

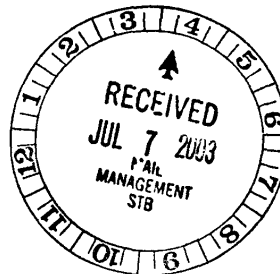
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July 7, 2003



Via Courier

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

ENTERED
Office of Proceedings

JUL 07 2003

**Part of
Public Record**

**Re: Paducah & Louisville Railway, Inc.
Abandonment Exemption -- In McCracken County
Kentucky -- Docket No. AB-468 (Sub-No. 5X)**

Dear Secretary Williams:

Enclosed please find an original and eleven copies of Boral Bricks Inc.'s Petition to Stay Pending Disposition of Petition to Reopen ("Petition") in the above-referenced proceeding. Please date stamp the eleventh copy and return it to our courier.

The enclosed Petition includes a facsimile verification. The original verification will be filed under separate cover. Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,

Ronald E. Quirk, Jr.

Enclosures

cc: All parties of record (w/enc.)

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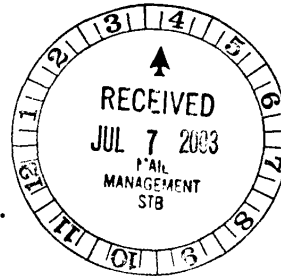
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. AB-468 (SUB-NO. 5X)

**PADUCAH & LOUISVILLE RAILWAY, INC.
- ABANDONMENT EXEMPTION -
IN MCCrackEN COUNTY, KY**

**BORAL BRICKS INC.
PETITION TO STAY PENDING
DISPOSITION OF PETITION TO REOPEN**



**ENTERED
Office of Proceedings
JUL 07 2003
Part of
Public Record**

Boral Bricks Inc. ("Boral"), by its attorneys and pursuant to Sections 1115.3(f) and 1152.25(e)(7) of the rules of the Surface Transportation Board, 49 C.F.R. §§ 1115.3(f) and 1152.25(e)(7), hereby submits its Petition to Stay ("Petition") the effective date of the Board's Decision in the above-captioned matter.¹ Boral will be submitting a Petition to Reopen the Decision on or before the due date of July 15, 2003, and it hereby petitions for stay of the effective date of the Decision pending disposition of Boral's forthcoming Petition to Reopen.² In support hereof, the following is respectfully shown:

I. STATEMENT OF FACTS

On June 20, 2003, the Board served its Decision granting approval of an exemption from the prior approval requirements of 49 U.S.C. § 10903, sought by Paducah & Louisville Railway, Inc. ("P&L") to abandon approximately 5,780 feet of rail line in the City of Paducah, McCracken County, KY (the "Line"). The Decision is

¹ See Decision and Notice of Interim Trail Use or Abandonment, Paducah & Louisville Railway, Inc., STB Docket No. AB-468 (Sub No. 5X) (Served June 20, 2003) ("Decision").

² The Board stated that petitions for stay must be filed by July 7, 2003, and petitions to reopen must be filed by July 15, 2003. Id. at 7.

scheduled to become effective on July 20, 2003,³ and Boral understands that P&L may cease providing service on the Line as of that date.

As Boral explained in its Reply in Protest (“Reply”), filed on April 14, 2003, Boral relies on the Line to transport approximately half of its brick materials to its Paducah Distribution Center. See Reply at 4. Boral explained that P&L’s proposed abandonment of the Line would cause severe economic harm to Boral’s business because: (a) Boral has no viable transportation alternatives to the Line; and (b) Boral would be subjected to abuse of market power. Id. at 4-7. Boral also averred, inter alia, that the Line is not an economic burden on P&L, and that the immediate community would be adversely harmed if P&L is permitted to abandon the Line. Id. at 7, 9-11.

The Decision did not analyze Boral’s contentions about harm to its business, but summarily dismissed Boral’s contentions without evaluating the evidence. The Decision also summarily declared, without any record evidence, that regulation of the proposed abandonment is not necessary to prevent Boral from abuse of market power because Boral’s “use of truck transportation for 50% of its inbound shipments indicates that this is a viable transportation option.” See Decision at 3.

The unrefuted fact is that Boral relies on the Line in order to meet the demands of its customers for high-quality, economically priced brick materials. If the Line is abandoned, Boral will almost certainly lose numerous customers to its competitors because of the increased transportation costs it will incur that will result in higher brick prices. Additionally, if the Line is abandoned on the proposed effective date of July 20, 2003, it is likely that motor carriers would not be immediately available to Boral to transport a viable quantity of brick materials to its distribution facility. As a company

³ Id.

whose business would be irreparably harmed if the Decision becomes effective, Boral submits this Petition to Stay.

II. ARGUMENT

The Board's Decision should be stayed pending disposition of Boral's forthcoming Petition to Reopen. The Board generally applies the "four prong" test for injunctive relief as stated by the U.S. Court of Appeals for the District of Columbia Circuit, that a stay should be granted where: (1) petitioner is likely to prevail on the merits; (2) petitioner will be irreparably harmed should a stay be denied; (3) no harm will result to other interested parties if the stay is granted; and (4) the public interest warrants a stay. See Boston and Maine Corporation – Abandonment Exemption – In Hartford and New Haven Counties, CT, STB Docket No. AB-32 (Sub-No. 23) (STB Served May 18, 1998), citing Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). This test is a "flexible one," see Population Institute v. McPherson, 797 F.2d 1062, 1078 (D.C. Cir. 1986); an "absolute certainty of success" on the merits is not required. Id. citing Cuomo v. U.S. Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985). Boral's request for stay satisfies these judicial standards.

A. Boral has a High Likelihood of Success on the Merits

The Board will grant a petition to reopen upon a showing that the action would be affected materially because of new evidence, changed circumstances, or material error. See 49 C.F.R. §§ 1115.4, 1152.25(e)(2)(ii). As will be discussed in Boral's Petition to Reopen, the Board committed material error in its Decision because it ignored some important arguments in Boral's Reply, and made summary conclusions about others.

For example, the Board failed to address Boral's argument concerning the competitive market for brick products, and the fact that abandonment of the Line would place Boral at a severe disadvantage vis-à-vis its main competitor, which has rail service, and would not incur the same transportation costs as Boral. The Board also failed to adequately address Boral's arguments concerning its lack of viable transportation alternatives and the overall harm to its business should the Line be abandoned; its conclusion concerning these arguments was made in one sentence. See Decision at 3.

Such unsupported conclusions are material errors. See, e.g., Olenhouse v. CCC, 42 F.3d 1560, 1578 (10th Cir. 1994)(citation omitted); First Girl, Inc. v. Regional Manpower Adm'r of US, 499 F.2d 122, 124 (7th Cir. 1974). Additionally, at least one federal court has held that an unsatisfactory discussion of harm to shippers in an abandonment proceeding is a reversible error. See Busboom Grain Company, Inc. v. ICC, 856 F.2d 790, 795 (7th Cir. 1988). Because the Decision is similarly flawed, Boral has a high likelihood of success on the merits.

B. Boral Will Suffer Irreparable Harm if the Stay is Not Granted

Boral would be irreparably harmed unless a stay is granted because of the lack of available trucks to serve its Paducah Distribution Center. The summer is the busiest time of year for produce growers, and a large number of commercial trucks are tied up in transporting produce throughout the U.S. Accordingly, trucks are often unavailable for other shippers.

Because of its reliance on the Line, Boral does not have any contracts with trucking companies, and there are no assurances that a truck would be available for a given shipment. During recent past summer seasons, Boral has had severe difficulties in

securing needed trucks, due to their being tied up with produce shippers. It has not been unusual for Boral to experience shortages in inventory in its Paducah Distribution Facility during the summer, due to the lack of available trucks. Boral has already had problems in securing trucks this season, and the summer has barely begun.

If the Decision goes into effect on July 20, Boral's difficulty in obtaining needed trucks will be compounded, because Boral now uses trucks for approximately 50% of its shipments to the Paducah Distribution Facility; as of July 20, Boral would be required to use trucks for 100% of those shipments. This will undoubtedly cause Boral to have more severe inventory shortages, particularly during the summer.

Additionally, the majority of the few trucks that might be available on an ad hoc basis during the summer are those that would be called in from parts of the country that are not their origination points. For Boral to obtain these trucks, if they were available, it would be forced to pay a premium, additional charge to the trucking companies for the return of their vehicles, which refer to this practice colloquially as "deadheading." If Boral shipped bricks in these "deadhead" trucks, Boral would be forced to pass those increased shipping charges on to its customers.

Boral has worked hard over many years to win customers through prompt delivery of reasonably-priced bricks; the Decision threatens Boral's business reputation and customer goodwill in that, absent a stay, it is highly likely that the cost of bricks will rise, and, deliveries will be delayed. Thus, the loss of rail service provided on the Line is likely to cause irreparable harm to Boral's business reputation and customer goodwill. Federal courts have held that a business's threatened loss of goodwill among its customers constitutes irreparable harm, which justifies a stay of a judicial action. See

Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 20 (1st Cir. 1996); United Healthcare, Inc. v. AdvancePCS, 316 F.3d 737, 741 (8th Cir. 2002).

Additionally, Boral's customers will be harmed absent a stay. Boral has numerous regular customers, including local builders and bricklayers, that depend on Boral to have a ready supply of good brick materials at economical prices at the Paducah Distribution Center. The shipping and inventory problems caused by loss of the Line would deny them Boral's ready supply of high-quality, low priced brick materials, and they would lose the prompt and dependable services Boral provides at the Paducah Distribution Center.

Loss of the Line will almost certainly result in Boral losing customers. It is highly unlikely that Boral would be able to gain those customers back, as the general increased shipping problems associated with trucks⁴ would drive Boral's prices up, while its main local competitor, which will continue to have rail service, will be able to sell its brick products at prices lower than Boral.

The threatened loss of customers also constitutes irreparable harm that warrants a stay. See Jacobson & Co., Inc. v. Armstrong Cork Co., 548 F.2d 438, 444 (2d Cir. 1977). The potential harm to Boral's customer base that this Decision will cause could also result in the loss of jobs for Boral employees, since the abandonment of the Line will lead to decreased revenues for the company.

Even if the Board were to subsequently reverse its Decision as a result of Boral's Petition to Reopen, in the interim Boral would suffer irreparable harm due to lack of rail service during that period, and the resulting consequences as discussed herein.

⁴ In its Reply, Boral discussed the economic hardships associated with the increased costs of shipping by trucks as opposed to rail. See Reply at 5-7.

Accordingly, A stay is necessary to prevent irreparable harm to Boral and its customers while the Board considers Boral's Petition to Reopen.

C. A Stay Would Not Harm Interested Parties

A stay will not harm P&L or any other interested parties. As P&L stated in its Petition, its primary concern in seeking abandonment of the Line is the purported future cost of rehabilitation of the track and grade crossings. See Petition at 5. Even if it were to be assumed that such future rehabilitation is necessary, P&L would not be required to invest in any "upgrades" during the brief period a stay would be in effect. The stay would simply retain the status quo while the Board considers the issues raised in Boral's Petition to Reopen.

A stay would also not harm the City of Paducah (the "City"). In its Decision, the Board granted the City a notice of interim trail use ("NITU") respecting possible future use of the Line. See Decision at 4. The NITU was issued subject to negotiations with P&L, and at the time the Decision was released, P&L had indicated a "willingness" to negotiate with the City for interim use. Id. Accordingly, any interim use discussions would be, if they have commenced at all, in the preliminary stages. Additionally, as noted by the Board, use of the right-of-way for trail purposes is subject to restoration for railroad purposes. Id. at 4-5. Consequently, no harm to the City would result from a stay.

D. The Public Interest Warrants a Stay

The public interest would also be served by staying the Decision. The residents and businesses of Paducah and environs will benefit by continued rail service because it will decrease the number of trucks on their roads, which means less traffic, air pollution, and road repairs. Additionally, because rail service allows Boral to keep its prices low

and its inventory promptly and fully stocked, Boral's customers benefit by having an additional brick supplier that can charge competitive prices.

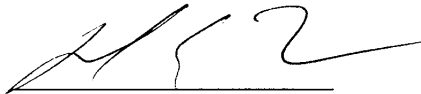
Conversely, it would be contrary to the public interest if the Line is abandoned before Boral's Petition to Reopen is considered. It will be difficult if not impossible to reinstate rail service, absent this stay, should P&L abandon rail service pending review of Boral's Petition to Reopen. This would, among other things, harm Boral's existing customers, because loss of the Line will deny them the high-quality, low-cost brick products and services they have come to depend on at the Paducah Distribution Center.

III. CONCLUSION

For all the foregoing reasons, the Board should grant this Petition, and stay the effectiveness of its Decision until disposition of Boral's Petition to Reopen.

Respectfully submitted,

BORAL BRICKS INC.



Frederick M. Joyce
Ronald E. Quirk, Jr.
Scott O'Melia

Its Attorneys

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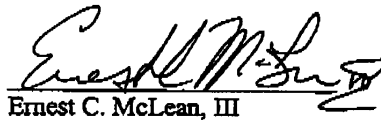
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July 7, 2003

VERIFICATION

I, Ernest C. McLean, III, verify under penalty of perjury, under the laws of the United States of America, that I have read the foregoing Petition to Stay Pending Disposition of Petition to Reopen, and that its assertions are true and correct to the best of my knowledge, information and belief. I further declare that I am qualified and authorized to submit this Verification on behalf of Boral Bricks Inc.

Executed on this 7th day of July, 2003


Ernest C. McLean, III
Vice President
Boral Bricks Inc.

CERTIFICATE OF SERVICE

I, Sonya Williams, an employee of the law firm of Alston & Bird LLP, do hereby certify that on this 7th day of July 2003, true and complete copies of the foregoing Petition to Stay Pending Disposition of Petition to Reopen in STB Docket No. AB-468 (Sub-No. 5X) by Boral Bricks Inc., were served by first class mail, postage prepaid, on the following:

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Troutman Sanders LLP
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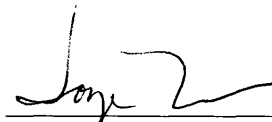
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Sonya Williams

*By Hand Delivery