

PUBLIC VERSION

SURFACE TRANSPORTATION BOARD

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

PAULSBORO REFINING COMPANY LLC
-- ADVERSE ABANDONMENT --
SMS RAIL SERVICE, INC. IN GLOUCESTER COUNTY, N.J.

235791

PETITION
OF
SMS RAIL SERVICE, INC.

ENTERED
Office of Proceedings
April 4, 2014
Part of
Public Record

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SMS RAIL SERVICE, INC.

Dated: April 4, 2014

SURFACE TRANSPORTATION BOARD

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Protestant, SMS Rail Service, Inc. ("SMS"), pursuant to 49 C.F.R. § 1117.1, respectfully petitions the Board for leave to file a reply to the Rely of the Paulsboro Refining Company LLC ("PRC"), filed March 10, 2014, and as grounds therefore states as follows:

1. PRC filed its Application for Adverse Abandonment on January 9, 2014.
2. SMS filed its Protest on February 24, 2014.
3. PRC filed its Reply on March 10, 2014. Among other things, PRC took issue with SMS' assertion that SMS, a rail carrier subject to the safety regulations of the Federal Railroad Administration and Pipeline and Hazardous Materials Safety Administration, necessarily is subject to stricter safety requirements than Savage Services Group, a non-carrier contract switcher, and, therefore, SMS' adverse abandonment is likely to render operations within the Paulsboro refinery less safe and to have an adverse affect on community development in the vicinity of the refinery and the Conrail Yard across Billingsford Road from the refinery's entrance.

4. Appended to PRC's Reply was the Verified Statement of Mr. Steven Krynski and its attachments. Mr. Krynski identified himself as PRC's Operations Manager of the Paulsboro refinery, and not from his personal knowledge but based upon what he said was a review of records maintained by the refinery's owners in the five-year period between January 2009 and January 2014 there were 23 rail service related incidents involving SMS. Mr. Krynski's Verified Statement and its attachments were designated as "Highly Confidential"¹, which meant that they could be seen only by SMS' attorney and consultant, signers of the Undertakings for "Highly Confidential" materials, who, of course, were unfamiliar with SMS' operations within the refinery but nevertheless were prohibited from discussing the alleged 23 rail service related incidents with any SMS' personnel.

5. SMS on March 11, 2014, filed its Petition to have Mr. Krynski's Verified Statement and its attachments re-designated as "Confidential", and by its Reply, filed March 19, 2014, PRC said it did not oppose the re-designation. The agreement accorded with the Board's view that "the parties are encouraged to work together to resolve their differences regarding designation." Docket No. FD 35662, Steellriver Infrastructure Partners LP, Steellriver Infrastructure Associates LLC, Steellriver Infrastructure Fund North America LP, and Patriot Funding LLC—Control Exemption—Patriot Rail Corp, et al., May 25, 2012, slip. op. p. 3.²

6. SMS is mindful of the general rule of 49 C.F.R. § 1104.13(c) that a reply to a reply is not permitted. Docket No. FD 35459, V&S Railway, LLC—Petition for

¹ The Board had entered a Protective Order, served July 26, 2012.

² PRC said that, although it offered no objection to the re-designation, it was not agreeing that SMS can or should be permitted to file a reply to PRC's Reply.

Declaratory Order—Railroad Operations n Hutchinson, Kan., served July 12, 2012, slip op. p. 5. The Board, however, is of the view, as it said in Docket No. AB 369 (Sub-No. 3X), Buffalo & Pittsburgh Railroad, Inc.—Abandonment Exemption—in Erie and Cattaraugus Counties, N.Y., served September 18, 1998, slip op. p. 2, “Although our regulations (49 CFR 1104.13(c)) do not permit replies to replies, we may do so in a particular instance if it is warranted.” Again, in Docket No. FD 34364, Vermont Railway, Inc.—Petition for Declaratory Order, served January 4, 2005, slip op. p. 1, the Board declared, “A ‘reply to a reply’ is normally not allowed by the Board’s Rules of Practice. See 49 CFR 1104.13(c). In the interest of having a complete record and because no party will be prejudiced, however, the additional pleadings will be accepted.” And once more, in Docket No. FD 34048, Reading Blue Mountain and Northern Railroad Company—Lease and Operation Exemption—Norfolk Southern Railway Company and Pennsylvania Lines, LLC, served August 1, 2001, slip. op. p.1, fn. 2, the Board stated, “In appropriate circumstances, we construe our rules liberally to allow pleadings where they will contribute to a complete record without prejudicing any party or delaying the proceedings.”

For its Reply to PRC’s Reply SMS simply seeks the Board’s acceptance into the record of the attached Verified Statement of Mr. James R. Pfeiffer, SMS’ Superintendent of Operating Practices, and, if it were to do so, the Board would have a more complete – and certainly a more balanced and unbiased -- record without prejudicing any party or delaying the proceedings. In the public version of his Verified Statement attached to PRC’s March 10, 2014, Reply, Mr. Krynski alleged that over the five-year period from January 2009 to January 2004, “[T]here have been 23 rail service related incidents

involving SMS, including 10 derailments, 3 accidents or near misses, 1 communication infraction, 4 safety infractions, 3 fires caused by SMS locomotives and 2 workmanship issues.” Mr. Pfeiffer in his Verified Statement discusses each one, admitting the occurrences of those incidents which had been described accurately and disputing those that had not been and were misrepresentations. For example, the three fires attributed by Mr. Krynski to SMS’ locomotives Mr. Pfeiffer explains were of uncut weeds adjoining the tracks on which the locomotives operated, and in his Verified Statement Mr. Pfeiffer discusses who and why the weeds had been left uncut. Two of the alleged 3 accidents or near misses Mr. Pfeiffer notes in his Verified Statement were altogether unrelated to SMS’ operations within the refinery and, accordingly, properly are of no relevance in the evaluation of SMS’ five-year safety record. The incidents were minor and of little consequence, only one required reporting to the FRA.

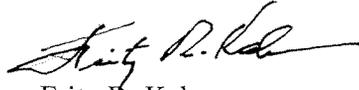
Mr. Krinsky’s Verified Statement and its attachments tend to leave the impression that SMS was perfectly indifferent to the alleged 23 safety incidents occurring over the five-year period. In fact, as Mr. Pfeiffer explains in his Verified Statement, SMS followed each occurrence, whether or not attributable to SMS’ flawed operations, with specific instructions to its engineers, conductors and other employees and took additional remedial actions necessary to avoid any recurrence. Copies of Bulletin Orders and other rules and instructions issued by SMS are attached to Mr. Pfeiffer’s Verified Statement.

WHEREFORE, SMS Rail Service Inc. respectfully asks the Board to accept into the record the attached Verified Statement of Mr. James F. Pfeiffer in reply to the Verified Statement of Mr. Steven Krynski appended to the Reply filed March 10, 2014, by Paulsboro Refining Company.

Respectfully submitted,

SMS RAIL SERVICE INC.

By its attorney,



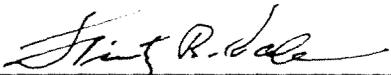
Fritz R. Kahn
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1919 M Street, NW (7th fl.)
Washington, DC 20036
Tel.: (202) 263-4152

Dated: April 4, 2014

CERTIFICATE OF SERVICE

I certify that I this day have served the foregoing Petition on the Paulsboro Refining Company, Norfolk Southern Railway Company, CSX Transportation, Inc. and Consolidated Rail Corporation by e-mailing their attorneys, Eric Hocky, Esq., at ehocky@clarkhill.com; David L. Colemaan, Esq. at david.coleman@nscorp.com; Paul R. Hitchcock, Esq., at Paul_Hitchcock@CSX.com; and David C. Ziccardi, Esq. at David.Ziccardi@Conrail.com.

Dated at Washington, DC, this 4th day of April 2014.



Fritz R. Kahn

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PAULSBORO REFINING COMPANY LLC
-- ADVERSE ABANDONMENT --
SMS RAIL SERVICE, INC. IN GLOUCESTER COUNTY, N.J.

VERIFIED STATEMENT
OF
JAMES F. PFEIFFER.

Dated: April 4, 2014

**VERIFIED STATEMENT
OF JAMES R. PFEIFFER**

I, James R. Pfeiffer, hereby state as follows:

1. Since 2009 I have been employed by SMS Rail Service, Inc., having held various positions within the operations department including but not limited to engineer and conductor, and, since that time, have served on the SMS Safety Committee, a committee of peers holding monthly meetings during which we examine and discuss safety topics both locally and industry-wide. Prior to my employment with SMS I have, since 1992, been involved in the railroad industry in assorted functions.
2. I currently act in the capacity of Superintendent of Operating Practices for SMS Rail, a position in which I have served since September of 2012. In this position I am a Designated Supervisor of Locomotive Engineers charged with, inter alia, overseeing the federally mandated Engineer and Conductor training and licensing programs, annual training programs (SMS' training requirements are voluntarily more stringent than the federal requirements) and the federally mandated Efficiency Testing program, wherein each operating employee is spot-checked several times per year to ensure rules compliance and operational competency and ability.
3. As SMS' Superintendent of Operating Practices I am a qualified (within the meaning of 49 CFR §217.4) engineer and conductor on all of the properties over which SMS operates trains, including the PRC Refinery in Paulsboro, New Jersey (the "Refinery").
4. By virtue of an Undertaking executed by me on March 20, 2014, I have had the opportunity to review the "Confidential" Verified Statement of Steven Krynski filed on or about March 10, 2014 by Paulsboro Refining Company LLC ("PRC").