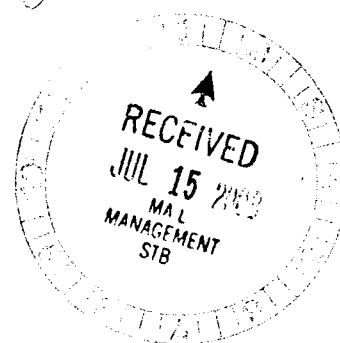


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July 15, 2003

Via Hand Delivery

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

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TRANSPORTATION BOARD

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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 plus eleven copies of Boral Bricks Inc.'s ("Boral") Petition to Reopen the above-referenced proceeding. A check in the amount of \$150.00 is enclosed for the filing fee.

Please date-stamp one of the copies, and return it to our courier. 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.

Enclosure

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

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JUL 15 2003

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PREFACE AND SUMMARY OF ARGUMENT

Boral Bricks, Inc. (“Boral”) petitions the Board to reopen its Decision served on June 20, 2003, wherein the Board granted the Paducah & Louisville Railway, Inc.’s (“P&L”) Petition for Exemption (“Exemption Petition”) of the prior approval requirements of 49 U.S.C. § 10903 to abandon approximately 5,780 feet of rail line in Paducah, KY (the “Line”). The Board’s Decision contains material errors that warrant reopening of the Decision.

The Decision fails to address many of the important statements that Boral, a shipper that utilizes the Line, made in its Reply to P&L’s Exemption Petition. The points raised by Boral which were not adequately addressed in the Decision include statements on crucial topics such as P&L’s abandonment of the Line would cause: (a) harm to Boral’s business due to abuse of market power; (b) harm to Boral’s business due to lack of viable transportation alternatives; and (c) violation of federal energy conservation policy.

Additionally, because P&L failed to provide substantial evidence in its Exemption Petition to meet its burdens of proof that an exemption is warranted and would serve the public interest or convenience, P&L’s exemption was based on an inadequate record. Binding Board precedents require that an exemption petitioner must present substantial evidence to meet its burdens of proof, and that an exemption may be granted only when the Board has sufficient information on which to make an informed decision. Accordingly, the Board erred in granting P&L’s Exemption Petition based on a lack of record evidence in this proceeding.

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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 REOPEN**

Boral Bricks Inc. ("Boral"), by its attorneys and pursuant to Sections 1115.4 and 1152.25(e)(2)(ii) of the rules of the Surface Transportation Board, 49 C.F.R. §§ 1115.4, 1152.25(e)(2)(ii), hereby submits its Petition to Reopen the Board's Decision in the above-captioned matter¹ on the ground of material error. In support hereof, the following is respectfully shown:

I. STATEMENT OF FACTS

On March 4, 2003, the Paducah & Louisville Railway, Inc. ("P&L"), filed a Petition for Exemption ("Exemption Petition") of the prior approval requirements of 49 U.S.C. § 10903 to abandon approximately 5,780 feet of rail line in the City of Paducah, McCracken County, KY (the "Line"). P&L's Exemption Petition contained two main arguments in favor of exemption: (1) traffic on the Line does not cover the costs of the Line's purportedly necessary rehabilitation; and (2) Boral, a shipper that uses the Line, allegedly has alternative transportation options available. See Exemption Petition at 5-6.

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"). The Board stated that petitions to reopen must be filed by July 15, 2003. Id. at 7. Accordingly, this Petition is timely filed.

On April 14, 2003, Boral timely filed its Reply in Protest (“Reply”) to P&L’s Exemption Petition. In its Reply, Boral explained that P&L’s Exemption Petition does not meet the statutory requirements for exemption because, inter alia: (1) abandonment of the Line would subject Boral to abuse of market power; (2) Boral has no viable transportation alternatives to the Line; (3) P&L’s proposed abandonment would violate federal energy conservation policy; and (4) operation of the Line is not a burden on P&L. See Reply at 3-7, 9-11.

On May 1, 2004, P&L filed a “Rebuttal” to Boral’s Reply, wherein P&L attempted to augment the information contained in its Exemption Petition. Boral subsequently filed a Motion to Strike the Rebuttal, contending, inter alia, that P&L’s Rebuttal was a “reply to a reply,” prohibited by 49 C.F.R. § 1104.13. See Motion to Strike at 1.

On June 20, 2003, the Board served its Decision. In pertinent part, the Decision granted Boral’s Motion to Strike and P&L’s Exemption Petition. See Decision at 1.² In granting P&L’s Exemption Petition, the Board concluded that: (a) the Line was uneconomical for P&L, and therefore certain rail transportation policies would be served by allowing P&L to abandon the Line; (b) abandonment of the Line would not violate federal energy conservation policy; and (c) Boral would not be subject to market abuse because it has alternative transportation options available. Id. at 3.

In its Decision the Board failed to, inter alia, address many of the important contentions Boral made in its Reply, and provided only cursory responses to others.

² On July 7, 2003, Boral timely filed a Petition to Stay the Decision pending disposition of this Petition to Reopen. The scheduled effective date of the Decision is July 20, 2003. See Decision at 7.

Consequently, the Board granted P&L's Exemption Petition without properly evaluating relevant record evidence.

II. STANDARD OF REVIEW

The Board's rules state that the Board will grant a petition to reopen a final decision upon a showing that the action would be materially affected because of new evidence, changed circumstances, or material error. See 49 C.F.R. §§ 1115.4, 1152(3)(2)(ii). An agency's failure to adequately consider relevant factors in an administrative action constitutes material error. See, e.g., Olenhouse v. CCC, 42 F.3d 1560, 1578 (10th Cir. 1994)(citation omitted); First Girl, Inc. v. Regional Manpower Administrator of the U.S., 499 F.2d 122, 124 (7th Cir. 1974).

III. ARGUMENT

The Decision should be reopened on the basis of material error, due to: (a) failure to adequately address crucial facts that Boral raised in this proceeding; (b) misapplication of relevant law; and (c) lack of record evidence to support the Decision.

A. Harm to Boral's Business Due to Abuse of Market Power

According to 49 U.S.C. § 10502(a)(2), in an exemption proceeding the Board is required to consider whether a transaction is either limited in scope, or whether continued regulation (i.e., a full abandonment proceeding) is not necessary to protect shippers from abuse of market power. In its Decision, the Board stated that "Given [our] market power finding, it is not necessary to determine whether the proposed transaction is limited in scope." See Decision at 4.

The Board's entire "market power finding" consists of the following conclusory statement:

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power because Boral, the only shipper on the line, has alternative transportation service available. Boral's current use of truck transportation for 50% of its inbound shipments indicates that this is a viable transportation option. Id. at 3.

The Board's statement does not constitute a "finding" because it ignored record evidence submitted by Boral concerning likely market abuse.³ In its Reply, Boral stated that abandonment of the Line would subject Boral to abuse of market power because: (a) Boral would incur substantial increased transport charges if the Line is discontinued, which would force it to increase its prices; (b) brick prices are typically set by bid and are therefore already very competitive; (c) Boral competes with other brick suppliers and companies selling other types of building materials; and (d) Boral's main local competitor continues to be served by rail; since it does not incur the same transport costs as Boral, it would be able to undercut Boral by selling its products at lower prices. See Reply at 5-6.

The Decision makes no mention of this record evidence concerning how discontinuance of the Line would subject Boral to market abuse. The Board's failure to consider the evidence presented by Boral is material error. See, e.g., First Girl, Inc., 499 F.2d at 124 (citation omitted); Olenhouse, 42 F.3d at 1574 (citations omitted).

The Board failed to adequately consider the harm to the shipper that utilizes the Line, Boral, which at least one federal court has held is reversible error. See Busboom Grain Company, Inc. v. ICC, 856 F.2d 790, 795 (7th Cir. 1988). In pertinent part, the issue in Busboom was the Interstate Commerce Commission's ("ICC") terse finding

³ Additionally, as discussed in pp. 6-8 herein, the Board improperly based its conclusion about viable transportation alternatives for Boral solely on an erroneous and unsupported statement by P&L.

regarding harm to shippers in an abandonment proceeding. In its order granting abandonment of a line, the ICC stated that:

The evidence shows that alternative service is readily available and that both [shippers] have used this alternative service While these shippers may experience some inconvenience and increased costs as a result of the abandonment, we have found in various proceedings that this is not sufficient to outweigh the detriment to the public interest of continued expiration of uneconomic or excess facilities. Id. (citation omitted).

The U.S. Court of Appeals for the Seventh Circuit stated that such a cursory analysis was “entirely unsatisfactory.” Id. (citation omitted). The court further stated that, contrary to the ICC’s contention, the precedent the ICC cited did not support its perfunctory finding that the increased costs of abandonment to the shippers are irrelevant if alternative transportation is available at any price, as long as the service is uneconomical to the railroad. Id. The court concluded that the ICC’s findings were “not adequately supported or explained,” and it reversed the ICC’s order permitting a railroad to abandon a branch line. Id. at 796.

The Board’s market abuse conclusion in the Decision is similarly flawed; its analysis is less detailed than the ICC’s order which was reversed in Busboom. The Board’s main rationale for granting P&L’s Exemption Petition is based on erroneous reasoning similar to what the Seventh Circuit rejected in Busboom: that the cost of abandonment to Boral is apparently irrelevant if the Board determines that continuing service is uneconomical to P&L. See Decision at 3. Consequently, the handling of the market abuse issue in the Decision is material error that warrants reversal.

B. Harm to Boral’s Business Due to Lack of Viable Transport Alternatives

Another matter that the Board is required to consider when determining whether a line may be abandoned is the availability of feasible transportation alternatives for

shippers utilizing that line. See Georgia Public Service Commission v. U.S. & ICC, 704 F.2d 538, 541 (11th Cir. 1983)(citations omitted).

In its Reply, Boral stated that trucks are not a viable alternative to rail service, because abandonment of the Line would result in, inter alia: (a) Boral's incurring substantial additional transport costs; (b) Boral's incurring significant additional labor and incidental costs due to breakage, because of the necessary loading and unloading at an offsite dock; and (c) lower productivity and increased costs of doing business for Boral, because increased congestion at Boral's loading area would result in severe shipping and hauling delays. See Reply at 5-6.

The Board's analysis of this issue in its Decision consists of one conclusory sentence, which is part of its two-sentence market abuse finding: "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 Board is required to determine whether any transportation alternatives purportedly available to Boral are logistically and economically feasible. See Georgia Public Service Commission, 704 F.2d at 545. Said the court: "If the phrase 'alternative' is to have any meaning, it must be interpreted to include transportation both logistically and economically feasible." Id. The court also stated that, due to the lack of substantial evidence in the record to support the existence of viable alternative means of transport for a shipper, grant of abandonment was arbitrary and capricious. Id. at 545-46.

In this case, there is no record evidence to support the existence of transportation alternatives for Boral. P&L's entire discussion of this issue in its Exemption Petition consisted of the erroneous statement that Boral "uses motor carriers for more than 90% of

its inbound shipments. Thus, motor carrier transportation provides a viable alternative to rail transportation.” See Exemption Petition at 6.⁴

The Board’s one-sentence analysis of this issue reflects P&L’s contention. See Decision at 3.⁵ But, as the U.S. Court of Appeals for the Eleventh Circuit stated, the railroad has the burden of proving that discontinuing rail service serves the public interest or convenience. See Georgia Public Service Commission, 704 F.2d at 545. The Board may not rely on P&L’s unsubstantiated, erroneous statement to grant P&L an exemption. “Despite the fact that [the railroad] had the burden of proving that abandonment was in the public convenience or necessity [49 U.S.C. § 10904(d)(1)], and that [the railroad] offered virtually no proof of alternative transportation, the Commission determined that alternative transportation was available. We find this incredible.” Id. The Decision is similarly flawed.

The Board did not consider Boral’s arguments concerning its lack of viable transportation alternatives to the Line, nor did it conduct the required examination of the economic or logistical feasibility of transportation alternatives for Boral. Hence, this is a material error that warrants reversal of the Decision. Id. at 545-46.

Additionally, the Board failed to consider the harm to the Paducah community, which by law it is required to do. Id. at 541. Boral discussed harm to the community that

⁴ P&L also contended that Boral “recently expressed an interest to possibly relocate [Boral’s] facilities to another rail-served site in the area, thus creating even more transportation alternatives via the continued use of P&L at a different site.” See Exemption Petition at 6. Boral disputed P&L’s contention in its Reply. See Reply at 4-5. In any event, P&L’s contention about this “alternative” includes P&L’s continued service to Boral, albeit at a different location. Hence, it supports Boral’s position that there are no viable transportation alternatives to rail service for Boral in the Paducah area.

⁵ The only difference between P&L’s assertion and the Board’s conclusion on this issue is that the Board acknowledged that Boral uses motor carriers for 50% of its shipments to the Paducah Distribution Center, rather than 90%, as P&L claimed. See Decision at 3. It is curious as to why the Board, in recognizing that Boral uses the Line for 40% more of its shipments than P&L asserted, chose not to analyze the feasibility of alternative transportation options, and ignored Boral’s comments on this issue.

abandonment of the Line would cause (see Reply at 7), but the Board did not analyze that issue in its Decision.

C. Violation of Federal Energy Policy

In an exemption proceeding, the Board is also required to consider whether continued regulation is not necessary to carry out rail transportation policies stated in 49 U.S.C. § 10101. See 49 U.S.C. § 10502(a)(1). In its Decision, the Board failed to adequately address Boral's contention that abandonment of the Line would violate federal energy conservation policy, which is to "encourage and promote energy conservation." See U.S.C. § 10101(14).

In its Reply, Boral explained that grant of an exemption would result in double the number of trucks serving the Paducah Distribution Center, which would contravene federal energy conservation policy. See Reply at 8. Boral cited a study from the Federal Railroad Administration that trucks consume substantially more fossil fuels than do locomotives. Boral also stated that P&L submitted incorrect information in its Environmental Report wherein it stated that its proposed abandonment would not result in a decrease in overall energy efficiency. Id. at 8-9 (citation omitted).

The Board's analysis on this topic consists of its conclusory statement that P&L's proposed abandonment of the Line would not violate energy conservation policy because the resulting increase in motor traffic would "not exceed the Board's threshold of an average increase in truck traffic of more than 10% of the average daily traffic or 50 vehicles a day on any affected road segment [49 C.F.R. § 1105.7(e)]."⁶ See Decision at 3, n.4.

⁶ The quoted C.F.R. text appears to apply to air pollution policy. See 49 C.F.R. § 1105.7(e)(5)(i)(C).

The failure to examine relevant data and apply relevant law constitutes reversible error. See Olenhouse, 42 F.2d at 1574, citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983); see also Illinois Commerce Commission v. I.C.C., 787 F.2d 616, 626 (D.C. Cir. 1986) (The ICC [Board] must consider all aspects of the rail transportation policy bearing on the propriety of the exemption and must supply an acceptable rationale therefore).

D. The Record Evidence is Inadequate to Grant an Exemption

Binding legal precedent states that an exemption is appropriate only when the Board has sufficient information on which to reach an informed decision. See Burlington Northern and Santa Fe Railway Company -- Abandonment of Chicago Area Trackage in Cook County, IL, STB Docket No. AB-6 (Sub-No. 382X) (STB Served Sept. 21, 1999) at 4; Boston and Maine Corporation -- Abandonment Exemption -- In Hartford and New Haven Counties, CT, STB Docket No. AB-32 (Sub No. 75X) (STB Served Dec. 31, 1996) at 5. Where there is an inadequate record, an exemption petition must be denied outright. Id.

In its Decision, the Board states that "P&L has produced unrefuted evidence that revenues are inadequate to cover the cost of operation and the projected line rehabilitation." See Decision at 3. The Board also states that Boral's evidence regarding its assertion that traffic will increase on the Line is "speculative and unsupported." Id. Based on the Board's conclusions regarding those two factors, it decided that granting P&L's Exemption Petition would serve various rail transportation policies. Id. citing 49 U.S.C. § 10101(5),(7),(9).

In an exemption proceeding, the burden is on the petitioner to prove: (a) that continuing to serve the line imposes a burden on the petitioner that outweighs the harm that would befall affected shippers and the local community; and (b) that the line in question is a burden on interstate commerce. See Burlington Northern and Santa Fe Railway at 6. When proposing to discontinue service, a railroad must also prove that discontinuance serves the public interest or convenience. See Georgia Public Service Commission, 704 F.2d at 545.⁷

The only “evidence” submitted by P&L regarding its revenues and the purported necessity for, and cost of, rehabilitating the Line consists of a statement in its Exemption Petition (and a verified statement from a P&L officer) regarding P&L’s estimates as to how much revenue it received from Boral’s shipments in 2001 and 2002, and how much it would purportedly cost to “rehabilitate” the Line, which it contends is in “poor condition.” See Exemption Petition at 5. P&L also speculated that the gross revenues it anticipates receiving over the next several years would not be enough to cover the Line’s rehabilitation costs. Id.

As Boral explained in its Reply, P&L offered no substantial evidence to support its assertion that the Line is in disrepair and requires hundreds of thousands of dollars in repair costs. See Reply at 10. Boral also pointed out that P&L did not submit any information whatsoever concerning the revenues it anticipates receiving during the next several years. Id.

⁷ Boral, like P&L, submitted a verified statement by an officer, attesting to the accuracy of the facts presented in its pleading. Accordingly, Boral disagrees with the Board’s statement that P&L’s “evidence” is “unrefuted,” while Boral’s is “speculative and unsupported.” P&L provided no additional “support” for its assertions than did Boral. In any event, the burden is on P&L to show that an exemption is warranted, and the Board is required to ensure that P&L met its burden before granting an exemption.

The scant evidence presented by P&L does not come close to providing the Board with sufficient information on which to make an informed decision. Under similar circumstances, the Board has required a railroad to submit hard evidence, including cost studies, revenue projections, and other financial information, so that the Board could at least have some objective information to assist it in determining whether a line is or is not profitable. See Burlington Northern and Santa Fe at 6; Boston and Maine Corporation at 4-5.

P&L provided no such required evidence. Indeed, P&L apparently realized that it had failed to provide the Board with sufficient information for grant of an exemption when it attempted to augment that information by filing its Rebuttal, which the Board correctly struck from the record.

Additionally, the Board's statement that P&L's evidence is "unrefuted" is incorrect. Boral disputed P&L's assertions about the Line's unprofitability in its Reply. See Reply at 9-11.

The material presented by P&L is not sufficient for P&L to meet its burdens of proof, nor is it adequate for the Board to make an informed decision on P&L's Exemption Petition. This lack of objective record information, plus the fact that most of Boral's assertions in this proceeding were ignored, fatally undermines the conclusion that federal rail transportation policy would be served by granting P&L's Exemption Petition. See Illinois Commerce Commission v. ICC, 787 F.2d at 627 (only by considering all aspects of a rail transportation policy bearing on the propriety of an exemption can the ICC [or Board] avoid the taint of arbitrariness).

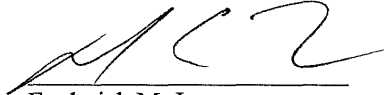
Because the Board granted P&L's Exemption Petition based on virtually no supporting evidence from P&L, it departed without explanation from precedent which requires a complete record for the Board to grant an exemption. See Burlington Northern and Santa Fe Railway Company at 4; Boston and Maine Corporation at 5. Federal courts have held that an agency's decision wherein it departs from prior precedent without explanation is arbitrary and capricious. See Bush-Quayle '92 Primary Committee v. FEC, 104 F.3d 448, 453 (D.C. Cir. 1997) (citations omitted).

IV. CONCLUSION AND REQUESTED RELIEF

For all the foregoing reasons, the Board should: (1) reopen the Decision served on June 20, 2003; and (2) issue a decision upon reopening denying P&L's Exemption Petition, due to, inter alia, P&L's failure to meet its burdens of proving that an exemption is warranted and would serve the public interest or convenience.

Respectfully submitted,

BORAL BRICKS INC.

A handwritten signature in black ink, appearing to read 'F. M. Joyce', written over a horizontal line.

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

Its Attorneys

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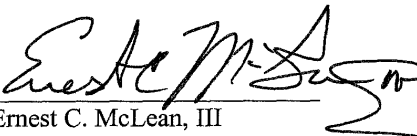
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(404) 881-7777 (fax)

July 15, 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 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 14th day of July, 2003

A handwritten signature in black ink, appearing to read "Ernest C. McLean, III", written over a horizontal line.

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 15th day of July 2003, true and complete copies of the foregoing 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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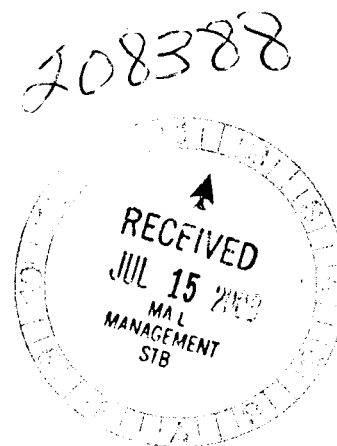
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July 15, 2003

Via Hand Delivery

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

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Sincerely,

Ronald E. Quirk, Jr.

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

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