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January 14, 2025 309097

Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
U.S. Surface Transportation Board
395 E. Street SW
Washington, DC 20423

ENTERED
Office of Proceedings
January 14, 2025
Part of
Public Record

**Re: *SMS Rail Service, Inc.*
 **Petition for Declaratory Order of Township of Pilesgrove, Salem County, NJ; &
 Petition for Leave to Intervene of Township of Mannington, Salem County, NJ
 STB Finance Docket No. 36770****

Dear Ms. Brown:

SMS Rail Service, Inc. hereby provides its Response to Submissions of Other Interested Persons Regarding Pilesgrove Township's and Mannington Township's Petitions for Declaratory Order and Supplemental Evidence and Argument, with Exhibit ZZ, in the above-referenced proceeding.

Please note that the verification required is contained in Exhibit ZZ to the Response.

If there are any questions about this matter, please contact me by phone (215-880-6913) or email (rak@berklein.com).

Thank you.

Respectfully,

/s/ Robert A. Klein
Robert A. Klein

cc: All parties shown on the attached service list

Ms. Cynthia T. Brown
January 14, 2025
Page Two

FD 36770 Service List

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BEFORE THE
SURFACE TRANSPORTATION BOARD

TOWNSHIP OF PILESGROVE, N.J.	)	FINANCE DOCKET
PETITION FOR DECLARATORY ORDER	)	NO. 36770

**RESPONSE OF SMS RAIL SERVICE, INC. TO
SUBMISSIONS OF OTHER INTERESTED PERSONS REGARDING
PILESGROVE TOWNSHIP'S AND MANNINGTON TOWNSHIP'S
PETITIONS FOR DECLARATORY ORDER AND
SUPPLEMENTAL EVIDENCE AND ARGUMENT**

SMS RAIL SERVICE, INC.
513 Sharptown Road
Logan Township, NJ 08085

Respondent

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Attorney for Respondent

DATE FILED: January 14, 2025

To Honorable Board Chairman Primus, and Board Members Fuchs, Schultz, and Hedlund:

In accordance with the Board's Decision served December 6, 2024, allowing a response to submissions of other interested persons by January 14, 2025, on behalf of SMS Rail Service, Inc. ("SMS"), the undersigned counsel for SMS submits this Response of SMS Rail Service, Inc. to Submissions (Comments and Amicus Curiae Briefs) by Other Interested Parties Regarding Pilesgrove Township's and Mannington Township's Petitions for Declaratory Order and Supplemental Evidence and Argument ("SMS's Response").

The submissions by other interested persons in this matter are by the American Short Line and Regional Railroad Association ("ASLRRA") and several of its members, the California Short Line Railroad Association ("CSLRA"), Sierra Northern Railway ("SNR") and Mendocino Railway ("MRY") ("Members"), filed December 16, 2024 ("Submissions" or "(member's) Subm."), including, in order on the docket:

- (i) Amicus Curiae Brief of Sierra Northern Railway (Doc. No. 309011);
- (ii) Amicus Curiae Brief of Mendocino Railway (Doc. No. 309013);
- (iii) Comments of The American Short Line and Regional Railroad Association (Doc. No. 309015);
- (iv) Comments of the California Short Line Railroad Association (Doc. No. 309018)

Relevant to SMS's Response to the ASLRRA's and its Members' Submissions is information contained in the Supplemental Verified Statement of James R. Pfeiffer, Chief Operating Officer of SMS ("J. Pfeiffer Supp. Stmt."), which is appended as **Exhibit "ZZ"**, the next consecutive lettered exhibit following those included with the Reply Evidence and Argument of SMS Rail Service, Inc. to Pilesgrove Township's and Mannington Township's Petitions for Declaratory Order and Supplemental Evidence and Argument, filed December 16, 2024 ("SMS's Reply" or "Reply").

The ASLRRA and its Members raise many important points relevant to this proceeding, including the following points, to which SMS will briefly respond below:

- 1. Preemption is intended to prevent a patchwork of state and local regulations from interfering with interstate commerce, such as by artificially bifurcating freight and excursion operations conducted by a rail carrier, and hamstringing a carrier's avenues for earning revenues to assist in its efforts to develop freight service and address, as in this case, years of deferred maintenance of the rail line.**

The ASLRRA and its Members lay out compelling reasons against such a patchwork or bifurcation, including showing that allowing the Townships to decide when and how they will take regulatory power away from the Board is unworkable and contrary to Congress' mandate in the Interstate Commerce Commission Termination Act ("ICCTA"), as characterized by the courts, for the preemptive scope of 49 U.S.C. § 10501(b) to be "broad and sweeping." ASLRRA Subm. at 7, 10; CSLRA Subm. at 3; SNR Subm. at 12, 16-19, 25; MRY Subm. at 4-6, 12, 15-19. The ASLRRA and its Members emphasize, as does SMS, that the intent of preemption is to avoid state and local regulation having the effect of unreasonably burdening or interfering with rail transportation.

SMS acknowledges that the issues presented by this declaratory order proceeding are to be fact-intensive. *See Denver & Rio Grande Railway*, at 3 (STB served February 22, 2012). For all of the reasons the ASLRRA and its Members set forth in their Submissions, and SMS set forth in its Reply, SMS believes that the facts involving the Salem Branch are strong reasons for the Board to continue to maintain its exclusive jurisdiction over SMS and the Branch in accordance with the ICCTA's mandate. It is indisputable that, SMS's seasonal passenger excursions notwithstanding, SMS, the Branch and all the structures and track about which the Townships complain are used in common with SMS's interstate freight operations. *See, e.g.*, SMS's Reply at 8 n.12, 27, 33. That is, all of the structures and track are used by SMS within the definition of "transportation" in the ICCTA subject to the Board's exclusive jurisdiction.

2. The test is whether SMS is performing more than minimal freight operations in interstate commerce, and SMS meets that test.

SMS agrees with the ASLRRA and its Members that “minimal freight” is determinative of the Townships’ positions, and in this case the facts show that SMS has “more than ‘minimal freight’ in interstate commerce.” *Denver & Rio Grande Railway*, at 7 (STB served March 24, 2015). As the ASLRRA points out, “SMS is distinguishable [from all of the entities in the cases cited by the Townships], it has clearly made an effort to grow [freight] business and has been successful.” ASLRRA Subm. at 9. In fact, already this year, SMS has had seven more freight carload movements on the Branch. J. Pfeiffer Supp. Stmt. ¶¶ 5-6 (**Ex. ZZ**). And, despite the negativity of the Townships and those who are not among the “90% of the County” who are “supportive of what SMS is doing,” the rail carrier SMS anticipates to increase freight substantially in the coming months. SMS’s Reply at 27-32 (citations omitted). Mr. Pfeiffer reports:

The additional anticipated freight cars for a new customer scheduled to begin manufacturing operations in a previously dormant part of the Mannington Mills plant in Mannington Township (referred to in *SMS’s Reply* at pp. 3-4, filed December 16, 2024) remains on course and is anticipated will result in upwards of more than 100 freight cars carrying lumber from outside New Jersey this year. Construction of the transloading area associated with this customer is still in progress, with some delays that may yet occur depending on weather.

J. Pfeiffer Supp. Stmt. ¶ 8 (**Ex. ZZ**). Thus, SMS already has more than minimal freight operation in interstate commerce in the barely two years it has been operating the Branch and has plans for considerably more freight traffic in the near future.

3. Without preemption, short lines like the Members and SMS cannot grow and thrive.

SMS actively markets itself to freight and transloading customers on its website, as the Submissions point out. And SMS is succeeding.

Already SMS has made substantial progress to bring the Branch into compliance with applicable standards. In the interest of brevity, the economic arguments that the ASLRRA and its Members set forth in their Submissions (ASLRRA Subm. at 5-6, 10; CSLRA Subm. at 2-3; SNR Subm. at 22-25; MRY Subm. at 15-17), and their other arguments in favor of SMS's position, are incorporated by reference.

4. Preemption applies to prevent targeted interference with rail transportation by local and state governments, as here.

Unfortunately, it may be that the Townships simply are dissatisfied with the County's plan for revitalizing the Branch and developing commerce, and for that reason alone are unwilling to acknowledge the law applicable to rail transportation. These Townships have taken an unfounded view of "transportation" under the ICCTA, and from there, they proceed to target SMS by issuing stop work orders and fines, in some instances bringing quasi-criminal charges (like Mannington, which has stated its intention to continue pressing charges against SMS), in their effort to undermine the ability of SMS to develop and provide freight service on the Branch. SMS's Reply at 18.

The Townships' suggestions that their concern is about "public safety" loses credibility in light of their failure to inspect. As pointed out in SMS's Reply at page 17, on November 7, 2024, Pilesgrove wrote in its Supplement to the Board, that "Pilesgrove is in the process of reviewing the documentation and setting up inspections." Pilesgrove's Supplement, filed November 7, 2024, at p. 8. Prior to November, dating back to the date of Pilesgrove's Petition, April 22, 2024 (filed May 1, 2024), Pilesgrove told the Board: "it is anticipated that an inspection will be forthcoming." Pilesgrove's Petition, at p. 5. Yet, in the months since those statements were made, Pilesgrove (and Mannington too) have taken no steps to inspect SMS's facilities, but rather have made a point of stopping by rail property unannounced simply to post notices of violations or stop work orders. *E.g.*, SMS's Reply at 24-32, 36-38. It makes no sense that these

Townships are continuing to press on in this proceeding and raise public safety as their concern without any apparent intention of exercising their police powers to inspect pending the Board's decision.

Mr. Pfeiffer reports that "SMS is unaware of any inspections of its facilities by Pilesgrove and Mannington Townships since *SMS's Reply*. No inquiries or requests for inspections have been received by SMS from these Townships. Also, no response to SMS's communications advising of its availability to accommodate inspections (as shown in *SMS's Reply*) has been received by SMS." J. Pfeiffer Supp. Stmt. ¶ 9 (Ex. ZZ).

Indeed, the targeted interference by Pilesgrove blocking electrical supply to SMS's properties and placing stop work orders (noted, too, in SNR Subm. at 20; MRY Subm. at 13) for the sheds and engine house used in both passenger and freight rail service is the kind of action preemption is intended to prevent. SMS is hopeful that Atlantic City Electric will provide SMS the electric service it requires in Pilesgrove. Mr. Pfeiffer reports:

Regarding the electrical connections and structures referred to in paragraphs 6-7 of my December 16, 2024 Verified Statement, there has been no cooperation by Pilesgrove Township to report following *SMS's Reply* and my Verified Statement. SMS has continued its work towards completing the infrastructure for the electrical connections, including construction of necessary subterranean conduits, and that work is about 90% completed. SMS is continuing to move forward in this regard and, barring further obstacles by Pilesgrove Township, anticipates electric service from Atlantic City Electric will be connected to the subject sheds and engine house located on Block 73, Lots 1 & 3, within the next 30 days.

J. Pfeiffer Supp. Stmt. ¶ 10 (Ex. ZZ).

Conclusion

In the interest of promoting revitalization of the Salem Branch and freight service on the Branch, SMS respectfully requests that the Board clarify for the Townships that SMS's operations, services, and facilities on or along the Salem Branch are transportation by rail carrier

covered by the federal preemption provisions contained in 49 U.S.C. § 10501, as broadened by the ICCTA, and thus the Branch and SMS are under the Board's exclusive jurisdiction.

SMS further respectfully requests that the Board also clarify for the Townships that zoning ordinances, and local and land use permit requirements, are preempted and that local administrative delays, permits, fees, and stop-work orders are preempted as well.

SMS appreciates the input and support of the ASLRRRA, CSLRA, SNR and MRY in this matter.

Respectfully submitted,

/s/ Robert A. Klein
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DATE FILED: January 14, 2025

EXHIBIT ZZ

TOWNSHIP OF PILESGROVE, N.J.) FINANCE DOCKET
PETITION FOR DECLARATORY ORDER) NO. 36770

Commonwealth of Pennsylvania)
) SS:
County of Montgomery)

- (i) Amicus Curiae Brief of Sierra Northern Railway (Doc. No. 309011);
- (ii) Amicus Curiae Brief of Mendocino Railway (Doc. No. 309013);
- (iii) Comments of The American Short Line and Regional Railroad Association

(Doc. No. 309015);

(iv) Comments of the California Short Line Railroad Association
(Doc. No. 309018)

4. SMS thanks Sierra Northern Railway, Mendocino Railway, the American Short Line and Regional Railroad Association, and the California Short Line Railroad Association for their comments submitted in this matter.

5. The following updates paragraph 5 of my Verified Statement, dated December 16, 2024, and shows the freight carload numbers upon the Salem Branch since December 16, 2024, as well as from the date of the inception of the Rail Line Service Agreement on March 30, 2021 (attached as Exhibit G to *SMS's Reply*):

Year	Customer	Carloads
2021	N/A	0
2022	N/A	0
2023	South Jersey Farmers Exchange	3 in/3 out
	Toys for Tots	1 in/1 out
2024	South Jersey Farmers Exchange	14 in/14out
	Environmental Rail Solutions	27 in/4 out
2025	Environmental Rail Solutions	7 in/0 out

6. The additional freight carload movements on the Branch to date in 2025 (shown in bold print above) are for Environmental Rail Solutions (“ERS”) and were made through both Pilesgrove and Mannington Townships. *See* two photos taken on January 9, 2025, and two photos taken on January 13, 2025, of the freight activities currently underway at SMS’s property (Block 73, Lots 1 & 3) in Pilesgrove, attached as **Exhibit “1”**.

7. As I stated in my December 16, 2024 Verified Statement, all of ERS’s freight movements are made through both Pilesgrove and Mannington Townships. To date, and geographically, *all* freight that has been serviced on the Branch must travel and has travelled through Pilesgrove Township in order to reach its destination.

8. The additional anticipated freight cars for a new customer scheduled to begin manufacturing operations in a previously dormant part of the Mannington Mills plant in Mannington Township (referred to in *SMS's Reply* at pp. 3-4, filed December 16, 2024) remains on course and is anticipated will result in upwards of more than 100 freight cars carrying lumber from outside New Jersey this year. Construction of the transloading area associated with this customer is still in progress, with some delays that may yet occur depending on weather.

9. SMS is unaware of any inspections of its facilities by Pilesgrove and Mannington Townships since *SMS's Reply*. No inquiries or requests for inspections have been received by SMS from these Townships. Also, no response to SMS's communications advising of its availability to accommodate inspections (as shown in *SMS's Reply*) has been received by SMS.

10. Regarding the electrical connections and structures referred to in paragraphs 6-7 of my December 16, 2024 Verified Statement, there has been no cooperation by Pilesgrove Township to report following *SMS's Reply* and my Verified Statement. SMS has continued its work towards completing the infrastructure for the electrical connections, including construction of necessary subterranean conduits, and that work is about 90% completed. SMS is continuing to move forward in this regard and, barring further obstacles by Pilesgrove Township, anticipates electric service from Atlantic City Electric will be connected to the subject sheds and engine house located on Block 73, Lots 1 & 3, within the next 30 days.

11. I am an officer of SMS, duly designated and qualified to verify the facts as stated above and in the *Response of SMS Rail Service, Inc. to Submissions by Other Interested Parties*, which I have reviewed. The facts stated herein and in such *Response* with respect to SMS are true and correct to the best of my knowledge, information, and belief.

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EXHIBIT 1



January 9, 2025



January 9, 2025



January 13, 2025



January 13, 2025

CERTIFICATION OF SERVICE

It is hereby certified that on this 14th day of January, 2025, I served a true and correct copy of the foregoing Response of SMS Rail Service, Inc. to Submissions (Comments and Amicus Curiae Briefs) by Other Interested Parties Regarding Pilesgrove Township's and Mannington Township's Petitions for Declaratory Order and Supplemental Evidence and Argument, with exhibits, in the manner indicated below upon the following counsel for the parties:

By Email:

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Date: January 14, 2025

/s/ Robert A. Klein
Robert A. Klein, Esq.