

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34905

VILLAGE OF CROTON-ON-HUDSON, NEW YORK

v.

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

REPLY OF THE VILLAGE OF CROTON-ON-HUDSON IN OPPOSITION TO
MOTIONS OF GREENTREE REALTY, LLC, RS ACQUISITION CO., LLC AND
NORTHEAST INTERCHANGE RAILWAY, LLC TO DISMISS COMPLAINT

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The Village of Croton-on-Hudson (the “Village”) responds in opposition to the Motion to Dismiss Complaint as to Greentree Realty, LLC (“Greentree”), served on August 15, 2006 (the “Greentree Motion”), and in opposition to the similar Motion of RS Acquisition Co., LLC (“RSA”) and Northeast Interchange Railway, LLC (“NIR”) to Dismiss Complaint, served August 21, 2006 (the “RSA/NIR Motion”).¹ The Village respectfully submits that Greentree, RSA and NIR were properly named as defendants in this Formal Complaint proceeding, and that their motions to dismiss should be denied.

The Surface Transportation Board (the “Board”) has broad authority under 49 U.S.C. § 721(a) to implement federal rail transportation policy and law, as set forth in the Interstate Commerce Commission Termination Act (“ICCTA”). ICCTA requires prior Board licensing of

¹ The Greentree Motion and RSA/NIR Motion are collectively referred to herein as the “Motions.”

entities that wish to offer common carrier services over a line of rail. 49 U.S.C. § 10902. ICCTA also prohibits persons not ordinarily subject to the jurisdiction of the Board from “knowingly authorizing, consenting to, or permitting a violation of” 49 U.S.C. §§ 10901-10906. 49 U.S.C. § 11901(c). The Board’s jurisdiction in this and similar complaint proceedings extends not only to the rail carrier that may be in violation of the provisions of 49 U.S.C. Subpart IV, but also to any and all parties involved in formulating plans for, or acquiescing to, the unlawful operations. The Board’s authority is thus broad enough to permit it to investigate whether Greentree, RSA and NIR are knowingly authorizing, consenting to, or permitting (that is, aiding and abetting) BSOR’s violation of 49 U.S.C. §10902, as the Village alleges, so that the Board can determine whether it is appropriate to order them to cease and desist from those actions and/or to request the Attorney General to commence an enforcement action against them in federal district court.

Greentree, the owner of the property on which BSOR is operating, had leased its property in mid-2005 to NIR, which last year sought Board approval to become a common carrier by rail. *Northeast Interchange Railway, LLC–Lease and Operation Exemption–Line in Croton-on-Hudson, NY*, Finance Docket No. 34734, Notice of Exemption filed August 1, 2005. When the Board rejected NIR’s notice of exemption,² NIR abandoned its stated objective of becoming a common carrier by rail and apparently also abandoned its lease with Greentree. Its corporate affiliate, RSA (both NIR and RSA are under the common ownership of Regus Industries), then

² *Northeast Interchange Railway, LLC–Lease and Operation Exemption–Line in Croton-on-Hudson, NY*, STB Finance Docket No. 34734 (STB served November 18, 2005).

entered into a lease with Greentree in March 2006, and then subleased the property to BSOR, a short line rail carrier operating 300 miles away near Buffalo, New York.

Apparently, Regus Industries' "Plan A" had been to operate a solid waste facility at the property through Metro-Enviro Transfer LLC. That plan was hindered by Judge Nicolai's refusal in 2005 to enjoin the Village from halting the waste operations. "Plan B" was to avoid the Village's law by creating a rail carrier ("NIR") and asserting ICCTA preemption over the track, characterized as a line of rail. That plan was made more difficult by the Board's decision to reject the notice of exemption (albeit with leave to file a petition for exemption or application). "Plan C" is now to recruit an existing rail carrier – BSOR – to take the place of NIR and to recharacterize the track as an excepted spur track. Why NIR could not simply have subleased the property to BSOR is not entirely clear on the present record. Perhaps because NIR (as the successor to Metro Enviro Transfer's lease from Greentree and to its state permits) was involved in proceedings to enjoin the solid waste operation being conducted at the property, Regus Industries thought it would be better to bring in a different affiliate, RSA, for Plan C. The Village believes that discovery will reveal that Greentree, NIR, RSA and BSOR worked closely together in developing and implementing a strategy to avoid state, county and municipal permitting.

Greentree states in its Motion that it "has never had any dealings with BSOR and has no contractual relationship with BSOR (except to the extent that RS's ability to contract with BSOR may be impacted by Greentree's lease to RS)." Greentree Motion at 3. But the specific nature of Greentree's lease of its property – which was a necessary step in facilitating BSOR's operation – and Greentree's knowledge of BSOR's intended operation are matters for the Board to

investigate in determining whether Greentree is aiding and abetting an illegal operation by BSOR. NIR and RSA cannot assert, of course, that they have never had any dealings with BSOR. Their roles in recruiting BSOR and entering into contractual arrangements designed to end run the Board's authority are similarly matters for the Board to investigate.

Greentree, RSA and NIR assert that a complaint can only name rail carriers as defendants – not aiders and abettors – because 49 U.S.C. § 11701(b) (which authorizes the Board to begin an investigation upon filing of a complaint) specifically mentions only rail carriers. Greentree Motion at 2-4; RSA/NIR Motion at 4.³ But the Board's rules governing complaint proceedings, 49 C.F.R. Part 1111, specifically reference 49 U.S.C. § 721 as authority in addition to 49 U.S.C. § 11701. Section 721(a) provides that “[e]numeration of a power of the Board in this chapter or subtitle IV does not exclude another power the Board may have in carrying out this chapter or subtitle IV.”

Section 11701(b) thus must be read *in pari materia* with other provisions of ICCTA, including 49 U.S.C. § 11901(c), which provides for enforcement against aiders and abettors through fines. *See American Fed. of Gov. Employees, Local 2782 v. Federal Labor Relations*

³ Greentree also cites *Ellis v. Interstate Commerce Commission*, 237 U.S. 434 (1915), and *Tri-State Brick and Stone of New York, Inc. – Petition for Declaratory order*, STB Finance Docket No. 34824 (STB served Aug. 11, 2006), for the argument that the Board has no power to investigate a non-carrier. Greentree Motion at 3-4. But *Ellis* sheds little light on the Board's authority since enactment of ICCTA in 1995 to investigate alleged aiders and abettors. The predecessor to Section 11901(c) was enacted by the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210 §§801(a), 802, 90 Stat. 126, 130 (1976) and was not considered by the Supreme Court in *Ellis*. And, in any event, the Supreme Court allowed the ICC “reasonable latitude” to investigate non-carriers and permitted the ICC to inquire into a number of topics, with leave to inquire into the remaining topics depending on the answers to the first round of investigation. The Board's recent decision in *Tri-State Brick and Stone* is similarly inapposite. While the decision addressed the extent of the Board's authority over non-carriers, there was no suggestion in that case that any non-carrier was aiding and abetting a rail carrier to violate ICCTA.

Authority, 803 F.2d 727, 740 (D.C. Cir. 1986) (“It is a generally accepted precept of interpretation that statutes or regulations are to be read as a whole, with ‘each part or section . . . construed in connection with every other part or section.’ 2A Sutherland, Statutes and Statutory Construction § 46.05 at 90 (C. Sands rev. 4th ed. 1984).”); *see also U.S. National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (“Over and over we have stressed that ‘[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.’” (citations omitted)); *Redmond-Issaquah Railroad Preservation Assn. v. Surface Transportation Board*, 223 F.3d 1057, 1061 (9th Cir. 2000) (when reviewing the STB’s interpretation of an ICCTA provision, court must “examine not only the specific provision at issue but also the structure of the statute: ‘We derive meaning from context, and this requires reading the relevant statutory provisions as a whole.’” (citations omitted)). When these provisions are read together, it must be concluded that the Board has authority to investigate the actions of non-carriers to determine whether to request that the Attorney General commence an enforcement action against the non-carrier in federal district court.

Greentree, RSA and NIR make much of the fact that the Attorney General, not a private party or the Board, must commence an enforcement action to impose fines on aiders and abettors. Greentree Motion at 4-6; RSA/NIR Motion at 4-5. But that does not mean that a private party may not ask the Board to investigate its allegation of aiding and abetting, and it certainly does not mean that the Board cannot undertake any investigation before asking the Attorney General to bring an enforcement action.

Greentree, RSA and NIR have offered to pay \$5,000 for dismissal of the complaint, asserting that this is the maximum fine that could ultimately be imposed upon them under Section 11901(c). Greentree Motion at 6-7, RSA/NIR Motion at 6. But Section 11901(c) permits a penalty of up to \$5,000 for “knowingly authorizing, consenting to, or permitting a violation of sections 10901 through 10906 of this title” (emphasis added), and Section 11901(a) makes it clear that, with respect to such violations by a rail carrier, “[a] separate violation occurs for each day the violation continues.” When the two subsections are read together, as they must be, it is seen that Greentree, RSA and NIR are potentially subject to penalties well in excess of \$5,000. Their offer to pay \$5,000 is thus meaningless (even if it were legally possible to buy one’s way out of an investigation by offering the maximum possible penalty, which the Village seriously doubts). Moreover, the level of the penalty does not affect the Board’s jurisdiction.

Finally, RSA and NIR argue that the Board could not issue a cease and desist order to them under 49 U.S.C. § 721(b)(4) because there is no possibility that such relief would be necessary to prevent “irreparable harm.” RSA/NIR Motion at 5-6. First, this is not the proper basis for dismissal at the threshold of a proceeding, but an argument as to the ultimate disposition on the merits which the Board need not address at this time. Second, the Village strenuously disagrees with the factual assertion of RSA and NIR that “rail operations by BSOR at the Property or any activities of RSA or NIR” could not “conceivably cause irreparable harm.” BSOR’s recent proposal to commence waste gypsum transloading operations at the property without Board approval provides ample evidence of the kind of irreparable harm that can occur. See August 14, 2006 letter from Michael B. Gerrard to Secretary Williams regarding BSOR’s proposed operations revealed to the United States District Court on August 9, 2006 by letter from

BSOR Counsel John T. McManus. The Board has denied motions to dismiss where, as here, the factual record is incomplete. *See, e.g., Holrail LLC—Construction and Operation Exemption—in Orangeburg and Dorchester Counties, SC*, STB Finance Docket No. 34421 (STB served October 20, 2004) at 2 (“Due to this lack of a complete record, as well as the unique facts and issues presented in this case, it would be premature to dismiss the case at this time.”).

The Village respectfully requests the Board to deny the Greentree Motion and RSA/NIR Motion in all respects.

Respectfully submitted,



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Dated: August 29, 2006

CERTIFICATE OF SERVICE

I certify that this Reply of the Village of Croton-On-Hudson in Opposition to Motions of Greentree Realty, LLC, RS Acquisition Co., LLC and Northeast Interchange Railway, LLC to Dismiss Complaint was served via electronic mail and first-class mail on August 29, 2006, to the following parties:

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