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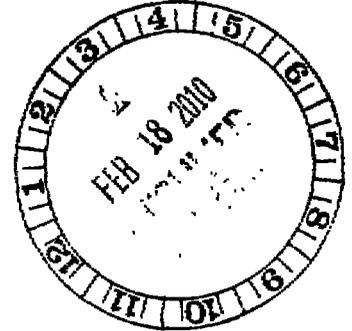
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FEB 18 2010

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Washington, D.C.



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February 17, 2010

VIA FEDERAL EXPRESS

Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Re: **Borough of Riverdale –Petition for Declaratory Order & Stay
STB Finance Docket No. 35299**

Dear Secretary Quinlan:

Recently, counsel for the Respondent, New York Susquehanna and Western Railway Corporation [“NYS&W”] filed a letter memorandum appending a recent order of the New Jersey Superior Court pertaining to the site operations at issue, and declaring that there is no longer any case or controversy for the Board to consider. Kindly accept this brief letter as the Petitioner’s reply to this most recent submission.

At the very least, the statements of Respondent are disingenuous, if not complete distortions of the actions of the New Jersey Superior Court. In addition to the assertion that there no longer remains a case or controversy, the Respondent further states that the issues presented by the Petitioner to the Surface Transportation Board were under the active consideration and jurisdiction of the New Jersey Superior Court and that the New Jersey court did not request any assistance of the Board in its resolution of the issues.

In reality, the proceeding commenced by the Respondent in the New Jersey court was to enforce a prior consent order executed between the parties. This parallel state court litigation was commenced by the Respondent. The case before the New Jersey court was not whether the Surface Transportation Board had or lacked jurisdiction over the non-rail operations proposed to be conducted by a third-party (later NYS&W) at the site in controversy, but rather whether the Planning Board could defer its review until a determination was made as to whether the proposed operation was preempted by federal law. The court assumed this Board’s jurisdiction, but left it to the Petitioner to seek a definitive ruling as to jurisdiction and preemption. Indeed, the court’s initial order of September 28, 2009, which is attached hereto, specifically, provided that the Riverdale Planning Board was without authority to determine whether the actions of the railroad were subject to preemption under 49 U.S.C. § 10501 (b), but held that:

4. The Borough of Riverdale has the right to pursue jurisdiction questions through the Surface Transportation Board. Nothing herein shall be construed as impeding the

Borough's right. This Order shall not be proof of preemption. The parties are left to their proofs before the Service [sic] Transportation Board:

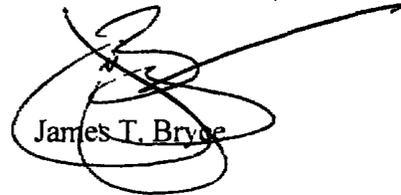
[Emphasis added.]

The record giving rise to the above order is informative of the court's desire to defer jurisdictional questions to the Surface Transportation Board. As found at Exhibit 6 of the Respondent's reply brief, the court's opinion stated: "and my only concern in this regard is what I've said earlier, and that is whether the [Planning] Board by not acting and making this de facto really had the authority to do that or is it preempted by federal law so that that decision has come has to come from the Surface Transportation Board or from a Federal Court in that regard not losing sight of the – our New Jersey decisions which basically deferred to – to Federal law . . . It's for the town if they are challenging that to go seek federal relief in that regard, but we, states, cannot interfere in the railway's decision." (pp 47-49.) "Prima facie under all the case law that I've cited. this is a railway use . . . [i]t doesn't mean that the town cannot get if they seek to [sic] a definitive opinion on this issue from the Surface Transportation Board." (p 60.)

The New Jersey court here sought to avoid specific determinations as to whether the operations being proposed by the Respondent were preempted under the ICCTA or whether Surface Transportation Board had jurisdiction over the operations proposed by Respondent. As the order clearly demonstrates, the court left the parties to their proofs before the Surface Transportation Board for a determination of the Board's jurisdiction and preemption. Contrary to Respondent's most recent submission, there is very much still a controversy as to whether the operations as proposed are, in fact, preempted – a controversy the New Jersey Superior specifically deferred to the Surface Transportation Board. Accordingly, the Petition should not be dismissed.

Respectfully submitted.

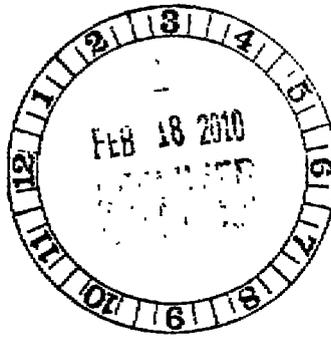
JOHNSON, MURPHY, HUBNER, McKEON,
WUBBENHORST, BUCCO & APPELT, P.C.



James T. Bryce

Enclosures

cc. Robert M. Jenkins, III, Esq.
John K. Fiorilla, Esq.
John M. Barbarula, Esq.
Cynthia T. Brown, Chief, Section of Administration



FILED

SEP 28 2009

**B. THEODORE BOZONELIS, A.J.S.C.
JUDGE'S CHAMBERS
MORRIS COUNTY COURTHOUSE**

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Attorneys for the Borough of Riverdale Planning Board

Borough of Riverdale	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION
Plaintiff,	:	MORRIS COUNTY
	:	
vs.	:	
	:	Docket No.: MRS-L-2297-96
The New York Susquehanna and Western Railway Corporation, a New Jersey Corporation	:	Civil Action
	:	
Defendant.	:	ORDER FOR ENFORCEMENT OF LITIGANT'S RIGHTS

THIS MATTER having been opened to the Court by John K. Fiorilla, Esq., of Capehart & Scatchard, P.A., attorneys for Defendant, The New York Susquehanna and Western Railway Corporation ("NYSW") and John M. Barbarula, Esq., of Barbarula Law Offices appearing for the Borough of Riverdale Planning Board and Robert H. Oostdyk of Johnson, Murphy, Hubner, McKeon, Wubbenhorst, Bucco and Appelt, P.C., appearing for the Borough of Riverdale and argument having been heard on September 16, 2009 that the Court finds:

1. The storage of goods in transit by a railroad on railroad property as part of a transloading operation constitutes "transportation" by rail carrier pursuant to 49 USC § 1501 (b); and
2. The Defendant has made a prima facie case that the brick transload operation it wishes to conduct at its Riverdale facility constitutes "transportation" by rail carrier pursuant to 49 USC § 10501 (b); and

3. The Borough of Riverdale Planning Board has no authority to make a finding of federal preemption under 49 USC § 10501 (b) a precondition for the Board's consideration of health and safety issues regarding a railroad's operation of its facility; and

4. The Borough of Riverdale has the right to pursue jurisdiction questions through the Surface Transportation Board. Nothing herein shall be construed as impeding the Borough's right. This Order shall not be proof of preemption. The parties are left to their proofs before the Service Transportation Board; and therefore

IT IS on this 28th day of September, 2009

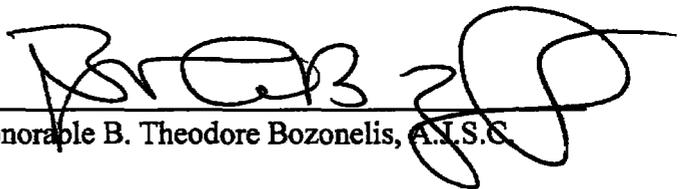
1. ORDERED, that the Borough of Riverdale Planning Board shall reinstate the Application of the Defendant pursuant to the Consent Order dated July 22, 1998, to operate its Riverdale facility as a transload facility for the movement of brick; and it is

2. ORDERED, that the Borough of Riverdale Planning Board shall conduct a hearing with the Defendant and review the health and safety issues regarding the operation of the facility for transloading bricks, and render a resolution within forty-five (45) days from the date of the entry of the within Order but no later than November 6, 2009; and it is

3. ORDERED, that the existing Consent Order remains in full force and effect; and it is further

4. ORDERED, that ~~after complying with~~ ^{subject to} the Borough of Riverdale Planning Board Resolution ^{on health and safety issues} the operations of Defendant may commence at once; and it is further

5. ORDERED, that if it appears that the Borough of Riverdale Planning Board will not or cannot come to a resolution of these issues with the Defendant, or if it appears that no resolution will be reached within forty-five (45) days of this Order, then upon notice from one or both of the parties, the Court will schedule a further hearing in this matter no later than November 9, 2009; and it is further
6. ORDERED, that the Court shall retain jurisdiction in this matter; and it is further
7. ORDERED, that a copy of the within Order shall be served upon all counsel of record within 7 days of the receipt of the filed Order by Plaintiff's counsel.



Honorable B. Theodore Bozonelis, A.J.S.C.