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SERVICE DATE – JULY 26, 2012

SURFACE TRANSPORTATION BOARD

DECISION

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

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

MOTION FOR PROTECTIVE ORDER

Decided: July 24, 2012

This decision grants a motion for a protective order in this proceeding.

Paulsboro Refining Company LLC (PRC) owns a 970-acre refinery in Paulsboro, N.J. Within this facility, it owns approximately 5.8 miles of railroad track. SMS Rail Service, Inc. (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).¹ 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 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, but that SMS has refused to seek Board authority to terminate its service.

To hasten the removal of SMS from the line, PRC filed a petition for adverse or third-party discontinuance of SMS' service on January 10, 2012, asking the Board to grant an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903. In a decision served on March 2, 2012, the Board rejected the petition without prejudice to PRC's coming back for relief. The decision explained that, under agency precedent, such relief must be sought in an application. On March 26, 2012, PRC took a step toward filing its application by petitioning the Board for certain waivers and exemptions from the abandonment application process.

¹ See SMS Rail Service—Acquis. and Operation 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.

On April 2, 2012, SMS filed a motion for a protective order. The railroad explains that granting the motion will facilitate the potential disclosure and use of commercially sensitive material in this proceeding. As an example of such material, it notes that an application must include highly confidential carrier revenue and cost data under 49 C.F.R. § 1152.22.

On April 5, 2012, PRC filed a reply to the motion for a protective order. Although PRC does not object to the imposition of a protective order, it believes that certain of the provisions sought by SMS need to be amended before the order is adopted. Specifically, PRC asks that: (A) the Board clarify that sections 1(a), (c), and (d) apply to both confidential and highly confidential material; (B) the Board clarify that a party can challenge the designation of confidential material as well as the designation of highly confidential material; (C) section 7 be modified to remove language suggesting that transportation contracts relating to locations other than the Paulsboro refinery might be relevant or have to be produced, and to add language stating that the disclosure of highly confidential material would not violate 49 U.S.C. § 11904; (D) section 10 be modified to ensure that PRC (and not just its outside counsel or consultants) can review highly confidential information provided by SMS related to SMS' service, given that it is entitled to this data pursuant to the parties' contract; and (E) the order be amended so that any party has the right to reveal its own data or information.

SMS filed a reply on April 9, 2012, and a request that the Board accept it into the record.² In its reply, SMS does not object to modifications (A), (B), and (E). It does, however, oppose modifications (C) and (D). SMS argues that when the Board adopted versions of section 7 in recent orders,³ none of them extended to highly confidential material, as SMS points out that PRC's proposed revision would do. The railroad contends that PRC's justification for access to highly confidential material under section 10 arises from the parties' contract, but points out that PRC terminated this agreement as of December 21, 2011. Moreover, in opposing any access by in-house PRC personnel to highly confidential material, SMS asserts that such access would defeat the very purpose of having a highly confidential designation.

Good cause exists to grant SMS' protective order, but modified as next discussed. PRC's proposed modifications (A), (B), and (E) are reasonable and have not been objected to by SMS. The protective order, therefore, will be amended to reflect these changes.

Modification (C) will be made in part. PRC is correct that the language concerning transportation contracts in section 7 is not necessary here. That language is not typically found in protective orders issued in abandonment proceedings, and transportation contracts concerning other facilities would most likely be beyond the scope of this proceeding. Deleting that part of section 7 is therefore appropriate.

² In the interests of a more complete and accurate record, SMS' reply will be accepted.

³ See Palmer Ranch Holdings—Adverse Aban.—Seminole Gulf Ry., in Sarasota Cnty., Fla., AB 400 (Sub-No. 5), slip op. at section 14 of protective order (STB served Jan. 9, 2012); and Stewartstown R.R.—Adverse Aban.—In York Cnty., Pa., AB 1071, slip op. at section 13 of protective order (STB served June 30, 2011).

PRC also asks that language be added to section 7 stating that the disclosure of highly confidential material would not violate 49 U.S.C. § 11904. As noted by SMS, however, similar provisions in other protective orders do not include reference to the disclosure of highly confidential data and Board practice consistently has allowed parties to protect the disclosure of highly confidential information or data to in-house counsel or employees of other parties. PRC has not justified why the section should be broadened beyond its traditional wording, and only the traditional language concerning § 11904 will therefore appear in the protective order.

Modification (D), however, will not be made. In (D), PRC seeks access in section 10 to highly confidential data. But that information is usually shielded from a party to a proceeding and PRC has provided no reason for the Board to depart from standard practice.⁴

The protective order, as modified, will be adopted. The unrestricted disclosure of this material, or other confidential, proprietary, or commercially sensitive material produced during the course of this proceeding, could harm the parties.

The motion, subject to the modifications discussed above, conforms with 49 C.F.R. § 1104.14 (governing requests for protective orders to maintain the confidentiality of materials submitted to the Board), and 49 C.F.R. § 1114.21(c) (governing protective orders regarding discovery). Issuance of the requested protective order, as modified, will ensure that the material will be used only in connection with this proceeding and not for any other business or commercial purpose. Accordingly, SMS' proposed protective order and undertakings, as modified in the Appendix to this decision, will be adopted.

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

It is ordered:

1. SMS' reply is accepted.
2. The motion for a protective order is granted and the protective order and undertakings in the Appendix to this decision will be adopted, as modified here.
3. The parties are directed to comply with the protective order set forth in the Appendix to this decision.
4. This decision is effective on its service date.

By the Board, Richard Armstrong, Acting Director, Office of Proceedings.

⁴ PRC apparently believes it has contractual rights to access this highly confidential information pursuant to its agreement with SMS. If so, PRC is free to pursue this claim in another forum.

APPENDIX

PROTECTIVE ORDER

1. Any party producing information, data, documents, or other material (hereinafter collectively referred to as “material”) in discovery to another party to this proceeding, or submitting material in pleadings, that the party in good faith believes reflects proprietary or confidential information, may designate and stamp such material as “CONFIDENTIAL,” and such material must be treated as confidential. Such material, any copies, and any data or notes derived therefrom:
 - (a) Shall be used solely for the purpose of this proceeding and any judicial review proceeding arising therefrom, and not for any other business, commercial, or competitive purpose.
 - (b) May be disclosed only to employees, counsel, or agents of the party requesting such material who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising therefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials, and provides a copy of the executed Undertaking to counsel for party providing the CONFIDENTIAL material.
 - (c) Must be destroyed by the requesting party, its employees, counsel, and agents, at the completion of this proceeding and any judicial review proceeding arising therefrom. However, counsel and consultants for a party are permitted to retain file copies of all pleadings which they are authorized to review under this Protective Order, including Paragraph 12.
 - (d) If contained in any pleading filed with the Board, shall, in order to be kept confidential, be filed only in pleadings submitted in a package clearly marked on the outside “Confidential Materials Subject to Protective Order.” See 49 C.F.R. § 1104.14.
 - (e) If any party wishes to challenge such designation, the party may bring such matter to the attention of the Board.
2. Any party producing material in discovery to another party to this proceeding, or submitting material in pleadings, may in good faith designate and stamp particular material, such as material containing shipper-specific rate or cost data, or other competitively sensitive information, as “HIGHLY CONFIDENTIAL.” Material that is so designated may be disclosed only to outside counsel or outside consultants of the party requesting such materials who have a need to know, handle, or review the materials for purposes of this proceeding and any judicial review proceeding arising

therefrom, provided that such outside counsel or outside consultants have been given and have read a copy of this Protective Order, agree to be bound by its terms, execute the attached Undertaking for Highly Confidential Material prior to receiving access to such materials, and provide a copy of the executed undertaking to counsel for the party providing the “HIGHLY CONFIDENTIAL” material. Material designated as “HIGHLY CONFIDENTIAL” and produced in discovery under this provision shall be subject to all of the other provisions of this Protective Order, including without limitation Paragraph 1(a), (c), (d), and (e).

3. In the event that a party produces material which should have been designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and inadvertently fails to designate the material as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL,” the producing party may notify the other party in writing within 5 days of discovery of its inadvertent failure to make the confidentiality designation. The party who received the material without the confidentiality designation will return the non-designated portion (including any and all copies) or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving party with properly designated material.
4. In the event that a party inadvertently produces material that is protected by the attorney-client privilege, work product doctrine, or any other privilege, the producing party may make a written request within a reasonable time after the producing party discovers the inadvertent disclosure that the other party return the inadvertently produced privileged document. The party who received the inadvertently produced document will either return the document to the producing party or destroy the document immediately upon receipt of the written request, as directed by the producing party. By returning or destroying the document, the receiving party is not conceding that the document is privileged and is not waiving its right to later challenge the substantive privilege claim, provided that it may not challenge the privilege claim by arguing that the inadvertent production waived the privilege.
5. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material at hearings in this proceeding, or in any judicial review proceeding arising herefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material to the Board, or the court, as appropriate, with a written request that the Board or the court: (a) restrict attendance at the hearings during discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material, and (b) restrict access to the portion of the record or briefs reflecting discussion of such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.
6. If any party intends to use “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in the course of any deposition in this proceeding, the party so intending shall so advise counsel for the party producing the materials, counsel for the deponent, and all other counsel attending the deposition, and all portions of the deposition at which any such “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material is used

shall be restricted to persons who may review the material under this Protective Order. All portions of deposition transcripts and/or exhibits that consist of or disclose “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material shall be kept under seal and treated as “CONFIDENTIAL” and/or “HIGHLY CONFIDENTIAL” material in accordance with the terms of this Protective Order.

7. To the extent that “CONFIDENTIAL” material is produced by a party in this or any related proceedings, and is held and used by the receiving person in compliance with the terms of this Protective Order, such production, disclosure, and use of the material and of the data that the material contains will be deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. § 11904 or of any other relevant provision of the ICC Termination Act of 1995.
8. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of the determination that the “CONFIDENTIAL” material, “HIGHLY CONFIDENTIAL” material, or copies or notes are to be released, or within 3 working days prior to such release, whichever is soonest, to permit the producing party the opportunity to contest the release.
9. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it publicly shall not be subject to this Protective Order even if the same information is produced and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in this proceeding.
10. Each party has a right to view its own data, information, and documentation (i.e., information originally generated or compiled by or for that party), even if that data, information, and documentation has been designated as “HIGHLY CONFIDENTIAL” by a producing party, without securing prior permission from the producing party. If a party (the “filing party”) files and serves upon the other party (the “reviewing party”) a pleading or evidence containing “HIGHLY CONFIDENTIAL” material of the filing party, the filing party shall also contemporaneously provide to outside counsel for the reviewing party a list of the “HIGHLY CONFIDENTIAL” information of the filing party contained in the pleading that must be redacted from the “HIGHLY CONFIDENTIAL” version prior to review by the in-house personnel of the reviewing party.
11. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material originated by that party, if such material does not contain or reflect any “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” material originated by any other party.
12. Any party filing with the Board a “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” pleading in this proceeding should simultaneously file a public version of the pleading.

UNDERTAKING

CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on July 26, 2012, governing the production of confidential documents in AB 1095 (Sub-No. 1), understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any data or information obtained under this Undertaking, or to use or permit the use of any techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in AB 1095 (Sub-No. 1) or any judicial review proceeding arising therefrom. I further agree not to disclose any data or information obtained under this Protective Order to any person who has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that counsel and consultants may retain copies of pleadings which they were authorized to review under the Protective Order.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Dated: _____

UNDERTAKING

HIGHLY CONFIDENTIAL MATERIAL

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I, _____, have read the Protective Order served on July 26, 2012, governing the production of highly confidential documents in AB 1095 (Sub-No. 1), understand the same, and agree to be bound by its terms. I further agree not to disclose any data, information or material designated "HIGHLY CONFIDENTIAL" to any person or entity who: (i) is not eligible for access to "HIGHLY CONFIDENTIAL" material under the terms of the Protective Order, or (ii) has not executed an Undertaking for Highly Confidential Material in the form hereof. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL" that I will limit my use of those documents and the information they contain to this proceeding and any judicial review proceeding arising therefrom; that I will take all necessary steps to assure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me; that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners; and that at the conclusion of this proceeding and any judicial review proceeding arising therefrom I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel and consultants may retain file copies of pleadings filed with the Board. I further understand that I must destroy all notes or other documents containing "HIGHLY CONFIDENTIAL" information in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that parties producing confidential documents shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL] [CONSULTANT] TO

[Party name]

Dated: _____