

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
May 15, 2020
Part of
Public Record

TWIN CITY METALS, INC.

Complainant,

v.

KET, LLC,

Defendant.

§
§
§
§
§
§
§
§
§
§
§

DOCKET NO. NOR 42168

REPLY TO MOTION FOR STAY

Twin City Metals, Inc. (TCM) respectfully submits to the Surface Transportation Board (STB or Board) its reply in opposition to the Motion for Stay of KET, LLC (KET) filed in the above-captioned proceeding on May 13, 2020. KET seeks a stay based on its claim that TCM failed to comply with the requirements of 49 C.F.R. § 1111.9(d). TCM asks the STB to deny this request and order the parties to provide a proposed procedural schedule to the Board in 19 days in accordance with 49 C.F.R. § 1111.11(a).

In support of its motion, KET stated as follows:

Count 6 of the Complaint seeks partial revocation of KET's class exemption under 49 U.S.C. §10105(d). As such, Count 6 constitutes a de facto petition to revoke.

In companion with filing this Motion for Stay, KET is about to file an Answer to the Complaint raising as an Affirmative Defense, inter alia, TCM's failure to comply with requirements of 49 C.F.R. § 1111.9(d). As pertinent hereto, the regulation states: "If a Complaint is filed simultaneously with a petition to revoke a class exemption, the Board will take no action on the complaint, and the [proceeding] will be held in abeyance automatically until the petition to revoke is adjudicated."

Wherefore, in the interests of justice, KET requests the Board stay this proceeding until TCM's petition to partially revoke KET's class exemption has been adjudicated.

TCM reviewed 49 C.F.R. § 1111.9 and could not find the language quoted by KET or a provision (d) in this regulation.¹ TCM did find the quoted language in 49 C.F.R. § 1111.10(e). However, that section of the Board's regulations only applies to the "Procedural schedule in cases using simplified standards". Clearly, TCM's Complaint does not fall within that category, making this language inapplicable here.²

Moreover, the Board has held:

Under the provisions of 49 U.S.C. 10502, a formal petition is not required in order for the agency to institute an exemption proceeding or to revoke an existing exemption. Thus, contrary to what BM/ST suggests, the Board has not itself imposed such a requirement. The Board retains the flexibility to evaluate exemption revocation requests that are made in the course of ongoing regulatory proceedings when appropriate. The ability to consider such requests is important where, as here, there is a need for expedition.

Granite State Concrete Co., Inc. and Milford-Bennington RR Co., Inc. v. Boston and Maine Corp. and Springfield Terminal Ry Co., Docket No. 42083, slip op. at 7 (STB served Sep. 15, 2003). In a subsequent decision, the Board stated that "we may revoke an exemption, in whole or in part, at any time under 49 U.S.C. 10502 (d), if we find that regulation is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101." *Pyco*

¹¹ TCM assumes this citation is to a prior version of 49 C.F.R. § 1111.9(d).

² TCM also could not find 49 U.S.C. § 10105(d) that was referenced by KET. TCM assumes that KET intended to cite 49 U.S.C. § 10502(d) as cited in TCM's Complaint regarding revocation of an exemption.

Industries, Inc. – Alternative Rail Service – South Plains Switching, Ltd. Co., et al, Finance
Docket No. 34802, slip op. at 4 (STB served June 21, 2006).

TCM did not file a simultaneous petition to revoke for two reasons. First, it wanted to explore the possibility of settlement before engaging in extensive discovery and the briefing of complex issues. Second, TCM wanted to take discovery before briefing this revocation issue to determine why KET unilaterally removed TCM's spur track, switch, and crossing on its private property without notice. TCM believes that its claims in its complaints and its request to partially revoke the exemption can be briefed simultaneously in the interest of efficiency and speed. Consequently, TCM states that the Board should deny this Motion for Stay and order the parties to meet to reach a proposed procedural schedule as required in 49 C.F.R. § 1111.11(a).

/s/ Daniel R. Elliott
Daniel Elliott PLLC
2000 Pennsylvania Avenue NW
Suite 7000
Washington, DC 20006
Counsel for Twin City Metals

CERTIFICATE OF SERVICE

In accordance with 49 C.F.R. § 1104.12, I hereby certify that on May 15, 2020, I served a copy of this Complaint on counsel known to represent KET in this matter by first-class mail and email as follows:

James H. M. Savage
22 Rockingham Court
Germantown, MD 20874
jsavagelaw@aim.com

/s/Daniel R. Elliott