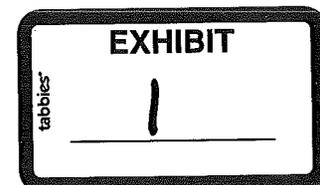


**SEPTEMBER 19, 1990 LEASE  
BETWEEN  
STATE OF VERMONT, LESSOR,  
AND  
VERMONT RAILWAY, INC., LESSEE**

| <i>Valuation Plans</i>                              | <i>Town</i>      | <i>Book</i> | <i>Pages</i> | <i>Recording Date</i> |
|---|------------------|-------------|--------------|-----------------------|
| V2/1 - V2/11  | Shaftsbury       | 78          | 83           | Oct. 30, 1990         |
| V2/2;V7/7 - V7/11;<br>V7/S.L.7 -<br>V7/S.L.7A       | Bennington       | 0-288       | 48           | Oct. 30, 1990         |
| V2/11 - V2/16                                       | Arlington        | 63          | 464          | Oct. 30, 1990         |
| V2/16 - V2/19                                       | Sunderland       | 46          | 119          | Oct. 31, 1990         |
| V2/19 - V2/27                                       | Manchester       | 195         | 134          | Nov. 1, 1990          |
| V2/27 - V2/34                                       | Dorset           | 81          | 487          | Oct. 30, 1990         |
| V2/34 - V2/38;<br>V2/40                             | Mount Tabor      | 17          | 475          | Oct. 31, 1990         |
| V2/38 - V2/40                                       | Danby            | 44          | 352          | Oct. 31, 1990         |
| V2/40 - V2/47                                       | Wallingford      | 55          | 376          | Oct. 30, 1990         |
| V2/47 - V2/53                                       | Clarendon        | 68          | 330          | Oct. 30, 1990         |
| V2/53 - V2/54;<br>V2/56 - V2/58<br>V3/51 - V3/      | Rutland Town     | 63          | 244          | Oct. 30, 1990         |
| V2/54 - V2/56<br>V2/S.L.55<br>V3/ - V2/53           | Rutland City     | 298         | 605          | Oct. 30, 1990         |
| V2/58 - V2/63                                       | Proctor          | 28          | 418          | Oct. 30, 1990         |
| V2/63 - V2/68                                       | Pittsford        | 87          | 550          | Oct. 30, 1990         |
| V2/68 - V2/76                                       | Brandon          | 105         | 474          | Oct. 30, 1990         |
| V2/76 - V2/79;<br>V5/15-4                           | Leicester        | 41          | 293          | Nov. 1, 1990          |
| V5/12 - V5/15                                       | Whiting          | 17          | 240          | Oct. 31, 1990         |
| V2/79 - V2/84                                       | Salisbury        | 38          | 84           | Oct. 30, 1990         |
| V2/84 - V2/90                                       | Middlebury       | 136         | 60           | Oct. 30, 1990         |
| V2/90 - V2/99                                       | New Haven        | 46          | 467          | Oct. 30, 1990         |
| V2/99 - V2/107                                      | Ferrisburgh      | 73          | 365          | Oct. 30, 1990         |
| V2/101  | Vergennes        | 39          | 469          | Oct. 30, 1990         |
| V2/107 - V2/113                                     | Charlotte        | 64          | 90           | Oct. 30, 1990         |
| V2/113 - V2/119                                     | Shelburne        | 133         | 473          | Oct. 30, 1990         |
| V2/119 V2/120                                       | South Burlington | 299         | 105          | Oct. 30, 1990         |
| V2/120 - V2/125;<br>V2/S.L.122; V2c/1;<br>V2c/S.L.1 | Burlington *     | 422         | 631          | Oct. 1, 1990          |

\* Original recorded at length in City of Burlington; memorandum of lease recorded elsewhere  
V2: Main Line Subdivision (Shaftsbury [White Creek, NY] - Burlington)  
V3: Bellows Falls Subdivision (Rutland Town - Rutland City)  
V5: Addison Railroad (Leicester and Whiting)  
V7: Chatham Subdivision (Bennington)

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631

LEASE

BETWEEN

STATE OF VERMONT

AND

VERMONT RAILWAY, INC.

*Oppd  
Vt. Railway*  
 CITY CLERK'S OFFICE  
 Received 10-1 1990 at 2:15 P.M.  
 and recorded in Vol. 422 on Page \_\_\_\_\_  
 of Burlington Land Records.  
 Attest: *J. Rader*  
 James E. Rader, City Clerk

*631 TO 655*

THIS LEASE made this 19th day of September, 1990 by and between the State of Vermont, a sovereign state, acting by and through its Agency of Transportation (VERMONT or STATE) and Vermont Railway, Inc., a Vermont railroad corporation with its principal place of business in the City of Burlington, County of Chittenden and State of Vermont (RAILWAY).

- WITNESSETH -

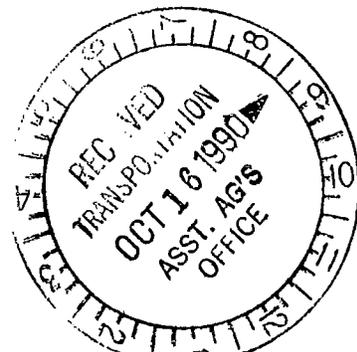
VERMONT hereby leases to RAILWAY and RAILWAY hereby leases from VERMONT the following described real estate and personal property:

ARTICLE I

THE PROPERTY DEMISED

All of the property of every kind and description, real, personal and mixed, acquired by VERMONT from Rutland Railway Corporation by deed dated January 1, 1964 (recorded in the Burlington land records at Book 151, Pages 566-76 and in the land records of other towns and cities through which said line passes), except as limited herein.

To Have and To Hold for a period of years from the date above written through January 5, 1994, yielding the rent hereinafter provided but subject to the defeasances and the rights of termination hereinafter reserved.



Also leased herein, upon the same terms and conditions, are (a) lands and premises in the towns of Shaftsbury, Dorset, Proctor, Leicester, Salisbury, Middlebury, Ferrisburg, and Whiting acquired by VERMONT from the Rutland Corporation (formerly the Rutland Railway Corporation) by deed dated December 13, 1967 (recorded in the Shaftsbury land records at Book 49, Pages 349-50 and in the land records of other towns in which such lands and premises are located), and (b) land and premises in the City of Burlington acquired by the State of Vermont, Lessor, and Vermont Railway, Inc., Lessee, from the City of Burlington by deed dated March 9, 1983 which is recorded in the Burlington land records at Book 297, Page 57, together with the office building and other improvements subsequently constructed thereon by VERMONT.

ARTICLE II

THE RENT RESERVED

2.1 VERMONT reserves as rent and RAILWAY covenants to pay or cause to be paid to VERMONT as and for the monetary rental of the premises, the following percentages of "Railway Operating Revenues" as defined in Account 501 of the Uniform System of Accounts for Railroad Companies prescribed by the Interstate Commerce Commission as such system of accounts exists at the date of this agreement:

| <u>On the Amounts of Railway Operating Revenues per Year</u> | <u>Percentage</u> | <u>Total Maximum Rental</u> |
|--|-------------------|-----------------------------|
| Not more than \$1,836,450                                    | 7%                | \$ 128,551.50               |
| More than \$1,836,450 but less than \$2,856,700              | 9%                | \$ 220,374.00               |
| \$2,856,700 or more  | 11%               | Not limited                 |

2.2-1 During each year of this lease, RAILWAY, on or before the 15th of each month, shall pay rent in monthly installments of seven percent of the "Railway Operating Revenues" included in Account 501 during the third preceding month until such revenues reach a cumulative total of \$1,836,450 per calendar year. Payments thereafter shall be made at the appropriate percentages set forth in the preceding table but shall not exceed the "Total Maximum Rental" set forth therein. Unless otherwise directed by VERMONT, all payments shall be made to the offices of the Vermont Agency of Transportation, 133 State Street, Montpelier, Vermont 05602.

2.2-2 Notwithstanding the foregoing rent schedule, total maximum rental will not exceed 7% for any calendar year following a calendar year in which RAILWAY's expenses for maintenance of roadway and structures (as defined by applicable regulations of the Interstate Commerce Commission) exceeded \$500,000.

2.2-3 Any late rent payments will accrue interest at the prevailing prime rate (as published in the Wall Street Journal).

2.3 If the tax imposed by 32 V.S.A. §§ 8211 and 8212 applies, then the credit provisions of 32 V.S.A. § 8212 shall apply to the leased property. Additionally there shall be credited to RAILWAY, in the payment of the rent reserved to VERMONT in accordance with Paragraph 2.1 and Paragraph 2.2 of the herein ARTICLE II, any payments made by RAILWAY to vendors or directly to the State of Vermont, Department of Taxes, for Sales and Use Tax imposed under the provisions of Title 32 V.S.A., Chapter 233, as amended, upon the purchase or use by RAILWAY of

materials used by RAILWAY to maintain the leased line and to contribute to the maintenance of buildings owned by VERMONT and occupied by RAILWAY, as required of RAILWAY pursuant to obligations for the same imposed upon RAILWAY in accordance with Paragraph 5.1 and Paragraph 5.2 of ARTICLE V hereinafter, and also in accordance with Paragraph 7.3 of ARTICLE VII hereinafter. However, if the total of such sales and use tax payments exceed the total rental payments due pursuant to Paragraphs 2.1 and 2.2-1 above for any calendar year, the rental due for that year shall be zero, and VERMONT shall not make any payment, credit or refund to RAILWAY, nor shall RAILWAY receive credit for such tax payments in any year other than the year in which the payments were made.

2.4 The provisions of this lease respecting the amount of rent due shall take effect with the rent payment for the month of June 1990 (due September 15, 1990). Rent payments for prior months, even if not yet remitted to VERMONT, shall continue to be determined under the parties' indenture of January 6, 1964, as subsequently renewed and amended.

### ARTICLE III

#### RENEWAL PRIVILEGE

If RAILWAY performs the agreements on its part, then it shall have the right, at the expiration of the current term (11:59 p.m. on January 5, 1994) to renew this lease for additional ten year terms, up to a maximum of six times:

|                     |                                   |
|---------------------|-----------------------------------|
| First renewal term  | January 6, 1994 - January 5, 2004 |
| Second renewal term | January 6, 2004 - January 5, 2014 |
| Third renewal term  | January 6, 2014 - January 5, 2024 |
| Fourth renewal term | January 6, 2024 - January 5, 2034 |
| Fifth renewal term  | January 6, 2034 - January 5, 2044 |
| Sixth renewal term  | January 6, 2044 - January 5, 2054 |

During each such renewal term the rent shall be that set forth in paragraph 2.2 of ARTICLE II herein. Such right shall be exercised by giving VERMONT written notice not later than one year prior to the expiration of each existing term.

#### ARTICLE IV

##### INSPECTION BY RAILWAY AND WARRANTY BY VERMONT

[Deleted]

#### ARTICLE V

##### COVENANTS AND AGREEMENTS BY RAILWAY

##### IN RELATION TO ITS POSSESSION DURING THE LEASE PERIOD

In further consideration of the lease hereby made, RAILWAY makes the following covenants and agreements:

5.1 RAILWAY covenants and agrees that, except as limited herein, it will maintain and operate said line or lines of railroad in compliance with Federal, State and Local laws and administrative regulations relating to the operation and maintenance thereof. Without limitation of the generality of the foregoing, RAILWAY agrees to maintain and operate the leased line in good operating condition and in no event under the minimum standards set by the Federal Railroad Administration for Class I (White Creek - Rutland) and Class II (Rutland - Burlington) freight railroads. RAILWAY will perform all obligations to be performed by the owner of a railroad, as set forth in Section 213.5 of the Federal Railroad Administration Track Safety Standards (49 CFR 213). RAILWAY covenants to contribute to the maintenance of buildings occupied by it in proportion to its occupancy.

5.2 The obligation of RAILWAY to maintain shall include the obligation to repair or replace such rail, ties and other items of track or signalling equipment as may be necessary to keep railroad in good operating condition. In the event of such replacement by RAILWAY the new property shall become the property of VERMONT and the removed property shall become the property of RAILWAY regardless of whether such removed property is sold or retained by RAILWAY as materials and supplies. If RAILWAY determines that any track, buildings or other facilities are not essential to its operations, it may request that VERMONT relieve it of its obligations in this ARTICLE V with respect to those portions of the demised premises. If it is decided that such track, buildings or other facilities should be dismantled or removed, RAILWAY shall pay to VERMONT the net salvage value thereof, as it may be determined by VERMONT. Where the costs of dismantling or removing exceed the market value of the materials, the amount of such excess may be deducted from RAILWAY's rental payments.

5.3 [Deleted]

5.4 RAILWAY covenants and agrees to maintain at least the following minimum schedules during the term of this lease:

| <u>Service</u>               | <u>Schedule</u>                                   |
|------------------------------|---|
| Rutland and Burlington Yards | Daily, except Saturdays, Sundays & Holidays       |
| Rutland - Burlington         | Three trips north and three trips south each week |
| Rutland - White Creek        | As needed   |

5.5 RAILWAY shall have the right to decrease this minimal schedule with the approval of the Secretary of Transportation if traffic conditions warrant such reduction. RAILWAY shall not be considered to be in default in respect of any obligation hereunder if prevented from fulfilling such obligation by reason of uncontrollable forces, the term "uncontrollable forces" being deemed for purposes hereof to mean any cause beyond the control of RAILWAY including, but not limited to, failure of facilities, flood, earthquake, storm, lightening, fire, epidemic, war, riot, civil disturbance, labor stoppage, sabotage, and restraint by court or public authority, which RAILWAY could not reasonably have been expected to avoid, and which by exercise of due diligence RAILWAY shall be unable to overcome.

5.6 RAILWAY understands that VERMONT is endeavoring to secure the maximum amount of service for the State and to that end covenants and agrees to cooperate, to the extent that it does not adversely affect its operations, with other carriers in the use of the Rutland Yard and in charging connecting carrier for such use. RAILWAY agrees that if a dispute arises as to the reasonableness of charges of rendering such service, then the Transportation Board of the State of Vermont may determine such reasonable charges and such determination will be binding upon it unless such determination shall conflict with a rule, regulation policy, decision or requirement of the Interstate Commerce Commission.

5.7 RAILWAY covenants and agrees to indemnify and hold the State harmless against all claims, damages or liability whatsoever arising out of or resulting from its possession, control, maintenance, operation or use of the premises or of its equipment.

5.8-0 RAILWAY covenants and agrees to obtain the insurance hereinafter specified in paragraph 5.8-1 but the complete or partial failure of an insurance carrier, for any reason whatsoever, fully to protect and indemnify the RAILWAY, or the inadequacy of insurance coverage shall not affect the obligation of RAILWAY to indemnify the State as provided above.

5.8-1 RAILWAY will maintain insurance of the following types and minimum coverages, carried by insurers acceptable to VERMONT:

| <u>TYPE</u>  | <u>LIMITS</u>   |
|--|---|
| (1) A standard Comprehensive General Liability policy, insuring against claims for bodily injury including death and consequential damage damages and for property damage (each occurrence) including claims of shippers; and specifically including any contractual liability assumed in paragraph 5.7 above. | Bodily Injuries<br>\$ 250,000 - each person<br>\$1,000,000 - each occurrence<br>\$ 50,000 - property<br>(each |
| (2) A standard policy covering RAILWAY'S liability under the Federal Employer's Liability Act.   | As required by Federal law and at least \$100,000 each person   |

5.8-2 [Deleted]

5.8-3 RAILWAY shall make VERMONT an additional insured under each of such policies (other than Employer's Liability) and shall furnish VERMONT with appropriate certificates of such insurance which shall specifically state that the insurance company shall furnish to VERMONT at least thirty (30) days notice of any lapse

or material changes in such insurance. This provision shall not, however, be deemed to establish the liability of VERMONT for the payment of any premiums or other charges for such insurance coverage.

5.8-4 As used herein the word "claims" shall include reasonable attorney's fees and other reasonable costs incidental to defense against claims.

## ARTICLE VI

### RENTALS FROM OTHERS

6.1 STATE shall have the right to any and all rents, license fees and permit fees arising from present and future leases of the demised premises, any renewals thereof and any new leases, including but not limited to rents, license fees and other revenues paid by utilities occupying a portion of the leased premises with poles and wires, and all revenues arising from the rights assigned to VERMONT by Rutland Railway Corporation by the deed dated January 1, 1964 hereinabove referred to and specified in Schedule B attached thereto. RAILWAY shall be under no obligation to collect rentals from such properties or to maintain them.

6.2 It is the intention of the parties to promote the industrial development of the area served by RAILWAY. They therefore agree that RAILWAY, with the consent of the STATE, may sublease presently unoccupied and undeveloped portions of the leased premises for use in connection with industrial development. All such subleases shall by their terms expire on or before the termination of this lease and any renewals thereof;

shall provide that the sublet premises shall be used for or in connection with industrial development; and shall not grant greater rights to such premises than are granted to RAILWAY by virtue of this lease. Rents arising from subleases of land, buildings, rights-of-way, tracks, sidings or other facilities for use in shipping, receiving or handling rail freight shall belong to RAILWAY. Rent from other sublet premises shall belong to VERMONT. VERMONT will not unreasonably withhold its consent to a proposed sublease.

6.3-0 The parties recognize the interests of other persons in acquiring rights to build and maintain a pipe line for the transportation of natural gas or petroleum products upon the premises. They therefore agree that VERMONT may subject the leased premises to easement and rights of way for a pipe line for the transportation of natural gas or petroleum products if the Transportation Board, after hearing to be held upon thirty (30) days notice to RAILWAY and such other notice as it deems reasonable, determines that,

(1) The public good of the State will be promoted by the granting of such easements and rights of way, and

(2) The operation of such pipe line, after the division of rents therefrom hereinafter set forth, shall not be inconsistent with the welfare of RAILWAY.

6.3-1 In determining the public good the Transportation Board shall give due weight and consideration to the effect of the proposed pipe line upon RAILWAY'S existing and reasonably foreseeable revenues, earnings and financial stability. RAILWAY agrees that its rights herein shall be subject to the easement and rights of way of the pipe line company if VERMONT executes an

easement and rights of way after a finding of public good, and RAILWAY further covenants to execute such documents to perfect such easement and rights of way as may be requested by VERMONT.

6.3-2 The rent or fee charged the person owning and operating such pipe line shall be determined by the Transportation Board on the basis of evidence presented at the hearing on public good hereinbefore mentioned. In the determination of a reasonable rental, the Transportation Board shall give due regard to the volumes to be transported and other relevant data. In no event shall the annual rental to be charged for such pipe line easements or rights of way be less than the annual loss of net earnings existing or reasonably foreseeable which RAILWAY can reasonably be expected to suffer during the term of such easement or grant of right of way as a result of pipe line operation.

6.3-3 For the purpose of this paragraph "RAILWAY'S net earnings" shall be computed as follows:

(a) The amount of "Railway Operating Revenues" which would have accrued annually to RAILWAY from traffic existing or reasonably foreseeable, if any, actually or foreseeable diverted from RAILWAY to the pipe line shall be determined.

(b) The amount of RAILWAY'S "transportation-rail line expenses" properly allocable annually to such diverted revenues shall be determined. "Transportation-rail line expenses" as used herein shall include the expenses described in Accounts 2241 to 2251 inclusive of the Uniform System of Accounts and the rent reserved in Article II hereof, but shall not include taxes on or measured by income or other operating expenses as described in Accounts 2201 to 2240 or 2252 to 2266 in the Uniform System of Accounts.

(c) "RAILWAY'S net earnings" shall be "Railway Operating Revenues" as determined in paragraph (a) hereof less "RAILWAY'S transportation-rail line expenses" as determined in paragraph (b).

6.3-4 The rental received from the pipe line company shall be divided as follows: RAILWAY shall be entitled to reimbursement of its loss of "RAILWAY'S net earnings" as computed herein and shall be entitled to at least 50% of such rentals in any event and VERMONT shall be entitled to the remainder thereof.

6.4 Notwithstanding any other provision of this article, net revenues (i.e., rents received from third parties or profits should RAILWAY itself act as developer) arising from installation of any fiber optics or equivalent line along railroad will be shared equally by the STATE and RAILWAY, after recovery by RAILWAY of any costs incurred to secure such rentals.

#### ARTICLE VII

##### BRIDGES; HIGHWAY CROSSINGS

7.1 During the term of this lease or any renewal thereof, VERMONT shall:

(a) maintain, repair, replace and install when necessary all highways at railroad grade crossings ;

(b) reimburse RAILWAY for the expense of the installation, but not for the maintenance or repair, of all signal or warning devices required at grade crossings (except at those crossings listed on Exhibit B and at such other crossings where VERMONT specifically agrees to accept such responsibility or where such responsibility is imposed on VERMONT by a regulatory body of competent jurisdiction);

(c) maintain, repair, replace, and install when necessary all structures, including approaches, carrying highways over the railroad;

(d) maintain, repair, replace and install when necessary all highways going under the railroad.

VERMONT shall not, by reason of this lease, be under any obligation to:

- (a) maintain structures carrying railroad over highways (except as otherwise provided in 30 V.S.A. Chapter 45);
- (b) maintain rails, ties, or other subsurface materials at grade crossing.

RAILWAY shall maintain, replace, repair and install when necessary all railroad tracks, ties, roadbed and (except as otherwise provided in 30 V.S.A. Chapter 45) structures carrying railroad over highway. Nothing herein shall affect RAILWAY'S obligations in regard to farm crossings, cattle guards, fences and water courses as set forth in Sub-Chapter 4 of Chapter 45 of Title 30 of the Vermont Statutes Annotated.

7.2-1 Nothing herein shall impair any obligation of any municipality or other party to maintain highway crossings, bridges, fences, track and structures, signals or any other statutory or contractual obligations of any municipality or other party.

7.2-2 VERMONT shall maintain, replace, repair and install when necessary all non-track elements (i.e., other than rails, ties and, where applicable, ballast) of structures which have a clear span of 10 feet or more and which carry railroad over watercourses. (A schedule of structures in this category is attached hereto as "Exhibit A" and incorporated herein by reference.) At the location of each such structure, VERMONT will be responsible for stream problems, including (but not limited to dredging), while RAILWAY will be responsible for

vegetation control and removal of debris left by high water. RAILWAY will furnish VERMONT (including its agents, employees and contractors) with transportation to and from structure locations not accessible from public highways.

7.3 If VERMONT is unable to perform its obligation under this Article it will so notify RAILWAY, in which event RAILWAY'S sole remedy will be to perform at its expense such installation, repair or maintenance as VERMONT and RAILWAY agree is necessary to permit RAILWAY to fulfill its obligations under this lease and the expense thereof shall be submitted to VERMONT and, upon approval by VERMONT as to amount (which shall not be unreasonably withheld), shall be deducted from the rentals specified in Article II to be paid by RAILWAY to VERMONT.

#### ARTICLE VIII

#### TERMINATION

If any rent shall be in default and unpaid for thirty (30) days after notice to RAILWAY or if default shall be made in any of the other covenants herein contained on the part of RAILWAY for thirty (30) days after notice to RAILWAY specifying default and demanding compliance, VERMONT may re-enter and take possession of the premises, or institute proceedings at law for the recovery of possession and upon re-entry or the making of an order or judgment awarding possession of the premises to VERMONT, this lease shall be terminated and at an end.

ARTICLE IX  
SPECIAL TERMINATION PROVISION

[Deleted 1976]

ARTICLE X  
OPTION TO BUY

VERMONT hereby grants to RAILWAY an option to buy the leased premises on the following terms and conditions:

10.1-1 At the STATE'S cost unless and until STATE receives an offer to buy from another person, as specified in paragraph 10.2 of this Article. It is agreed and understood by the parties that STATE'S cost, as used herein, amounts to \$3,036,940.30 as of December 31, 1989. Beginning January 1, 1990, the STATE'S cost will be increased in any calendar year in an amount by which capital investment by the STATE, including (but not limited to) bridge rehabilitation/replacement and the purchase and installation of heavier weight rail (i.e., 100#/yard or greater), exceeds rentals paid by RAILWAY. Beginning January 1, 1990, the STATE'S cost will be decreased by amounts by which capital investment by RAILWAY went beyond RAILWAY'S maintenance obligations under this lease and which the STATE agreed in advance was necessary for the efficient operation of the railroad. (For purposes of this paragraph, the term "capital investment by RAILWAY" shall not include any expense deducted from rent under paragraph 7.3.)

10.2 If STATE receives a bona fide offer which it desires to accept for the purchase of the leased property, then it shall communicate such offer to RAILWAY. If such offer exceeds STATE'S cost as defined in paragraph 10.1 of this Article, RAILWAY shall

have 180 days after receipt of such notice to enter into a contract to buy at the STATE'S cost as defined in paragraph 10.1 of this Article. If such offer is less than the STATE'S cost as defined in paragraph 10.1 of this Article and STATE desires to accept such offer, then RAILWAY shall have 180 days after receipt of such notice to enter into a contract to buy at such offer price.

10.3 The STATE covenants not to sell any part or portion of the demised premises without the written consent of RAILWAY, given after 30 days notice of the STATE'S desire to sell. The proceeds of any such partial sale, after deduction of the expense directly attributable thereto, shall be deducted from STATE'S cost as defined in paragraph 10.1.

10.4 If RAILWAY buys the leased premises and thereafter files a petition for a Certificate of Public Convenience and Necessity under the Revised Interstate Commerce Act, 49 U.S.C. § 10903, to abandon or discontinue operations on all or any portion thereof (or seeks a regulatory exemption under 49 U.S.C. § 10505 to the same effect), then STATE shall have the option for a period of one (1) year following the date of such filing to buy the portion or portions of road sought to be abandoned at the lesser of (1) the net salvage value thereof as of the time the STATE exercises its option or (2) the amount RAILWAY paid STATE therefor plus the salvage value of capital improvements made during the period of RAILWAY'S ownership.

## ARTICLE XI

### WAIVERS

Any waiver at any time by either party hereto of its rights with respect to a default under this agreement, or with respect to any other matter arising in connection with this agreement, shall not be deemed to be a waiver with respect to any subsequent default or matter. No delay, short of the statutory period of limitations, in asserting or enforcing any right hereunder shall be deemed to be a waiver of such right.

## ARTICLE XII

### NOTICES

Any notice, demand, or request provided for in this agreement or given or made in connection with this agreement shall be deemed to be properly given or made if delivered or sent by certified mail, postage prepaid, addressed as follows, or to such other addresses as may hereafter be designated in writing by the respective parties hereto:

To or upon the State:

Secretary  
Vermont Agency of Transportation  
133 State Street  
Montpelier, VT 05602

To or upon Railway:

President  
Vermont Railway, Inc.  
One Railway Lane  
Burlington, VT 05401

## ARTICLE XIII

### REGULATORY AUTHORITIES

13.1 This agreement is subject to valid laws, and to valid orders, rules and regulations of duly constituted regulatory authorities having jurisdiction.

13.2 If RAILWAY finds any portion of this contract to be unduly burdensome, then it may apply to the State through the Secretary of Transportation for modification thereof, and the Secretary, with approval of the Governor, on behalf of the State shall make such modifications as found necessary or reasonable.

13.3 As used herein, Uniform System of Accounts shall mean the Uniform System of Accounts prescribed by the Interstate Commerce Commission and in effect on January 1, 1964, as from time to time amended.

#### ARTICLE XIV

#### CAPITAL STOCK

[Deleted]

#### ARTICLE XV

#### ACCOUNTS; INSPECTION

15.1 RAILWAY will keep proper accounts in which full, true and correct entries will be made of all dealings or transactions which relate to this lease. Such accounts shall show, without limitation, the amount and disposition of any state funds or rent credits received pursuant to this agreement. All such records will be kept for a period of four (4) years, or such longer period as may be reasonably requested by the STATE.

15.2 RAILWAY will permit any authorized representative of the STATE to visit and inspect any properties of RAILWAY, to examine its accounts and corroborating, records, reports, and other papers and to make copies and extracts therefrom, all at such reasonable times and as often as may be reasonably requested.

15.3 STATE agrees that any information provided STATE by RAILWAY on the following subjects will be confidential:

- (a) customer data;
- (b) confidential shipper contracts;
- (c) financial obligations and financial standing; and
- (d) proprietary data known only to certain individuals within RAILWAY'S organization and which give RAILWAY the opportunity to obtain business advantage over competitors who do not know it.

#### ARTICLE XVI

##### RELATIONSHIP TO PRIOR LEASE

16.1 This agreement with the terms and provisions contained herein constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes and replaces all other agreements and representations in connection with such subject matter. Specifically, this lease, as of the effective date hereof, supersedes the parties' indenture of January 6, 1964, as previously renewed and amended.

#### ARTICLE XVII

##### MISCELLANEOUS

17.1 Pursuant to 32 V.S.A. § 3113, RAILWAY hereby certifies, under the pains and penalties of perjury (maximum penalty: 15 years in prison, a \$10,000.00 fine, or both), that it is in good standing with respect to, or in full compliance with a plan approved by the Commissioner of Taxes to pay, any and all taxes due the State of Vermont as of the date of this lease. Notwithstanding any other provision of this agreement, VERMONT reserves the right to deny any renewal, extension, consent, or

permission under this agreement unless RAILWAY and any proposed assignee first provide VERMONT with written certification of tax compliance in accordance with 32 V.S.A. § 3113.

IN WITNESS WHEREOF, the State of Vermont has caused its name to be subscribed, this 19<sup>th</sup> day of July, 1990, by its Secretary of Transportation, for the Agency of Transportation.

IN PRESENCE OF:

STATE OF VERMONT  
AGENCY OF TRANSPORTATION  
("Vermont" or "State")

Jeanne Blahudec  
Chris Prater

By:

Paul R. Philbrook  
Paul R. Philbrook  
Secretary of Transportation

STATE OF VERMONT

WASHINGTON COUNTY, SS.

At Montpelier, this 19<sup>th</sup> day of July, A.D.. 1990, personally appeared Paul R. Philbrook, Secretary of Transportation, and acknowledged the foregoing instrument by him executed to be his free act and deed, and the free act and deed of the State of Vermont.

Before me,

Jeanne Blahudec  
Notary Public

APPROVED PER 5 V.S.A. § 3405:

Maddeline M. Curran  
GOVERNOR

APPROVED AS TO FORM:

DATED: July 18, 1990

Paul R. Philbrook  
ASSISTANT ATTORNEY GENERAL

IN WITNESS WHEREOF, Vermont Railway, Inc. has caused its name to be hereunto subscribed, at Burlington, in the County of Chittenden and State of Vermont this 18<sup>th</sup> day July of A.D., 1990, by the hand of John R. Pennington, its President and duly authorized agent.

IN PRESENCE OF:

VERMONT RAILWAY, INC.  
("RAILWAY")

Kathleen Wilson  
Wendy C. Willenbaker  
STATE OF VERMONT

By:

John R. Pennington  
John R. Pennington  
President and Duly  
Authorized Agent

CHITTENDEN COUNTY, SS.

At Burlington, this 18<sup>th</sup> day of July, A.D., 1990, personally appeared John R. Pennington and acknowledged the foregoing instrument by him, as President and Duly Authorized Agent of Vermont Railway, Inc., subscribed to be his free act and deed, and the free act and deed of said Vermont Railway, Inc.

Before me,

Kathleen Wilson  
Notary Public

VERMONT RAILWAY, INC.  
BRIDGES OVER WATERCOURSES WITH CLEAR SPAN OF 10' OR MORE

EXHIBIT A  
(P. 1 OF 2)

| BRIDGE NO. | TOWN         | M.P.    | DOT NO.  | FEATURE CROSSED        | MAINT. | LENGTH | O.H. CLEAR. | TYPE         | MATERIAL | EXHIBIT A  | R.R. |
|------------|--------------|---------|----------|------------------------|--------|--------|-------------|--------------|----------|------------|------|
|            |              |         |          |                        |        |        |             |              |          | DATE BUILT | O/U  |
| 55         | BENNINGTON   | 858.138 | --       | WALLOOMSAC RIVER       | ST     | 106'-9 | 12'-9       | T.P.G.       | S        | 1903       | --   |
| 56         | BENNINGTON   | 858.915 | --       | FURNACE BROOK          | ST     | 54'-0  | 17'-0       | D.P.G.       | S        | 1891       | --   |
| 57         | BENNINGTON   | 861.527 | --       | PARAN CREEK            | ST     | 79'-0  | 14'-5       | D.P.G.       | S        | 1979       | --   |
| 57A        | SHAFTSBURY   | .796    | --       | COLD SPRING BROOK      | ST     | 12'-0  | 9'-0        | ST.ARCH      | STONE    |            | --   |
|            | SHAFTSBURY   | 3.165   | --       | PARAN CREEK            | ST     | 18'-0  | 13'-6       | WOOD STR.    | WOOD     |            | --   |
|            | SHAFTSBURY   | 4.1     | --       | PARAN CREEK            | ST     | 36'-6  | 12'-3       | D.P.G.       | S        | 1902       | --   |
|            | SHAFTSBURY   | 5.337   | --       |                        | ST     | 10'-0  |             | ARCH         | STONE    |            | --   |
| 59X        | SHAFTSBURY   | 9.3     | --       | LAKE SHAFTSBURY OUTLET | ST     | 15'-0  |             | CONC.        | C        |            | --   |
| 62         | ARLINGTON    | 14.719  | --       | ROARING BRANCH BROOK   | ST     | 158'-1 | 16'-0       | T.P.G.       | S        | 1901       | --   |
| 63         | SUNDERLAND   | 17.93   | --       | MILL BROOK             | ST     | 45'-5  | 9'-9        | T.P.G.       | S        | 1903       | --   |
| 64         | SUNDERLAND   | 18.127  | --       | BATTENKILL RIVER       | ST     | 136'-4 | 14'-6       | D.P.G.       | S        | 1896       | --   |
| 65         | MANCHESTER   | 18.989  | --       | BATTENKILL RIVER       | ST     | 108'-6 | 18'-3       | T.P.G.       | S        | 1903       | --   |
| 67         | MANCHESTER   | 20.957  | --       | LYE BROOK              | ST     | 46'-0  | 12'-0       | D.P.G.       | S        | 1896       | --   |
| 69         | MANCHESTER   | 22.617  | --       | BOURNE BROOK           | ST     | 45'-4  | 11'-0       | T.P.G.       | S        | 1903       | --   |
| 70         | MANCHESTER   | 23.036  | --       | BATTENKILL RIVER       | ST     | 66'-6  | 10'-0       | P. TRESTLE   | WOOD     | 1941       | --   |
| 71         | MANCHESTER   | 23.575  | --       | BATTENKILL RIVER       | ST     | 60'-4  | 9'-7        | T.P.G.       | S        | 1903       | --   |
| 72         | MANCHESTER   | 24.184  | --       | BATTENKILL RIVER       | ST     | 65'-4  | 14'-5       | T.P.G.       | S        | 1903       | --   |
| 73         | MANCHESTER   | 25.715  | --       | BATTENKILL RIVER       | ST     | 45'-4  | 15'-11      | D.P.G.       | S        | 1903       | --   |
| 74         | MANCHESTER   | 26.198  | --       | BATTENKILL RIVER       | ST     | 45'-4  | 12'-5       | T.P.G.       | S        | 1903       | --   |
| 76         | DORSET       | 27.189  | --       | BATTENKILL RIVER       | ST     | 45'-4  | 11'-11      | D.P.G.       | S        | 1903       | --   |
| 77         | DORSET       | 27.674  | --       | BATTENKILL RIVER       | ST     | 45'-4  | 13'-3       | D.P.G.       | S        | 1903       | --   |
| 79         | DORSET       | 28.167  | --       |                        | ST     | 10'-0  |             | BOX          | C        |            | --   |
| 79C        | DORSET       | 30.675  | --       |                        | ST     | 14'-0  |             | ARCH,        | STONE    |            | --   |
| 80         | DORSET       | 31.783  | --       | OTTER CREEK            | ST     | 15'-0  | 5'-0        | SOL.RAIL FL. | S        | 1911       | --   |
| 83         | MT.TABOR     | 36.34   | --       | MILL BROOK             | ST     | 65'-4  | 7'-3        | T.P.G.       | S        | 1903       | --   |
| 85         | DANBY        | 37.704  | --       | OTTER CREEK            | ST     | 108'-6 | 13'-9       | T.P.G.       | S        | 1903       | --   |
| 86         | DANBY        | 37.726  | --       | CATTLE PASS            | ST     | 16'-2  | 12'-8       | I-BEAM       | S        |            | --   |
| 87         | WALLINGFORD  | 40.575  | --       | STREAM                 | ST     | 45'-4  | 6'-8        | T.P.G.       | S        | 1903       | --   |
| 88         | WALLINGFORD  | 41.358  | --       | OTTER CREEK            | ST     | 160'-4 | 22'-0       | D.P.G.       | S        | 1892       | --   |
| 89         | WALLINGFORD  | 42.683  | --       | OTTER CREEK            | ST     | 92'-7  | 23'-2       | T.P.G.       | S        | 1903       | --   |
| 91         | WALLINGFORD  | 45.039  | --       | ROARING BROOK          | ST     | 45'-5  | 6'-4        | T.P.G.       | S        | 1902       | --   |
| 92         | WALLINGFORD  | 46.314  | --       | STREAM                 | ST     | 13'-11 | 7'-0        | I-BEAM       | S        |            | --   |
| 93         | CLARENDON    | 47.925  | --       | MILL RIVER             | ST     | 116'-0 | 21'-9       | THRU TRUSS   | S        | 1903       | --   |
| 94         | CLARENDON    | 48.044  | --       | MILL RIVER             | ST     | 129'-8 | 10'-11      | T.P.G.       | S        | 1903       | --   |
| 96         | CLARENDON    | 50.49   | 851-263M | BROOK & FARM ROAD      | ST     | 45'-4  | 14'-10      | T.P.G.       | S        | 1903       | 0    |
| 98         | CLARENDON    | 51.266  | --       | COLD RIVER             | ST     | 48'-4  | 7'-6        | T.P.G.       | S        | 1903       | --   |
|            | CLARENDON    | 51.381  | --       | HUZZY BROOK            | ST     | 10'-0  |             | ARCH         | STONE    |            | --   |
| 98A        | CLARENDON    | 51.654  | 851-270X | OVERFLOW & CATTLE PASS | ST     | 35'-0  | 6'-0        | T.P.G.       | S        | 1928       | 0    |
| 99         | CLARENDON    | 51.849  | --       | COLD RIVER             | ST     | 108'-6 | 9'-4        | T.P.G.       | S        | 1903       | --   |
|            | RUTLAND CITY | 51.828  | --       | MOON BROOK             | ST     | 10'-6  |             | RAIL TOP     | S        |            | --   |

VERMONT AGENCY OF TRANSPORTATION  
PLANNING DIVISION  
AS OF JULY 18, 1990

(CONTINUED)

A:STATEBR1.VTR

VERMONT RAILWAY, INC.  
BRIDGES OVER WATERCOURSES WITH CLEAR SPAN OF 10' OR MORE

EXHIBIT A  
(P.2 OF 2)

| BRIDGE NO. | TOWN          | M.P.    | DOT NO. | FEATURE CROSSED    | MAINT. | LENGTH | O.H. CLEAR. | TYPE          | MATERIAL | DATE BUILT | R.R. O/U |
|------------|---------------|---------|---------|--------------------|--------|--------|-------------|---------------|----------|------------|----------|
| 202        | RUTLAND CITY  | 54.937  | --      | EAST CREEK         | ST     | 98'-4  | 27'-6       | D.P.G. TRESS  | S        | 1953       | --       |
| 204        | PROCTOR       | 58.981  | --      | OVERFLOW           | ST     | 21'-8  | 12'-6       | S.STR & SOL.F | S&C      | 1932       | --       |
| 205        | PROCTOR       | 59.124  | --      | OTTER CREEK        | ST     | 242'-9 | 22'-6       | T.P.G. & T.TR | S        | 1899       | --       |
| 206        | PROCTOR       | 59.353  | --      | OVERFLOW           | ST     | 33'-7  | 12'-0       | ST.STR. & SOL | S&C      | 1934       | --       |
| 207        | PROCTOR       | 59.416  | --      | OVERFLOW           | ST     | 65'-4  | 12'-0       | T.P.G.        | S        | 1903       | --       |
| 214        | PITTSFORD     | 63.283  | --      | OTTER CREEK        | ST     | 16'-0  | 10'-6       | REIN. CONC.   | S&C      | 1914       | --       |
| 215        | PITTSFORD     | 63.466  | --      | OTTER CREEK        | ST     | 207'-6 |             | T.P.G.        | S        | 1900       | --       |
| 217        | PITTSFORD     | 63.978  | --      | OVERFLOW           | ST     | 15'-0  | 14'-7       | REIN. CONC.   | S&C      | 1928       | --       |
| 219        | PITTSFORD     | 64.864  | --      | OTTER CREEK        | ST     | 207'-6 | 20'-7       | T.P.G. & T.TR | S        | 1900       | --       |
| 220        | PITTSFORD     | 67.251  | --      | OTTER CREEK        | ST     | 210'-0 | 15'-0       | T.P.G.        | S        | 1899       | --       |
| 222        | BRANDON       | 70.853  | --      | WESHOBE RIVER      | ST     | 67'-10 | 30'-7       | D.P.G.        | S        | 1903       | --       |
| 227        | LEICESTER     | 75.723  | --      | OVERFLOW           | ST     | 15'-6  | 9'-6        | REIN. CONC.   | S&C      | 1929       | --       |
| 228        | LEICESTER     | 76.225  | --      | OTTER CREEK        | ST     | 161'-0 | 22'-0       | THRU. TRUSS   | S        | 1929       | --       |
| 229        | LEICESTER     | 77.339  | --      | OTTER CREEK        | ST     | 157'-2 | 22'-5       | THRU. TRUSS   | S        | 1896       | --       |
| 230        | LEICESTER     | 77.471  | --      | OVERFLOW           | ST     | 50'-0  | 16'-2       | D.P.G.        | S        | 1893       | --       |
| 232        | SALISBURY     | 82.811  | --      | OVERFLOW           | ST     | 85'-0  | 9'-6        | SSTR. SOL. FL | S        | 1931       | --       |
| 233        | MIDDLEBURY    | 83.334  | --      | OTTER CREEK        | ST     | 142'-4 | 22'-6       | THRU. TRUSS   | S        | 1896       | --       |
| 234        | MIDDLEBURY    | 83.8    | --      | OVERFLOW           | ST     | 64'-0  | 10'-6       | SSTR. SOL. FL | S        | 1931       | --       |
| 235        | MIDDLEBURY    | 83.883  | --      | CATTLE PASS        | ST     | 15'-0  | 10'-0       | REIN. CONC.   | S&C      | 1931       | --       |
| 236        | MIDDLEBURY    | 84.1    | --      | OVERFLOW           | ST     |        |             | REIN. CONC.   |          |            | --       |
| 238        | MIDDLEBURY    | 86.034  | --      | CATTLEPASS         | ST     | 15'-0  | 8'-9        | WOOD STR.     | WOOD     |            | --       |
| 239        | MIDDLEBURY    | 87.039  | --      | OTTER CREEK        | ST     | 234'-8 | 22'-11      | THRU TRUSS    | S        | 1893       | --       |
| 243        | NEW HAVEN     | 90.778  | --      | NEW HAVEN RIVER    | ST     | 330'-2 | 80'-0       | D.P.G. & D.T. | S        | 1896       | --       |
| 249        | FERRISBURG    | 102.419 | --      | LITTLE OTTER CREEK | ST     | 145'-4 | 55'-2       | CONC.         | S&C      | 1903       | --       |
| 252        | FERRISBURG    | 105.203 | --      | LEWIS CREEK        | ST     | 94'-0  | 29'-0       | D.P.G.        | S        | 1899       | --       |
|            | FERRISBURG    | 106.058 | --      |                    | ST     | 10'-0  |             | ARCH          | STONE    |            | --       |
| 252A       | CHARLOTTE     | 107.144 | --      | THROPE BROOK       | ST     | 10'-0  |             | ARCH          | STONE    |            | --       |
|            | SHELBURNE     | 116.988 | --      |                    | ST     | 12'-0  |             | ARCH          | STONE    |            | --       |
| 261        | SHELBURNE     | 115.545 | --      | LAPLATTE RIVER     | ST     | 107'-0 | 47'-0       | D.P.G.        | S        | 1902       | --       |
| 262A       | SO.BURLINGTON | 119.6   | --      | POTASH BROOK       | ST     | 16'-0  |             | ARCH          | S&C      | 1978       | --       |
| 265        | BURLINGTON    | 121.326 | --      | BARGE CANAL        | ST     | 33'-3  | 22'-0       | BASCULE       | S        | 1920       | --       |

VERMONT AGENCY OF TRANSPORTATION  
PLANNING DIVISION  
AS OF JULY 18, 1990

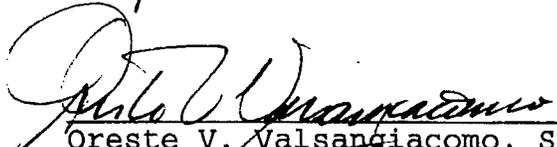
RAIL/HIGHWAY CROSSINGS  
ON VERMONT RAILWAY  
WHERE STATE OF VERMONT  
IS RESPONSIBLE  
FOR COST OF MAINTENANCE, INCLUDING  
WARNING DEVICES

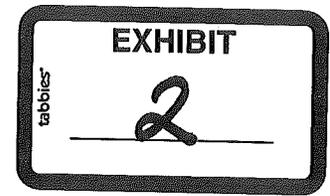
| <u>Milepost</u> | <u>Town</u> | <u>Highway</u> |
|-----------------|-------------|----------------|
| 27.94           | Dorset      | U.S. Route 7   |
| 52.68           | Clarendon   | U.S. Route 4   |
| 100.04          | Ferrisburgh | U.S. Route 7   |

CERTIFICATE OF APPROVAL

I, Oreste V. Valsangiacomo, Sr., Acting Chief Officer to the State of Vermont Joint Fiscal Office, do hereby certify that the Legislative Joint Fiscal Committee on the 19<sup>th</sup> day of September, 1990, did, pursuant to 5 V.S.A. § 3405, approve a new lease by and between the State of Vermont, acting through its Agency of Transportation, and Vermont Railway, Inc., for continued operation on State-owned railroad property generally described as the line of railroad between Bennington and Burlington acquired by the State of Vermont from the Rutland Railway Corporaion by deed dated January 1, 1964.

Dated this 19<sup>th</sup> day of September, 1990.

  
\_\_\_\_\_  
Oreste V. Valsangiacomo, Sr.  
Acting Chief Fiscal Officer  
State of Vermont  
Joint Fiscal Office



State of Vermont  
Office of the Secretary  
One National Life Drive  
Montpelier, VT 05633-5001  
www.aot.state.vt.us

[phone] 802-828-2657  
[fax] 802-828-3522  
[ttd] 802-253-0191

Agency of Transportation

December 10, 2013

Mr. David W. Wulfson, President  
Vermont Railway, Inc.  
One Railway Lane  
Burlington, VT 05401-5290

Re: Request to Renew September 19, 1990 Lease for Third  
Renewal Term (January 6, 2014 – January 5, 2024)

Dear Mr. Wulfson:

I am writing to follow up on your January 2, 2013 request to renew the September 19, 1990 Lease between Vermont Railway, Inc. and the State of Vermont for the former Rutland Railway line between Bennington and Burlington.

This is to confirm that the State of Vermont has accepted your request.

Sincerely,

Brian R. Searles  
Secretary of Transportation

cc: Trini Brassard, Assistant Director of PPAID  
Christopher J. Cole, Director of PPAID  
John K. Dunleavy, Assistant Attorney General



GUIDES → BERNIE SANDERS | BEST OF VERMONT | STUDENTS | TOURISM

VERMONT'S INDEPENDENT VOICE

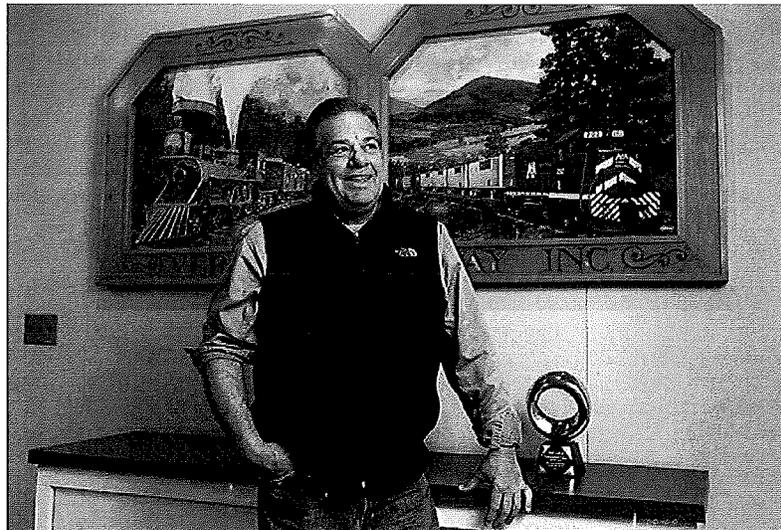


HOME + DESIGN » CONSTRUCTION &amp; DEVELOPMENT

FEBRUARY 03, 2016

## Plans for a Railroad's Freight Facility Outrage Shelburne

By MOLLY WALSH @MOKAWA



David Wulfson

OLIVER PARINI

The town of Shelburne is feeling railroaded. Literally.

**Vermont Railway** has been chugging full speed ahead to build a freight storage and distribution yard on the west side of Route 7, a mile north of the village center.

The facility — two 50,000-square-foot road-salt sheds, a fuel island and tanks, a rail spur, and parking for up to 30 trucks — would replace a comparable Vermont Railway operation on Briggs Street in Burlington, where **City Market/Onion River Co-op** plans to open a second store.

Vermont Rail plans to bypass local and state Act 250 review under a federal exemption designed to preserve interstate commerce — a move that has set off alarms in Shelburne, a town known for well-groomed suburban streets, lakeshore luxury homes, open fields and carefully maintained historic buildings.

"We're trying to maintain quintessential Vermont," said Sage Tucker-Ketcham, executive director of the Shelburne Craft School.

The town won a reprieve last week, when the **Vermont Department of Environmental Conservation** ordered tree clearing and other preconstruction at the site to stop. Vermont Railway complied, but vows to start construction by March.

The freight yard won't be visible from the school or businesses in Shelburne's historic center. But residents are worried it might increase truck traffic on already-busy Route 7, which bisects the village.

Preparations for construction began last month on the 32-acre wooded parcel, just west of the Harbour Industries manufacturing complex next to Route 7. The railroad cleared acres of trees, to the dismay of residents who can see the property from Route 7. And while the parcel is zoned for industrial use, it's in an area that lures walkers, birders and kayakers. It's surrounded by Vermont Nature Conservancy land and lazy, curving stretches of the LaPlatte River, which feeds into Lake Champlain's Shelburne Bay.

Kevin Clayton, owner of **Village Wine and Coffee**, said the railroad's actions have stirred up the community. "This is a really small sandbox," Clayton said. "You've got to play nicely."

The fact that such a large project could be exempt from state environmental review is an issue that other communities should care about, he added. "This is beyond NIMBY ... You can't call it a Shelburne thing."

At least one Shelburne resident supports the project. David Wulfson, president of Vermont Railway, lives on Webster Road just east of the parcel, which his late father purchased decades ago. Wulfson vowed to use the railroad's legal firepower to push the facility through and insisted it will be a "Cadillac" project.

Trucks can get to the site almost directly from Route 7, and it's set apart from residential neighborhoods — although there are some houses on the other side of the road.

Town officials said Wulfson has refused to provide basic details, ranging from truck-traffic forecasts to the volume of goods and fuel expected to come in by rail. Wulfson said he's been more than upfront with information. He met with town officials in executive session Tuesday, and at least six times before that, he pointed out. On January 20, Wulfson responded in writing — albeit vaguely — to nine questions from town officials. He shared the email with *Seven Days*.

In an interview at the Burlington rail yard, Wulfson remarked, "I don't want to get into 'He said, she said, we said.' All I know is, we're going to build a facility that's good for the region." As he talked about his plans, light snow fell on the freight cars parked outside.

Vermont Railway operates on or owns about 350 miles of track in Vermont, New York and New Hampshire. It leases most of its Vermont track from the state.

Although this winter has been unseasonably warm, cold snowy winters the prior two years drove up the demand for road salt. Some municipal customers ran out. Vermont Railway wants more storage capacity for the ice-melting compound and has outgrown the jumble of salt sheds and industrial buildings it owns in Burlington's South End, just south of the city's main rail yard.

A real estate deal is driving the move to Shelburne, too. Last spring, City Market signed a contract to buy Vermont Railway's 4-acre parcel at Briggs Street, where the salt sheds are currently located, as well as an adjoining parcel owned by Barrett Trucking. The buildings will be demolished to make way for City Market's second store. Barrett headquarters would move, along with the salt sheds, to Vermont Railway's Shelburne facility.

It's time to get the salt-truck traffic out of the South End, Wulfson said. Houses sit within 150 feet of the Burlington salt sheds, while the Shelburne parcel won't affect residential neighborhoods, he added.

"We're not changing anything," he said. "All we're doing is moving from the neighborhoods in Burlington to the backwoods in Shelburne."

But salt isn't the only commodity Wulfson wants at the freight yard, known in rail-speak as an "intermodal facility." He hopes trains will bring other cargo, too. "We're looking at lumber. We're looking at fuel oil," Wulfson said. "We're looking at heavy construction equipment like backhoes and tractors and bucket-loaders that can come in by rail from the midwestern factories."

Nationally, trains are carrying more of the freight that trucks once hauled. "The railroad business is probably as busy as it's ever been in general," he said. "Our business continues to grow, and we hope to keep it that way."

Shelburne is fighting the plan with legal actions. It slapped Vermont Railway with a zoning violation for starting construction without the proper local permit and got word out to the public. More than 200 people came to a selectboard meeting last week, and a February 9 meeting at Shelburne Community School is expected to draw an even bigger crowd.

A side issue fueled the fire. After the town filed the zoning violation, Wulfson last week retaliated by closing off a parking lot next to the former Champlain Flyer commuter rail station in the village. The lot had been used for a half dozen years as free public parking and a cut-through for emergency vehicles. The closure outraged residents. Somebody cut the metal cable that Wulfson strung up to block the lot.

Wulfson re-opened the lot Tuesday night after meeting with the Shelburne select board in executive session. He says he is willing to essentially sublet the state-owned lot for free for five years. The town hopes to have the lease signed within a week.\*

*(Read letters from **Vermont Railway** and the **Shelburne Selectboard**.)*

Meanwhile, Colangelo told *Seven Days* that the rail project needs a thorough review. "Contaminants such as salt and fuel will be stockpiled at the facility. It's very close to the LaPlatte [River] and Lake Champlain," Colangelo said.

Selectboard chair Gary von Stange said Wulfson is operating under a veil of secrecy: "Mr. Wulfson has refused to provide any details. Accordingly, it is impossible to ascertain his true plans because he personally has refused to provide those plans."

It's unfair that other developments are subject to review and Wulfson's plans are not, von Stange said: "He wants to be special."

The railroad concedes that under the Clean Water Act, it needs at least two federal stormwater permits — one for construction and the other to commence general operations. The company's December 23 application for the construction permit is pending. That prompted the Department of Environmental Conservation to issue a notice of violation on Thursday, on grounds that the clearing and site-preparation work required the permit.

Wulfson said the work was not construction and therefore not a violation. He said he intended to comply with federal permit requirements.

The federal exemption that Vermont Railway is invoking to avoid a broader permit review is the 1995 Interstate Commerce Commission Termination Act. It has withstood legal challenges both nationally and closer to home.

The state lost a legal battle in 2005 against Wulfson's Green Mountain Railroad, which argued that it was not subject to Act 250 review for a rail loading and storage facility in Rockingham.

In an earlier case from 2000, Vermont Railway won on some, but not all, points in a battle with the City of Burlington over the federal exemption on permits for the Briggs Street facility.

For state transportation officials, the Shelburne project is tricky terrain. Although it's hugely unpopular with locals, state policy actively encourages investment in rail because it moves goods more efficiently with less fuel and gets trucks off the roads. The state has a grant program to help pay for rail spurs to intermodal facilities similar to the one Vermont Railway envisions in Shelburne.

But loud local opposition has made its way to Montpelier, and state officials aren't cheerleading for Vermont Railway right now. At least not openly.

At the behest of Chittenden County legislators and state officials, Wulfson visited Montpelier last Thursday and shared some of his plans with lawmakers and with Chris Cole, Vermont's transportation secretary.

In an interview with *Seven Days*, Cole spoke carefully. "I'm not going to comment on the facility, as to whether we support it or oppose it, because it's not really our role," he said.

In Cole's opinion, Vermont Railway would need a state highway access permit if it creates a new curb cut onto Route 7. For now, it's using an existing curb cut off Route 7, a short access road that leads to Harbour Industries.

But Wulfson's plans show the railroad would improve access to the road. So Cole is pressing him to provide traffic studies and said he verbally warned Wulfson that the company could face a permit violation if Vermont Railway fails to produce them.

Cole knows the state has already lost one big case against the federal exemption in Rockingham. The lesson for the state and Shelburne, he said, is to negotiate rather than litigate.

"We've been down this road before," Cole said. "We understand where the boundaries are. And really, what we have found is that it's easier to get what you want working with the railroad cooperatively rather than trying to battle with them in court." He added: "That would be my only advice, my only comment, to the town."

**Read a February 2 letter from Vermont Railway to the town of Shelburne:**

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*\*Update February 3, 2016: This story has been updated to reflect the results of a Tuesday night meeting between the town and the railroad, which has reopened the parking lot it owns.*

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# APPENDED CASES

42416

SERVICE DATE – JUNE 1, 2012

DO

FR-4915-01-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35631]

Saratoga and North Creek Railway, LLC—Operation Exemption—Tahawus Line

Saratoga and North Creek Railway, LLC (Saratoga),<sup>1</sup> a Class III rail carrier, has filed a verified notice of exemption under 49 C.F.R. § 1150.41 to operate an approximately 29.71-mile line of railroad, known as the Tahawus Line.<sup>2</sup> The rail line extends between the existing connection with Saratoga at milepost NC 0.0 at North Creek

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<sup>1</sup> Saratoga is a limited liability company, wholly owned by San Luis & Rio Grande Railroad (SLRG). SLRG is a Class III rail carrier and a subsidiary of Permian Basin Railways, Inc. (Permian), which in turn is owned by Iowa Pacific Holdings, LLC (IPH). IPH and Permian formed Saratoga for the purpose of operating the entire rail line running between Newcomb, N.Y., on the north and Saratoga Springs, N.Y., on the south, interchanging traffic with the Delaware & Hudson Railway Company, Inc. d/b/a Canadian Pacific (CP) at Saratoga Springs. In two previous proceedings, the Board authorized Saratoga to operate between Saratoga Springs and Corinth, N.Y., and then between Corinth and North Creek, N.Y. See Saratoga & N. Creek Ry.—Acquis. & Operation Exemption—Del. & Hudson Ry., FD 35500 (STB served June 1, 2011) and Saratoga & N. Creek Ry.—Operation Exemption—Warren Cnty., N.Y., FD 35500 (Sub-No. 1) (STB served June 1, 2011).

<sup>2</sup> Saratoga previously filed a notice of exemption to operate the Tahawus Line in October 2011. The notice of exemption was served and published in the Federal Register on November 10, 2011. See Saratoga & N. Creek Ry.—Operation Exemption—Tahawus Line, FD 35559 (STB served Nov. 10, 2011). In a decision served on November 23, 2011 (November Decision), the Acting Director of the Office of Proceedings rejected the notice before it became effective. An appeal was filed by Saratoga to the November Decision and the appeal was denied by the Board in a decision served on May 14, 2012 (May 2012 Decision). In the May 2012 decision, the Board stated that subsequent filings have provided sufficient evidence to resolve concerns that led to the notice being rejected, and that now a new notice of exemption may be filed by the railroad. As a result of the May 2012 Decision, this new notice of exemption is being filed.

and its terminus at milepost NC 29.71 at Newcomb. Saratoga states that it presently owns the line, which it had acquired from NL Industries, Inc. (NL) in 2011 as private track outside of the Board's regulatory jurisdiction under 49 U.S.C. §§ 10901-6.<sup>3</sup> Saratoga intends to provide common carrier rail service over the subject line connecting to its existing trackage at North Creek and extending to its connection with CP at Saratoga Springs. Saratoga points out that there are no agreements applicable to the line imposing any interchange commitments.

Saratoga certifies that as a result of this transaction its projected annual revenues will not exceed \$5 million and will not result in Saratoga's becoming a Class I or Class II rail carrier.

Saratoga states that it intends to consummate the transaction at least 30 days from the filing date of the notice. The earliest this transaction can be consummated is June 16, 2012, the effective date of the exemption (30 days after the exemption was filed).

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the

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<sup>3</sup> Saratoga states that the Board found in the May 2012 Decision that Saratoga did not need any Board authority to acquire this trackage as such property was outside the Board's jurisdiction. See B. Willis, C.P.A., Inc.—Petition for Declaratory Order, FD 34013 (STB served Oct. 3, 2001) (B. Willis), aff'd sub nom. B. Willis, C.P.A., Inc. v. STB, 51 Fed Appx. 321 (D.C. Cir. 2002) (private track is typically built and maintained by a shipper (or its contractors) to serve only that shipper, moving the shipper's own goods, so that there is no "holding out" to serve other shippers for compensation).

effectiveness of the exemption. Stay petitions must be filed no later than June 8, 2012 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to Docket No. FD 35631, must be filed with the Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001. In addition, one copy of each pleading must be served on John D. Heffner, Strasburger & Price, 1700 K Street, N.W., Suite 640, Washington, DC 20006.

Board decisions and notices are available on our website at  
“[WWW.STB.DOT.GOV](http://WWW.STB.DOT.GOV).”

Decided: May 29, 2012.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

2007 WL 4410682

Only the Westlaw citation is currently available.  
United States District Court,  
E.D. Arkansas,  
Jonesboro Division.

PLASSER AMERICAN CORPORATION, Plaintiff

v.

The BURLINGTON NORTHERN AND SANTE FE RAILWAY COMPANY, Defendants.

No. 3:06CV00095 JLH.

|  
Dec. 14, 2007.

**Attorneys and Law Firms**

Jeffrey W. Puryear, Womack, Landis, Phelps, McNeill & McDaniel, Jonesboro, AR, Robert D. Brown, Donato, Minx & Brown, P.C., Houston, TX, for Plaintiff.

Barry Deacon, John C. Deacon, Brandon J. Harrison, Barrett & Deacon, Jonesboro, AR, for Defendants.

***OPINION AND ORDER***

J.N HOLMES, District Judge.

\*1 Plasser American Corporation has brought suit against The Burlington Northern and Santa Fe Railway Company alleging negligence and breach of contract. Plasser originally filed this action in the Circuit Court of Lawrence County, Arkansas. Burlington Northern removed this action to this Court pursuant to 28 U.S.C. § 1441(b), under which “[a]ny civil action of which the district courts have original jurisdiction,” whether through federal question or diversity jurisdiction, may be removed. Both parties are corporations organized under the laws of Delaware, so the parties are not diverse. Burlington Northern contends that Plasser's right to relief necessarily depends on resolution of a substantial question of federal law and therefore this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331. Specifically, Burlington Northern argues that Plasser's claims are preempted by the Federal Railway Safety Act and its accompanying regulations. The parties have filed cross motions for summary judgment, both of which seek a resolution only on the question of preemption. Because Plasser's negligence claim is preempted, Burlington Northern's motion for summary judgment on that claim is granted. However, Plasser's breach of contract claim is not preempted and is remanded to state court.

**I.**

On or about December 13, 2002, Plasser and Burlington Northern entered into a contract whereby Plasser would provide ballast undercutting services for railroad tracks with a Ballast Undercutter/Cleaner Model RM 802. Paragraph seven of the contract stated that all loss or damage to Plasser's property would be assumed by Plasser “unless such loss or damage was proximately caused by the fault of Railroad.” The contract defined “ ‘fault’ of a party [as] the intentional misconduct, gross negligence, or, as between the parties, sole negligence of the party....” According to paragraph five of the contract, Burlington Northern was to be responsible for the transportation of the undercutter to various work sites. On or about January 12, 2005, a ballast undercutter, owned by Plasser and under the control of Burlington Northern, was being transported from one job site to another. It derailed near Ravenden in Lawrence County, Arkansas, causing damage to the undercutter in the process.

## II.

State law that conflicts with federal law is preempted under the Supremacy Clause of the Constitution. U.S. CONST., art. VI, cl. 2. Congressional intent to preempt state law may be expressed in statutory language or implied in the structure and purpose of federal law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992). "In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the states to supplement it.'" *Id.* (quoting *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982)) (citation omitted). "If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387 (1993).

\*2 The pertinent portion of the Federal Railroad Safety Act, which contains both an express preemption clause and an express savings clause, states:

(a) National uniformity of regulation.-

(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order-

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) Clarification regarding State law causes of action.-

(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party-

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) Jurisdiction.-Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

49 U.S.C. § 20106. Under the Federal Railway Safety Act, there is an express congressional command: “[l]egal duties imposed on railroads by the common law” are preempted if the Secretary of Transportation has prescribed a regulation covering the subject matter at issue. *See Easterwood*, 507 U.S. at 664, 113 S.Ct. at 1737-38. “To prevail on [a] claim that the regulations have preemptive effect, [a party] must establish more than that they ‘touch upon’ or ‘relate to’ that subject matter, for ‘covering’ is a more restrictive term which indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law.” *Id.* at 664, 113 S.Ct. at 1738 (citation omitted). Here, Plasser has alleged that the “derailment was caused by a drop in the rail elevation.” (Compl. ¶ 7.) “Thus, the issue before the Court is whether the Secretary of Transportation has issued regulations covering the same subject matter as [Arkansas] negligence law pertaining to” rail elevation. *See Easterwood*, 507 U.S. at 664, 113 S.Ct. at 1738.

\*3 Plasser's claim of negligence is pre-empted by 49 C.F.R. § 213.63. Section 213.63 states in pertinent part:

[On a Class 3 track, t]he deviation from uniform profile on either rail at the mid-ordinate of a 62-foot chord may not be more than ... 2¼ inches. [On a Class 3 track, t]he deviation from zero crosslevel at any point on tangent or reverse crosslevel elevation on curves may not be more than ... 1¾ inches. [On a Class 3 track, t]he difference in crosslevel between any two points less than 62 feet apart may not be more than ... 2 inches.

This regulation “displace[s] state and private decisionmaking authority by establishing a federal-law requirement that” rail elevation be contained within certain prescribed limits. *See Easterwood*, 507 U.S. at 670, 113 S.Ct. at 1741. “Indeed, [section 213.63] effectively set the terms under which railroads are to” manage track elevation. *See id.* In addition to the Supreme Court, the Ninth Circuit Court of Appeals has also stated, “For purposes of ... the FRSA, a state regulation ‘covers the same subject matter’ as an FRA regulation if it addresses the same safety concerns as the FRA regulation.” *Burlington N. R.R. Co. v. Montana*, 880 F.2d 1104, 1105 (9th Cir. 1989). Here, the Federal Railroad Administration has determined the standards for proper rail elevation and the extent to which rails can rise or drop. 49 C.F.R. § 213.63. This regulation “covers the same subject matter” at issue in Plasser's claim that Burlington Northern negligently allowed a drop in rail elevation. Because “the Secretary of Transportation ... [has] prescribe[d] a regulation ... covering the subject matter of the State requirement,” Plasser's negligence claim is preempted.

With regard to Plasser's claim for breach of contract, Burlington Northern argues that the “complete pre-emption banner” should apply. “The doctrine of ‘complete preemption’ establishes more than a defense to a state-law claim. On occasion the Supreme Court has concluded that ‘the pre-emptive force of a statute is so ‘extraordinary’ that it ‘converts’ an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.’” *Chapman v. Lab One*, 390 F.3d 620, 625 (8th Cir. 2004) (quoting *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393, 107 S.Ct. 2425, 2430, 96 L.Ed.2d 318 (1987)). The Supreme Court has generally limited those “occasions” to areas of the law such as the Labor Management Relations Act or the Employee Retirement Security Act of 1974, areas where “Congress intended for the federal courts to fashion a body of ‘federal common law’ that would govern disputes arising under the federal statutes.” *Id.* at 629.

When it comes to an area traditionally governed by state law, such as contract law, a court interpreting a federal statute will be reluctant to find pre-emption “[i]n the interest of avoiding unintended encroachment on the authority of the States...” *Easterwood*, 507 U.S. at 663-64, 113 S.Ct. at 1737. In such a situation, “pre-emption will not lie unless it is ‘the clear and manifest purpose of Congress.’” *Id.* at 664, 113 S.Ct. at 1737 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947)). In the Federal Railway Safety Act, Congress expressly saved certain state-law causes of action in its preemption provision. *See* 49 U.S.C. § 20106(b). “That solicitude for state law, together with the ‘presumption against preemption’ in an area traditionally governed by state law counsels hesitation before [the Court] conclude[s] that a subject matter governed by state law is substantially subsumed by federal regulations.” *Chapman*, 390 F.3d at 627 (citation omitted). Furthermore, “an express preemption clause gives rise to an inference that implied preemption is foreclosed.” *Id.* (citing *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288-89, 115 S.Ct. 1483, 1488, 131 L.Ed.2d 385 (1995)).

\*4 Here, Burlington Northern attempts to avoid its own self-imposed obligation. Unlike the disputes arising under the federal law of the LMRA or ERISA, there is no indication that Congress intended to preempt contract disputes between sophisticated business entities. Plasser cites *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995), which, while not squarely on point is nonetheless analogous. There, American Airlines, although governed by the Airline Deregulation Act, entered into separate private agreements with customers, agreements that the Supreme Court held were not preempted and were governed by state contract law. The Court stated that “terms and conditions airlines offer and passengers accept are privately ordered obligations ‘and thus do not amount to a State’s enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law’ ...”*Id.* at 228-29, 115 S.Ct. at 824. Additionally,

The ADA’s preemption clause ..., read together with the [Federal Aviation Act’s] saving clause, stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties’ bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.

*Id.* at 232-33, 115 S. Ct at 826.

While some “[l]egal duties imposed on railroads by the common law fall within the scope of” the FRSA’s preemption umbrella, the specific legal duty at issue in the breach of contract claim was not imposed by the common law as tort claims are; rather, it was a legal duty voluntarily assumed by Burlington Northern in exchange for consideration sufficient in Burlington Northern’s eyes to justify assuming that obligation. The State of Arkansas enacted no law attempting to regulate the safety or security of Burlington Northern’s railroads. The Federal Railroad Safety Act prevents the State of Arkansas from enacting such laws but not from affording relief to a party who claims and may prove that Burlington Northern dishonored a contract to which it voluntarily agreed. Burlington Northern argues that Plasser’s breach of contract claim is a masked tort claim because in order for Burlington Northern to be at fault under the contract, it must be found to be negligent. This argument is unavailing. In this context, whether or not Burlington Northern was negligent is not a claim in and of itself. Rather, if Burlington Northern acted in a particularly negligent manner, that would constitute one element of Plasser’s contract claim, specifically whether or not Burlington Northern breached the agreement.

In effect, Burlington Northern’s summary judgment motion on this claim is asking the Court to intercede and provide it with immunity from a risk it voluntarily and for sufficient consideration agreed to assume. If the Court applied the doctrine of complete preemption, a provision of the contract for which Plasser bargained and to which Burlington Northern agreed would essentially be meaningless. To deprive Plasser an opportunity for redress for which it bargained in a lawful manner would be wholly unjust and would be unwarranted by any legal principle. It is worth noting that the Eighth Circuit has stated that “the absence of an alternative cause of action militates against a finding of complete preemption.”*Chapman*, 390 F.3d at 629. In light of the presumption against preemption in an area traditionally governed by state law, the clause contained in the Federal Railroad Safety Act saving state claims, the lack of clear and manifest Congressional intent to preempt contract disputes involving railroads, and the absence of any value of law authorizing the Court to strike a provision from a lawfully agreed upon contract, the Court concludes that Plasser’s breach of contract claim is not preempted by federal law.

\*5 Because the Court has jurisdiction over Plasser’s preempted negligence claim, the Court has the authority to exercise supplemental jurisdiction over Plasser’s remaining state-law claim for breach of contract. 28 U.S.C. § 1367(a) (“[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that ... form part of the same case or controversy...”). However, “[t]he district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if ... the district court has dismissed all claims over which it has original jurisdiction....” 28 U.S.C. § 1367(c)(3). Here, Plasser’s breach of contract claim is based on state law; the predominant defenses are based on state law; and all of the claims that arose under the Constitution and laws of the United States have been dismissed. What remains is a claim for monetary damages under Arkansas law. Out of respect for the principles of federalism and for the courts of the State of Arkansas, this Court will exercise its discretion under 28 U.S.C. § 1367(c) to decline to exercise

supplemental jurisdiction with respect to Plasser's state-law breach of contract claim. *Cf. Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988) (“[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims.”); *Chapman*, 390 F.3d at 630 (concluding that where complete preemption does not apply to a state-law claim in a FRSA setting, the “action should not be removed to federal court based on the existence of federal question jurisdiction”); *Condor Corp. v. City of St. Paul*, 912 F.2d 215, 220 (8th Cir.1990) (stating that, after dismissing the federal claims, the district court should have exercised its discretion to decline pendent jurisdiction because of “the necessity to provide great deference and comity to state court forums to decide issues involving state law questions”) *see also* 49 U.S.C. § 20106(c) (“Nothing in [the FRSA preemption clause] creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.”). Therefore, Plasser's claim for breach of contract is remanded to the Circuit Court of Lawrence County, Arkansas.

### CONCLUSION

Burlington Northern is entitled to summary judgment on Plasser's negligence claim because it is preempted by 49 U.S.C. § 20101 et seq. and Federal Railroad Administration regulations. However, Plasser's breach of contract claim is not preempted. The Court declines to extend supplemental jurisdiction over the breach of contract claim and hereby remands that claim to the Circuit Court of Lawrence County, Arkansas.

\*6 IT IS SO ORDERED.

### All Citations

Not Reported in F.Supp.2d, 2007 WL 4410682

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