

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**VILLAGE OF CROTON-ON-HUDSON, NEW YORK**

v.

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

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Docket No. FD-34905

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**FORMAL COMPLAINT**

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Dated: June 29, 2006

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The Village of Croton-on-Hudson, New York (the “Village”) respectfully submits this Formal Complaint against Buffalo Southern Railroad, Inc. (“BSOR”), Greentree Realty, LLC (“Greentree”); RS Acquisition Co., LLC (“RSA”); and Northeast Interchange Railway, LLC (“NIR”) pursuant to 49 U.S.C. § 11701(b) and 49 C.F.R. § 1111.1 *et seq.*<sup>1</sup> The Village complains that BSOR has not received authority from the Surface Transportation Board (the “Board”) under 49 U.S.C. §10902 to operate as a common carrier at 1A Croton Point Avenue in the Village (the “Property”) over a 1,600-foot track (the “Track”) and that BSOR has therefore

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<sup>1</sup> The Village is a local government entity. Pursuant to 49 C.F.R. §1002.2(e)(1) filing fees are waived for a “proceeding which is filed by a ... local government entity.” Therefore, the Village has not paid the filing fee typically required to accompany the filing of a complaint.

unlawfully held itself out as a common carrier over the Track. The Village further complains that (1) Greentree, the owner of the Property and Track, (2) RSA, the present lessee from Greentree of the Property and Track, and (3) NIR the former lessee from Greentree of the Property and Track, have knowingly authorized, consented to, and permitted this violation of section 10902. The Village respectfully requests the Board to order BSOR, Greentree, RSA and NIR to cease and desist from their unlawful operations under 49 U.S.C. §721(b)(4), to fine BSOR, Greentree, RSA and NIR to the maximum extent permitted by law under 49 U.S.C. §11901, to require BSOR to file an application under 49 U.S.C. §10902 if BSOR seeks lawful authority for its operations in the Village, and to afford the Village such other relief as the Board deems appropriate.

#### **The Parties**

1. The Village of Croton-on-Hudson is a New York municipal corporation, with offices located at the Stanley H. Kellerhouse Municipal Building, 1 Van Wyck Street, Croton-on-Hudson, New York 10520.

2. Buffalo Southern Railroad, Inc. is a New York corporation, headquartered at 8600 Depot Street, Eden, New York 14057. On information and belief, BSOR is a Class III rail common carrier that operates over approximately 32 miles of rail line between Buffalo, New York and Gowanda, New York and provides industrial switching services at Tonawanda, New York.

3. Greentree Realty, LLC is a New York limited liability company. On information and belief, its principal place of business is at 1A Croton Point Avenue, Croton-on-Hudson, New York 10520. In a prior proceeding, the Board was informed that the address of Greentree is c/o

Kenneth Gunshor, Esq., 100 South Bedford Road, Suite 150, Mount Kisco, NY 10549. *See* Verified Notice of Exempt Transaction, *Northeast Interchange Railway, LLC-Lease and Operation Exemption-Line in Croton-on-Hudson, New York*, Finance Docket No. 34734 (filed July 29, 2005), at 2. Greentree owns the Property and the Track.

4. RS Acquisition Co., LLC is a New York limited liability company. RSA's Chief Executive Officer is Andreas Y. Gruson. On information and belief, its principal place of business is 2730 Transit Road, West Seneca, NY 14224. RSA is the present lessee of the Property and Track.

5. Northeast Interchange Railway, LLC is a New York limited liability company. NIR's Chief Executive Officer is Andreas Y. Gruson. On information and belief, its principal place of business is 2730 Transit Road, West Seneca, NY 14224. In a prior proceeding, the Board was informed that NIR should receive correspondence through James E. Howard, One Thompson Square, Suite 201, Charlestown, MA 02129. *See* Verified Notice of Exempt Transaction, *Northeast Interchange Railway, LLC-Lease and Operation Exemption-Line in Croton-on-Hudson, New York*, Finance Docket No. 34734 (filed July 29, 2005), at 1. NIR is the former lessee of the Property and Track. RSA and NIR are under the common ownership of Regus Industries LLC.

### **The Facts**

6. On May 17, 2006, BSOR filed a Complaint in the United States District Court for the Southern District of New York against the Village and sixteen members of its elective and appointive Boards seeking a declaratory judgment that the Village may not apply its local zoning and land use laws and the state eminent domain law against BSOR's operations at the Property.

*Buffalo Southern Railroad, Inc. v. Village of Croton-on-Hudson et al.*, Case No. 06 Civ. 3755 (CM) (S.D.N.Y.). BSOR argued that such application is preempted by the Interstate Commerce Commission Termination Act (“ICCTA”), 49 U.S.C. § 10501, and violates the Commerce Clause of the United States Constitution. BSOR also sought a temporary, preliminary and permanent injunction against such application. The Complaint was accompanied by (1) Plaintiff’s Application for a Temporary Restraining Order, (2) Memorandum of Law in Support of Plaintiff’s Application for a Temporary Restraining Order and Motion for a Preliminary Injunction, and (3) Affidavits of Albert Feasley, John T. McManus, Daniel M. Meehan, and Joseph Rutigliano. A copy of the May 17, 2006 filing is attached as Exhibit 1.

7. The Village received telephonic and written notice of this impending filing on May 16, 2006 from BSOR’s counsel. This is the first time that Village representatives learned that BSOR was operating, or intended to operate, in the Village.

8. BSOR’s Complaint reveals that on March 3, 2006, BSOR entered into a lease for the Property. Complaint ¶ 28; Feasley Affidavit ¶10 and Ex. B.

9. The Property is approximately ten acres in size. It is bounded on the west by a rail line owned by Metro-North Commuter Railroad. CSX Transportation, Inc. (“CSXT”) operates freight rail service over that line. The Property includes the Track, an approximately 1,600-foot track over which rail service has been, and can be, provided. Complaint ¶¶ 21 and 22; Feasley Affidavit ¶¶ 5 and 6 and Ex. A.

10. Greentree apparently transferred the lease of the Property and Track from NIR to RSA sometime between the Board’s November 17, 2005 decision in Finance Docket No. 34734

and March 3, 2006. RSA in turn subleased the Property and Track to BSOR on March 3, 2006. Feasley Affidavit ¶ 10 and Ex. B.

11. On information and belief, Greentree, NIR and RSA all worked together to restructure the lease arrangements at the Property, recruit and induce BSOR to come onto the Property, and work out an arrangement for BSOR to claim common carrier status, in a way that purports to circumvent state and local regulation, for the financial benefit of Greentree, NIR and RSA. In doing so, Greentree, NIR and RSA had knowledge that BSOR had not obtained necessary authorizations from the Board under 49 U.S.C. Subtitle IV, Part A.

12. BSOR represented to the District Court that it is offering common carrier rail service over the Track:

Now, BSOR holds itself out to the public generally to provide common carrier rail service at the BSOR Croton yard, including transloading and switching services to rail customers delivering or receiving various commodities by truck at the BSOR Croton Yard, transferring containers and bulk commodities between trucks and rail cars, and providing other rail transportation services involving the exchange of empty and loaded rail cars for various commodities with CSX.

Complaint ¶ 28. Feasley Affidavit ¶ 11 is identical, except that the words “and bulk commodities” are omitted.

13. Joseph Rutigliano of Coastal Distribution, LLC stated in his affidavit that “Coastal arranged for BSOR to transport sand, aggregate, wallboard and other building materials and products by rail to the Transload Facility in Croton” and that “BSOR is beginning to provide such service to Coastal.” Rutigliano Affidavit ¶¶ 7 and 8.

14. BSOR represented to the District Court that it is offering common carrier rail freight service over the Track to more than one shipper.

15. The Track is over 300 miles from BSOR's rail line in western New York.

16. The Village and the individually named representatives filed Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Preliminary Injunction on May 23, 2006. That Memorandum was supported by the Affidavits of Louis E. Gitomer, Charles A. Kane, and Marianne Stecich. A copy of the May 23, 2006 filing is attached as Exhibit 2.

17. Ms. Stecich, the Village Attorney, described the proceedings related to Metro Enviro's operation of a waste transfer station on the Property from 1997 to 2005. She also described the subsequent efforts of Northeast Interchange Railway, LLC to commence common carrier operations over the Track for the transportation of construction waste and other commodities (of which the Board is aware). *See Northeast Interchange Railway-LLC-Lease and Operation Exemption-Line in Croton-on-Hudson, New York*, STB Finance Docket No. 34734 (filed Aug. 1, 2005).

18. Mr. Kane, a Supervisor of Metro North Commuter Railroad and a Village Trustee, stated that he had not observed any activity by BSOR at the Property.

19. Mr. Gitomer, a regular practitioner before the Interstate Commerce Commission and this Board, explained in his affidavit that BSOR appeared to be seeking to convert the Track from an excepted "spur, industrial, team, switching, or side" track to a line of railroad. Mr. Gitomer further stated that, prior to holding itself out as a common carrier over this additional line of railroad far from its own territory and in the territory of CSXT, BSOR should have obtained Board approval under 49 U.S.C. §§ 10901 or 10902(a).

20. On May 25, 2006, BSOR filed a Memorandum of Law in Further Support of Plaintiff's Motion for a Preliminary Injunction along with a May 24, 2006 Affidavit from Albert Feasley. A copy of the May 25, 2006 filing is attached as Exhibit 3.

21. Mr. Feasley contended that BSOR had been holding itself out as a common carrier over the Track since March 2006, and had in fact operated over the Track. Second Feasley Affidavit ¶¶ 8 and 9. Apparently acknowledging that lawful operation over an additional line of railroad would require Board approval, Mr. Feasley contended that the track was excepted spur track and not a line of railroad.

22. By letter to the District Court dated May 31, 2006, Paul T. Hitchcock, Associate General Counsel-Regulatory for CSXT, informed the Court of its position on the delivery of cars to the Track. A copy of the May 31, 2006 letter is attached as Exhibit 4.

23. Following a June 1, 2006 hearing on BSOR's motion for preliminary injunction, the District Court granted the motion, conditioned on BSOR's "continued refusal to accept solid waste as defined by New York State regulations." Decision and Order Granting Plaintiff's Motion for a Preliminary Injunction, Case No. 06 Civ. 3755 (CM) (June 12, 2006), attached as Exhibit 5. The District Court concluded that "BSOR is likely to prevail on the issue of whether ICCTA preemption applies, because the question about the legality of its operation does not affect the STB's exclusive jurisdiction over the site under § 10501 of the ICCTA." Decision at 14.

24. The District Court, however, invited BSOR and/or the Village to present to the Board the question whether BSOR's operations on the Track require Board approval:

Certainly someone should look into whether BSOR's Westchester operation requires a certificate of authority, and under the doctrine

of “primary jurisdiction” articulated by the Supreme Court in U.S. v. Western Pac. R. Co., 352 U.S. 59, 64 (1956), that someone ought to be the Surface Transportation Board. Determining whether BSOR requires a license to operate in the proposed fashion involves far more than simply interpreting the statute. The reviewing authority must decide 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. This involves analysis, not only of the “intended use” of trackage, see Nicholson v. Interstate Comm. Comm’n, 711 F.2d 364, 367 (D.C. Cir. 1983); but also of the “purpose and effect” of the proposed arrangement. Texas & Pac. Ry. Co. v. Gulf, Colo. & Santa Fe Ry. Co., 270 U.S. 266, 46 S. Ct. 263 (1926); Brotherhood of Locomotive Engineers v. U.S., 101 F.3d 718, 728 (D.C. Cir. 1996). As I learned when I delved (more deeply than proved necessary) into these matters, these are complicated and arcane questions, on which the ICC and STB have spoken in the past (albeit not on these precise facts). Clearly, such matters should be resolved as a matter of national rail policy, not in a piecemeal fashion by unspecialized district courts.

Decision at 17-18.

25. As BSOR has not presented this question to the Board since the District Court’s June 12 Decision, the Village is accepting the District Court’s invitation to do so. The District Court set forth the procedure for doing so:

If BSOR, a Class III rail carrier, is conducting unauthorized common carrier operations from Westchester County, in violation of Chapter 109 of the ICCTA, the statute itself provides remedies: a fine of up to \$5,000 per violation per day. 49 U.S.C. § 11901(a) . . . . The procedure for enforcing such violations, which is set forth in Chapter 117, is for “any person,” (which would include the Village of Croton-on-Hudson) to file a complaint with the Surface Transportation Board. 49 U.S.C. § 11701(a) (2000).

Decision at 19.

### **Issues Presented**

The Village presents three issues in this Formal Complaint:

(1) Whether BSOR may operate the Track as a common carrier by rail only with Board approval (because it would constitute the operation of an additional or extended line of rail under the authority of the Board under 49 U.S.C. § 10902).

(2) Whether BSOR violated 49 U.S.C. § 10902 by holding itself out as a common carrier and/or by operating as a common carrier at the Property without Board approval.

(3) Whether Greentree, RSA or NIR knowingly authorized, consented to, or permitted BSOR's violation of 49 U.S.C. § 10902, or any other provision of 49 U.S.C. Subtitle IV, Part A.

### **Relief Sought and Procedure**

The Village respectfully requests:

(1) that the Board initiate a proceeding to determine the issues presented above;

(2) in the event the Board determines that BSOR violated 49 U.S.C. § 10902, or any other provision of 49 U.S.C. Subtitle IV, Part A, by holding itself out as a common carrier and/or by operating as a common carrier over the Track without Board approval,

(a) that the Board, pursuant to 49 U.S.C. § 721(b)(4), order BSOR to cease and desist from operating over the Track in violation of 49 U.S.C. § 10902 or any other provision of 49 U.S.C. Subtitle IV, Part A,

(b) that the Board initiate proceedings to fine BSOR for its violation under 49 U.S.C. § 11901(a), and

(c) that the Board order BSOR to file an application under 49 U.S.C. § 10902 if BSOR seeks lawful authority for its operations in the Village;

(3) in the event the Board determines that Greentree, RSA and/or NIR knowingly authorized, consented to, or permitted BSOR's violation of section 10902 or any other persons' violations of any provision of 49 U.S.C. Subtitle IV, Part A,

(a) that the Board, pursuant to 49 U.S.C. § 721(b)(4), order Greentree, RSA and/or NIR to cease and desist from authorizing, consenting to, or permitting BSOR or any other rail carrier from operating over the Track without prior Board approval under 49 U.S.C. § 10902, and

(b) that the Board initiate proceedings to fine Greentree, RSA and/or NIR for their violation under 49 U.S.C. §11901(c); and

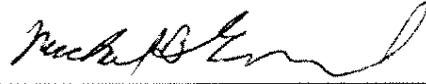
(4) that the Board order such other relief as the Board deems appropriate.

The Village submits that the public interest would be served by fining BSOR, Greentree, RSA and NIR the maximum amount permitted by statute. The record reflects that BSOR, Greentree, RSA and NIR deliberately sought to evade Board authority, and a maximum penalty would deter others from similarly attempting such an end run around the Board's authority.

Attached to this Formal Complaint is the verification of Gregory J. Schmidt, Mayor of the Village of Croton-on-Hudson, attesting that the foregoing facts are true and correct.

Neither this proceeding nor the granting of the relief requested herein will constitute a major federal action significantly affecting the environment or the conservation of energy resources.

Respectfully submitted,

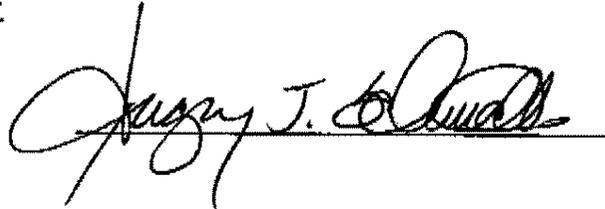
A handwritten signature in black ink, appearing to read "Michael B. Gerrard", written over a horizontal line.

Michael B. Gerrard  
ARNOLD & PORTER LLP  
399 Park Avenue  
New York, New York 10022-4690  
(212) 715-1000  
*Attorney for the Village of Croton-on-Hudson*

Dated: June 29, 2006

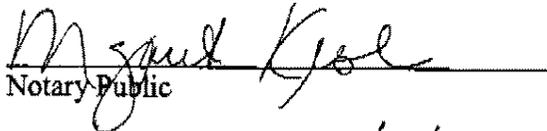
VERIFICATION

I, Gregory J. Schmidt, depose and state that I am Mayor of the Village of Croton-on-Hudson, that I am authorized to make this Verification, and that I have read the foregoing Formal Complaint, and know that the facts asserted therein are true and accurate as stated to the best of my knowledge, information and belief.

  
\_\_\_\_\_

Subscribed and sworn to before me on this 29<sup>th</sup> day of June, 2006, by

Gregory J. Schmidt, personally known to me or proved to me on the basis of satisfactory evidence to be the person who appeared before me.

  
\_\_\_\_\_  
Notary Public

My commission expires: 10/23/2009

MARGARET KEESLER  
Notary Public, State of New York  
No. 01KE5050950  
Qualified in Westchester County  
Commission Expires October 23, 2009

CERTIFICATE OF SERVICE

I certify that on this 30<sup>th</sup> day of June, 2006, I served a copy of the foregoing document upon the respondents, Buffalo Southern Railroad, Inc., Greentree Realty, LLC, RS Acquisition Co., LLC, and Northeast Interchange Railway, LLC by overnight courier (Formal Complaint and Exhibits) and facsimile (Formal Complaint only), at the following addresses and facsimile numbers:

*Counsel to BSOR, NIR and RSA:*

John T. McManus  
Crane, Parente, Cherubin & Murray  
90 State Street  
Albany, NY 12207  
518-432-8000

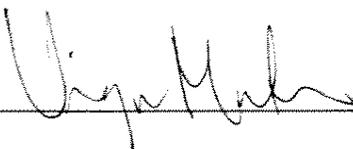
*and*

James E. Howard LLC  
One Thompson Square  
Suite 201  
Charlestown, MA 02129  
617-886-9322

*Counsel to Greentree:*

David S. Steinmetz  
Zarin & Steinmetz  
81 Main Street, Suite 415  
White Plains, NY 10601  
914-682-7800

The envelope containing such copy and the cover page of the facsimile transmitting such copy bear the legend, "Service of STB Formal Complaint."

  
\_\_\_\_\_