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January 8, 2015

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, D. C. 20423

Re: Docket No. AB 1095 (Sub-No. 1), Paulsboro Refining Company, LLC—
Adverse Abandonment—In Gloucester County, N.J.

Dear Ms. Brown:

Attached for filing in the subject proceeding is the Petition of SMS Rail Service, Inc. for a Stay Pending Judicial Review.

A Payment Form giving my credit card information for the \$300 filing fee was faxed to you earlier today.

Copies of this letter and its attachment are being served by me this day on each party of record by e-mailing them to their attorneys.

If you have any question concerning this filing or if I otherwise can be of assistance, please let me know.

Sincerely yours,


Fritz R. Kahn

Att.

Cc: Eric M. Hockey, Esq.
David L. Coleman, Esq.
Paul R. Hitchcock, Esq.
David C. Ziccardi, Esq.

SURFACE TRANSPORTATION BOARD

Docket No. AB 1095 (Sub-No. 1)

PAULSBORO REFINING COMPANY LLC--ADVERSE
ABANDONMENT—IN GLOUCESTER COUNTY, N.J.

PETITION OF SMS RAIL SERVICE, INC.
FOR A STAY PENDING JUDICIAL REVIEW

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Attorney for

SMS RAIL SERVICE, INC.

Dated: January 8, 2015

SURFACE TRANSPORTATION BOARD

Docket No. AB 1095 (Sub-No. 1)

PAULSBORO REFINING COMPANY LLC--ADVERSE
ABANDONMENT—IN GLOUCESTER COUNTY, N.J.

PETITION OF SMS RAIL SERVICE, INC.
FOR A STAY PENDING JUDICIAL REVIEW

Petitioner, SMS Rail Service, Inc. (“SMS”), pursuant to 49 U.S.C. § 721(b)(4) and 49 C.F.R. § 1115.5(a), respectfully requests the Board to enter a stay of its Decision, served December 2, 2014, pending its judicial review and in support thereof states, as follows:

SMS’s stay request satisfies the standards of Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977), and Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

There is a strong likelihood that SMS will prevail on the merits. The Board’s Decision is arbitrary, capricious and not in accordance with law. 5 U.S.C. § 706(2)(A). The adverse abandonment of a rail carrier intent and capable of continuing its operations to be permit its replacement by a noncarrier contract switcher is unprecedented, and the Board failed to discuss its rationale for the departure from precedent. The abandonment of a rail carrier’s line, whether voluntary or adverse, must meet the standard of 49 U.S.C. § 10903(d), and satisfying the demands of the track’s owner fails to establish that the present or future public convenience and necessity requires or permits the abandonment and will not have a serious, adverse impact on community development. The

determination of the safety of operations will not be compromised by the replacement of a rail carrier by a noncarrier contract switcher is not within the delegated authority of the Board, and the Board failed to seek the views of the Federal Railroad Administration (“FRA”) which, pursuant to 49 U.S.C. Part A—Safety—of Subtitle V of the U.S. Code, is the agency empowered to regulate the safety of railroad operations. The Board in its Decision adopted the analysis and recommendations of the Final Environmental Analysis of its Office of Environmental Analysis, but the Final Environmental Analysis is not of record and was not made available to SMS and the other parties. SMS advanced arguments and offered evidence which are not mentioned in the Board’s Decision and presumably were not considered by the Board in reaching its conclusion. In the absence of express language in 49 C.F.R § 10903 applicable to the facts in this case, the Board erred as a matter of law in construing 49 C.F.R. § 10903(b)(2) as requiring the imposition of the employee protective conditions of Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91, 98 (1979). It would be unreasonable for a rail carrier that did not seek the abandonment authorization to be subject to the employee protective conditions. If those conditions are imposed on SMS, rather than the applicant for its adverse abandonment, namely Paulsboro Refining Company (“PRC”), SMS will suffer irreparable harm.

SMS will suffer irreparable harm in the absence of a stay. Financial loss normally will not satisfy the requirement of irreparable harm, for the appropriate legal action can recover the funds upon the petitioner’s prevailing in the reviewing court. See Wis. Gas Co. v. FERC, 758 F. 2d 669, 674 (D.C. Cir. 1985). That, however, is not the case in the

instant proceeding. The Board in its Decision imposed the employee protective conditions of Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C, 91, 98 (1979), and, if those conditions are applied to SMS, SMS will need to pay its employees – the eleven engineers, conductors, maintenance of way and other workers who have maintained and operated SMS at the Paulsboro refinery -- the difference between their current wages and what, if anything, they are able to earn working elsewhere pending the outcome of the judicial review proceeding. Even if SMS were to prevail and the Board’s Decision were to be set aside by the reviewing court, SMS would be unable to gain the refund of the sums it paid the displaced employees.

No interested party will be substantially harmed. To the contrary, if a stay pending judicial review were entered by the Board, the Paulsboro refinery would continue to receive the satisfactory and safe service which it has received from SMS for the past fourteen years.

The public interest supports the granting of the stay. It stands to reason that the residents of Paulsboro and the adjacent communities and the drivers of the many trucks and cars on Billingsport Road which pass the Paulsboro refinery’s railroad entrance are better off as long as the maintenance and operations of the tracks within the refinery are entrusted to SMS, a rail carrier operating FRA compliant locomotives crewed by FRA certified engineers and conductors, than they would be if SMS were replaced by Savage Service Group (“Savage”), the non-carrier contract switcher proposed in PRC’s application for adverse abandonment. As a non-carrier contract switcher, Savage would not need to comply with any of the FRA’s regulations. Neither PRC nor Savage has offered no evidence of Savage’s past performance.

WHEREFORE, SMS Rail Service, Inc. respectfully requests the Board to enter a stay pending judicial review.

Respectfully submitted,

SMS RAIL SERVICE, INC.

By its attorney,



Fritz R. Kahn

Fritz R. Kahn, P.C.

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Washington, DC 20036

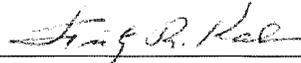
Tel.: (202) 263-4152

Dated: January 8, 2015

CERTIFICATE OF SERVICE

I certify that I this day have served the foregoing Petition on the Paulsboro Refining Company, Norfolk Southern Railway Company, CSX Transportation, Inc. and Consolidated Rail Corporation by e-mailing copies to their attorneys, Eric M. Hockey, Esq., at ehockey@clarkhill.com, David L. Coleman, Esq., at david.coleman@nscorp.com, Paul R. Hitchcock, Esq. at Paul_Hitchcock@CSX.com, and David C. Ziccardi, Esq. at David.Ziccardi@Conrail.com.

Dated at Washington, DC, this 8th day of January, 2015.



Fritz R. Kahn