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May 3, 2013

VIA ELECTRONIC FILING
Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

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ENTERED
Office of Proceedings
May 3, 2013
Part of
Public Record

Re: *Hilco SP Rail, LLC – Acquisition and Operation Exemption – RG Steel Railroad Holding, LLC*, STB Finance Docket No. 35734

Dear Ms. Brown:

I have attached the Petition of the Maryland Department of Transportation for a Stay in the above-referenced proceedings.

Sincerely,

Allison I. Fultz

Attachment

**Before the
Surface Transportation Board
Washington, D.C.**

STB Finance Docket No. 35734

**HILCO SP RAIL, LLC – ACQUISITION AND OPERATION EXEMPTION – RG
STEEL RAILROAD HOLDING, LLC**

**PETITION OF
THE MARYLAND DEPARTMENT OF TRANSPORTATION
FOR A STAY**

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Dated: May 3, 2013

**Before the
Surface Transportation Board
Washington, D.C.**

STB Finance Docket No. 35734

**HILCO SP RAIL, LLC – ACQUISITION AND OPERATION EXEMPTION – RG
STEEL RAILROAD HOLDING, LLC**

**PETITION OF
THE MARYLAND DEPARTMENT OF TRANSPORTATION
FOR A STAY**

The Maryland Department of Transportation (“**MDOT**”) hereby petitions this Board for a stay of the effective date of the Notice of Exemption (the “**NOE**”) filed by Hilco SP Rail, LLC (“**Hilco**”) in this proceeding. Based on previous filings in related proceedings¹ regarding operation authority for the same railroad line that is the subject of this proceeding (the “**Line**”, described more fully below), MDOT has no reason to believe that Hilco’s true intent in acquiring this property that is the object of the NOE is not ultimately to scrap and salvage the Line. Because destruction of the Line, which serves as an important transportation and economic hub in Baltimore, Maryland, would cause irreparable harm to MDOT and the interests of the shipping public in the State, and therefore would not be consistent with the public interest, the Board should grant MDOT’s Petition for Stay.

¹ *MCM Rail Services LLC d/b/a Baltimore Industrial Railroad – Operation Exemption – HRE Sparrows Point, LLC*, STB Finance Docket No. 35725, and *MCM Rail Services LLC –Petition for Retroactive Exemption – In Sparrows Point, MD*, STB Finance Docket No. 35707.

BACKGROUND

On April 12, 2013, Hilco, a noncarrier, filed the NOE requesting Board authority to acquire and operate the Line, which consists of approximately 12 miles of railroad track located in Sparrows Point, Baltimore County, Maryland. Hilco SP Rail, LLC, Verified Notice of Exemption, STB Finance Docket No. 35734 (Filed April 12, 2013). According to the NOE, Hilco acquired the Line and other real property and assets of a bankrupt steel mill located in Sparrows Point (collectively, the “**Property**”) on September 14, 2012, from its affiliate, HRE Sparrows Point LLC (“**HRE**”), which itself acquired the Property as the result of bankruptcy proceedings on August 7, 2012. *Id.* at 4. At the time of its acquisition of the Property, Hilco entered into an agreement to have MCM Rail Services LLC (“**MCM**”), a noncarrier, operate the Line. *Id.* at 4-5.

Although Hilco assumed ownership of the Property and MCM agreed to begin operating over the Line on September 14, 2012, neither Hilco nor MCM sought Board authorization for acquisition or operation of the Line until December 20, 2012, when MCM filed a Petition for Retroactive Exemption (“**MCM’s Petition**”) requesting authority to operate over the Line. MCM Rail Services LLC, Petition for Retroactive Exemption, STB Finance Docket No. 35707 (Filed Dec. 20, 2013). Importantly, MCM’s Petition provided background information regarding the circumstances of and motives for the purchase of the Property. Specifically, MCM’s Petition stated that “HRE’s desired [sic] to market, sell or demolish, remove and scrap certain property, plant, equipment and improvements at the [Property]. [MCM’s parent entity] and Hillco²] have teamed on other projects in the Midwest to demolish, recycle and scrap large obsolete properties and prepare them for redevelopment.” *Id.* at 2. Furthermore, “[a]s part of the demolition and removal services, HRE and MCM negotiated an arrangement whereby for a period of forty-two

² “Hillco Industries” is the firm asserted in MCM’s Petition to be HRE’s affiliate. *Id.* at 2.

months MCM would provide rail services at the Sparrows Point site, while its parent [entity] would provide demolition services.” *Id.* at 3-4. MCM’s Petition also noted that MCM was unaware that the Line was subject to the Board’s jurisdiction when it agreed to operate the Line, and that sale of the Property was completed on an “expedited” basis. *Id.* at 1, 4-5.

MCM subsequently sought to withdraw MCM’s Petition³ and instead sought Board authorization for operation of the Line through a notice of exemption filed on March 20, 2013 (“**MCM’s NOE**”). *See* MCM Rail Services, LLC, Verified Notice of Exemption, STB Finance Docket No. 35725 (Filed Mar. 20, 2013). Concerned about preservation of the Line for future rail service in light of HRE’s clearly stated intent to salvage assets on the Property, MDOT filed a Petition for Leave to Intervene in the MCM proceedings on April 8, 2013. Petition of the Maryland Department of Transportation for Leave to Intervene, STB Finance Nos. 35725 and 35707 (Filed Apr. 8, 2013) (“**Petition to Intervene**”). Although MCM responded to the Petition to Intervene stating that it has no intent to abandon and salvage the Line, and that “[n]either MCM nor Hilco has *expressed support* for a future abandonment of the Line,”⁴ Hilco has remained silent in both its NOE and in communications with MDOT with respect to its intentions. MCM’s response to the Petition to Intervene notes that the 42-month operating license is tied to the estimated period of time required to demolish the steel mill and remove the material.⁵ Hilco has not explained whether this timeline is calculated to permit salvaging of the Line after salvaging of the industrial facility is complete.

The Board stayed the effectiveness of MCM’s Notice pending further information from MCM regarding Board authority for acquisition of the Line. *MCM Rail Services LLC d/b/a*

³ MCM, Motion to Withdraw, STB Finance Docket No. 35707 (Filed Apr. 9, 2013).

⁴ Response of MCM Rail Services LLC, d/b/a/ Baltimore Industrial Railroad to the Maryland Dept. of Transp., STB Finance Docket No. 35725 (Filed April 29, 2013), at 7 (emphasis added).

⁵ *Id.* at 8.

Baltimore Industrial Railroad – Operation Exemption – HRE Sparrows Point, LLC, STB Finance Docket No. 35725, and *MCM Rail Services LLC –Petition for Retroactive Exemption – In Sparrows Point, MD*, STB Finance Docket No. 35707, *slip op.* at 3 (Service Date April 5, 2013). The Board ordered HRE, as apparent owner of the Line, to seek Board authority or otherwise explain why such authority was not necessary. *Id.*, *slip op.* at 2. In response, Hilco filed the NOE, explaining that it, not HRE, is the owner of the Line. *NOE* at 4-5.

Based on the same concerns that prompted MDOT to file its Petition to Intervene in the MCM proceedings, MDOT now files this Petition for Stay requesting that the Board delay the effectiveness of the NOE pending the delivery of clarifying information or assurances regarding Hilco’s true interests in acquiring the Line, including its plans for continued operation of the Line following completion of the salvage of the large industrial facilities that Hilco also acquired out of the bankruptcy proceedings.

ARGUMENT

The criteria for disposition of a petition for stay are whether: (1) petitioner is likely to prevail on the merits of any challenge to the action sought to be stayed; (2) petitioner will be irreparably harmed in the absence of a stay; (3) issuance of a stay would substantially harm other parties; and (4) the public interest supports the granting of the stay. *Eighteen Thirty Group, LLC—Acquisition Exemption—In Allegany Cnty., Md.*, FD 35438, *et al.*, *slip op.* at 2 (Service Date Nov. 17, 2010); *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (“*Holiday Tours*”); and *Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958). The party seeking a stay carries the burden of

persuasion on all of the elements required for a stay. *Id.*, *slip op.* at 3. MDOT satisfies the above requirements.

(1) MDOT IS LIKELY TO SUCCEED ON THE MERITS OF A PETITION FOR
REVOCATION OF THE EXEMPTION.

MDOT is seeking to meet with representatives of Hilco to determine Hilco’s intent with respect to the Line. Barring additional information or assurances from Hilco as a result of these communications, MDOT intends to file a petition for revocation of the exemption. MDOT is likely to prevail on the merits of such a petition for revocation. As noted in *Holiday Tours*, a petitioner for stay does not need to demonstrate that the ultimate success of its claims is a mathematical probability. 559 F.2d at 843. Instead, “[t]he necessary ‘level’ or ‘degree’ of possibility of success will vary according to the court’s assessment of the other factors,” and a court “may grant a stay even though its own approach may be contrary to movant’s views of the merits.” *Id.*

Here, MDOT’s claims are likely to succeed on the merits given the information provided in MCM’s Petition along with the subsequent filings by Hilco and MCM. Pursuant to 49 U.S.C. § 10502(d), the Board may revoke an exemption in whole or in part if it finds that (1) the notice of exemption contained false or misleading information; (2) regulation is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; or (3) revocation is necessary to ensure the integrity of the Board’s processes. *S&F Ry. – Acquisition and Operation Exemption – Toledo, Peoria and Western Ry. Corp. between La Harpe and Peoria, Il.*, STB Finance Docket No. 33995 and *Kern W. Schumacher and Morris H. Kulmer – Continuance in Control Exemption – SF&L Ry.*, STB Finance Docket No. 33996, (Service Date Oct. 17 2002), (“*S&F Railway*”), *slip op.* at 10 (citations omitted).

In particular, the Board may revoke an exemption for an active rail line where the intent of the acquiring party is to degrade, abandon, and salvage that line. *See id.*, slip op. at 19. Such a revocation is supported by the national rail policy under 49 U.S.C. § 10101, including §§ 10101(4) ensuring the development and maintenance of a sound rail system; (5) fostering sound economic conditions in transportation; and (9) encouraging honest and efficient management of rail carriers. *See S&F Ry. – Acquisition and Operation Exemption – Toledo, Peoria and Western Ry. between La Harpe and Peoria, Il.*, STB Finance Docket No. 33995, *Kern W. Schumacher and Morris H. Kulmer – Continuance in Control Exemption – SF&L Ry.*, STB Finance Docket No. 33996, and *SF&L Ry. – Abandonment Exemption – In Hancock, McDonough, Fulton and Peoria Counties, IL.*, STB Docket No. AB-448 (Sub-No. 2X, slip op. at 3 (Service Date Jan. 31, 2003) (“*S&F Railway IP*”).

According to MCM’s Petition, HRE, Hilco’s affiliate and the party originally represented as owning the Line, acquired the Property for the purpose of scrapping assets contained on the Property. In discussing its salvaging activities, MCM’s Petition did not detail which assets on the Property would be subject to salvaging, nor did it distinguish between the Line and other assets to be scrapped within the Property. Hilco (or its affiliates) and MCM’s parent entity have teamed up in the past to scrap industrial sites, but neither company nor their affiliates involved in the operation of the Line have sought to operate a common carrier line before. The assertions in MCM’s Petition that MCM—the operator of the Line—was not initially aware that the Line was subject to the Board’s jurisdiction, strongly suggest that Hilco was similarly unaware of the Line’s status when it acquired the Property, as does Hilco’s seven month delay in seeking after-the-fact authorization from the Board. The NOE contains no statement to refute the broad-based

description of salvage and demolition of the Property's existing facilities set forth in MCM's Petition.

If Hilco intends to salvage assets on the Property, did not intend to acquire and operate a common carrier line, and entered into an operating agreement that lasts only as long as it will take to salvage assets on the Property, it is entirely reasonable, considering the circumstances and without further information or assurances otherwise, to infer that Hilco is intending to ultimately scrap and salvage the Line. Hilco's NOE remains silent as to its intent with respect to the Property's and Line's future. The only indication MDOT has that Hilco does not intend to salvage the Line is based on MCM's statements regarding MCM's intent, as well as a statement from MCM that Hilco has *not expressed support* for a future abandonment of the Line.⁶ MCM's assertions that it has no intent to salvage or abandon the Line, while welcomed and appreciated, cannot substitute for meaningful and substantiated assurances from Hilco itself, as owner of the Line, that its intent is not to salvage the Line after scrapping other non-rail assets of the Property. Indirect statements such as MCM's regarding Hilco's intent are not enough to contradict the inferences drawn from the circumstances surrounding Hilco's acquisition of the Property.

Much of what is known about this transaction so far suggests that Hilco's intent is to ultimately scrap and salvage the Line. Thus, the Board's exemption authority is not appropriate here because the transaction is inconsistent with the national rail transportation policy set forth at 49 U.S.C. § 10101. Specifically, the proposed transaction will not ensure the development and maintenance of a sound rail system, foster sound economic conditions in transportation, or encourage honest and efficient management of rail carriers. 49 U.S.C. § 10101(4), (5), (9); *S&F Railway II*, slip op. at 3. As a result, an MDOT petition for revocation of Hilco's NOE would be

⁶ Response of MCM Rail Services LLC, d/b/a/ Baltimore Industrial Railroad to the Maryland Dept. of Transp., STB Finance Docket No. 35725 (Filed April 29, 2013), at 7.

likely to succeed on the merits. In addition to the merits, the three remaining factors weigh in favor of staying the effective date of the NOE, further supporting MDOT's Petition for Stay.

(2) MDOT'S INTEREST IN PROTECTING THE VIABILITY OF ESSENTIAL RAIL ASSETS IN THE STATE WILL BE HARMED IF THE TRANSACTION IS ALLOWED TO PROCEED WITHOUT FURTHER INQUIRY INTO HILCO'S INTENTIONS AS TO THE LINE.

MDOT will be irreparably harmed in the absence of a stay should Hilco seek to salvage the Line or otherwise render it inoperable after obtaining authority to acquire and operate the Line. It is true, of course, that MCM has sought operating authority that will, if it becomes effective, be revocable only upon receipt of abandonment authorization from this Board. However, it is equally true that if Hilco and MCM have plans for use of the property currently occupied by the Line for purposes other than rail service, they can together use the forthcoming 42 month period as a time to allow the Line and service over it to deteriorate, thus driving away the shippers that currently rely on service over the Line. The importance of this line to the twelve shippers currently served and to the State's plans for growth and improvement of the port facilities to which Sparrows Point is adjacent, boldly underscore the importance of preventing this important piece of rail infrastructure from falling into the hands of companies whose long term interest may be solely in the scrap value, not the ongoing operating integrity, of the Line.

As the agency responsible for overseeing all aspects of transportation within the State of Maryland, MDOT is tasked with protecting the interests of the State's transportation infrastructure and ensuring safe and efficient movement of people and goods. The Property and the rest of Sparrows Point occupy an advantageous location, whose position is enhanced by active rail service connecting Sparrows Point businesses to the national rail network. That rail service, along with connections to the water and the interstate highway network, allows Sparrows Point to function as a true intermodal transportation hub. Accordingly, MDOT is

keenly interested in ensuring that the Line remains in active operation in order to maintain service to the businesses currently served by the Line and to keep open the possibility of further opportunities for developing economic activity.

(3) ANY HARM TO HILCO AND MCM IS OUTWEIGHED BY THE POTENTIAL HARM TO THE VITAL TRANSPORTATION INTERESTS OF THE STATE OF MARYLAND.

Neither Hilco nor MCM will be harmed by a stay. Indeed, any harm that Hilco or MCM may experience arises due to their own delay in presenting the transactions to this Board for approval (or exemption) and to the statements they have made about the intention to scrap the assets acquired in the bankruptcy proceedings.

Hilco, not the State and not anyone else, is responsible for the delays here and for the uncertainty about the potential fate of this line of railroad. A further delay caused by staying the effective date of the Notice until the Board can better determine Hilco's intent with respect to the Line should not substantially harm Hilco or MCM.

(4) THE PUBLIC INTEREST WILL BE SERVED BY GRANTING MDOT'S REQUEST FOR A STAY.

Finally, issuance of a stay is entirely in the public interest. Given the importance of Sparrows Point as a current and potential economic and transportation hub, delaying the effectiveness of the Notice until the Board determines whether Hilco's acquisition of the Line will jeopardize its future is consistent with the public interest. As the state agency serving the transportation needs of the public, and whose officials must answer to publicly elected officials, MDOT is in a prime position to assert the interests of the public. Furthermore, members of the public most directly affected by the acquisition of the Line, the shippers that the Line serves, will obtain the greatest benefit from ensuring that Hilco's acquisition does not result in the Line's destruction.

CONCLUSION

MCM's Petition, which discussed the reasons for acquisition of the Line, raises serious questions about Hilco's intentions with respect to the Line's future continued operation. While MCM's subsequent filings in a related proceeding attempt to allay the fears created by the initial documents, Hilco itself has not spoken. Until Hilco provides further substantiated assurances regarding continuation of service on the Line, the Board should stay the effective date of Hilco's NOE.

WHEREFORE, and in view of the foregoing, MDOT respectfully requests this Board to stay the effective date of the NOE pending a determination regarding Hilco's intent regarding the Line and the relationship between Hilco's acquisition of the Property and MCM's operation of the Line.

Dated: May 3, 2013

Respectfully submitted,



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Certificate of Service

I hereby certify that I have this 3rd day of May, 2013, caused to be served a copy of the foregoing Petition of the Maryland Department of Transportation for a Stay upon the following parties of record by first class mail, with postage prepaid:

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