UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

VERMONT RAILWAY, INC., Plaintiff,	)	
v.	)	Civil Action No. 2:16-cv-16-wks
TOWN OF SHELBURNE and JOE COLANGELO in his capacity as Town Manager and Zoning Enforcement Officer, Defendants.	)	

MOTION FOR A STAY OF JUDGMENT, TEMPORARY RESTRAINING ORDER, RELIEF FROM THE COURT'S JUNE 29, 2016 OPINION AND ORDER AND EXPEDITED DISCOVERY AND HEARING

NOW COMES Defendant, Town of Shelburne, and hereby moves this Court for a temporary restraining order, pursuant to Fed. R. Civ. P. 65(b) ordering Plaintiff, Vermont Railway, Inc., to cease work on property located at 2087 Shelburne Road, also identified as parcel 6-1-13, with Span number 582-183-11857, to stay the instant appeal in this matter, and for relief from this Court's June 29, 2016 Opinion and Order pursuant to Fed. R. Civ. P. 60(b)(2),(3). The Town further requests that this Court issue an expedited discovery schedule in this matter and schedule an immediate hearing in this matter subsequent to the completion of the expedited discovery. In support thereof, the Town submits the following Memorandum of Law and supporting materials.

MONAGHAN SAFAR DUCHAM PLLC

156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662

92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080

www.msdvt.com

MEMORANDUM OF LAW

A. *Factual History*

Vermont Railway, Inc. ("Vermont Railway" or "Railway") is a Vermont Corporation registered with the Vermont Secretary of State, having a principal place of business at One Railway Lane, Burlington, Vermont, 05401. District Court Doc. Nos. 1, 6. Vermont Railway is the owner of a parcel of land located at 2087 Shelburne Road, Shelburne, Vermont, ("Property") acquired on December 28, 2015 from Northern Vermont Financial Corporation. District Court Doc. Nos. 6, 25. The Town of Shelburne ("Town") is a municipal corporation located in Shelburne, Vermont. District Court Doc. Nos. 1, 6. Shortly after acquiring the Property pre-construction and construction activities commenced in order to develop a salt transload facility and certain additional buildings, such as an office and shop, for Vermont Railway's site operator: Barrett Trucking Co., Inc.[1] District Court Doc. Nos. 1, 6, 25.

On January 20, and February 11, 2016 Joe Colangelo, as the Town Manager/Zoning Enforcement Officer for the Town, issued a Notice of Violation and Corrective Notice of Violation (respectively) for development on the Property. *Id.* District Court Doc. Nos. 1, 6. On January 25, 2016 the Town filed Town of Shelburne v. Vermont Railway, Inc., Docket No. 1-9-16 Vtec in State of Vermont Superior Court, Environmental Division along with a concurrent Motion for Preliminary Injunction. *See* District Court Doc. Nos. 1, 6. The Railway did not initially notice the removal of the state action to federal court pursuant to 42 U.S.C. § 1441 *et seq*., but instead filed its own, and competing, complaint. District Court Doc. No. 1. On January 27, 2016 the Railway noticed the removal of the state action, and the two matters were consolidated on February 24, 2016. District Court Doc. No. 12. The Town filed an

[1] Barrett Trucking Co., Inc.'s involvement in the acquisition and development of the Property was a key issue before the District Court.

MONAGHAN SAFAR DUCHAM PLLC
156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662
92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080
www.msdvt.com

additional Motion for Preliminary Injunction and its Answer/Counterclaim, raising additional causes of action, in the District Court on February 16, 2016. District Court Doc. Nos. 6, 8. Plaintiff moved to dismiss the Town's counterclaims. District Court Doc. No. 36.

Hearings were held on the motions for preliminary injunction on March 7, 2016, May 3-5, May 9, 2016, May 17, 2016 and May 20, 2016. District Court Doc. Nos. 58, 60, 67. On June 29, 2016 the District Court issued an Opinion and Order, in part, denying the Town's motions for preliminary injunction and entering a declaratory order that the Interstate Commerce Commission Termination Act (ICCTA) preempts the Town's pre-construction permit requirement and enjoining the Town from enforcing any regulation preventing Vermont Railway from constructing the proposed facility. District Court Doc. No. 84.

In its decision, this Court found that the activities on the Property were preempted and were transportation by rail, because although Barrett Trucking was to be the facility operator, they had no financial interest in the Property and no control over any of the activities on the Property. In its reasoning, this Court stated:

> The Town asserts that it is unclear whether the proposed development "is anything more than a Barrett Trucking project aspiring to be a diversified transload facility, developed in such a way as to fall under the protections of the ICCTA." ECF No. 77 at 33.
>
> Once again, the record evidence belies the Town's assertion. **As explained by Mr. Wulfson, the Railway owns the Property and is paying for the construction of the intermodal facility**. ECF No. 68 at 905. The Railway is also responsible for paying the taxes and utilities on the planned development. Defendant's Exhibit DD at 6. Although the Railway intends to contract with Barrett Trucking for the operation of the facility, the draft Operating Agreement makes clear that shippers will pay the Railway directly for the movement of freight. Defendant's Exhibit DD at 4. The draft Agreement further provides that the Railway will compensate Barrett Trucking for operating the facility as its exclusive agent, and that Barrett Trucking itself will have no authority to separately transact with third parties for the shipment, storage, or transloading of goods at the facility. Id. Given those facts, the Court finds that the Railway will exert sufficient

MONAGHAN SAFAR DUCHAM PLLC
156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662
92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080
www.msdvt.com

> control over the intermodal facility such that the operation of the facility will qualify as transportation performed by a "rail carrier."[5] *See Hi Tech Trans, LLC*, STB Finance Docket No. 34192 (Sub-No. 1), 2003 WL 21952136, at *4-5 (S.T.B. Aug. 14, 2003).
>
> n.5 In addition, Joseph Barrett has testified that **if Barrett Trucking constructs a building on the Property or exercises its option to purchase the Property in the future, it will freely submit to the Town's zoning regulation**. *See* ECF No. 63 at 611-12.
> Opinion and Order at 22-23.

On or about Wednesday, September 14, 2016, the Town came into the possession of the August 10, 2016, Minutes of the Vermont State Infrastructure Bank (hereinafter Bank). Attached as Exhibit A. These minutes illustrate that the Bank Board reviewed and approved an application for a One Million Four Hundred Fifty Seven Thousand Eight Hundred Eighty Three Dollar ($1,457,883.00) loan for Barrett Trucking "to fund a portion of the construction of a transload intermodal facility located on land owned by Vermont Railway (VTR) in Shelburne Vermont with the Project consisting of a rail spur, salt shed (approximately 47, 250 sf), unloading pit, truck scale, office trailer and equipment staging area." Exhibit A at 3-4.

The minutes also show a 2.5 million dollar ($2,500,000.00) loan to Barrett Trucking, Inc. from "MB," which, upon information and belief, is Merchant's Bank, for total project costs of Five Million Five Hundred Thirty Five Thousand Eight Hundred Sixty Three Dollars ($5,535,863.00). Exhibit A.

Among the members of the Board participating in the approval of this loan were, upon information and belief, interestingly, the Secretary of the Agency of Transportation, Chris Cole, and Michelle Boomhower, Division Director of Policy, Planning and Intermodal Development. This information is newly discovered to the Town of Shelburne and was not available or in existence at the time of the hearings.

MONAGHAN SAFAR DUCHAM PLLC
156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662
92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080
www.msdvt.com

The Town also believes that there is additional significant and relevant evidence that remains to be discovered relative to this loan. The Town of Shelburne ("the Town") now seeks a temporary restraining order (TRO) ordering Vermont Railway, Inc. ("Railway") to cease developing property located at 2087 Shelburne Road, also identified as parcel 6-1-13, with Span number 582-183-11857 ("the Property") while the Court relieves it from its decision of June 29, 2016, which was decided based on improper and incomplete information and possibly purposefully, false testimony by Barrett Trucking and Vermont Railway witnesses.

The Town has and will continue to be irreparably harmed if the Railway continues project development on the Property for the pendency of the action, particularly when a portion of this project- being Barrett Trucking's portion- is subject to the Town's regulatory oversight. The Town now moves this Court for a TRO ordering Vermont Railway to cease work on the Property. The Town also moves this Court to order immediate and expedited discovery and schedule a hearing to reconsider its June 29, 2016 Opinion and Order at the earliest possible date subsequent to the completion of the expedited discovery on the basis of newly discovered evidence and possible fraud.

B. Jurisdiction of the District Court.

F.R.A.P. 8(a) concerns a stay or injunction pending appeal and provides that the movant must file the initial motion in the District Court as follows:

(a) Motion for Stay

(1) Initial Motion in the District Court.
A party must ordinarily move first in the district court for the following relief:
(A) a stay of the judgment or order of a district court pending appeal;
(B) approval of a supersedeas bond; or

MONAGHAN SAFAR DUCHAM PLLC

156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662

92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080

www.msdvt.com

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

The District Court is not deprived of jurisdiction to issue a stay of its judgment pending appeal. *Rakovich v. Wade*, 834 F.2d 673, 673 (2nd Cir. 1987); *Marshall v. Berwick Forge and Fabrication Co*., 474 F.Supp 104, 107-08 (M.D. PA 1979). The basis of this rule is that this Court "knows more of the case than the circuit court of appeals can learn . . . ." *Chevron Corporation v. Donzinger*, 37 F.Supp.3d 650, (S.D.N.Y. 2014).

C. Temporary Restraining Order.

Federal courts have the power to grant temporary restraining orders under Fed. R. Civ. P. 65(b), which provides:

> **(b) Temporary Restraining Order.**
> **(1)** ***Issuing Without Notice.*** The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:
> **(A)** specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
> **(B)** the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.
> **(2)** ***Contents; Expiration.*** Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry--not to exceed 14 days--that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.
> **(3)** ***Expediting the Preliminary-Injunction Hearing.*** If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.
> **(4)** ***Motion to Dissolve.*** On 2 days' notice to the party who obtained the order without notice--or on shorter notice set by the court--the

MONAGHAN SAFAR DUCHAM PLLC
156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662
92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080
www.msdvt.com

> adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

Federal Court's have stated that a party moving for a TRO must:

> present specific facts in an affidavit or a verified complaint [which] clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition. Second, the moving party's attorney must certify in writing any efforts made to give notice and the reasons why notice should not be required.
> *Hancox v. Citimortgage, Citifinancial, Community Mortgage, and Carrington Mortgage*, 2013 WL 12049113 at 1 (W.D. Tenn. 2013); *see also Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 405–06 (2d Cir. 2011).

Whether the temporary restraining order is in the public interest should also be considered. *Litwin v. OceanFreight, Inc.*, 865 F.Supp.2d 385 (S.D.N.Y. 2011) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."); *See also Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008).

"The purpose of a temporary restraining order is to preserve an existing situation in status quo until the court has opportunity to pass upon the merits of the demand for a preliminary injunction, . . . and is necessarily limited to very brief period. . . ." *Pan Am. World Airways, Inc. v. Flight Engineers' Intern. Ass'n, PAA Chapter, AFL-CIO*, 306 A.2d 840, 842-43 (2nd Cir. 1962). Absent an injunction, there is no way to go back in time and put the parties in their current positions if the Railway is allowed to have Barrett Trucking stealthily construct this project and entirely avoid the rightful

MONAGHAN SAFAR DUCHAM PLLC
156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662
92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080
www.msdvt.com

and proper regulation of the Town. This continued and unregulated development, where it has already clearly been defined through this Court and through the admissions of the parties, is beyond damaging.

1. Irreparable Harm

This Court, in its June 29, 2016, Opinion and Order denied the Town's motion for preliminary injunction on the grounds that the Town failed to demonstrate that it is likely to suffer actual and imminent irreparable harm. Order at 14-15. It is now clear that all or a large portion of this project is really a Barrett Trucking project, again, attempting to avoid proper land use regulations. The Town is suffering irreparable harm because it is now- without injunctive relief- unable to lawfully regulate the activities of Barrett Trucking on this property. *See generally* Affidavit of Gary von Stange. Furthermore, Barrett clearly stated under oath, at the hearing before this Court, that it would submit to the jurisdiction of both the State and the Town if it attempted to place its own operations on the Property. *See* Opinion and Order at note 5. The Town clearly has the right to regulate land use by Barrett and it is being denied the ability to do so absent injunctive relief halting project construction.

2. Success on the Merits.

The Town has a substantial likelihood of success on the merits. Based upon the new information- Post Hearing- that this project continues to be funded and built in part by and for Barrett Trucking, despite the hearing testimony of the Railway and Joe Barrett, the Project is, at least in part, outside the scope of the ICCTA. Furthermore, there are serious questions going to the merits of the litigation and the Court may look at the applicable balance of hardships.

MONAGHAN SAFAR DUCHAM PLLC

156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662

92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080

www.msdvt.com

If Vermont Railway and Barrett are permitted to continue with the development of the Project without any sort of municipal oversight over the portions of the project which the Town can rightfully regulate, the development is made permanent and the Property can never go back to what it once was. *See* Hearing Tr. at 715–16.

Preliminary injunctions exist to serve just this sort of purpose, and maintain the status quo while litigation progresses. Delaying holding an emergency hearing and or denying the motion for preliminary injunction only prolongs the time period in which Railway can continue development without restriction of potentially applicable State and local law.

As previously set forth in detail in the Town's Post Hearing Memoranda, the ICCTA, "has jurisdiction over transportation by rail carrier that is—(A) only by railroad; or (B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment." 49 U.S.C. § 10501(a)(1). ICCTA preemption requires an analysis of whether the state or local law "would have the effect of unreasonably burdening or interfering with rail transportation." *Tubbs v. Surface Transp. Bd.*, 812 F.3d 1141, 1144 (8th Cir. 2015) (citation omitted) (internal quotation marks omitted); *see also Emerson*, 503 F.3d. 1126, 1133 (citing *CSX Transp., Inc.,* S.T.B. Finance Docket No. 34662, slip op. at 4, 2005 WL 1024490, *3 (May 3, 2005)) ("The [Surface Transportation Board] has held that to decide whether a state regulation is preempted 'requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation.' We agree with this standard and adopt it.").

Transportation by rail includes all "property . . . or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement

MONAGHAN SAFAR DUCHAM PLLC
156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662
92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080
www.msdvt.com

concerning use . . ..” 49 U.S.C. § 10102(9). The Surface Transportation Board (“STB” or “Board”) has noted that “‘[m]any rail construction projects are outside of the Board’s regulatory jurisdiction. For example, railroads do not require authority from the Board to build or expand facilities such as *truck transfer facilities*, weigh stations, or similar facilities *ancillary* to their railroad operations . . ..” *In re Appeal of Vt. Ry.,* 171 Vt. 496, 500 (emphasis in original) (citing *Borough of Riverdale*, S.T.B. Finance Docket No. 33466, slip op. at 5, 1999 WL 715272, *4 (Sept. 9, 1999)); *see also Fla. E. Coast Ry. v. City of W. Palm Beach*, 110 F. Supp. 2d 1367, 1376–79 (S.D. Fla. 2000), *aff’d*, 266 F.3d 1324 (11th Cir. 2001) (emphasis added) (Mere ownership of property by a railway on which lessee operated business *which entailed unloading aggregate from railcars and distributing it did not result in preemption of local zoning regulation of the facility by the ICCTA*; after examining nature of the operation, court concluded operation was not “integrally related” to provision of interstate rail service.).

As this new evidence demonstrates, Barrett Trucking has a substantial financial and ownership interest in this project. The new evidence suggests that the information given to this Court at the hearing may have been, at best, misleading and incomplete. The fact that the State Bank loan funds are being given to Barrett for the development of this site and what appears to be the purchase of this Property, turns the testimony provided the Court on its head. Accordingly, as this project has many components that are not transportation by rail and are supported by Barrett Trucking, the Town has the likelihood of success on the merits of its claim.

3. Balance of The Hardships.

There are sufficiently serious questions in this case going to the merits that make them fair ground for litigation, and the balance of hardships tips towards the Town. *See Tubbs v.*

MONAGHAN SAFAR DUCHAM PLLC

156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662

92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080

www.msdvt.com

Surface Transp. Bd., __ F.3d __, 2015 WL 9465907, *3 (8th Cir. 2015); *see also Emerson*, 503 F.3d at 1133 (citing *CSX Transp., Inc.,* S.T.B. Finance Docket No. 34662, slip op. at 4 (May 3, 2005) (ICCTA preemption requires a fact based inquiry). The issue of whether Barrett Trucking has continued to try and backdoor its operations into the Property in the name of Vermont Railway, without the required state and local land use oversight and after its pledge to the Court and the Town is significant. Given the very concerns that the loan application and approval raise in this case and the possibility of false representations to the Court as to Barrett's financial involvement in this development, the balance of the hardships clearly weight in favor of the Town.

D. Relief from Judgment for Newly Discovered Evidence.

F.R.Civ.P 60(b) allows relief from judgment for newly discovered evidence and fraud and provides:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

Evidence that was not available at the time of a trial constitutes newly discovered evidence. *See Bain v. MJJ Productions, Inc.,* 751 F.3d 642, 646-647 (D.C. Cir. 2014).

MONAGHAN SAFAR DUCHAM PLLC
156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662
92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080
www.msdvt.com

> Fraud, both generally and for the purposes of Rule 60(b)(3) "is the knowing misrepresentation of a material fact, or concealment of the same when there is a duty to disclose, done to induce another to act to his or her detriment. *See* BLACKS LAW DICTIONARY 685 (8th ed.2004); 37 AM.JUR.2D Fraud and Deceit § 23 (2001) ("The five traditional elements of fraud . . . include: a false representation; in reference to a material fact; made with knowledge of its falsity; with the intent to deceive; and on which an action is taken in justifiable reliance upon the representation."); 12 MOORE'S FEDERAL PRACTICE § 60.43[1][b] (3d ed. 1999). *Info-Hold, Inc. v. Sound Merchandising, Inc*. 538 F.3d 448, 456 (6th Cir. 2008).

The August 10, 2016 minutes of the State Bank constitute newly discovered evidence that was not, with reasonable diligence, discoverable at the time of the trial because these minutes did not exist at the time of trial. The Town became aware of this evidence on or about the evening of Wednesday, September 14, 2016. See Affidavit of Gary von Stange. Furthermore, this evidence calls into question whether both Vermont Railway and Barrett Trucking's Joe Barrett testified truthfully about Barrett's continued financial involvement in the project and its control over operations and ownership over the Property and infrastructure of the project. Furthermore, it also calls into question the veracity of Barrett's testimony that he would submit to local and state land use regulations if he sought to have any portion of his operations on the Property. False testimony to Court, upon which it based its determination, would certainly qualify as a grounds for relief from judgment.

Accordingly, the Town seeks relief from this Court's June 29, 2016 Opinion and Order and seeks the opportunity to conduct further expedited discovery relative to the continued financial involvement of Barrett into this project. The Town also seeks a hearing on these issues immediately following the close of the expedited discovery.

MONAGHAN SAFAR DUCHAM PLLC

156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662

92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080

www.msdvt.com

WHEREFORE, the Town respectfully requests that this Court:

A. Grant the Town a temporary restraining order, restraining the Vermont Railway and Barrett Trucking from any further work on the Project;

B. Relieve the Town from the decisions of this Court in its June 29, 2016 Opinion and Order;

C. Issue an expedited discovery schedule on all relevant discovery;

D. Stay the appeal to the Second Circuit Court of Appeals pending this Court's decision on the Town's Motion for Relief from Judgment, and

E. Grant any further and additional relief that this Court deems equitable and just.

Dated this 17th day of September, 2016.

Respectfully submitted,
TOWN OF SHELBURNE
By and through its counsel,

/s/Claudine C. Safar, Esq.
Claudine C. Safar, Esq.
Monaghan Safar Ducham PLLC
156 Battery Street
Burlington, VT 05401
(802) 660-4735
csafar@msdvt.com

MONAGHAN SAFAR DUCHAM PLLC

156 Battery Street
Burlington, VT 05401
T 802 660 4735
F 802 419 3662

92 Fairfield Street
St. Albans, VT 05478
T 802 524 0080

www.msdvt.com