

SERVICE DATE – MARCH 2, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1095X

SMS RAIL SERVICE, INC.—ADVERSE DISCONTINUANCE OF SERVICE  
EXEMPTION—GLOUCESTER COUNTY, NJ

Digest:<sup>1</sup> Paulsboro Refining Company LLC (PRC) asks that the Board find that a railroad company no longer needs to operate tracks on the refinery’s property. Under Board precedent, “adverse abandonment or discontinuance” relief may be obtained only through an application. Because PRC has filed a petition for exemption rather than an application, its filing is dismissed. PRC may refile its request in an application, and the Board will consider the merits of the refinery’s case at that time.

Decided: March 1, 2012

On January 10, 2012, Paulsboro Refining Company LLC (PRC) filed a petition under 49 U.S.C. § 10502 seeking exemption from the provisions of 49 U.S.C. § 10903 for the adverse discontinuance of rail service provided by SMS Rail Service, Inc. (SMS) over a line owned by PRC. On January 10, as clarified on January 11 and January 12, SMS submitted replies seeking rejection of PRC’s petition for exemption. PRC filed responses on January 11 and 17, 2012, to SMS’ submissions.<sup>2</sup>

As discussed below, a petition for exemption is not the proper mechanism for seeking an adverse discontinuance. Under agency precedent, such relief must be sought in an application. While we are therefore dismissing PRC’s petition for exemption, dismissal is without prejudice. Accordingly PRC may seek the relief through an application under the procedures in

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> PRC argues that the Board should reject or strike the second filing made on January 12 as either a second reply not permitted under 49 C.F.R. § 1104.13(a) or a “reply to a reply” pursuant to 49 C.F.R. § 1104.14(c). We will accept SMS’ January 12 filing into the record along with PRC’s reply to that filing in order to provide for a more complete record on Board processes. Accepting these filings will also not unduly delay the proceeding.

49 C.F.R. pt. 1152, and the Board will review the merits of an application after it is properly submitted.

## BACKGROUND

PRC owns a 970-acre refinery in Paulsboro, N.J. Within this facility, it owns 5.8 miles of railroad track. SMS has provided service over this track since 2000, when the railroad entered into an operating agreement with the facility's prior owner, Valero Refining Company – New Jersey (Valero-NJ).<sup>3</sup> Under the parties' agreement, as amended, SMS provides common carrier service by interchanging traffic with Norfolk Southern Railway Company, CSX Transportation, Inc., or their agent, Consolidated Rail Corporation. SMS also provides plant switching services under the contract.

PRC states that it no longer needs or seeks to use the common carrier services of SMS, and that it wishes to perform its own plant switching through the use of a noncarrier switching contractor. PRC claims that it has given SMS notice of termination, as provided by their contract. PRC now asks the Board to grant an exemption for the adverse discontinuance of SMS' service, because the railroad has allegedly refused to file for discontinuance authority.

SMS opposes PRC's request. SMS argues that agency precedent precludes the use of the exemption process to obtain agency authority for an adverse discontinuance. The railroad also argues that the petition should be rejected because PRC failed to serve its filing on designated officials 10 days in advance of the filing of its petition, as required by 49 C.F.R. § 1152.50 (d), and failed to publish notice in the newspaper, as required by 49 C.F.R. § 1105.12.

PRC acknowledges that the Board has indicated in the past a practice of requiring parties seeking an adverse abandonment or discontinuance to do so through an application.<sup>4</sup> It points out, however, that the case SMS cites in support of the practice involved a refusal to allow an adverse abandonment through a third-party's use of the Board's expedited notice of exemption process, whereas in this proceeding PRC has filed a petition for exemption. PRC asserts that allowing a petition for exemption in this case is particularly fitting, because there is no need for an analysis of financial burdens on the existing common carrier, or of track conditions, and because the only other shipper on the line, ExxonMobil, agrees to the termination of SMS' service and the substitution of a new noncarrier switching agent. PRC states that in Cheatham County Rail Authority—Application and Petition for Adverse Discontinuance, FD 32049 (ICC served Nov. 4, 1992) (Cheatham County), the agency allowed a party to pursue an adverse discontinuance through a petition for exemption.

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<sup>3</sup> See SMS Rail Service—Acquis. and Oper. Exemption—Valero Refining Co.—N. J., FD 33927 (STB served Sept. 22, 2000). According to PRC, on December 13, 2010, Valero-NJ changed its name to the petitioner's name, Paulsboro Refining Company LLC, and on December 17, 2010, PBF Holding Company LLC acquired all of the ownership interests of PRC.

<sup>4</sup> Letter filed on January 17, 2012, at 2.

## DISCUSSION AND CONCLUSIONS

Under the Board's long-standing practice, parties are not permitted to use our exemption procedures in adverse discontinuance or abandonment matters.<sup>5</sup> Adverse discontinuances and abandonments involve removing a railroad's common carrier rights on a line based on the request of a third party, something the Board takes very seriously. The agency has consistently dismissed petitions for exemption when those filing seek adverse abandonment or adverse discontinuance.<sup>6</sup> In numerous other cases, parties have initiated adverse abandonments by filing applications, and the agency has processed them accordingly.<sup>7</sup>

PRC argues that the Board's regulations, including its special rules applicable to petitions for abandonment or discontinuance exemptions, 49 C.F.R. § 1152.60, do not on their face preclude using the exemption procedures in this type of case. We note those regulations, however, do not address whether an adverse abandonment or discontinuance would be appropriate for an exemption petition. Rather, 49 C.F.R. § 1152.60 merely sets forth the steps parties in abandonment petition proceedings must take in addition to, or in lieu of, our more general exemption procedures in 49 C.F.R. pt. 1121. Such regulations in no way contravene the Board's past rulings that particular cases—including, but not limited to adverse abandonments—warrant an application.

PRC also claims that using the exemption process here would not pose a detriment to any party, because the carrier still has an opportunity to defend itself in that process. But opposing parties have this opportunity in every petition for exemption proceeding. Yet the Board has not found the opportunity to submit a reply to be a justifiable basis for permitting petitions for exemption in instances where an application is necessary to ensure development of a full and adequate record for Board consideration. PRC has provided insufficient reasoning why the Board should depart from its long-standing precedent.<sup>8</sup>

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<sup>5</sup> See, e.g., Southern Pacific Rail Corp.—Aban. Exemption—In Garfield, Eagle, and Pitkin Cntys., Colo., AB 12 (Sub-No. 190X) (STB served June 10, 1996) (Southern Pacific).

<sup>6</sup> See Mass. Bay Transp. Auth.—Exemption—Discon. of Service in Arlington, Bedford, and Lexington, Mass., FD 31269 (ICC served Aug. 30, 1990) (MBTA), and Wisc. Dept. of Transp.—Aban. Exemption, FD 31303 (ICC served Dec. 5, 1988) (WisDot), both of which involved petitions for exemption.

<sup>7</sup> See, e.g., Salt Lake City Corp.—Adverse Aban.—In Salt Lake City, Utah, AB 33 (Sub-No. 183) (STB served Mar. 8, 2002).

<sup>8</sup> PRC relies on the Cheatham County proceeding, but that proceeding comports with past practice. There, the owner of the line and a new railroad wishing to operate on it filed an “application and petition” seeking “whatever [Interstate Commerce] Commission authorization is necessary.” When instituting an investigation in that proceeding, the agency held that “the exemption alternative is not available in this adverse discontinuance matter,” citing WisDot and  
(continued...)

For these reasons, we will dismiss the petition for exemption filed by PRC. Our dismissal is without prejudice. Should PRC choose to pursue an adverse discontinuance, it may file a formal application under 49 U.S.C. § 10903.<sup>9</sup>

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. SMS' January 12 filing and PRC's reply are accepted.
2. PRC's petition for exemption is dismissed without prejudice.
3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.

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(...continued)

MBTA, and granted discontinuance authority after review of the applicant's application. Cheatham Cnty. Rail Auth.—Application and Petition for Adverse Discon., FD 32049, slip op. 1 (ICC served July 21, 1992).

<sup>9</sup> Because SMS alone has the common carrier obligation for this line, any application filed should be for adverse abandonment authority.