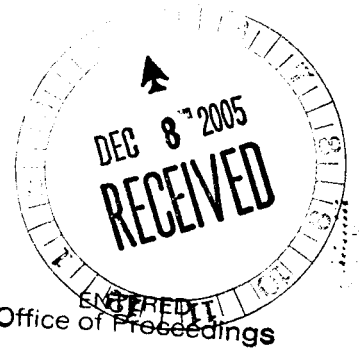


ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD



STB DOCKET NO. AB-1081X
SAN PEDRO RAILROAD OPERATING
COMPANY, LLC-ABANDONMENT EXEMPTION-
IN COCHISE COUNTY, AZ

DEC 08 2005

Part of
Public Record

PETITION FOR EXEMPTION
UNDER 49 U.S.C. 10502
FROM 49 U.S.C. 10903

ORIGINAL

San Pedro Railroad Operating Company's Reply
Chemical Lime Company's Protest

Respectfully submitted

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ORIGINAL

Dated: December 8, 2005

BEFORE THE
SURFACE TRANSPORTATION BOARD



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To Chemical Lime Company's Protest

INTRODUCTION

Pursuant to 49 CFR 1104.13, San Pedro Railroad Operating Company ("SPROC") replies to the Protest of Chemical Lime Company ("Chemical Lime").¹ Accepting SPROC's Reply will provide the Board with a more complete understanding of the record, will not delay the proceedings, and should not prejudice any party. See, Sierra Pacific Industries-Abandonment Exemption, STB Docket No. AB-512X (served February 25, 2005) (Sierra Pacific). SPROC has shown that its request to abandon the subject rail line meets both the exemption criteria of 49 U.S.C. 10502 and the public convenience and necessity standard of

¹ To the extent the Board believes that leave to reply is required, SPROC petitions the Board to accept this pleading.

49 U.S.C. 10903 and that the subject abandonment should be granted.

BACKGROUND

By petition filed October 17, 2005, SPROC seeks an exemption permitting it to discontinue service over and abandon approximately 76.2 miles of track and railroad right-of-way ("the Line") in Cochise County, AZ. SPROC had previously sought an exemption from the Board permitting this abandonment. Because Chemical Lime Company, the sole shipper on the Line, protested the abandonment, the Board denied SPROC's original abandonment request in a decision served September 15, 2005,² stating "without prejudice to SPROC's refiling an appropriate abandonment application or a petition for exemption [emphasis supplied] that contains all relevant evidence and financial data." September 15 Decision at 5.

In keeping with that decision, on October 17, 2005, SPROC resubmitted its abandonment request as an individual petition for exemption for abandonment. The Board served a decision on November 4, 2005, accepting SPROC's filing and setting a procedural schedule with protests and public

² Hereafter cited as the "September 15 Decision."

comments due November 25, 2005, and with a final decision on the merits due on or before February 3, 2006.

Like mushrooms after the Spring rains, Chemical Lime is predictably back, submitting a new protest in the form of its "Statement in Opposition."³

ARGUMENT

The gist of Chemical Lime's protest is (1) that this abandonment is not the type of case suitable for handling by exemption so the Board should require SPROC to resubmit its request yet a third time as an application and (2) that SPROC's termination of service on account of substantial bridge damage constitutes an unauthorized abandonment and unreasonable embargo. Chemical Lime is wrong on both accounts.

Chemical Lime's repeated assertions that this abandonment is not appropriate for what it calls a "summary disposition in an exemption proceeding" demonstrate its unfamiliarity with current STB abandonment procedures and precedent. Contrary to statements in Chemical Lime's Reply, the Board has granted petitions seeking exemptions

³ On November 21, 2005, Chemical Lime filed a motion with the Board for an extension of its November 25 deadline for filing its protest. Chemical Lime claimed it needed the extension because the upcoming Thanksgiving Holiday and client travel have prevented its counsel from getting together to discuss strategy with its client and represented to the Board that the extension might facilitate a negotiated resolution of the dispute. Although the Board granted Chemical Lime a very short extension, Chemical Lime never contacted SPROC's Chairman to pursue any further settlement discussion.

for abandonments in the face of shipper or public agency opposition. See, Sierra Pacific, supra at page 2 of this Reply and Greenville County Economic Development Corporation-Abandonment And Discontinuance Exemption - In Greenville, SC, STB Docket No. AB-490 (Sub-No. 1X), served October 12, 2005, infra at page 8 of this reply. In Minnesota Northern Railroad, Inc.-Abandonment Exemption-Between Redland Junction and Fertile, In Polk County, MN (STB Docket No. 497 (Sub-No. 2X) (served Nov. 14, 1997), cited in Chemical Lime's protest to SPROC's first petition at page 6, the Board found that the petitioner had presented a sufficient level of detail to substantiate its claims. It granted the abandonment despite substantial opposition.

SPROC has searched Chemical Lime's Statement in vain to find some compelling basis for its insistence on the use of an application and has found none. As a result of the Board's September 15 Decision denying its first petition and in response to the Board's explicit invitation to file a properly supported abandonment petition [emphasis supplied]⁴, SPROC prepared and filed a Petition that was and is tantamount to a full blown application. It included detailed, confidential economic data and underlying work

⁴ See, September 15 Decision at 5.

papers, a two inch thick bridge report prepared by a prominent engineering consulting firm, a signed salvage agreement for purchase of the track materials, and a property appraisal. By contrast, Chemical Lime submitted no data to refute the voluminous and compelling evidence presented by SPROC. To that extent, SPROC's evidence represents not just the "best evidence" but the only evidence of the economics of rail service on the Line. By comparison, Chemical Lime's protest is pure argument.

Due to the sensitive nature of the underlying figures and work papers supporting this material, SPROC filed a Motion for Protective Order with the Board that the Board granted. Chemical Lime could have obtained a copy of the Confidential Version merely by requesting one and signing and returning the Confidential Undertaking. In contrast to Chemical Lime, Charles Sotello, who protested the first Petition, signed the undertaking and obtained a confidential copy. The simple fact is that Chemical Lime has neither challenged the economic basis for its abandonment request nor sought a copy of the Confidential Version to enable it to do so. Furthermore, as already noted, Chemical Lime has not submitted any evidence in

support of its assertions as to the Line's "profitability"⁵ or the condition of the Line's bridges or track. It cannot be heard to complain now.

Regarding its second argument, SPROC has not illegally abandoned the Line or imposed an unreasonable embargo. It embargoed the Line in response to a clear warning by the Federal Railroad Administration that it would shut down the railroad if SPROC did not voluntarily do so. SPROC sees no need to repeat the ample evidence on these points submitted with its Petition. It merely notes that it has submitted substantial evidence on the costs of track and bridge restoration and Chemical Lime has chosen to submit none. SPROC has reviewed each of the several cases cited by Chemical Lime and, as discussed at length in its Petition, believes that its embargo would be found lawful and reasonable by the Board under any of those precedents. Nevertheless, SPROC views Chemical Lime's Statement as a protest to the abandonment, not a formal complaint challenging the embargo's reasonableness.

Significantly, Chemical Lime failed to cite several recent cases involving short line railroad abandonments and shipper challenges to embargos. Those cases support SPROC's position that its service termination was legal and

⁵ See, Statement at 9.

its embargo reasonable. Sierra Pacific Industries-Abandonment Exemption, STB Docket No. AB-512X (served February 25, 2005) involved a heavily contested abandonment petition for a 12 mile long line that handled 561 cars for 2003 and 138 cars in 2004 (January 1 through June 3 only). Unlike SPROC which sought abandonment even before terminating operations, Sierra ceased operations on June 3, 2004, embargoed the Line on July 7, and filed its exemption petition on November 12. According to the Petition on file with the STB, Petitioner would have had to invest approximately \$3.5 million in repairs to the line over a 7 year period (approximately \$1.5 million for 2004 alone) but for the abandonment. Community interests and one shipper opposed the abandonment, presenting the same argument that Chemical Lime presents here: this abandonment is inappropriate for an exemption because of their opposition. Notwithstanding that argument, the Board granted the abandonment exemption.

The abandonment and complaint cases⁶ involving the rail line owned by the Greenville Economic Development Corporation are similarly relevant. The abandonment case

⁶ Greenville County Economic Development Corporation-Abandonment And Discontinuance Exemption - In Greenville, SC, STB Docket No. AB-490 (Sub-No. 1X), served October 12, 2005, and Groome & Associates, Inc. and Lee K. Groome v. Greenville County Economic Development Corporation, STB Docket No. 42087, served July 27, 2005.

involved a request to terminate service over 12 miles of railroad that had been out of service since 1997 and had been acquired by the petitioner, an economic development agency. Groome, historically the second largest shipper on the subject line, protested Greenville's petition for exemption and filed a formal complaint with the Board challenging the reasonableness of Greenville's embargo. The Board granted Greenville's abandonment petition despite Groome's opposition. It found that the extended embargo became unreasonable after a long passage of time and granted the shipper a modest amount of damages (about \$37,500 out of the almost \$2 million sought). However, the complaint case is more significant for the Board's statement about when an embargo becomes unreasonable:

For all of these reasons, we find that GCEDC did not violate the law by failing to repair the line immediately and put it back into service. The prior owner had not provided regular service for 18 months before GCEDC bought the line, and the prior owner ultimately decided to take steps to abandon the line in light of the line's poor prospects.

. . . .

Nevertheless, even in such circumstances, a party with an obligation to provide service may not refuse to do so indefinitely in the face of a reasonable request for service. Rather, a railroad must, within a reasonable time, either provide service or take steps to be relieved of the common carrier obligation. Slip op. at 19.

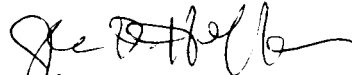
In Groome, the Board determined that a two year suspension of service was reasonable after which it either had to repair the track and restore service or seek abandonment authority. Here, SPROC sought abandonment authority before terminating service and embargoing the Line. Upon receiving an adverse ruling on its first abandonment petition, it promptly prepared and resubmitted this Petition. Accordingly, SPROC's service termination was both legal and reasonable.

In closing, SPROC notes that if the Line is really vital to Chemical Line's transportation needs, it has the ability to preserve service by filing an offer of financial assistance under the provisions of 49 U.S.C. 10904(d)-(f) and the Board's regulations at 49 CFR 1152.27. Time will tell if it does so.

CONCLUSION

For all of these reasons SPROC has satisfied the Board's criteria for granting an exemption from the abandonment provisions of 49 U.S.C. 10903 and requests that a decision be issued promptly.

Respectfully submitted,



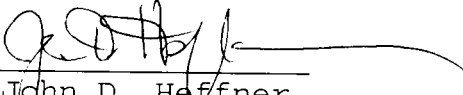
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Attorney for San Pedro
Railroad Operating
Company, LLC

Dated: December 8, 2005

CERTIFICATE OF SERVICE

I, John D. Heffner, certify that I have served a copy of San Pedro Railroad Operating Company's Reply to Chemical Lime Company's Protest on all parties to this proceeding by first class mail and fax transmission this 8th day of December 8, 2005.



John D. Heffner