

Before the
SURFACE TRANSPORTATION BOARD
STB Docket No. AB-1095 (Sub. No. 1)

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PAULSBORO REFINING COMPANY LLC
-- ADVERSE ABANDONMENT --
SMS RAIL SERVICE, INC. IN GLOUCESTER COUNTY, NJ

REPLY OF PAULSBORO REFINING COMPANY LLC

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Dated: March 10, 2014

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REPLY OF PAULSBORO REFINING COMPANY LLC

In accordance with the schedule established by the Board, Paulsboro Refining Company LLC (“PRC” or “Applicant”) is filing this Reply to address the Protest filed by SMS Rail Service, Inc. (“SMS”) and the Joint Comments filed by Conrail, Norfolk Southern Railroad Company and CSX Transportation, Inc. (collectively, the “Railroads”). This Reply also relies on, and incorporates by reference, the facts and legal arguments set forth in the Application. Neither the Protest nor the Joint Comments set forth any facts that contradict the basic assertions of the Application that there is no demand for continued common carrier service by SMS in Paulsboro, and that the public convenience and necessity support the proposed abandonment.

Discussion

- 1. Nothing in the Protest filed by SMS establishes a continuing need by the public for SMS’s common carrier services at the Refinery.**

In its Protest, SMS seeks to divert the Board’s attention from the essential question of whether there is any public necessity for SMS’s common carrier service at the Refinery to continue. SMS cannot dispute that the current primary shipper (and owner of the tracks), PRC, no longer wishes to receive common carrier service from SMS. The

only other remaining shipper, ExxonMobil does not oppose the change from a common carrier to a switching contractor.¹ Despite SMS's recitation of its marketing successes at other locations, SMS acknowledges that there are no prospects for additional customers at the Refinery. Protest at 11. Thus, it is clear that in opposing the abandonment, SMS is looking out solely for its personal financial interest, and not for the public's interest.

SMS goes through a long recitation of the history of this proceeding and the ongoing state court litigation between PRC and SMS. The state court litigation involves the interpretation of provisions of the contract between PRC and SMS, and the scope of SMS's obligations once it received a notice of termination from PRC, subjects that are not within the jurisdiction of the Board. However, the misrepresentations by SMS about the status and subject of the litigation and the process here at the Board, need to be addressed. The current state court action does not seek to evict SMS, nor does it seek a finding from the court that the tracks have been or should be abandoned (matters which PRC acknowledges are solely within the jurisdiction of the Board.). Rather the state court action seeks findings regarding SMS's obligations under the operating agreement after receiving a termination notice from PRC, including whether SMS is liable for damages for the PRC's cost of proceeding at the Board as a result of breaching those obligations. SMS attempted to remove the action to federal court on the grounds that the Board's exclusive jurisdiction over abandonments was involved, but the matter was remanded to the state court indicating that the federal court did not agree that the Board's exclusive jurisdiction was involved. Further, despite SMS's attempts to have the case

¹ Just because common carrier service is available does not mean that a customer needs to use the service. *See V&S Railway, LLC – Petition for Declaratory Order – Railroad Operations in Hutchinson, Kan.*, STB Docket No. FD 35459 (served July 12, 2012), slip op. at 12-13.

either referred to the Board or stayed, the court, while recognizing that the Board has the jurisdiction to determine the question of abandonment, has retained jurisdiction over the state law contract claims and has allowed discovery to continue.

As set forth in the Application, the delay in filing the Application came about because PRC was hoping to resolve its issues with SMS either privately, or through the state court action. However, when SMS continued to refuse to seek abandonment voluntarily, PRC eventually decided to go forward with the adverse abandonment proceeding, including the environmental consultations and the preparation and filing of the Environmental and Historic Report that are required before an Application can be filed. PRC is continuing with the current state court proceeding in which the court will decide if part of SMS's obligations on termination were to seek the necessary authority to stop service and remove its equipment.

As noted in the Application, PRC acknowledges that removal of SMS is a two part process – it must obtain abandonment authority for SMS from the Board in this proceeding, and unless SMS voluntarily stops service, it must then demonstrate in a state court proceeding that SMS should be evicted. Application at 15-16.² The ongoing state court litigation does not take away from the Board's jurisdiction or its need to determine if the Application should be granted.

SMS claims that PRC justifies the proposed abandonment solely on the termination of the operating agreement. Protest at 8. But, of course that is not the case. PRC has clearly established in the Application that PRC, the primary and almost the only shipper, determined that it no longer needed SMS's common carrier service, and that it

² As described above, the current state court proceeding does not seek to evict SMS.

could be better served by a private switching contractor. ExxonMobil, the other remaining shipper, determined that its less than 10 cars per year could also be handled by a switching contractor. Thus, what PRC demonstrated in the Application was that there was no public need for SMS's ongoing common carrier service. The decision to terminate the agreement was an outgrowth of the determination that SMS's service was no longer required.

Further, the fact that PRC did not file a formal complaint with the Board, or that it did not cite a list of problems in its termination notice, does not mean that PRC was satisfied with SMS's service as suggested by SMS. Protest at 12. If it had been satisfied, it would not have terminated the operating agreement. Rather, the operating agreement provided that it could be terminated on 90 days' written notice, and there is no requirement that cause be shown or demonstrated. Accordingly, PRC chose to merely give the simple termination notice that was required under the operating agreement.

SMS argues that the Board's duty is to protect the public from unnecessary abandonments, and that the Board generally will not grant an adverse abandonment in situations where the incumbent carrier can demonstrate that there is a demand for service or a reasonable prospect for future service. Protest at 10-11. However, in this case, as discussed above, the current customers are not demanding SMS's service, and even SMS acknowledges that there is no prospect for additional customers at the Refinery. There is no evidence that the public wants or needs SMS's common carrier service; indeed the only party seeking protection from the Board is SMS. Further, in none of the cases cited by SMS where adverse abandonment was denied was the applicant the owner of the tracks as is the situation here.

SMS acknowledges the Board has granted adverse abandonments when there is a contractual dispute between the owner of the rail lines and the contracted common carrier. Protest at 12. The Board has clearly held in such situations that it will not allow a carrier to use the Board's jurisdiction to defeat a proper claim for termination. *See* Application at 14-16. The fact that PRC wants to replace SMS's services at the Refinery with a switching contractor does not change the Board's analysis about the need for SMS's common carrier services. The Railroads can continue to provide service to PRC (either in Paulsboro yard, or to the Refinery – see the discussion below), and the switching contractor can provide all of the services within the Refinery.

Finally, SMS attempts to assert that the abandonment of common carrier service by SMS would be inconsistent with rural and community development. Protest at 13-14. SMS does not focus on the effect on regional economic development which is the subject of the Board's regulations, because SMS cannot show that there will be any adverse effects from its cessation of common carrier service. As shown by PRC in the application, there will be no change in the rail service received by PRC (or ExxonMobil), and therefore no adverse effect on any development in the region.

Instead, SMS attempts to divert the Board's attention by intimating that the proposed service by a switching contractor will be less safe than the service provided by SMS, and further that the community will be adversely affected because of it. In addition to the issue not being relevant to the information required by the regulations regarding the impact on rural and community development (*see* 49 C.F.R. §1152.22(e)), SMS has not presented any evidence that service by a switching contractor will be unsafe, or that SMS's continued service would be any safer than the service that would be provided by

PRC's switching contractor. First it should be noted that service by a switching contractor is not inherently less safe than service provided by a common carrier. The accident in Paulsboro that SMS cites as an example of why the community needs protection occurred while common carrier service was being provided by Conrail.³ Further, SMS has overstated its own safety record. While it may be true that SMS has not reported any incidents to the FRA in recent years, that assertion does not mean there have not been safety issues and accidents in connection with the service provided by SMS to PRC. PRC is aware of at least 23 safety incidents over the past five years. *See* Krynski Verified Statement.⁴ As recently as this past January there was a derailment, and an incident where an SMS employee was using a cell phone while riding on, and getting on and off, a moving train entering the Refinery. *Id.* SMS presents no evidence that Savage, a potential switching contractor for PRC at the Refinery, is an unsafe operator although it intimates as such. *See* Protest at 13. Such insinuations are not consistent with the experience that PRC's affiliate in Delaware City, Delaware has had with Savage. *See* Fedena Verified Statement. Also, as shown in the Savage brochure submitted by SMS with its Protest, Savage is very focused on safety and has won awards for the safety of its operations. *See* Savage brochure attached to Protest as Exhibit A at p. 9.

³ The reference to the Conrail derailment seems very much a scare tactic. While hazardous materials are shipped to the Refinery, the Refinery does not ship or receive vinyl chloride which was the freight that threatened the community. Krynski Verified Statement, ¶ 8.

⁴ The exhibits to the Krynski Verified Statement include highly confidential information. Accordingly, the Verified Statement attached to this Reply is the Public version with the exhibits redacted. A highly confidential version of the Verified Statement is being filed separately under seal in accordance with the Protective Order served by the Board in this proceeding on July 26, 2012.

In sum, in this case, SMS voluntarily signed an operating agreement for a limited term, and later agreed to an amendment that among other things provided for termination on 90 days' notice. While PRC acknowledges that SMS cannot stop providing service until the Board grants abandonment authority, SMS should not be able to use the Board's jurisdiction as a shield to defeat the proper termination of the operating agreement when shippers no longer desire or require SMS's service. *Stewartstown Railroad Company – Adverse Abandonment – In York County, PA*, STB Docket No. AB 1071 (served November 14, 2012), slip op. at 4-5. See also *Minnesota Commercial Railway Company – Adverse Discontinuance – In Ramsey County, MN*, STB Docket No. AB-882 (served July 16, 2008); *Jacksonville Port Authority – Adverse Discontinuance – In Duval County, FL*, STB Docket No. AB-469 (served July 17, 1996).

2. The Joint Comments seek clarification of the proposed operations but do not provide any basis for denying the request for abandonment authority.

The Railroads take no position on the merits of PRC's request for adverse abandonment authority, and are ready to provide common carrier service. Joint Comments at 1. The Railroads merely request additional information on how the switching services would be handled, and sufficient time to enter into agreements and plan the transition. PRC has provided the Railroads with its preferred operating plan, and has indicated a willingness to discuss alternatives and to enter into appropriate agreements to cover use of tracks and the delivery and pick up of cars. Fedena Verified Statement, ¶ 5. Further, the request by the railroads that the Board require SMS to

cooperate with any transition in service providers, is consistent with the request made by PRC in the Application. *See* Application at 17.⁵

Conclusion

For the reasons set forth above and in the adverse application, the Board should find that Applicant's proposed abandonment satisfies the requirements of 49 C.F.R. §1152, and should issue a decision granting the adverse abandonment authority requested.

Respectfully submitted,



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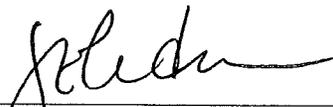
Dated: March 10, 2014

⁵ In its Protest, SMS did not object to the requested transition provisions, or indicate that it would not comply with any such requirements. However, to ensure a smooth and safe transition in keeping with the interests of PRC, SMS and the Railroads, PRC requests that such transition requirements be included in the Board's decision.

VERIFICATION

I, James Fedena, hereby verify under penalty of perjury that the facts set forth in the foregoing Reply are true and correct. Further, I certify that I am qualified and authorized to file this Verification.

Executed on March 10, 2014.



James Fedena
Senior Vice President

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2014, I served a copy of the public version of the Application for Adverse Abandonment on the persons listed below by the method shown:

By email and US First Class Mail, postage prepaid:

Fritz R. Kahn
1919 M Street, NW
7th Floor
Washington, DC 20036

David Ziccardi
Conrail
1717 Arch Street, 32nd Floor
Philadelphia, PA 19103

David Coleman
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510

Paul Hitchcock
CSX Transportation, Inc.
Law Department
500 Water Street, J150
Jacksonville, FL 32202

By US First Class Mail, postage prepaid:

Michael A. Carrocino, Facility Manager
Exxon Mobil Research and Engineering
Company
600 Billingsport Road
Paulsboro, NJ 08066

Cooperative Extension of Gloucester
County
Rutgers New Jersey Agricultural
Experiment Station
County Government Services Building
1200 N. Delsea Dr.
Clayton, NJ 08312-1095

Governor Chris Christie
State of New Jersey
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New Jersey Department of Transportation
Freight, Air & Water Division (Rail)
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Trenton, NJ 08628-0600

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1400 Independence Ave., SW
Washington, DC 20250-0003

US Department of Transportation
Federal Railroad Administration
1200 New Jersey Avenue, SE
Washington, DC 20590

Headquarters, Military Surface
Deployment and Distribution Command
Transportation Engineering Agency
Attn: SDTE-SA (Railroads for National
Defense)
709 Ward Drive, Building 1990
Scott AFB, IL 62225-5327

Conservation and Outdoor Recreation
Programs
National Park Service
1849 C Street, NW
Org. Code 2220
Washington, DC 20240

US Railroad Retirement Board
844 North Rush Street
Chicago, IL 60611-2092

By:



Eric M. Hocky

VERIFIED STATEMENT OF

JAMES FEDENA

I, James Fedena, hereby state as follows:

1. I am the Senior Vice President of Paulsboro Refinery Company LLC (“PRC”). I have held this position since December, 2010. I also serve as Senior Vice President of PBF Holding Company LLC (“PBF”), PRC’s parent company.
2. Based on my positions with PRC and PBF, I am familiar with the logistics of the rail service provided to the PRC refinery in Paulsboro, New Jersey (the “Refinery”), as well as at other PBF refinery facilities including one in Delaware City, Delaware (the “Delaware Refinery”).
3. At the Delaware Refinery, the in-plant switching as well as the interchange of traffic with the serving common carrier railroad is performed by a switching contractor (Savage Services Corporation (“Savage”). The switching contractor operates outside of the gates of the Delaware Refinery and interchanges cars with the serving railroad on the railroad’s property. The serving railroad does not need to operate to or into the Delaware Refinery property. We have found this to be a safe and efficient way to operate the facility.
4. We believe that the Refinery can also be safely and efficiently served by a switching contractor in the same way that the Delaware Refinery is served.
5. In response to the questions raised by Conrail and the other railroads in their Joint Comments (the “Railroads’ Comments”), we have advised Conrail that PRC’s preferred operating plan would involve the switching contractor delivering cars to, and picking up cars from, Conrail in Conrail’s yard across the street from the Refinery. PRC does not believe that such operations would require any use of Conrail main line tracks, and it

would save Conrail the cost and expense (and diligence) of operating within the Refinery. PRC is willing to enter into a customary agreement with Conrail to govern the operations and the exchange of traffic, and has advised Conrail of its willingness to do so.

6. As noted in the SMS Protest, PRC is considering using Savage as the switching contractor for the Refinery. Based on our experience with Savage at the Delaware Refinery, we are confident in Savage's abilities to safely handle the commodities, including the hazardous materials, that need to be handled at the Refinery, and with Savage's ability to coordinate operations with the serving carriers. If PRC were to select a different switching contractor, it would of course ensure that the contractor has the experience and ability to perform safely and efficiently.

Verification

I, James Fedena, hereby verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on March 7, 2014.



James Fedena
Senior Vice President

VERIFIED STATEMENT OF

STEVEN KRYNSKI

I, Steven Krynski, hereby state as follows:

1. I am the Operations Manager of Paulsboro Refinery Company LLC (“PRC”). I have held this position since 2013. Prior to serving as Operations Manager, I served since 2000 in various other positions at the PRC refinery in Paulsboro, New Jersey (the “Refinery”), including under its prior ownership by Valero Refining Company.
2. Based on my service at the Refinery, I am familiar with the operations and service provided by SMS Rail Service, Inc. (“SMS”) at the Refinery.
3. I have reviewed the Protest filed by SMS in this proceeding, and in particular the portion in which SMS claims how safe its operations have been and how it has had no reportable incidents over the past 8 years. Protest, at 13. Those assertions are misleading if not deliberately false.
4. PRC terminated the operating agreement with SMS because PRC was not satisfied with the operations of SMS, including concerns about the safety of their operations at the refinery.
5. It is true that the termination of the SMS operating agreement was not specifically based on unsafe operations by SMS. But the operating agreement does not require a reason for the termination; it only requires 90-days’ notice.
6. PRC does not know whether SMS has reported any incidents to the FRA, or whether SMS was required to; however, based upon a review of our records for the past 5 years (January, 2009 – January, 2014), there have been 23 rail service related incidents involving SMS, including 10 derailments, 3 accidents or near misses, 1 communication

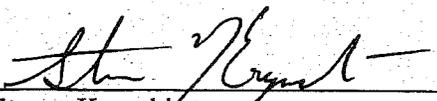
infraction, 4 safety infractions, 3 fires caused by SMS locomotives, and 2 workmanship issues. All of these incidents were brought to the attention of, and discussed between, PRC and SMS. See Exhibit A detailing the incidents.

7. The most recent incident was in January of this year. In this incident, I personally observed an employee of SMS talking on a cell phone while getting on and off a moving train in plain view of another SMS employee. I reported the incident to SMS who investigated the report and disciplined the employee. See Exhibit B.
8. In its Protest, pp. 13-14, SMS discusses the Conrail accident in Paulsboro in which residents in Paulsboro were exposed to vinyl chloride gas. However, the accident was unrelated to operations at the Refinery – it occurred off-site, and the vinyl chloride is not a product that was destined for, nor is it used at, the Refinery.

Verification

I, Steven Krynski, hereby verify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on March 6, 2014.



Steven Krynski
[title]

***"PUBLIC" VERSION
SUBJECT TO PROTECTIVE ORDER SERVED JULY 26, 2012***

EXHIBIT A

INCIDENT REPORTS

[REDACTED]

***"PUBLIC" VERSION
SUBJECT TO PROTECTIVE ORDER SERVED JULY 26, 2012***

EXHIBIT B

DISCIPLINARY ACTION

[REDACTED]