

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34903

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

REPLY OF THE VILLAGE OF CROTON-ON-HUDSON TO
MOTION TO DISMISS NOTICE OF EXEMPTION

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Dated: July 20, 2006

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The Village of Croton-on-Hudson (the “Village”) responds to the Motion of Buffalo Southern Railroad, Inc. to Dismiss Verified Notice of Exempt Transaction (the “Motion”) filed by the Buffalo Southern Railroad, Inc. (“BSOR”) on June 30, 2006. The issue before the Surface Transportation Board (the “Board”) is the status of BSOR’s operations at 1A Croton Point Avenue in the Village (the “Property”) over a 1,600-foot track (the “Track”).

BSOR argues that the Track is excepted track as defined at 49 U.S.C. §10906, not a railroad line or rail line as that term is used in 49 U.S.C. §§10901 and 10902. In fact, however, there are three types of railroad track throughout the United States: (1) a line of railroad that is subject to the full panoply of Board jurisdiction and regulation; (2) a spur, industrial, team switching, or side track¹ that is subject to Board jurisdiction but as to which advance Board authority to operate is not required under 49 U.S.C. § 10906; and (3) track that is not part of the regulated rail system in the United States, but is a private track or a plant facility not subject to the jurisdiction of the Board. The Village respectfully submits that the Track, as it was operated

¹ We will refer to “a spur, industrial, team switching, or side track” as “Spur Track.”

by the former lessee Metro Enviro Transfer, LLC (“MET”), was a private track, which was not subject to the Board’s jurisdiction. If BSOR intends to operate the Track as a private track as it has been operated in the past, there is no need for Board authorization, whether through the Notice of Exemption procedure or otherwise (and of course there would be no Interstate Commerce Commission Termination Act preemption in that event). If, however, BSOR commences offering common carrier service over this line, as it has represented it has done or at least intends to do, BSOR’s operation of the Track will convert it from a private track to a railroad line subject to full Board jurisdiction.

BACKGROUND

Prior to August 1, 2005, the Property and the Track, which was constructed in 1997 by a predecessor of MET, had been operated by MET as a waste transfer station pursuant to a lease from Greentree Realty, LLC (“Greentree”), the owner of the Property and the Track. The Track was private track, not a line of railroad or a Spur Track.

For several years, the Village attempted to close the waste transfer station on the Property because of repeated serious violations of the special permit that was required for MET to operate the construction and waste transfer business. After a five year process, the construction and waste transfer station on the Property closed in August 2005.

On August 1, 2005, the Northeast Interchange Railway, LLC (“NIR”) filed a notice of exemption with the Board to lease the Track from Greentree and operate the Track as a line of railroad. The Board stayed the effectiveness of NIR’s notice² and then rejected the notice. In rejecting NIR’s notice, the Board stated:

² *Northeast Interchange Railway, LLC– Lease and Operation Exemption–Line in Croton-on-Hudson, NY*, STB Finance Docket No. 34734 (STB served August 5, 2005).

[T]he factual and legal issues presented in the pleadings filed to date demonstrate that NIR's proposed transaction is controversial and raises important issues that make more scrutiny and the development of a more complete record necessary. The current construction and demolition waste operation at the site has attracted substantial opposition and local interest, including litigation in which the operations of NIR's predecessor were found to be a threat to the public health by the state court. Moreover, NIR has expressed an intent to convert this previously private construction waste transfer operation into what could turn out to be a more extensive for-hire common carrier operation involving commodities in addition to construction waste. The Village cites this planned expansion in support of its argument that the operational changes that are expected would exceed the Board's thresholds for conducting an environmental review. (footnote omitted).

The Village has asked us to examine the extent of the Board's jurisdiction over the proposed operations, and thus the extent to which state and local regulation of the handling of construction waste on the property would be preempted under 49 U.S.C. 10501(b). It notes that a non-railroad, or a railroad to the extent it is engaged in activities other than transportation, is not subject to Board jurisdiction. The Village raises concerns about the nature of the handling that the waste material would receive at the site (which, it believes, will constitute processing, rather than transloading), whether NIR would be operating as a common carrier by railroad (rather than as a private shipper of waste), and whether the transaction is private track or excepted from our licensing authority under 49 U.S.C. 10906 on the ground the track is switching or spur track. Under these circumstances, we conclude that our class exemption procedure is not appropriate for considering NIR's proposed transaction, and we will reject its notice.

Because we are rejecting NIR's notice of exemption in STB Finance Docket No. 34734, NIR will have to file either a petition for exemption under our case-by-case exemption procedures at 49 CFR part 1121, or a formal application under 49 U.S.C. 10901 and 49 CFR 1150 Subpart A, if it desires to pursue Board authority for the transaction. Any filing must include NIR's entire case-in-chief.

Either the petition for exemption or the application process should allow the Board to compile a record sufficient to resolve the issues that have been raised about this proposal.

Northeast Interchange Railway, LLC—Lease and Operation Exemption—Line in Croton-on-

Hudson, NY, STB Finance Docket No. 34734 (STB served Nov. 18, 2005) (“*NIR Rejection*”) at

4-5. After the Board rejected NIR's notice, the Track retained its prior characterization as a private track not subject to Board jurisdiction.

Shortly after the Board rejected NIR's notice, BSOR entered the picture. BSOR obtained NIR's interest in the lease of the Property through a Lease Agreement dated as of March 3, 2006 with RS Acquisition Co., LLC ("RS"), NIR's parent.³

Instead of approaching the Village or filing a request for authority with the Board, on May 16, 2006, BSOR ran to the U.S District Court for the Southern District of New York and filed a complaint seeking a declaration that it was providing transportation by rail carrier and that the Village could not enforce local laws against BSOR's operation, and also seeking temporary, preliminary and permanent injunctions preventing the Village from enforcing its laws against BSOR. BSOR claimed that it was a common carrier, that it was providing common carrier service over the Track, and that the Village was going to interfere with BSOR's common carrier operations. The Court granted the preliminary injunction halting the Village's eminent domain proceedings conditioned on BSOR's continued refusal to accept solid waste.

The Court's opinion invited the parties to ask the Board "whether BSOR's Westchester operation requires a certificate of authority" and "whether an existing common carrier by rail may expand its base of operations to a new area (which is what BSOR says that it wants to do) without first obtaining a license from the STB by (1) first acquiring track that would ordinarily be excepted from STB authority because it is 'switch' or 'spur' track, and then (2) contracting with other carriers for interchange rights over trackage outside its licensed operating area." *Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson*, Civil Action No. 06 CIV 3755 (CM) (S.D.N.Y. June 12, 2006) (Exhibit A to BSOR's Motion), slip op. at 17-18.

³ RS is not the owner of the Property. It is a lessee. RS leased the Property from Greentree.

Two filings with the Board were made in response to the Court's invitation. First, on June 29, 2006, BSOR filed the Notice of Exemption in this proceeding. Second, on June 30, 2006, the Village filed a complaint alleging that BSOR was operating unlawfully and that Greentree, RS, and NIR had knowingly authorized, consented to, or permitted BSOR's unlawful operations. *See Village of Croton-on-Hudson, NY v. Buffalo Southern Railroad, Inc.; Greentree Realty, LLC; RS Acquisition Co., LLC; and Northeast Interchange Railway, LLC*, STB Finance Docket No. 34905 (filed June 30, 2006).

On June 30, 2006, the Village filed a Petition to Reject Notice of Exemption or, In the Alternative, for Stay of Effectiveness and for Consolidation. BSOR filed the Motion on June 30, 2006. On July 3, 2006, the Board granted a housekeeping stay of the effective date of the exemption.⁴

ARGUMENT

In the Motion, BSOR relies on the incorrect premise that all track is either Spur Track or a line of railroad. The Board, however, recognizes the existence of private track that is not subject to the jurisdiction of the Board under 49 U.S.C. §10501.

The Track was private track while operated by MET. While private track and Spur Track have similar physical characteristics, the two can be distinguished by the circumstances of their construction and use. "The usual conception of a spur, as far as physical characteristics are concerned, is a stub end, or sidetrack, connecting only at one end with a main line or branch of a railroad and constructed by or for the use of the carrier owning or operating the railroad. This, of course, excludes any line constructed by an independent company, unless, possibly, the

⁴ *Buffalo Southern Railroad Inc.–Acquisition and Operation Exemption–Line in Croton-on-Hudson, NY*, STB Finance Docket No. 34903 (STB served July 3, 2006).

independent company were incorporated merely for the purposes of the existing carrier.”

Operation of Lines by C. R. & E. Ry. Co., 94 I.C.C. 389, 394 (1925). In contrast, “[p]lant service is private service. Its distinguishing characteristic is that it is performed in the interest of particular shippers, and that the facilities employed are not available or accessible to shippers generally.” *A. T. & S. F. Ry. v. Kansas City Stock Yards Co.*, 33 I.C.C. 92, 99 (1915); *see also General Electric Co. v. New York Central & H. R. R. Co.*, 14 I.C.C. 237 (1912) (interior switching tracks constructed to meet the needs of a business are plant facilities). The Board has recognized the existence of private track in more recent decisions.⁵ Under this precedent, the Track was private track while operated by MET. The Track was constructed by an independent company, which was a predecessor of MET, not by or for the use of CSX Transportation, Inc. (“CSXT”), the adjacent railroad, or by or for the use of BSOR, which did not appear on the scene until years after the Track had been constructed. The Track was constructed only to service the facility on the Property.

The question before the Board is how the Track should now be classified in light of BSOR’s lease of the Track and operations over the Track. The Village contends that the Track could be classified as either private track or as line of railroad, depending on the specific facts of BSOR’s operations, but that (as explained below) it cannot possibly be characterized as Spur

⁵ *Kaw River Railroad, Inc.—Acquisition and Operation Exemption—The Kansas City Southern Railway Company*, STB Finance Docket No. 34509 (STB served May 3, 2005); *Ohio Valley Railroad Company—Acquisition and Operation Exemption—Harwood Properties, Inc.*, STB Finance Docket No. 34486 (STB served September 28, 2004); *GWI Switch Services, L.P.—Operation Exemption—Lines of Southern Pacific Transportation Company*, STB Finance Docket No. 32481 (STB served August 7, 2001).

Track with respect to BSOR's operations because it is not adjacent or auxiliary to BSOR's rail line.

BSOR asserts that it is a common carrier but fails to reveal that its operations in Erie County, NY are pursuant to a Modified Rail Certificate over a line of the former Erie-Lackawanna Railroad from Buffalo Creek (BC) Junction, in the City of Buffalo, to the Village of Gowanda, in the Town of Collins, a distance of about 31 miles (the "Erie Line"), which is owned by the County of Erie, NY. *Buffalo Southern Railroad, Inc.—Operation—in Erie County, NY*, ICC Finance Docket No. 29922 (ICC served May 10, 1982).⁶ BSOR claims that it is providing common carrier service over the Track, but the nature of BSOR's use of the Track is far from clear at present.

BSOR's web site⁷ states that BSOR offers (1) electronic rail and truck scales on site, (2) multiple track for car loading or unloading, sorting, storage or repair, (3) equipment to off load most product types; bulk aggregates, steel, lumber, concrete products, palletted materials, (4) enclosed structure with rail dock inside, (5) secure premises, (6) interchange service from CSX, and (7) passenger rail connections via Metro North Railroad and Amtrak. *See* Exhibit 1 hereto. These last two items are curious as BSOR has informed the Board that it does not have an interchange agreement with CSXT, BSOR has not informed the Board that it offers passenger service, and BSOR does not in fact have facilities for passenger service on the Track. BSOR notably does not indicate that it operates any locomotives on the 1,600-foot Track. The first five

⁶ As an operator under a Modified Certificate, BSOR can abandon its operations of the Erie Line without Board authorization or could be ejected from the Erie Line by Erie County pursuant to the contract between BSOR and Erie County without Board authorization. *See* 49 C.F.R. §1150.22.

⁷ <http://members.aol.com/buffalosouthern/croton.html>

services listed on the website are consistent with a characterization of the Track as private track.

The Village has served discovery on BSOR in STB Finance Docket No. 34905 in an effort to clarify the relevant facts of BSOR's operations in Westchester County.

If the track in question were adjacent to BSOR's rail line near Buffalo, New York, some additional analysis might be required to determine whether the track would be properly characterized as Spur Track or a private track. But no such analysis is required for this Track in Westchester County. Spur Track is adjacent to a line of the railroad operating over the Spur Track. See *Effingham RR Co. – Pet. For Declaratory Order*, 2 S.T.B. 606 (1997), reconsideration denied, *Effingham Railroad Company – Petition for Declaratory Order – Construction at Effingham, IL, et al.*, STB Docket No. 41986 (STB served Sept. 18, 1998), *aff'd sub nom. United Transp. Union v. STB*, 183 F.3d 606 (7th Cir. 1999) ("*Effingham*"). BSOR's Erie Line is about 300 miles away. As to BSOR, the Track is not Spur Track. The Track does not permit BSOR to provide services that are auxiliary to the common carrier service BSOR provides over the Erie Line. As was the case in *Effingham*, BSOR is providing a new service in a new territory.⁸

In *Effingham*, the Board concluded that because the railroad was going to "operate in territory it has not previously served" and "that this proposal will constitute its entire operation"

⁸ BSOR suggests that the question whether the Track is now properly characterized as Spur Track is a purely legal question that the Board can answer without further proceedings. While the Village believes that the Board can determine that the Track is *not* excepted track without further factual development (because it is uncontested that the Track is not adjacent or auxiliary to BSOR's main line), the Board could not determine that the Track *is* excepted track without factual development of BSOR's current and intended future use of the Track. And even if the Board were to conclude that the Track is a Spur Track as to BSOR, such that there would be some form of Interstate Commerce Commission Termination Act ("ICCTA") preemption, the scope of that preemption would still have to be determined in light of the specific facts presented.

the “proposed operation is [a line of railroad] subject to our authority.” *Id.* at 610. The only distinction between the facts in *Effingham* and those here is that BSOR is an existing common carrier. But, BSOR is not authorized to operate as a common carrier beyond the Erie Line and BSOR’s operations on the Track are not related to BSOR’s operations on the Erie Line. It is also clear that BSOR is invading a new territory; BSOR has never operated in or even near the Village.

Before an industry may open its private track and facilities to the public as a common carrier of interstate commerce, as BSOR says it is seeking to do, it is obliged to establish that public convenience and necessity require its operations as such. *U.S. Phosphoric Products Corp. v. A. C. L. R. R.*, 206 I.C.C. 411, 418 (1935). In order to make a showing of public convenience and necessity, the railroad is required to file an application for authority to operate the former private track. With the current exemptions that are in effect, the filing of a notice of exemption would be an analogous requirement. The Board has required parties seeking to initiate common carrier service over “private tracks [previously] beyond the Board’s licensing authority” to obtain authority in advance of those operations.⁹

The Village has demonstrated that the Track was private track outside the Board’s jurisdiction when it was operated by MET. Operation of private track by a non-contiguous railroad located over 300 miles away does not convert private track to Spur Track. Depending on the nature of the operation, the Track either remains private track or becomes a line of railroad requiring BSOR to obtain authority from the Board. BSOR claims that it is operating

⁹ *Kaw River Railroad, Inc. – Acquisition and Operation Exemption – The Kansas City Southern Railway Company*, STB Finance Docket No. 34509 (STB served May 3, 2005); *Ohio Valley Railroad Company – Acquisition and Operation Exemption – Harwood Properties, Inc.*, STB Finance Docket No. 34486 (STB served September 28, 2004).

over the Track as a common carrier. If this claim is true, the Village contends that BSOR has unlawfully converted the Track into a line of railroad subject to the jurisdiction of the Board but without prior Board approval. But if it turns out that this claim is not true, the Track remains private track, not Spur Track.

The Board's jurisdiction is being invoked in this proceeding and in a number of other recent proceedings in novel ways as entities seek to use ICCTA preemption, 49 U.S.C. § 10501(b), to displace state and local authority over waste facilities. These proceedings present difficult issues for the Board. The Board is charged with protecting the legitimate operations of an interstate rail network, and must not allow its processes to be abused by entities that are created (or relocated) for sham purposes. It is difficult to discern a legitimate business purpose for bringing BSOR into the dispute between the Village and owners/operators of the waste transfer facility on the Property. Accordingly, the Village respectfully requests that the Board reject BSOR's argument that its operations come within the jurisdiction of the Board (so as to afford it the benefit of ICCTA preemption), but that its operations are excepted from the authority of the Board under 49 U.S.C. § 10906 (such that it is relieved of any condition or oversight that could be imposed by the Board). The Board should instead reject BSOR's Notice of Exemption for the same reasons that it rejected NIR's earlier Notice of Exemption applicable to the Track. *NIR Rejection*.

**THE DISTRICT COURT HAS NOT DETERMINED THE ISSUES RELEVANT TO THE
BOARD'S DETERMINATION OF ITS JURISDICTION AND AUTHORITY OVER
BSOR'S OPERATIONS IN THE VILLAGE**

BSOR argues that the Village may not question the nature of its operations over the Track because the District Court "has put this to rest" in its June 12, 2006 decision. Motion at 11, 14. But BSOR overstates the District Court's findings. For purposes of determining whether

BSOR was *likely to succeed* on the merits of its claim of ICCTA preemption, the District Court accepted BSOR's allegation that it "holds itself out" as a common carrier in Westchester County.

Slip op. at 7, 15. The District Court made no conclusive determination that BSOR had in fact provided common carrier services. Slip op. at 15. Nor did the Court make any determination as to whether BSOR could feasibly provide common carrier services over the Track. Moreover, the District Court recognized that BSOR may be operating illegally in Westchester County – a determination for the Board to make – and as such could be subject to fines of up to \$5,000 per day, which presumably would cause BSOR to cease any unlawful common carrier operations in Westchester County. Slip op. at 19. Nor did the District Court suggest that it intended to preclude the Board from determining the correct characterization of the Track under ICC and STB precedent.

When the District Court addresses the merits of BSOR's Complaint, it has discretion to reconsider any preliminary finding of fact or conclusion of law it made in ruling on BSOR's motion for preliminary injunction. As the United States Supreme Court has explained:

The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.

University of Texas v. Camenisch, 451 U.S. 390, 395 (1981) (citations omitted). The District Court here expressly recognized that its June 12 decision was not a "final resolution of the matters contested in this lawsuit." Slip op. at 28.

CLARIFICATION OF THE VILLAGE'S PRIOR FILINGS

In its Petition to Reject the Notice of Exemption in *Northeast Interchange Railway, LLC—Lease and Operation Exemption—Line in Croton-on-Hudson, NY*, STB Finance Docket No. 34734, filed on August 4, 2005, just four days after NIR filed its Verified Notice of Exempt Transaction, the Village referred to the Track, based on its existing use by CSXT to pick up freight from its customer MET, as a “spur” track to the CSXT rail line. In doing so, the Village had not considered the factors that distinguish a Spur Track from a private track. The Board understood, however, based on all of the arguments made by the Village, that one of the Village’s arguments was that “the activity in which NIR would be engaging is not subject to Board jurisdiction because it is not transportation by railroad, but merely continuation of the same private waste processing activities by a different entity.” *NIR Rejection* at 2. Accordingly, the Board concluded that two of the issues to be addressed in the proceeding (requiring rejection of the Notice) were whether “NIR would be operating as a common carrier by railroad (rather than as a private shipper of waste), and whether the transaction is private track” or Spur Track. *Id.* at 5.

The Village was then confronted with BSOR’s emergency motion for temporary restraining order and preliminary injunction on May 16, 2006, in which BSOR argued that it could operate as a common carrier over the Track without Board authorization because the Track was excepted Spur Track. The Village opposed this contention by arguing, that, whatever the prior characterization of the Track, BSOR’s proposed operations would convert the Track into line of rail requiring advance Board authorization. The Village’s Memorandum of Law in Opposition to Plaintiff’s Motion for Preliminary Injunction, filed in *Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson* on May 23, 2006, focused on the distinction between Spur

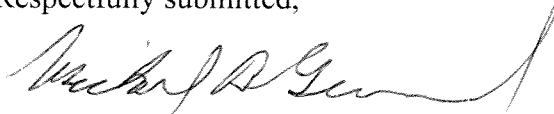
Track and a line of railroad in order to refute BSOR's position. BSOR's suggestion (in its Motion at 10) that "the Village argued in the proceedings before the District Court that the Croton Track was an excepted track under section 10906" as used by BSOR is utterly false. The Village argued that there could be no preemption under ICCTA, 49 U.S.C. § 10501(b), when operations over a line of railroad were not lawful.

With this brief, the Village has had sufficient time to now address the factors which distinguish private track and Spur Track and to properly characterize the Track, as used by MET, as private track rather than Spur Track. But what is important here, of course, is not the past use of the Track (when CSXT served its shipper MET), but BSOR's current and intended future use of the Track.

CONCLUSION

The Village respectfully requests that the Board reject BSOR's argument that the Track is Spur Track that is within the jurisdiction of the Board but excepted from its authority. Depending on the facts to be found by the Board, the Board should determine that the Track is either private track, which is not subject to the Board's jurisdiction, or that BSOR's operations of the Track will convert it from private track to a railroad line subject to full Board jurisdiction.

Respectfully submitted,



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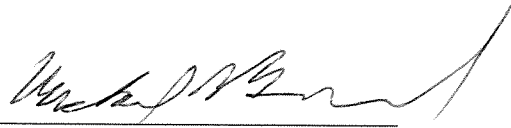
Attorneys for the Village of Croton-on-Hudson

Dated: July 20, 2006

CERTIFICATE OF SERVICE

I certify that this Response of the Village of Croton-on-Hudson to Motion to Dismiss
Notice of Exemption was served via overnight courier on July 20, 2006, to the following party:

James E. Howard, L.L.C.
One Thompson Square, Suite 201
Charlestown, MA 02129

A handwritten signature in black ink, appearing to read "Michael B. Gerrard", is written over a horizontal line.

Michael B. Gerrard
July 20, 2006

EXHIBIT 1

Croton-on-Hudson - Transload Facility

BSOR Switching Services - Gateway to Westchester County and New York City

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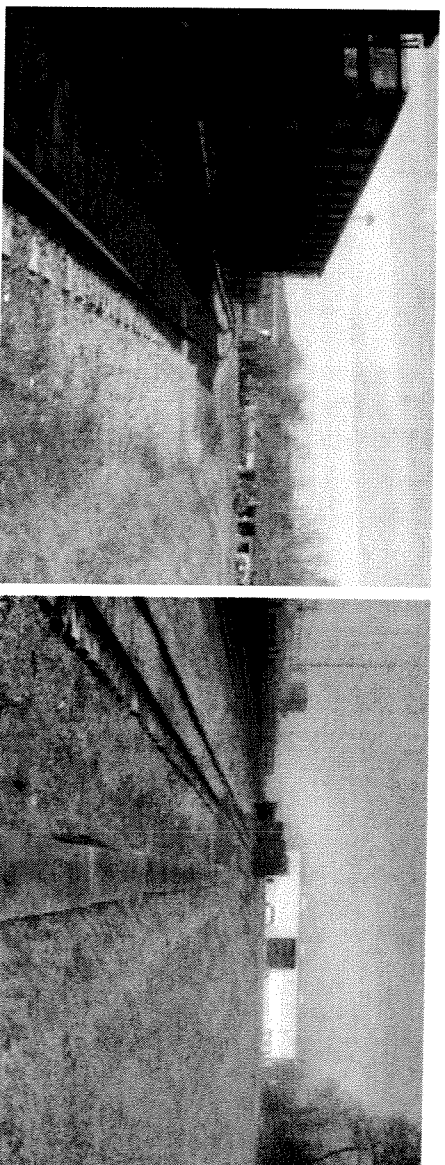
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For further information or to discuss you transportation needs, please contact the BSOR by calling (716)992-4979 or via email at bsorcroton@aol.com.

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