter 109 of the ICCTA (Licensing) provides that a, "Class III rail carrier providing transportation subject to the jurisdiction of the Board may acquire or operate an extended or additional rail line under this section *only if the Board issues a certificate authorizing such activity.*" 49 U.S.C. § 10902(a) (2000) (Emphasis added). BSOR is indisputably a Class III rail carrier, and it has not previously been authorized to provide service in Westchester County. The Village argues that BSOR's proposed operation is an attempt to acquire or operate an "extended or additional rail line" without first obtaining the necessary operating authority. Until it obtains that authority, it cannot provide common carriage, so it is not a "rail carrier" within the meaning of the ICCTA and its facility is not within the STB's exclusive jurisdiction.

BSOR responds in two ways. First, it argues that the legality of its Croton operation is irrelevant to the issue of STB preemption over the site. Second, plaintiff contends that the Village is wrong: it did not need to seek approval or obtain any certificate from the STB before commencing operations; neither did it need to file a notice of exemption, as NIR did (without success). BSOR relies on an exception (not an exemption) to § 10902(a): 49 U.S.C. § 10906, which states, "The Board *does not have authority under this chapter* over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks." BSOR contends that the 1600 feet of track in the Yard is a "side" or "spur" track,

and so its operation in Croton is not considered to be an “extended or additional line.”⁶

The Village insists that the question about the legality of what BSOR is doing in Croton-on-Hudson must be resolved before this court can decide whether plaintiff is a “rail carrier” and so is likely to succeed on the merits of its application for injunctive relief. And the Village asserts that the preferred procedure for resolving that question is to refer the issue to the STB and to stay this action until the STB issues a ruling.

If the legality of BSOR’s new Croton operation were germane to the reach of section 10501, I would without hesitation refer this matter to the STB. Certainly someone should look into whether BSOR’s Westchester operation requires a certificate of authority, and under the doctrine of “primary jurisdiction” articulated by the Supreme Court in U.S. v. Western Pac. R. Co., 352 U.S. 59, 64 (1956), that someone ought to be the Surface Transportation Board. Determining whether BSOR requires a license to operate in the proposed fashion involves far more than simply interpreting the statute. The reviewing authority must decide whether an existing common carrier by rail may expand its base of operations to a new area (which is what BSOR says that it wants to do) without first obtaining a license from the STB by (1) first

⁶ The parties in this case have taken what at first appear to be contradictory positions: BSOR, seeking STB preemption of local action, asserts that the STB has no authority over its operations in the Yard, while the Village contends that preemption does not apply because the Yard operations are subject to STB authorization, which has not yet been given (or even requested). These positions arise from the presence of apparently contradictory provisions in the ICCTA itself: 49 U.S.C. § 10501(b)(2), which vests *exclusive jurisdiction* over the construction and operation of side and spur tracks in the STB, and 49 U.S.C. § 10906, which strips the STB of *authority* over the same.

One court has squared these two seemingly contradictory provisions. The Seventh Circuit has concluded that while entities may construct, transfer, or operate side or spur tracks without STB approval pursuant to 49 U.S.C. § 10906, the STB retains *exclusive jurisdiction* over those sites that preempts state or local regulation of such tracks under 49 U.S.C. § 10501(b)(2). United Transp. Union – Ill. Legislative Bd. v. Surface Transp. Bd., 183 F.3d 606, 612 (7th Cir. 1999).

acquiring track that would ordinarily be excepted from STB authority because it is “switch” or “spur” track, and then (2) contracting with other carriers for interchange rights over trackage outside its licensed operating area. This involves analysis, not only of the “intended use” of trackage, see Nicholson v. Interstate Comm. Comm’n., 711 F.2d 364, 367 (D.C. Cir. 1983); but also of the “purpose and effect” of the proposed arrangement. Texas & Pac. Ry. Co. v. Gulf Colo. & Santa Fe Ry. Co., 270 U.S. 266, 46 S. Ct. 263 (1926); Brotherhood of Locomotive Engineers v. U.S., 101 F.3d 718, 728 (D.C. Cir. 1996). As I learned when I delved (more deeply than proved necessary) into these matters, these are complicated and arcane questions, on which the ICC and STB have spoken in the past (albeit not on these precise facts). Clearly, such matters should be resolved as a matter of national rail policy, not in a piecemeal fashion by unspecialized district courts.

Additionally, in his highly informative letter to the Court (for which I express my gratitude) the General Counsel of CSX advises the court that the STB also exercises considerable oversight over interchange and trackage agreements between common carriers, such as the ones BSOR had told the court it will have to enter into in order to fulfill its common carriage contracts with Coastal LLC and with any future customers. This factor, too, militates in favor of having the STB, not me, look into the legality of BSOR’s Croton-on-Hudson operation.

However, I have concluded that these thorny issues need not be resolved in order to determine this motion. Even if BSOR is operating illegally, the site is subject to exclusive STB jurisdiction as long as BSOR is providing common carriage by rail.

I reject the Village’s argument that, if BSOR’s local operation is illegal (because it is unlicensed), BSOR is not a “rail carrier” for ICCTA purposes in this part of the world. If BSOR

is required to obtain a license from the STB in order to do what it claims to be doing at the Yard, then it is a “rail carrier” that is conducting an illegal operation outside of the area where it is licensed to provide service. But as long as it is providing common carriage for compensation somewhere – and it is – it is still a “rail carrier” within the meaning of the statute. The Yard is a “facility” under the statute, and BSOR proposes to “move property by rail” out of Croton. Under the ICCTA, that is sufficient to trigger STB preemption over both BSOR’s operations and its facilities.

It actually makes no sense to subject only properly “licensed” rail carriers to STB jurisdiction. The ICCTA and its predecessor law, the Interstate Commerce Act, were passed in order to subject *all common carriages by rail* to federal oversight – and, not incidentally, to punish any railroad that provided common carriage without complying with the statutory scheme. If BSOR, a Class III rail carrier, is conducting unauthorized common carrier operations from Westchester County, in violation of Chapter 109 of the ICCTA, the statute itself provides remedies: a fine of up to \$5,000 per violation per day. 49 U.S.C. § 11901(a), see also *Gitomer Aff.* ¶ 23. Violations of Chapter 109 (of which sections 10902 and 10906 are part) also carry civil penalties of up to \$5,000 for any person “authorizing, consenting to, or permitting” such violation. 49 U.S.C. § 11901(c).⁷

The procedure for enforcing such violations, which is set forth in Chapter 117, is for “any person,” (which would include the Village of Croton-on-Hudson) to file a complaint with the Surface Transportation Board. 49 U.S.C. § 11701(a) (2000). The Board, upon receipt of a

⁷ As far as this court is concerned, this third-party penalty statute explains CSX’s reluctance to do anything that its lawyers believe would violate the ICCTA.

complaint, may commence an investigation and take “take appropriate action to compel compliance,” including a civil action for statutory penalties as described above. Id.; see also 49 U.S.C. § 11901(f) (2000). A complaint may be filed by any “person,” including a government agency, regardless of whether that entity suffered injury due to the alleged violation. 49 U.S.C. § 11701(b) (2000).

Another remedial section of the ICCTA, 49 U.S.C. § 11702, specifically grants the STB power to seek injunctive relief for violations of Chapter 109 through a civil action. 49 U.S.C. § 11702.

These are the exclusive, Congressionally-mandated remedies for BSOR’s purported violation of the ICCTA. Significantly, Congress has not vested the federal courts with authority to impose penalties for a violation of Chapter 109’s licensing regulations unless the STB brings a civil proceeding. Certainly nothing in the ICCTA suggests that a carrier’s violation of the licensing provisions of that Act renders it and its facilities subject to the jurisdiction of states and localities, thereby thwarting Congress’ clear intent that rail carrier facilities of all sorts be created, operated and discontinued only at the behest of the Surface Transportation Board. In fact, section 10501 clearly states that “remedies provided under this part... preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b). To put it succinctly, illegal operations by a rail carrier do not preempt preemption.

Therefore, the purported illegality of BSOR’s operation in Croton-on-Hudson does not impact the STB’s exclusive jurisdiction over the site – at least, while the “yard or facility” is under lease to a “rail carrier” that is purporting to provide “transportation” from that site. Moreover, the “abandonment” or “discontinuance” of what clearly appears to be “spur...or side

tracks, or facilities” would itself be subject to STB jurisdiction, even if the “rail carrier” were not providing “transportation” to and from the site. 49 U.S.C. § 10501(b)(2) (2000). Accordingly, the ICCTA preempts the Village’s exercise of eminent domain or other regulatory authority over the Yard, except to the minimal extent permitted by Green Mountain.

3. The Doctrine of Unclean Hands Does not Militate Against Entry of an Injunction.

During oral arguments, defendant suggested that plaintiff’s request for equitable relief should be denied under the “unclean hands” doctrine.

“The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage.” PenneCom B.V. v. Merrill Lynch & Co., Inc., 372 F.3d 488, 493 (2d Cir. 2004) (quoting Bein v. Heath, 47 U.S. 228, 247 (1848)).

The purported fraud, deceit or unfair means that BSOR employed was not identified with precision. If it is BSOR’s unlicensed provision of common carriage from Croton, then, as just discussed, the Village’s remedy lies elsewhere: it should file a complaint with the STB and trigger the enforcement provisions of 49 U.S.C. §§ 11701-11901.

The very act of leasing the site to a “rail carrier” might also be the unfair means (although it is hard to see how that open and notorious action could constitute fraud or deceit). At oral argument, the Village announced its belief that the lease to BSOR was of a piece with numerous similar transactions that are taking place all over the country when municipalities try to close down noxious or offensive industrial uses of sites within their boundaries. According to counsel for the Village, the practice of placing industrial land containing trackage in the hands of

a real railroad like BSOR – or even an imaginary “railroad” like BSOR’s predecessor, NIR – in an effort to divest municipalities of the ability to regulate land within their borders has become so widespread that Congress is convening hearings on the issue, to see whether the ICCTA requires amending.

If indeed these representations by counsel are true (and it is nothing more than a lawyer’s representation; there is no evidence in the record of any such widespread practice), then there is reason for concern, since this Court very much doubts that Congress intended such a result. But the very fact that Congress is or may be convening hearings to decide whether it should plug a loophole in the law suggests that, as things stand now, the Village is preempted from condemning or regulating the site, except by application of neutral health and safety regulations as permitted by Green Mountain. Taking advantage of loopholes in laws is a time-honored American tradition. It is not a deceitful or unfair means to an end. And (once again), the Village’s remedy lies in a venue other than this Court: it can call Senators Schumer and Clinton and Representative Kelley, and urge them to support an amendment to the ICCTA to correct any manifest injustice that is being worked by the law’s loose language.

C. The Equities Balance in Favor of an Injunction

As between the parties to this lawsuit, the balance of hardship tips in favor of plaintiff.

BSOR faces a draconian result if the Village condemns the property: it will be forced to cease operations at the site. The Village has already taken the first step toward condemnation, by holding a public hearing on the possible condemnation of the site at which the Village’s need for a new Department of Public Works facility was presented in some detail. N.Y. EDPL §§ 202-203

(2006). If the Village commences a proceeding under Article 4 of EDPL, the land will almost certainly be condemned. The present record before this Court indicates that the land is certainly intended for a constitutionally permissible "public use." See Kelo v. City of New London, Conn., -- U.S. --, 125 S. Ct. 2655, 2663 (2005). Provided that this requirement is met, an aggrieved party's right of appeal seems limited to the propriety of the condemnation proceedings themselves. See N.Y. EDPL § 207(c) (2006). And under the EDPL, the municipality holds nearly all the cards, with any aggrieved party having little right to participate in the initial determination and limited right to judicial review thereafter. See Brody v. Village of Port Chester, 434 F.3d 121, 132-33 (2d Cir. 2005). Only intervention by a court early in the condemnation process can stave off a taking that the Village is determined to make.

On the other hand, a temporary injunction against further takings or regulatory activities at the site has very little downside for the Village. BSOR asserts that its operations at the Yard will in fact serve the public interest, by increasing the flow of goods into Westchester county, and I can hardly find that an increased flow of goods into Westchester County is NOT in the public interest.

Plaintiff also asserts that its operations pose no risk to the public health or safety, because that it is not in the business of transporting hazardous materials. Feas. Aff. ¶ 42. Significantly, BSOR represented to the Court during oral argument that no shipment of waste materials is planned. On the record before me, that representation is credible. BSOR is not generally in the business of carrying such materials and it does not appear to have any necessary permits from the New York DEC or Westchester County to do so. Counsel has represented to this Court that plaintiff has no immediate plans to carry such waste. (Admittedly, counsel fudged when asked

whether it would so represent for all time). So there does not appear to be any imminent danger that waste management or recycling operations, which the state courts have already found inimical to the health and safety of Village residents, will resume at the Yard. And make no mistake: whatever the Village says about needing a new public works facility, it is the prevention of waste transfer (or similar) operations at the Yard – which seemed a distinct possibility as recently as a year ago – that underlies the Village’s interest in exercising its eminent domain powers.

I nonetheless acknowledge that the Village has advised the Court that it wants to acquire the Yard for use as a municipal storage lot for road and sewer trucks, salt, and other such items. Def. Opp. at 3. A temporary ban on the acquisition of this particular site for that purpose, however, is of little moment. Croton has apparently been seeking such a site since the mid-1980s. Id. Only in recent months has it focused on using the Yard for this purpose.

Moreover, in its (understandable) ire at having been blindsided by plaintiff (and its lessor), the Village revealed to the Court that it would have been willing to discuss a division of the site between the portions it might need and the part BSOR wanted to use – if only plaintiff had come to it before commencing a lawsuit. This suggests that the Village may not require the portion of the property devoted to rail-related uses for its public works operation.

In light of the above, I find that the Village’s interest in acquiring the site, while real, will not be harmed by the issuance of a preliminary injunction. It will work only a short delay in a process that has taken twenty years to get to this point.

Of course, the public has an interest in prohibiting the provision of unauthorized rail service. And if, as the Village alleges, BSOR’s proposed “common carriage” operation out of the

Yard needs to be licensed, there is a public interest in stopping illegal activity.

But that is a general public interest, not an interest of the Village of Croton-on-Hudson. And the public's interest can best be vindicated by appropriate proceedings before the STB – not by permitting the Village to assert regulatory authority in a circumstance where Congress wants that authority to rest solely with the STB.

D. Commerce Clause

Plaintiff also contends that it is entitled to relief under the Commerce Clause of the Constitution, as made actionable by 28 U.S.C. § 2201 (Count II) or 28 U.S.C. § 1983 (Count III). The Commerce Clause preempts state regulations that place a disparate burden on interstate commerce clearly excessive in relation to local benefits. United Haulers Ass'n Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 438 F.3d 150, 156-57 (2d Cir. 2006).

“It is a fundamental rule of judicial restraint, however, that this Court will not reach constitutional questions in advance of the necessity of deciding them.” Three Affiliated Tribes of Fort Berthold Reservation v. World Eng. PC, 467 U.S. 138, 157, 104 S. Ct. 2267 (1984). Where, as here, plaintiff has prevailed on its first cause of action, there is no need to reach the question of whether it has stated a valid constitutional claim under the Commerce Clause.

The Terms of the Injunction

Plaintiff's motion for a preliminary injunction against the Village's acquisition of the Yard by eminent domain is granted. However, this injunction is conditioned on (1) BSOR's posting of an undertaking with the Court in the amount of \$100,000; and (2) BSOR's continued

refusal to accept solid waste materials at the Yard.

The setting of a bond requires little or no explanation. Fed. R. Civ. P. 65(c) provides, “No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper.” That language has been held to vest “wide discretion” in the district courts to set the bond amount. Doctor’s Assoc’s, Inc. v. Stuart, 85 F.3d 975, 985 (2d Cir. 1996). It is the determination of this Court that \$100,000 is an amount sufficient to redress any possible harm to the Village as a result of the injunction’s delay in the condemnation of the site.

The other condition I am setting on the preliminary injunction requires more fulsome comment. A district court, in the exercise of its equity powers, may “impose conditions requiring maintenance of the status quo.... when the injunctive powers of the court are invoked and the conditions are necessary to do justice between the parties.” Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. Co., 363 U.S. 528, 531-32, 80 S. Ct. 1326 (1960); accord U.S. v. Bedford Assoc’s, 618 F.2d 904, 914 (2d Cir. 1980).

Without question, the “status quo” at the Yard includes the absence of waste management, storage, or transshipment operations. The Village has litigated that position extensively, and won. While I have concluded that the prospect of harm resulting from the shipment of waste materials to and from the Yard is (at present) remote, the Village is legitimately concerned about that prospect. Before any railroad was involved with this site, the Village received two decisions from the State Supreme Court that shut down the waste management operation at the site. The timing of the lease, without more, suggests that BSOR’s acquisition of an interest in the property is as much a litigation tactic as a business decision. The

Village knows nothing about the relationship between BSOR and NIR, Greentree and Metro Enviro, because BSOR's very existence, and its lease, appear to have been kept carefully secret from the Village until the commencement of this lawsuit..

During oral arguments, the Village proposed that BSOR be enjoined from operating common carrier operations at the Yard altogether while the STB addresses the underlying matter.⁸ I treat that request as a cross-motion for a preliminary injunction, and I deny it, because the Village has not demonstrated that it and its citizens will suffer any irreparable harm in the event that BSOR commences shipment of non-hazardous materials at the Yard. At present, the only threat of harm to the Village comes from increased truck traffic and commercial activity in the area. Since BSOR cannot begin any significant operation at the Yard as long as CSX harbors legitimate doubts about the legality of the contemplated enterprise and appears unwilling to handle shipments bound for the Yard without having those issues resolved, the minimal risk of harm to the public interest does not create sufficient reason for this Court to enjoin BSOR's operations.

Nonetheless, I acknowledge the Village's abiding interest in preventing the commencement of waste management and recycling operations at the site, and I conclude that the equitable remedy of injunction *pendente lite* should be conditioned on the maintenance of the status quo as ordered by the state courts: no waste hauling of any sort. This condition allows BSOR to operate without opening up the can of worms that would result if this court were to issue an order that, in essence, overturned the work of the New York State Supreme Court.

⁸The Village also offered that it would agree to halt its eminent domain proceedings voluntarily if BSOR agreed to halt all operations at the Yard *pendente lite*. That offer was rejected by BSOR's attorney.

Nothing in the ICCTA requires me to ignore the fact that the state courts, over years of litigation concerning this site, have expressed a concern about the conduct of waste management and recycling operations in the Yard, and have enjoined other parties (albeit not plaintiff) from conducting such operations. In view of the findings of those courts, sitting in equity, I conclude that it is appropriate to maintain the status quo *vis-a-vis* waste management until there is some final resolution of the matters contested in this lawsuit.

If the Village intends to persist in its argument that the site is not within the exclusive jurisdiction of the Surface Transportation Board, and can convince me that the resolution of that question is necessary to the final resolution of this lawsuit, I will, as indicated previously, refer appropriate questions to the STB for resolution.⁹ This action would have to be stayed during the pendency of any such reference. Reiter v. Cooper, 507 U.S. 258, 268, 113 S. Ct. 1213 (1993). However, I decline to make such a reference now for two reasons: I do not believe reference is necessary to the resolution of this motion, and the Village may wish to take an immediate appeal from the entry of the preliminary injunction.

Conclusion

For the reasons stated above, BSOR's motion for a preliminary injunction halting the Village's eminent domain proceedings is granted. This injunction is conditioned on BSOR's

⁹ At present, it appears to the court that the following questions should be answered by the STB: (a) whether BSOR's operations at the Yard as a common carrier by rail constitute the operation of an additional or extended line of rail under the authority of the Board under 49 U.S.C. § 10902, and whether BSOR can avail itself of the statutory exception under 49 U.S.C. § 10906; (b) whether, if a certificate is required for its operations, such a certificate should be granted. There may be other questions to be referred as well.

The Village's cross-motion for an injunction of all BSOR activity at the Yard is denied.

This constitutes the decision and order of the Court.

Dated: June 12, 2006

A handwritten signature in black ink, appearing to read "G. J. McManus", written over a horizontal line.

U.S.D.J.

BY FAX TO ALL COUNSEL

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BUFFALO SOUTHERN RAILROAD, INC.,

Plaintiff,

- against -

COMPLAINT

CIVIL ACTION No.:

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A. W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as member of the Village Planning Board; VINCENT ANDREWS, as member of the Village Planning Board; FRANCES ALLEN, as member of the Village Planning Board; ROBERT LUNTZ, as member of the Village Planning Board; KATHLEEN RIEDY, as member of the Village Zoning Board of Appeals; RHODA STEPHENS, as member of the Village Zoning Board of Appeals; RUTH WAITKINS, as member of the Village Zoning Board of Appeals; WITT BARLOW, as member of the Village Zoning Board of Appeals; and PAUL ROLNICK, as member of the Village Zoning Board of Appeals,

Defendants.

Plaintiff Buffalo Southern Railroad, Inc. ("BSOR"), by its attorneys and for its complaint against Defendants Village of Croton-on-Hudson; Gregory J. Schmidt, as Mayor of the Village of Croton-on-Hudson; Daniel O'Connor, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; Richard F. Herbek, as Manager of the Village of Croton-on-Hudson; Thomas P. Brennan, as Trustee on the Village Board of Trustees; Charles A. Kane, as Trustee on the Village Board of Trustees; Ann Gallelli, as Trustee on the Village Board of Trustees; Leo A.

W. Wiegman, as Trustee on the Village Board of Trustees; Chris Kehoe, as member of the Village Planning Board; Vincent Andrews, as member of the Village Planning Board; Frances Allen, as member of the Village Planning Board; Robert Luntz, as member of the Village Planning Board; Kathleen Riedy, as member of the Village Zoning Board of Appeals; Rhoda Stephens, as member of the Village Zoning Board of Appeals; Ruth Waitkins, as member of the Village Zoning Board of Appeals; Witt Barlow, as member of the Village Zoning Board of Appeals; and Paul Rolnick, as member of the Village Zoning Board of Appeals (collectively, the "Village Defendants"), states as follows:

JURISDICTION

1. Jurisdiction concerning BSOR's claims exists pursuant to 28 U.S.C. §§ 1331, 1337, 1343, 2201, and 2202. More particularly, this Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 in that it involves an action arising under the Constitution and laws of the United States. This Court also has jurisdiction pursuant to 28 U.S.C. § 1337 in that it involves an action arising under an Act of Congress regulating commerce, namely, the Interstate Commerce Commission Termination Act (the "ICCTA"), 49 U.S.C. § 10101, *et seq.* This Court also has jurisdiction pursuant to 28 U.S.C. § 1343.

VENUE

2. Pursuant to 28 U.S.C. § 1391(b), the Southern District of New York is an appropriate venue as the Village Defendants are within this District. Further, a substantial part of the events giving rise to BSOR's claims occurred in this District, and the property that is the subject of this action is within this District.

PARTIES

3. Plaintiff BSOR is a corporation organized under the laws of the State of New York, with its principal place of business in Eden, New York. BSOR is a Class III rail common carrier that operates approximately 32 miles of rail line between Buffalo, New York and Gowanda, New York; provides switching services at Tonawanda, New York; interchanges rail traffic with five railroads; and offers common carrier service at Croton-on-Hudson, New York, as described below.

4. Defendant Village of Croton-on-Hudson (the "Village" or "Croton") is, upon information and belief, a municipal corporation organized under and by virtue of the laws of the State of New York, with municipal offices at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

5. Defendant Gregory J. Schmidt is, upon information and belief, the Mayor of the Village and a member of the Village Board of Trustees, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

6. Defendant Daniel O'Connor, P.E. is, upon information and belief, the Engineer and Building Inspector for the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

7. Defendant Richard F. Herbek is, upon information and belief, the Manager of the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

8. Defendant Thomas P. Brennan is, upon information and belief, a Trustee on the Village Board of Trustees, which has an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

9. Defendant Charles A. Kane is, upon information and belief, a Trustee on the Village Board of Trustees, which has an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

10. Defendant Ann Gallelli is, upon information and belief, a Trustee on the Village Board of Trustees, which has an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

11. Defendant Leo A. W. Wiegman is, upon information and belief, a Trustee on the Village Board of Trustees, which has an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

12. Defendant Chris Kehoe is, upon information and belief, a member of the Village Planning Board, which is a municipal body organized under the laws of the State of New York and makes land use determinations within the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

13. Defendant Vincent Andrews is, upon information and belief, a member of the Village Planning Board, which is a municipal body organized under the laws of the State of New York and makes land use determinations within the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

14. Defendant Frances Allen is, upon information and belief, a member of the Village Planning Board, which is a municipal body organized under the laws of the State of New York and makes land use determinations within the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

15. Defendant Robert Luntz is, upon information and belief, a member of the Village Planning Board, which is a municipal body organized under the laws of the State of New York

and makes land use determinations within the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

16. Defendant Kathleen Riedy is, upon information and belief, a member of Village Zoning Board of Appeals, which is a municipal body organized under the laws of the State of New York and makes land use determinations within the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

17. Defendant Rhoda Stephens is, upon information and belief, a member of Village Zoning Board of Appeals, which is a municipal body organized under the laws of the State of New York and makes land use determinations within the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

18. Defendant Ruth Waitkins is, upon information and belief, a member of Village Zoning Board of Appeals, which is a municipal body organized under the laws of the State of New York and makes land use determinations within the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

19. Defendant Witt Barlow is, upon information and belief, a member of Village Zoning Board of Appeals, which is a municipal body organized under the laws of the State of New York and makes land use determinations within the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

20. Defendant Paul Rolnick is, upon information and belief, a member of Village Zoning Board of Appeals, which is a municipal body organized under the laws of the State of New York and makes land use determinations within the Village, with an office at the Stanley H. Kellerhouse Municipal Building at 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

FACTS

21. BSOR leases and provides rail transportation service at an approximately 10 acre parcel of property located at 1A Croton Point Avenue, Croton-on-Hudson, New York, also known and designated on the Village Tax Map as Section 78.16, Block 2, Lots 1 and 2 (the "Property").

22. The Property includes approximately 1,600 feet of track that connects with the Hudson line of CSX Transportation, Inc. ("CSX") at approximately milepost QC 25 in the Village (the "Croton Track").

23. There is also an existing building on the Property used for transloading commodities between rail cars and trucks (the "Transload Facility"). Generally, a transload facility is a facility that is used to transfer commodities from one mode of transportation (e.g., truck) to another mode of transportation (e.g., rail). When used in connection with rail transportation, transload facilities allow shippers or consignees, not served directly by rail carrier and otherwise solely dependent on truck transportation, to have access to rail transportation service and the national rail network. As a result, transload facilities are an integral part of rail transportation (collectively, the "Croton Track," "Transload Facility," and "Property" constitute the "BSOR Croton Yard").

24. The BSOR Croton Yard is located in the most industrially developed section of the Village. New York State Route 9, a four lane divided highway, which is the main North/South artery through the Village and for the western portion of Westchester County, is immediately to the East of the BSOR Croton Yard. A commuter railroad parking lot is located to the South of the BSOR Croton Yard, a massive rail equipment maintenance facility to the Southwest, and a commercial warehouse building currently storing tires, to the North. To the

West is the Croton-Harmon Rail Yard, which is a large rail-industrial complex containing numerous tracks and switches for both commuter and freight trains.

25. Upon information and belief, the Property has long been utilized for commercial purposes -- in particular, for the storage and transfer of various products and materials, such as rocks, stone, soil, and sand -- since at least the early 1960s.

26. More recently, from 1997-2005, a prior entity utilized the Croton Track and the Transload Facility to transfer construction and demolition debris ("CD&D") from trucks to rail cars for interstate shipment and, ultimately, disposal.

27. During the last several years, BSOR has sought to provide rail common carrier transportation services at additional locations, both in western New York and elsewhere.

28. As a result of BSOR's efforts to increase the locations of its services, on March 3, 2006, BSOR leased the BSOR Croton Yard. Now, BSOR holds itself out to the public generally to provide common carrier rail service at the BSOR Croton Yard, including transloading and switching services to rail customers delivering or receiving various commodities by truck at the BSOR Croton Yard, transferring containers and bulk commodities between trucks and rail cars, and providing other rail transportation services involving the exchange of empty and loaded rail cars for various commodities with CSX.

29. BSOR's rail transportation operations at the BSOR Croton Yard provide coordination between rail carriers and motor carriers and allow BSOR to provide rail transportation service economically and efficiently for shippers and consignees, thereby enabling them to have access to the national rail network by means of interchange with CSX.

30. As a result, BSOR's rail transportation operations promote and have a beneficial effect on interstate commerce.

31. Furthermore, without this important rail link at the BSOR Croton Yard, the already overburdened roads in Westchester County will be further inundated with even more long-haul truck traffic.

32. Transload facilities like BSOR's are of great interest and value to businesses because they provide companies with an additional option for cost effective transportation and distribution of their materials and products in interstate commerce.

33. Upon information and belief, many businesses outside of the area are unable to viably serve the Westchester County market given the huge cost associated with truck transportation.

34. BSOR's Transload Facility is of particular interest to businesses because, in many cases, they can transport their products to the lucrative Westchester County market more easily and cheaply by rail, rather than by truck. Further, the BSOR Croton Yard is unique in that it is the only viable link to the national rail network in Westchester County for transloading bulk products.

35. As a result, Coastal Distribution, LLC ("Coastal") has arranged with BSOR for it to transport sand and other building materials and products by rail to the BSOR Croton Yard for transfer to trucks for distribution throughout the Westchester County market.

36. BSOR has begun to provide such service to Coastal.

37. Coastal has informed BSOR that it would like to enter into a long-term agreement to transport and transload sand, aggregate, and other building materials and products, but it is unwilling to do so given the uncertainty created by the Village's attempts to condemn and/or interfere with the BSOR Croton Yard, as described below.

38. In addition, a number of other businesses have expressed an interest in using BSOR's transportation and transloading services at the BSOR Croton Yard. They have refrained from arranging for shipments to or entering into agreements with BSOR due to the Village's conduct.

39. Recently, the Village Board of Trustees held a public hearing "[t]o determine the Village's need for the Property . . . [at] 1A Croton Point Avenue, Section 78.16 Block 2 Lots 1 and 2 as the first step in the process of acquiring the property by eminent domain."

40. That night, in furtherance of the Village's attempt at exercising eminent domain to take the Property, the Board of Trustees adopted a full environmental assessment form as part of the New York State Environmental Quality Review Act ("SEQRA") process.

41. A few weeks ago, an appraiser hired by the Village inspected the Property to provide a valuation as part of the condemnation proceeding. Although the Village has so far refused to make it public, upon information and belief, the appraiser's report is complete.

42. On April 3, 2006, the Village held a "scoping session" concerning the purported condemnation in advance of preparing a Draft Environmental Impact Statement pursuant to SEQRA.

43. Additionally, on several occasions over the last year, some of the Defendants have contended that any activities at the Property are subject to and regulated by the 1979 Village of Croton-on-Hudson Zoning Law (the "Zoning Code").

44. Further, some of the Defendants have threatened that, if activity was commenced at the Property without the Village's prior approval, it would issue stop work orders and/or seek to halt any activity by other means.

45. As demonstrated by the above conduct, unless enjoined by this Court, the Village Defendants will take further actions to attempt to stop, regulate, and/or interfere with BSOR's rail transportation operations, including condemning the Property.

46. If the Property is condemned, BSOR's relationships with its existing customer will necessarily be terminated, thereby adversely and irreparably affecting BSOR.

47. The result is the same if the Village attempts to or actually halts or disrupts the operations at the BSOR Croton Yard, even for a short period of time, pursuant to some provision in the Zoning Code or other local regulation(s) or ordinance(s).

48. Further, those businesses that have expressed an interest in using BSOR's transportation and transloading services are sure to look elsewhere if there is a threat that the BSOR Croton Yard will be condemned or closed or that service will be disrupted by the Village's actions.

THE ICCTA

49. In 1995, Congress enacted the ICCTA, which took effect on January 1, 1996. Among other things, the ICCTA amended and recodified the Interstate Commerce Act—the statute pursuant to which rail carriers have been regulated by the federal government for over 100 years.

50. As amended by the ICCTA, 49 U.S.C. § 10501(b) gives the Surface Transportation Board (the "STB") exclusive jurisdiction over transportation by rail carriers and the facilities used by such carriers in providing rail transportation service, including transload facilities, and over the acquisition and operation of spur, industrial, team, switching or sidetracks or facilities, even if located entirely within one state.

51. The ICCTA also includes a broad and strengthened express preemption provision in 49 U.S.C. § 10501(b) that provides for preemption of state and local regulation of rail carriers such as BSOR, as well as the facilities used by such carriers in providing rail transportation service.

52. Since the ICCTA became effective in 1996, the preemption provision contained in section 10501(b) has consistently been construed by courts and the STB as preempting state and local regulation of rail transportation and the facilities used in providing rail transportation including, but not limited to, all state and local permitting and approval requirements and other laws or regulations -- such as zoning and eminent domain laws -- that have the effect of precluding and/or impeding rail transportation.

THE COMMERCE CLAUSE

53. Article I, Section 8 of the United States Constitution gives to the Congress the exclusive power to regulate interstate commerce.

54. The Commerce Clause has consistently been construed as precluding any state or local government from engaging in any regulation if it imposes an undue and unnecessary burden on interstate commerce.

COUNT I

55. Pursuant to Federal Rule of Civil Procedure 10(c), BSOR realleges and incorporates by reference Paragraphs "1" through "54" of this Complaint.

56. A controversy has arisen between the parties concerning the application of certain laws to and enforcement of such laws against BSOR in connection with its rail transportation operations at the BSOR Croton Yard. The Village Defendants contend that they have a right to enforce, among other things, the Zoning Code and the New York Eminent Domain Procedure

Law, while BSOR maintains that these laws are preempted by the ICCTA and their enforcement does and will continue to violate the Supremacy Clause of the United States Constitution. Declaratory relief pursuant to 28 U.S.C. § 2201 is appropriate in order to resolve this controversy.

57. The BSOR Croton Yard and its attendant buildings and equipment fall within the definitions of the terms “railroad” and “transportation.” 49 U.S.C. § 10102(6) and (9).

58. Further, “transportation” is provided at the BSOR Croton Yard by a “rail carrier,” BSOR, within the meaning of the ICCTA. 49 U.S.C. § 10102(5) and (9).

59. It follows that, pursuant to the Constitution and laws of the United States, including 49 U.S.C. § 10501, the Village Defendants have no authority to require BSOR to seek any approval(s) and/or permit(s) from the Village Defendants concerning BSOR’s activities, operations, and/or land usage occurring at the BSOR Croton Yard as the local zoning and land use provisions are preempted.

60. Similarly, the Village Defendants have no authority to condemn the Property as the eminent domain statutes are preempted.

61. As a result, BSOR is entitled to a declaratory judgment that the above statutes and provisions are preempted by the ICCTA to the extent that the Village Defendants seek to enforce these requirements with respect to BSOR’s rail transportation operations at the BSOR Croton Yard.

62. In order to protect BSOR’s rights as described above, it is necessary that a temporary, preliminary, and permanent injunction be issued prohibiting the Village Defendants, or any of their boards, agencies, departments, officers, agents, representatives, servants, employees, and persons in active concert or participation with them, from applying or enforcing

against BSOR any laws, ordinances, rules, regulations, or other requirements that seek or purport to regulate, license, or otherwise interfere with the activities, operations, and/or land usage occurring at the BSOR Croton Yard, and otherwise prohibiting the Village Defendants from any interference with BSOR's use of the BSOR Croton Yard.

63. Unless so enjoined by this Court, BSOR will suffer imminent, permanent, and irreparable harm for which there is no adequate remedy at law.

64. The balancing of the equities favors BSOR rather than the Village Defendants.

65. BSOR has not made any prior application for the relief herein requested.

COUNT II

66. Pursuant to Federal Rule of Civil Procedure 10(c), BSOR realleges and incorporates by reference Paragraphs "1" through "65" of this Complaint.

67. A controversy has arisen between the parties concerning the application of certain laws to and enforcement of such laws against BSOR in connection with its rail transportation operations at the BSOR Croton Yard. The Village Defendants contend that they have a right to enforce, among other things, the Zoning Code and the New York Eminent Domain Procedure Law, while BSOR maintains that the enforcement of these statutes and provisions violates and will continue to violate the Commerce Clause of the United States Constitution. Declaratory relief pursuant to 28 U.S.C. § 2201 is appropriate in order to resolve this controversy.

68. Enforcement of these statutes and provisions with respect to BSOR's rail transportation operations at the Property impose on BSOR significant economic and operational burdens that are both unnecessary and unwarranted. It also imposes an undue and unnecessary burden on interstate commerce.

69. BSOR is entitled to a judgment declaring that enforcement of these statutes and provisions with respect to BSOR's rail transportation operations at the BSOR Croton Yard is unconstitutional because it imposes an impermissible burden on interstate commerce in violation of the Commerce Clause of the United States Constitution.

70. In order to protect BSOR's rights as described above, it is necessary that a temporary, preliminary, and permanent injunction be issued prohibiting the Village Defendants, or any of their boards, agencies, departments, officers, agents, representatives, servants, employees, and persons in active concert or participation with them, from applying or enforcing against BSOR any laws, ordinances, rules, regulations, or other requirements that seek or purport to regulate, license, or otherwise interfere with the activities, operations, and/or land usage occurring at the BSOR Croton Yard, and otherwise prohibiting the Village Defendants from any interference with BSOR's use of the BSOR Croton Yard.

71. Unless so enjoined by this Court, BSOR will suffer imminent, permanent, and irreparable harm for which there is no adequate remedy at law.

COUNT III

72. Pursuant to Federal Rule of Civil Procedure 10(c), BSOR realleges and incorporates by reference Paragraphs "1" through "71" of this Complaint.

73. BSOR is entitled to a judgment declaring that the Village Defendants' enforcement of the New York Eminent Domain Procedure Law or zoning and land use provisions with respect to BSOR's rail transportation operations at the BSOR Croton Yard constitutes a deprivation of BSOR's rights secured by the United States Constitution in violation of 42 U.S.C. § 1983 since the Village Defendants' enforcement imposes an impermissible

burden on interstate commerce in violation of Article I, Section 8 of the United States Constitution (the Commerce Clause).

74. BSOR lacks an adequate remedy at law.

75. Unless enjoined by this Court, the Village Defendants' actions with respect to BSOR's rail transportation operations at the Property have caused and will continue to cause irreparable injury to BSOR.

76. Pursuant to 42 U.S.C. § 1988, BSOR is entitled to recover its attorneys fees in bringing this action from the Village Defendants.

WHEREFORE, BSOR prays for entry of judgment in its favor against the Village Defendants, awarding BSOR:

a. a declaration that BSOR's operations at the BSOR Croton Yard fall within the definition of "transportation by rail carrier" under the ICCTA;

b. a declaration that the Village Defendants, or any of their boards, agencies, departments, officers, agents, representatives, servants, employees, and persons in active concert or participation with them, are without authority or jurisdiction in, and preempted from, applying or enforcing against BSOR any laws, ordinances, rules, regulations, or other requirements that seek or purport to regulate, license, or otherwise interfere with the activities, operations, and/or land usage occurring at the BSOR Croton Yard;

c. a declaration that all of the Village Defendants' efforts to do so heretofore are null and void;

d. a declaration that the Village Defendants' application and enforcement against BSOR of the above laws, ordinances, rules, regulations, or other requirements that seek or purport to regulate, license, or otherwise interfere with the activities, operations, and/or land usage occurring at the BSOR Croton Yard is unconstitutional and in violation of Article I, Section 8 of the United States Constitution;

e. a declaration that the Village Defendants' application and enforcement against BSOR of the above laws, ordinances, rules, regulations, or other requirements that seek or purport to regulate, license, or otherwise interfere with the activities, operations, and/or land usage occurring at the BSOR Croton Yard is in violation of 42 U.S.C. § 1983;

f. a temporary, preliminary, and permanent injunction prohibiting the Village Defendants, or any of their boards, agencies, departments, officers, agents, representatives,

servants, employees, and persons in active concert or participation with them, from applying or enforcing against BSOR any laws, ordinances, rules, regulations, or other requirements that seek or purport to regulate, license, or otherwise interfere with the activities, operations, and/or land usage occurring at the BSOR Croton Yard, and otherwise prohibiting the Village Defendants from any interference with BSOR's use of the BSOR Croton Yard;

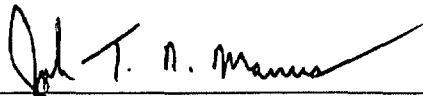
g. an award of BSOR's attorneys fees in bringing this action pursuant to 42 U.S.C. § 1988; and

h. such other relief to which BSOR may be entitled at law or in equity.

Dated: May 16, 2006

Respectfully submitted,

CRANE, PARENTE, CHERUBIN & MURRAY

By: 

John T. McManus
Bar Roll No.: JM5473
Attorneys for Plaintiff
Buffalo Southern Railroad, Inc.
90 State Street
Albany, New York 12207
518.432.8000
518.432-0086 (facsimile)

James E. Howard
1 Thompson Square
Suite 201
Charlestown, MA 02129
617.886.9322
617.886.9324 (facsimile)

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COPY

BUFFALO SOUTHERN RAILROAD, INC.,

Plaintiff,

- against -

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A. W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as member of the Village Planning Board; VINCENT ANDREWS, as member of the Village Planning Board; FRANCES ALLEN, as member of the Village Planning Board; ROBERT LUNTZ, as member of the Village Planning Board; KATHLEEN RIEDY, as member of the Village Zoning Board of Appeals; RHODA STEPHENS, as member of the Village Zoning Board of Appeals; RUTH WAITKINS, as member of the Village Zoning Board of Appeals; WITT BARLOW, as member of the Village Zoning Board of Appeals; and PAUL ROLNICK, as member of the Village Zoning Board of Appeals,

Defendants.

AFFIDAVIT OF
ALBERT FEASLEY
CIVIL ACTION No.:

Judge McMahon

06 CIV. 3755

STATE OF NEW YORK)
COUNTY OF ERIE) ss.:

Albert Feasley, being duly sworn, deposes and says:

1. I am the Vice President of Operations for BSOR,¹ and I submit this affidavit in support of BSOR's application for a temporary restraining order and motion for a preliminary injunction.

¹ In the interest of brevity, the terms used herein are as defined in BSOR's accompanying memorandum of law, except where specifically noted.

BSOR's Rail Operations

2. BSOR is a Class III rail carrier² that operates approximately 32 track miles in Erie County and the Croton Track and Transload Facility in Westchester County, provides switching services in Tonawanda, New York, and interchanges rail traffic with a number of other railroads.

3. Since January 21, 1982, BSOR has held itself out to the public as engaged in the business of transportation of property by rail for compensation, offering its services to the public generally.

4. For example, BSOR has been transporting commodities such as scrap metal, liquid propane, feed, fertilizer, and lumber and other building materials for numerous businesses for compensation for many years in western New York.

The BSOR Croton Yard

5. The BSOR Croton Yard consists of a ten-acre parcel of property, located at 1A Croton Point Avenue, Croton-on-Hudson, New York, also known and designated on the Village Tax Map as Section 78.16, Block 2, Lots 1 and 2. There are approximately 1,600 feet of track on the Property that connects with the Hudson line of CSX at approximately milepost QC 25 in the Village.

6. The BSOR Croton Yard is located in the most industrially developed section of the Village. New York State Route 9, a four lane divided highway, which is the main North/South artery through the Village and for the western portion of Westchester County, is immediately adjacent to and East of the BSOR Croton Yard. A commuter railroad parking lot is located to the South of the BSOR Croton Yard, a massive rail equipment maintenance facility to the West and Southwest, and a commercial warehouse building currently storing tires, to the

² A rail carrier is classified by federal regulations as "Class III" when the carrier has annual revenues of \$20,000,000 or less. 49 C.F.R. Part 1201 1-1. Class III carriers are generally referred to as "shortlines."

North. Just past this warehouse to the North is a major freight rail yard. To the West is the Croton-Harmon Rail Yard, which is a large rail-industrial complex containing numerous tracks and switches for both commuter and freight trains. See Exhibit "A."

7. The Property has, upon information and belief, long been utilized for commercial purposes -- in particular, for the storage and transfer of various products and materials, such as rocks, stone, soil, sand, and other debris -- since at least the early 1960s.

8. More recently, from 1997-2005, the Croton Track and the Transload Facility were used by a prior entity to transfer CD&D from trucks to rail cars for interstate shipment and, ultimately, disposal.

BSOR's Rail Transportation Activities At The BSOR Croton Yard

9. During the last several years, BSOR has sought to provide rail common carrier transportation services at additional locations, both in western New York and elsewhere.

10. As a result of BSOR's efforts to increase the locations of its services, on March 3, 2006, BSOR leased the BSOR Croton Yard. See Exhibit "B."

11. Now, BSOR holds itself out to the public generally to provide common carrier rail service at the BSOR Croton Yard, including transloading and switching services to rail customers delivering or receiving various commodities by truck at the BSOR Croton Yard, transferring containers between trucks and rail cars, and providing other rail transportation services involving the exchange of empty and loaded rail cars for various commodities with CSX.

12. BSOR's ongoing rail transportation operations at the BSOR Croton Yard provide coordination between rail carriers and motor carriers and allow BSOR to provide rail

transportation service economically and efficiently for shippers and consignees, thereby enabling them to have access to the national rail network by means of interchange with CSX.

13. As a result, BSOR's rail transportation operations promote and have a beneficial effect on interstate commerce.

14. Furthermore, without this important rail link at the BSOR Croton Yard, the already overburdened roads in Westchester County will be further inundated with even more long-haul truck traffic.

The Village's Conduct

15. Upon information and belief, the Village Board of Trustees recently held a public hearing "[t]o determine the Village's need for the Property . . . [at] 1A Croton Point Avenue, Section 78.16 Block 2 Lots 1 and 2 as the first step in the process of acquiring the property by eminent domain."

16. Upon information and belief, that night, in furtherance of the Village's attempt at exercising eminent domain to take the Property, the Board of Trustees adopted a full environmental assessment form (the "EAF") as part of the New York State Environmental Quality Review Act ("SEQRA") process.

17. Upon information and belief, a few weeks ago, an appraiser hired by the Village inspected the Property to provide a valuation as part of the condemnation proceeding. Although the Village has so far refused to make it public, the appraiser's report is apparently complete.

18. Upon information and belief, on April 3, 2006, the Village held a "scoping session" concerning the purported condemnation in advance of preparing a Draft Environmental Impact Statement ("DEIS") pursuant to SEQRA.

19. Additionally, upon information and belief, on several occasions over the last year, some of the Defendants have contended that any activities at the Property are subject to and regulated by the Village Zoning Code. Further, some of the Defendants have threatened that, if activity was commenced at the Property without prior approval under the Zoning Code, the Village would issue stop work orders and/or seek some other form of relief.

20. Clearly, condemnation of the Property would cease BSOR's rail transportation activities in Westchester County. Further, application of the Village's zoning and land use provisions would unduly interfere with interstate commerce by giving the Village the ability to deny BSOR the right to conduct operations and would be time consuming, allowing the Village to delay or interfere with BSOR's rail transportation activities almost indefinitely.

21. As a result, BSOR was forced to commence this action seeking declaratory and injunctive relief against the Village.

22. BSOR now moves for a temporary restraining order and a preliminary injunction to prohibit the Village from condemning the Property and from enforcing certain zoning and land use provisions against BSOR.

Irreparable Harm To BSOR

23. Transload facilities like BSOR's are of great interest and value to businesses because they provide companies with an additional option for transportation of their materials and products in interstate commerce.

24. BSOR's Transload Facility is of particular interest to businesses because, in many cases, they can transport their products to the lucrative Westchester County market more easily and inexpensively by rail, rather than by truck.

25. As a result, Coastal has arranged with BSOR for it to transport sand and other building materials and products by rail to the Property for transfer to trucks for distribution throughout the Westchester County market.

26. BSOR has begun to provide such service to Coastal.

27. Coastal has informed me that it would like to enter into a long-term agreement to transport and transload aggregate and other building materials, but it is unwilling to do so given the uncertainty created by the Village's attempts to condemn and/or interfere with the BSOR Croton Yard.

28. In addition, a number of other businesses have expressed an interest in using BSOR's transportation and transloading services at the BSOR Croton Yard. They have refrained from arranging for shipments to or entering into agreements with BSOR due to the Village's conduct.

29. If the Property is condemned, BSOR's relationships with its existing customer will necessarily be terminated, thereby adversely and irreparably affecting BSOR.

30. The result is the same if the Village attempts to or actually halts the operations at the BSOR Croton Yard, even for a short period of time, pursuant to some provision in the Zoning Code or other local regulation(s) or ordinance(s).

31. Coastal needs to have certainty and regularity in the shipment of its products so that it can efficiently control its inventory, coordinate its sales and marketing efforts, and remain profitable.

32. Further, it is difficult logistically for customers such as Coastal to switch back and forth between rail-truck intermodal and all-truck movements.

33. If BSOR cannot guarantee dependable and consistent service, it will be viewed as being too unreliable and therefore not a viable option. In short, BSOR's reputation and goodwill will be severely harmed.

34. If the Property is condemned or BSOR cannot otherwise operate, Coastal will lose the ability to use BSOR and the BSOR Croton Yard. As a result, Coastal will have to cancel its arrangements with BSOR and ship its materials and products via other carriers -- most likely truck carriers. Given the competitive nature of the shipping market, BSOR will likely lose this customer for good.

35. Further, those businesses that have expressed an interest in using BSOR's transportation and transloading services are sure to look elsewhere if there is a threat that the BSOR Croton Yard will be condemned or closed.

36. Additionally, the loss of these customers will effectively preclude BSOR from entering and competing in the Westchester County market for the transloading and transportation of materials and products.

A Preliminary Injunction Benefits The Public Interest

37. The public interest will be served if a preliminary injunction is granted.

38. The continued operation of the BSOR Croton Yard has a beneficial effect on interstate commerce. For example, the BSOR Croton Yard provides businesses with an additional option for transportation of their materials and products in interstate commerce. The continued operation of the BSOR Croton Yard allows BSOR to compete with trucks for long-haul transportation of materials and products, thereby promoting economic and efficient rates for interstate transportation, while at the same time permitting coordination between rail and truck in the form of the operation of an intermodal facility.

39. Further, the roads and highways in Westchester County suffer from congestion, much of it due to long-haul trucking traffic of materials and products. In competing with trucks, the operation of the Transload Facility benefits the public interest by reducing the number of and distance traveled by trucks on the crowded highways and roads in the County. For example, a single railcar loaded with aggregate (i.e., rock) is the equivalent of approximately five tractor trailers. As a result, rail transportation is also recognized as being more fuel efficient and less polluting than motor carriers.

40. Additionally, the operation of the BSOR Croton Yard promotes economic development in Westchester County. A number of jobs have been and will be created for individuals who work and will work at the BSOR Croton Yard.

41. Nor will the requested preliminary injunctive relief harm the public interest.

42. First, there will be no harm to the public resulting from the operations at the BSOR Croton Yard. For example, Coastal's commodities handled at the BSOR Croton Yard will simply be transloaded between rail and trucks and then moved to offsite destinations. There will be no processing of these commodities on the Property, and the commodities are not hazardous materials. Thus, the operation of the BSOR Croton Yard will not harm the public interest.

43. Second, BSOR's operations at the BSOR Croton Yard are subject to numerous federal statutes and regulations governing environmental matters, as well as safety and maintenance of track and equipment.

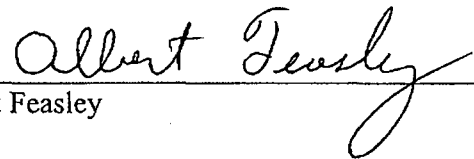
44. Third, BSOR's lease of the BSOR Croton Yard provides additional protections. For example, the lease mandates that BSOR "shall inspect and maintain the Croton Track and related rail facilities and the Croton Property to a condition that permits safe and efficient rail

operation and in accordance with any applicable regulations, including regulations of the [Federal Railroad Administration].”

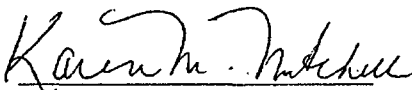
45. Fourth, upon information and belief, the Property has long been utilized for commercial purposes, including as a transloading facility for decades. In the 1960s, the Property was used as a repair garage and for the storage and transfer of various products and materials, such as rocks, stone, soil, sand, and other debris.

46. More recently, the Property has housed a transloading facility, specifically, a C&DD transfer station and processing facility, of which the Croton Track has been an integral part. Thus, BSOR’s present operations are consistent with the Property’s prior long-term use, which has not harmed the public.

47. Finally, BSOR’s operations are in keeping with and ideally suited to the industrial nature of the surrounding area, which is heavily rail-oriented.

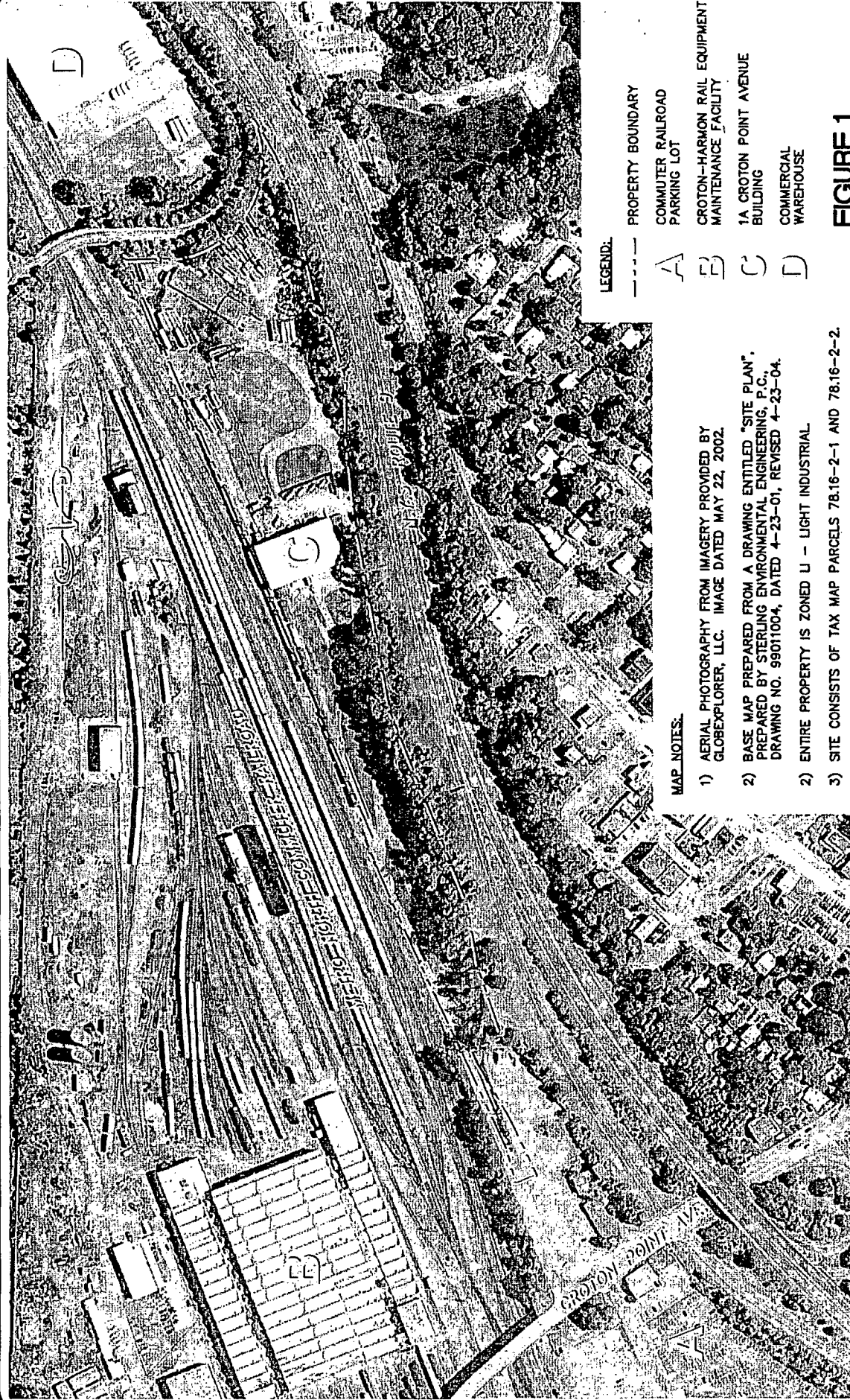

Albert Feasley

Sworn to before me this 9th
day of May, 2006


Notary Public

KAREN M. MITCHELL
No. 01A0513824
Notary Public, State of New York
Qualified in Erie County
My Commission Expires Dec. 27, 09

EXHIBIT "A"



LEGEND:

- PROPERTY BOUNDARY
- A COMMUTER RAILROAD PARKING LOT
- B CROTON-HARMON RAIL EQUIPMENT MAINTENANCE FACILITY
- C 1A CROTON POINT AVENUE BUILDING
- D COMMERCIAL WAREHOUSE

FIGURE 1

MAP NOTES:

- 1) AERIAL PHOTOGRAPHY FROM IMAGERY PROVIDED BY GLOBEXPLORER, LLC. IMAGE DATED MAY 22, 2002.
- 2) BASE MAP PREPARED FROM A DRAWING ENTITLED "SITE PLAN", PREPARED BY STERLING ENVIRONMENTAL ENGINEERING, P.C., DRAWING NO. 99011004, DATED 4-23-01, REVISED 4-23-04.
- 2) ENTIRE PROPERTY IS ZONED U - LIGHT INDUSTRIAL.
- 3) SITE CONSISTS OF TAX MAP PARCELS 78.16-2-1 AND 78.16-2-2.

STERLING

Sterling Environmental Engineering, P.C.
24 Wade Road • Latham, New York 12110

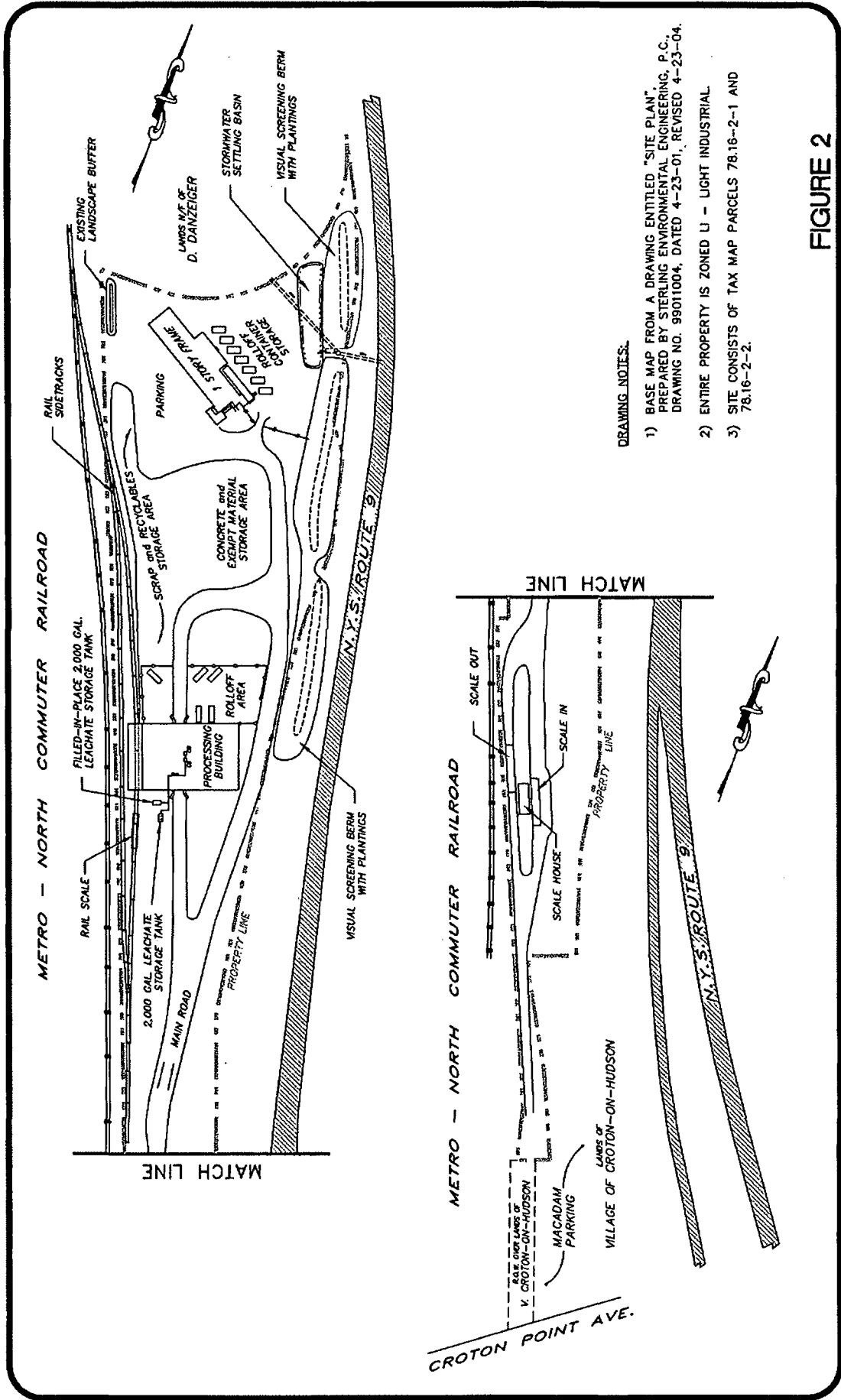
SITE AERIAL
WITH OVERLAY

1A CROTON POINT AVENUE

V. OF CROTON-ON-HUDSON

WESTCHESTER CO., N.Y.

PROJ. No.:	99011	DATE:	5-8-06	SCALE:	1" = 300'	DWG. NO.	99011011	FIGURE	1
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STERLING
Sterling Environmental Engineering, P.C.
24 Wade Road • Latham, New York 12110

WESTCHESTER CO., N.Y.

PROJ. No.: 99011

DATE: 5-8-06

SCALE: 1" = 200'

DWG. NO. 99011012

FIGURE 2

EXHIBIT "B"

LEASE AGREEMENT

This Lease Agreement (the "Agreement") is made as of this 3rd day of March, 2006 by and between RS Acquisition Co., LLC. ("RSA") and Buffalo Southern Railroad, Inc. ("Buffalo Southern") (each a "Party" or together the "Parties").

WHEREAS, Buffalo Southern is a Class III rail common carrier that operates approximately 32 miles of line between Buffalo, New York and Gowanda, New York and provides industrial switching services at Tonawanda, New York; and

WHEREAS, Buffalo Southern desires to provide common carrier and industrial switching services at other locations; and

WHEREAS, Greentree Realty LLC ("Greentree") is the owner and lessor, and RSA, a noncarrier, is the lessee, of an approximately 10 acre parcel of real property located in Croton-on-Hudson, New York, as more specifically described in Exhibit A attached hereto (the "Croton Property"), that includes approximately 1,600 feet of track that connects with the Hudson line of CSX Transportation, Inc. ("CSX") at approximately milepost QC 25 in Croton (the "Croton Track"); and

WHEREAS, the Parties desire to enter into an arrangement pursuant to which (1) RSA will lease the Croton Property, including the Croton Track, to Buffalo Southern and (2) Buffalo Southern will provide common carrier rail service at the Croton Property and on the Croton Track, including transloading and switching services to rail customers delivering or receiving various commodities by truck at the Croton Property, transferring containers between trucks and rail cars and providing other rail transportation services involving the exchange of empty and loaded rail cars for various commodities with CSX.

NOW, THEREFORE, the Parties, intending to be legally bound and in consideration of the foregoing premises and the mutual covenants set forth below, hereby agree as follows:

1. Lease. RSA hereby leases to Buffalo Southern the Croton Property and the Croton Track for purposes of possession, use and occupation by Buffalo Southern in order to provide common carrier and industrial switching services, as described more fully below. Unless terminated earlier upon the mutual written agreement of the Parties or in accordance with Section 8 of this Agreement, the initial term of this Agreement shall be two (2) years. This Agreement shall terminate on the date that is two (2) years after the date of this Agreement; provided, however, that this Agreement shall continue in full force and effect after such date, and may then be terminated upon no less than 180 days' written notice of the intention to terminate by either Party. Notwithstanding any provision to the contrary in this Agreement, a non-defaulting Party may terminate this Agreement in the event of a Default, as defined in section 8 below, by the other Party.

2. Rent.

3. Rail Common Carrier Operations. Buffalo Southern shall at all times during the term of this Agreement have the exclusive right to provide common carrier rail transportation service on the Croton Track and at the Croton Property to rail customers that wish to ship or receive containers or other commodities that may be reasonably handled at the Croton Property and on the Croton Track; provided, however, that Buffalo Southern shall not, without the prior written consent of RSA, handle any hazardous commodities or construction and demolition debris. As described more fully below, the rights and obligations of Buffalo Southern shall include, without limitation, providing employees or agents and equipment necessary to provide such common carrier rail service, establishing and maintaining operating and commercial relationships with CSX and other rail carriers or entities as appropriate, switching and exchanging with CSX loaded and empty rail cars, marketing the rail transportation services of Buffalo Southern to rail customers, determining, except as otherwise provided above, the commodities and rail traffic to be handled at the Croton Property, establishing and maintaining relationships with rail customers, negotiating transportation rates with rail customers, billing and collecting from rail customers, preparing and maintaining railroad accounting records, including without limitation car accounting records, bills of lading, waybills, car hire reports and interchange reports, coordinating day-to-day interactions with CSX and maintaining the Croton Track and related rail facilities in a condition that is adequate for the provision of such common carrier rail transportation service and in accordance with applicable standards, including without limitation standards of the Federal Railroad Administration ("FRA").

4. Maintenance. Buffalo Southern shall inspect and maintain the Croton Track and related rail facilities and the Croton Property to a condition that permits safe and efficient rail operation and in accordance with any applicable regulations, including regulations of the FRA. Buffalo Southern shall not, without the prior written consent of RSA, alter or remove any part of the Croton Track or related rail facilities or construct any additional track or related rail facilities. Buffalo Southern shall maintain any locomotives or other equipment that is necessary or appropriate for its operations on the Croton Track in accordance with any applicable regulations, including without limitation regulations of the FRA.

5. Books and Records. Each Party shall maintain accurate and complete books and records with respect to their respective responsibilities and the activities relating to the performance of this Agreement. Each Party shall have the right, upon reasonable notice to the other and during normal business hours, to inspect such records of the other Party.

6. Indemnification. Buffalo Southern shall indemnify and save harmless RSA and Greentree from and against any claims or liabilities for personal injury, property damage or regulatory fines or claims arising from or in connection with the rail transportation service provided by Buffalo Southern on the Croton Track or the Croton Property. In the event that Buffalo Southern is obligated to indemnify RSA or Greentree, Buffalo Southern shall defend any such claim at its expense with counsel of its choice, which

counsel shall be reasonably acceptable to RSA or Greentree, and with discretion to settle or defend such claims as it deems appropriate.

7. Insurance. During the term of this Agreement, Buffalo Southern shall provide and maintain in effect a policy of comprehensive general liability insurance, including contractual liability assumed by Buffalo Southern under the provisions of this Agreement and coverage for employees subject to the provisions of the Federal Employers Liability Act, covering the liability of Buffalo Southern, RSA and Greentree for any and all property damage, personal injury, or death arising out of any cause whatsoever, regardless of degree of fault, in the exercise by Buffalo Southern of its rights or the performance of its responsibilities pursuant to this Agreement. Such policy shall name RSA and Greentree as additional insureds and provide for a minimum of 30 days' advance notice before any changes or cancellation may become effective. Such insurance shall have policy limits of not less than \$3,000,000 per occurrence and \$3,000,000 in the aggregate with deductible amounts not in excess of \$25,000 and shall be with insurers and in form acceptable to RSA and Greentree. Buffalo Southern shall provide to RSA and Greentree written evidence of the amount of such insurance and its effectiveness and shall promptly notify RSA and Greentree of any termination, decrease, lapse or other adverse change in coverage. In the event that such insurance provides coverage only on a claims-made basis, Buffalo Southern shall, upon any termination of such coverage, purchase an extended reporting option satisfactory to RSA and Greentree.

8. Default and Remedies. The following occurrences or events shall constitute events of default: (a) the failure of either Party to make payment of any amount due hereunder continuing for 5 business days after the date when such payment was due; (b) the failure of either Party to perform any material covenant, obligation or condition on its part to be performed under this Agreement and the continuance of such failure for 10 days after notice from the other Party; (c) the insolvency of either Party or failure to pay its debts as they come due, the appointment of a receiver or trustee for either Party or for any substantial part of its property or the filing of an involuntary case against either Party under the Bankruptcy Code and which is not dismissed within 30 days; or (d) the filing by either Party of a voluntary case under the Bankruptcy Code or any other law relating to the liquidation or reorganization of debts or making a general assignment for the benefit of creditors. The occurrence of any such event prior to the giving of any required notice or the expiration of any applicable grace period shall constitute an "Event of Default", and after the giving of any required notice or the expiration of any applicable grace period shall constitute a "Default". Upon the occurrence of any Default, the non-defaulting Party may, at its option, terminate this Agreement by giving the defaulting Party written notice of such termination. In addition, the nondefaulting Party may exercise any other remedy at law or in equity that may be available. The remedies set forth in this section 10 are cumulative, and the exercise by either Party of one or more of such remedies or the failure on the part of either Party to exercise any remedy provided for hereunder shall not prejudice the right of any such Party to exercise any remedy from time to time and as often as it may deem necessary.

9. Dispute Resolution. The Parties shall attempt in good faith to resolve any issues, claims or disputes relating to or arising under this Agreement through informal discussions. Each Party shall designate a person to represent it in all such discussions. In

the event that either Party raises an issue, claim or dispute, the other Party shall promptly, and no later than 5 days after notice of an issue, claim or dispute, engage in such informal discussions. If any such issue, claim or dispute cannot be satisfactorily resolved within 15 days after any such notice, either Party may initiate legal proceedings, but no such proceedings may be initiated prior to the expiration of such 15 day period.

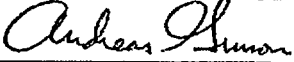
10. Confidentiality and Nondisclosure. Neither of the Parties shall, without the prior written consent of the other Party, disclose or communicate to third persons or use for any purpose other than the implementation of this Agreement any information obtained from the other Party unless (a) disclosure is compelled by judicial process or (b) such information is otherwise legally in the public domain. Neither of the Parties, nor its counsel or any agent, shall, except as may be necessary to implement this Agreement or, in the opinion of counsel to a Party, to comply with the requirements of applicable law, rule or regulation, disclose to any third person the fact of or any of the terms of this Agreement without the prior written consent of the other Party.

11. Assignment. The operational rights and duties under this Agreement shall not be assigned by Buffalo Southern without the prior written consent of RSA, which consent shall not be unreasonably delayed, conditioned or withheld.

12. Other. This Agreement is subject and subordinate to the terms and conditions of the lease of the Croton Property from Greentree to RSA, as such lease may be amended from time to time. Buffalo Southern shall not assign or sublet any interest in the Croton Property. In the event of a condemnation or a taking of the Croton Property by eminent domain, whether whole or partial, Buffalo Southern shall have no right to, or interest in, and shall make no claim for, any compensation awarded for such taking.

IN WITNESS WHEREOF, THE PARTIES HAVE EXECUTED THIS AGREEMENT
AS OF THE DATE FIRST WRITTEN ABOVE.

RS ACQUISITION CO, LLC


By: Andrew Y. Givens
Its: CEO

BUFFALO SOUTHERN RAILROAD, INC.

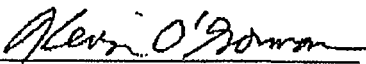

By: KEVIN O'GORMAN
Its: CEO

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BUFFALO SOUTHERN RAILROAD, INC.,

Plaintiff,

- against -

AFFIDAVIT OF
ALBERT FEASLEY

CIVIL ACTION No.: 06 CIV. 3755

JUDGE MCMAHON

VILLAGE OF CROTON-ON-HUDSON; GREGORY J. SCHMIDT, as Mayor of the Village of Croton-on-Hudson; DANIEL O'CONNOR, P.E., as Engineer and Building Inspector for the Village of Croton-on-Hudson; RICHARD F. HERBEK, as Manager of the Village of Croton-on-Hudson; THOMAS P. BRENNAN, as Trustee on the Village Board of Trustees; CHARLES A. KANE, as Trustee on the Village Board of Trustees; ANN GALLELLI, as Trustee on the Village Board of Trustees; LEO A. W. WIEGMAN, as Trustee on the Village Board of Trustees; CHRIS KEHOE, as member of the Village Planning Board; VINCENT ANDREWS, as member of the Village Planning Board; FRANCES ALLEN, as member of the Village Planning Board; ROBERT LUNTZ, as member of the Village Planning Board; KATHLEEN RIEDY, as member of the Village Zoning Board of Appeals; RHODA STEPHENS, as member of the Village Zoning Board of Appeals; RUTH WAITKINS, as member of the Village Zoning Board of Appeals; WITT BARLOW, as member of the Village Zoning Board of Appeals; and PAUL ROLNICK, as member of the Village Zoning Board of Appeals,

Defendants.

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss.:

Albert Feasley, being duly sworn, deposes and says:

1. I am the Vice President of Operations for BSOR, and I submit this affidavit in further support of BSOR's motion for a preliminary injunction.

2. Today, I am awaiting the arrival of rail cars to the BSOR Croton Yard from Coastal containing sand and other building materials. Currently, these rail cars are located on CSX's line within one mile of the BSOR Croton Yard.

3. Until today, I had been advised that these rail cars would arrive at the BSOR Croton Yard either today or tomorrow. This morning, a CSX representative informed me that CSX would deliver the cars today. Shortly thereafter, CSX advised me that it would transport the cars to the BSOR Croton Yard tomorrow morning, following a track safety inspection of the Croton Track, where the cars will be interchanged. I had already inspected the Croton Track and found it to be in compliance with all applicable regulations. Subsequently, however, another CSX representative stated that CSX will not deliver the cars due to the pendency of this action.

4. BSOR has asked CSX to enter into an interchange agreement, but, to date, CSX has declined.

5. Nevertheless, BSOR subscribes to the Association of American Railroads interchange rules, and I understand that CSX does as well. These rules provide detailed guidance and requirements for the interchange of rail cars even without a written interchange agreement. As a result, even without an interchange agreement, BSOR maintains that CSX has an obligation to provide service requested by customers and, as part of providing that service, to interchange cars with CSX. BSOR is willing to permit CSX to operate on the Croton Track for purposes of interchanging cars even if there is no interchange agreement. In fact, as demonstrated below, CSX has already done so.

6. After the above cars are interchanged, BSOR is going to unload them and load trucks for Coastal for the sale and distribution of these products by Coastal in the Westchester County market.

7. I am aware that, in opposition to BSOR's pending motion, the Village has alleged that BSOR is not currently operating at and not publicly offering service at the BSOR Croton Yard. These contentions are utterly false.

8. Since executing the lease in March 2006, BSOR has held itself out to the public generally to provide common carrier rail service at the BSOR Croton Yard, including transloading and switching services to rail customers delivering or receiving various commodities by truck at the BSOR Croton Yard, transferring containers between trucks and rail cars, and providing other rail transportation services involving the exchange of empty and loaded rail cars for various commodities with CSX.

9. More specifically, on or about March 30, 2006, BSOR interchanged 14 rail cars with CSX from the BSOR Croton Yard for interstate transportation. BSOR charged a customer for BSOR's switching and interchange service. This interchange, as with all of BSOR's interchange of rail cars with CSX occurred on the Croton Track, not the through railroad line. It would be impractical to attempt to interchange with CSX on the through railroad line because it is heavily used both for freight and passenger operations.

10. Coastal has arranged with BSOR for it to transport sand and other building materials and products by rail to the BSOR Croton Yard for transfer to trucks for distribution throughout the Westchester County market. As I mentioned above, BSOR is expecting to interchange and unload these rail cars containing sand and other building materials on May 25th.

11. Since this Court's grant of the temporary restraining order, Coastal has begun the process of entering into a long-term agreement to transport and transload sand, aggregate, and other building materials and products. In the event that this Court does not grant the requested injunctive relief, Coastal has advised me that it is likely that it will terminate this process as the

uncertainty created by the Village's attempts to condemn and/or interfere with the BSOR Croton Yard will reemerge.

12. In addition, since March 2006, I have spoken with a number of other businesses that have expressed an interest in using BSOR's transportation and transloading services at the BSOR Croton Yard. Among other things, I have explained BSOR's services to these prospective customers and offered them initial transportation rate quotations. Again, in the event that this Court does not grant the requested injunctive relief, those businesses that have expressed an interest in using BSOR's transportation and transloading services are sure to look elsewhere if there is a threat that the BSOR Croton Yard will be condemned or closed.

13. Finally, since March 2006, BSOR has procured different pieces of equipment to load and unload rail cars at the BSOR Croton Yard.

The Croton Track

14. The Croton Track is approximately 1,600 feet long. It consists of a connection to a through railroad line and then splits into two tracks, one of which runs through the Transloading Facility. The other track is parallel to the first and is used primarily for storage. The Croton Track connects with the Hudson railroad line at approximately milepost QC 25 in the Village and is located wholly within New York State.

15. The Croton Track is "stub-ended," meaning that it does not connect with another rail line at both ends; rather, it ends on one side with a barrier.

16. The track is a lighter weight than the weight of the rail on the through line that connects with the Croton Track.

17. There is no regularly scheduled service on the Croton Track; instead, BSOR provides service on an as-needed basis.

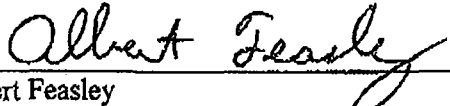
18. When BSOR does provide service on the Croton Track, it is typically used for loading, unloading, storage, or switching operations.

19. The Croton Track was not built to, nor is it used by BSOR, to invade another railroad's territory.

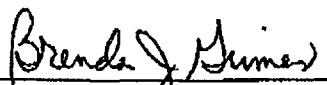
20. On the contrary, the BSOR Croton Yard has generated and is generating rail business for CSX. Under BSOR's operation, the Yard will be used for transloading rail cars, switching them within the Yard, and interchanging them with CSX. Further, BSOR is holding itself out as a common carrier to provide service to any rail customer that has commodities that can reasonably be handled at the Yard. This is not invasion of the territory of CSX; rather, it is switching and facilitating the movement of rail traffic that only CSX, the long-haul carrier, can handle. In sum, BSOR and CSX must work cooperatively to generate and move rail business; BSOR is not an "invader" attempting to take business away from CSX.

21. Greentree Realty, LLC owns the Croton Track.

22. BSOR has been a rail carrier operating at locations other than the BSOR Croton Yard since 1982. The Croton Track was not acquired in order to make BSOR a rail carrier and does not comprise BSOR's entire operations.


Albert Feasley

Sworn to before me this 24th
day of May, 2006


Notary Public

BRENDA J. GRIMES
Notary Public, State of New York
No. 01GR8133957
Qualified in Westchester County
Term Expires September 19, 2009

EXHIBIT E



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Paul.Hitchcock@csx.com

May 31, 2006

Via Facsimile No. 914-390-4152

The Honorable Colleen McMahon
Judge of the United States District Court
Southern District of New York
United States Courthouse, Room 533
300 Quarropas Street
White Plains, NY 10601

Re: Buffalo Southern Railroad, Inc. v. Village of Croton, et al.
Case No. : 06 CIV 3755

Dear Judge McMahon:

I have just finished reviewing a copy of a letter to Your Honor from Mr. McManus dated May 30, 2006. In that letter, he states: "The only conclusion that can be drawn from the above facts is that A&P's actions on behalf of the Village Defendants led CSX to withhold the Coastal rail cars from BSOR." Given that CSXT provides line haul transportation to and from the New York area, and must be involved in the movement of any rail cars to or from the siding at Croton, I have found it appropriate to have discussions with attorneys for both parties. I hope that you will not consider it inappropriate for CSXT to address conclusions contained in Mr. McManus' letter in a similar fashion.

The purpose of this letter is to assure you that CSX Transportation, Inc. has reached all decisions about this matter independently and has not been influenced in the slightest by the actions of the Village or its counsel.

Let me explain the difficult situation in which CSXT finds itself:

When it first came to my attention that the Buffalo Southern, a short line railroad operating in the Buffalo, NY area, was taking the position in legal documents filed with this Court that it was operating as a common carrier by rail on the siding at Croton, NY – without so much as filing papers with the US Surface Transportation Board (STB) – I was frankly surprised. In 29 years of practice before the STB and its predecessor, the Interstate Commerce Commission, it has always been my view that to have common carrier status, an operator of a railroad must be certificated by the agency to operate a

"line of railroad." (Carriers operating prior to 1920 were grandfathered.) An entity moving freight cars from one position to another on an exempt industrial siding is not engaged in common carriage by rail. It is merely an industrial switching operation which is entitled to none of the rights (and none of the many obligations) of a carrier operating a line of railroad. To my knowledge, the position urged by lawyers for Buffalo Southern is without precedent, and I do not expect it would be upheld by the STB.

Further militating against the position that Buffalo Southern is asking CSXT to accept is the past history of operations on this track. The sidetrack in question has long been regarded as an industry sidetrack, not a line of railroad. An industry sidetrack is a piece of track that connects to the line haul or local switching railroad. It is typically located on a shipper/receiver's property, sometimes an industrial park. The common carrier providing service to the customer enters into a sidetrack agreement with the customer or owner of the track with supplementary agreement with the actual shipper/receiver, if different. The sidetrack agreement defines responsibilities for, *inter alia*, liability, maintenance, and clearances to ensure cars do not collide with obstacles as they are moved along the track. I understand that CSXT or its predecessor, Conrail, entered into an industrial sidetrack agreement at some time in the past with a non-railroad entity at this location.

In deciding how to address these questions, CSXT must make its best assessment of the legal status claimed and act in a way that it believes is consistent with the policies and precedents of our regulator, the STB. Accordingly, when I learned that Buffalo Southern was demanding to be treated by CSXT as a rail carrier with rights of interchange under the ICC Termination Act administered by the STB (ICCT Act), I concluded that there was no basis for CSXT to recognize that alleged status absent some direction from the STB or this Court.

CSXT does not have an "interchange" with the Buffalo Southern at Croton. An interchange is created when two carriers agree to hold themselves out to the public and to the rest of the rail industry as conducting a set of well-understood relationships at a location. An agreement to establish an interchange is manifested by recording the fact with Railinc, a wholly owned subsidiary of the Association of American Railroads. Railinc maintains the industry's computer reference files which are used by all railroads as a basis for their computer systems to process shipping instructions and for many other purposes. (The STB can order the creation of an interchange or its cancellation; neither party can unilaterally create an interchange or unilaterally cancel one.) The act of CSXT in delivering or picking up cars from a sidetrack at Croton does not constitute interchange of traffic between two carriers.

CSXT accordingly does not have an interchange agreement with Buffalo Southern regarding the track at Croton. Rail carriers enter into interchange agreements which identify the tracks on which cars will be left, define liability as between the parties, and otherwise govern the details of conducting interchange. AAR "Interchange Rules" do not govern processes and rights for interchange of traffic – they govern the repair and maintenance of freight cars that are interchanged among railroads.

CSXT does not gain anything from holding cars in its yard awaiting resolution of the Buffalo Southern's status. I did offer to Buffalo Southern's counsel in our call of the 25th, to hold a discussion of the possible ad hoc handling of the three cars in a three-way conversation among CSXT, Buffalo Southern and the STB's Office of Compliance and Enforcement. That offer was not accepted by them at that time. I renew that offer here. Alternatively, and Buffalo Southern's attorneys did react favorably to this suggestion, I offered to prepare an industrial sidetrack agreement(s) among CSXT and the current owner(s) or lessee(s) of the track in question, with appropriate reservations of rights and legal positions. That is to say, if an agreement governing the customary elements of a sidetrack agreement(s) can be reached among the appropriate parties, CSXT is prepared to deliver the cars in question, without requiring or expecting Buffalo Southern to waive any legal arguments it wishes to pursue before this court or the STB. On the very next business day following that conversation I engaged outside counsel to begin preparing such a document(s). CSXT will continue to pursue this avenue.

CSXT's physical connection with the track at Croton is by way of certain operating rights over Metro North which give us the right to pick up and deliver to customers there. CSXT does not anticipate any objection by Metro North should the Court or STB find that Buffalo Southern is a rail carrier, but neither can CSXT assure anyone that Metro North will not object.

Let me make clear that CSXT will comply with whatever decision this Court or the STB makes about Buffalo Southern's status. CSXT has not sought to intervene in the litigation on either party's side. CSXT will treat with Buffalo Southern at Croton as a common carrier entitled to interchange rights if that is the decision. That decision will impose certain obligations on CSXT under the ICCT Act and STB rules, and we will abide by them. If the decision is that Buffalo Southern's operation is an industrial switching function, CSXT is prepared to enter into sidetrack agreement(s) and to transport freight to and from the customers at that location. Pending a final decision, CSXT will continue to progress the interim arrangements discussed above - a sidetrack agreement(s) with reservation of rights and positions.

Very truly yours,



Paul R. Hitchcock

PRH/pkw

cc: Mr. John T. McManus, Facsimile No. 518-432-0086
Mr. Michael Gerard, Facsimile No. 212-715-1399
Mr. James Howard, Facsimile No. 617-886-9324

**FACSIMILE TRANSMISSION**

TRANSMIT TO:	Telephone No.	Facsimile No.
The Honorable Colleen McMahon Judge of the United States District Court Southern District of New York		914-390-4152

CC:	Mr. John T. McManus Mr. Michael Gerard Mr. James Howard	518-432-0086 212-715-1399 617-886-9324
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RE: Buffalo Southern Roadroad v. Village of Croton-on-Hudson, et al.

FROM: Paul R. Hitchcock
Associate General Counsel - Regulatory
Law Department
Telephone: 904 / 359-1192
Facsimile: 904 / 359-7518

DATE: May 31, 2006

NUMBER OF PAGES, INCLUDING COVER: 4

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