

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34905

VILLAGE OF CROTON-ON-HUDSON, NEW YORK

v.

BUFFALO SOUTHERN RAILROAD, INC.; GREENTREE REALTY, LLC; RS
ACQUISITION CO., LLC; and NORTHEAST INTERCHANGE RAILWAY, LLC

REPLY OF THE VILLAGE OF CROTON-ON-HUDSON IN OPPOSITION
TO PETITION TO HOLD PROCEEDINGS IN ABEYANCE AND
TO MOTION FOR PROTECTIVE CONDITIONS CONCERNING DISCOVERY

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Dated: August 4, 2006

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The Village of Croton-on-Hudson (the “Village”) responds in opposition to the Petition of Buffalo Southern Railroad, Inc. to Hold Proceedings in Abeyance and Motion for Protective Conditions Concerning Discovery (the “Petition”), filed by the Buffalo Southern Railroad, Inc. (“BSOR”) on July 20, 2006.¹ The Village respectfully submits that this Formal Complaint proceeding, including discovery served by the Village on BSOR and the other defendants, should proceed. The Village has separately petitioned the Board to reject BSOR’s Notice of Exemption filed in Finance Docket No. 34903. If the Board rejects the Notice of Exemption and BSOR chooses to cease operations over the Track rather than filing a petition for exemption or an application, the Formal Complaint must still be decided with respect to BSOR’s operations to that date. If the Board rejects the Notice of Exemption and BSOR chooses to file a petition for

¹ Of the four named defendants, only BSOR has sought to hold this proceeding in abeyance.

exemption or an application, the Board should then consolidate that new proceeding with the ongoing Formal Complaint proceeding.

THE FORMAL COMPLAINT PROCEEDING SHOULD NOT BE STAYED

BSOR misstates the issue to be decided by the Board. Based on the specific nature of the operations conducted over the 1,600-foot track (the “Track”) at 1A Croton Point Avenue in the Village, the Track may properly be characterized as a line of railroad, a Spur Track,² or a private track. *See* Reply of the Village of Croton-on-Hudson to Motion to Dismiss Notice of Exemption, *Buffalo Southern Railroad, Inc. – Lease and Operation Exemption – Line in Croton-on-Hudson, New York*, Finance Docket No. 34903 (filed July 20, 2006), at 1-2, 5-10. While the Board can reject BSOR’s contention that the Track is excepted Spur Track without further factual development (because it is uncontested that the Track is not adjacent or auxiliary to BSOR’s main line), the Board cannot affirmatively determine that the Track is a Spur Track (as opposed to a line of rail or a private track) without factual development of BSOR’s current and intended future use of the Track.³

BSOR should not be permitted to continue gaming this important determination. BSOR entered into a lease of the Track on March 3, 2006, but did not promptly come to the Board. BSOR should have sought the Board’s determination of the legal status of the Track in advance

² We will refer to “a spur, industrial, team switching, or side track” as “Spur Track.”

³ *See, e.g., CNW–Aban. Exemp.–In McHenry County, IL, 3 I.C.C.2d 366 (1987), rev’d on other grounds sub nom. Illinois Commerce Comm’n v. ICC, 879 F.2d 917 (D.C. Cir. 1989) (spur determination is fact-based).*

of operations at the beginning of March, not at the end of June when it filed its Notice of Exemption in Finance Docket No. 34903.⁴

If the Track is a line of railroad, BSOR is purporting to operate as a common carrier but is without authority to do so. Conversely, BSOR may be engaging in a sham by purporting to be a common carrier in the Village (but in fact conducting private track operations) in an effort to assist other parties to engage in operations they can only engage in if state and local laws are preempted. Only if the Track is properly characterized as a spur to BSOR's main line (which is located about 300 miles away) is BSOR operating lawfully.

Rather than moving to hold this proceeding in abeyance, BSOR should be seeking a determination as expeditiously as possible of whether it is acting lawfully. The owner of BSOR's line – Erie County – should also want a prompt determination of whether its lessee is operating lawfully, even if the track involved is outside the County. In addition, the Village is entitled to the Board's determination, as expeditiously as possible, as to the proper characterization of the Track, and as to whether BSOR should be ordered to cease and desist from engaging in unlawful operations. In addition, BSOR should not be given the opportunity to argue that any fines for unlawful operation should not accrue during an abeyance period.

BSOR HAS NOT MADE OUT A CASE FOR ANY PROTECTIVE CONDITIONS

The discovery was served on BSOR in this Formal Complaint proceeding. The caption clearly identifies the case as the Formal Complaint proceeding, even though the caption erroneously refers to Finance Docket No. 34903 (the Notice of Exemption proceeding) instead of

⁴ See, e.g., *Maine DOT–Acq. Exemption, Me. Central R. Co.*, 8 I.C.C.2d 835, 838 (1991).

Finance Docket No. 34905. BSOR does not dispute that the Village has the right to serve discovery in connection with the Formal Complaint.

The Village's discovery requests should not be stayed. The discovery sought by the Village seeks information to be used to determine the type of operation BSOR is conducting on the Track to assist the Board in determining the legality of BSOR's operation. The Board cannot make a determination that the Track is excepted Spur Track without analysis of the facts that the Village is seeking to develop through discovery (although the Board can determine that the Track is not excepted Spur Track without further discovery if it accepts the Village's contention that spur track must be adjacent and auxiliary to a carrier's main line). Contrary to BSOR's suggestion (at 6), the discovery requests are thus not "premature."

Nor is the scope of the discovery requests improper. Discovery is permitted of information that appears reasonably calculated to lead to discovery of admissible evidence. 49 C.F.R. § 1114.21(a)(2). All of the interrogatories and document requests could lead to evidence that is relevant to the legality of BSOR's operations and characterization of the Track, which turns in part on the actual, intended and feasible use of the Track. BSOR's assertion (at 7) that the District Court has conclusively determined that "BSOR is acting as a common carrier with respect to operations on the Croton Track" is simply false. *See* Reply of the Village of Croton-on-Hudson to Motion to Dismiss Notice of Exemption at 10-11, *Buffalo Southern Railroad, Inc. – Lease and Operation Exemption – Line in Croton-on-Hudson, New York*, Finance Docket No. 34903 (filed July 20, 2006), *citing University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Nor has BSOR made the requisite showing that the requested discovery is unduly burdensome.

The Board should proceed to address the Village's Formal Complaint against BSOR and the other defendants. BSOR has represented that it has already commenced operations over the Track at issue and has not represented that it will cease those operations, which the Village contends are unlawful, pending authorization by the Board.

The Village respectfully requests the Board to deny the Petition in all respects.

Respectfully submitted,



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Dated: August 4, 2006

CERTIFICATE OF SERVICE

I certify that this Reply of the Village of Croton-On-Hudson in Opposition to Petition to Hold Proceedings in Abeyance and to Motion for Protective Conditions Concerning Discovery was served via electronic mail and first-class mail on August 4, 2006, to the following parties:

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A handwritten signature in cursive script that reads "Mary Gabrielle Sprague". The signature is written in dark ink and is positioned above a horizontal line.

Mary Gabrielle Sprague
August 4, 2006