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WATSON, STEVENS, FIORILLA & RUTTER, LLP

Attorneys At Law

Representing clients with vigor and integrity.

January 21, 2004

FEDERAL EXPRESS

Vernon A. Williams, Office of the Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423



Re: In the Matter of Morristown & Erie Railway Company
Reply to Petition of Five New Jersey Municipalities to Reopen
Finance Docket No. 34054

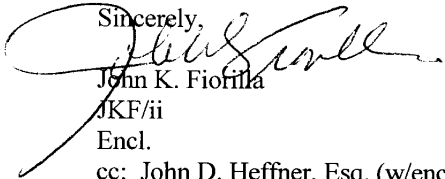
Dear Mr. Williams:

This firm represents the Respondent Morristown & Erie Railway Company of Morristown, New Jersey (M&E"). Enclosed please find for filing an original and ten copies of Reply to Petition of Five New Jersey Municipalities to Reopen, which is filed in reply to petitioners' request to reopen its decision of July 5, 2002 granting a Modified Certificate of Public Convenience and Necessity to M & E., in the above captioned matter.

A disc with a copy of the Respondent's Reply, with attached Certification of John K. Fiorilla, Esq., and Certification of Gordon R. Fuller, is enclosed in Word Perfect format.

Also enclosed is one additional copy to be stamped filed and returned to me in the self-addressed stamped envelope enclosed. Your prompt attention to this matter is kindly appreciated.

Sincerely,


John K. Fiorilla
JKF/ii
Encl.

cc: John D. Heffner, Esq. (w/encl.) Federal Express
Kraig M. Dowd, Esq. (w/enc.) Federal Express
Scott N. Stone, Esq. (w/encl.) Federal Express
Jonathan M. Broder, Esq. (w/encl.) Federal Express
Gordon R. Fuller, COO, M& E Railway- w/enc.
Nathan R. Fenno, Esq. (w/encl)

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A. Dudley Watson (1917-1990)
Edward L. Webster, Jr. (1950-1987)

ENTERED
Office of Proceedings
JAN 22 2004
Part of
Public Record

209925

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 34054

Morristown & Erie Railway, Inc. – Modified Certificate

MORRISTOWN & ERIE RAILWAY, INC.'S REPLY TO PETITION OF FIVE NEW
JERSEY MUNICIPALITIES TO REOPEN

Respondent, Morristown & Erie Railway, Inc. ("M&E") hereby respectfully requests that the Board deny Petitioners' request to reopen its decision of July 5, 2002 granting a Modified Certificate of Public Convenience and Necessity to M&E. Respondent M&E contends that there are no changed circumstances that warrant reconsideration of the Board's decision in that M&E has satisfied all statutory and regulatory conditions for operation of the formerly abandoned Rahway Valley Railroad and Staten Island Railway.

ENTERED
Office of Proceedings

JAN 22 2004

I. PETITIONERS HAVE FAILED TO ESTABLISH CHANGED
CIRCUMSTANCES

Part of
Public Record

Petitioners allege, in essence, that the factual basis upon which the Board relied in their July 5, 2003 decision to grant a Modified Certificate to M&E pursuant to 49 CFR § 1150.21 et seq. has changed to warrant additional consideration by the Board. Respondent M&E contends that Petitioners' argument is erroneous and misleading.

Petitioners' arguments rely entirely on the assumption that the Petitioner Municipalities have been endowed with certain contractual rights pursuant to the operating agreement between Respondent M&E and the County of Union to forestall the continued restoration of the rail lines at issue. This argument was

expressly rejected by the New Jersey Superior Court in Petitioners' state court challenge to the operating agreement. See Affidavit of John K. Fiorilla, Esq., paragraphs 4-6, attached hereto as Exhibit A.

In an unpublished opinion, the Court concluded that 1. Petitioners were not third-party beneficiaries to the operating agreement and that 2. The County of Union, as the real party in interest, had the ultimate authority to determine whether additional phases of the rail restoration should proceed. The Court reasoned that that the Union County Board of Freeholders was vested by statute with the power to act unilaterally in negotiating and agreeing to the terms of the Operating Agreement with M&E without the need to first obtain municipal approval under the terms of that agreement. See id. at paragraph 5.

Further, Petitioners had adequate notice and opportunity to comment at both the state and federal levels. The restoration of the Rahway Valley and Staten Island lines are part and parcel of a detailed statutory scheme that has its roots in the New Jersey Bridge Rehabilitation & Improvement & Right of Way Preservation Bond Act of 1989, P.L. 1989, Ch. 180. Pursuant to that Act, the State of New Jersey appropriated \$15,000,000 for the "preservation and acquisition" of the lines at issue in this case. Appropriations Act, P.L. 1992, Ch. 35. In addition, the June 2000 contract between the New Jersey Department of Transportation and Union County expressly required the County to rehabilitate these lines to FRA Class 2 standards. See Exclusive Use Agreement attached hereto as Exhibit B.

Petitioners' allegation that they did not have an opportunity to present their position at the local level is entirely without merit. Petitioners admit in their filing with this agency that they were "actively involved with Union County about the possible reactivation". Furthermore, the Petitioners' have not produced one iota of evidence to support their claim that New Jersey's Open Public Meetings Act was violated in this case because of a failure to provide adequate notice to Petitioners. See Exhibit A, paragraph 8. Although Respondents concede that there was some ambiguity throughout the public dialogue on these issues, Petitioners' only remedy is to seek redress through the political process. This Petition is nothing more than a misplaced attempt to thwart the legally sanctioned and authorized activities of the railroad.

II. UNDER A MODIFIED CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY, AN ENVIRONMENTAL ASSESSMENT IS NOT REQUIRED

Respondents are operating pursuant to a Modified Certificate pursuant to the July 5, 2002 decision of the Board and are therefore exempt from licensing requirements that ordinarily apply to new railroad construction. In addition, even if licensing requirements did apply, the applicable thresholds that would trigger environmental review have not been met, or if met, have been fully resolved pursuant to the abandonment proceedings surrounding these lines.

The regulatory framework promulgated by the STB provides guidance in this respect. Pursuant to 49 CFR § 1150.22, the acquisition by a state of an abandoned railroad line is not subject to the jurisdiction of the STB. See

Common Carrier Status of States, State Agencies, 363 ICC 132, 137 (1980); cf. Hayfield Northern Railroad Company, Inc. v. Chicago and North Western Transportation Company, 467 U.S. 622, 633 (1984)(noting that unless the ICC attaches post abandonment conditions to a certificate of abandonment, the consummation of an abandonment brings its regulatory mission to an end.).

Further, if the state contracts with a carrier to resume operations pursuant to a modified certificate, the carrier is specifically exempt from the more extensive licensing requirements found at 49 U.S.C. § 10901. See also Common Carrier Status of States, State Agencies, 363 ICC 132, 137 (1980). However, environmental review may be triggered where certain thresholds are found to exist. See 49 CFR § 1105.6. Respondents contend that the current restoration of previously abandoned line and train service that would not exceed 3 round trip trains per week would not trigger an environmental assessment in this case.

The Board's decision in Missouri Central Railroad Company, STB Finance Docket No. 33508 (September 14, 1999), provides strong support for Respondent's argument. In that case, the Board found that there was no significant environmental impact triggering further review unless the number of trains amounted to at least 8 trains per day. In this case, M&E has represented that the number of trains per week would not exceed three round trips. See Certification of Gordon R. Fuller, attached hereto as Exhibit C. Therefore, any contention by Petitioners that a resumption of service would have a significant environmental impact is clearly erroneous. See also 49 CFR 1105.7 (e)(5)(i)(A)(codifying this principle).

The rail lines at issue in this case were the subject of abandonment proceedings in 1992. Pursuant to those proceedings, a thorough environmental assessment was conducted by the ICC to determine environmental impact. The ICC concluded that the New Jersey Department of Environmental Protection should be advised of any hazardous waste sites. In 1993, the Rahway Valley Railroad commissioned Eder Associates to conduct a Phase I environmental audit. A copy of the conclusions of that report are attached hereto as Exhibit D. When the line was sold to the New Jersey Department of Transportation, a specific condition of the contract of sale required pre-closing cleanup pursuant to that report. See Exhibit E attached hereto. The closing occurred, which would indicate that the required preclosing clean up in fact occurred.

Petitioners' contention that the rail restoration in this case amounts to a new rail line construction project is entirely misplaced. As discussed, *supra*, the licensing requirements for new construction have been set forth at 49 U.S.C. § 10901 et seq. The Modified Certificate specifically exempts M&E from complying with those more onerous requirements. Respondent M&E urges that the issuance of a Modified Certificate is akin to a ministerial act and not a major federal action which would trigger environmental review under the National Environmental Policy Act. Cf. Iowa Southern Railroad Company, 5 I.C.C.2d 496, 503 (April 17, 1989)(discussing NEPA implications under the Trails Act).

In Missouri Central, STB Finance Docket No. 33508, (April 30, 1998), the STB found that the resumption of service over an abandoned line does not trigger environmental review absent specific threshold findings under 49 CFR §

1105.6(b)(4) and (c)(2) and (3). As discussed, *supra*, those thresholds are generally not met unless there has been a significant increase (defined as approximately 8 trains per day) in railroad activity. That is not the case here and therefore Respondents contend that an environmental assessment is not required in this case.

Even if environmental review was triggered here, Petitioners' offer no concrete proof that any environmental regulation has been violated or that specific relief is required. Further, in light of the limited amount of train operations that will occur, Petitioners' argument is even less compelling. In Mid States Coalition for Progress v. STB, 345 F.3d 520 (8th Cir. 2003), the Court accorded deference to the STB's finding that no significant impact would result from the operation of 37 trains per day with decibel levels above 70. In contrast, M&E intends to run three round trips per week and Respondents have produced no evidence that decibel levels would exceed applicable thresholds.

Respondents argue that the resumption of service would also pose hazards in the area of safety and pollution. Again, Respondents do not quantify these allegations with any concrete evidence. Further, Respondents ignore the ameliorative impact that resumed freight service will have on truck pollution and safety. As the Court noted in Mid States (*supra*), "NEPA does not require that an agency eliminate all adverse affects that might result from a project." *Id.* at 535.

As stated by M&E's Chief Operating Officer, Gordon R. Fuller, "Once operational, M&E will satisfy all EPA and FRA standards with regard to noise, carriage of freight and emissions." See Exhibit C, paragraph 7. Therefore, while

Petitioners' concerns regarding safety and health are duly noted for the record, they are not ripe for review by this agency at this time. The prophylactic measures inherent in ensuring that the railroad complies with FRA Class 2 operational standards should allay many of the concerns of the Petitioners and citizens who live along the right of way. In sum, the Board's finding that the restoration of the railroad is consistent with the public convenience and necessity outweighs any alleged adverse impact asserted by Petitioners at this time.

III. THE PETITION IS BARRED BY THE DOCTRINE OF LACHES

In Burlington Northern & Santa Fe, STB Finance Docket No. 33549 (Sept. 25, 2002), the STB addressed the argument that laches could bar consideration of an arbitration matter. In that case, the Board noted that laches applies when there is an unreasonable delay in asserting a claim that results in prejudice to the party asserting the laches defense. Other factors that may be considered in determining whether laches should be invoked as a bar to suit include whether the delay results in stale evidence and whether or not it affects the integrity of the arbitration process. See id.

In Burlington Northern, the Board rejected the petitioners' laches argument despite a nearly 2-½ year delay because there was no showing that such a delay resulted in prejudice to petitioners' case. In contrast, a compelling argument can be made for a laches defense in this case. The operating agreement was executed in May 2002 and a Modified Certificate to begin the restoration project was issued by the STB in July 2002. Phase I of the project has been

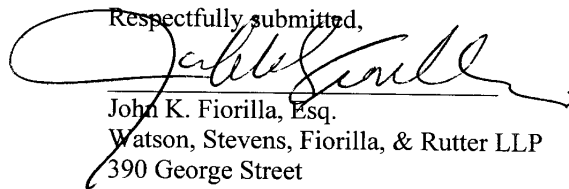
completed and work has commenced on Phase II. Significantly, M&E has incurred significant costs of approximately \$3.6 million to date. See Exhibit C, paragraph 5. Unlike Burlington Northern, there is clear evidence that Petitioners' delay in bringing this action would cause significant prejudice to Respondent.

In this case, the Municipalities waited until June 2003 to file a complaint in state court that challenged the Operating Agreement. These proceedings were not commenced until January 2004, nearly two years after the execution of the Agreement. The state court addressed the laches issue and asserted that it is well substantiated by the record. The court reasoned that although the municipalities filed their complaint in June 2003, they had constructive notice of the railroad restoration project as early as 2002 and that their delay in bringing suit amounted to a substantial injustice in light of the expenditures involved. The Petitioners offered no viable reason for their delay. Accordingly, Respondents respectfully request that the Board dismiss the Petition.

IV. CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition to reopen the proceedings in this matter be dismissed.

Respectfully submitted,



John K. Fiorilla, Esq.
Watson, Stevens, Fiorilla, & Rutter LLP
390 George Street
P.O. Box 1185
New Brunswick, NJ 08902
(732) 545-2250
Attorney for Respondent M&E

DATED: JANUARY 21, 2004

CERTIFICATION AND PROOF OF SERVICE AND MAILING

I, INES IORIO, of full age, do hereby certify and say:

1. I am an Administrative Assistant at the law firm of Watson, Stevens, Fiorilla & Rutter, LLP, attorneys for Respondent Morristown & Erie Railway, Inc.

2. On January 21, 2004, I forwarded an original and eleven copies of Respondent's Reply to Petition of Five New Jersey Municipalities to Reopen, with attachments, to: Vernon A. Williams, Office of the Secretary, Surface Transportation Board, 1925 K Street, N.W., Washington, DC 20423, via Federal Express. A copy of the above-mentioned Reply, with attachments, was sent via Federal Express to:

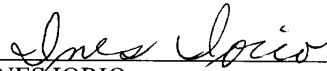
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Union City, NJ 07087

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2550 M Street, N.W.
Washington, DC 20037

Jonathan M. Broder, Esq.
Consolidated Rail Corporation
Two Commerce Square
2001 Market St., 16th Floor
Philadelphia, PA 19103

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.


INES IORIO

DATED: January 21, 2004

EXHIBIT A

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 34054

Morristown & Erie Railway, Inc. – Modified Certificate

CERTIFICATION OF JOHN K. FIORILLA, ESQ.

I, John K. Fiorilla, Esq., under penalty of perjury do testify as follows:

1. I am a partner at the law firm of Watson, Stevens, Fiorilla, & Rutter LLP, attorneys for the Respondent Morristown & Erie Railway, Inc. ("M&E") and am familiar with the facts of this case.
2. In July 2003, the Petitioner Municipalities each filed a Complaint in lieu of prerogative writ in the Superior Court of New Jersey, Law Division, Union County at Elizabeth, New Jersey. See Complaint of Roselle Park attached hereto as Exhibit 1. The Complaints challenged the Operating Agreement between co-Respondents M&E and the County of Union. The Complaints were consolidated by the Court for hearing and bears docket # UNN-L-2302-03.
3. On August 19, 2003 Respondents M&E and Union County each filed a Motion to Dismiss the consolidated Complaints in lieu of an Answer and the case was ultimately decided by the Honorable Edward W. Beglin, Jr., A.J.S.C. on December 5, 2003. A copy of M&E's Motion to Dismiss is attached hereto as Exhibit 2.

4. Both M&E and Union County have made a formal request for the transcript of the proceedings before Judge Beglin that occurred on December 5, 2003; however, because of extenuating circumstances regarding the court reporter, a transcript has not been provided to the parties to date. Once the transcript is produced by the court reporter, a copy will be forwarded to the Board to supplement the record.
5. On December 5, 2003, the return date of the motion to dismiss, Judge Beglin dismissed the Complaint of the Municipalities with prejudice on nearly all counts. See Order attached hereto as Exhibit 3. In so doing, the Court reasoned that the Union County Board of Freeholders was vested by statute with the power to act unilaterally in negotiating and agreeing to the terms of the Operating Agreement with M&E - without the need to first obtain municipal approval under the terms of the Operating Agreement.
6. Further, the Court opined that the terms of the Operating Agreement itself did not support the Municipalities argument that they were third party beneficiaries, entitled to assert any rights under the Operating Agreement.
7. Finally, the Court found that Respondent M&E had expended substantial sums of money in reliance on the Agreement and that it would contravene equitable principles to enjoin the restoration project.
8. The Court permitted the Municipalities additional time to present evidence of violations of New Jersey's Open Public Meetings Act, however, not one iota of evidence has been produced to date.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 1/19/04

By: 
John K. Fiorilla, Esq.

1

JUL 17 2003

CIVIL CASE MANAGEMENT
UNION COUNTY

JOHNSTONE, SKOK, LOUGHLIN & LANE

A PROFESSIONAL CORPORATION

324 EAST BROAD STREET

P.O. BOX 490

WESTFIELD, N.J. 07091

(908)233-9000

Attorneys for Plaintiff, The Borough of Roselle Park

Our File No. 3569.2839

THE BOROUGH OF ROSELLE PARK,
JOHN DOE AND JANE DOE 1-5,
ABC CORPORATION 1-5 AND
OTHERS SIMILARLY SITUATED

Plaintiffs,

vs.

THE COUNTY OF UNION AND THE
MORRISTOWN AND ERIE RAILWAY,
INC., A NEW JERSEY CORPORATIONDefendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO.

UNN-L-2689.03

Civil Action

Action in Lieu of
Prerogative Writ Pursuant To
Rule 4:69-1

The Plaintiff, The Borough of Roselle Park, A Municipal Entity organized and existing by Statutory and Legislative Authority of the State of New Jersey, with its principal place for public business c/o Borough Hall, 110 East Westfield Avenue, in the Borough of Roselle Park, County of Union and State of New Jersey by way of Complaint against these Defendants says as follows:

PARTIES

1. The Plaintiff, The Borough of Roselle Park, is a Municipality of the State of New Jersey with its address as aforesaid.

2. The Plaintiffs John Doe and Jane Doe 1-10 are fictitious names for citizens of the State of New Jersey and residents within the confines of the Municipality of Roselle Park.
3. The Plaintiffs, ABC Corporations 1-5 is a fictitious name for affected companies that are situated in the Borough of Roselle Park.
4. The Defendant, The County of union is, upon information and belief, a body politic established in 1857 under the laws of the State of New Jersey.
5. The Defendant, Morristown and Erie Railway, Inc. is upon information and belief a New Jersey Corporation.

JURISDICTION

6. This Court has jurisdiction of this action pursuant to R. 4:69-1.

FACTS COMMON TO ALL COUNTS

7. Upon information and belief, no material railroad service has utilized the entire Rahway Valley line within Union County, since 1991, when sections of the Rahway Valley and Staten Island Railroads were abandoned, leaving unused track through eight county municipalities: Cranford, Linden, Kenilworth, Roselle, Roselle Park, Springfield, Summit and Union.
8. The rail lines were purchased by the New Jersey Department of Transportation (NJDOT) in 1994 in accordance with the New Jersey Bridge Rehabilitation and Railroad Right-of-Way Preservation Bond Act of 1989.

9. Almost nine years later, the County of Union, under Freeholder Resolution 813-2000, signed an agreement with NJDOT dated June 23, 2000 to permit the County to restore service on the respective lines.
10. Two years later, on May 9, 2002, the County agreed to terms with the Morristown and Erie Railway (hereinafter "M&E") for a ten year Operating Agreement that would be divided into four phases, each one reactivating service on a particular line.
11. M&E Railway then applied for a Modified Certificate of Public Convenience and Necessity, which was approved by the Federal Surface Transportation Board on June 27, 2002 under STB Finance Docket No. 34054.
12. Under the agreement implementation of the line activation would be in four phases and "M&E will not proceed with the rehabilitation of the Phase III lines and the commencement of rail services until it receives the written concurrence of the County." On or about June of 2002 upon information and belief, Plaintiff states that a representative of Defendant M&E Railway Inc. undertook to forward correspondence indicating the initial reactivation of the Rail Line would be shortly commenced with general cleaning and clearing of debris in proximity to the rail line. Shortly thereafter on about August of 2002 a Representative of the County of Union

forwarded correspondence to the effect that the Codefendant M&E Railway Inc. would be performing limited work restricted to potential safety and public health concerns. The duly authorized representative of the CoDefendant County of Union also reiterated statements made in the Operating Agreement as well as in the Summary by the STB that reactivation would not begin without County approval.

13. The Board of Chosen Freeholders adopted Resolution 902-02 on August 22, 2002, promising the municipalities that commencement of the reactivation would not occur unless all eight municipalities consented. The resolution in part states the County "shall not approve the usage of the rail line right-of-way unless and until the affected municipalities each pass a governing body resolution consenting to such usage."
14. Upon information and belief, residents of Roselle Park have approached the Mayor and Town Council with concerns of noise, safety and environmental problems that would result from the railroad reactivation. Accordingly the Borough of Roselle Park has enacted a Resolution that the Mayor and Council of the Borough of Roselle Park on behalf of the citizens and residents of the Borough hereby oppose the reactivation of the railroad by the Morristown and Erie Railway and/or any related actions by the CoDefendant County of Union which would allow or permit same.

15. Upon information and belief there is now pending a New Jersey Assembly Bill Number 2916 which would prevent reactivation of the Rail Line and require its conversion and permanent use for conservational and recreational purposes.
16. Upon information and belief, following the signing of the Operating Agreement and the passage of the Resolution 633-2003 on June 5, 2003, the County maintained its position that it would not begin implementation of the railroad without the approval of the municipalities.
17. On June 5, 2003, the Board of Chosen Freeholders scheduled a special meeting, and following more than two hours of a closed, private session, representatives from Kenilworth, Springfield and Roselle Park all opposed reactivation. However, despite such objections, the Board of Chosen Freeholders voted for, and adopted Resolution 633 2003, authorizing the County to being implementing Phases II, III, and IV of the Operating Agreement between M&E Railway and the County of Union.

COUNT ONE

18. Plaintiffs repeat and reallege Paragraphs 1 through 17 as if set forth more fully at length herein.

19. The Plaintiff, Borough of Kenilworth, acting in its representative capacity on behalf of its citizens, relied, to its detriment and the detriment of its citizens, upon the statements made by the Defendant County of Union, by their continued representation to the Plaintiffs that no implementation of the rail line could continue without the express authorization of the municipality, to wit; the Borough of Roselle Park.
20. The Defendant County of Union, upon information and belief, has represented in writing and in meetings, both public and otherwise, that no implementation could occur without the express consent and cooperation of the Municipalities effected. No attempt to garner such consent and/or cooperation occurred.
21. According to the Operating Agreement's Business and Operating Plan, the agreement may not contain any provisions that conflict with existing County Legislation or Policy.
22. Additionally, the rail line was to be rehabilitated only upon the mutual consent of the parties to this agreement, namely the County of Union (County) and Morristown and Erie Railway, Inc. (M&E). Within 30 days of the Agreement's execution (May9th, 2002), the County and M&E agreed to establish a dialogue with the effected communities and develop the most efficient plan to maximize the benefits of the project. Upon

information and belief, no timetable for such dialogue or plan apparently exists, nor was there any intention of implementing one.

23. M&E fulfilled its obligation to apply for a Certificate of Public Convenience and Necessity within thirty days of execution of the Agreement. They obtained approval within the specified six months from the date of filing.
24. The implementation of the rail line is, upon information and belief, imminent, and yet, no dialogue or plan has been advanced by the Defendant County of Union or M&E.
25. The Borough of Roselle Park relied to its detriment upon the representations of the County of Union and the Morristown and Erie Railway, Inc., and its citizens will be harmed unless the implementation of the railway is enjoined pending dialogue with the municipalities so affected by the plan.

COUNT TWO

26. Plaintiffs repeat and re-allege paragraphs 1 through 25 as if set forth herein in full.
27. The Borough of Roselle Park relied upon the terms and conditions contained within the Operating Agreement.
28. Pursuant to the terms of Resolution 813-2000, the implementation of the system will:

benefit the citizens (and) increase commerce in the County. The revitalization of the Rahway Valley, Staten Island and other rail lines in County will provide critical links to the national transportation system that will permit Union County to offer new transportation and distribution options, such as

benefit the citizens (and increase commerce in the County. The revitalization of the Rahway Valley, Staten Island and other rail lines in County will provide critical links to the national transportation system that will permit Union county to offer new transportation and distribution options, such as intermodalism, Value Added Services, and logistics management, and permit the County to take full advantage of its deep-water seaport access. [And] there has been substantial expression by businesses and industries for the resumption of local rail service.

29. The Defendant County of Union has failed to meet its obligations vis-à-vis the municipalities in general and specifically with regard to the Borough of Roselle Park.
30. The Plaintiff, Borough of Roselle Park, on behalf of its citizens, is a third-party beneficiary of the representations and terms of the Operating Agreement, which terms have been breached as aforesaid.

COUNT THREE

31. Plaintiffs repeat and re-allege paragraphs 1 through 30 as if set forth herein in full.
32. Upon information and belief, the actions of the County of Union in approving and implementing the Operating Agreement were legislative in nature.
33. Pursuant to N.J.S.A. 10:4-7, the Open Public Meeting Act mandates that such action as is legislative in nature be open to the public, upon at least forty-eight (48) hours notice.
34. Upon information and belief, the Defendant County of Union failed to give such notice in accordance with N.J.S.A. 10:4-7.

COUNT FOUR

35. Plaintiffs repeat and re-allege paragraphs 1 through 34 as if set forth herein in full.
36. Upon information and belief, the Defendant County of Union has failed to meet the minimum requirements of the State Rail Plan, pursuant to N.J.A.C. 16:53C-5.1.

COUNT FIVE

37. Plaintiffs repeat and re-allege paragraphs 1 through 36 as if set forth herein in full.
38. Upon information and belief, Defendant, County of Union, has failed to prepare and/or file an Environmental Impact Statement relating to the implementation of the plan, and as such, has put the citizens and businesses of the Borough of Roselle Park at risk.

COUNT SIX

39. Plaintiffs repeat and re-allege paragraphs 1 through 38 as if set forth herein in full.
40. Upon information and belief, Defendant, County of Union, has failed to prepare and/or file a traffic and safety study relating to the implementation of the plan, and as such, has put the citizens and businesses of the Borough of Roselle Park at risk.

COUNT SEVEN

41. Plaintiffs repeat and re-allege paragraphs 1 through 40 as if set forth herein in full.
42. Upon information and belief, one or more of the Freeholders of the County of Union have undisclosed conflicts of interest regarding the implementation of the plan and/or the Operating Agreement.

COUNT EIGHT

43. Plaintiffs repeat and re-allege paragraphs 1 through 42 as if set forth herein in full.
44. Plaintiffs John and Jane Doe 1-5 and ABC Corporations 1-5 are individuals and/or businesses that will be affected by the implementation of the plan and/or Operating Agreement.

COUNT NINE

45. Plaintiffs repeat and re-allege paragraphs 1 through 44 as if set forth herein in full.
46. The actions or threatened actions of the CoDefendants herein constitute and create common law nuisance and trespass that threaten to create and/or will cause personal injury and property damage to the residents of the Borough of Roselle Park and the Community at large.

PRAYER FOR RELIEF

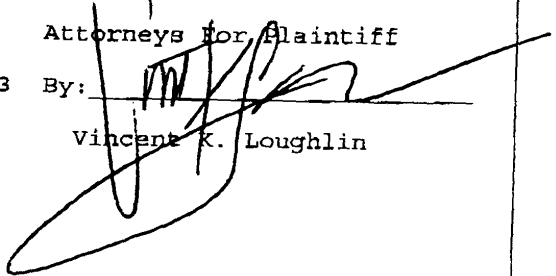
WHEREFORE, the Plaintiffs request that this Court:

1. Assume jurisdiction over the action;
2. Enjoin any implementation of the Operating Agreement pending a full and statutorily compliant meeting upon notice to the effected municipalities;
3. Disqualify such Freeholders of the Defendant County of Union that have or appear to have or appear to have conflicts of interest with regard to the Operating Agreement or the implementation of the rail line;
4. Vacate the findings of the County of Union with regard to the Operating Agreement, and vacate any resolutions appurtenant thereto;
5. Order immediate depositions and discovery with regard to this action; and
6. Order the defendants preserve all documents, materials and things with regard to this action; and
7. For such other relief as the Court may deem just and proper.

JOHNSTONE, SKOK, LOUGHLIN & LANE

Attorneys for Plaintiff

Dated: July 15, 2003

By: 

Vincent K. Loughlin

DESIGNATION OF TRIAL COUNSEL

Vincent K. Loughlin, Esq. Is herewith designated as Trial Counsel.

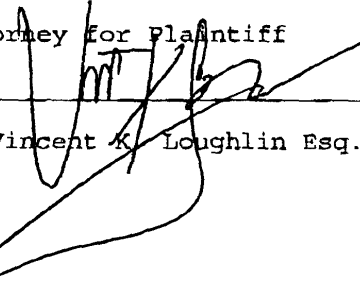
CERTIFICATION PURSUANT TO RULE 4:5-1

Pursuant to Rule 4:5-1, the undersigned certifies that to the best of his knowledge, the within matters in controversy are not the subject of any other action pending in any other Court or of a pending arbitration proceeding nor is any action or arbitration proceeding contemplated nor are other parties required to be joined in this action.

JOHNSTONE, SKOK, LOUGHLIN & LANE

Attorney for Plaintiff

Dated: July 15, 2003

By: 

Vincent K. Loughlin Esq.



CIVIL CASE INFORMATION STATEMENT (CIS)

Use for Initial Law Division - Civil Part pleadings (not motions) under Rule 4:5-1.
Pleading will be rejected for filing, under Rule 1:5-6(c), if information above the black bar is not completed or if attorney's signature is not affixed.

FOR CLERK USE ONLY		
PAYMENT TYPE: CK	CS	CA
CHG / CK NO.		
AMOUNT:		
OVERPAYMENT:		
BATCH NUMBER:		

ATTORNEY/PRO SE NAME Vincent K. Loughlin Esq	TELEPHONE NUMBER (908) 233 9000	COUNTY OF VENUE Union
FIRM NAME (IF ANY) Johnstone, Skok, Loughlin & Lane		DOCUMENT TYPE Action in Lieu of Prerogative Writ
OFFICE ADDRESS 324 East Broad St. PO Box 490 Westfield, NJ 07090		JURY DEMAND ☐ YES ☒ NO
NAME OF PARTY (e.g. John Doe, Plaintiff) Plaintiff Borough of Roselle Park	CAPTION The Borough of Roselle Park et al v The County of Union and The Morristown and Erie Railway et al	
CASE TYPE NUMBER (See number list on back) 701	IS THIS A PROFESSIONAL MALPRACTICE CASE? ☐ YES ☒ NO IF YOU HAVE CHECKED "YES," PLEASE FILE A SEPARATE AND APPLICABLE CASE LAW REGARDING YOUR OBLIGATION TO FILE AN AFFIDAVIT OF MERIT.	
RELATED CASES PENDING? ☒ YES ☐ NO	IF YES, LIST DOCKET NUMBERS UNN-L 2302-03	
DO YOU ANTICIPATE LEAVING ANY PARTIES (including all of those considered of record)? ☒ YES ☐ NO	NAME OF DEFENDANT'S PRIMARY INSURANCE COMPANY, IF KNOWN ☐ NONE ☒ UNKNOWN	

THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE

CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION

A. DO PARTIES HAVE A CURRENT, PAST OR RECURRENCE RELATIONSHIP? ☒ YES ☐ NO	IF YES, IS THAT RELATIONSHIP: ☐ EMPLOYER-EMPLOYEE ☐ FRIEND/NEIGHBOR ☐ OTHER (specify) _____ ☐ RIVAL ☐ BUSINESS
B. DOES THE TORTURE GOVERNING THIS CASE PROVIDE FOR PAYMENT OF FEES BY THE LOSING PARTY? ☐ YES ☒ NO	

USE THIS SPACE TO IDENTIFY THE COURT TO ANY SPECIAL CASE CHARACTERISTICS THAT MAY WARRANT INDIVIDUAL MANAGEMENT OR ALTERNATIVE DISPOSITION

The present Complaint is filed on behalf of one of several Municipalities in Union County who are affected by the same facts and circumstances referred to in the Pleadings. It is anticipated that all of these matters will be consolidated as they relate to the same claim or controversy.

DO YOU OR YOUR CLIENT NEED ANY DISABILITY ACCOMMODATION? ☐ YES ☒ NO	IF YES, PLEASE IDENTIFY THE REQUESTED ACCOMMODATION: _____
WILL AN INTERPRETER BE NEEDED? ☐ YES ☒ NO	IF YES, FOR WHAT LANGUAGE: _____
ATTORNEY SIGNATURE Vincent K. Loughlin Esq	

July 15, 2003

Revised 11/2002

SIDE 2



CIVIL CASE INFORMATION STATEMENT (CIS)

Use for initial pleadings (not motions) under Rule 4:5-1

CASE TYPES (Choose one and enter number of case type in appropriate space on the reverse side.)

Track I — 150 days' discovery

- 181 NAME CHANGE
- 176 FORFEITURE
- 302 TENANCY
- 399 REAL PROPERTY
- 802 BOOK ACCOUNT
- 803 COMMERCIAL TRANSACTION
- 808 OTHER INSURANCE CLAIM (INCLUDING DECLARATORY JUDGMENT ACTIONS)
- 806 PIP COVERAGE
- 810 UM or UIM CLAIM
- 811 ACTION ON NEGOTIABLE INSTRUMENT
- 999 CONTRACT
- 801 SUMMARY ACTION
- 802 OPEN PUBLIC RECORDS ACT (SUMMARY ACTION)

Track II — 300 days' discovery

- 308 CONSTRUCTION
- 909 EMPLOYMENT (other than CEPA or LAD)
- 602 ASSAULT AND BATTERY
- 603 AUTO NEGLIGENCE - PERSONAL INJURY
- 608 PERSONAL INJURY
- 610 AUTO NEGLIGENCE - PROPERTY DAMAGE
- 999 TORT - OTHER

Track III — 450 days' discovery

- 005 CIVIL RIGHTS
- 301 CONDEMNATION
- 804 MEDICAL MALPRACTICE
- 808 PRODUCT LIABILITY
- 907 PROFESSIONAL MALPRACTICE
- 808 TOXIC TORT
- 609 DEFAMATION
- 616 WHISTLEBLOWER / CONSCIENTIOUS EMPLOYEE PROTECTION ACT (CEPA) CASES
- 617 INVERSE CONDEMNATION
- 618 LAW AGAINST DISCRIMINATION (LAD) CASES

Track IV — Active Case Management by Individual Judge / 450 days' discovery

- 999 ENVIRONMENTAL COVERAGE LITIGATION
- 999 RECEIVED LITIGATION
- 999 ACTIONS UNDER FEDERAL Y2K ACT
- 999 MISDEMEANORS
- 999 DOMESTIC VIOLENCE
- 999 REPETITIVE STRESS SYNDROME
- 999 ACTIONS IN LIEU OF PREROGATIVE WRIT

Mass Tort (Track IV)

- | | |
|----------------|--------------------------|
| 240 DIET DRUG | 601 ASBESTOS |
| 241 TOBACCO | 612 BLOOD-CLOTTING SERUM |
| 243 LATEX | 702 LEAD PAINT |
| 245 RESULIN | |
| 247 PROPULSID | |
| 246 CIBA GEIGY | |
| 254 FPA | |

999 OTHER (Briefly describe nature of action) _____

If you believe this case requires a track other than that provided above, please indicate the reason on Side 1, in the space under "Case Characteristics."

JOHNSTONE, SKOK, LOUGHLIN & LANE
A PROFESSIONAL CORPORATION
324 EAST BROAD STREET
P.O. BOX 490
WESTFIELD, N.J. 07091
(908)233-9000

Attorneys for Plaintiff, The Borough of Roselle Park
Our File No. 3569.2839

THE BOROUGH OF ROSELLE PARK,
JOHN DOE AND JANE DOE 1-5, ABC
CORPORATION 1-5 AND OTHERS
SIMILARLY SITUATED,

Plaintiffs,

vs.

THE COUNTY OF UNION AND THE
MORRISTOWN AND ERIE RAILWAY,
INC., A NEW JERSEY
CORPORATION,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO. UNN-L-2689-03

Civil Action

AMENDED COMPLAINT

The Plaintiff, The Borough of Roselle Park, A Municipal Entity organized and existing by Statutory and Legislative Authority of the State of New Jersey, with its principal place for public business c/o Borough Hall, 110 East Westfield Avenue, in the Borough of Roselle Park, County of Union and State of New Jersey by way of Amended Complaint against these Defendants says as follows:

PARTIES

1. The Plaintiff, The Borough of Roselle Park, is a Municipality of the State of New Jersey with its address as aforesaid.

2. The Plaintiffs John Doe and Jane Doe 1-10 are fictitious names for citizens of the State of New Jersey and residents within the confines of the Municipality of Roselle Park.
3. The Plaintiffs, ABC Corporations 1-5 is a fictitious name for affected companies that are situated in the Borough of Roselle Park.
4. The Defendant, The County of Union is, upon information and belief, a body politic established in 1857 under the laws of the State of New Jersey.
5. The Defendant, Morristown and Erie Railway, Inc. is upon information and belief a New Jersey Corporation.

JURISDICTION

6. This Court has jurisdiction of this action pursuant to R. 4:69-1.

FACTS COMMON TO ALL COUNTS

7. Upon information and belief, no material railroad service has utilized the entire Rahway Valley line within Union County, since 1991, when sections of the Rahway Valley and Staten Island Railroads were abandoned, leaving unused track through eight county municipalities: Cranford, Linden, Kenilworth, Roselle, Roselle Park, Springfield, Summit and Union.
8. The rail lines were purchased by the New Jersey Department of Transportation (NJDOT) in 1994 in accordance with the New Jersey Bridge Rehabilitation and Railroad Right-of-Way Preservation Bond Act of 1989.

9. Almost nine years later, the County of Union, under Freeholder Resolution 813-2000, signed an agreement with NJDOT dated June 23, 2000 to permit the County to restore service on the respective lines.
10. Two years later, on May 9, 2002, the County agreed to terms with the Morristown and Erie Railway (hereinafter "M&E") for a ten year Operating Agreement that would be divided into four phases, each one reactivating service on a particular line.
11. M&E Railway then applied for a Modified Certificate of Public Convenience and Necessity, which was approved by the Federal Surface Transportation Board on June 27, 2002 under STB Finance Docket No. 34054.
12. Under the agreement implementation of the line activation would be in four phases and "M&E will not proceed with the rehabilitation of the Phase III lines and the commencement of rail services until it receives the written concurrence of the County." On or about June of 2002 upon information and belief, Plaintiff states that a representative of Defendant M&E Railway Inc. undertook to forward correspondence indicating the initial reactivation of the Rail Line would be shortly commenced with general cleaning and clearing of debris in proximity to the rail line. Shortly thereafter on about August of 2002 a Representative of the County of Union forwarded correspondence to the effect that the Codefendant M&E Railway Inc. would be

performing limited work restricted to potential safety and public health concerns. The duly authorized representative of the Co-Defendant County of Union also reiterated statements made in the Operating Agreement as well as in the Summary by the STB that reactivation would not begin without County approval.

13. The Board of Chosen Freeholders adopted Resolution 902-02 on August 22, 2002, promising the municipalities that commencement of the reactivation would not occur unless all eight municipalities consented. The resolution in part states the County "shall not approve the usage of the rail line right-of-way unless and until the affected municipalities each pass a governing body resolution consenting to such usage."
14. Upon information and belief, residents of Roselle Park have approached the Mayor and Town Council with concerns of noise, safety and environmental problems that would result from the railroad reactivation. Accordingly the Borough of Roselle Park has enacted a Resolution that the Mayor and Council of the Borough of Roselle Park on behalf of the citizens and residents of the Borough hereby oppose the reactivation of the railroad by the Morristown and Erie Railway and/or any related actions by the Co-Defendant County of Union which would allow or permit same.
15. Upon information and belief there is now pending a New Jersey Assembly Bill Number 2916 which would prevent

reactivation of the Rail Line and require its conversion and permanent use for conservational and recreational purposes.

16. Upon information and belief, following the signing of the Operating Agreement and the passage of the Resolution 633-2003 on June 5, 2003, the County maintained its position that it would not begin implementation of the railroad without the approval of the municipalities.
17. On June 5, 2003, the Board of Chosen Freeholders scheduled a special meeting, and following more than two hours of a closed, private session, representatives from Kenilworth, Springfield and Roselle Park all opposed reactivation. However, despite such objections, the Board of Chosen Freeholders voted for, and adopted Resolution 633 2003, authorizing the County to being implementing Phases II, III, and IV of the Operating Agreement between M&E Railway and the County of Union.

COUNT ONE

18. Plaintiff repeats and re-alleges Paragraphs 1 through 17 as if set forth more fully at length herein.
19. The Plaintiff, Borough of Roselle Park, acting in its representative capacity on behalf of its citizens, relied, to its detriment and the detriment of its citizens, upon the statements made by the Defendant County of Union, by their continued representation to the Plaintiff that no implementation of the rail line could continue without the express authorization of the municipality, to wit; the Borough of Roselle Park.

20. The Defendant County of Union, upon information and belief, has represented in writing and in meetings, both public and otherwise, that no implementation could occur without the express consent and cooperation of the Municipalities affected. No attempt to garner such consent and/or cooperation occurred.
21. According to the Operating Agreement's Business and Operating Plan, the agreement may not contain any provisions that conflict with existing County Legislation or Policy.
22. Additionally, the rail line was to be rehabilitated only upon the mutual consent of the parties to this agreement, namely the County of Union (County) and Morristown and Erie Railway, Inc. (M&E). Within 30 days of the Agreement's execution (May 9th, 2002), the County and M&E agreed to establish a dialogue with the affected communities and develop the most efficient plan to maximize the benefits of the project. Upon information and belief, no timetable for such dialogue or plan apparently exists, nor was there any intention of implementing one.
23. M&E fulfilled its obligation to apply for a Certificate of Public Convenience and Necessity within thirty days of execution of the Agreement. They obtained approval within the specified six months from the date of filing.
24. The implementation of the rail line is, upon information and belief, imminent, and yet, no dialogue or plan has been advanced by the Defendant County of Union or M&E.

25. The Borough of Roselle Park relied to its detriment upon the representations of the County of Union and the Morristown and Erie Railway, Inc., and its citizens will be harmed unless the implementation of the railway is enjoined pending dialogue with the municipalities so affected by the plan.

COUNT TWO

26. Plaintiff repeats and re-alleges paragraphs 1 through 25 as if set forth herein in full.
27. The Borough of Roselle Park relied upon the terms and conditions contained within the Operating Agreement.
28. Pursuant to the terms of Resolution 813-2000, the implementation of the system will:
- benefit the citizens (and) increase commerce in the County. The revitalization of the Rahway Valley, Staten Island and other rail lines in County will provide critical links to the national transportation system that will permit Union County to offer new transportation and distribution options, such as benefit the citizens (and) increase commerce in the County. The revitalization of the Rahway Valley, Staten Island and other rail lines in County will provide critical links to the national transportation system that will permit Union county to offer new transportation and distribution options, such as intermodalism, Value Added Services, and logistics management, and permit the County to take full advantage of its deep-water seaport access. [And] there has been substantial expression by businesses and industries for the resumption of local rail service.
29. The Defendant County of Union has failed to meet its obligations vis-à-vis the municipalities in general and specifically with regard to the Borough of Roselle Park.
30. The Plaintiff, Borough of Roselle Park, on behalf of its citizens, is a third-party beneficiary of the

representations and terms of the Operating Agreement, which terms have been breached as aforesaid.

COUNT THREE

31. Plaintiff repeats and re-alleges paragraphs 1 through 30 as if set forth herein in full.
32. Upon information and belief, the actions of the County of Union in approving and implementing the Operating Agreement were legislative in nature.
33. Pursuant to N.J.S.A. 10:4-7, the Open Public Meeting Act mandates that such action as is legislative in nature be open to the public, upon at least forty-eight (48) hours notice.
34. Upon information and belief, the Defendant County of Union failed to give such notice in accordance with N.J.S.A. 10:4-

COUNT FOUR

35. Plaintiff repeats and re-alleges paragraphs 1 through 34 as if set forth herein in full.
36. Upon information and belief, the Defendant County of Union has failed to meet the minimum requirements of the State Rail Plan, pursuant to N.J.A.C. 16:53C-5.1.

COUNT FIVE

37. Plaintiff repeats and re-alleges paragraphs 1 through 36 as if set forth herein in full.
38. Upon information and belief, Defendant, County of Union, has failed to prepare and/or file an Environmental Impact

Sttement relating to the implementation of the plan, and as such, has put the citizens and businesses of the Borough of Roselle Park at risk.

COUNT SIX

39. Plaintiff repeats and re-alleges paragraphs 1 through 38 as if set forth herein in full.
40. Upon information and belief, Defendant, County of Union, has failed to prepare and/or file a traffic and safety study relating to the implementation of the plan, and as such, has put the citizens and businesses of the Borough of Roselle Park at risk.

COUNT SEVEN

41. Plaintiff repeats and re-alleges paragraphs 1 through 40 as if set forth herein in full.
42. Upon information and belief, one or more of the Freeholders of the County of Union have undisclosed conflicts of interest regarding the implementation of the plan and/or the Operating Agreement.

COUNT EIGHT

43. Plaintiff repeats and re-alleges paragraphs 1 through 42 as if set forth herein in full.
44. Plaintiffs John and Jane Doe 1-5 and ABC Corporations 1-5 are individuals and/or businesses that will be affected by the implementation of the plan and/or Operating Agreement.

COUNT NINE

45. Plaintiff repeats and re-alleges paragraphs 1 through 44 as if set forth herein in full.
46. The actions or threatened actions of the Co-Defendants herein constitute and create common law nuisance and trespass that threaten to create and/or will cause personal injury and property damage to the residents of the Borough of Roselle Park and the Community at large.

COUNT TEN

47. Plaintiff repeats and re-alleges paragraphs 1 through 46 as if set forth herein in full.
48. Defendant, County of Union, is subject to and bound by the requirements of the Local Lands and Building Law, N.J.S.A. 40A:12-1, et seq.
49. Pursuant thereto, defendant, County of Union, may only acquire an interest in property "as may be necessary and suitable for the performance of its function." (N.J.S.A. 40A:12-3(a).)
50. The leasehold acquired by the defendant, County of Union, from the New Jersey Department of Transportation is not necessary and suitable for appropriate functions of the County of Union, and is therefore in violation of the statute and illegal.
51. Pursuant to N.J.S.A. 40A:12-5(a)(2), the acquisition of the leasehold by the County of the property in question shall be

subject to lawful conditions, restrictions and limitations as to its use.

52. In spite of the reasonable restriction upon the use of the property by the County, wherein the County agreed to subject its use to the agreement and consent of the municipalities through which the rail lines run, the County of Union has failed to abide by that restriction, and therefore, the actions of the County are illegal.

COUNT ELEVEN

53. Plaintiff repeats and re-alleges paragraphs 1 through 52 as if set forth herein in full.
54. The agreement between the County of Union and M&E Railroad provides for funds to be set aside by the County for subsidy of the railroad freight line service.
55. The County has entered into such agreement without obtaining the agreement of the appropriate agency in the New Jersey Department of Transportation as required by N.J.S.A. 40:9C-1

COUNT TWELVE

56. Plaintiff repeats and re-alleges paragraphs 1 through 55 as if set forth herein in full.
57. Defendant, County of Union, is subject to the requirements and restrictions of the Local Public Contracts Law, N.J.S.A. 40A:11-1, et seq.
58. The Operating Agreement between the County of Union and M&E Railroad dated May 9, 2002, is subject to the requirements thereof.

59. The services which are the subject of the contract are not extraordinary unspecifiable services.
60. Defendant, County of Union, failed to comply with the terms of the Local Public Contract Law, including, but not limited to specifically: N.J.S.A. 40A:11-4, N.J.S.A. 40A:11-4.2, N.J.S.A.:40A:11-6.1, and N.J.S.A. 40A:11-20, et seq.

COUNT THIRTEEN

61. Plaintiff repeats and re-alleges paragraphs 1 through 60 as if set forth herein in full.
62. The agreement between County of Union and M&E Railroad does not provide for any consideration to be paid to the County, as all funds collected by M&E Railroad pursuant to the contract are to be used for furthering the purposes of M&E.
63. The entry into such contract is either the result of a mutual mistake by the parties, or overreaching by M&E Railroad, and the contract is therefore void.
64. The contract is also void and/or voidable as being contrary to the public interest and/or public policy in the State of New Jersey.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff requests that this Court:

1. Assume jurisdiction over the action; and
2. Void the Lease Agreement between the County of Union and M&E Railroad; and

3. Vacate the findings of the County of Union with regard to the Operating Agreement, and vacate any resolutions appurtenant thereto; and
4. Alternatively enforcing the agreement and restrictions that the rail line may not be activated without the express approval and agreement of each municipality; and
5. Alternatively, enjoin any implementation of the Operating Agreement pending a full and statutorily compliant meeting upon notice to the affected municipalities; and
6. Disqualify such Freeholders of the Defendant County of Union that have or appear to have or appear to have conflicts of interest with regard to the Operating Agreement or the implementation of the rail line; and
7. Order the defendants preserve all documents, materials and things with regard to this action; and
8. Order immediate depositions and discovery with regard to this action; and
9. For attorneys' fees and costs of the suit; and
10. For such other relief as the Court may deem just and proper.

Johnstone, Skok, Loughlin & Lane

By: _____

Vincent K. Loughlin

Dated: October 2, 2003

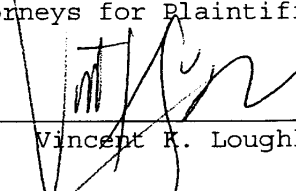
DESIGNATION OF TRIAL COUNSEL

Vincent K. Loughlin, Esq. is herewith designated as Trial Counsel.

CERTIFICATION PURSUANT TO RULE 4:5-1

Pursuant to Rule 4:5-1, the undersigned certifies that to the best of his knowledge, the within matters in controversy are not the subject of any other action pending in any other Court or of a pending arbitration proceeding nor is any action or arbitration proceeding contemplated nor are other parties required to be joined in this action.

Johnstone, Skok, Loughlin & Lane
Attorneys for Plaintiff

By: 

Vincent K. Loughlin

Dated: October 2, 2003



CIVIL CASE INFORMATION STATEMENT (CIS)

Use for initial Law Division - Civil Part pleadings (not motions) under Rule 4:5-1.

Pleading will be rejected for filing, under Rule 1:5-6(c), if information above the black bar is not completed or if attorney's signature is not affixed.

FOR USE BY CLERK'S OFFICE ONLY

PAYMENT TYPE : CK CG CA

CHG / CK NO.

AMOUNT :

OVERPAYMENT :

BATCH NUMBER :

ATTORNEY / PRO SE NAME Vincent K. Loughlin, Esq.		TELEPHONE NUMBER (908) 233-9000	COUNTY OF VENUE Union
FIRM NAME (If applicable) Johnstone, Skok, Loughlin & Lane		DOCKET NUMBER (When available) UNN-L-2689-03	
OFFICE ADDRESS 324 East Broad Street, P.O. Box 490 Westfield, NJ 07091		DOCUMENT TYPE Amended Complaint	
		JURY DEMAND ☐ YES ☒ NO	
NAME OF PARTY (e.g. John Doe, Plaintiff) Plaintiff, BOROUGH OF ROSELLE PARK		CAPTION THE BOROUGH OF ROSELLE PARK et al. v. THE COUNTY OF UNION AND THE MORRISTOWN AND ERIE RAILWAY, et al.	
CASE TYPE NUMBER (See reverse side for listing) 701	IS THIS A PROFESSIONAL MALPRACTICE CASE? ☐ YES ☒ NO IF YOU HAVE CHECKED "YES," SEE N.J.S.A. 2A:53A-27 AND APPLICABLE CASE LAW REGARDING YOUR OBLIGATION TO FILE AN AFFIDAVIT OF MERIT.		
RELATED CASES PENDING? ☒ YES ☐ NO	IF YES, LIST DOCKET NUMBERS UNN-L-2302-03		
DO YOU ANTICIPATE ADDING ANY PARTIES (arising out of same transaction or occurrence)? ☒ YES ☐ NO	NAME OF DEFENDANT'S PRIMARY INSURANCE COMPANY, IF KNOWN ☐ NONE ☒ UNKNOWN		
THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE.			
CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION			
A. DO PARTIES HAVE A CURRENT, PAST OR RECURRENT RELATIONSHIP? ☒ YES ☐ NO		IF YES, IS THAT RELATIONSHIP ☐ EMPLOYER - EMPLOYEE ☐ FRIEND / NEIGHBOR ☒ OTHER (explain) ☐ FAMILIAL ☐ BUSINESS Municipality County Government	
B. DOES THE STATUTE GOVERNING THIS CASE PROVIDE FOR PAYMENT OF FEES BY THE LOSING PARTY? ☐ YES ☒ NO			
USE THIS SPACE TO ALERT THE COURT TO ANY SPECIAL CASE CHARACTERISTICS THAT MAY WARRANT INDIVIDUAL MANAGEMENT OR ACCELERATED DISPOSITION: The present Complaint is filed on behalf of one of several Municipalities in Union County who are affected by the same facts and circumstances referred to in the Pleadings. It is anticipated that all of these matters will be consolidated as they relate to the same claim or controversy.			
DO YOU OR YOUR CLIENT NEED ANY DISABILITY ACCOMMODATIONS? ☐ YES ☒ NO		IF YES, PLEASE IDENTIFY THE REQUESTED ACCOMMODATION: _____	
WILL AN INTERPRETER BE NEEDED? ☐ YES ☒ NO		IF YES, FOR WHAT LANGUAGE: _____	
ATTORNEY SIGNATURE Vincent K. Loughlin, Esq.		October 2, 2003	

Revised effective 10/1/02

SIDE 2



CIVIL CASE INFORMATION STATEMENT

(CIS)

Use for initial pleadings (not motions) under Rule 4:5-1

CASE TYPES (Choose one and enter number of case type in appropriate space on the reverse side.)

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- 175 FORFEITURE
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- 801 SUMMARY ACTION
- 802 OPEN PUBLIC RECORDS ACT (SUMMARY ACTION)

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- 604 MEDICAL MALPRACTICE
- 606 PRODUCT LIABILITY
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- 618 LAW AGAINST DISCRIMINATION (LAD) CASES

Track IV — Active Case Management by Individual Judge / 450 days' discovery

- 156 ENVIRONMENTAL COVERAGE LITIGATION
- 234 FRT PLYWOOD LITIGATION
- 245 ACTIONS UNDER FEDERAL Y2K ACT
- 303 MT. LAUREL
- 508 COMPLEX COMMERCIAL
- 613 REPETITIVE STRESS SYNDROME
- 701 ACTIONS IN LIEU OF PREROGATIVE WRIT

Mass Tort (Track IV)

- | | |
|----------------|--------------------------|
| 240 DIET DRUG | 601 ASBESTOS |
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| 247 PROPULSID | |
| 248 CIBA GEIGY | |
| 264 PPA | |

999 OTHER (Briefly describe nature of action) _____

If you believe this case requires a track other than that provided above, please indicate the reason on Side 1, in the space under "Case Characteristics."

2

Watson, Stevens, Fiorilla, & Rutter LLP
390 George Street
P.O. Box 1185
New Brunswick, New Jersey 08903
(732) 545-2250
Attorneys for the Morristown & Erie
Railway, Inc.

RECEIVED / FILED
Superior Court of New Jersey
AUG 19 2003
CIVIL CASE MANAGEMENT
UNION COUNTY

THE BOROUGH OF KENILWORTH, ET AL.	) SUPERIOR COURT OF NEW JERSEY:
	) LAW DIVISION: UNION COUNTY
	)
Plaintiff,	) DOCKET NO. UNN-L-2302-03
	)
	) Civil Action
	)
Vs.	)
	) NOTICE OF MOTION TO DISMISS
	)
	)
THE COUNTY OF UNION AND THE	)
MORRISTOWN AND ERIE RAILWAY,	)
INC., A New Jersey Corporation	)
	)
Defendant	)
	)
	)

To: Harvey Fruchter, Esq.
Attorney for the Borough of Kenilworth
726 Boulevard, Suite 19
Kenilworth, NJ 07033

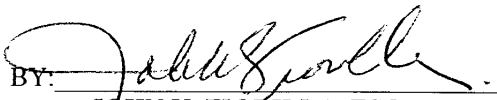
PLEASE TAKE NOTICE that on **Friday, September 12, 2003, at 9:00 A.M.**, or such other time as may be scheduled, the undersigned, attorneys for Defendant Morristown & Erie Railway, Inc. shall make application to the above-captioned court, at the Union County Court House, Elizabeth, New Jersey, for an Order dismissing the Complaint.

PLEASE TAKE FURTHER NOTICE that Defendant will rely upon the attached brief in support of this application.

PLEASE TAKE FURTHER NOTICE that Defendant requests oral argument.

PLEASE TAKE FURTHER NOTICE two (2) proposed forms of Order are submitted herewith.

**WATSON, STEVENS, FIORILLA & RUTTER
ATTORNEYS FOR MORRISTOWN & ERIE
RAILWAY, INC.**

BY: 
JOHN K. FIORILLA, ESQ.

DATED: August 19, 2003

CERTIFICATION

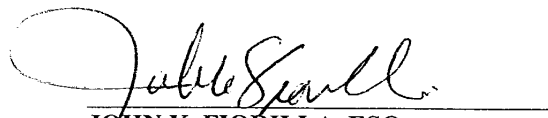
I hereby certify that the original and copy of the within Notice of Motion, with supporting brief and proposed forms of Order were hand delivered on August 19, 2003 to the Motions Clerk, Superior Court of New Jersey, Union County Court House, Elizabeth, N.J., and were hand delivered on August 19, 2003 to Plaintiff's agent:

Harvey Fruchter, Esq.
726 Boulevard, Suite 19
Kenilworth, NJ 07033

A copy of the Notice of Motion with supporting brief and proposed forms of Order were sent on August 19, 2003 via Federal Express to Robert Barry, Esq., attorney for defendant Union County:

Brownstein Booth & Barry
512 42nd Street
Union City, NJ 07087

Dated: 8/19/2003


JOHN K. FIORILLA, ESQ.

Watson, Stevens, Fiorilla, & Rutter, LLP
390 George Street
P.O. Box 1185
New Brunswick, New Jersey 08903
(732) 545-2250
Attorneys for Defendant, Morristown & Erie
Railway, Inc.

RECEIVED / FILED
Superior Court of New Jersey
AUG 25 2003
CIVIL CASE MANAGEMENT
UNION COUNTY

THE BOROUGH OF ROSELLE PARK, ET
AL.

Plaintiffs,

Vs.

THE COUNTY OF UNION AND THE
MORRISTOWN AND ERIE RAILWAY,
INC., A New Jersey Corporation

Defendants.

) SUPERIOR COURT OF NEW JERSEY:

) LAW DIVISION: UNION COUNTY

) DOCKET NO. UNN-L-2689-03

) Civil Action

BRIEF IN SUPPORT OF DEFENDANT, MORRISTOWN
AND ERIE RAILWAY'S, MOTION TO DISMISS

John K. Fiorilla, Esq.
Peter J. Fabriele, Esq.

On the Brief

PRELIMINARY STATEMENT

On or about July 17, 2003, plaintiffs, The Borough of Roselle Park ("Roselle Park"), et al., have filed a Complaint Action In Lieu Of Prerogative Writ, ("Complaint") seeking, among other things, to enjoin any implementation of an Operating Agreement between defendants, the Morristown & Erie Railway, Inc. (the "M&E") and the County of Union, (the "County"), for the operation of the former Staten Island and Rahway Valley Railroad lines that had been abandoned in 1990 through 1992, contingent upon the approval of the Federal Safety Transportation Board (the "STB"). See Operating Agreement, attached hereto as Exhibit A. Plaintiffs do so despite admitting in the Complaint that it (and other affected municipalities) participated in a special meeting of the Union County Board of Chosen Freeholders (the "Board") that resulted in a resolution authorizing the County to begin implementing various phases of the Operating Agreement. See Complaint ¶17, attached hereto as Exhibit B.

As a threshold matter, the plaintiffs' complaint is time-barred by R. 4:69-1 et seq. That rule unequivocally provides that an action challenging the validity of a public ordinance or public contract cannot be brought more than 45 days after the accrual of the right to review. In addition, the plaintiffs have failed to cite any factors that would allow relaxation of the 45-day time bar. Furthermore, even if the complaint were not time-barred, this Court lacks subject matter jurisdiction to issue injunctive relief. Moreover, not only are the plaintiffs' claims preempted by the ICCTA, 49 U.S.C.A. § 10101 et seq., any injunction issued here would constitute state action and therefore would be preempted by federal law. Finally, the parties to the Operating Agreement contemplated the STB's exercise of control over the track.

For the reasons more fully set forth below, the plaintiffs' complaint should be dismissed.

STATEMENT OF FACTS

The facts herein are taken from plaintiffs' Complaint.

The M&E is a common carrier of freight by rail. See Exhibit A, pp. 2. The County is a body politic established in 1857 under the laws of the State of New Jersey. Exhibit B, ¶4. Pursuant to the State of New Jersey Bridge Rehabilitation & Improvement and Railroad Right-of-Way Preservation Bond Act of 1989, Public Law 192, Ch. 25, the Department of Transportation (the "DOT") purchased segments of certain tracks of railroad located in Union County which were previously abandoned by the Staten Island Railroad and the Rahway Valley Railroad. See Purchasing Agreement attached hereto as Exhibit C. On June 23, 2000, the County signed an agreement with the DOT allowing the County a right-of-entry on the Rahway Valley Line for purposes of rehabilitating and restoring the line to operational status. See Exhibit B, ¶9.

According to Board Resolution No. 813-20 dated June 22, 2000:

[T]he "revitalization of the Rahway Valley, Staten Island and other rail lines in the County will provide critical links to the national transportation system that will permit Union County to offer new transportation and distribution options, such as intermodalism, Value Added Services, and logistics management, and permit the County to take full advantage of its deep-water seaport access ..."

See Exhibit D.

Thereafter, in May 2002, M&E entered into an agreement with the County for the operation of the former Staten Island and Rahway Valley Railroad lines that had been abandoned in 1990-92 with STB approval. See Exhibit B, ¶10. According to the language of the Operating Agreement, the timeline for completion of Phases II of the restoration project required the "mutual consent of the parties to this Agreement." See Exhibit B, ¶13. The Operating

Agreement also reflected the common purpose of the parties to further the economic development of this area of track:

“Whereas, the intent of the parties is to create a corridor of sustainable economic development for the benefit of Union County and the State of New Jersey; and

Whereas all parties will work together to maximize the economic and social benefits to the communities; and

Whereas, M&E, the County, and the State recognize that a start up operation is fragile at best, expensive and requires the mutual cooperation of the parties. In this regard, the parties pledge their cooperation in this start up and operation of the line and its continued success ...”

See Exhibit A, pp. 3.

In July 2002, the STB granted M&E’s application for a Modified Certificate of Public Convenience and Necessity (the “Modified Certificate”) authorizing the restoration scheme as set forth in the Operating Agreement. See Exhibit E.

In response to public protest by individual homeowners who live along the railroad right-of-way, the Board adopted Resolution No. 902-02 that purported to clarify the “mutual consent” provisions regarding Phase II. See Exhibit F. Resolution 902-02 provided that usage of the right-of-way would require the consent of those municipalities affected by the Phase II development.

On June 6, 2003, the Board adopted Resolution No. 633-2003 that authorized the implementation of Phases II, III and IV of the Operating Agreement between M&E and the County. See Exhibit G. Resolution 633-2003 was passed even after hearing from, during a special meeting, opposition from representatives from Roselle Park and other affected towns. See Exhibit B, ¶ 17.

LEGAL ARGUMENT

I. PLAINTIFFS' ACTION IN LIEU OF PREROGATIVE WRIT IS TIME-BARRED BY R. 4:69-1

Actions in lieu of prerogative writs are governed by the provisions of New Jersey Court Rule 4:69-1 et seq. That rule unequivocally provides that an action challenging the validity of a public ordinance or public contract cannot be brought more than 45 days after the accrual of the right to review. Here, plaintiffs filed their action in lieu of prerogative writ on or about June 17, 2003. Since the Operating Agreement was executed on May 9 2002, the 45-day period to challenge the contract began on that date. See Ott v. Town of West New York, 92 N.J. Super. 184 (Law Div. 1966)(holding that the date of execution of a contract triggers the running of the 45 day time bar). Clearly, the plaintiffs' action is time-barred by R. 4:69-1 and, thus, should be dismissed.

Furthermore, the 45-day time bar should not be relaxed in this instance. In order for the 45-day time-bar to be relaxed, there must be a showing of one of the following: (1) that there is an important and novel constitutional question, (2) that the public action was rendered in an informal or ex parte manner, or (3) that there are important public rather than private interests which require adjudication or clarification. See Borough of Princeton v. Board of Chosen Freeholders, 169 N.J. 135, 152 (2001). Against these factors, the court should balance the policy underlying the statute of limitation, i.e. "to encourage parties not to rest on their rights." Id. at 153.

In Borough of Princeton, the Court held that the 45-day limit should be relaxed because the public contract extended beyond the term limit imposed by public contract law. The court reasoned that this facially invalid term limit imposed a "continuing violation of public rights." Id. at 155, quoting Reilly v. Brice, 109 N.J. 555 (1988). Therefore, the court concluded that the

third factor of the relaxation test, i.e. an important public rather than private interest that required adjudication or clarification, outweighed any “timeliness barriers”. Id.

In contrast, there is nothing in the record here that would indicate a continuing violation of a public right. The Operating Agreement between M&E and the County was the subject of significant public debate and was a matter of public record. In fact, the plaintiffs do not challenge the legality of the Operating Agreement, but rather, they contend that an ordinance adopted in August 2002 by the Board purported to give plaintiff municipalities a veto power with regards to the continued progress of the rail restoration under the Operating Agreement. See Exhibit B, ¶ 13. The facially illegal terms of the contract that were present in Borough of Princeton are not present here. As there is no allegation of such illegality that would compromise the public’s interest in this case, the 45-day bar should be enforced.

In Reilly v. Brice, the court noted that “ordinarily, ignorance of the existence of a cause of action will not prevent the running of the statute of limitations except where there has been concealment”. 109 N.J. at 559. In Reilly, the Court found that the settlement of an employment dispute between the city and its police chief was not publicized with enough specificity per N.J.S.A. 10:4-8(d) and thus relaxation of the 45-day bar was warranted. Id.

Unlike Reilly, there is nothing in the record here that would indicate “concealment” on the part of the County or M&E. The Operating Agreement was the product of well-publicized negotiations. Unlike Reilly, there is nothing in the record to indicate that the June 2000 Resolution authorizing the Operating Agreement between M&E and the County was not listed on the agenda for that meeting. That resolution clearly stated that such an agreement would be entered in order to restore freight service on the Staten Island Railroad and the Rahway Valley Railroad Lines. Further, plaintiffs had actual notice of the County’s intentions to resume freight service because representatives of the municipalities had opposed reactivation prior to the

Board's adoption of Resolution 633-2003 that authorized implementation of Phases II, III and IV of the Operating Agreement. See Exhibit B, ¶17.

Even if this Court were to relax the 45-day rule, the plaintiffs' case must be dismissed since injunctive relief cannot be afforded in an action in lieu of prerogative writ. See Priory v. Borough of Manasquan, 39 N.J. Super. 147 (App. Div. 1956). In Priory, the Court upheld the lower court's dismissal of a prerogative writ action as being an inappropriate form of action. The Court reasoned that the plaintiffs were not challenging the ordinance itself, but were seeking injunctive relief based on a nuisance theory. Id. at 156. Likewise, plaintiffs are not challenging the validity of the Operating Agreement in this case. On the contrary, plaintiffs seek a judicially imposed interpretation of the Operating Agreement that would require municipal approval and would entitle plaintiffs to the equitable remedy that is the basis for their complaint, i.e. to enjoin further railroad operations. Accordingly, since the nature of the relief that plaintiffs seek fails to substantiate their prerogative writ action as a threshold matter, the action should be dismissed.

Moreover, the allegations contained in plaintiffs' complaint do not afford a legal remedy. Although the standard for a motion to dismiss is high, the court should grant the motion where there is no set of circumstances that would support the allegations in the complaint. In Camden County Energy Recovery Association v. NJEDEC et al., 320 N.J. Super. 59 (App. Div. 1999), the court dismissed plaintiffs' complaint because the challenge to the public contract at issue amounted to "no more than a fundamental challenge to high level policy decisions over a course of years, by representatives of the state" Id. at 65. As in Camden County Energy Recovery Association, plaintiffs improperly seek judicial intervention as a means to challenge the actions of the County, namely entering into the Operating Agreement with M&E. Plaintiffs' challenge, in effect, is a challenge to the policy decisions of the Board that resolved to enter the Operating Agreement after significant open debate by plaintiff Roselle Park and negotiations. See Exhibit B, ¶17. Thus, the plaintiffs' complaint should be dismissed.

II. AS A MATTER OF LAW, THE COURT LACKS SUBJECT MATTER JURISDICTION TO ISSUE INJUNCTIVE RELIEF

The Interstate Commerce Commission Termination Act of 1995 (“ICCTA”) transferred regulatory authority over the nations’ railroads from the Interstate Commerce Commission (“ICC”) to the STB. 49 U.S.C.A. § 10101 et seq. Although the ICCTA sought to minimize federal intrusion into the rail transportation industry by abolishing the ICC, the Act preserves certain regulatory authority for the STB. The STB must, in general terms, effectuate the policies of the United States to provide for a safe and efficient rail transportation system. 49 U.S.C.A. § 10101(3). Under the guise of this broad mandate, Congress explicitly vested the STB with jurisdictional authority over railroad carriers. 49 U.S.C.A. § 10501. Specifically, the STB has jurisdiction 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. . . . [49 U.S.C.A. §§ 10501(b)(1) and (2)]

Most importantly, “the jurisdiction of the Board over [the above matters] 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. Id. (emphasis added).]

Within the meaning of the statute, “transportation” includes the following:

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail regardless of ownership or an agreement concerning use. . . . [49 U.S.C.A. 10102(9)(A)(emphasis added).]

Clearly, the aforementioned statutory provisions explicitly grant the STB exclusive and plenary jurisdictional authority over certain issues associated with rail transportation.

The ICCTA and the case law interpreting it unequivocally demonstrates that the STB has exclusive and plenary authority in providing remedies and has preempted all federal or state remedies. Kraus v. Santa Fe Southern Pacific Corp., 878 F.2d, 1193, 1197-98 (9th Cir. 1989), cert. dismissed 493 U.S. 1051, 107 L.Ed.2d. 850 (1990); DeBruce Grain Inc. v. Union Pacific Railroad, 983 F.Supp. 1280, 1283 (W.D.Mo. 1997) order aff'd 149 F.3d 787 (8th Cir. 1998); City of Auburn v. United States et al., 154 F.3d 1025 (1998), cert. den'd 1999 WL 169424 (U.S.) (which stands for the principle that the STB now has exclusive authority over the operation of rail lines that are part of the interstate railway network); In re Application of Burlington Northern Railroad Company v. Page Grain Company, 545 N.W.2d. 749, 751 (1996).

In Kraus v. Santa Fe Southern Pacific Corp., 878 F.2d, 1193, 1197-98 (9th Cir. 1989), cert. dismissed 493 U.S. 1051, 107 L.Ed.2d. 850 (1990), for example, the Court confirmed the ICC's preemptive authority in dismissing a private action brought in federal court to recover damages resulting from a railroad merger. The decision reaffirmed the ICC's exclusive jurisdiction over claims concerning rail transportation carriers and the remedies awarded for actions arising out of such matters. Id.

In DeBruce Grain Inc. v. Union Pacific Railroad, 983 F.Supp. 1280, 1283 (W.D.Mo. 1997) order aff'd 149 F.3d 787 (8th Cir. 1998), the District Court extended Kraus's holding to confirm the exclusive jurisdiction to the STB, the ICC's successor. Both the case law and the ICCTA's legislative history clearly indicate that any cause of action that implicates the STB's exclusive jurisdiction to regulate railroads and their operations either by a state through its executive, legislative, or judicial branches, or a private party, through judicial enforcement of that cause of action, has been preempted by the STB's exclusive jurisdiction.

The STB's exclusive and plenary jurisdictional authority over the operation, construction, abandonment and practices of railroad carriers governs the plaintiffs' efforts to enjoin restoration of rail service as outlined in the Operating Agreement between the County and M&E. A grant of the equitable relief sought by plaintiffs would have the effect of terminating the railroad's efforts to restore safe and efficient service to the formerly abandoned lines pursuant to the Modified Certificate issued by the STB.

The ICCTA dictates that the State Court has no jurisdiction to adjudicate matters involving "transportation by a rail carrier." 49 U.S.C.A. §10501(b). The mere fact that M&E is operating pursuant to a Modified Certificate pursuant to 49 CFR § 1150.22 does not preclude the STB from exercising its exclusive jurisdiction by way of 49 U.S.C.A. § 10501.

Specifically, 49 CFR § 1150.22 provides:

"The acquisition by a State¹ of a fully abandoned line is not subject to the jurisdiction of the Surface Transportation Board. The acquisition by a State of a line approved for abandonment and not yet fully abandoned is exempted from the Board's jurisdiction. If the State intends to operate the line itself, it will be considered a common carrier. However, when a State acquires a rail line described under Section 1150.21 and contracts with an operator to provide service over the line, only the operator incurs a common carrier obligation. The operators of these lines are exempted from 49 U.S.C.A. 10901 and 10903 which are the statutory requirements governing the start up and termination of operations. Operators exempted from these requirements must comply with the requirements of this part and must apply for a modified certificate of public convenience and necessity. The operator is a common carrier and incurs all benefits and responsibilities under 49 U.S.C. subtitle IV." (emphasis added)

The jurisdictional exemption provided by the federal regulation only applies to "acquisition by a State" of an abandoned line. It is clear, however, that when the state or other common carrier resumes operation of the line, the jurisdiction of the STB is triggered. Accordingly, as the Operating Agreement clearly provides for the restoration of freight service

¹ 49 CFR Section 1150.21 defines the term "State" to include "States, political subdivisions of States, and all instrumentalities through which the State can act."

with M&E as the designated common carrier, this matter falls within the exclusive jurisdiction of the STB.

In Wisconsin Central, Ltd. V. Surface Transportation Board, 112 F.3d 881 (7th Cir. 1997), the Court held that if a formerly abandoned line is leased to a common carrier, the operator is subject to the jurisdiction of the STB. Further, the Court reasoned that where the intent of the owner of an abandoned line is to restore service to the line, the jurisdiction of the STB would also apply. See also Indiana Hi-Rail et al. ICC Finance Docket No. 32422 (1994)(noting that “a person who acquires an abandoned line and then contracts with an agent to provide rail service on the line acquires a residual common carrier obligation”).

The underlying intent of M&E and the County is reflected in both the Operating Agreement and in the various Board resolutions. Pursuant to the Operating Agreement, the County has delegated the responsibility to operate the line to M&E, and therefore has acquired a “residual common carrier obligation”, subjecting itself to the jurisdiction of the STB. Accordingly, this Court is without jurisdiction and, the matter should be dismissed.

III. CONSISTENT WITH THE SUPREME COURT’S 2000 DECISION, PLAINTIFF’S CLAIMS MUST BE DISMISSED SINCE THEY ARE PREEMPTED BY THE ICCTA, 49 U.S.C.A. 10101 ET SEQ.

In Village of Ridgefield Park v. New York Susquehanna and Western Railway Corp., 163 N.J. 446 (2000), the New Jersey Supreme Court articulated the doctrine of federal preemption as it applies to the operations of a railroad. In upholding the reasoning of the Appellate Court, Justice Stein noted that the ICCTA preempts all state or local regulation of a railroad to the extent such regulation has any economic impact on railroad operations or interstate commerce. Id. at 462. The Court concluded that because zoning regulations could be used to defeat the railroad’s maintenance and upgrading activities and thus interfere with the efficiency of railroad operations, the action of the municipality in seeking an injunction was preempted. Id. Further,

the dissent reasoned that the scope of the preemptive effect should be considered first by the STB. Id. at 463, Long, J., dissenting.

Applying the Court's reasoning in Village of Ridgefield Park to the facts at bar, it is clear that the plaintiffs' action in seeking injunctive relief is preempted by the ICCTA to the extent that requiring municipal approval for continued railroad operations would "frustrate transportation-related activities and interfere with interstate commerce." Village of Ridgefield Park, 163 N.J. at 461, quoting In re: Borough of Riverdale, STB Docket No. 33466 (1999), attached hereto as Exhibit A; see also Greater Bay Hotel & Casino v. Tose, 34 F.3d 1227 (3rd Cir. 1994)(noting that where the legislature vests an agency with exclusive jurisdiction, "the agency is the only forum in which complaints within that jurisdiction may be adjudicated originally."); CSX Transportation Inc. v. Georgia Public Service Commission, 944 F.Supp. 1573, 1583 (N.D. Ga. 1996)("[B]y preempting state regulation of railroad operations, and granting exclusive jurisdiction over the regulation of almost all aspects of railroad operations to the [STB], Congress removes the ability of states to frustrate its policy of deregulating and reviving the railroad industry."). Accordingly, an award of injunctive relief in this case would not only flout the express preemption language of the ICCTA granting the STB exclusive jurisdiction over railroad matters, it would frustrate its underlying legislative purpose. Thus, plaintiffs' complaint should be dismissed.

IV. A JUDICIALLY FASHIONED REMEDY CONSTITUTES STATE ACTION
THAT HAS BEEN PREEMPTED BY FEDERAL LAW

One of the issues in this case is whether a court-issued injunction constitutes “state action” similar to enforcement of a state statute, regulation or municipal ordinance. Although there is no direct authority on this point within the context of preemption, there is indirect authority that is persuasive here. For example, in the constitutional law context, “state action” has been specifically defined as to include the action of state courts and of its judicial officers acting in their official capacities. Shelley v. Kraemer, 334 U.S. 1, (1948); Rich v. Jones, 142 N.J. Eq. 215, 218 (1948); Commonwealth of Virginia v. River, 100 U.S. 313 (1880) which stated in pertinent part the following:

“It is doubtless true that a State may act through different agencies,-- either by its legislative, its executive, or its judicial authorities; and the prohibitions of the [14th] amendment extend to all action of the state denying equal protection of the laws, whether it be action by one of these agencies or by another.” Id. at 842 (citations omitted)(emphasis added).

The concept that the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of the United States Supreme Court. Id. at 12. Furthermore, the United States Supreme Court has stated that it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government. Id. at 18.

Analysis of some of the pertinent facts in Shelley are instructive in the case at bar. Shelley concerned whether one of the parties was entitled to judicial enforcement of racially discriminatory terms of an agreement among private individuals. The United States Supreme Court first noted that there “was no shield against merely private conduct, however discriminatory or wrongful”. Shelley, 334 U.S. at 13. The Supreme Court concluded, therefore, “that the restrictive agreements standing alone [could not] be regarded as a violation of any

rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms,” it was clear that there was no state action. Id. (emphasis added).

The proposition that judicial enforcement of an agreement between private parties constitutes state action in which preemption is implicated is also supported by the New Jersey Court of Appeals decision in Ridgefield Park v. New York Susquehanna and Western Railway Corp., 318 N.J. Super 385 (1999), aff’d on other grounds 163 N.J. 446 (2000). In Ridgefield Park, the Appellate Division clearly noted that the state court’s enforcement of contract law to provide a litigant a remedy against a railroad carrier, which implicated the ICCTA, had been preempted by the STB. Id. at 405. Similarly, this Court’s enforcement of the municipal consent provision, in violation of the STB’s preemptive authority to regulate railroad operations, has been preempted in the same way the actions of a state’s legislative and executive branches have been preempted.

V. THE PARTIES TO THE OPERATING AGREEMENT CONTEMPLATED THE STB’S EXERCISE OF CONTROL OVER THE TRACK

The polestar of contract construction is to find the intention of parties as revealed by the language used by them. Homann v. Torchinsky, 296 N.J. Super. 326, 334 (App. Div. 1997), certif. denied, 149 N.J. 141 (1997). To this end, the language used must be interpreted in accordance with justice and common sense. Id. In construing a contract, the court must determine the intention of the parties as disclosed by the language used, taken in its entirety. Dontzin v. Myer, 301 N.J. Super. 501, 507 (App. Div. 1997). In the quest for the intention of the parties to a contract, the court must consider the relations of the parties, the attendant circumstances, and the objects they were trying to obtain. An agreement must be construed in the context of the circumstances under which it was entered into and it must be accorded a rational meaning in keeping with the express general purpose. Id. at 334 (citations omitted).

The Operating Agreement clearly evinces an understanding that the contractual relations of the parties would be subject to the regulatory authority of the STB. Specifically, the Agreement required M&E to obtain STB approval prior to commencing common carrier services. See Exhibit A, pp. 7. In addition, one of the grounds for a finding of breach included a failure to secure required federal operating authority. Id., pp.14

Plaintiffs should not now be allowed to judicially enjoin continued railroad operations given the express language of the Operating Agreement and the intent of the parties thereto. Accordingly, their complaint should be dismissed.

CONCLUSION

For the foregoing reasons, defendant M&E respectfully requests that an order be entered by this Court dismissing all Counts of the Complaint with prejudice.

Respectfully submitted,

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Dated: August 21, 2003

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FILED

DEC 15 2003

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THE BOROUGH OF KENILWORTH,
JOHN DOE and JANE DOE 1-5, ABC
CORPORATION 1-5 and OTHERS
SIMILARLY SITUATED,

Plaintiffs,

vs.

THE COUNTY OF UNION AND THE
MORRISTOWN AND ERIE RAILWAY,
INC., A NEW JERSEY CORPORATION,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY
DOCKET NO.: UNN-L-2302-03

Civil Action

ORDER

THIS MATTER having been presented to this Court by way of Motion to Dismiss Plaintiffs' Complaints, as amended, for failure to state a claim or, in the alternative, for a more definite pleading from Plaintiff, on behalf of Defendant, County of Union by Brownstein Booth & Associates, P.C., on notice to Harvey Fruchter, Esq., attorney for Plaintiff, Borough of Kenilworth; Vincent K. Loughlin, Esq., attorney for Plaintiff, Borough of Roselle Park; Bruce H. Bergen, Esq., attorney for Plaintiff, Township of Springfield; John De Massi, Esq., attorney for Plaintiff, Borough of Roselle and Barry A. Osmun, Esq., attorney for Plaintiff, City of Summit; John K. Fiorilla, Esq., attorney for Defendant, Morristown & Erie Railway, Inc., and the Court having considered the papers submitted and the oral arguments made by counsel, and good cause having been shown for the entry of this Order.

IT IS on this 16th day of December 2003.

ORDERED as follows:

1. Defendant, Morristown and Erie Railway, Inc.'s Motion to Dismiss Plaintiffs' Amended Complaints for failure to state a claim upon which relief may be granted is hereby granted in its entirety and Plaintiffs' Complaints, as amended are hereby dismissed as against the Defendant, Morristown and Erie Railway, Inc. with prejudice; and

2. Defendant County of Union's Motion to Dismiss Plaintiffs' Amended Complaints for failure to state a claim upon which relief may be granted is hereby granted as to all counts contained within each of the Plaintiffs Amended Complaints except that the following counts shall remain:

Borough of Roselle Park:	Count Three (3) and Count Seven (7)
Borough of Roselle:	Count Three (3)
Borough of Kenilworth:	Count Ten (10) and Count Seven (7)
City of Summit:	Count Four (4) and Count Eight (8)
Township of Springfield:	at paragraphs two (2) and (3), inasmuch as they incorporate Counts Three (3) and Ten (10), respectively, of the Borough of Roselle Park's and Borough of Kenilworth's Amended Complaints.

3. Defendant County of Union shall file an Answer to the above listed remaining Counts by no later than December 20, 2003.

4. All Discovery in this matter shall be completed by no later than January 4, 2004.

5. A copy of this Order shall be served upon counsel for all parties within 5 days of the date of this Order.


EDWARD W. BEGLIN, R. J.S.C.
A.J.S.C.

R: 1:6-2(a): The within matter was XXX opposed unopposed.

R: 1:6-2(f): ✓ The Court made (✓ oral written) findings of fact and conclusions of law explaining its disposition of this matter on December 5th, 2003.

 If no such findings have been made by the Court, appended hereto is a statement of reasons for the disposition of this matter on , 2003.

 The Court concludes that explanation is not necessary or appropriate.

EXHIBIT B

THIS AGREEMENT, made this 23 day of June, in the year Two Thousand, between THE NEW JERSEY DEPARTMENT OF TRANSPORTATION (STATE), acting through the Commissioner of Transportation and the COUNTY OF UNION (COUNTY) acting through the Union County Freeholders, Department of Economic Development witnesseth that:

WHEREAS, the STATE is the owner of the New Jersey segments of certain tracks of railroad property located in Union County, New Jersey, as generally shown on the map annexed hereto and made a part hereof as EXHIBIT A (the Property), said segments hereinafter referred to as the Staten Island Railroad (SIRR) and the Rahway Valley Railroad (RVRR); and

WHEREAS, the State purchased the Property pursuant to The New Jersey Bridge Rehabilitation and Improvement and Railroad Right-of-Way Preservation Bond Act of 1989 (the Act); and

WHEREAS, the Act authorizes the state to construct, reconstruct, improve, rehabilitate, demolish or renew such property as necessary to preserve the property for transportation purposes; and

WHEREAS, the Property has been abandoned since 1991 and the STATE and the COUNTY have determined that its rehabilitation, and reactivation to accommodate rail freight service would benefit the people, increase commerce in the COUNTY and the region and carry out the intent of the Act; and

WHEREAS, the COUNTY with the STATES financial assistance, wishes to rehabilitate the Property; and

WHEREAS, subsequent to or concurrent with the rehabilitation of the line the COUNTY wishes to take the steps necessary to reactivate the Property; and

WHEREAS, the STATE and COUNTY have determined that the COUNTY has the necessary expertise and capability to facilitate the rehabilitation and reactivation of rail freight service to the Property and is the appropriate agency to undertake those actions; and

WHEREAS, the STATE wishes to grant to the COUNTY the right to enter upon the Property for the purpose of rehabilitating and reactivating the Property; and

WHEREAS, the COUNTY, subject to the availability of sufficient funding, will assume full responsibility for the physical rehabilitation to Federal Railroad Administration (FRA) Class 2 Track standards for the SIRR and RVRP railroad track structures and associated Rights-of-Way, as shown on Exhibit A.

NOW, THEREFORE, in consideration of the covenants and mutual agreements of the Parties hereto, it is hereby covenanted and agreed by the STATE and COUNTY as follow:

I. OBLIGATIONS OF THE PARTIES

The STATE hereby enters into this Agreement with the COUNTY for the use of the Property. This Agreement grants the COUNTY the right of entry to the Property under the terms and conditions set forth herein for the purposes of rehabilitating the railroad track, structures and right-of-way and the subsequent reinstitution of rail service on the Property.

The STATE, subject to the availability of funds, shall provide the COUNTY with the funds set forth in attached Exhibit B, in order to assist the COUNTY with the Project.

The COUNTY shall physically rehabilitate to FRA Class 2 Track standards, the RVRP railroad track and the segment of the SIRR railroad track in Union County, including the structures and associated rights-of-way as shown on Exhibit A, incorporated in and made a part of this AGREEMENT. Said physical rehabilitation shall be substantially completed by the end of _____, 2000, with the final completion no later than _____, 2000.

The COUNTY will enter into and administer an operating agreement (Operating Agreement) with the private rail carrier (Operator) for the purpose of reactivating rail freight service on the Property. The selected Operator will have the sole responsibility to obtain the certificate of Convenience and Necessity/Exemption Certificate from the Federal Surface Transportation Board (STB) to become a freight railroad. This certificate is required in order to operate the railroad lines.

This Agreement shall be the authority for the COUNTY to enter upon the Property to effectuate the purposes of this Agreement.

The STATE may review the final designs for the Project. The STATE may inspect the completed Project prior to the reactivation of rail freight service by the Operator.

ARTICLE I AGREEMENT

Unless otherwise mutually agreed to by the Parties in writing, this Agreement will take effect upon execution by the Parties.

This AGREEMENT shall terminate no later than July 19, 2023, unless terminated earlier by mutual agreement of the Parties.

III. EXCLUSIVE RIGHT TO USE

The COUNTY shall have the exclusive right to use, for rail freight service, the whole or any part of subject Property, except as required in Section XI of this Agreement entitled OVERHEAD TRACKAGE RIGHTS and Section XII entitled RESERVATIONS. The STATE shall not take any action that will interfere with the use thereof.

IV. COSTS

A. Operations

The STATE will not be obligated for any costs associated with the operation of the Property, which will be the sole responsibility of the COUNTY or the Operator.

B. Maintenance

The STATE will not be obligated to maintain the Property. That responsibility shall lie with the COUNTY or the Operator. The Operator's responsibilities shall be fully set forth in the Operating Agreement.

C. Taxes

The COUNTY, in the Operating Agreement, shall provide that the Operator will be responsible for any applicable state or local taxes.

NEW JERSEY RAILROAD

The day-to-day operations of the railroad will be conducted by the Operator pursuant to the Operating Agreement, subject to oversight by the COUNTY.

VI. LIABILITIES and RISK ALLOCATION

The STATE, subject to the provisions of the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq., shall be responsible for, and shall at its own expense, defend itself against any and all suits, claims, losses, demands, or damages of whatsoever kind or nature, arising out of or in connection with any act or omission of the STATE, its employees, agents or contractors, in the performance of the obligations assumed by the STATE pursuant to this Agreement. The STATE hereby releases and holds harmless the COUNTY from any and all liabilities, claims, losses, costs, expenses and demands of any kind or nature whatsoever arising, under state or federal law, out of or in connection with the STATE'S performance of the obligations assumed by the STATE pursuant to this Agreement.

The COUNTY, subject to the provisions of the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq., shall be responsible for, and shall at its own expense, defend itself against any and all suits, claims, losses, demands, or damages of whatsoever kind or nature, arising out of or in connection with any act or omission of the STATE, its employees, agents or contractors, in the performance of the obligations assumed by the STATE pursuant to this Agreement. The STATE hereby releases and holds harmless the COUNTY, from any and all liabilities, claims, losses, costs, expenses and demands of any kind or nature whatsoever arising, under state or federal law, out of or in connection with the STATE'S performance of the obligations assumed by the STATE pursuant to this Agreement.

VII. INDEMNIFICATION/OPERATOR

The COUNTY, through the Operating Agreement with the Operator, shall require the Operator to indemnify the STATE and the COUNTY. In addition, the COUNTY shall require the Operator to carry a minimum amount of \$5 million in public liability insurance, naming the STATE and COUNTY as additional insurers, and will require the Operator to be responsible for all public liability, including environmental claims and claims under the Federal Employers Liability Act that may occur after the Operator takes over responsibility for the Property, unless such claims are related to pre-existing environmental conditions.

The COUNTY shall include in the Operating Agreement, a clause requiring the Operator to defend, indemnify, protect and save harmless the STATE and COUNTY, and their agents, servants, and employees from and against any and all suits, claims, losses, demands, or damages of whatever kind or nature arising out of or claimed to arise out of the performance of the Operating Agreement unless such claims are related to a preexisting environmental condition.

The COUNTY shall include in all agreements/contracts with its agents and/or contractor(s), a clause requiring said contractor(s) to defend, indemnify, protect and save harmless the STATE and the COUNTY, and their agents servants, and employees from and against any and all suits, claims, losses, demands, or damages or whatever kind or nature arising out of or claimed to arise out of the performance of the rehabilitation work or other work related to the performance of this Agreement.

Neither the Union County Board of Chosen Freeholders, nor Department of Economic Development nor any officer or employee thereof, shall be charged personally with any liability under any term or provision of this Agreement or because of its execution or attempted execution or because of any breach or alleged breach thereof.

Neither the STATE nor any officer or employee thereof, shall be charged personally with any liability under any term or provision of this Agreement or because of its execution or attempted execution or because of any breach or alleged breach thereof.

VIII. FORCE MAJEURE

An event of "Force Majeure" as used herein means an event beyond the reasonable control of and which occurs without the fault or negligence of the Party claiming Force Majeure, which events may include but are not limited to: acts of God; strikes, lockouts or other similar such industrial disturbances; acts of the public enemy, wars, civil disturbances, blockades, military actions, insurrections or riots; landslides, floods, washouts, lightning, earthquakes, tornadoes, hurricanes, blizzards or other storms or storm warnings; explosions, fires, sabotage or vandalism; mandates, directives, orders, restraints or inactions of any governmental, regulatory or judicial body or agency; breakage, defects malfunctioning, or accident to machinery, equipment, materials or lines of pipe or wires; inability or delay in the obtaining of materials or equipment, inability to obtain or utilize any certificate, permit, approval, easement, license or Right-of-Way. The settlement of strikes, lockouts or other similar such industrial disturbances shall be entirely within the discretion of the Party directly affected. The requirement herein that any event of Force Majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes, lockouts or other similar such industrial disturbances when such course is, in the opinion of the party directly affected, inadvisable.

In the event the STATE or COUNTY is rendered unable, wholly or in part, by an event of Force Majeure, to perform any obligation it has under this Agreement, except with respect to a payment obligation, it is agreed that, by the STATE or the COUNTY giving notice and full particulars of such event of Force Majeure to the other Party, as soon thereafter as practicable, obligation(s) of the STATE or the COUNTY so far as they are affected by such event of Force Majeure, shall be suspended during the continuance of any inability or incapacity so caused, but for no longer period. THE STATE or the COUNTY shall use reasonable commercial efforts to remedy the cause of such inability or incapacity with all reasonable dispatch. Neither Party to this Agreement shall be liable to any other Party to this Agreement for any claims(s), loss(es), damage(s), liability(ies) or expense(s) sustained or incurred by the STATE, or the COUNTY arising out of, relating to, or

... of the COUNTY'S inability or incapacity to perform an obligation under the Agreement suspended due to any event of Force Majeure, as herein provided. It is also understood that mandates, directives, orders, restraints or inactions of the STATE or the COUNTY or any other governmental or regulatory body or agency controlled by either of them shall be considered an event of Force Majeure for the purposes of the STATE'S or COUNTY'S respective obligations under this Agreement. Further, any event of Force Majeure under the Operating Agreement shall be recognized as an event of Force Majeure under this Agreement.

IX. EVENTS OF DEFAULT AND BREACHES AND REMEDIES OF CONTRACT

Any of the following shall constitute an event of default by the STATE:

1. Failure of the STATE to make the property available to the COUNTY shall constitute a default.
2. Failure of the STATE to make available to the COUNTY any agreed to funding contained in the New Jersey Department of Transportation Capital Program as adopted by New Jersey State Legislature.

Any one of the following shall constitute an event of default by the COUNTY:

1. Failure to accomplish the rehabilitation of the segment of the Property to a minimum FRA Class 2 track standard, or to a mutually agreed upon higher standard.
2. Failure to enter into an Operating Agreement with an Operator for the operation and maintenance of the Property.

Upon the occurrence of any event of default, either the STATE or the COUNTY may terminate this Agreement by giving notice to the other party, and all rights and obligation under this Agreement shall become null and void with neither party having any recourse, either in law or in equity, against the other.

Except with regard to any event of default herein, upon the occurrence of any breach of any term under this Agreement, the injured party shall notify the breaching party in writing and specify the breach and what corrective action is desired to cure the breach. If, upon the expiration of 60 days from the receipt of said notice, the breach has not been cured and the breach is material, the injured party shall have the right, at its sole option, to cure the breach if possible and be reimbursed by the

... for the cost thereof, including any and all reasonable attorney's fees, and for any reasonably foreseeable consequential damages. Except with respect to the occurrence of an event of default as agreed to herein, nothing herein shall prevent the injured Party from resorting to any other remedy permitted under this Agreement or at law or equity, including seeking damages and/or specific performance, as shall be necessary or appropriate to make the injured party whole. Failure of the injured party to demand or enforce a cure for breach in one instance shall not be deemed a waiver of its right to do so for any subsequent breach by the breaching party.

The failure of any party hereto to enforce at any time any of the provisions of this Agreement or to exercise any right or option which is herein provided shall in no way be construed to be a waiver of such provisions(s) as to the future, nor in any way to affect the validity of this Agreement or any part hereof or the right of either party to thereafter enforce each and every such provision and to exercise any such right or option. No waiver of any breach of this Agreement shall be held to be a waiver of any other or subsequent breach.

X. DISCONTINUATION OF SERVICE

Nothing herein shall preclude the COUNTY, consistent with applicable federal law, from discontinuing the operation of all or a part of the rail service over all or any portion of the Property subject to this Agreement if circumstances arise which the parties agree under the terms of this Agreement would justify discontinuing the operation. The STATE agrees that it will not object to, or take any action to prevent, such agreed upon discontinuance.

XI. OVERHEAD TRACKAGE RIGHTS

The COUNTY will provide in any agreements with the Operator, the right of the COUNTY, with the prior written approval of the STATE, to assign overhead trackage rights.

In addition to all other provisions of this agreement, the COUNTY reserves the right to assign trackage rights, form agreements, interchange agreements, and issue any other permits to any rail service provider, including but not limited to New Jersey Transit Rail Operations, and/as others in order for those agencies to access areas connected by the Property.

XII. RESERVATIONS

The STATE reserves the right to grant any interest in property not required for railroad purposes, as delineated in the Operating Agreement, and to collect and retain any revenue therefrom, e.g. outdoor advertising.

The STATE shall have the exclusive right to run fiber optic cables along the Property. At no time, however, will the installation or maintenance of fiber optic cables or any other use by the STATE interfere in any way with the operation of the Property.

... shall have the exclusive right to all operating revenue generated by the railroad operation. This revenue will be used for the purposes of economic development throughout the County.

Neither the STATE nor the COUNTY will enter into any other subleases involving the railroad right-of-way unless it has the approval of both parties and its purpose is exclusively for the operation of the railroad.

XIII. ENTIRE AGREEMENT

This Agreement constitutes the full agreement between the parties with respect to the subject matter hereof, and supersedes all prior agreements or understandings regarding such subject matter. The subject matter of this Agreement may not be explained or supplemented by the circumstances of its negotiation, the course of dealing between the parties or usage of trade.

XIV. SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon, and shall inure to the benefit of, or may be performed by, the successors and assigns of the parties, except that, no assignment, pledge or other transfer of this Agreement by a party shall serve to release the assignor, pledgor or transferor from any of its obligations under this Agreement, unless consent to the release is given in writing by the STATE or COUNTY, which consent shall not be unreasonably delayed or withheld, or unless such transfer is incident to a reorganization or merger or consolidation with or transfer all of or substantially all of the assets of the transferor to another person or entity, which person or entity shall, as part of such succession, assume all the obligations of the transferor under this Agreement.

XV. CHOICE OF LAW

This Agreement shall be governed and construed in accordance with the laws of the State of New Jersey.

XVI. COUNTERPARTS

This Agreement may be executed in counterparts. Each shall be deemed an original but together shall constitute one and the same instrument.

XVII. CAPTIONS

The captions or headings used in this Agreement are for convenience only and are not intended to affect the construction of the matter in the sections which follow them. Accordingly, they shall have no effect whatsoever in determining the rights or obligations of the parties.

XVIII. MISCELLANEOUS

Each party hereto certifies that, to the best of its knowledge and belief, all things required by law to be done and performed by it to enable it to execute this Agreement have been done and performed.

Nothing in this Agreement is intended, nor shall it be construed as, subjecting either party to any laws or regulations that they would not otherwise be subject to.

XIX. SURVIVAL OF OBLIGATIONS

All indemnifications set forth in Section VI - LIABILITIES AND RISK ALLOCATION - and Sections VII - INDEMNIFICATION OPERATOR - shall survive this Agreement.

XX. NOTICES

All notices hereunder shall be sent by first class mail, postage prepaid, registered or certified mail addressed to:

If to the STATE: Executive Director, Aeronautics & Freight Systems
New Jersey Department of Transportation
1035 Parkway Avenue, P.O. Box 600
Trenton, NJ 08625

If to the COUNTY: County Manager
Union County Courthouse
Elizabethtown Plaza
Elizabeth, NJ 07207

XXI. NO THIRD PARTY BENEFITS

Nothing herein contained shall be understood or construed to create any third party benefits, rights or property interests unless the person claiming such rights is identified herein and the rights claimed are expressly set forth in this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed the day and year first above written.

WITNESS:

James Delany

COUNTY OF UNION

BY: Michael J Lapolla
PRINT NAME: Michael J Lapolla
TITLE: County Manager

WITNESS:

Paul M. Harkin
Acting Secretary
Department of Transportation

STATE OF NEW JERSEY
DEPT. OF TRANSPORTATION

BY: Nicholas Monahan
Nicholas Monahan, Manager
Division of Right of Way

DATE: 6/20/00

The aforementioned Agreement has been reviewed and approved as to form.

JOHN J FARMER, JR.
ATTORNEY GENERAL OF NEW JERSEY

BY: Serg V. Touchton
DEPUTY ATTORNEY GENERAL

DATE: June 21, 2000

The aforementioned Agreement has been reviewed, approved as to form and attested to by the County of Union:

ATTEST: M. Elizabeth Genievich
M. ELIZABETH GENIEVICH, CLERK
Board of Chosen Freeholders

APPROVED AS TO FORM

BY: Jeremiah O'Dwyer
JEREMIAH O'DWYER, ESQ
Deputy County Counsel

EXHIBIT B

**CAPITAL TRANSPORTATION TRUST FUNDS AVAILABLE TO THE COUNTY
FOR REHABILITATION OF THE SIRR & RVR RAILROADS**

FY'97 Statewide Capital Improvement Program (TIP)	\$2.0 million
Matched funds from NJDOT through Rail Freight Capital Program	\$.3 million
FY'98 Statewide Capital Improvement Program (TIP)	\$2.0 million
Additional FY'98 Rail Freight Capital Program	\$2.3 million
Chemical Coast Clearance (per Ted Matthews)	\$.2 million
FY'99 Statewide Capital Improvement Program (TIP)	\$1.0 million

EXHIBIT C

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 34054

Morristown & Erie Railway, Inc. – Modified Certificate

CERTIFICATION OF GORDON R. FULLER

I, Gordon R. Fuller, under penalty of perjury do testify as follows:

1. I am the Executive Vice President and Chief Operating Officer of the Respondent Morristown & Erie Railway, Inc. ("M&E") and am familiar with the facts of this case.
2. In my capacity as Vice President and COO, I have been directly involved with the negotiation and implementation of the Operating Agreement between the M&E and the Respondent County of Union that is the subject of controversy in this case.
3. The Operating Agreement between M&E and Union County vested M&E with the responsibility of restoring to FRA Class II operational status segments of the formerly abandoned Rahway Valley and Staten Island Railroad lines.
4. Pursuant to the terms of the Agreement, Union County authorized work in several phases. Pursuant to Phase I of the Agreement, M&E has performed all of its obligations in rehabilitating the Staten Island Railroad line, i.e. from MP 4.7 immediately west of the New Jersey Turnpike in Linden, New Jersey to MP 2.3 immediately east of St. Georges Avenue in Linden and has begun

work on Phase II of the project. To date, a total of three million six hundred thousand dollars (\$3,600,000) has been expended to accomplish Phase I requirements.

5. The restoration work is essentially a tie and surfacing operation that is intended to restore the track to FRA Class II standards. In addition, M&E has replaced light rail with heavy rail as required.
6. The M&E is not expanding the track bed along the line; however, four bridges will be replaced. In addition, M&E is removing encroachments from the right of way which includes some resurfacing of the track bed.
7. Once operational, M&E will satisfy all EPA and FRA standards with regards to noise, carriage of freight and emissions.
8. The M&E plans to run three round-trip trains per week when service resumes.
9. The work performed by M&E does not include the salvaging of track and based on information and belief, there has been no salvage of existing track since the abandonment of these lines.
10. Based on information and belief, the abandonment of this track complied with all environmental conditions established by the STB or other public agencies. Further, M&E is not aware of any hazardous materials on or under the track bed.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: Jan. 19, 2004

By:


Gordon R. Fuller

EXHIBIT D

V. CONCLUSIONS

1. Considering that the property is a railroad right-of-way and that the property passes through industrial areas, there is no evidence of significant environmental impact along the right-of-way.
2. Some adjacent properties are being remediated. There was no impact on the right-of-way visually evident.
3. Documentation of no further action for the former engine service facility should be secured from NJDEPE.
4. A report summarizing underground storage tank removal and site conditions at the Broad Street Summit property is being reviewed by the NJDEPE.
5. Property lines should be verified in the field to identify encroachments by structures, debris and other materials.
6. Generators of debris and other materials deposited on and releases onto the right-of-way should be required to remove the materials and remediate any impacts.

EXHIBIT E

EXHIBIT H

1. Remove the bridge structure (not including concrete abutments) at Broad Street, Summit, NJ.
2. Remove the underground tank located at 207 Market Street, Kenilworth, NJ in accordance with applicable regulations.
3. Address all items set forth in the attached report.

NEW JERSEY DEPARTMENT OF TRANSPORTATION
*****MEMORANDUM*****

RECEIVED
DEPT OF LAW & PUBLIC SAFETY

TO: RECORD
FROM: *James R. Sweet*
James R. Sweet
Bureau of Environmental Analysis

MAR 9 1994

LAW DIVISION
TRANSPORTATION DEPT
TRENTON NJ

SUBJECT: Rahway Valley Railroad
Union County

DATE: March 3, 1995

This memorandum serves as a follow-up to a previous memorandum from Jack McQuillan to Theodore Mathews dated 7/13/94 (copy attached), which documented the findings of my preliminary review of the subject property, which was conducted on 7/11/94.

Subsequent to my initial review of the Rahway Valley Railroad, a follow-up site review was conducted on 9/1/94 with John Pinto, representing the Delaware Otsego Corporation, parent company of the RVRR. Based upon my observations with Mr. Pinto on 9/1/94, my findings are as follows:

-The properties located directly adjacent to RVRR right-of-way as it passes through the Northeast corner of Fairfield Av. and Market St. in Kenilworth Borough exhibit signs of significant contamination. Field observations on 9/1/94 showed evidence of soil staining by petroleum products, debris (including what appeared to be asbestos shingles), drums (some empty, some filled with product), abandoned vehicles and vehicle parts, and other waste strewn throughout the vicinity of the ROW and the ROW itself. It is acknowledged that the scope of this investigation did not include any soil or groundwater sampling activities. Therefore, the degree of contamination cannot be fully measured at this time. It is noted that photographs which partially show the contamination in this area are included in the Phase I Environmental Audit report dated November 1993, as prepared by Eder Associates Consulting Engineers, P.C. The photographs depicting the above noted area are contained in Appendix A of the report and are identified as Photographs 8,9,10, & 11.

-Miscellaneous waste materials (i.e. trash) are strewn along most of the length of the ROW particularly the industrial areas that the RVRR passes through. Such waste materials do not appear to pose any threat to the surrounding environment.

Based upon the above, we offer the following recommendations:

-Consistent with the findings of the Environmental Audit Report dated November 1993 as

prepared by Eder Associates (environmental consultant hired by RVRR), we recommend that "Generators of debris and other materials deposited on and releases onto the ROW should be required to remove the materials and remediate any impacts." It is our further recommendation that in the absence of cooperation from adjacent property owners in this matter that the RVRR should conduct a cleanup of the aforementioned waste materials prior to the transfer of ownership of the RVRR right-of-way to the NJDOT. This office would be available to conduct a follow-up review of the ROW prior to the transfer of ownership to verify that a clean-up has indeed been conducted.

-It is strongly recommended that measures be initiated by the Department to close off all access to the RVRR right-of-way once ownership of the property has been assumed. This may be accomplished by installation and/or repair of fencing, utilization of barrier curbing along access points near at-grade crossings with public streets, etc. Such measures would inhibit the placement of waste materials onto the "clean" ROW (i.e. hinder illegal dumping).

-The use of the standard ROW environmental clauses during final ROW negotiations with the RVRR is strongly recommended in order to reduce the Department's future liabilities with regard to this property.

Please feel free to contact me at 5-5365 should there be any further questions regarding this matter.

JRS

Attachment

c. w/att.: J. Boylan
J. McQuillan
J. Christian
L. Amico
T. Mathews
A. Thiele, DAG
R. Cebrick

NEW JERSEY DEPARTMENT OF TRANSPORTATION
*** MEMORANDUM ***

TO: Theodore H. Matthews
Bureau of Freight Services

FROM: Jack McQuillan
Bureau of Environmental Analysis

SUBJECT: Rahway Valley Railroad
Union County

DATE: 7/13/94

In response to your request to John Mole' dated 3/17/94, the Bureau of Environmental Analysis has conducted a preliminary review of the Rahway Valley Railroad property in Union County. This review consisted of an analysis of the *Environmental Audit Report* dated November 1993 as prepared by Eder Associates Consulting Engineers, P.C. and a field inspection of the right-of-way by Mr. Jim Sweet of my staff on July 11, 1994.

The results of the preliminary review by our staff are as follows:

-Generally speaking, we disagree with the conclusions of Eder Associates in that "there is no evidence of significant environmental impact along the right-of-way". As noted by Eder Associates, the property does pass through industrial areas which, in our opinion, increase the potential for contaminant migration onto the railroad property. In fact, staff from BEA noted that some of the adjacent landowners (both industrial and residential) have encroached upon the railroad ROW. Therefore, the environmental integrity of the ROW is considered suspect for much of the length of the ROW. Since Eder Associates did not conduct any sampling activities as part of their efforts, there is no way of determining whether the property is contaminated (other than the observation of solid wastes and/or soil stains noted during a site walk-through).

-We agree with the findings of Eder Associates in that "Generators of debris and other materials deposited on and releases onto the right-of-way should be required to remove the materials and remediate any impacts."

-We agree with the findings of Eder Associates in that "Documentation of no further action for the former engine service facility should be secured from the NJDEP."

It is noted that our review is based solely upon a review of the aforementioned report by Eder Associates and a cursory review of the ROW. In fact, some portions of the ROW were not readily accessible to our staff at the time of our review due to encroachments by adjacent property owners.

MAR-15-95 WED 10:16 AM DIV OF LAW TRANS

FAX NO. 16092925649

P. 5

It is the recommendation of this office that any ROW purchase agreements for the Rahway Valley Railroad property include standard environmental clauses as utilized by the Division of ROW. We further stress that the current owners of the property be required to remove all solid wastes (debris, etc.) from the ROW prior to finalization of the purchase. Also, all encroachments onto the ROW by adjacent property owners should be rectified and measures be taken, where possible, to secure the ROW by means of fencing, etc. to preclude future encroachments.

Should there be any questions regarding the above issues, please feel free to contact Mr. Jim Sweet of my staff at 5-5365.

JRS

c.: L. Amico
R. Cebrick
J. Mole'

INTERSTATE COMMERCE COMMISSION
WASHINGTON, DC 20423

De Alh
SERVICE DATE

ENVIRONMENTAL ASSESSMENT

AUG 18 1992

NO. AB-211

Rahway Valley Railroad Company - Abandonment - In Union County, NJ

In the above entitled proceeding the Rahway Valley Railroad Company (RVRR) has filed an application seeking authority under 49 U.S.C. 10903 and 10904 to abandon all of its railroad line operations. RVRR's lines originate at Aldene and terminate at Summit, including a branch line from Branch Junction to Union, a total distance of 7.8 miles, all within Union County, NJ. A map depicting the rail line in relationship to the area served is appended to the report. After the abandonment authority becomes effective, the railroad will be able to salvage track, ties and other railroad appurtenances, and to dispose of the right-of-way.

The railroad has submitted an environmental report which concludes that the quality of the human environment will not be affected significantly as a result of the abandonment or any post-abandonment activities, including salvage and disposition of the right-of-way. We have investigated the record in this proceeding. Also, we have contacted appropriate agencies and individuals to verify the railroad's report and to obtain additional information and comments regarding the potential environmental effects of the proposed abandonment. Contacts have included U. S. Fish and Wildlife Service; State Historic Preservation Officer; Council of the Borough of Roselle Park in the County of Union; New Jersey Division of Coastal Zone Resources; State of New Jersey, Department of Commerce, Energy and Economic Development; United States Department of Agriculture; New York District Army Corps of Engineers and the City of Summit, New Jersey.

The State Historic Preservation Officer has not completed its review of the proposed abandonment. Under these circumstances, the Rahway Valley Railroad Company shall retain its interests in and take no steps to alter the historic integrity of the Rahway Valley Railroad Company and all railroad associated structures 50 years old or older located in New Jersey, until completion of the Section 106 process of the National Historic Preservation Act, 16 U.S.C. 470.

RVRR's environmental consultant contacted the United States Army Corps of Engineers (CORPS) by letter of April 14, 1992, requesting information on whether section 404 or 402 permits or any other permits would be required prior to the proposed abandonment. The CORPS has not responded to RVRR's request for information. RVRR states in a letter to the CORPS that the bridges on the line span their affected waterbodies and do not use any in-stream support structures. All salvage activities will occur within the right-of-

way. No dredging, filling, or deposition of materials into any waterbody will occur as part of salvage of any portion of the line.

RVRR's environmental consultant indicates that a few sites of hazardous/toxic wastes have recently been identified within the right-of-way. We recommend that prior to any salvage activities RVRR should contact the New Jersey Department of Environmental Protection and inform them of the presence of hazardous waste on the right-of-way.

The New Jersey Division of Coastal Resources was contacted to determine whether the proposed abandonment is in compliance with the State's coastal zone management program. RVRR's environmental consultant advises that the subject line is not within the State's coastal zone. However, while we are awaiting a formal response from the Division of Coastal Resources we recommend that RVRR not be allowed to salvage the line to safeguard any potential impacts in the project's coastal area that may be affected by abandonment activities that may occur within the State's Coastal Area.

Based on 1991 shipping data, 22 rail carloads per year could be diverted to truck movement or a combination of truck and rail movements if the proposed abandonment is granted. The existing regional and local transportation systems and patterns are adequate and no significant impacts on transportation is expected in the area. There will be no substantial impacts to human health and safety.

Based on the information provided from all sources to date and subject to the recommended conditions, we conclude that, as currently proposed, abandonment of the line will not significantly affect the quality of the human environment. Therefore, the environmental impact statement process is unnecessary.

Alternatives to the proposed abandonment would include denial (and therefore no change in operations), discontinuance of service without abandonment, and continued operation by another operator. In any of these cases, the existing quality of the human environment and energy consumption should not be affected.

Following abandonment and salvage of the rail line, the right-of-way may be suitable for other public use. A request containing the requisite four-part showing for imposition of a public use condition (49 CFR 1152.28) must be filed with the Commission and served on the railroad within the time specified in the Federal Register notice.

A request for a certificate of interim trail use (CITU) is due to the Commission, with a copy to the railroad, within 30 days of filing of the application. Nevertheless, the Commission will accept late-filed requests as long as it retains jurisdiction to do so in a particular case. See Ex Parte No. 274 (Sub-No. 13), Railroad Abandonments - Supplemental Trails Act Procedures, 4 I.C.C.2d 152,158 (1987) and Illinois Commerce Commission v. I.C.C.,

848 F.2d 1246, 1261 (D.C. Cir. 1988). This request must comply with the Commission's rules for use of rights-of-way as trails (49 CFR 1152.29).

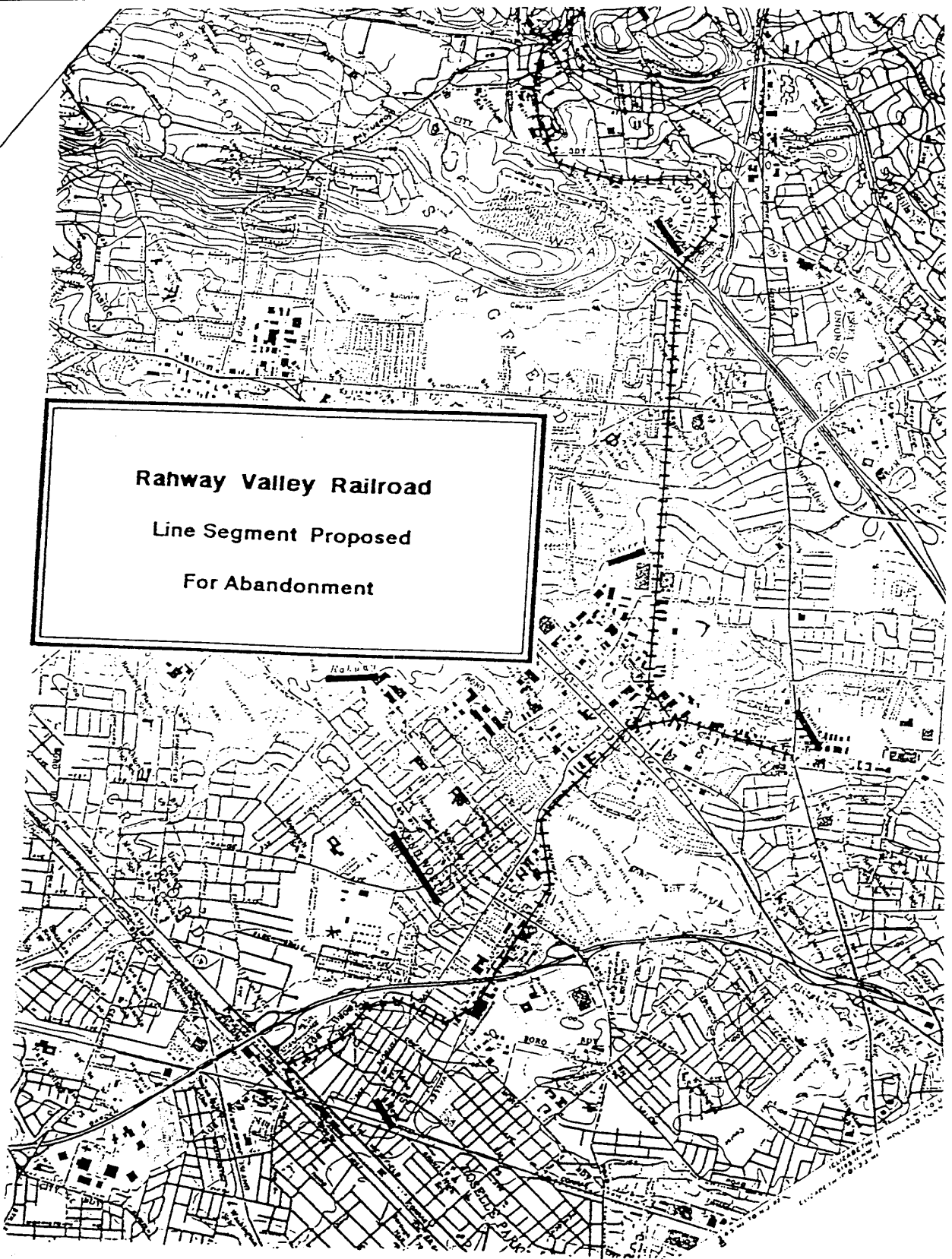
Comments and questions regarding this environmental assessment should be directed to the Commission's Section of Energy and Environment, Office of Economics, Room 3219, Washington, DC 20423, to the attention of Phillis Johnson-Ball at (202) 927-6213, who prepared this environmental assessment.

Date made available to the public: August 14, 1992.

Comment due date: September 11, 1992

(SEAL)

Sidney L. Strickland, Jr.
Secretary





IN REPLY REFER TO:
ES-92/240

United States Department of the Interior

FISH AND WILDLIFE SERVICE

Fish and Wildlife Enhancement
927 North Main Street (Bldg. D1)
Pleasantville, New Jersey 08232

Tel: 609-646-9310
FAX: 609-646-0352

May 4, 1992

Mr. Robert M. Maestro
Environmental Consultant
P.O. Box 672
Occoquan, Virginia 22125

Dear Mr. Maestro:

This letter responds to your April 10, 1992, request to the U.S. Fish and Wildlife Service (Service) for information on the presence of federally listed endangered and threatened species within the vicinity of a proposed railroad abandonment project in Union County, New Jersey. The proposed abandonment would consist of cessation of rail operations and salvage of tracks, ties, and bridges.

This response is provided pursuant to the Endangered Species Act of 1973 (87 Stat. 884, as amended; 16 U.S.C. 1531 et seq.) to ensure the protection of endangered and threatened species and does not address all Service concerns for fish and wildlife resources. These comments do not preclude separate review and comments by the Service as afforded by the Fish and Wildlife Coordination Act (48 Stat. 401, 16 U.S.C. 661 et seq.), if any permits are required from the U.S. Army Corps of Engineers pursuant to the Clean Water Act of 1977 (33 U.S.C. 1344 et seq.), nor do they preclude comments on any forthcoming environmental documents pursuant to the National Environmental Policy Act of 1969 as amended (83 Stat. 852; 42 U.S.C. 4321 et seq.).

Enclosed are current summaries of federally listed and candidate species in New Jersey for your information. Except for an occasional transient bald eagle (*Haliaeetus leucocephalus*), or peregrine falcon (*Falco peregrinus*), no federally listed or proposed threatened or endangered flora or fauna are known to occur within the proposed project area. No further consultation pursuant to Section 7 of the Endangered Species Act is required by the Service. If additional information on listed and proposed species becomes available or if project plans change, this determination may be reconsidered.

Candidate species are species under consideration by the Service for possible inclusion on the List of Endangered and Threatened Wildlife and Plants. Although these species receive no substantive or procedural protection under the Endangered Species Act, the Service encourages federal agencies and other planners to consider candidate species in the project planning process. The State's Natural Heritage Program provides the most up-to-date data source for

candidate species in New Jersey, as well as maintaining information on State listed species, and may be contacted at the following address:

Mr. Thomas Breden
Natural Heritage Program
Division of Parks and Forestry
CN 404
Trenton, New Jersey 08625
(609/984-0097)

Should the Natural Heritage Program data search reveal the presence of any candidate species in the project area, the Service must be contacted to ensure that these species are not adversely affected by project activities.

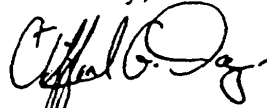
Further information on State listed wildlife species may be obtained from the following office:

Ms. JoAnn Frier-Murza
Endangered and Nongame Species Program
Division of Fish, Game and Wildlife
CN 400
Trenton, New Jersey 08625
(609/292-9101)

Information contained in this letter and additional information obtained from the aforementioned sources represents the public interest for fish and wildlife resources and should warrant full consideration in the project planning process. The Service requests that no part of this letter be taken out of context and if reproduced, the letter should appear in its entirety.

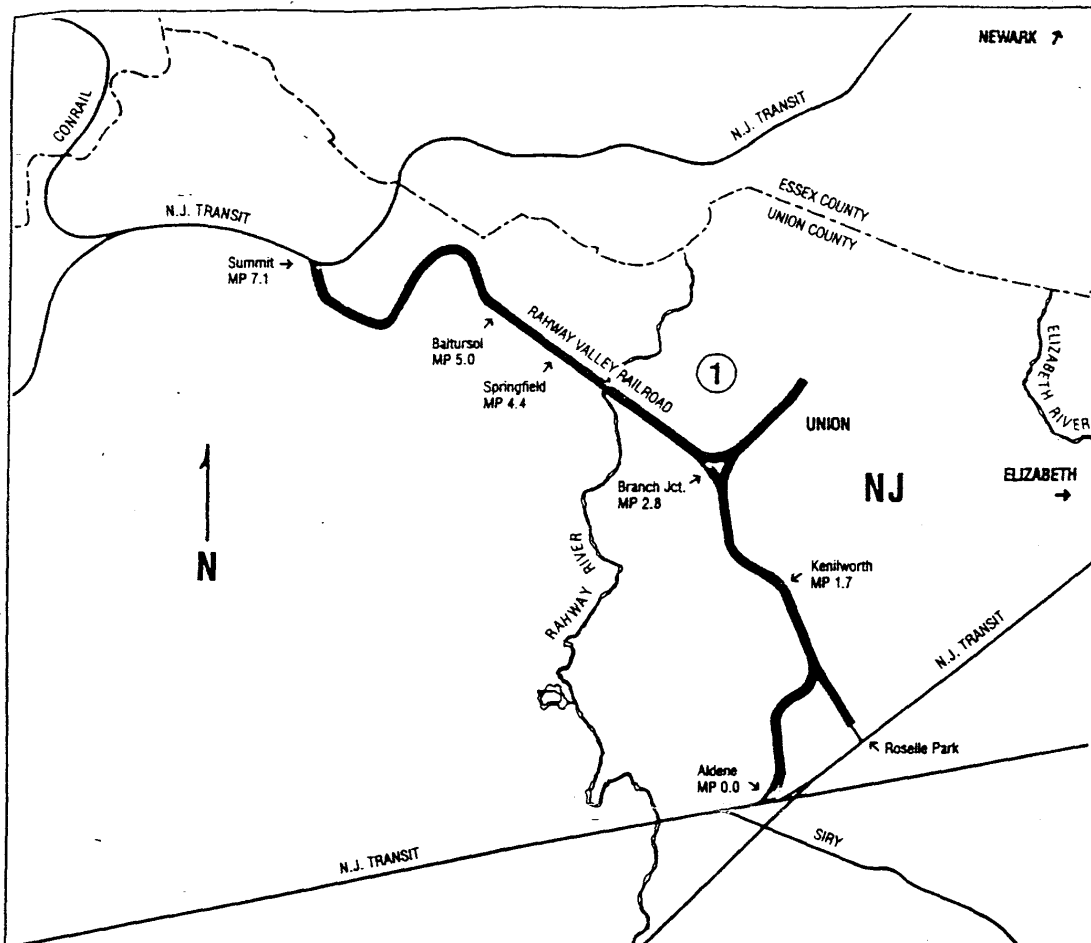
Please contact Dana Peters of my staff if you have any questions or require further assistance regarding threatened or endangered species.

Sincerely,



Clifford G. Day
Supervisor

Enclosures



The Rahway Valley Railroad SYSTEM DIAGRAM MAP/February 1992

LEGEND

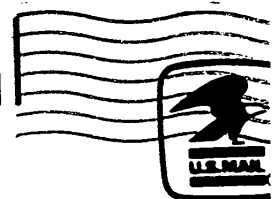
CATEGORY ① - subject of an abandonment or discontinuance application to be filed within three years:

Entire line.

Interstate Commerce Commission
Office of the Secretary, Service Section
Washington, D.C. 20423

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COOPERSTOWN NY 13326-1110