

LAW OFFICES OF
LOUIS E. GITOMER, LLC.

LOUIS E. GITOMER
Lou@lgraillaw.com

MELANIE B. YASBIN
Melanie@lgraillaw.com
410-296-2225

600 BALTIMORE AVENUE, SUITE 301
TOWSON, MARYLAND 21204-4022
(410) 296-2250 • (202) 466-6532
FAX (410) 332-0885

234190

May 8, 2013

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

ENTERED
Office of Proceedings
May 8, 2013
Part of
Public Record

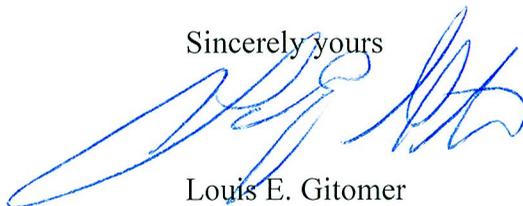
RE: Docket No. FD 35734, *Hilco SP Rail, LLC—Acquisition and Operation Exemption—RG Steel Railroad Holding, LLC*

Dear Ms. Brown:

Enclosed for efilng is the Response of Hilco SP Rail, LLC to the Maryland Department of Transportation.

If you have any questions, please call or email me.

Sincerely yours



Louis E. Gitomer
Attorney for: Hilco SP Rail, LLC

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 35734

HILCO SP RAIL, LLC —ACQUISITION AND OPERATION EXEMPTION—
RG STEEL RAILROAD HOLDING, LLC

RESPONSE TO PETITION OF THE MARYLAND DEPARTMENT OF TRANSPORTATION
FOR A STAY

Louis E. Gitomer, Esq.
Law Offices of Louis E. Gitomer LLC
600 Baltimore Avenue, Suite 301
Towson, MD 21204
(410) 296-2250
Lou@lgrailaw.com

Attorney for HILCO SP RAIL, LLC

Dated: May 8, 2013

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. FD 35734

HILCO SP RAIL, LLC —ACQUISITION AND OPERATION EXEMPTION—
RG STEEL RAILROAD HOLDING, LLC

RESPONSE TO PETITION OF THE MARYLAND DEPARTMENT OF TRANSPORTATION
FOR A STAY

Hilco SP Rail, LLC (“Hilco”) respectfully requests the Surface Transportation Board (the “Board”) to deny the Petition of the State of Maryland Department of Transportation for a Stay filed on May 3, 2013 (the “Petition”). Hilco did not acquire the rail line and agree that MCM Rail Services LLC, d/b/a Baltimore Industrial Railroad (“MCM”) would to operate the line with the intent to scrap the rail line or cease rail operations.¹ It is Hilco’s intent to develop the property it acquired out of bankruptcy and the railroad line is an important part of that redevelopment.

The State of Maryland Department of Transportation’s (“MDOT”) has failed provide a single fact, much less to demonstrate any basis to stay the effectiveness of the Notice of Exemption (the “Notice”) whereby Hilco seeks to acquire and operate an approximately 12-mile line of railroad in Sparrows Point, Baltimore County, MD (the “Line”). Instead of meeting its heavy burden in justifying a stay, MDOT’s Petition is based upon its desire to receive “clarifying information or assurances regarding Hilco’s true interests in acquiring the Line, including its

¹ Indeed, had abandonment and scrapping of the line been Hilco’s intent, it would have made use of the abandonment provisions under the Bankruptcy Code. 11 U.S.C. §1170.

plans for continued operation of the Line following completion of the salvage of the large industrial facilities that Hilco also acquired out of the bankruptcy proceedings.” Petition at 4. Hilco has responded to this request in the opening paragraph of this pleading and in a meeting held on May 7, 2013 with MDOT.

BACKGROUND

Hilco acquired the exclusive right to operate the Line on September 14, 2012 from the bankrupt RG Steel Railroad Holding, LLC (“RGS Railroad”) pursuant to Asset Purchase Agreement dated as of August 7, 2012 (the “APA”) among Environmental Liability Transfer, Inc., Commercial Development Company, Inc., and Sparrows Point, LLC (collectively “Purchaser”) and RG Steel Sparrows Point, LLC and RGS Railroad (collectively “Seller”). Purchaser agreed to purchase certain assets from Seller, including the railroad assets of RGS Railroad. Pursuant to Section 1.8 of the APA, Seller and Purchaser agreed that Purchaser could designate HRE Sparrows Point LLC (“HRESP”) as the acquirer of certain assets at closing.

A Designation of Purchased Assets dated as of August 7, 2012 (the “DPA”) between Seller and Purchaser designated HRESP as the acquirer of certain purchased assets, and certain related agreements between Purchaser and HRESP granted HRESP the exclusive right to possession of the land and the railroad track of RGS Railroad, along with all other assets of RGS Railroad. RGS Railroad continued to operate until the sale was closed on September 14, 2012. At the time of the September 14, 2012 closing, HRESP immediately assigned all of its rights and interests in the railroad assets to its affiliate Hilco, at which time Hilco agreed that MCM would

operate the Line.² HRESP did not operate the Line and did not hold itself out to provide common carrier service over the Line. Indeed, HRESP was merely a vehicle to pass its rights and interests in RGS Railroad through to Hilco on the day that closing occurred.

The sale of assets pursuant to the APA was authorized and approved on August 21, 2012 by United States Bankruptcy Judge Kevin J. Carey in *Order Authorizing and Approving (I) Sale of Sparrows Point Assets Free and Clear of Liens, Claims, Encumbrances, and Interests; and (II) Granting Related Relief in WP Steel Venture LLC, et al.*, Debtors, Case No. 12-11661 (KJC) (the “Order”). The *Order* also authorized the designation of the acquisition of certain assets to be acquired by HRESP and HRESP’s exclusive license to the land and to operate the railroad assets upon closing. The exclusive license of the common carrier obligation and to operate the railroad assets of the Line was immediately assigned to Hilco.

In the Notice, Hilco recognized that it “will have the residual common carrier obligation to operate over about 12 miles of railroad line as well as additional spur, industrial, team, switching, and side track as a common carrier railroad.” Notice at 6. Hilco recognizes that MCM and Hilco must fulfill the common carrier obligation at 49 U.S.C. §11101 and that they cannot terminate railroad services until they comply with and receive authority under 49 U.S.C. §10903, or assign the rights to provide service to a third party.

Hilco and MCM do not plan to salvage the Line.

² MCM sought authority to operate the Line in Docket No. FD 35725, *MCM Rail Services LLC, d/b/a Baltimore Industrial Railroad—Operation Exemption—HRE Sparrows Point, LLC* filed on March 20, 2013.

ARGUMENT

MDOT has not satisfied the Board's criteria for a stay of the Proposed Transaction, and Hilco respectfully requests that the Board deny the stay. MDOT has not met its burden with respect to any of the following criteria:

In deciding a petition for stay, the Board follows the traditional stay criteria by requiring a party seeking a stay to establish that: (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed by a stay; and (4) the public interest supports the granting of the stay.³ The petitioner carries the burden of persuasion on all of the elements required for such extraordinary relief.⁴

Entergy Arkansas, Inc. & Entergy Services, Inc. v. Union Pacific Railroad Company, Missouri & Northern Arkansas Railroad Company, Inc., & BNSF Railway Company, Docket No. NOR 42104 (STB served April 25, 2011) at 2.

MDOT will not prevail on the merits. MDOT is wrong when it claims that it can justify revocation of the Notice. Acquiring a line of railroad out of bankruptcy and continuing to operate it, as Hilco and MCM have done, are not contrary to the rail transportation policy. In fact, Hilco's action fosters the rail transportation policy. Operating the Line, which connects with CSX Transportation, Inc. ("CSXT") and Norfolk Southern Railway Company ("NSR") will allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail (49 U.S.C. §10101(1)). Use of the Notice procedure will minimize the need for Federal regulatory control over the rail transportation system and result in fair and expeditious regulatory decisions when regulation is required (49 U.S.C.

³ See *Washington Metro. Area Transit Comm'n v. Holidays Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

⁴ *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

§10101(2)). Operation of the Line by MCM, with Hilco as the residual common carrier, will promote a safe and efficient rail transportation system (49 U.S.C. §10101(3)). Operation of the Line by MCM, with Hilco as the residual common carrier, in furtherance of the development of the Sparrows Point facility as an industrial complex and port facility will: (i) ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense (49 U.S.C. §10101(4)); (ii) foster sound economic conditions in transportation and ensure effective competition and coordination between rail carriers and other modes (49 U.S.C. §10101(5)); and (iii) encourage honest and efficient management of railroads (49 U.S.C. §10101(9)). Use of the Notice procedure will reduce regulatory barriers to entry into and exit from the industry (49 U.S.C. §10101(7)) and provide for the expeditious handling and resolution of all proceedings (49 U.S.C. §10101(15)).

MDOT has not shown a likelihood that it would succeed in having the exemption revoked. MDOT invokes 49 U.S.C. §10101(4, 5, and 9) as the bases for succeeding in having the Notice revoked based on the facts and analysis in *SF&L Railway, Inc.-Acquisition and Operation Exemption-Toledo, Peoria and Western Railway Corporation Between La Harpe and Peoria, IL*, Finance Docket No. 33995 (served October 17, 2002) (“*SF&L Railway*”), which is clearly distinguishable from this proceeding. The six factors that the Board relied on revoking the exemption in *SF&L Railway*, at 19, are distinguished from the facts in this proceeding as follows. MCM, with Hilco as the residual common carrier, has operated the Line and interchanged traffic with CSXT and NSR, the only connecting railroads. MCM, with Hilco as the residual common carrier, is the operator of the Line and did not value the Line based on the

salvage value of the track, but on the potential revenue from going concern value. MCM and Hilco, as the residual common carrier, are licensed to operate all of the essential components of the Line under the APA, DPA, and Railroad Services Agreement. MCM and Hilco do not anticipate discontinuing service over the Line. It is the desire of MCM and Hilco to continue to operate the Line beyond the 42 month license. Neither MCM nor Hilco has expressed support for a future abandonment of the Line. The Line was acquired under the *Order*. The *Order* would not have approved the transfer of the Line and steel mill properties from the bankrupt estate unless there was financing in place, which there was. Moreover, any financing required for MCM's operation of the Line is detailed in the Railroad Services Agreement. Finally, there was no delay in consummating the transaction. Upon transfer of the bankrupt estate on September 14, 2012, MCM, with Hilco as the residual common carrier, began operating the Line.

The Sparrows Point facility was originally acquired with the idea of selling it to another steel mill operator. However, there were no offers to acquire the Sparrows Point facility as a steel mill. Hilco then decided to redevelop all 3,100 acres of the Sparrows Point facility after salvaging the steel mill and supporting facilities. The Line is not considered a supporting facility. Indeed, it is a critical component of the redevelopment of the Sparrows Point facility as an industrial and port complex. Moreover, service on the Line has continued unabated with ongoing marketing efforts.

MDOT cannot rely on arguments that it has not tendered to the Board in a petition to revoke that it has not filed. The record before the Board overwhelmingly supports a determination that Hilco and not MDOT would succeed on the merits. Hilco has demonstrated

that the precedent relied upon by MDOT is inapplicable. MDOT has provided no precedent or factual justification that its assumptions and inferences make the proposed transaction unsuitable for an exemption.

MDOT will not suffer irreparable harm absent a stay. MDOT contends that it will be irreparably harmed if the Line is salvaged or rendered inoperable. MDOT contends that it will suffer irreparable harm if the Notice becomes effective because it is “keenly interested in ensuring that the Line remains in active operation in order to maintain service to businesses currently served by the Line and to keep open the possibility of further opportunities for developing economic activity.” Petition at 9. It appears that MDOT’s interests are the same as those of Hilco.

However, MDOT has not demonstrated that it would suffer irreparable harm, or any harm, if Hilco were authorized to acquire and operate the Line through the Notice procedures. Indeed, as a regulated carrier, Hilco would be subject to complaints before the Board if it or MCM were not fulfilling the common carrier obligation. In addition, Hilco would not be able to abandon and salvage the Line without advance authority from the Board. Finally, if MDOT were truly interested in retaining the Line and the Board found that abandonment was appropriate, MDOT could acquire the Line through the offer of financial assistance process. Hilco has no plans to seek to abandon the Line, but wants to point out that approval of the Notice would eliminate the concerns of MDOT because of the procedures and protections available from the Board.

MDOT is not a shipper and will not lose service. Indeed, none of the shippers shipping over the Line today have filed in support of MDOT. MDOT does not have any investment in the

Line, while Hilco has made a substantial investment and sees the best way of earning a return on the investment by redeveloping the Sparrows Point facility as an industrial and port complex with the Line operated as a railroad.

MDOT has not met its burden of demonstrating irreparable harm based on actual evidence.

Other parties will be harmed if a stay is granted. MCM and Hilco will suffer irreparable harm if the Notice is stayed. Neither MCM nor Hilco has been able to obtain markings or join the railroad accounting systems. Therefore, they have not been able to receive interchange payments from CSXT and NSR since September 14, 2012. Moreover, MCM and Hilco have not been able to join the electronic data interchange system for ordering cars, which has resulted in delays in providing equipment to shippers. Granting the stay sought by MDOT will only exacerbate the harm.

MDOT has failed to carry its burden of persuasion with regard to demonstrating that other parties will not be harmed by a stay.

The public interest requires that the stay be denied. Hilco has made a substantial investment in the Sparrows Point facility. Hilco believes that it can earn a return on its investment by salvaging the steel mill and associated facilities and redeveloping the property as an industrial and port complex, served by a railroad. Denying the stay of the Notice will allow Hilco to participate as a railroad, subject to Board jurisdiction, and be able to better serve shippers. MDOT will have over three years to determine whether the Line will be operated, and at any time seek appropriate relief from the Board. Indeed, it would appear the protection available from the Board would be more in the public interest than leaving the operation of the

Line without Board authorization, especially since there are active shippers using the current service.

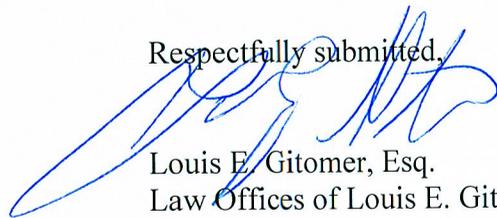
MDOT has failed to carry its burden of persuasion with regard to demonstrating that the public interest supports a stay of the Notice.

CONCLUSION

The Proposed Transaction is simply the acquisition and operation of the Line by Hilco. Nowhere does Hilco state that it will salvage the Line. MDOT is wrong in stating that Hilco intends to salvage the Line. MDOT has not demonstrated that it could succeed on the merits if it were to file a petition to revoke and MDOT has not provided any evidence that it would suffer irreparable harm if the Notice became effective. However, Hilco, MCM and the shippers on the Line would suffer irreparable harm if the stay were granted. Finally, MDOT has not shown that the public interest supports the stay.

MDOT has failed to carry its burden of persuasion with regard to demonstrating that it has met the criteria for a stay of the Notice. Hilco respectfully requests that the Board deny the Petition and permit the Notice to become effective.

Respectfully submitted,



Louis E. Gitomer, Esq.
Law Offices of Louis E. Gitomer LLC
600 Baltimore Avenue, Suite 301
Towson, MD 21204
(410) 296-2250
Lou@lgraillaw.com

Attorney for HILCO SP RAIL, LLC

Dated: May 8, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have caused the Response of Hilco SP Rail, LLC, to the Maryland

Department of Transportation, to be served electronically on:

Maryland Department of Transportation
Charles A. Spitulnik
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, NW
Suite 800
Washington, DC 20036
cspitulnik@kaplankirsch.com

Fritz Enterprises, Inc.
William L. Elson
1650 W. Jefferson
Trenton, MI 48183
bill@fritzinc.com



Louis E. Gitomer
May 8, 2013