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July 12, 2010

## **BY E-FILING**

Cynthia T. Brown  
Chief of the Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423-0001

RE: *Escanaba & Lake Superior Railroad Company – Abandonment Petition for Exemption – Line in Ontonagon and Houghton Counties, MI,*  
STB Docket No. AB-415 (Sub-No. 2X)

Dear Ms. Brown:

For the reasons set forth below, the Escanaba & Lake Superior Railroad Company (“ELS”) hereby requests that the above-referenced matter be held in abeyance for 60 days to permit parties interested in the future disposition of the rail line that is the subject of this abandonment proceeding (the “Line”) additional time to explore alternatives to abandonment. ELS is amenable to such an abeyance provided that the Board makes clear that it does not and will not sanction any effort by Heartland during the pendency of this proceeding to foreclose on ELS’s rail assets.

As the Board is doubtlessly well aware, ELS filed the above-referenced abandonment petition for exemption (the “Petition”) on April 9, 2010. The Board gave notice of the Petition on April 27, 2010. In so doing, the Board established a procedural schedule under which comments responsive to the merits of the Petition were due by May 12, 2010, and it stated its intention to issue a decision on the merits by or before July 28, 2010. Only one interested party – the Michigan Department of Natural Resources (“MDNR”) – submitted timely comments. Others, including the County of Ontonagon, MI (“Ontonagon County”), Heartland Business Bank (“Heartland”), Senator Carl Levin (“Levin”), and Smurfit-Stone Container Corporation (“Smurfit”)<sup>1</sup> have tendered documents to the Board well after the May 12 deadline. Despite the

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<sup>1</sup> Collectively, the “letter filers.”

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lateness of these recently-offered documents and their other obvious procedural deficiencies, the Board nevertheless has accepted such documents into the record as formal filings. The general thrust of these letter filings is that the proposed abandonment would be harmful to community interests, and that the Board ought either to deny the Petition (Ontonagon County and Heartland), or postpone action on the Petition (Levin and Smurfit).

Not one of the aforementioned letter filers disputes ELS's economic evidence in support of abandonment. Moreover, although they are aware that the Line is essentially moribund and inactive at this time, none of the letter filers has identified a single entity that would want or need rail service over the Line. Although some of the letter filers claim that adverse community impacts would flow from abandonment, such assertions are entirely speculative. The truth is, there is no active industry on the line that opposes or would be harmed by the proposed abandonment, and there is no evidence showing that abandonment would result in any loss of essential transportation services.<sup>2</sup> While it is clear that the community around Ontonagon has been harmed by the closure of the Smurfit Mill – just as ELS has been harmed – the record, even at this late date, does not show that abandonment of the Line would result in any significant harm to shippers or to the community.

Whether another industry would emerge in the near term to acquire the shuttered Smurfit paper mill and resume shipping over the Line at levels remunerative to ELS is anybody's guess, but ELS has its doubts. Even though ELS, the affected community, and (evidently) Smurfit have endeavored to attract new industry to the Smurfit mill site,<sup>3</sup> *not one possible buyer of the mill has contacted ELS regarding future rail service needs*, and Smurfit has not conveyed any would-be buyer's interest to ELS. In fact, ELS's own investigation indicates that possible buyers of the Smurfit mill site – at least some of which might not be in a position to ship or receive product for years as the site is converted to other purposes – may never want or need rail service.<sup>4</sup>

ELS's detailed and undisputed economic data shows that the Line is a drain on ELS, and, unless abandoned, could lead ultimately to ELS's insolvency, despite the fact that the balance of the ELS system is profitable. In addition, ELS's Petition states that it is contending with a collection action initiated by Heartland, which was prompted by the sudden revenue loss resulting from the closure of the Smurfit mill. In that collection action, Heartland has threatened to foreclose on the entire railroad and to do so as quickly as possible. For these reasons, ELS's

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<sup>2</sup> As is stated in the Petition, during the final months that Smurfit operated the mill in Ontonagon, it did not make any use of rail transportation services.

<sup>3</sup> Smurfit's late-filed comments are utterly self-serving. Smurfit clearly would benefit from the retention of the Line for the time, if only for the reason that it may extract a higher sales price for land with direct rail access even if that rail access proves ultimately to be unnecessary for a future purchaser of the mill.

<sup>4</sup> Undercutting the implication of some that the Line is necessary, ELS's petition reflects that Smurfit itself did not use rail service for the last few months of its operation of the mill.

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continued existence depends upon one of the following: (1) purchase of the mill by a rail-dependent shipper that will make a firm commitment to ship sufficient traffic over the Line, making the Line's continued operation financially viable; (2) expeditious abandonment of the Line (as it has requested in its Petition); (3) prompt purchase of the Line by a third party; or (4) a suitable subsidy arrangement justifying ELS's retention of the Line as inactive asset with considerable liquidation value.

Notwithstanding the substantial opportunity costs associated with postponement of Board action on ELS's Petition, ELS has considered the views and concerns expressed by the letter filers, and it has decided to seek for a suspension of the pending proceeding and the associated decision deadline. This voluntary request to hold this proceeding in abeyance for 60 days is precisely in keeping with Smurfit's letter request (attached), and is consistent with Senator Levin's request to postpone agency action. ELS is not optimistic that the abeyance period will yield positive results,<sup>5</sup> but it is nevertheless advancing this abeyance request as a good faith gesture to interested parties (all of whom have known about the proposed abandonment for months), to facilitate renewed efforts that might eliminate the need to abandon the Line.

Although ELS is willing to delay action on the subject abandonment to allow a limited period of time to explore a resolution of the matter that may not require further Board action, ELS is nevertheless bedeviled by the pending Heartland collection action, and Heartland's repeated threats to seize some or all of ELS's rail lines. An extension of time could serve to fuel Heartland's aggressive tactics, thereby frustrating the purpose of this abeyance request. (In fact, ELS's financial situation is further compromised by any delay, although the letter filers other than Heartland conveniently ignore this point.) In light of ELS's willingness to have this proceeding held in abeyance, ELS urges the Board in such an order to state that, during the remaining pendency of this proceeding, it would not sanction any attempt by a third party over ELS's objection to seize or otherwise assume ownership of any of ELS's rail assets.<sup>6</sup>

ELS submits that, under the unusual circumstances here, with numerous late-filed requests for the Board to postpone action on the pending Petition, an order holding the proceeding in abeyance for 60 days is appropriate and would appear to be consistent with agency policy and precedent.<sup>7</sup> Such an abeyance order could facilitate a resolution of the pending matter

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<sup>5</sup> In that regard, ELS has attached a letter from U.S. Representative Bart Stupak painting a rather bleak picture for the prospect of federal or state support for preserving the Line.

<sup>6</sup> ELS does not ask the Board to render any opinion on the merits of Heartland's pending state court claim. Rather, ELS merely asks the Board not to sanction possible rail asset foreclosures that would upset the processing of this proceeding, and that would be unduly disruptive of interstate commerce. As information, ELS has renewed contact with Heartland in an effort to negotiate a restructuring of ELS's remaining debt, and ELS is optimistic that a more cooperative dialogue ultimately will yield an amicable resolution of the pending state court matter.

<sup>7</sup> See The City of Chicago, Illinois – Adverse Abandonment – Chicago Terminal Railroad in Chicago, Illinois, STB Docket No. AB-1036 (STB served March 4, 2010) (granting an abeyance

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without the need for further Board involvement, and it might lead to an arrangement whereby Ontonagon retains access to rail service. If nothing else, it will give interested parties the additional time they request to sort out their options, and will serve to resolve whether ELS's skepticism is well-founded or not.

But ELS cannot afford to wait indefinitely for a possible alternative to abandonment, especially in light of the detailed and essentially undisputed evidence of record regarding the economic merits of abandonment in this case. Interested parties have already had more than ample time to assess and respond to ELS's abandonment plans. ELS submits that the Board will know in 60 day's time whether or not that additional time will have fostered a mutually acceptable alternative to the current course. In addition, a 60-day abeyance will encourage those who have prompted this abeyance request to act with necessary alacrity to demonstrate whether there is genuine possible substance behind their requests for postponement of Board action. Finally, if it agrees to hold the proceeding in abeyance, the Board must defend against any effort by Heartland to attempt to foreclose upon ELS's rail assets and thereby disrupt the very objectives of this abeyance request.

Respectfully Submitted,



Keith G. O'Brien

Robert A. Wimbish

Counsel for Escanaba & Lake Superior  
Railroad Company

Attachments

cc: All parties of record

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request in an adverse abandonment proceeding to facilitate private resolution of disputes); Norfolk Southern Railway Company – Abandonment Exemption – In Fulton County, GA, STB Docket No. 290 (Sub-No. 210X) slip op. at 2 (STB served Feb. 5, 2009) (in holding abandonment proceeding in abeyance to allow interested parties to discuss arrangements that would address the concerns and interests of all involved, the Board noted its “longstanding policy favoring the private resolution of complex matters such as these”); Tennessee Railway Company – Abandonment Exemption – In Scott County, TN, STB Docket AB-290 (Sub-No. 260X), et al. (STB served Sept. 30, 2005) (holding in abeyance an offer of financial assistance (“OFA”) proceeding occasioned by an abandonment in order to allow the parties to explore amicable arrangements outside of the scope of the OFA process).

**Smurfit-Stone**  
222 North LaSalle Street  
Chicago, IL 60601

July 7, 2010

Surface Transportation Board  
395 E Street, SW  
Washington, D.C. 20423-0001  
Attn: Daniel R. Elliot III

Re: Escanaba & Lake Superior Railroad Company  
Petition to Abandon 42.3 miles of rail line in Ontonagon and Houghton Counties, MI  
STB Docket No. AB-415-2X

Dear Chairman Elliot:

Smurfit-Stone Container Corporation (“Smurfit”) has been made aware of the Petition filed with the STB by the Escanaba & Lake Superior Railroad Company to abandon its rail line which runs to and from our paper mill located in Ontonagon, Michigan. Smurfit has just emerged from Chapter 11 bankruptcy and as part of its Plan of Reorganization has closed the Ontonagon mill and placed it on the market for sale. Having the rail service to the mill has been an attractive feature to potential buyers who are interested in restarting operations at the mill. We understand that the Board intends to hold a hearing on the E&LS’ Petition on July 28, and we would like request that the Board postpone that hearing until sometime after our sale of the mill to allow the purchaser time to address the abandonment petition. We are presently receiving offers from various buyers, and hope to have a definitive sale agreement in place by the end of August. We respectfully request that the Board postpone its scheduled hearing on the Petition for an additional 60 days to allow a prospective purchaser of the mill, who has an interest in continuing the rail service to the mill, to express their views. Thank you for your consideration of this request. Please feel free to contact me to discuss this matter further. I can be reached at (312) 580-4606.

Very truly yours,



Ronald J. Megna  
Assistant General Counsel & Assistant Secretary

CC: Keith O’Brien  
Jim Jessup

**BART STUPAK**  
1ST DISTRICT, MICHIGAN

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SCOTT SCHLOEGEL—CHIEF OF STAFF  
TOM BALDINI—DISTRICT DIRECTOR



*Congress of the United States*  
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May 13, 2010

Mr. John Larkin  
President  
Escanaba & Lake Superior Railroad  
One Larkin Plaza  
Wells, Michigan 49849-0217

Dear Mr. Larkin

I wanted to bring you up to date on actions my staff and I have taken in exploring assistance for E&LS Railroad, particularly in light of the planned abandonment of track from Ontonagon to Sidnaw.

Earlier this year I submitted an appropriations request of \$6.5 million for the construction of a rail line to the Quinnesec mill. The U.S. House of Representatives has since implemented a ban on earmarks directed to for-profit entities; this request will therefore not be funded by the House. The U.S. Senate has implemented no such ban so you should urge Senators Levin and/or Stabenow to seek funding for the project. I will provide a copy of this letter to the senators' offices.

With your announcement in September 2009 of a Pre-Legal Notice for the Upcoming Railroad Abandonment of track from Ontonagon to Sidnaw (45.6 miles), my staff contacted the Surface Transportation Board (STB) of the U.S. Department of Transportation. We wanted to understand the process and factors considered by STB in evaluating such request. We were advised verbally that it is difficult to deny such a request if the owner can show that the revenue realized from volume of traffic over the track cannot sustain operations and maintenance. With no current traffic on the line there is no money being generated so the STB would be unlikely to intervene in the abandonment. The STB also indicated that they were required to evaluate any potential offers to buy the railroad and operate the line.

We have also been in contact with the Michigan Economic Development Corporation to encourage them to look at ways to assist. They advised us that they had renegotiated the state loan to the E&LS and that payments were received on a timely cycle until Smurfit-Stone implemented temporary shut-downs and discontinued payment to the E&LS. They were evaluating options but were not optimistic because of the lack of commerce on the track and the delinquency of the company to pay on the loan.

PLEASE REPLY TO:

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902 LUDINGTON STREET  
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200 DIVISION STREET  
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(231) 348-0657

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575 COURT STREET  
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(989) 345-2258

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We also contacted the U.S. Department of Agriculture division of Rural Development (USDA-RD) and the U.S. Small Business Administration (SBA). Neither agency will provide funds or guarantee loans if a company is in default on any current loans.

I have also had my staff investigate the possibility of TARP funds being used for this project. Although Congress originally provided the executive branch broad discretion in the disbursement of TARP funds, as the program has been implemented payments have been limited to financial institutions and the automotive industry. Significant opposition in Congress to a broader use of TARP funds has prevented the Treasury Department from implementing proposals that would use TARP funds for economic development goals.

When Smurfit-Stone announced the closure of the Ontonagon mill, I traveled to Ontonagon to meet with local resident and community leaders to discuss their concerns and how we might help. We contacted the U.S. Economic Development Administration (EDA) to arrange a grant to be used to hire staff to assist with economic development for the Western Upper Peninsula. This grant, along with a grant obtained from MEDC, helped to facilitate the hiring of a person set to start in June. My staff has met with the State Director of USDA to explain the importance of a grant for economic development purposes for the Western U.P. We were advised last week that a grant had been approved.

My district staff has had discussions with local businesses regarding the economic impact of E&LS abandoning a portion of its rail line and the economics of E&LS using the CN rail line connecting to the Quinnesec mill. CN officials will also be visiting the area this week. The mill has had some informal discussions with CN regarding the fees being charged to use the track.

The issue of a possible federal bailout for the Montreal, Maine & Atlantic Railway abandonment of 233 miles of track in northern Maine was also raised with my office. My staff did research and found that segments of the track are being used by 22 manufacturers to transport goods. We also found that U.S. Representatives Michaud and Oberstar requested the Surface Transportation Board (STB) hold a public hearing in the state on the impact of this possible closing. It was also found that Governor Baldacci requested a state bond package that included funds to preserve the railroad line. I know that suggestions have been made indicating that the federal government would provide funds but this claim cannot be substantiated at this time.

Given the realities and options that have already been exhausted, direct federal loans or subsidies to E&LS are not likely at this time. My staff and I continue to look for ways to assist E&LS. As always, I am open to suggestions that are feasible in the current business and political climate.

Sincerely,



BART STUPAK  
Member of Congress

BTS/ tlb