UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

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

OPINION AND ORDER

I. Introduction

This case arises out of Vermont Railway's ("Railway") planned development of property located in Shelburne, Vermont for use as a salt transloading facility ("the project") to be operated by Barrett Trucking. On June 29, 2016, this Court granted the Railway's request for a declaratory judgment that the Interstate Commerce Commission Termination Act ("ICCTA") preempts the Town of Shelburne's ("Town") zoning regulations as applied to the project.[1] The Court denied the Town's request for contrary declaratory relief and a preliminary injunction. On September 17, 2016, the Town moved the Court for a temporary restraining order, for relief from this Court's June 29, 2016

[1] The Court reserved judgment on the question of whether the ICCTA preempts other, unspecified local regulations.

Opinion and Order, for a stay of its appeal of that order, and for expedited discovery and a hearing. ECF 90. At a hearing held on October 18, 2016, the Court granted that motion in part and denied it in part, holding that it did not have authority to stay the appeal but that it would order further discovery in order to fully explore the basis for the Town's motion for relief from judgment. ECF 103. After resolving the parties' disputes concerning the scope of permissible discovery and confidentiality concerns, ECF 118, 124, 126, the Court held a hearing to address the Town's pending motions on March 27-29 and April 3 and 5, 2017. It then permitted the parties to submit post-hearing memoranda on the merits of the request for relief from judgment. For the reasons outlined below, the Court **denies** the Town's motion for relief from judgment, a temporary restraining order and other equitable relief. ECF 90.

II. Factual Background

In its motion for relief from judgment, the Town alleged that on or about September 14, 2016, it came into possession of the August 10, 2016 Minutes of the Vermont State Infrastructure Bank ("SIB"), which stated that the SIB Board reviewed and approved an application for a $1,457,883 loan for Barrett Trucking "to fund a portion of the construction of a transload intermodal facility located on land owned by Vermont Railway in Shelburne, Vermont." ECF 90, p. 4. In addition, the minutes also

showed a 2.5 million dollar loan to Barrett Trucking, Inc. from "MB," which the Town presumed to be a reference to Merchants Bank. After fully exploring the role of Barrett Trucking's financial and operational involvement in the project in discovery and at the hearing, the Town asserts that the extent of Barrett Trucking's financial role in the project constitutes newly discovered evidence and demonstrates that the Railway made a misrepresentation at the prior hearing. The Railway contends that Barrett Trucking's role, as understood in light of the hearing evidence from 2017, was fully disclosed prior to the June 29, 2016 order, and is consistent with prior evidence on this issue.

a. Evidence of Barrett Trucking's role in the project presented prior to the June 29, 2016 Opinion and Order

Joseph Barrett, a co-owner of Barrett Trucking, testified in the May 2016 hearing that Barrett Trucking entered into a purchase and sale contract with Northern Vermont Financial Corporation for the Shelburne property on May 8, 2015. May 2016 hearing transcript ("Tr.") 570. He made a down payment of $300,000 at that time, with the understanding that Barrett Trucking would purchase the property, keep some of it to build its office on, and lease another portion to the Railway for it to build and develop the salt transload project on. *Id;* Tr. 593-94. However, Mr. Barrett testified that he later found out that

he "couldn't get the financing" for the purchase of the property "in a timely fashion." Tr. 583. According to Mr. Barrett, his bank wasn't going to issue financing "without more research," which would delay the funding request, because it found out that there was some kind of contamination on the site. Tr. 584; 593. Mr. Barrett represented to the Court that the agreement had "very little –I don't know if it's contingencies, but very little options for us to get out of it down the road." Tr. 593. As a result, Mr. Barrett assigned Barrett Trucking's rights under the purchase and sale agreement to Vermont Railway. Tr. 588. However, Barrett Trucking contributed an additional $75,000 towards the purchase of the property after that assignment, which would be added to its initial down payment as a loan to the Railway. Tr. 596. Mr. Barrett did not recall specifying any terms or interest rates for the $375,000 loan, and did not initially remember having a contract for that loan. Tr. 597-98. He testified that at that point, Barrett Trucking did not have any ownership interest in the property at all. Tr. 598-99. In exchange, Barrett Trucking and the Railway agreed that Barrett Trucking would have "an operating agreement to operate the facility." Tr. 599.

At that point, Mr. Barrett testified that Barrett Trucking had an option to keep putting money into the project, so that "if we wanted to invest further, we could." Tr. 601. However, he

initially testified that he did not think Barrett Trucking continued to invest in the project after December 28, 2015. *Id.* In response to the Court's questioning, Mr. Barrett replied that he did not pay anything to VHB – the engineering firm that Mr. Barrett had hired to evaluate the property prior to the assignment of its interest to the Railway –after it terminated Barrett Trucking's relationship with that firm on this project in December 2015. After counsel for the Town questioned Mr. Barrett on several additional payments evidenced by the Railway's discovery production, Mr. Barrett acknowledged that he had let the Railway borrow $100,000 for a two-week period. Tr. 606. He confirmed, however, that he did not "contribute anything either by way of a direct donation or loan to the Railroad or [by] payment of any services" to project contractors after the December 2015 assignment of Barrett Trucking's interest in the purchase and sale agreement to the Railway. Tr. 607. He stated that he did not know what the amounts identified as payments from Barrett Trucking on the Railway's balance sheet were for. Tr. 610.

In addition, Mr. Barrett was asked about a draft promissory note for a one million dollar, interest-free loan from Barrett Trucking to the Railway, which was attached to their operating agreement. He testified that Barrett Trucking had "the option or the ability to make up to a million dollar payment" for the

development of the project site, but did not have an obligation to make more payments. Tr. 630-31. Finally, Mr. Barrett stated that he would probably lend the Railway between $500,000 and one million dollars without interest, but that if he had to borrow money from a third party in order to re-lend it to the Railway, he would charge the Railway interest on it. Tr. 641. He implied that he could have made a loan of up to a million dollars, as provided by the promissory note, from his cash flow if he did so over a period of time. The timing of the loan would be "up to whatever Vermont Railway decides to put in[to]" the development of the project. Tr. 643.

Mr. Wulfson, the Railway's president, also testified that the Railway stepped in to purchase the Shelburne property after Barrett Trucking failed to obtain financing due to environmental issues on the property. Tr. 827. In addition, Mr. Wulfson testified that although there was a draft operating agreement between Barrett Trucking and the Railway at the time, "there's a lot of money that has not been papered yet," in addition to the $300,000 that Mr. Barrett put down for the purchase and sale agreement. Tr. 822. He agreed with Mr. Barrett that they "shook hands" to reach agreements, "and a lot of this stuff is still in limbo." *Id.* He could not recall how much had not been "papered," but stated that he believed it was $375,000. He stated that additional amounts on a spreadsheet from his accounting

department represented the amount that Barrett Trucking had paid for the preliminary engineering before assigning its interest in the purchase of the Shelburne property to the Railway.

In addition to this testimony, the Court received in evidence several draft written agreements establishing the rights of the two companies in connection with the 2016 hearing. In particular, the evidence included an Agreement dated December 28, 2015 between Barrett Trucking and the Railway, in which Barrett Trucking assigned its rights and obligations under the purchase and sale agreement to the Railway, and the Railway agreed to lease a portion of the premises back to Barrett Trucking upon acquiring the property "because it would be more efficient for Barrett to operate all of its business from a single location." The agreement provided that "in connection with the development of the premises, Barrett shall loan funds to the Railway to pay for the costs therefore," and that Barrett would become the operator of the facility in exchange. 2016 Exhibit BB; Defendant’s Exhibit (“D. Exh.”) A. The loan would be accompanied by a promissory note and secured by a first priority mortgage. The agreement provided that immediately after the premises were to be acquired by the Railway, the parties were to execute and deliver an option agreement. The draft promissory note, dated to the same day, provided for a loan of up to one million dollars to be advanced by Barrett Trucking to the

Railway. The loan was to be paid in full on or before December 28, 2035 in a single payment to be delivered on that maturity date. In addition, the agreement included, as an exhibit, an unsigned option agreement giving Barrett Trucking the right to purchase all of the premises. [2] The purchase price was set as the balance due and owing Barrett Trucking by the Railway in the Promissory Note executed for the financing of the project. Finally, the parties signed an additional, $300,000 promissory note for the loan on the purchase price of the premises, to be repaid on or before September 1, 2016.

b. Evidence of Barrett Trucking's role in the project presented at 2017 hearing

At the 2017 hearing, the parties elicited additional evidence of Barrett Trucking's attempts to obtain financing for the project, its property interest in the project, and the roles of each company in the development of the facility. With regard to Barrett Trucking's alleged failure to finance the initial purchase of the property, the Town presented testimony from Michael Breen, Barrett Trucking's long-time account officer at Merchants Bank, who stated that Merchants Bank may have talked to Mr. Barrett about financing the purchase of the land, but most likely explained to Mr. Barrett that Merchants Bank does not typically finance undeveloped land without understanding

[2] This option agreement and the second promissory note appear in Exhibit A in the record from the 2017 hearing.

what is planned for the property. ECF 150, 2017 Hearing Transcript ("2017 Tr."), p. 43-44. He also did not recall stating that Merchants Bank would not provide financing for the property in November of 2015, and did not recall telling Mr. Barrett that Merchants Bank would not proceed with financing based on the environmental concerns evidenced in the September 2015 report from Barrett Trucking's environmental engineers. 2017 Tr. 43, 34. He clarified, however, that he "probably made clear to [Mr. Barrett] that [Merchants Bank] needed to understand whether there was in fact any contamination on the property and the extent of it and the liability for it and so on." 2017 Tr. 34. Since "throughout 2015[,] lots of details about this project were changing all the time," Mr. Breen testified that it was not clear to him "just what the financing request was ultimately going to look like." 2017 Tr. 180.

In addition, Mr. Breen clarified that Barrett Trucking financed the entire $675,000 purchase price of the property at closing. 2017 Tr. 136. The final $300,000 payment was made through a loan from the Railway to Barrett Trucking, for which the parties executed a promissory note with a maturity date of September 1, 2016, "with the understanding that in the end that note would be part of the larger note, whatever that amount proved to be, from the Railway back to Barrett Trucking." *Id.* Although Barrett Trucking paid for the property, however,

Vermont Railway became the title owner of the property. *See* Plaintiff's Exhibits ("P. Exh.") 3 and 4.

According to Mr. Breen, Mr. Barrett and Mr. Wulfson had "lots of conversations" between the time Barrett Trucking put down the $300,000 deposit on the land and the December 2015 closing on the land about "how best to structure the purchase of the land and how best to structure the development of it." 2017 Tr. 36. "[I]n the end they decided it would be best for the Railroad to buy the land and for Barrett under an exclusive operating agreement to be the operator of the transload facility, and under that agreement Barrett would provide financing for the Railroad. Barrett would in fact fund the improvement costs ... and the Railroad would in turn issue to Barrett a promissory note for the full cost when that amount was ultimately determined." *Id.*

Mr. Breen's notes indicate that he had ongoing conversations with Mr. Barrett between January and May, 2016 regarding Barrett Trucking's search for financing for the project. On May 4, 2016, the second day of the 2016 hearing in this case, Mr. Breen met with Mr. Wulfson, and explained that Mr. Wulfson had agreed to pledge $1.5 million from the Railway's sale of property to City Market as collateral for the loan to get the project built. D. Exh. B1, p. 2. However, he indicated that Mr. Wulfson "expect[ed] [Barrett Trucking] to secure long

term financing so that the cash collateral is released." *Id.* Separately, an email from Mr. Barrett to Mr. Breen dated February 8, 2016 indicates that Barrett Trucking was paying for all of the ongoing expenses for the Shelburne project at that time. D. Exh. Y.

In addition, Mr. Breen testified about his ongoing engagement with Mr. Barrett to obtain financing from Merchants Bank in order to fund the development of the project, as a loan from Barrett Trucking to the Railway. In the period from April 2015 until the closing on the Merchants Bank loan in September 2016, Mr. Breen's primary contact on the project was Mr. Barrett. 2017 Tr. 30. However, he understood that Mr. Barrett worked closely with Mr. Wulfson, and he spoke to Mr. Wulfson a handful of times during that period. *Id.* Mr. Barrett worked with Mr. Breen to provide the bank with information about the project, including cost estimates, and to secure further financing from SIB. Barrett Trucking was responsible for providing the Bank with requisitions for costs related to the project. 2017 Tr. 68. However, Mr. Breen also testified that his clear impression, based on his conversations with Mr. Barrett and his review of the operating agreement and the construction contracts, was that the Railway would have "the ultimate say on what would happen when" with regard to the construction process. 2017 Tr. 83-85.

In addition, the parties introduced documentation about the obligations that Barrett Trucking and the Railway assumed in connection with these loans. First, Barrett Trucking, the Railway, and Joseph, Scott and Brian Barrett, individually, entered into an agreement on September 1, 2016 with Merchants Bank accepting a $2.5 million loan. D. Exh. F. Pursuant to that agreement, Barrett Trucking agreed to submit monthly requisitions for disbursements of the loan, pay for an engineer to perform progress inspections, and comply with a series of additional covenants regarding its own finances. The Railway agreed to be a co-borrower on the loan until certain conditions were met.[3] Mr. Breen testified that those conditions had been satisfied, such that the Railway was no longer a co-borrower, by the date of his testimony in 2017. 2017 Tr. 87-88. Moreover, the agreement stated that the Railway would provide a Guaranty of the loan if this Court were to determine that the Town's regulations are not preempted under the ICCTA. Both Barrett Trucking and the Railway assumed security obligations, including providing a mortgage on the property.[4]

[3] In particular, the Railway would cease to be a co-borrower when "(a) the project is complete, (b) the Project has been issued an operational stormwater discharge permit and an 1111 permit in final unappealable form or all appeal periods have expired without appeal and (c) the Vermont State Infrastructure Bank ("SIB") loan has been fully funded." *Id.* On an unspecified date in September 2016, Merchants Bank, the Railway and Barrett Trucking signed an addendum to the Promissory Note and Guaranty, further specifying how these conditions would be satisfied. D. Exh. I.

[4] In particular, the loan is secured by a first mortgage on the Railway's fee interest in the project, a first assignment of the operating agreement

Several additional documents further detailed the obligations of Barrett Trucking and the Railway to each other. Their Operating Agreement, signed August 26, 2016, establishes that Barrett Trucking shall be the exclusive agent of the Railroad, licensed to operate the facility with its own crews for the purpose of conducting transloading of railroad freight at the facility. D. Exh. C. The Railway reserved the right to transload goods other than salt at the facility, free from interference or fees payable from or to Barrett Trucking. *Id.* However, the Operating Agreement restricts Barrett's operations on the facility, other than transloading salt, without written consent of the Railway. Nor can Barrett Trucking contract with third parties for the transloading or shipment of goods at the facility. Rather, the Railway will be solely responsible for collecting revenues attributable to the movement of freight through the facility. *Id.* Finally, the agreement calls for the Railway and Barrett Trucking to "cooperate to identify, program and construct all transload facilities," but explains that Barrett Trucking must seek written consent from the Railway for

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between the Railway and Barrett Trucking pertaining to the property, a first assignment of the promissory note and mortgage from the Railway to Barrett Trucking, a first assignment of private crossing agreement from the Railway and a first security interest in all contracts, related bonds, and other incidents associated with the project. Finally, the loan was cross-collateralized by all of Barrett Trucking's existing property and assets, and secured by mortgages on Barrett Trucking's real estate in South Burlington and New Hampshire. The actual promissory note on this loan identifies a Commercial Security Agreement provided by the Railway and another given by Barrett Trucking as collateral for the loan. D. Exh. J, p. 2.

any improvement it seeks to undertake. The agreement also provides that the two companies shall cooperate to maintain and repair the facility as needed, but that any new, replaced property would remain property of the Railway. The Railway is responsible for contracting and obtaining utilities on the facility, and both companies are responsible for maintaining insurance. *Id.*

In addition, on August 26, 2016, the companies executed a promissory note, whereby the Railway promised to repay Barrett Trucking $5 million at zero percent interest. D. Exh. D. On September 1, 2016, the companies executed a mortgage from the Railway to Barrett Trucking to secure the repayment of the debt. D. Exh. E. However, on the same date, the companies signed an agreement with Merchants Bank subordinating the mortgage securing that note to the mortgage given to Merchants Bank. D. Exh. L, M. They also executed a collateral assignment of the promissory note and mortgage in favor of Barrett Trucking to Merchants Bank, as well as a collateral assignment of all of Barrett Trucking's rights, title and interest in its operating agreement with the Railway to Merchants Bank. D. Exh. N, O. In addition, on September 1, 2016, the companies executed a construction loan agreement with Merchants Bank, outlining the responsibility of both companies, as "borrowers," with respect to the construction of the project. D. Exh. K. This contract

does not provide for the Railway to be released from "borrower" status upon meeting certain conditions. As a consequence, under the agreement, the Railway assumed the same obligations as Barrett Trucking for purposes of ensuring the proper development and construction of the project.

In the first half of 2016, Mr. Barrett discussed obtaining financing from the Vermont Economic Development Authority (VEDA) with the Railway and Merchants Bank. D. Exh. A2.[5] In May of 2016, Mr. Barrett met with VEDA and Merchants Bank representatives to discuss financing. D. Exh. B3. Mr. Greenfield determined that the project would likely not be eligible for VEDA loans, but might be eligible for a loan from SIB, a separate state entity which provides financing to support transportation infrastructure and economic development. *Id.* 269, 272. On June 23, 2016, Mr. Barrett submitted a loan application to SIB. D. Exh. B5. The loan application provides, in relevant part, that revenue for the project will be based on a contract between Cargill and the Railway, and that under the operating agreement, Barrett Trucking will receive all funds paid to Vermont Railway under the Contract with Cargill. *Id.*, p. 4. It attached the 15-year Storage and Handling Agreement between the Railway and

[5] The former Chief Operating Officer of VEDA, Steven Greenfield, testified that VEDA is a state public sector bank that provides economic development stimulus and agricultural loans. 2017 Tr. 268.

Cargill. Mr. Wulfson provided VEDA with a memorandum on April 27, 2016, outlining the nature of the project. D. Exh. A5.

Barrett Trucking received a commitment letter for a loan of $1,457,883 from SIB on August 12, 2016. The letter required the following collateral for the loan: (1) a second mortgage from the Railway on the project site, subject only to the mortgage of Merchants Bank, (2) a collateral assignment of the operating agreement between the Railway and Barrett Trucking, subject only to the first assignment of that agreement to Merchants Bank and (3) joint and several personal guaranties of Joseph, Scott and Brian Barrett. D. Exh. B7. In addition, the commitment letter included, as a term of the loan, that Barrett Trucking should provide evidence of a significant equity contribution. Notably, however, the commitment letter did not mention the promissory note from the Railway to Barrett Trucking. William Roberts, the loan officer assigned to the application, testified that SIB initially did not take a collateral assignment of the note because it did not have repayment terms, and instead provided only for a balloon payment from the Railway to Barrett Trucking at the end of a fifteen year period. 2017 Tr. 369. On January 10, 2017, Barrett Trucking closed on a loan from SIB for $1.5 million dollars. D. Exh. B8. The companies thereafter signed the required mortgages, collateral assignments and guaranties, and executed an agreement between the Railway, Barrett Trucking and

both lenders establishing the respective rights of each. D. Exh. B12. After closing, SIB realized that the repayment amounts in the operating agreement "didn't jibe," and asked Mr. Breen about that issue. Mr. Breen explained that there was also a promissory note that would be repaid over the course of fifteen years, and SIB requested that this be provided as collateral for its loan as well. *Id.* at 370. SIB and Barrett Trucking signed a collateral assignment of the five million dollar note and related mortgage between Barrett Trucking and Vermont Railway thereafter. D. Exh. B11. On March 8 and 9, 2017, both companies and both banks signed a restated priority agreement concerning the collateral for both bank loans. D. Exh. D12. Ms. Dingle, an attorney with experience in financial transactions involving VEDA, testified that it was uncommon for collateral to be subsequently modified in this fashion. *Id.* at 413.

III. Discussion

I. Motion for Relief from Judgment

Federal Rule of Civil Procedure 60(b) allows a party to obtain relief from judgment for "(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial…" and "(3) fraud …, misrepresentation, or misconduct by an opposing party", among other reasons. Fed. R. Civ. P. 60(b). On September 17, 2016, the Town sought relief from judgment for newly discovered evidence,

and suggested that witnesses for the Railway may have testified falsely, providing an additional ground for relief. ECF 90. In light of the lack of clear evidence that either ground for relief had been met, the Court ordered additional discovery to determine whether new evidence or prior misrepresentations would warrant reconsideration of its prior ruling on ICCTA preemption. ECF 103. In its post-hearing memorandum filed on April 21, 2017, the Town renewed its arguments for Rule 60(b) relief, arguing that its prior motion should be granted due to newly discovered evidence and misrepresentations. ECF 168. For the reasons outlined below, the Court finds that neither newly discovered evidence nor fraud, misrepresentation or misconduct warrants relief from its prior judgment. Accordingly, the Court denies the Town's motion for relief from judgment.

a. Newly discovered evidence

In order to demonstrate the existence of new evidence under Fed. R. Civ. P. 60(b)(2), "the movant must demonstrate that (1) the newly discovered evidence was of facts that existed at the time of trial or other dispositive proceeding, (2) the movant must have been justifiably ignorant of them despite due diligence, (3) the evidence must be admissible and of such importance that it probably would have changed the outcome; and (4) the evidence must not be merely cumulative or impeaching." *U.S. v. Int'l Brotherhood of Teamsters*, 247 F.3d 370, 392 (2d

Cir. 2001). Since the parties have had a full opportunity to present new evidence pertaining to the underlying merits of the ICCTA preemption claim, the Court will focus primarily on whether the evidence of Barrett Trucking's financial role and operational involvement in the project would alter the outcome of its preemption determination. Moreover, since the Court finds that, taking into account all of the newly presented evidence, it must still reach the same conclusion, it need not address whether some or all of that evidence was available at the time of the 2016 hearing, whether the Town was justifiably ignorant of that evidence at the time, or whether the new evidence is cumulative or impeaching.

To qualify for federal preemption under 49 U.S.C. §10501(b), the activities at issue must constitute "transportation," and must be performed by, or under the auspices of, a "rail carrier." *See The City of Alexandria, Virginia--Petition for Declaratory Order*, STB Finance Docket No. 35157, 2009 WL 381800, at *1 (Feb. 17, 2009). Contrary to the Town's submission, the evidence presented at the 2017 hearing demonstrates that federal preemption applies here because both requirements were satisfied in this case.

i. Rail Carrier

"Whether a particular activity is considered part of transportation by rail carrier under Section 10501 is a case-by-

case, fact-specific determination." *See Texas Cent. Business Lines Corp. v. City of Midlothian*, 669 F.3d 525, 530 (5th Cir. 2012); *Borough of Riverdale –Petition for Declaratory Order*, STB Docket No. 35299, 2010 WL 3053100 (3 Aug., 2010). Where a third party merely uses railway property to transload cargo, but the railway's involvement is insufficient to make the third party's activities "an integral part" of the railway's provision of transportation, the transload is not carried out "by a rail carrier." *See Hi Tech Trans, LLC-Petition for Declaratory Order-Newark, Nj*, STB Finance Docket No. 34192, Sub-no. 1, 2003 WL 21952136, at *4 (Aug. 14, 2003). In numerous cases, the STB has identified general criteria to determine when a given transportation activity conducted by a third party should be deemed to be an integral part of the railway's activities. *See Town of Babylon and Pinelawn Cementary –Petition for Declaratory Order*, STB Finance Docket No. 35057, 2008 WL 275697 (31 Jan., 2008); *The City of Alexandria, Virginia--Petition for Declaratory Order*, STB Finance Docket No. 35157, 2009 WL 381800, at *1 (Feb. 17, 2009); *Borough of Riverdale –Petition for Declaratory Order*, STB Docket No. 35299, 2010 WL 3053100 (3 Aug., 2010). In *Town of Babylon and Pinelawn Cementary*, for example, the Surface Transportation Board ("STB"), which has jurisdiction over transportation by a rail carrier, concluded that a third party's activities were not carried out by a rail

carrier because: (1) the railway had "essentially no involvement in the operations at the facility," (2) the third party had "almost total control over the activities at the facility" and "the exclusive right to conduct transloading operations on the property," (3) the third party built the facility and was responsible for all necessary maintenance, (4) the third party was entitled to charge a fee for its transloading services from customers, over which the railway had no control, and (5) the third party was obligated to maintain liability insurance in favor of the railway. 2008 WL 275697, at *4. Thus, the STB found that the third party was not acting as an agent or under the auspices of the railway, and its operations were therefore insufficient to make its activities "an integral part" of the railway's provision of transportation. *Id*.

Courts of Appeals have embraced this fact-specific, multi-factor evaluation. For example, in *New York & Atlantic Ry. Co. v. Surface Transp. Bd.*, the Second Circuit upheld the STB's reasoning in *Town of Babylon and Pinelawn Cementary –Petition for Declaratory Order*, STB Finance Docket No. 35057, 2008 WL 275697 (31 Jan., 2008). 635 F.3d 66, 73-74 (2d Cir. 2011). In doing so, it distinguished between "an independent business providing a service to a rail carrier and its customers," which is not subject to preemption, and "a facility that the rail carrier controls and represents as [sic] integral part of its

services." *Id.* Likewise, the Third Circuit embraced the STB's rationale in *Hi Tech Trans, LLC v. New Jersey*, finding that a third party's activities were not conducted "by a rail carrier" where the license agreement between the parties "essentially eliminate[d the railway's] involvement in, and responsibility for, the operation of [the third party's] facility," and where the third party did not claim that it was the agent or employee of the railway. 382 F.3d 295, 308-309 (3rd Cir. 2004). Most recently, the Ninth Circuit emphasized that the STB looks to factors such as "the degree of control exercised by the carrier over the non-carrier's operations, the involvement of the carrier in day-to-day operations, the structure of payments and cost agreements, and other terms of the agreement between the carrier and the non-carrier" to determine "whether the non-carrier's activities are 'an integral part of [the rail carrier's] provision of transportation by rail carrier.'" *Oregon Coast Scenic Railroad, LLC v. Oregon Department of State Lands et. al.,* 841 F.3d 1069, 1074 (9th Cir. 2016).

Finally, recent STB cases have also given weight to the railway's ownership interest in the transportation facility. For example, in *Borough of Riverdale –Petition for Declaratory Order*, STB Docket No. 35299, 2010 WL 3053100, *4 (3 Aug., 2010) the STB concluded that a third party's transload activities were part of transportation by a rail carrier where the railway owned

the facility and paid for improvements on it, and also determined transloading rates, charged customers directly, and retained responsibility and control over operating procedures at the facility. Likewise, in *The City of Alexandria, Virginia--Petition for Declaratory Order*, 2009 WL 381800, at *1 (Feb. 17, 2009), the third party's transload activities were found to be part of the railway's transportation where the railway owned the facility and constructed it with its own funds, and its operating agreement did "not have any of the characteristics of a lease or license that would be consistent with [the third party's] conducting an independent business," among other factors.

On balance, these factors weigh in favor of finding that Barrett Trucking's activities at the Shelburne property are an integral part of the Railway's transportation, and are therefore carried out under the auspices of a rail carrier. First, the Railway in this case retained ultimate control over the operation of the facility and Barrett Trucking's work as operator. For example, the operating agreement between the companies provides that Barrett Trucking will undertake its transload work as the Railway's agent. In fact, Barrett Trucking must obtain the written consent of the Railway to do anything at the facility other than transload salt on its behalf. Mr. Wulfson testified that the Railway has "final say on whether or

not any freight is coming in or out of this transload facility." 2017 Tr. 608. The operating agreement also provides that the Railway will be responsible for contracting and obtaining utilities on the facility. Furthermore, the operating agreement makes Barrett Trucking liable to the Railway for any loss, damage to or destruction of property arising from its operation of the facility. The Railway, however, is not liable to Barrett Trucking for damage or injury it causes.

Moreover, the evidence presented at the hearing clearly establishes that the Railway interfaces with its primary customer, Cargill, to contract for the transload of salt. The Railway, as the handler named in the salt storage and handling agreement, is solely responsible for collecting revenues attributable to the movement of freight through the facility. D. Exh. B2. In addition, the operating agreement allows the Railway to contract for the transload of other services, but precludes Barrett Trucking from contracting with third parties for the transload or shipment of goods at the facility. The parties dispute the exact percentage of profit derived from the Railway's contract with Cargill that will be retained by Barrett Trucking in connection with its services. However, the percentage share is ultimately less relevant than the overall structure of the contractual arrangements to determine whether Barrett Trucking's work is an integral part of the Railway's

activities. Here, it is undisputed that the Railway, rather than Barrett Trucking, holds itself out as providing a service to third party customers, and that the Railway retains some of the financial benefit for doing so.

Furthermore, although Barrett Trucking clearly played a critical role in financing the construction of the property, the Railway retained ultimate control over construction-related decisions. Mr. Breen testified that although Mr. Barrett provided Merchants Bank with information on the construction process, his understanding was that Mr. Wulfson made the ultimate decisions on the progress of the construction. Mr. Wulfson also retained and paid subcontractors. While some of these were initially paid directly by Barrett Trucking, those payments were rolled into the Railway's loan with Barret Trucking. Thus, the Railway was ultimately responsible for payment. Moreover, the Railway's project costs have exceeded the amount loaned by Barrett Trucking by a significant percentage, requiring the Railway to bear this cost itself. In addition, Mr. Wulfson testified that the Railway's "clerk of the works" was responsible for allowing Barrett Trucking to open bids for construction proposals, was present at the time of the bid opening and ensured that the bid documents were pre-approved by SIB. 2017 Tr. 599; 602-03. In fact, the Railway and Barrett Trucking's joint construction loan agreement with Merchants Bank

requires the Railway to assume the same responsibilities as Barrett Trucking concerning the construction process. D. Exh. K. Finally, the Railway assumed a significant financial commitment in taking on this loan, both by agreeing to repay Barrett Trucking and by providing a guaranty on the loan from Merchants Bank if the project ultimately fell through due to this Court's ruling. Accordingly, the Railway is ultimately the party on the hook for a large portion of the construction financing if the transload project is unsuccessful.

Finally, the Town puts great emphasis on Barrett Trucking's allegedly-veiled ownership interest in the property. While ownership is clearly relevant to the preemption inquiry, however, it is not dispositive. In an early decision, for example, the Eleventh Circuit found that a third party's private distribution activities on land leased from a railway did not constitute rail transportation. *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1336 (11th Cir. 2001). Although the railway owned the property, the arrangement "merely facilitate[d the third party's] operation of a private distribution facility on [railway]-owned premises." *Id.*[6] Conversely, the Fifth Circuit recently found that regulation of

[6] Since the decision preceded the Third Circuit's decision in *Hi Tech Trans*, 382 F.3d at 308-09, and the Second Circuit's embrace of the STB's rationale in *New York & Atlantic Ry. Co.*, 635 F.3d at 73-74, the Eleventh Circuit did not systematically apply the broader range of factors considered by the STB later on.

a railway's transload operation was preempted where the railway operated a transload facility in coordination with a third party on property leased by the railway from yet another entity. *Texas Cent. Business Lines Corp. v. City of Midlothian*, 669 F.3d 525 (5th Cir. 2012).[7] The Court found it significant that the railway was "the only party to the transloading with a real-property interest," and that it owned, constructed and designed the permanent improvements on the property. *Id.* at 531-32. Given the link between those property interests and the railway's operational control over the underlying activities at issue, it was not necessary for the railway to actually own the property for preemption to apply.

Even if ownership were as critical as the Town implies, the sum of the property interests of the two companies in this case provides, at best, a mixed view of the ultimate control retained by the Railway in the arrangement. The parties do not dispute that the Railway is the clear title owner of the Shelburne property, and is responsible for paying taxes in connection with the property. In addition, it has assumed a financial stake in the development of the improvements on the property by signing a promissory note in favor of Barrett Trucking for the

[7] There, the Court considered the following factors to determine whether transloading is "by a rail carrier": (1) whether the rail carrier holds out transloading as part of its business, (2) the degree of control retained by the carrier, (3) property rights and maintenance obligations, (4) contractual liability, and (5) financing. *Id.*

construction of the facility and the cost of the land, financing a significant portion of construction costs itself, providing a guaranty on the loan from Merchants Bank in the event that this Court orders that the project is not subject to preemption, and executing mortgages on the property in favor of Merchants Bank, SIB and Barrett Trucking.

However, the evidence also demonstrates that Barrett Trucking has (1) a mortgage on the property and a substantial equity interest in the facility, since it financed the entire purchase price of the property and the majority of construction costs for the project; (2) an arguably enforceable option to purchase the Shelburne property and (3) a lease on the property.[8] In theory, these interests could lead Barrett Trucking to have a level of control and responsibility for the overall development and success of the project that differs from that typically exercised by a mere agent or operator. As explained above, however, the evidence suggests that the ultimate decisions on the construction project, the ability to engage clients and conduct business, and the authority to dictate the terms of the transload process were in fact retained by the Railway. Thus, in

[8] The Town argues that Barrett Trucking has an enforceable option to purchase the facility. If the facility were to come under Barrett Trucking's ownership and control at some point in the future, the Court would certainly be presented with a different scenario, and preemption may not apply at that point. However, given that Barrett Trucking has not in fact purchased the property, the Court is not persuaded that this option to purchase is pertinent to the preemption analysis as outlined by the authorities cited above. In fact, the Town does not explain how the option necessarily alters the Court's preemption analysis.

light of the weight of the other factors in this case, the Court finds that the secondary property interests Barrett Trucking retains in the Shelburne facility are insufficient to undercut the nature of its agency relationship with the Railway. As such, the Court must conclude that the activities undertaken at the property are carried out by a rail carrier for purposes of ICCTA preemption.

ii. Transportation

In addition, the Town argues that the activity to be conducted on the Shelburne property should not be considered transportation for purposes of preemption. The Town does not dispute that the "storage, handling, and interchange" of cargo constitutes transportation pursuant to 49 U.S.C. § 10102(9)(B), or that "transloading activities fall within the Termination Act's definition of "transportation.""*N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 248 (3d Cir. 2007) (citing *Green Mountain R.R. Corp. v. Vt.,* 404 F.3d 638, 642 (2d Cir.2005)). Instead, the Town contends that ICCTA preemption does not apply because the activities undertaken on the property are not "transloading," but rather long-term warehousing. *See Grosso v. Surface Transportation Bd.,* 804 F.3d 110, 118 (1st Cir. 2015), *reh'g denied, Del Grosso v. Surface Transp. Bd.,* 811 F.3d 83 (1st Cir. 2016).

However, the evidence the Town points to in fashioning this argument was largely available to the Court at the last hearing. It is as unavailing to the Town now as it was then. First, the principal purpose of the activities undertaken on the property does not appear to have changed since the last hearing. Although Mr. Wulfson represented to SIB in writing that Vermont Railway acquired property "for the principal purpose of moving and expanding a warehouse and distribution facility for salt," as the Town asserts, he also stated that the new facility "is now being developed for the transportation and distribution of salt and other goods" immediately thereafter. D. Exh. A5. These two representations, made in the same document, were not presented as contradictory, and do not describe activity that is distinct from transloading on its face.[9] Nor does Mr. Wulfson's description of the property's purpose conflict with the Court's prior understanding of the nature of the activities to be undertaken there.[10]

[9] Although the Town asserts that "it has become apparent that this Project at a minimum could be bifurcated into a rail portion (perhaps including the siding and road) and a storage/local truck portion (including the scale, office and two sheds)," it does not point to evidence that the project has actually been split in this manner. In fact, the Town does not point to specific evidence to support this claim at all. ECF 168, p. 29. If, down the road, the operations of the project were to "bifurcate" in a manner that is different from the organizational structure inherent in the operating agreement between Barrett Trucking and the Railway, the Court might be presented with a different preemption analysis. As it stands, however, the Court is not persuaded that the purpose of the project's activities has changed since the last hearing.

[10] The Court previously found that the facility would be used primarily for unloading bulk salt arriving by rail for local distribution by truck and for temporary storage in sheds pending distribution. ECF 84, p. 19.

Moreover, the Town does not set forth clear authority for the notion that seasonal storage would not be considered "short term."[11] In fact, the Second Circuit has found that storage of salt for winter use constitutes transportation within the meaning of the ICCTA. *See Green Mountain R.R. Corp. v. Vt.*, 404 F.3d 638, 640 (2d Cir. 2005). Therefore, the Court sees no reason to upset its prior determination on this question. Since newly presented evidence would not have changed the outcome of the Court's prior order on this matter, the Court denies the Town's motion for relief from judgment on this ground.

b. Fraud, misrepresentation or misconduct

Moreover, relief from judgment is not warranted in this case as a result of fraud, misrepresentation or misconduct by an opposing party. The Town argues that Mr. Barrett misrepresented his involvement in the project at the 2016 hearing by (1) stating that he did not believe Barrett Trucking had an obligation to make more payments towards the project's development, but had merely the option to make up to a million dollar payment on the project and (2) stating that he would charge interest on Barrett Trucking's loan to the Railway if he

[11] The Town's reference *to Grosso*, 804 F.3d at 120 (1st Cir. 2015) is unavailing. There, the First Circuit remanded to determine whether the vacuuming, screening, bagging, and palletizing of wood pellets facilitated the transloading of the pellets from the railcars to the trucks or was done solely for another, unrelated purpose. However, the Court did not set a time frame on the amount of time that a good could be stored in order for it to be considered transportation.

were required to borrow money to make the loan, but later making an interest-free loan to the Railway with money borrowed from SIB and Merchants Bank.

Relief from judgment on grounds of fraud, misrepresentation or misconduct "cannot be granted absent clear and convincing evidence of material misrepresentations and cannot serve as an attempt to relitigate the merits" of the underlying decision. *Fleming v. N.Y. Univ.,* 865 F.2d 478, 484 (2d Cir.1989). "To prevail, a movant must show that the conduct complained of prevented the moving party from fully and fairly presenting her case." *Genger v. Genger*, 663 F. App'x 44, 51 (2d Cir. 2016) (internal quotation omitted). Where an earlier court's order does not rely on the allegedly fraudulent evidence, such circumstances do not arise. *Id.* Rule 60(b)(3) is "invoked where material information has been withheld or incorrect or perjured evidence has been intentionally supplied." *Travelers Cas. & Sur. Co. v. Crow & Sutton Assocs.*, 228 F.R.D. 125, 131 (N.D.N.Y. 2005) (citing *Matter of Emergency Beacon Corp.,* 666 F.2d 754, 759 (2d Cir.1981)). However, "an aggrieved party seeking relief ... must be able to show that there was no opportunity to have the ground now relied upon to set aside the judgment fully litigated in the original action." *Gleason v. Jandrucko*, 860 F.2d 556, 560 (2d Cir. 1988). Where a party alleges misconduct on the ground that a witness lied at a deposition, but could

have deposed eye witnesses to impeach that witness' testimony, no relief is available. *Id.*

At the outset, the Court notes that the Town has not alleged any fraud, misrepresentation or misconduct committed by Vermont Railway, the only opposing party in this case. Rather, the misrepresentations it points to in its brief were made by Mr. Barrett, a non-party witness. Even if Mr. Barrett's testimony were attributable to the Railway, however, his statements concerning the companies' expectations of Barrett Trucking's role in financing the project are merely imprecise, and do not rise to the level of fraud, misrepresentation or misconduct. In fact, Mr. Barrett testified in 2016 that he believed that he had the ability, but not the obligation at that point, to make additional investments in the development of the project. To be sure, Mr. Breen represented to the Court in 2017 that his understanding was that the parties had agreed that Barrett Trucking would in fact fund the improvement costs for the project by December 2015, and Mr. Breen's notes from his conversation with Mr. Wulfson in May of 2016 suggest that Mr. Wulfson expected as much. However, Mr. Breen did not directly contradict Mr. Barrett's statement that Barrett Trucking had not yet assumed a formal obligation to do so at that point. Moreover, the fact that Mr. Barrett and Mr. Wulfson were attempting to obtain external financing for the project does not

contradict any particular statement made at the 2016 hearing, since neither of them were asked whether they were engaged in such efforts, and no financing commitment had come through at that time.

Moreover, although Mr. Barrett testified in 2016 that he had not contributed additional funds towards the project after December 2015, he later acknowledged that he had lent the Railway $100,000, and testified that he did not know what the Railway had used these funds for. He also expressed a lack of familiarity with the Railway's accounting of the loaned funds, demonstrating that he was unaware of the precise details of the funding arrangement at that moment. Moreover, Mr. Wulfson's 2016 testimony that, in addition to the $100,000 documented loan, Barrett Trucking had lent the Railway "a lot of money that has not been papered yet," put Mr. Barrett's testimony into question. In this sense, the Town could have, and in fact did, litigate the credibility of Mr. Barrett's testimony on this precise point. *Gleason*, 860 F.2d at 560. As such, the inconsistencies in Mr. Barrett's testimony concerning the exact funding provided to the Railway in the first part of 2016 does not provide grounds for Rule 60(b)(3) relief.

Moreover, even if Mr. Barrett's testimony concerning the amount of money that Barrett Trucking had contributed towards the development of the project by the 2016 hearing could be

described as "incorrect or perjured evidence," the Town has set forth no evidence that Vermont Railway "*intentionally* supplied" that falsehood. *See Travelers Cas. & Sur. Co. v. Crow & Sutton Assocs.*, 228 F.R.D. at 131. In fact, Mr. Wulfon's contrary testimony in 2016, noted above, belies such a claim. Accordingly, even if the Court were to find that Mr. Barrett's testimony rose to the level of perjury (which it does not), that characterization would not require it to conclude that the Railway committed misconduct giving rise to Rule 60(b)(3) relief.

Finally, since the Court reaches the same conclusion on the underlying merits of the ICCTA preemption question after taking the 2017 evidence into account, it also finds that the Town has not demonstrated that any fraud, misrepresentation or misconduct by the Railway was material, or that it prevented the Town from "fully and fairly presenting its case." *See Fleming,* 865 F.2d at 484; *Genger*, 663 F. App'x at 51. Accordingly, the Court denies the Town's motion for relief from judgment pursuant to Fed. R. Civ. P. 60(b)(3).

II. Additional motions

Since no relief from the Court's prior order is warranted, the Court also denies the Town's motion for a temporary restraining order and motion for a stay of judgment as moot.

IV. Conclusion

In sum, the Court finds that the activity on the Shelburne property constitutes transportation by a rail carrier for purposes of 49 U.S.C. §10501, and is thus subject to preemption under the ICCTA. As such, neither new evidence nor fraud, misrepresentation or misconduct warrants relief from the Court's June 29, 2016 Opinion and Order. Accordingly, the Town's motion for a stay of judgment, temporary restraining order, relief from this Court's June 29, 2016 Opinion and Order and other equitable relief is hereby **denied**. ECF 90.

Dated at Burlington, in the District of Vermont, this 28th day of June, 2017.

/s/ William K. Sessions III
William K. Sessions III
District Court Judge