

212-715-1399

518-432-0086

617-886-9324

FAX COVER SHEET

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
300 QUARROPAS STREET
WHITE PLAINS, NY 10601
PHONE: 914-390-4146
FAX : 914-390-4152

JUDGE MCMAHON
DISTRICT JUDGE

TO: Michael Leonard
John T. McManus
James Howard

FROM: _____

PAGES (INCLUDING THIS COVER SHEET): 6

THE INFORMATION IN THIS FACSIMILE TRANSMISSION IS CONFIDENTIAL AND MAY BE PRIVILEGED. IF YOU HAVE RECEIVED THIS FACSIMILE IN ERROR, CONTACT THE NUMBER ABOVE AND EITHER DESTROY THE ORIGINAL OR RETURN IT BY MAIL. ANY USE OF THIS FACSIMILE BY ANYONE OTHER THAN THE INTENDED RECIPIENT IS STRICTLY PROHIBITED.

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: _____ DATE FILED: _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X

BUFFALO SOUTHERN RAILROAD, INC.,

Plaintiff,

-against-

06 Civ. 3755 (CM)

VILLAGE OF CROTON-ON-HUDSON, et al.,

Defendants.

X

McMahon, J.:

On June 12, 2006, this court entered an order preliminarily enjoining the Village of Croton-on-Hudson, New York, (the "Village") from condemning the property and related track and facilities used in Buffalo Southern Railroad, Inc.'s ("BSOR") rail transportation operations in Westchester County (the "Croton Yard") and from applying and enforcing against BSOR zoning ordinances, permitting and pre-clearance requirements and other local regulations. The order was expressly conditioned on BSOR's not accepting "solid waste as defined by New York State regulations" or, as I put it more bluntly, "no waste hauling of any sort." (Opinion and Order at 27, 28). At the time the court imposed this condition, parties other than BSOR (including parties who were arguably predecessors in interest to BSOR) had been enjoined by the New York State Supreme Court from operating any sort of waste management or transfer operation at the Croton Yard without first obtaining a special permit from the Village. This court refused to enter any order that would, in effect, make an end run around that injunction.

Neither side took an appeal from the court's order. A bond was posted (belatedly) and the preliminary injunction took effect.

In August, the court was approached by BSOR, which sought an informal ruling that haulage of gypsum pursuant to two contracts it had entered into with Coastal Distribution, LLC ("Coastal") did not violate the preliminary injunction order. Coastal transports and distributes building materials and products to customers throughout the Northeast; one of Coastal's customers, Lafarge North America ("Lafarge"), operates a wallboard manufacturing plant in Buchanan, New York, six miles from the Croton Yard.

The court indicated that it would proceed only on a motion with a full record, and BSOR subsequently made what it called a Motion to Confirm that BSOR's Transloading and

Copies mailed / handed / faxed to counsel 10 / 23 / 06

Transportation of Gypsum and Sheetrock Tailings will not run afoul of the condition the court imposed on the preliminary injunction. Rather than testing the scope of the injunction by carrying out the contracts and being challenged by the Village, BSOR asks for an advance adjudication that what it proposes to do will not run afoul of the preliminary injunction.

The Village opposes the motion.

The two contracts at issue provide for the transfer and carriage of different forms of gypsum.

Contract #1 involves the transloading and transportation of gypsum from Lafarge's plant in Buchanan to a sister plant in Palatka, Florida. The gypsum is surplus from Lafarge's sheetrock manufacturing process in Buchanan. The Lafarge facility is currently undergoing an \$80 million expansion and does not have the space to store gypsum for reuse there. Lafarge and Coastal propose to transfer the gypsum to Palatka, where it will be used to manufacture new sheetrock.

Under the agreement, Coastal will deliver the gypsum by truck to the Croton Yard from the Buchanan plant. The gypsum will be deposited on the floor of the enclosed building at the Yard. Any dust will allegedly be suppressed and contained by the enclosure and by wetting the gypsum prior to the gypsum's leaving Buchanan – pelletizing the gypsum, which is ordinarily a powder. Using a front-end loader, BSOR will load the gypsum onto gondola cars provided by Lafarge for rail transportation to Palatka. The freight will be carried over rail lines operated by CSX Transportation, Inc. ("CSX") pursuant to an interchange agreement reached between CSX and BSOR after the entry of the preliminary injunction.

Coastal anticipates that approximately ten trucks will deliver gypsum to the Yard per day, which will fill three rail cars per day. The contract calls for the transshipment of 20,000 tons per year of gypsum.

The condition imposed by the Court was that BSOR not "accept" solid waste as defined by New York State regulations. If the powdered gypsum that is the subject of Contract #1 constitutes solid waste under the regulations, then the court's condition is violated. If it is not, then the court's condition is not violated. It is as simple as that.

Gypsum is a naturally occurring mineral that enjoys widespread industrial, commercial and agricultural use. It is mined, then crushed and (usually) pulverized to powder form prior to use. Powdered gypsum that has never been used in any product cannot possibly constitute "solid waste."

The parties have submitted competing affidavits concerning whether the gypsum under discussion constitutes "solid waste" as defined by 6 N.Y.C.R.R. § 360-1.2(a). BSOR, through its thoroughly qualified expert, Mark P. Millsbaugh, P.E., asserts that the gypsum is not "garbage" or "refuse" that is being "discarded;" rather, it is a raw material that will be "recycled"

(Millspaugh's term) for use in the manufacture of new sheetrock. (Millspaugh Aff., ¶¶ 17-20.) Millspaugh does not attest to whether the gypsum in question was previously used in some discarded product; he merely suggests as much by his careful use of the word "recycled." (*Id.*) However, Millspaugh opines that because gypsum remains a feedstock for the wallboard manufacturing process, it never becomes "solid waste" within the meaning of 6 N.Y.C.R.R. § 360-1.2. (*Id.* at ¶ 18.) Millspaugh also notes that gypsum (whether virgin or destined for reuse or recycle) is not regulated as a solid waste and is specifically excluded from the waste stream by 6 N.Y.C.R.R. § 360.1.2(a)(4)(viii). (*Id.* at ¶ 19.)

The Village did not submit a competing expert affidavit, but rather submitted an affidavit from its counsel, Michael B. Gerrard, Esq. BSOR asks that I disregard or accord no weight to Mr. Gerrard's affidavit. However, I note that he simply propounds legal arguments (which are also made in the Village's brief) concerning the issue of "recyclables" as waste material under New York State regulations. According to the regulations of the New York State Department of Environmental Conservation, ("DEC"), 6 N.Y.C.R.R. § 360-1.2(b)(129), "[r]ecycle means to use recyclables in manufacturing a product." Section 360-1.2(b)(130) goes on to provide that "[r]ecyclable means solid waste that exhibits the potential to be used repeatedly." Mr. Gerrard and the Village's argument is that, under these two provisions, if the gypsum is being "recycled" into new wallboard, it constitutes solid waste. Or, put otherwise, the Village's position is that all powdered gypsum other than virgin gypsum (i.e., gypsum that has never previously been incorporated into any product) is solid waste — even if that gypsum is indistinguishable in form or content from virgin gypsum.

The fact that the gypsum under discussion is a raw material that is used in the manufacture of a new product is not dispositive of the question before the court. Solid waste — discarded automobiles tires, for example — is frequently used in the manufacture of new products. However, as Mr. Millspaugh notes, 6 N.Y.C.R.R. § 360.1-2(a)(4)(viii) provides that "materials including source separated recyclables that have been traditionally incorporated as a secondary material in the manufacturing process" do not qualify as "solid waste." (Millspaugh Aff., ¶ 18.) This regulation defines "source separation" as "dividing solid waste into some or all of its component parts at the point of generation, including the separation of recyclables from each other or the separation of recyclables from other solid waste. The residue remaining after recyclables are removed from the waste stream is not considered source separated material." 6 N.Y.C.R.R. § 360.1-2(b)(160). This definition for "source separated recyclables" provides ample guidance that the gypsum at issue should not be deemed "solid waste."

As Mr. Millspaugh has averred — and defendants have not contested — "[w]allboard . . . is a common building material consisting of gypsum sandwiched between paper." (Millspaugh Aff., ¶ 15.) If, indeed, the gypsum at issue has been taken from old wallboard (a solid waste) and recycled for use in newly manufactured wallboard, the recycled gypsum qualifies as "source separated recyclable," while the paper from which it is separated remains "solid waste." Therefore, the predicate for Mr. Gerrard's legal argument — that every recyclable product qualifies as a solid waste — does not stand up to close scrutiny.

The Village attacks this regulatory exception in its second argument, contending that this exception is “directly contradicted” (Def. Mem. at 9) by DEC’s practice of permitting parties to petition the DEC to determine whether a party may use a particular solid waste for a “beneficial use.” 6 NYCRR 360-1.15(d). But the defendants miss the point of that regulation. Section 360-1.15 does not exist so that the DEC can determine whether a given material is “solid waste.” Rather, this regulation permits a user of something that is otherwise defined in the regulations as “solid waste” – which source separated recycled gypsum is not – to petition for permission to make use of the solid waste. Since the source separated gypsum is NOT solid waste, there is no need for anyone to petition the DEC for a determination regarding whether the gypsum may be used beneficially in any manufacturing process and, therefore, the procedure cited by the Village has no applicability to this situation. Were plaintiff and Coastal to petition the DEC for such a beneficial use determination, they would not only pose the wrong question to the wrong adjudicator; the petition could amount to an admission by plaintiff that the gypsum is solid waste and that Contract #1 runs afoul of the condition set in the June 12, 2006 preliminary injunction. Moreover, to the extent defendants suggest that the DEC is the proper venue for determining whether Contract #1 violates the preliminary injunction condition, it goes without saying that the DEC lacks jurisdiction to opine on such a question.

I therefore conclude that compliance with Contract #1 does not run afoul of the specific condition imposed on the preliminary injunction.

Contract #2 involves the transloading and transportation of sheetrock “tailings” from Lafarge’s Buchanan plant to an out-of-state landfill. Tailings are a mix of gypsum and paper that are the result of squaring off or finishing sheetrock for sale. Under the agreement, the tailings will be loaded into leak-proof, closed intermodal containers at the Buchanan plant. Coastal will then transport the containers to the Croton Yard by truck, where BSOR will load them onto rail cars for transportation out of New York State.

Initially, Coastal anticipates that it will deliver four containers to the Croton Yard per day via four trucks. One rail car is necessary for every four intermodal containers. Eventually, Coastal anticipates that it will deliver up to sixteen containers to the Yard per day, resulting in the loading of four rail cars.

BSOR admits that tailings constitute solid waste. Therefore, Contract #2 is completely contrary to the letter and the spirit of the condition imposed by this court on the preliminary injunction. Moreover, there is no question that if BSOR’s predecessors in interest attempted to do what BSOR proposes to do under the Contract #2, such action would violate the state court injunction, which prohibits the use of the Croton Yard for the transloading of solid waste unless the then-tenant of the Yard obtained a permit from the Village. To BSOR’s argument that the method of transporting the solid waste tailings would make BSOR’s proposed operation “not . . . contrary to the purpose of the Court’s condition,” I can only say that this court’s preliminary injunction order intended to prohibit BSOR from transloading and transporting solid waste, without regard to how that waste was treated or carried.

I therefore deny BSOR's motion for an order confirming that compliance with Contract #2 would not run afoul of the "status quo" condition imposed on the preliminary injunction.

It should go without saying that this opinion addresses only the issue of whether the gypsum that is the subject of the two contracts qualifies as "solid waste" under New York State DEC regulations. It does not address the legality of BSOR's status as a common carrier or the legality of its transportation of the product under the I.C.C. Termination Act ("ICCTA") if it is a common carrier by rail.

In that regard, I understand that the Village is raising before the Surface Transportation Board ("STB") an argument concerning BSOR's status as a common carrier that it (admittedly) did not raise before this court (allegedly due to the press of time). I also understand that BSOR is suggesting to the STB that this court has already predetermined issues that are properly before the STB. Let me be quite clear: nothing that I said or did in conjunction with the issuance of the preliminary injunction was intended to tie the hands of the STB to deal with BSOR's operation -- whatever it is -- in whatever manner the agency deems appropriate. It may be that the STB will make findings that will render this court's *preliminary* conclusions about ICCTA preemption erroneous. So be it. The STB, not this court, is in charge of the nation's rail policy. I await with interest the ruling of the administrative agency -- and I will consider the question of permanent injunctive relief when that opinion issues.

Dated: October 23, 2006



U.S.D.J.

BY FAX TO ALL COUNSEL