

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34903

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

AMENDED AND SUPPLEMENTAL PETITION OF THE VILLAGE OF
CROTON-ON-HUDSON TO REJECT NOTICE OF EXEMPTION

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Dated: July 26, 2006

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On Friday, June 30, the Village of Croton-on-Hudson, New York (the “Village”) filed a Petition to Reject Notice of Exemption Or, In the Alternative, For Stay of Effectiveness and For Consolidation (the “Petition”), pursuant to the provisions of 49 C.F.R. §§ 1117.1 and 1150.32(c). Without prior notice to the Village, Buffalo Southern Railroad, Inc. (“BSOR”) had filed its Verified Notice of Exempt Transaction (“Notice”) on Thursday June 29, 2006. Believing that it was prudent to file the Petition with the Board before the weekend and Fourth of July holiday period commenced, the Village quickly drafted and filed the Petition on June 30.

The June 30 Petition cited to the Board’s August 5, 2005 decision in *Northeast Interchange Railway, LLC - Lease and Operation Exemption - Line in Croton-on-Hudson, NY*, STB Finance Docket No. 34734, in which the Board had stayed the effectiveness of the notice of exemption filed by Northeast Interchange Railway, LLC (“NIR”) with respect to operations over the same 1,600-foot track (the “Track”) at issue in this proceeding. The Petition also should have cited to the Board’s subsequent decision in that proceeding, in which the Board rejected NIR’s notice of exemption “because the lease and operation transaction contemplated by NIR is not appropriate for consideration under the abbreviated class exemption procedures of 49 CFR 1150.31.” *Northeast Interchange Railway, LLC - Lease and Operation Exemption - Line in*

Croton-on-Hudson, NY, STB Finance Docket No. 34734 (STB served Nov. 18, 2005) at 4. The Board's reasons for rejecting NIR's Notice apply with equal force to BSOR's Notice.

Both the NIR and BSOR proceedings present a substantial legal question as to how the proposed operations are properly characterized for purposes of the Board's jurisdiction and licensing authority. Contrary to BSOR's suggestion in its Reply in Opposition to the Village's Petition, filed in this proceeding on July 7, 2006 (the "BSOR Reply") (at 5), the fact that BSOR is an existing rail carrier (in upstate New York) whereas NIR was not does not change the situation. BSOR presents the novel situation of a rail carrier attempting to avail itself of the exception of 49 U.S.C. § 10906 over a short track three hundred miles away from its rail line. The District Court in *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 to Dismiss Verified Notice of Exempt Transaction, filed June 30, 2006), did not purport to decide whether BSOR required a Board license to operate in the Village or, if so, whether that license should be granted. The District Court clearly stated that this Board should decide these questions. *Id.* at 17-18.

Both cases also present substantial and similar factual questions about the nature of the proposed operations.¹ The evidence of BSOR's current and intended operations should be presented in the first instance by BSOR. BSOR's Notice failed to present any evidence to the Board, however, but relied solely on a gross mischaracterization of the District Court's decision

¹ 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. The Village believes that the Board can reject BSOR's contention that the Track is excepted spur track without further factual development (because it is uncontested that the Track is not adjacent or auxiliary to BSOR's main line). However, the Board could not affirmatively determine that the Track is a spur track (as opposed to a line of rail or a private track) without factual development of BSOR's current and intended future use of the Track.

granting a preliminary injunction to BSOR in *Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson*.

Moreover, the handling of solid waste by BSOR remains an issue, just as it was in the NIR proceeding. BSOR says that it is temporarily not handling solid waste while the District Court's preliminary injunction is in effect whereas NIR intended to handle solid waste. BSOR Reply at 5-6. But it has made no representation that it would never haul solid waste.²

Thus, none of these differences makes BSOR's transaction "routine" and lacking in "substantial controversy and local interest." November 18, 2005 Decision at 4. BSOR's Notice should thus be rejected just as NIR's Notice was rejected. Accordingly, as in the NIR proceeding, the Village urges the Board to reject BSOR's Notice and direct BSOR to file either a petition for exemption under 49 CFR part 1121 or a formal application under 49 U.S.C. § 10902 if it desires to proceed with its operations over the Track.

The Board has clearly explained that the summary exemption procedure is not appropriate for a transaction -- like this one -- that seeks to convert a private operation into a "for-hire common carrier service" with associated preemption:

There are some types of situations in which approval would be so routine that we have a "class exemption" allowing parties to obtain Board authorization subject only to an after-the-fact Board review if objections are received. Thus, in 1985, the ICC adopted rules in *Class Exemption-Acq. & Oper. of R. Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985) (*Class Exemption*), under which a

² The District Court stated that, in the hearing on BSOR's motion for preliminary injunction, "Counsel [for BSOR] has represented to this Court that plaintiff has no immediate plans to carry such waste. (Admittedly, counsel fudged when asked whether it would so represent for all time.)." *Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson*, at 23. See also Answer of Buffalo Southern Railroad, Inc. to Formal Complaint (filed July 19, 2006) at 5, ¶ 23 in *Village of Croton-on-Hudson, New York v. Buffalo Southern Railroad, Inc.; Greentree Realty, LLC; RS Acquisition Co., LLC; and Northeast Interchange Railway, LLC*, Finance Docket No. 34905 (filed June 30, 2006), where BSOR denies that it voluntarily refused to accept solid waste.

noncarrier can obtain approval to acquire and operate a line of railroad within 7 days, subject to that authority being later revoked (if our regulatory scrutiny is found to be necessary) or treated as void *ab initio* (if the exemption notice is found to have contained false or misleading information). The class exemption procedures were adopted to serve shippers and community interests by facilitating continued rail service, on lines that the selling carrier could no longer operate profitably, by new, smaller carriers seeking to provide service more efficiently. See *Class Exemption*, 1 I.C.C.2d at 812-13, 817. The procedures are designed to meet the need for expeditious handling of a large number of requests that are rarely opposed. In most instances, the transactions under this proposal will involve resumed or continued rail service with no change in operations. *Class Exemption*, 1 I.C.C.2d at 811.

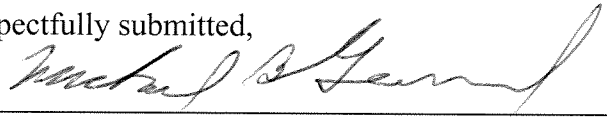
The transaction at issue in this case differs substantially from the type of transaction that the ICC viewed as falling within the scope of *Class Exemption*. First, it has attracted substantial controversy and opposition, including opposition from public agencies. Second, it would convert private carrier operations into for-hire common carrier service. Such a conversion triggers this agency's primary jurisdiction, thus withdrawing the service and the property over which it operates from many aspects of local control. And in this case, the issue of local control over the property involved in the case underlies much of the opposition to the proposed transaction. Thus, unlike most cases where *Class Exemption* is invoked, there are substantial factual and legal issues that have been presented here which require additional scrutiny and the development of a more complete record.

Riverview Trenton Railroad Company-Acquisition and Operation Exemption-Crown Enterprises, Inc., STB Finance Docket No. 33980 (STB served February 15, 2002) at 6-7 (footnote omitted).

The Village respectfully requests that the Board accept this brief filing and permit the Village to rely on the arguments made in the Village's pleadings in Finance Docket No. 34734 and the cited Board decisions rejecting and revoking notices of exemption in support of its Petition to reject BSOR's Notice. BSOR will not be prejudiced by this amendment.

In the meantime, the Board should proceed to address the Village's Formal Complaint against BSOR and others with whom BSOR is associated. *Village of Croton-on-Hudson, New York v. Buffalo Southern Railroad, Inc.; Greentree Realty, LLC; RS Acquisition Co., LLC; and Northeast Interchange Railway, LLC*, Finance Docket No. 34905 (filed June 30, 2006). Unlike NIR, BSOR has represented that it has already commenced operations over the Track at issue and has not represented that it will cease those operations, which the Village contends are unlawful, pending authorization by the Board. The Village will separately file a reply opposing BSOR's Petition to Hold Proceedings in Abeyance, filed in Finance Docket No. 34905 on July 20, 2006.

Respectfully submitted,



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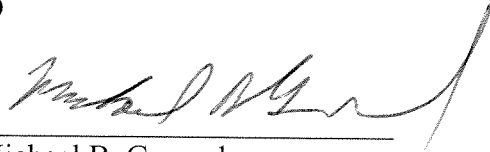
Attorneys for the Village of Croton-on-Hudson

Dated: July 26, 2006

CERTIFICATE OF SERVICE

I certify that this Amended and Supplemental Petition of The Village of Croton-on-Hudson to Reject Notice of Exemption was served via overnight courier on July 26, 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", written over a horizontal line.

Michael B. Gerrard
July 26, 2006