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July 14, 2003

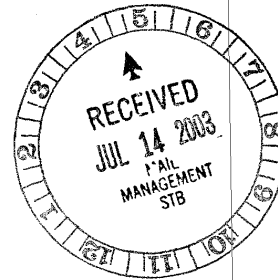
FED. ID: 52-1888690

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

ENTERED
Office of Proceedings

JUL 14 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 the Reply of Paducah & Louisville Railway, Inc. to Petition of Boral Brick Inc. for Stay Pending Disposition of Petition to Reopen (“Reply”) in the above-referenced proceeding. As can be seen from the certificate of service, a copy of the attached Reply has been served on all parties of record.

Please acknowledge receipt and filing of the enclosed Reply by date stamping the eleventh copy and returning it to our courier. If there are any questions concerning this filing, please contact me at 202-637-9499 (ext. 13).

Sincerely,

A handwritten signature in dark ink, appearing to read 'William A. Mullins'.

William A. Mullins

Enclosure

Cc: All parties of record (w/ enclosure)

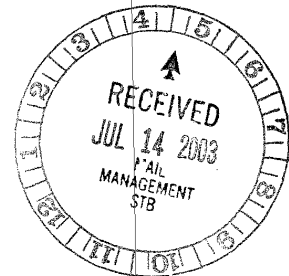
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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

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

**REPLY OF PADUCAH & LOUISVILLE RAILWAY, INC. TO
PETITION OF BORAL BRICKS INC. FOR STAY PENDING
DISPOSITION OF PETITION TO REOPEN**



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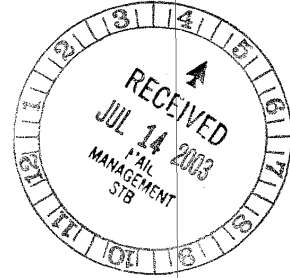
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PETITION OF BORAL BRICKS INC. FOR STAY PENDING
DISPOSITION OF PETITION TO REOPEN**

Paducah & Louisville Railway, Inc. ("P&L"), pursuant to 49 C.F.R. §§ 1115.3(f) and 1152.25(e)(7), hereby replies to Boral Bricks Inc.'s Petition to Stay ("Petition") the Abandonment Exemption ("Exemption") approved by the Surface Transportation Board ("STB" and/or "Board") on June 20, 2003. Boral's Petition should be denied.

SUMMARY OF ARGUMENT

P&L respectfully requests that the Board deny this Petition because Boral Bricks Inc. ("Boral" and/or "Petitioner") has not made any of the four showings required for a grant of injunctive relief. *See SF&L Railway, Inc. – Acquisition and Operation Exemption – Toledo, Peoria and Western Railway Corporation Between La Harpe and Peoria, IL*, STB Finance Docket No. 34282 (STB Served February 6, 2003) ("SF&L"), *citing Washington Metro Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) ("Holiday Tours"); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). *See also 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). As discussed in more detail

below, Boral's Petition is insufficient to justify a stay because: (i) it is unlikely to prevail where the Board has already considered and rejected its arguments; (ii) it has not shown it will suffer "irreparable harm;" (iii) P&L and the public would be harmed as a result of the stay; and (iv) on balance, the public interest is best served by allowing the Exemption to take effect as scheduled. For these reasons, Boral cannot show that there is a material error in the Board's Decision. As a consequence, Boral's Petition should be denied.

BACKGROUND

On March 4, 2003, P&L filed a petition for exemption with the Board to abandon approximately 5,780 feet of rail line ("the Line") in the City of Paducah in McCracken County, Kentucky.¹ Notice was served and published in the Federal Register on March 24, 2003. 68 FR 14273. Boral filed its Protest to the exemption on April 14, 2003², and P&L filed its Rebuttal on May 2, 2003.³ On June 20, 2003, the Board served its Decision in this proceeding, which granted P&L's Petition for Exemption. *Paducah & Louisville – Abandonment Exemption – In McCracken County, Kentucky*, STB Docket No. AB-468 (Sub-No. 5X) (Served June 20, 2003) ("Decision").

The Decision found that P&L had provided "unrefuted evidence" that revenues are inadequate to cover the cost of current operations and projected rehabilitation on the Line. Decision at 2-3. The Board reviewed and accepted P&L's evidence that the use of and revenues from the Line had been decreasing. (In 2001, only 66 carloads traveled on the Line and in 2002, only 58; and the total revenue generated during those years was less than \$80,000.) The Board

¹ See *Petition for Exemption, Paducah & Louisville Railway, Inc.*, STB Docket No. AB-468 (Sub-No. 5X) (filed March 4, 2003).

² *Rebuttal Boral Brick Inc.'s Reply in Protest to Petition for Exemption*, STB Docket No. AB-468 (Sub-No. 5X) (filed May 1, 2003).

³ *Reply in Protest to Paducah & Louisville Railway, Inc. – Abandonment Exemption in McCracken County, Kentucky*, STB Docket No. AB-468 (Sub-No. 5X) (filed April 14, 2003).

also accepted that the condition of the tracks was poor, which would require P&L to spend in excess of \$616,066 to repair the Line. Decision at 2 (noting that rehabilitation was needed and that seven grade crossings required repair). The Decision also found that Boral's assertions of hardship and necessity were "speculative and unsupported by any evidence." Decision at 3. Upon weighing all the arguments, the Board granted P&L's Petition for Exemption pursuant to 49 U.S.C. 10502, and the additional requirements as set forth in the Decision. *Id.* at 6-7. On July 7, 2003, Boral filed a Petition for Stay of the Decision Pending its Petition to Reopen. Despite this latest filing (and its numerous other filings in this case), Boral has failed to provide sufficient evidence to support a Stay of the Decision.

ARGUMENT

I. STANDARD OF DECISION

As the Petition correctly states, the movant must show the following elements in order to obtain an administrative stay: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Holiday Tours*, 559 F.2d at 843. As the petitioner, it is Boral's obligation to justify the exercise of such an extraordinary remedy, *Cuomo v. United States Nuclear Regulatory Comm.*, 772 F.2d 972, 978 (D.C. Cir. 1985), and Boral bears the burden of persuasion on all of the elements required for such extraordinary relief. *Canal Authority of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). *See also SF&L, slip op.* at 3. Here, the Petitioner has failed to demonstrate that it is entitled to a stay under any of the criteria and thus, Boral's request for a stay should be denied.

II. BORAL HAS NOT SHOWN A LIKELIHOOD OF PREVAILING ON THE MERITS OF ITS PETITION TO REOPEN

The first prong of the *Holiday Tours* test requires the party seeking a stay to establish that it is likely to prevail on the merits of its petition for review. In this instance, Boral must therefore carry the burden of establishing that it is likely to prevail on the as-yet unfiled petition to reopen or in an appropriate appeal. Because Boral cannot make such a showing, its Petition must be denied.

Boral makes two connected assertions as to why the Board's Decision is inadequate, both of which have already been evaluated and rejected in the Decision: (i) that Boral has no viable transportation alternatives; and (ii) that Boral's costs would increase if forced to use trucks for all inbound shipments. Petition at 2-4. In again making these assertions, Boral has presented no new evidence or argument to justify a reversal of the Board's conclusions, let alone a stay of the effective date of the abandonment. The Petition is simply devoid of any specific facts regarding the unavailability of the specific shipping / trucking equipment that would be needed to haul bricks and fails to mention any concrete estimates relating to loss of revenue, business or sales. Where a party fails to offer any facts that would demonstrate the likelihood that it will prevail on the merits, the petition for stay must be denied. *Holiday Tours*, 559 F.2d 841.

It is clear that Boral's Petition is deficient and that it would not succeed on the merits. First, Boral clearly has transportation alternatives available to it, and in fact uses those transportation alternatives for a significant amount of its transportation needs. Boral attempts to argue that trucks would not be available to it, but fails to present evidence of that fact. Indeed, Boral attempts to confuse the issues by arguing that there is a trucking shortage due to the high volume of produce being shipped throughout the United States. How this fact relates to the lack of trucking capacity for a company located in Paducah, KY is unclear. Indeed, without

conducting a survey of the trucking industry, P&L submits that even if there were a shortage of trucks used in the produce trade and such a shortage did exist in the Paducah region, it is unlikely that the refrigerated trucks tied up in produce usage would not be required for shipping bricks; rather, Boral would most likely utilize flat-bed trucks for transporting its product. In sum, other than broad assertions, Boral has simply presented no evidence that trucks would be unavailable to it.

Boral's position is at odds with the fact that it already uses trucks for 50% of its inbound brick shipments and all of its outbound shipments, conclusively demonstrating that "this is a viable transportation option." Decision at 3-4. P&L submits that the trucking companies currently used by Boral would be able to provide additional capacity or to offer names of alternate trucking companies and Boral has not shown otherwise.

As to its argument that trucking is more expensive than rail, even if true, that alone does not justify denying an abandonment petition or granting a stay. The Board must balance the potential harm to affected shippers and communities against the present and future burden that continued operations could impose on the railroad and on interstate commerce. *See Birmingham Southern Railroad Company – Abandonment and Discontinuance of Trackage Rights – In Jefferson County, Alabama*, STB Docket No. AB-192 (Sub-No. 1) (STB Served April 29, 1988), *citing Colorado v. United States*, 271 U.S. 153 (1926). Here, the Board conducted such a balancing of factors and concluded that the costs to P&L for continued rail operations far outweighed the costs to the public and Boral bricks if the abandonment were granted. Boral's stay petition presents no new evidence to change that conclusion.

Boral does argue that it cannot effectively compete in the market for brick products without continued rail transportation, but as the Board held in its Decision, this statement has not

been supported by any evidence from Boral. Decision at 3-4; Petition at 4-5. For example, Boral did not submit any specific or documented information regarding estimated transportation cost increases or examples of bids and/or customers that it anticipated losing to competitors. Furthermore, even if true and Boral truly needs continued rail service to compete, it can purchase and operate the line under the statutory provisions of 49 U.S.C. § 10904.

Instead, Boral wants P&L to continue to subsidize its transportation costs by continuing to operate the line at a loss. The Board should reject such an approach.

The purpose of a stay is to evaluate the evidence currently available and to grant relief for which there is no other legal remedy; it is not to extend the time for a dissatisfied party to conduct a fact-gathering process. As noted, the Board weighed the evidence and found Boral's arguments deficient. Boral does have transportation alternatives available to it and the Board's decision adequately weighed all of the arguments and evidence. Accordingly, Boral is unlikely to prevail on the merits and its petition thus fails to meet the first requirement of the *Holiday Tours* test and the stay should be denied.

III. BORAL HAS NOT SHOWN THAT IT WILL SUFFER "IRREPARABLE HARM" IF A STAY IS NOT GRANTED

As Boral admits, in order to prevail on its Petition, it must demonstrate that it will suffer irreparable harm if a stay is not granted. Petition at 3. Mere speculation or an unsubstantiated fear of harm, however, does not show irreparable injury. *Seaboard System Railroad, Inc.—Abandonment—In Boone, Carroll, Clinton, Hamilton and Marion Counties, IN*, Ab-55 (Sub-No.94), 1985 ICC LEXIS 429 (ICC served May 3, 1985).

Boral contends that the loss of rail transportation would cause irreparable harm because of lack of available trucks to serve its distribution center. Petition at 4-5. Specifically, Boral claims it has had difficulties in using trucks because of the produce season and that it may

receive “deadheading” charges. Despite the fact that such an assertion is highly speculative and likely untrue, given that Boral already uses trucks for 50% of its inbound movements and 100% of its outbound movements, these are principally cost issues and, absent more, mere economic harm is not irreparable. *Borey v. National Union Fire Ins. Co. of Pittsburg*, 934 F.2d 30 (2nd Cir. 1991); *Kaplan v. Board of Educ.*, 759 F.2d 256 (2nd Cir. 1985). Furthermore, not even an affidavit has been included to support these statements. Boral did admit, however, that it has not entered into transportation contracts with any trucking companies. Petition at 5. And Boral admits that the shortage of trucks is a seasonal issue. Petition at 4-5. As such, Boral’s Petition fails to meet the second requirement for a stay and the Petition should be denied.

IV. A STAY WOULD HARM P&L AND THE PUBLIC

Under the third requirement for granting a stay, Boral must demonstrate that there would be no substantial harm to any interested parties, including P&L and the general public. *Holiday Tours*, at 843. The Board, however, has already reviewed the facts and found that P&L would indeed be harmed if rail operations were to continue. P&L’s revenues are simply inadequate to cover the cost of operation and the high projected cost of rehabilitation. Decision at 3-5. Specifically, the Board found that low traffic levels do not support any prediction of meaningful traffic (or revenue) increases in the future. Decision at 3. Boral presented no evidence, either during the course of this proceeding or in its stay petition, to contradict these claims.

In addition to harm related to P&L, a grant of the stay request could subject the public to possible unsafe road conditions. As the Board found, there are seven rough grade crossings in need of repair and track that needed rehabilitation. Decision at 4. The Petition, however, argues that the temporary nature of the stay would shield P&L from having to expend funds for operation and rehabilitation. Boral’s statement misses the point. If the stay is granted, P&L will

remain financially (and legally) culpable for the Line maintenance and operation until a final decision is entered. Under this situation, there remains a risk to the public because the track and crossings remain in a deteriorating condition, which could cause either an accident on the tracks or damage to automobiles at one of the seven grade crossings. Boral ignores these potential harms to the public.

Specifically, Boral fails to take into account the increased safety risk if the abandonment is delayed. The poor condition of the tracks could lead to derailment, causing injuries to the train crew, the destruction of one of Boral's own shipments and, possibly, damages to neighboring homes, facilities or businesses. Also, and as the Board's Decision noted, seven rail crossings are in need of repair. Decision at 2. If, as Boral suggests, P&L would not have to invest in any upgrades during the stay, then there is an increased risk of automobile damage or accidents at these crossings. All of these factors demonstrate that the public interest is best served by a denial of a stay.

In conclusion, granting the stay would subject P&L to continued financial loss contrary to the objective of the rail transportation policy to provide adequate revenues to the rail system. It could also result in possible unsafe operating conditions and potential harm to the public due to deteriorating grade crossings and poor track conditions. Such factors would be contrary to §10101a(3), (6) and (12). Boral has completely failed to satisfy the final prong of the *Holiday Tours* test. Accordingly, the stay should be denied.

CONCLUSION

Boral has failed to meet its burdens under the *Holiday Tours* test. The Petition fails the first prong because the Board, having considered all the facts, granted the Petition for Exemption. Boral has presented no facts showing that the Board's conclusions are in error. Boral also fails to meet the second element because it has provided no facts to support a finding of irreparable harm. Next, if the stay were granted, P&L would be forced to incur additional operational and maintenance costs or the public would face potential risks, causing harm to interested parties and defeating the third prong of the test. Last, the public interest would be best served by denying the stay because of the increased property and/or safety risks discussed above. For these reasons, P&L respectfully requests that the Board deny Boral Brick's Petition for Stay.

Respectfully submitted,

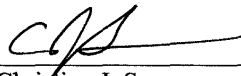


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July 14, 2003

CERTIFICATE OF SERVICE

This is to certify that I have this 14th day of July, 2003, I caused the foregoing
“Reply of Paducah & Louisville Railway, Inc. to Petition of Boral Bricks Inc. for Stay
Pending Disposition of Petition for Reopen” to be served on all parties of record by
facsimile and first class mail.



Christine J. Sommer