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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34903



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

RESPONSE OF BUFFALO SOUTHERN RAILROAD, INC.
TO "REPLY OF THE VILLAGE OF CROTON-ON-HUDSON TO
MOTION TO DISMISS NOTICE OF EXEMPTION"

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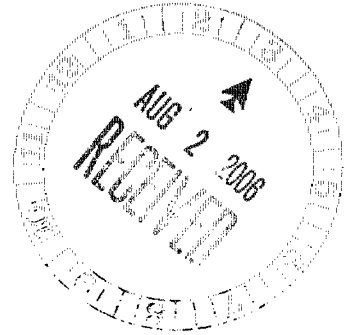
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Dated: August 1, 2006

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MOTION TO DISMISS NOTICE OF EXEMPTION"

Buffalo Southern Railroad, Inc. ("BSOR") submits this response to the "Reply of the Village of Croton-on-Hudson to Motion to Dismiss Notice of Exemption" (the "Reply"). Contrary to the arguments advanced by the Village of Croton-on-Hudson (the "Village"), the track on which BSOR is operating in Croton on Hudson, New York (the "Croton Track") is an excepted track within the meaning of 49 U.S.C. 10906, rather than a private track or a line of railroad. As a consequence, the Board lacks authority to regulate the acquisition or operation of the Croton Track. Thus, the Verified Notice of Exempt Transaction (the "Notice") filed by the BSOR should be dismissed.

ARGUMENT

I. The Croton Track is Not a Private Track.

Relying upon early 20th century decisions of the Interstate Commerce Commission (the "ICC"), the Village argues that the Croton Track was formerly private track when in possession of the prior tenant of the property on which the Croton Track is located. Based upon a review of BSOR's web site, which contains a list of services offered by BSOR at the Croton Track, the Village concludes that the most of the services "are consistent with a characterization of the Track as private track." Reply at 7-8. Thus, the Village contends, the Croton Track is a "private track" that is entirely outside the jurisdiction of the Board. As demonstrated below, the Village is incorrect; the Croton Track is not a private track.

As an initial matter, the Village correctly recognizes that whether or not the Croton Track was a private track for purposes of the prior tenant is not determinative for purposes of deciding its status currently. Rather, the current and intended use of the Croton Track, together with application of the other criteria typically used, dictates whether it is an excepted track, a line, or a private track.

The primary characteristic of a private track is the absence of any common carrier holding out the opportunity to provide rail service to multiple customers that have plants or facilities located adjacent to the track. Private tracks are "typically built and maintained by a shipper (or for a shipper at the shipper's expense) and operated by the shipper (or its contractor) to serve only that shipper, moving the shipper's own goods, so that there is no "holding out" to serve other shippers for compensation." B. Willis, C.P.A., Inc.--Petition for Declaratory Order, STB Finance Docket No. 34013, decision

served October 3, 2001. If service is provided to a shipper/owner by contract with a rail carrier, private tracks are characterized by an absence of any possessory interest in the track on the part of the rail carrier, no obligation of the rail carrier to pay to use the track, maintenance by the shipper/owner at its expense, rather than maintenance paid for or performed by the rail carrier and, most importantly, no attempt by the rail carrier to hold itself out to serve any customer other than the shipper/owner. The New York Central R.R. Co. v. Southern Railway Co., 226 F. Supp. 463 (N.D. Ill. 1964); Hanson Natural Resources Company--Non-Common Carrier Status--Petition for Declaratory Order, ICC Finance Docket No. 32248, decision served December 5, 1994.

Application of these criteria here compels the conclusion that the Croton Track is not a private track in the possession of and as operated by BSOR. Indeed, BSOR is holding itself out to provide common carrier service to any customers that may require transloading services that can feasibly be provided on the Croton Track. Furthermore, BSOR has a possessory interest in the Croton Track by means of its lease, pays rent for its use of the Croton Track, and is required to maintain the Croton Track at its own expense. Unlike the common situation with respect to any private track, there is no shipper or rail customer that has a plant or facility located on the Croton Track; rather, BSOR's rail customers are located elsewhere and avail themselves of BSOR's transloading services on the Croton Track.

The services shown on the BSOR web site, which the Village alleges are "consistent" with private track, are typical of operations on excepted track or lines, rather than on private track. Specifically, offering rail and truck scales, having multiple tracks available for loading and unloading cars and equipment for loading and unloading

different types of commodities, providing an enclosed structure with a rail dock inside, and promising secure premises are all common characteristics of switching operations on section 10906 track.

The ICC decisions relied upon by the Village are distinguishable from the facts of this matter and do not support the conclusion that the Croton Track is a private track. More specifically, the general statements in these cases relating to lines of railroad, excepted track, and private track are simply not probative for purposes of the detailed analysis that is required in order to determine the proper classification of any particular track.

For example, the issue in Operation of Lines by Coal River & Eastern Ry. Co., 94 I.C.C. 389 (1925), was whether to grant a certificate of public convenience and necessity to a noncarrier affiliate of a coal company for the operation of tracks that were constructed between coal mines and connections with a main line of Chesapeake & Ohio Railroad. The ICC determined that both of the tracks were lines of railroad, rather than excepted spur tracks, and that the lines should be operated by Chesapeake & Ohio rather than the coal company affiliate.

In Atchison, Topeka & Santa Fe Ry. Co. v. Kansas City Stock Yards Company, 33 I.C.C. 92 (1915), the issue was whether the stockyard company, which had tracks within its facilities, could be compensated by line haul railroads for certain transportation services that the stockyard company provided on such tracks. The ICC determined that the car movements over the stockyard track constituted "transportation" provided to shippers generally rather than "plant service" performed only for particular shippers, as contended by the line haul carriers. Although the stockyard company was entitled to

compensation, it could not be compensated by means of a tariff, because it was not a common carrier.

The facts of General Electric Co. v. New York Central & Hudson River R. R., 14 I.C.C. 237 (1912), led the ICC to an opposite conclusion. General Electric attempted to charge New York Central for certain storage tracks provided and switching activities performed by General Electric at its mega-facility in Schenectady, New York. The ICC found that the activities performed by General Electric within its plant facilities were solely for its benefit and convenience rather than part of any transportation provided by New York Central.

In sum, the Croton Track is not private. BSOR provides common carrier transloading to customers generally, and the Croton Track is not used exclusively for the benefit of any particular customer.

II. An Excepted Track Need Not be Adjacent to a Line of the Same Rail Carrier.

The Village also attempts to support the proposition that the Croton Track is private by advancing the argument that, in order to be an excepted track within the meaning of section 10906, a track must be "adjacent to a line of the railroad operating over the [excepted track]". Reply at 8. Stated differently, the Croton Track is not a section 10906 track for BSOR, according to the Village, because it is not contiguous or auxiliary to the BSOR line in Buffalo. The sole support cited by the Village for this proposition is Effingham Railroad Company--Petition for Declaratory Order, 2 S.T.B. 606 (1997), reconsideration denied, Effingham Railroad Company--Petition for Declaratory Order--Construction at Effingham, Illinois, et al., STB Finance Docket No. 41986, decision served September 18, 1998, aff'd sub nom. United Transportation Union

v. STB, 183 F.3d 606 (7th Cir. 1999) ("Effingham"). As shown below, Effingham is distinguishable from the situation relating to the Croton Track and does not support the weight that the Village attempts to place upon it.

As a threshold matter, Effingham does not hold or otherwise state that a section 10906 track must be adjacent to a line of railroad of the same carrier. The issue did not arise in Effingham, and the Board did not base its decision upon, or even comment on, any purported requirement that an excepted track must be connected to a line of railroad of the same carrier. Thus, the Village's reliance on Effingham is based on its own flawed interpretation of the decision, rather than the plain language. As shown below, however, Effingham does not support this tortured interpretation.

As the Board is well aware, the Effingham decisions involved a rather complex set of facts where a noncarrier ultimately acquired authority from the Board to operate into and out of an industrial park by means of an existing track and newly constructed track, all of which was or would be owned by other parties. The Board determined that the first step of the proposed transaction--operation of a 206-foot track that connected Conrail to an existing shipper located in the park--was subject to its jurisdiction under 49 U.S.C. 10901, because, at the time, the track would constitute the entire trackage to be operated by the noncarrier that would become a carrier. Operation over an extension of the 206-foot track was found to be outside the scope of the Board's licensing authority, and within section 10906, because the track was entirely within an industrial park. Finally, operation over another newly constructed track that would leave the industrial park in order to provide a connection with Illinois Central was considered to be a line of railroad.

The Board explained its decision to subject the 206 foot segment to its licensing authority because it constituted Effingham Railroad's entire operation. Decision served September 18, 1998 at 5. In subsequent decisions, the Board has cited Effingham for the proposition that the proposed acquisition and operation of an excepted section 10906 track by a noncarrier requires Board authorization if the track will constitute the entire trackage operated by the noncarrier. See, e.g., Union Pacific Railroad Company--Operation Exemption--In Yolo County, California, STB Finance Docket No. 34252, decision served December 5, 2002; Texas Central Business Lines Corp.--Operation Exemption--Midtexas International Center, STB Finance Docket No. 33997, decision served September 20, 2002; Central Illinois Railroad Company--Lease and Operation Exemption--Lines of The Burlington Northern and Santa Fe Railway Company at Chicago, Cook County, Illinois, STB Finance Docket No. 33960, decision served September 12, 2002. Thus, Effingham stands only for the proposition that a noncarrier requires Board authorization when acquiring and operating a section 10906 track if the track will constitute the entire operation of the new operator, which is not the situation presented here.

The Village recognizes that BSOR was a licensed common carrier before acquiring and operating the Croton Track and that this fact distinguishes the BSOR situation from Effingham. Reply at 9. Contrary to the Village's argument, however, the "entire line" distinction is critical and leads to the conclusion that Effingham is not only inapposite based on its holding, but that it is also inapplicable to the facts of this case. Stated differently, Effingham does not apply, because the Croton Track does not constitute the entire line of BSOR.

As noted above, Effingham also involved the newly-formed rail carrier's operation of an additional, newly-constructed line that extended its operations outside of the industrial park. In analyzing this operation, the Board relied upon the "purpose and effect" test, promulgated in the Texas & Pacific Railway Company v. Gulf, Colorado & Santa Fe Railway Company, 270 U.S. 266 (1926), which was discussed in the Motion to Dismiss, and which involves a substantial extension of a carrier's line into territory not previously served and already served by another carrier. As explained in the Motion to Dismiss, Texas & Pacific involved facts far different than those in this case. Here, BSOR is not invading the territory of CSX in order to compete such that Board scrutiny and authorization would be appropriate. Rather, BSOR seeks only to work jointly with CSX in order to cultivate new rail customers to be served on the Croton Track. Indeed, since there are no existing rail customers located on the Croton Track, and CSX has expressed no interest in developing customers in order to serve them directly on the Croton Track, there could not possibly be any danger of BSOR invading the territory of CSX.

In Effingham and its progeny, the Board has used language referring to the ability to "serve new customers" as a reason to exercise its licensing authority under section 10901. This language is derived from the purpose and effect test of Texas & Pacific, and it makes sense to apply such an analysis when the question is whether acquisition or operation of a line will enable an existing carrier substantially to expand its service in order to reach "new" customers that are already served by another carrier. The "new customer" analysis does not make sense, however, if used in connection with the Effingham rationale--regulation is appropriate if the track to be acquired would constitute

the entire line of the noncarrier seeking to operate the track. Indeed, for a noncarrier commencing its initial operations, any customer is a new customer.

BSOR has not identified any cases in which the issue was whether, in order to be an excepted track under section 10906, the track must be physically connected to a line of railroad of the same carrier. The plain language of section 10906 does not, however, give any credibility to--much less compel--such a conclusion. Furthermore, the substantial body of case law that has developed with respect to the criteria for determining whether a track is excepted or a line of railroad applies equally well whether a section 10906 track is physically connected to a line of the same carrier or is not connected. In other words, the intended use test, the purpose and effect test, and the other criteria typically evaluated can be applied and trusted to lead to the correct conclusion, whether there is a physical connection or not. Finally, it is simply not logical to acknowledge, as the Village does, that the Croton Track would be a section 10906 track if CSX leased and operated the Croton Track for transloading and switching purposes, but then to argue that it is not a section 10906 track if BSOR performs the same switching and transloading services and relies on CSX for line haul movement.

III. Even Private Track May Be Operated by a Common Carrier.

As demonstrated above, the Croton Track is not a private track; rather, it is an excepted track under section 10906. Even if the Croton Track were found to be a private track, however, the result for purposes of the operation of the Croton Track would be the same as if it were determined to be a line of railroad. In either case--whether the Croton Track is a private track or a line--common carrier operations are possible with STB authority. The New York Central Railroad Company v. Southern Railway Company;

Kaw River Railroad, Inc.--Acquisition and Operation Exemption--The Kansas City Southern Railway Company, STB Finance Docket No. 34509, decision served May 3, 2005; Ohio Valley Railroad Company--Acquisition and Operation Exemption--Harwood Properties, Inc., STB Finance Docket No. 34486, decision served February 23, 2005.

Moreover, the Village concedes, as it must, that such authority may be obtained pursuant to the Notice even if the Croton Track is a private track. Reply at 9.

IV. The Village's New Attempt to Have the Board Reject the Notice is Unavailing.

Although clearly irrelevant to the Motion to Dismiss and the Village's opposition, the Village has gratuitously attempted to bolster its earlier arguments for rejection of the Notice. Even if the Board considers these arguments, they do not mandate rejection of the Notice.

The Village claims that the jurisdiction of the Board is being invoked in "novel ways" in order to use preemption under 49 U.S.C. 10501. On the contrary, however, there is nothing novel about the Notice or the Motion to Dismiss. First, BSOR brought to the Board, before the Village bothered to do it, the question concerning the status of the Croton Track. Second, the filing of a notice accompanied by a motion to dismiss is a standard procedure used to obtain clarification from the Board. Most significantly, BSOR did not file its notice in order to use preemption. Preemption has already been recognized in the proceedings before the United States District Court for the Southern District of New York.

To the extent the Village suggests or insinuates that the Notice is an "abuse" of the Board's processes by BSOR or that the procedures are being used by BSOR for "sham purposes," such suggestions are wholly without merit. Contrary to the Village's

assertion, BSOR has an obvious legitimate business purpose in providing common carrier service for hire at the Croton Track. Furthermore, as the Board recognizes, the class exemption notice procedures do not require parties to explain why they are filing notices or to justify their business purposes. Furthermore, BSOR is not injecting itself, nor is anybody bringing BSOR into, any dispute between the Village and the owners or operators of any waste transfer facility at the Croton Track. As the Village well knows, BSOR is not a party to any litigation in state court involving the Village and others. Moreover, there is no waste transfer facility operating at the Croton Track, and BSOR is a rail carrier, not a waste transfer facility operator, that is currently enjoined from handling solid waste on the Croton Track.

Finally, the Village again argues that the Notice should be rejected for the "same reasons" that the Board rejected the notice of Northeast Interchange Railway ("NIR") in 2005. As explained in the Motion to Dismiss, BSOR is not NIR (nor are they affiliates), and the facts and circumstances are vastly different. NIR had state and local permits to conduct waste transfer operations, and it also desired to operate the Croton Track as a line of railroad. Any dispute between NIR and the Village concerning waste transfer operations is simply not a part of this proceeding in any respect and certainly provides no basis to reject the Notice. The Village's repetition of these allegations does not make them true or relevant.

V. The District Court's Decision Conclusively Determined that
BSOR is a Common Carrier at the Croton Track Entitled to Preemption.

The Village argues that the District Court has not decided "issues relevant to the Board's determination of its jurisdiction and authority over BSOR's operations in the

Village" and that the Board may determine the "scope" of preemption. Reply at 8, fn. 8 and 10. As demonstrated below, this argument is without merit.

The District Court decided that the local zoning laws and other local regulations of the Village were preempted pursuant to 49 U.S.C. 10501. In order to reach such a conclusion, the Court had to, and in fact did, determine that BSOR is providing rail transportation service at the Croton Track and is doing so as a common carrier. The time for the Village to take an interlocutory appeal from the preliminary injunction decision has come and gone. Consequently, unless and until there is a subsequent decision by the District Court or the Court of Appeals reversing the decision, it is binding on BSOR and the Village and has res judicata effect for purposes of any proceedings before the Board.

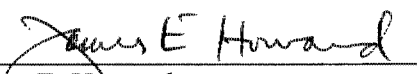
The Court considered whether to refer any issues to the Board and decided not to do so, reasoning that reference was not necessary for the resolution of the preemption issue framed by the motion for a preliminary injunction. The Court observed that if the Village could "convince me that the resolution of that question [whether the Croton Track is within the exclusive jurisdiction of the Board] is necessary to the final resolution of this lawsuit, I will, as indicated previously, refer appropriate questions to the STB for resolution". Decision at 28. One of the questions that the Court indicated that it would refer if necessary was "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". Decision at 28, fn. 9 (emphasis added). It is evident from this statement that the Court believed that it had decided that BSOR was in fact a common carrier and that the issue for the Board would be whether BSOR, as a common

carrier at the Croton Track, required Board authority or not. Significantly, this is the same issue that BSOR raised by means of the Notice and the Motion to Dismiss. Thus, the division of labor--or the questions decided or to be decided by the Court and the Board, respectively--has been clearly articulated, and there is no room in any proceedings before the Board for the Village to relitigate the question whether BSOR is operating as a common carrier at the Croton Track or whether the Village's regulations and ordinances are preempted.

In apparent recognition of the fact that the Court has decided the issues discussed above against the Village, it alternatively contends that the Court has the discretion to reconsider any findings of fact or conclusions of law made in connection with the preliminary injunction. Whether the Court has such discretion and whether it may exercise it to reverse its prior determinations are for the Court to decide and beside the point at the moment. For the time being, the decisions of the Court constitute the law of the case in the litigation before the Court and are res judicata for purposes of proceedings before the Board.

Respectfully submitted,

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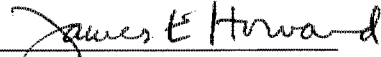
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Dated: August 1, 2006

Certificate of Service

I hereby certify that I have served the foregoing pleading by sending a copy via Federal Express on August 1, 2006 to Michael B. Gerrard, Arnold & Porter LLP, 399 Park Ave., New York, NY 10022-4690.


James E. Howard