

SERVICE DATE – DECEMBER 2, 2014

SURFACE TRANSPORTATION BOARD

DECISION

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

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

Digest:¹ Paulsboro Refining Company LLC (PRC), which owns approximately 5.8 miles of rail line operated by SMS Rail Services, Inc. (SMS) within PRC’s refinery in Paulsboro, N.J., no longer wishes to receive common carrier service from SMS. PRC allegedly has terminated its operating agreement with SMS, but SMS refuses to terminate its operations and vacate the property. The Board is granting, subject to conditions, PRC’s application for “adverse abandonment.”

Decided: November 25, 2014

On January 10, 2014, Paulsboro Refining Company LLC (PRC) filed an application under 49 U.S.C. § 10903, requesting that the Board authorize the third-party (“adverse”) abandonment of approximately 5.8 miles of rail line (the Line) it owns, which is currently operated by SMS Rail Service, Inc. (SMS), a Class III railroad.² PRC no longer wishes to receive common carrier service from SMS, but instead have switching operations performed by Savage Services Group (Savage), a noncarrier contract operator. Savage would provide contract service to PRC and ExxonMobil Corporation (ExxonMobil), the only customers served from tracks within PRC’s refinery. SMS opposes the application. As discussed below, we find that granting adverse abandonment here, subject to certain conditions, is consistent with § 10903.

BACKGROUND

PRC owns the Line, which lies within PRC’s 970-acre refinery in Paulsboro, N.J. SMS has provided service over the Line since August 2000, when it entered into an operating agreement with the facility’s prior owner, Valero Refining Company – New Jersey, and obtained

¹ 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).

² The Board determined in a decision served on March 2, 2012, that any attempt to remove SMS from the Line should be made through an adverse abandonment application because SMS alone has the common carrier obligation on the Line.

operating authority from the Board.³ Under the agreement, as amended, SMS interchanges traffic with Consolidated Rail Corporation (Conrail), on behalf of Norfolk Southern Railway Company (NSR) and CSX Transportation, Inc. (CSXT).⁴ SMS also provides plant switching services pursuant to the agreement.

PRC asserts that it no longer requires common carrier service from SMS. Instead, PRC wishes to have switching operations at the refinery performed by a noncarrier (Savage), pursuant to a private contract. PRC states that while SMS serves ExxonMobil, ExxonMobil “can also be served by PRC’s contract switching carrier.”⁵ Furthermore, ExxonMobil states that it “takes no exception” to the proposed abandonment. PRC alleges that it has given SMS proper notice of termination, but that SMS has refused to terminate its operations or to file for abandonment authority. PRC states that it filed the application seeking to have the Board remove its jurisdiction over SMS’s operation of the Line so that PRC can pursue state law remedies in its dispute with SMS.⁶

Notice of PRC’s application was served and published in the Federal Register on January 30, 2014. NSR, CSXT, and Conrail (collectively, the Interchange Carriers) jointly filed comments on February 20, 2014. Although the Interchange Carriers take no position on whether the Board should grant the application, they ask that the Board, inter alia: (1) require PRC to clarify whether it expects that Conrail, on behalf of CSXT and NSR, will physically deliver rail traffic into PRC’s facility or whether PRC intends to have its switching contractor perform operations similar to SMS’s current operations; (2) afford the Interchange Carriers an additional opportunity to comment on the application once that clarification has been provided; and (3) stay the effectiveness of any grant of abandonment authority until the parties have first executed all

³ See SMS Rail Serv.—Acquis. & Oper. Exemption—Valero Ref. Co.—N.J., FD 33927 (STB served Sept. 22, 2000).

⁴ SMS states that the interchange track, which it maintains and operates, is across the street from the refinery in a yard owned by ExxonMobil. Conrail calls this the Paulsboro Yard and claims to own the interchange track.

⁵ Based on agency precedent, which the Board applies here, Savage’s proposed post-abandonment handling of PRC’s and ExxonMobil’s traffic in contract rail service would not be subject to our jurisdiction. See, e.g., Consol. Rail Corp.—Pet. for Decl. Order, 1 I.C.C. 2d 284 (1984). Unlike SMS’s service, there is no evidence of record (e.g., a common carrier rate) that Savage would be holding out to provide its service to the general public at the refinery. Under this precedent, should Savage at some point in the future intend to hold itself out as a provider of rail transportation to the general public at the refinery or otherwise engage in common carriage service, it would need to obtain operating authority from the Board.

⁶ PRC’s application represents its second attempt to remove the Board’s jurisdiction over this trackage. The Board rejected PRC’s first attempt for procedural reasons. An explanation of PRC’s initial attempt, the Board’s imposition of a protective order, and the Board’s exemption and waiver of application requirements not necessary in this case are found in the two decisions served in this proceeding on July 26, 2012.

necessary operating and other agreements so as to assure an orderly transition of operations and service.

On February 24, 2014, SMS filed a protest opposing PRC's application and describing its ongoing litigation with PRC.⁷ SMS argues that the Board has routinely denied adverse abandonment applications where, as here, the carrier in question stands ready to provide continued rail service.⁸ SMS adds that neither Valero nor PRC has ever expressed dissatisfaction with its service by filing a complaint or otherwise. SMS asserts that its agreement with PRC did not require SMS to promptly seek abandonment authority upon its termination. SMS also questions whether Savage has the expertise to safely handle hazardous materials and raises concerns that, as a noncarrier, Savage would not be subject to federal regulation.

On March 10, 2014, PRC filed a reply clarifying for the Interchange Carriers the nature of the proposed operations that would take place if SMS were removed from the Line and responding to SMS's claims. As part of its reply, PRC questions SMS's safety record and includes a verified statement from PRC's Operations Manager, Steven Krynski, and two exhibits containing a list of 23 alleged incidents and a disciplinary report concerning SMS's operations.⁹ In a pleading filed on April 4, 2014, SMS presents a verified statement from Mr. James R. Pfeiffer, SMS's Superintendent of Operating Practices, responding to Krynski's statement and examining each of the 23 alleged safety incidents raised by PRC. On April 17, 2014, PRC replied, arguing that SMS has not refuted the safety concerns.¹⁰

⁷ According to SMS, on April 3, 2012, PRC brought an action against SMS in the Superior Court of New Jersey, Gloucester County, alleging SMS's breach of the parties' operating agreement.

⁸ See Norfolk S. Ry.—Adverse Aban.—St. Joseph Cnty., Ind., AB 290 (Sub-No. 286) (STB served Apr. 17, 2012); Yakima Interurban Lines Ass'n—Adverse Aban.—in Yakima Cnty., Wash., AB 600 (STB served Nov. 19, 2004); Seminole Gulf Ry.—Adverse Aban.—in Lee Cnty., Fla. (Seminole Gulf), AB 400 (Sub-No. 4) (STB served Nov. 18, 2004); Waterloo Ry.—Adverse Aban.—Lines of Bangor & Aroostook R.R. & Van Buren Bridge Co. in Aroostook Cnty., Me., AB 124 (Sub-No. 2) (STB served May 3, 2004); Salt Lake City Corp.—Adverse Aban.—in Salt Lake City, Utah, AB 33 (Sub-No. 183) (STB served Mar. 8, 2002).

⁹ Both exhibits were designated "Highly Confidential" and were redacted from the public version of PRC's March 10 filing. On March 11, 2014, SMS petitioned that the Board redesignate the sensitive material as "Confidential." On March 19, 2014, PRC responded to SMS's petition. Although PRC did not oppose the redesignation, it did oppose allowing SMS to file an additional statement after SMS's review of the redesignated material. SMS subsequently gained access to this material.

¹⁰ In the April 4 pleading, SMS asked the Board to accept the Pfeiffer statement into the record but PRC objected in the April 17 reply. In a decision served on April 29, 2014, the Board, among other things, accepted the April 4 and April 17 filings and provided the Interchange Carriers an opportunity to respond to PRC's March 10 filing.

On May 19, 2014, the Interchange Carriers filed a statement reiterating their neutral position on the abandonment and their request for executed agreements prior to the effectiveness of any abandonment authority granted here. If the Board grants the abandonment, they ask that SMS be required to cooperate fully with all of the parties during the transition-of-service period. On July 15, 2014, PRC submitted a further filing alleging that SMS has had three additional safety incidents, including one derailment. SMS submitted a reply on August 4, 2014, taking issue with PRC's claims. On September 23, 2014, PRC submitted another filing alleging additional derailments. SMS replied to the filing on October 10, 2014. In this filing, SMS asserts that the events described in the September 23 filing caused no damage. SMS also responds to PRC's concerns about safety by reiterating its argument that certain federal safety regulations would not apply under PRC's plan to convert to private switching operations.

DISCUSSION AND CONCLUSIONS

Legal Standard. Under 49 U.S.C. § 10903(d), the standard that applies to any application for authority to abandon a line of railroad is whether the present or future public convenience and necessity (PC&N) require or permit the proposed abandonment. In applying this standard in a third-party or adverse abandonment context, the Board considers whether there is a present or future public need for rail service over the line and whether that need is outweighed by other interests.¹¹ As part of the PC&N analysis, the Board must consider whether the proposed abandonment would have a serious, adverse impact on rural and community development. 49 U.S.C. § 10903(d). The environmental impacts of the proposed abandonment also must be considered, and, pursuant to 49 U.S.C. § 10903(b)(2), affected rail employees must be adequately protected.

The Board has exclusive and plenary jurisdiction over rail abandonments to protect the public from an unnecessary discontinuance, cessation, interruption, or obstruction of available rail service.¹² Accordingly, the Board typically preserves and promotes continued rail service where a carrier has expressed a desire to continue operations and has taken reasonable steps to acquire traffic.¹³ On the other hand, the Board does not allow its jurisdiction to be used as a bar to state law remedies in the absence of an overriding federal interest.¹⁴ If adverse abandonment

¹¹ See N.Y. Cross Harbor R.R. v. STB, 374 F.3d 1177, 1180 (D.C. Cir. 2004); City of Cherokee v. ICC, 727 F.2d 748, 751 (8th Cir. 1984). See also Seminole Gulf.

¹² See Modern Handcraft, Inc.—Aban., 363 I.C.C. 969, 972 (1981).

¹³ See Chelsea Prop. Owners—Aban.—Portion of Consol. Rail Corp.'s West 30th Street Secondary Track in New York, N.Y., 8 I.C.C. 2d 773, 779 (1992), aff'd sub nom. Consol. Rail Corp. v. ICC (Conrail), 29 F.3d 706 (D.C. Cir. 1994).

¹⁴ See Kan. City Pub. Serv. Freight Oper.—Exemption—Aban. in Jackson Cnty., Mo., 7 I.C.C. 2d 216 (1990). See also CSX Corp. & CSX Transp., Inc.—Adverse Aban. Application—Can. Nat'l Ry. & Grand Trunk W. R.R., AB 31 (Sub-No. 38) (STB served Feb. 1, 2002).

is granted, the decision removes the agency's jurisdiction, enabling the applicant to pursue other legal remedies against the incumbent carrier, if necessary.¹⁵

SMS notes that the agency has denied adverse abandonment applications where the carrier in question stood ready to provide continued rail service and claims those cases provide relevant precedent. This case, however, involves a landlord/tenant dispute, and the agency's line of cases on that point is more analogous.¹⁶

PC&N Analysis. Applying the above principles to this case, we find that the present or future PC&N both require and permit the proposed adverse abandonment. The record demonstrates that there is no present or future need for common carrier service because PRC, the owner of the Line and its primary shipper, intends to replace SMS's service with that of Savage, a noncarrier contract switching operator, pursuant to a private contract. ExxonMobil, the only other shipper receiving SMS's service, does not take exception to the removal of SMS's common carrier service. Moreover, there should be no adverse impact on shippers or on rural and community development because the service provided by Savage would replace the common carrier service that SMS is now providing.

SMS's safety evidence¹⁷ fails to demonstrate that removal of our jurisdiction would not be in the public interest. The record demonstrates that Savage has been providing contract service in a safe and efficient manner for PRC's parent, PBF Holding Company LLC, at a Delaware facility.¹⁸ SMS errs in suggesting that there will be inadequate safety regulation of the traffic at issue here if Savage takes over these operations. Although the Federal Railroad Administration rules for transportation of hazardous materials by rail would not apply without a common carrier operating within the facility, other federal safety laws would continue to apply to operations involving hazardous materials at Paulsboro. See 49 U.S.C. § 5101, et seq.

¹⁵ See Conrail, 29 F.3d at 709; Modern Handcraft, 363 I.C.C. at 972.

¹⁶ See Tacoma E. Ry.—Adverse Discontinuance of Oper. Application—Line of City of Tacoma in Pierce, Thurston & Lewis Cntys., Wash., AB 548 (STB served Oct. 16, 1998), reopening denied (STB served Mar. 3, 1999). See also Jacksonville Port Auth.—Adverse Discontinuance—in Duval Cnty., Fla., AB 469 (STB served July 17, 1996); Cheatham Cnty. Rail Auth. “Application and Petition” for Adverse Discontinuance, AB 379X (ICC served Nov. 4, 1992). Unlike those adverse discontinuance cases, this case involves an adverse abandonment because PRC is not only seeking to evict the operator from the Line, but is also seeking to convert the Line from a regulated line. Nevertheless, the facts presented here are very similar to the circumstances at issue in these adverse discontinuance cases, where the Board has found that a tenant's service was no longer wanted or needed and that there was no federal interest in retaining the agency's jurisdiction.

¹⁷ SMS describes its own safety record and questions whether Savage could safely handle toxic materials, especially in light of a recent spill near the refinery. It also provides an article discussing a recent safety incident involving Savage at a Utah facility.

¹⁸ PRC Reply, V.S. Fedena (Mar. 10, 2014).

Moreover, the cars being used for operations within the refinery will remain subject to federal hazardous materials regulations requiring such steps as placarding. See 49 C.F.R. pts. 100-185. In addition, all federal safety laws that are currently applicable to the common carrier service provided by the Interchange Carriers for shipments from Paulsboro would continue to apply.

Environmental Matters. The Board is required to consider the environmental impacts of the proposed abandonment to meet its obligations under the National Environmental Policy Act, 42 U.S.C. § 4321, et seq. PRC submitted a combined environmental and historic report with its application and notified the appropriate federal, state, and local agencies of the opportunity to submit information concerning the environmental impacts of the proposed abandonment. See 49 C.F.R. § 1105.11. The Board's Office of Environmental Analysis (OEA) examined the environmental and historic report, verified its data, and analyzed the probable environmental effects of the proposed action. OEA issued for public review and comment an Environmental Assessment (EA) on February 12, 2014, concluding that the proposed abandonment would not significantly impact the quality of the human environment. Here, if operations continue through the use of the noncarrier switching contractor, there would be no salvage of track or diversion of traffic. Accordingly, no environmental conditions were recommended in the EA.

OEA received one comment, a letter from SMS, dated March 14, 2014. SMS's letter identifies a number of safety-related concerns involving future operations of the Line should adverse abandonment be authorized. In a Final EA issued March 19, 2014, OEA was not persuaded that the proposed abandonment raised potentially significant environmental concerns or that SMS had shown a need for any environmental conditions. Rather, OEA pointed to information in the record indicating that PRC planned to contract with Savage, a switching contractor with experience in operations at refinery facilities for operations, and that PRC would continue to use the common carrier service of the Interchange Carriers (which would continue to be subject to all applicable federal safety regulations) for shipments to and from the refinery.

We adopt the analysis and recommendations in the EA and Final EA. The concerns that SMS raises before OEA are similar to those it has presented in opposition to PRC's application. As discussed above and in the EA and Final EA, SMS's argument that the service planned to be provided by Savage could not be performed safely is unpersuasive. We agree with OEA that the proposed abandonment, if implemented, would not significantly affect the quality of the human environment and that no environmental conditions are needed here.

Based on the record presented, we find that PRC has met its burden of demonstrating that removing our jurisdiction by granting adverse abandonment is consistent with § 10903 and that there is no overriding federal interest in perpetuating SMS's operations at Paulsboro. Therefore, we will grant PRC's adverse abandonment application, subject to standard employee protective conditions and conditions to ensure an orderly transition of operations, as set out below.

Our Conditions. In approving this application, we must ensure that affected railroad employees will be adequately protected. 49 U.S.C. § 10903(b)(2). We have found that the conditions imposed in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979) satisfy the statutory requirements, and we will impose those employee protective conditions here.

PRC asks that the Board impose a condition directing SMS to cooperate with PRC, Savage, and the Interchange Carriers in an orderly transition of operations and service before it stops operating as a carrier subject to Board jurisdiction on this Line. The Interchange Carriers join in a request for this condition and request a further condition that the Board stay the effectiveness of the abandonment authority until PRC and/or its switching operator enter into any appropriate agreements with the Interchange Carriers. The Interchange Carriers warn that service to the refinery could be interrupted if all the necessary agreements are not in place prior to the termination of the Board's jurisdiction to allow PRC to seek to evict SMS from the premises under state law.

There were no objections to these conditions. The condition concerning cooperation is reasonable, and we will impose it. In addition, we will condition our abandonment authority so that it can only be exercised after the Board is notified that all necessary agreements are in place. This condition will provide administrative certainty and also provide for an orderly transition of operations without service interruptions.

Remaining Matters. In its July 26, 2012 decision, the Board granted waivers and exemptions foreclosing the filing of Offers of Financial Assistance (OFA) and requests for a public use condition. The Board alerted the public in the January 30, 2014 Federal Register notice that any trail use requests would be due by February 24, 2014. None were received, and no trail use condition will be imposed here.

It is ordered:

1. PRC's adverse abandonment application is granted subject to the employee protective conditions set forth in Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho, 360 I.C.C. 91 (1979).
2. SMS is directed to cooperate with PRC, Savage, and the Interchange Carriers in an orderly transition of operations and service before it stops operating as a carrier on this Line.
3. The abandonment authority will not become effective until PRC and/or its switching operator notify the Board that they have executed all necessary agreements with the Interchange Carriers.
4. This decision is effective on January 2, 2015. Any petition to stay or petition to reopen must be filed as provided at 49 C.F.R. § 1152.25(e).

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