

SURFACE TRANSPORTATION BOARD

DECISION

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

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

Digest:¹ This decision permits Paulsboro Refining Company LLC to bypass some of the procedures normally required in a typical abandonment proceeding should it file an application for adverse abandonment of a rail line that is being operated by SMS Rail Service, Inc. The Board is waiving those procedures that would be difficult or impossible for a non-operator of a rail line to comply with, such as revenue and cost data, but retaining other requirements that are necessary to allow the Board to act on the application.

Decided: July 23, 2012

In a petition filed on March 26, 2012, Paulsboro Refining Company LLC (PRC or petitioner) seeks waiver of certain Board regulations and exemption from certain statutory provisions, in connection with an adverse or third-party application it plans to file under 49 U.S.C. § 10903. Through its application, PRC wishes to terminate the common carrier authority of SMS Rail Service, Inc. (SMS) to operate approximately 5.8 miles of rail line (the Line) owned by PRC and within its facility. On April 13, 2012, SMS filed a reply in partial opposition. As discussed below, the waiver and exemption requests will be granted in part.

BACKGROUND

PRC owns a 970-acre refinery in Paulsboro, N.J. Within this facility, it owns the Line, which consists of approximately 5.8 miles of railroad tracks. SMS has provided service over the Line since 2000, when it entered into an operating agreement with the facility's prior owner, Valero Refining Company – New Jersey (Valero-NJ).² Under the agreement, as amended, SMS

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 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.

provides common carrier service by interchanging traffic with Norfolk Southern Railway Company (NSR), CSX Transportation, Inc. (CSXT), or their agent, Consolidated Rail Corporation (Conrail). 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 switching at its plant through the use of a noncarrier switching contractor. PRC advises that it has given SMS notice of termination, as provided by their contract, but that SMS has refused to file for authority to terminate its operations. To hasten the removal of SMS from the Line, PRC filed a petition on January 10, 2012, asking the Board to grant an exemption under the Board's rules to terminate SMS' service. In a decision served on March 2, 2012, the Board rejected the petition for exemption.³ The Board explained that such relief must be sought by filing an adverse abandonment application.

To facilitate the submission of its adverse abandonment application, on April 2, 2012, PRC filed a motion for protective order⁴ and on March 26, 2012, the instant petition seeking certain waivers and exemptions from the abandonment process. PRC asserts that the waivers and exemptions it requests are similar to those that the Board has customarily granted in adverse abandonment proceedings.

DISCUSSION AND CONCLUSIONS

The Board's regulations require that abandonment applications conform to the requirements of 49 C.F.R. pt. 1152, subpart C—Procedures Governing Notice, Applications, Financial Assistance, Acquisition for Public Use, and Trail Use. In appropriate instances, such as the filing of an adverse abandonment application, the Board will waive inapplicable or unnecessary provisions and grant exemptions as appropriate from statutory requirements.⁵

System Diagram Map. PRC seeks an exemption from 49 U.S.C. § 10903(c), which requires carriers to maintain a system diagram map and to identify on that map rail lines planned for abandonment or discontinuance of service. PRC also seeks waiver of 49 C.F.R. § 1152.22(a)(5), which requires reference to inclusion of the rail line subject to the abandonment request on the carrier's system diagram map or narrative, the date upon which the line was first listed there for abandonment, and a copy of the line description which accompanies the carrier's map. PRC's position is that, because it is not the carrier and does not have access to such a map, these requirements are inapplicable. PRC states, however, that it will file with its application the detailed map of the line, as required under 49 C.F.R. § 1152.22(a)(4). In reply, SMS does not oppose PRC's requests concerning the system diagram map.

³ SMS Rail Service—Adverse Discontinuance of Service Exemption—Gloucester Cnty., N.J., AB 1095X (STB served Mar. 2, 2012).

⁴ The Board is also serving today a decision granting an amended version of the sought protective order.

⁵ See Palmer Ranch Holdings—Adverse Aban.—Seminole Gulf Ry.—In Sarasota Cnty., Fla. (Palmer Ranch), AB 400 (Sub-No. 5), slip op. at 3 (STB served Sept. 21, 2011).

We will exempt petitioner from the requirements of 49 U.S.C. § 10903(c) and waive 49 C.F.R. § 1152.22(a)(5). Exemption and waiver of the system diagram map requirements are customary in adverse proceedings, because the applicant generally does not have access to the system diagram map, as is the case here.⁶

Notice of Intent. PRC asks for waiver of the requirements of 49 C.F.R. § 1152.21 to permit it to deviate from the prescribed form of notice as set forth in the regulations. PRC states that the prescribed wording in the notice of intent is inappropriate for adverse abandonment proceedings. Instead, it proposes to use the alternative language in Exhibit B of its petition. In response, SMS argues that the notice of intent must include the telephone number of the applicant's representative, but that PRC's alternative notice does not.

The Board has approved form changes in other adverse abandonment cases.⁷ PRC's amended notice of intent is in substantial compliance with the requirements of 49 C.F.R. § 1152.21, and the proposed changes are reasonable in the context of PRC's forthcoming application. We will require, however, appropriate additions to the notice based on our denial of certain waivers and exemptions that we discuss later in this decision. Accordingly, we will grant the waiver, subject to these additions. We will also require PRC to provide its representative's telephone number in the notice.

Service of the Notice of Intent on Shippers. PRC seeks relief from the requirements in 49 U.S.C. § 10903(a)(3)(D) and 49 C.F.R. § 1152.20(a)(2)(i) that the notice of intent be served on significant users of the Line. PRC believes that, outside of itself, the only user of the Line is ExxonMobil. Not only does PRC propose to serve its notice on that party, but also on CSXT, NSR, and Conrail. We will deny this exemption from 49 U.S.C. § 10903(a)(3)(D) and waiver of 49 C.F.R. § 1152.20(a)(2)(i) given that PRC has effectively proposed compliance with these requirements. PRC has notice already, and it has agreed to serve ExxonMobil with the notice of intent. Because PRC has agreed to serve its notice on CSXT, NSR, and Conrail, we will also require PRC to serve future filings on those entities.

Service of Notice of Intent on the National Railroad Passenger Corporation (Amtrak) (if Amtrak operates over the involved line). PRC seeks waiver of the requirement in 49 C.F.R. § 1152.20(a)(2)(x) that the notice be served on Amtrak because that entity does not operate on the 5.8 miles of track in question. The waiver request will be granted.

Service of the Notice of Intent on Labor Organizations. PRC requests a waiver of 49 C.F.R. § 1152.20(a)(2)(xii), which requires service of the notice of intent on the headquarters of all duly certified labor organizations that represent employees on the affected line. PRC does not believe that SMS's employees are represented by labor organizations and, accordingly,

⁶ See id., slip op. at 5; and Norfolk S. Ry.—Adverse Aban.—St. Joseph Cnty., Ind. (St. Joseph), AB 290 (Sub-No. 286), slip op. at 4 (STB served Oct. 26, 2006).

⁷ See Palmer Ranch, slip op. at 3; and E. St. Louis Junction R.R.—Adverse Aban.—in St. Clair Cnty., Ill. (St. Clair), et al., AB 838, slip op. at 6-7 (STB served June 30, 2003).

asserts that service on the headquarters of labor organizations should not be required under the regulation. In its reply, SMS confirms that its employees are not organized. We will grant PRC's waiver request.

Posting of the Notice of Intent. PRC requests an exemption from 49 U.S.C. § 10903(a)(3)(B) and waiver of 49 C.F.R. § 1152.20(a)(3), which require that a copy of the notice of intent be posted at each agency station and terminal on the line to be abandoned, or, if there are no agency stations on the line, at any agency station through which business for the line is received or forwarded. PRC states that it does not believe that there are any agency stations or terminals on the line and, accordingly, that posting should not be required. Furthermore, petitioner states that SMS, ExxonMobil, and the connecting carriers will receive copies of the abandonment notice.

SMS opposes the request. It notes that Conrail's Paulsboro Yard receives traffic from the Line and argues that PRC provides no reason why its notice of intent should not be posted at the yard. In this case, we do not need to require such action. It appears that all the parties of interest already will be notified by mail. Furthermore, as discussed below, we will require PRC to publish its notice of intent three times in the newspaper. These steps should be sufficient here, and there is therefore no need for PRC to enter Conrail's premises. We will therefore grant this waiver and not require PRC to post notice at the Conrail yard.

Newspaper Publication. PRC requests a waiver from 49 C.F.R. § 1152.20(a)(4), which requires newspaper publication of a notice of intent to abandon at least once a week for three consecutive weeks. PRC explains that, because the application must certify that the requirements have been satisfied, this publication requirement will necessarily delay the filing of the application beyond the minimum 15 days PRC must already wait to file its application. Accordingly, PRC proposes that it publish its notice of adverse abandonment application only once rather than the minimum of three times. PRC argues that this notice is sufficient because all interested parties will already be receiving notice. SMS opposes the request. It claims that PRC offers no precedent or justification for the amended publishing schedule.

We will deny this waiver request. As we noted in Cerro Gordo County, Iowa—Adverse Discontinuance—Iowa Traction Railroad Co. (Cerro Gordo), AB 1063, slip op. at 5 (STB served Mar. 16, 2011), newspaper publication is not onerous and ensures that all persons and entities with an interest in the line are given notice and the opportunity to participate in any proceedings. Here, requiring three publications as opposed to one will take a short amount of time and will better ensure that the public is aware of the upcoming application.

Physical Condition of the Line. PRC asks for waiver of 49 C.F.R. § 1152.22(b). This regulation requires a detailed description of the present physical condition of the line. PRC claims that, although it can observe the condition of the tracks, it does not have a detailed knowledge of their present physical condition. It further asserts that this information is not expected to be used to support the application, and it cites Cerro Gordo, St. Joseph, and Palmer Ranch to support its waiver request. SMS opposes this waiver. It claims that the track is an integral part of the PRC refinery, that PRC recently discussed the condition of the track with the proposed switching contractor, and that the case law does not support PRC's waiver.

We will deny the waiver request. Only in St. Joseph did the Board grant this request, and that case involved an applicant with a more distant relationship to the tracks that were proposed for adverse abandonment there. Here, the track is owned by PRC and is on its premises. It would therefore not be burdensome for PRC to meet this requirement.

Service on the Line. PRC asks for waiver of 49 C.F.R. § 1152.22(c), the requirement that an application include a description of the service provided on the line during the Base Year (as defined by 49 C.F.R. § 1152.2(c)). PRC claims that only the carrier has this information, and that the Board should waive the requirement, citing Cerro Gordo, St. Joseph, and Stewartstown Railroad Co.—Adverse Abandonment—In York County, Pa. (Stewartstown), AB 1071 (STB served Mar. 10, 2011). SMS objects to this request and references filings where PRC has admitted to having this knowledge.

We will deny the request for this waiver. PRC has already described how much traffic is on the line. Moreover, almost all of the traffic belongs to PRC. Given that the service in question is happening on PRC's property, it should not be burdensome for it to fulfill the remaining requirements of 49 C.F.R. § 1152.22(c) as part of its application.

Revenue and Cost Data. PRC seeks waiver of the regulations in 49 C.F.R. § 1152.22(d) requiring revenue and cost data. It claims that it does not possess this information. SMS does not oppose this request. We will grant this waiver request.

Rural and Community Impact. PRC seeks a waiver from 49 C.F.R. § 1152.22(e) and an exemption from 49 U.S.C. § 10903(d) regarding the rural and community impact of the abandonment. PRC claims that it does not have the information required by § 1152.22(e) and that, regardless, there will be no impact because there will be no loss of service. SMS opposes the request and claims that it will use this data to help oppose PRC's application. We will deny this request. Under 49 U.S.C. § 10903(d), the Board is required to consider adverse impacts on rural and community development, which may arise in both adverse and traditional abandonments.⁸ Here, the parties appear not to agree about whether there will be an adverse impact if SMS is not on the line, and the Board will examine this question should PRC file an application. We will require SMS to cooperate with PRC by providing PRC with shipper and traffic data in its possession that will aid PRC in satisfying the requirements of 49 C.F.R. § 1152.22(e)(2).⁹

Federal Register Notice. PRC requests a limited waiver of 49 C.F.R. § 1152.22(i), which prescribes the wording for the draft Federal Register notice that an applicant must submit to the Board. PRC proposes to use the alternative language set forth in Exhibit C of its petition, which PRC believes to be reasonable in the context of its application. We find that PRC must make the same modifications in the Federal Register notice discussed above for its proposed notice of

⁸ See Palmer Ranch, slip op. at 5.

⁹ See St. Clair, slip op. at 6.

intent, including providing its representative's telephone number. Subject to these modifications, we find that the Federal Register notice in PRC's Exhibit C is in substantial compliance with the requirements of 49 C.F.R. § 1152.22(i). To the same extent we granted a waiver for the form of the notice of intent discussed above, we grant the waiver request pertaining to 49 C.F.R. § 1152.22(i).

Offers of Financial Assistance and Public Use. PRC asks for exemption from 49 U.S.C. § 10904 and waiver of the corresponding regulations at 49 C.F.R. § 1152.27, which govern an offer of financial assistance (OFA) to continue rail service. SMS does not oppose PRC's request. The Board will grant PRC's request for exemption from the OFA provisions of 49 U.S.C. § 10904. The effect of granting an adverse abandonment is that the Board's primary jurisdiction is withdrawn, thus permitting state, local or other federal law to apply where there is no overriding federal interest in interstate commerce.¹⁰ If the Board ultimately finds that the public convenience and necessity require or permit withdrawal of its regulatory authority in this adverse abandonment proceeding, it would be fundamentally inconsistent with the rationale underlying the adverse abandonment sought here to provide for further Board regulation under the OFA provisions of § 10904.¹¹ For the same reasons, the Board will grant a corresponding waiver of 49 C.F.R. § 1152.27.

Similarly, PRC's requested exemption from the public use provisions of 49 U.S.C. § 10905 and waiver of the implementing regulations at 49 C.F.R. § 1152.28 will also be granted. Again, should the Board decide to withdraw its primary jurisdiction over the line, it should not then allow its jurisdiction to be invoked to impose a public use condition.¹²

Trails Act. With respect to PRC's request for waiver of the trail use provisions of 49 C.F.R. § 1152.29, the Board has never had the occasion to address fully the issue of whether trail use provisions can and should apply in cases where adverse abandonment authority has been granted.¹³ In any event, there is no need to address the trail use provisions at this time. These provisions would be applicable only if and when the Board grants PRC's adverse abandonment application. Therefore, this issue can be addressed, if need be, in a later decision.¹⁴

Environmental and Historic Impacts. PRC claims that there is no need for environmental and historic reports because there will be a continuation of service should SMS be removed from the line, and there will be no transfer of the track, no salvage, and no effects on structures. PRC

¹⁰ Palmer Ranch, slip op. at 7; and St. Joseph, slip op. at 6.

¹¹ Palmer Ranch, slip op. at 7.

¹² CSX Transp., Inc.—Adverse Aban.—In Shelby Cnty., Tenn., AB 1010, slip op. at 6 (STB served Oct. 10, 2007).

¹³ See St. Joseph, slip op. at 6-7.

¹⁴ See Denver & Rio Grande Ry. Historical Found.—Adverse Aban.—In Mineral Cnty., Colo., AB 1014, slip op. at 5 (STB served Oct. 18, 2007).

cites Salt Lake City Railroad Co.—Adverse Abandonment—Line of Utah Transit Authority in Salt Lake City, Utah (Salt Lake City), AB 520 (STB served Aug. 26, 1999), as an example where the Board waived the requirement. SMS opposes the request and distinguishes the case cited by PRC. SMS further points to Cerro Gordo and Palmer Ranch as decisions where the Board denied such a request.

We will deny this request. If we grant PRC's forthcoming adverse abandonment application, the track would presumably leave the agency's jurisdiction by being turned into private track. Therefore, this could be our last juncture to review the environmental impacts of such an action and to impose environmental conditions mitigating harms. The situation at the PRC refinery is therefore unlike that in Salt Lake City, where service was to continue under our jurisdiction and subject to our environmental review if and when abandonment authority were subsequently sought. Moreover, Palmer Ranch states that the Board generally conducts an environmental review as part of an adverse abandonment.¹⁵

Exemption Criteria. We grant the exemptions in this decision because full compliance with the Interstate Commerce Act is not necessary here to carry out the rail transportation policy of 49 U.S.C. § 10101. Rather, these exemptions will provide PRC with a reasonable opportunity to make its case that there is no overriding present or future public need for the line to remain part of the national rail system, will promote the rail transportation policy by eliminating unnecessary procedures, and thus will expedite regulatory decisions in accordance with 49 U.S.C. § 10101(2). Other aspects of the rail transportation policy will not be adversely affected.¹⁶ Further, application of the statutory provisions from which we are granting exemptions is not necessary to protect shippers from an abuse of market power.¹⁷ The major shipper on this line, PRC, has initiated this adverse abandonment proceeding, and the only other shipper, ExxonMobil, is also aware of the potential change in service and generally takes no exception to it.¹⁸

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

¹⁵ See Palmer Ranch, slip op. at 6.

¹⁶ SMS claims that several criteria of the rail transportation policy would benefit from denial of PRC's petition for exemptions and waivers. We disagree. The reasons put forward by SMS go to the merits of granting the adverse abandonment, and that matter is not currently before this agency. Should PRC file its adverse abandonment application, both petitioner and SMS would have the opportunity to discuss the merits of the application at that time.

¹⁷ Given our market power finding, we need not determine whether these actions are limited in scope.

¹⁸ PRC's Pet. Exh. B, Jan. 10, 2012.

It is ordered:

1. PRC's petition for exemption and waiver is granted in part and denied in part, as described above.
2. This decision is effective on its service date.

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