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**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

STB Docket No. AB-1071

**STEWARTSTOWN RAILROAD COMPANY
– ADVERSE ABANDONMENT –
IN YORK COUNTY, PA**

**REPLY IN OPPOSITION TO STEWARTSTOWN
RAILROAD COMPANY'S STAY REQUEST**

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George M. Hart**

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The Estate of George M. Hart (the “Estate”) hereby responds to Stewartstown Railroad Company’s (“SRC”) request for a stay in the above-referenced abandonment proceeding. For the reasons set forth below, SRC’s stay request (evidently seeking a stay of an unlimited duration) must be denied.

PRELIMINARY MATTER – BIFURCATED ESTATE RESPONSE

SRC’s stay request is embedded in a filing entitled as a “Petition to Re-Open and Stay the Board’s Decision of November 14” (the “SRC Petition”).¹ In addition to a stay, the SRC Petition also seeks reopening of the proceeding on the basis that – (1) the Board’s November 16 Decision contains material error; and (2) new circumstances have arisen warranting a fresh look at the case’s

¹ The Board did not serve its decision in this proceeding granting the Estate’s abandonment application until November 16, and that date – not November 14 – is the relevant date for the purposes of measuring the deadline for appeals and stay requests. As it is, the timing of the SRC Petition, filed on November 30, seems tacitly to acknowledge the procedural insignificance of the November 14 “decision” date. For purposes of this proceeding, and for purposes of complying with typical Board practice in referring to decisions as of their respective service dates, the Estate will refer to decision from which SRC seeks relief as the “November 16 Decision.”

merits. In light of the strict 5-day reply deadline² for stay requests (49 C.F.R. § 1152.25(e)(2)(i)), the Estate is responding herein to the stay component of the SRC Petition only. SRC will tender a timely response to the reopening component of the SRC Petition at a later date.

ARGUMENT

In an abandonment proceeding, just as in any other proceeding before the Board, the party seeking a stay must carry its burden of proof that a stay is warranted under the Board's four-part standard. Specifically, to obtain a stay here, SRC would have to meet its burden under the so-called "Holiday Tours"³ test, and show that – (1) there is a strong likelihood that SRC will prevail on the merits of any challenge to the action sought to be stayed; (2) SRC will suffer irreparable harm in the absence of a stay; (3) issuance of the stay would not substantially harm other parties; and (4) issuance of a stay would be in the public interest.⁴ A stay is an extraordinary injunctive remedy "and will generally not be granted unless the requesting party can show that it faces unredressable actual and imminent harm that would be prevented by an injunction."⁵

² The Estate is disappointed by what it perceives as SRC's slippery tactics in filing the SRC Petition. Throughout this proceeding, the Estate has arranged to serve copies of its pleadings upon counsel for SRC via email, the most expeditious form of service, and SRC's counsel has reciprocated – until now. In this instance, SRC appears to have dispensed with the courtesy of email service, so that the Estate first became aware of the SRC Petition when it was detected on this Monday morning as a posting on the Board's website. This is troubling in view of the short turn-around for replies to stay requests under the Board's abandonment regulations.

³ Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

⁴ See, e.g., BNSF Railway Company – Abandonment Exemption – In Rolette and Towner Counties, ND, STB Docket No. AB 6 (Sub-No. 473X) (STB Served Apr. 26, 2011) ("Rolette-Towner"); R.J. Corman Railroad Company/Pennsylvania Lines, Inc. – Abandonment Exemption – In Clearfield, Jefferson, and Indiana Counties, PA, STB Docket No. AB 491 (Sub-No. 2X) (STB served Dec. 11, 2008) (both standing for the proposition that the four-part Holiday Tours standard applies to stay requests filed under the Board's abandonment appeals and stay procedures).

⁵ American Chemistry Council, et al. v. Alabama Gulf Coast Railway, et al., STB Docket No. NOR 42129, slip op. at __ (STB served May 4, 2012).

SRC (like the abandonment opponent in the Rolette-Towner case whose stay request was denied) makes no mention of Holiday Tours, and doesn't apply the Holiday Tours criteria to the facts and circumstances of this case. SRC also fails to prove that any imminent, unredressable, actual harm that would befall it absent a stay. Rather, based on the virtually non-existent discussion of the stay request found in the SRC Petition, it appears that the stay is premised entirely upon SRC's post-November 16 Decision election to offer the Estate "not less than \$275,000.00" in settlement of the debt it has owed for four years. SRC depicts its decision to extend a new proposal to settle its debt as a "changed circumstances" warranting postponement of the November 16 Decision's effective date. But "changed circumstances," especially those of the stay-seeker's own devising, clearly are no basis for a stay, and so SRC's stay request must be denied.

Under the correct injunctive remedy standard, SRC's stay request fails. First, SRC is highly unlikely to prevail on the merits. The November 16 Decision, which was issued well over a year after the official close of the record, reflects a careful, thorough, and thoughtful Board assessment of the facts and the application of those facts to the law. Not only is the November 16 Decision legally sound, but the SRC petition makes no persuasive case that the Board erred, as will be further discussed in the Estate's pending response to the reopening component of the SRC Petition.

Second, SRC faces no irreparable harm absent a stay. The Estate remains willing to discuss with SRC a financial arrangement that could obviate the need to foreclose upon SRC's assets under state law processes. (In fairness, SRC may have hoped that it would not be held to the debt obligations it incurred as a result of SRC's relationship with Mr. Hart, but the debt is nevertheless valid and repayment is long overdue. SRC has ducked its obligations to the Estate and its residual beneficiary for years, content to do little except force the Estate's hand into an expensive and time consuming abandonment process. For this reason, SRC should understand that the Estate has no patience for SRC's dilatory tactics, and, especially now, expects a full repayment of the debt, so the

Estate sees very little to “negotiate.”) In light of the pending offer of financial assistance (“OFA”) process, there is adequate time for such discussions. A stay, on the other hand, would merely enable additional SRC debt evasion. SRC has had four years to remedy its situation and avoid the consequences of foreclosure on its assets, so SRC’s claim that it needs more time to work out the details of a possible settlement to avoid the loss of its assets is selfishly one-sided, and a stay would reward SRC for years of inaction and delay.

SRC only now feels compelled to do the responsible and honest thing by offering to pay its long-outstanding debt after the Board has properly chosen to remove the “shield” of the agency’s jurisdiction. SRC disingenuously contends that the Estate and the residuary beneficiary, Bucks County Historical Society (“BCHS”), have ignored SRC’s settlement proposals, claiming that they “have refused to speak with SRC directly about a repayment plan or negotiate terms.” That is untrue.⁶ The fact is, SRC has made only two offers that the Estate is aware of – (1) the utterly unworkable and unacceptable five-year repayment plan based on whimsical visions of future earnings that the Estate discussed thoroughly in its Rebuttal filing in this proceeding; and (2) an offer to sell a pair of SRC-owned locomotives to reduce by a modest fraction the outstanding debt owed (a proposal, incidentally, that the Estate welcomed as a positive first step, but that it appears SRC has not since acted upon). The “offer” conveyed by the SRC Petition is far different from and more substantial than any that the Estate has received heretofore. But it is hardly a coincidence that

⁶ SRC, in attempt to excuse its debt evasion, has repeatedly mischaracterized the Estate as unyielding and uncommunicative on issues surrounding SRC’s debt obligation, and it does so again in the SRC Petition. SRC’s tactic is not only self-serving and false, it is also ironic. After issuance of the November 16 Decision, counsel for the Estate has repeatedly reached out to SRC’s counsel in an effort to discuss the ramifications of that decision, to discuss the anticipated next steps of each party, and to explore whether or not SRC had both the intention and financial wherewithal to protect its interest in the subject rail line. SRC’s counsel never responded, and the Estate has only now, through the SRC Petition, become aware of SRC’s intentions and its partial debt repayment offer.

this offer emerged after the Board rendered a decision that would allow the Estate to foreclose upon SRC's assets under state law processes.⁷

SRC knows, however, that there is little to discuss or negotiate. The executor of the Estate must, under the terms of the Mr. Hart's will and under state law as a fiduciary, pursue repayment of SRC's debt to the benefit of the Estate's residual beneficiary. The executor of the estate cannot simply forego debt collection or accept a "discounted" settlement absent residual beneficiary endorsement without facing the serious prospect of being found to be in violation of its fiduciary duties, and thus to be liable to BCHS. Nevertheless, neither the Estate nor BCHS has ignored any reasonable settlement offer as SRC claims, because until now, SRC has made no serious offer. Now, years later and after the imminent removal of the jurisdictional shield, SRC for the first time faces the urgency of its situation, appreciates that it will now be treated as any other business debtor under state law, tacitly owns up to its obligations, and extends a promising offer that is approaching the full amount that it owes (less interest, of course). A stay would reverse such progress.

Beyond that, assuming SRC actually has the money to repay its debt, there is adequate time absent a stay for SRC and the Estate to come to terms. That is because of the pendency of James Riffin's intent to file an OFA, which has effectively tolled this proceeding and has already postponed the effective date of the Board's November 16 Decision. Accordingly, SRC has time to arrange for satisfying its debt obligations to the Estate and avert the loss of its railroad assets, and thus SRC faces no imminent or unavoidable harm.

⁷ SRC's actions speak much louder than its words. SRC repeatedly has acknowledged its debt obligation, but it has taken no meaningful action for years to satisfy that obligation. Rather, SRC has avoided making any genuine offer of immediate repayment until confronted with a Board decision that effectively compels remedial action. To be sure, SRC could have extended a repayment proposal such as the one in its Petition at any time during the pendency of this proceeding, or it could have demonstrated good faith by making substantial, continuing payments on the debt obligation during that time. Instead, it did neither because – (1) it expected that the Board would endorse its conduct by denying the Estate's abandonment application; and (2) it clung to the convenient if flimsy excuse that the Estate's rejection of SRC's laughable 5-year repayment plan meant that SRC didn't have to do anything else.

Third, a stay would harm the Estate, whose interests as a creditor the Board has recognized in the November 16 Decision. SRC fails to articulate the expected duration of the stay it seeks, leading the Estate to presume that SRC would prefer that it run in perpetuity until a “settlement” is achieved. But, in view of the simple fact that, for purposes of collection, time does indeed equal money, postponement of the effective date of the November 16 Decision would harm to the Estate.⁸

Fourth, and finally, a stay would not be in the public interest. The Board, in its November 16 Decision, recognized that, on balance, the public interest in protecting the creditworthiness of railroads and protecting the interests of a legitimate creditor (be it an individual like Mr. Hart and, following his death, his estate and its beneficiaries, or be it a bank or other private lender) is a public interest that outweighs the interest in upholding the jurisdictional shield against the possible removal of a rail line with no realistic prospects for future freight service. To date, SRC has been unable to repay the amount owed to the Estate, and it has not guaranteed full repayment of the debt. For these reasons, a stay ensures nothing but the unacceptable *status quo*.

CONCLUSION

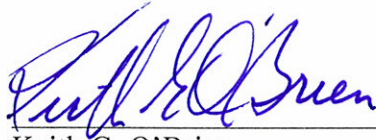
For four years, the Estate has sought repayment of the debt SRC owes to it, and, for that same period of time, SRC has done little more than pay lip service to its obligations. The Board’s November 16 Decision has already begun to change all of that. Faced with the loss of its jurisdictional shield and its ability to continue to evade its obligations as a result, SRC has proposed a sizeable initial “settlement” offer – one that could have preceded the November 16 Decision, but, quite tellingly, did not. The genuine threat of foreclosure, and only that threat of foreclosure it seems, could have moved SRC off of the proverbial “dime,” and because of that, SRC is for the first time compelled to act in a genuinely responsible fashion toward its creditor. Under the

⁸ For example, the OFA statute and its legislative history acknowledge the fact that delayed action on an abandonment does injury to the party seeking to reclaim the value of the assets comprising the rail line authorized for abandonment.

circumstances, the approaching effective date of the November 16 Decision (although tolled due to the OFA process) and perhaps the OFA process itself have already rendered promising first steps under which SRC may arrange for prompt and full repayment of its debt. Granting a vaguely-described stay, particularly one unsupported under the Holiday Tours criteria, would be contrary to Board precedent, and it would give SRC license to revert back to its bad-faith tactics.

For these reasons, the Board must deny the Estate's stay request. For reasons that the Estate will supply in a filing it will offer at a later date, the Board should also deny SRC's petition to reopen this proceeding.

Respectfully submitted,



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Dated: December 5, 2012

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing reply to be served upon all parties of record by first class mail (postage prepaid) or by more expeditious means of delivery.


Robert A. Wimbish

Dated: December 5, 2012