

Before the
SURFACE TRANSPORTATION BOARD

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

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

**REPLY OF PAULSBORO REFINING COMPANY LLC
TO PETITION OF SMS RAIL SERVICE, INC.
FOR A STAY PENDING JUDICIAL REVIEW**

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Dated: January 12, 2015

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In a decision served December 2, 2014 (the “*December Decision*”), the Board granted the adverse abandonment application that had been filed by Paulsboro Refining Company LLC (“PRC”), and directed SMS Rail Service, Inc. (“SMS”) to cooperate in an orderly transition of operations and service. The *December Decision* by its terms became effective on January 2, 2015, and directed, *inter alia*, that any petition for stay was required to be filed as provided at 49 CFR §1152.25(e). *December Decision* at 7, ordering paragraph 4.

On January 8, 2015, SMS filed a petition for a stay pending judicial review (the “Stay Petition”). As PRC will demonstrate in this Reply, the Stay Petition should be denied because it was not timely filed, and even if it were timely filed, it should be denied because SMS has not established that the Board’s criteria for a stay have been satisfied.

Discussion

A. The Stay Petition was not timely filed.

SMS purports to file its Stay Petition pursuant to 49 CFR §1115.5(a). However, as ordered by the *December Decision*, petitions for stay were to be governed by the

provisions of 49 CFR §1152.25(e).¹ Section 1152.25(e)(7)(iii) provides that a petition for a stay of an abandonment decision pending judicial review must be filed not less than 15 days prior to effective date of the abandonment authorization. Since the *December Decision* was effective as of January 2, 2015, any petition for stay pending judicial review was required to be filed by December 18, 2015. Since the Stay Petition was not filed until January 8, 2015, it was not timely filed and should be dismissed.²

B. SMS has not satisfied the Board's criteria for the granting of a stay.

SMS acknowledges the Board's standards for granting a stay, although the specific standards are not set forth. As the Board has often held:

The standards governing disposition of a petition for stay are: (1) whether petitioner is likely to prevail on the merits (here, of a request for revocation); (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay would be in the public interest. *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), and *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958). **The party seeking a stay carries the burden of persuasion on all of the elements required for a stay.** *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974) (*Callaway*).

BNSF Railway Company – Discontinuance of Trackage Rights Exemption – In Peoria and Tazewell Counties, ILL, STB Docket No. AB 6 (Sub-No. 470(X) (served July 2, 2010), at 2 (emphasis added). While SMS in its Stay Petition mentions each of the

¹ As provided in Section 1152.25(e), in abandonment proceedings, the appellate procedures set forth in the section apply in lieu of the procedures set forth in 49 CFR §1115.

² Even if 49 CFR §1115.5(a) applied as suggested by SMS, the result would be the same. Section 1115.5(a), requires that a petition for a stay pending judicial review be filed not less than 10 days prior to the effective date of the decision. In this case that deadline would have been December 23, 2014.

elements, SMS clearly has not met its burden to demonstrate all (or any) of the standards for a stay.

1. SMS is not likely to prevail on the merits of its judicial appeal.

The Board's decision to grant the adverse abandonment application was unanimous and clearly set forth the standard for granting an adverse abandonment, i.e., whether there is a present or future need for rail service, and whether that need is outweighed by other interests. *December Decision* at 4. The Board then analyzed the evidence presented by the parties, and concluded that there is no present or future need for common carrier service because PRC as the owner of the Line and the primary (almost exclusive) shipper intends to use a noncarrier switching operator. *Id.* at 5. Moreover, the decision of the Board to grant an adverse abandonment in the circumstances of this case is not "unprecedented" as asserted by SMS. The Board has cited a line of decisions in analogous landlord /tenant disputes. *Id.* at 5, fn 16.

SMS also raises for the first time (despite the numerous filing made in this proceeding) the issue of whether it is appropriate for the Board to impose labor protection on this abandonment. However, the abandonment statute, 49 USC §10903(b)(2) clearly requires the protection of employees in all abandonments. SMS is the employer who benefitted from their service, and there is nothing improper in having SMS compensate those employees now that it has been determined that its service should stop. The Board properly imposed the employee protective conditions that it imposes in abandonment proceedings, and SMS has not cited any law or decisions that would make it likely that such conditions would be reversed on appeal.

2. SMS will not be irreparably harmed if no stay is issued.

A stay should not be granted unless the requesting party can show it faces “unredressable actual and imminent harm.” *BNSF Railway, supra* at 3. Here SMS relies solely upon the employee protection payments it may be required to make as irreparable harm. However, as SMS acknowledges in its Stay Petition, financial loss does not normally satisfy the requirement of irreparable harm. SMS has not claimed or demonstrated that any required payments will drive the company out of business, or even estimated the amounts for which it might be responsible. The employees may of course be used by SMS at its other locations, or they may get other employment in the industry. Clearly, SMS has not established that it will suffer irreparable harm.

3. The issuance of the stay would irreparably harm PRC.

The pendency of this proceeding has prevented PRC from negotiating with and arranging for a noncarrier switching operator to take over operations. A stay will further delay the changeover, and will require PRC to continue to use SMS despite the fact that PRC’s confidence in SMS’s ability to perform, and the relationship of the parties has deteriorated. PRC will be irreparably harmed by being required to continue to use and pay SMS instead of its preferred provider.

4. The issuance of a stay would not be in the public interest.

SMS makes only a cursory attempt to demonstrate that a stay would be in the public interest – arguing once again that the public using the adjacent road and the neighboring communities would be better protected by having a rail carrier instead of a noncarrier switching operator perform the services within the PRC facility. However, the Board has already specifically determined that SMS has failed to demonstrate that

removal of the Board's jurisdiction would not be in the public interest. *December Decision* at 5. SMS has submitted nothing additional that would suggest that a stay to perpetuate SMS's service is in the public interest.

Conclusion

For the reasons set forth above, the Stay Petition should be denied.

Respectfully submitted,



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Dated: January 12, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2015, I served a copy of the foregoing

Reply on the persons listed below by the method shown:

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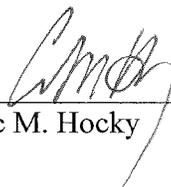
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