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ORIGINAL

210230

March 4, 2004



VIA HAND DELIVERY - RETURN COPY

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW (7th fl.)
Washington, DC 20423-0001

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Office of Proceedings
MAR - 4 2004
Part of
Public Record

Dear Secretary Williams:

Enclosed for filing in STB Finance Docket No. 33483, SMS Rail Service, Inc.-Petition for Declaratory Order-Status of Rail Carrier, are the original and ten copies of the Petition for Declaratory Order of SMS Rail Service, Inc.

This firm's check for \$1,000 in payment of the filing fee is attached.

Additional copies of this letter and of the Petition are enclosed for you to stamp to acknowledge your receipt of them and to return to me via the messenger.

If you have any question concerning the foregoing which you believe I may be able to answer or if I otherwise can be of assistance, please let me know.

Sincerely yours,


Fritz R. Kahn

enc.

cc: Henry D. Light, Esq.
Mr. Jeffrey L. Sutch

FILED

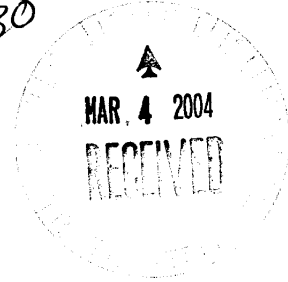
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BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

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STB Finance Docket No. 34483

SMS RAIL SERVICE, INC.
- PETITION FOR DECLARATORY ORDER -
STATUS OF RAIL CARRIER

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Office of Proceedings

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PETITION FOR DECLARATORY ORDER
OF
SMS RAIL SERVICE, INC.

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Attorney for

SMS RAIL SERVICE, INC.

Dated: March 4, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Finance Docket No. 34483

SMS RAIL SERVICE, INC.
– PETITION FOR DECLARATORY ORDER –
STATUS OF RAIL CARRIER

PETITION FOR DECLARATORY ORDER
OF
SMS RAIL SERVICE, INC.

Petitioner, SMS Rail Service, Inc., of Bridgeport, New Jersey ("SMS"), pursuant to section 5(d) of the Administrative Procedure Act, 5 U.S.C. 554(e), respectfully requests the Board to enter a declaratory order to terminate a controversy between it and Norfolk Southern Railway Company of Norfolk, Virginia ("NS"), concerning SMS' status as a rail carrier in the receipt, or tender for transportation, of shipments consigned to, or shipped from, the industries located within a complex at Paulsboro, New Jersey. The Board heretofore has exercised its authority to resolve disputes such as this by entering declaratory orders. See, STB Finance Docket No. 34428, Port Authority of New York and New Jersey–Petition for Declaratory Order, served January 21, 2004; STB Finance Docket No. 33989, Pejeboscot Industrial Park, Inc., d/b/a Grimm Industries–Petition for Declaratory Order, served May 15, 2003; Finance Docket No. 33697, National Passenger Corporation–Petition for Declaratory Order–Weight of Rail, served

January 31, 2003.

A.

Identification of the Parties

SMS is a Class III rail carrier subject to the jurisdiction of the Board, pursuant to the authority conferred in Finance Docket No. 32494, SMS Rail Service, Inc.–Lease and Operate Exemption–Pureland Association, Inc., served May 26, 1994.

NS is a Class I rail carrier subject to the jurisdiction of the Board, pursuant to the Decision of the Board's predecessor, the Interstate Commerce Commission ("ICC"), in Norfolk Southern Corp.–Control–Norfolk & W. Ry. Co., 366 I.C.C. 173 (1982).

B.

Description of Site

SMS began serving the complex at Paulsboro, pursuant to the Board's authorization in STB Finance Docket No. 33927, SMS Rail Service, Inc.–Acquisition and Operation Exemption–Valero Refining Company–New Jersey, served September 22, 2000. Valero Refining Company–New Jersey ("Valero"), an affiliate of Valero Energy Corporation of San Antonio, Texas, one of the Nation's largest refining companies, acquired the Paulsboro site in 1998. The facility encompasses approximately 970 acres and includes approximately 5.8 miles of railroad lines. Operations within the complex heretofore had been performed by Consolidated Rail Corporation ("Conrail"), but Valero's dissatisfaction with Conrail's performance led to the agreement providing for SMS to maintain and render service on the railroad lines within the locale.

In addition to Valero, the complex includes the plants of three other industries, Air

Products and Chemicals, Inc., Exxon Mobil Corporation and Oxbow Carbon & Minerals, Inc., the rail traffic of which is handled by SMS within the Paulsboro site.

The railroad whose lines connect with SMS is Conrail, although, under the South New Jersey Joint Facilities plan of operations, NS, as well as CSX Transportation, Inc., can and do operate their trains directly to and from the connection with SMS. Although deemed by SMS to be wholly inadequate, SMS' Track 234, located within the complex at Paulsboro, has been designated and reluctantly accepted by SMS as the interchange track.

C.

Status of SMS

Notwithstanding that SMS acquired the Board's authorization to render service within the complex at Paulsboro pursuant to the section-10902 class exemption of 49 C.F.R. 1150.41, et seq., it nevertheless is a rail carrier subject to the Board's jurisdiction. See, Class Exem. for Acq. or Oper. Under 49 U.S.C. 10902, 1 S.T.B. 95 (1996); Class Exemption-Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810 (1985), aff'd sub nom., Illinois Commerce Com'n v. I.C.C., 817 F.2d 145 (D.C. Cir. 1987).

SMS' employees are subject to the Railroad Retirement Act, 49 U.S.C. 231, et seq., rather than social security, they may sue for injuries or deaths pursuant to the Federal Employers' Liability Act, 45 U.S.C. 51, et seq., instead of being bound by workmen's compensation, and their labor-management relations are governed by the Railway Labor Act, 45 U.S.C. 151, et seq. and not by the National Labor Relations Act applicable to other employees.

Even if SMS were serving only a single shipper, Valero, it still would be a rail carrier. See, The Tap Line Cases, 234 U.S. 1 (1914). As we already have mentioned, however, SMS

serves three additional industries, Air Products and Chemicals, Inc., Exxon Mobil Corporation and Oxbow Carbon & Minerals, Inc., and holds itself out to serve any other shippers which may locate within the site.

SMS, accordingly, is not dissimilar from the many railroads which the Board has authorized to render operations within industry facilities.. See, STB Finance Docket No. 34442, Maritime Rail, LLC–Lease and Operation Exemption–Meadows Industrial Track, served December 19, 2003; STB Finance Docket No. 34040, Riverview Trenton Industrial Railroad Company–Petition for an Exemption from 49 U.S.C. 10901 to Acquire and Operate a Rail Line in Wayne County, MI, served May 15, 2003, app. pend., City of Trenton v. S.T.B. (6th Cir.); STB Finance Docket No. 34145, Bulkmatic Railroad Corporation–Acquisition and Operation Exemption–Bulkmatic Transport Company, served November 19, 2002; STB Finance Docket No. 34207, CHS Holdings, Inc.–Acquisition and Operation Exemption–J.K. Line, Inc., served June 20, 2002; STB Finance Docket No. 33695, Fredonia Valley Railroad, Inc.–Acquisition and Operation Exemption–In Caldwell County, KY, served January 6, 1999.

D.

NS' Actions

NS has elected to ignore the Board's franchising of SMS and the resultant status of SMS as a rail carrier subject to the jurisdiction of the Board in rendering service within the complex at Paulsboro. As far as NS is concerned, SMS is a nothing more than the operator of plant track not a part of the general railroad system of transportation.

One. NS has refused to include SMS in the routing of freight shipments to and from the industries located within the complex at Paulsboro. The name of SMS does not appear as a

participating rail carrier on NS' bills of lading or on NS' waybills accompanying the shipments, and SMS shares in none of the revenue collected by NS on traffic moving from and to the Paulsboro industries, whether from the shippers on prepaid shipments or the consignees on collect shipments, for the railroad transportation services rendered by it.

49 U.S.C. 10703, in part, provides, "Rail carriers providing transportation subject to the jurisdiction of the Board under this part shall establish through routes (including physical connections) with each other . . . "

In Thompson v. United States, 343 U.S. 549 (1952), the Supreme Court had occasion to construe the predecessor provision, 49 U.S.C. 1(4). The Supreme Court, 343 U.S. at 556, quoted from the ICC's decision in Through Routes and Through Rates, 12 I.C.C. 163, 166 (1907), in which the agency said, "A 'through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destinations on the line of another." The Supreme Court, 343 U.S. at 557, concluded:

In short, the test of the existence of a "through route" is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service.

NS has chosen not to participate with SMS in establishing through routes to and from the industries located in the complex at Paulsboro and, hence, appears to be in violation of 49 U.S.C. 10703.

Two. NS has refused to interchange carloads of freight with SMS consigned to, or originating at, the industries within the complex at Paulsboro. While NS may drop off cars on SMS's Track 234 or pick them up from there, as far as NS is concerned, it thereby is delivering

the cars directly to the consignee or is receiving the cars directly from the shipper. In the view of NS, SMS is nothing more than an agent acting under the direction and control of the industries in pulling or spotting their cars on SMS' Track 234.

49 U.S.C. 10742 provides, "A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall provide reasonable, proper, and equal facilities that are within its power to provide for the interchange of traffic between, and for the receiving, forwarding, and delivering of passengers and property to and from, its respective line and a connecting line of another rail carrier . . ."

In speaking of the predecessor provision, 49 U.S.C. 3(4), the Supreme Court in The No. 37, 288 U.S. 239, 241 (1933), declared:

Petitioner and respondent were connecting carriers. As such, each in the discharge of its duties to the public, owed to shippers of freight in its possession destined to points on or routed over the railway of the other the duty to deliver to the connecting line for further transportation; and each was correspondingly bound to receive and carry.

NS has chosen not to interchange freight shipments with SMS and, therefore, appears to be in violation of 49 U.S.C. 10742.

Three. NS has refused to participate with SMS in the continuous movement of freight shipments consigned to industries located within the complex at Paulsboro. When dropping off cars on SMS' Track 234, NS will not provide SMS with the waybills relating to the shipments, and what is more alarming, if the freight shipments are of hazardous materials, NS will not provide SMS with the shipping papers, as required by 49 C.F.R. 172.200, et seq., and 49 C.F.R. 174.24, et seq.

49 U.S.C. 10744 provides:

A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may not enter a combination or arrangement to prevent the carriage of freight from being continuous from the place of shipment to the place of destination whether by change of time schedule, carriage in different cars, or by other means. The carriage of freight by those rail carriers is considered to be continuous carriage from the place of shipment to the place of destination when break bulk, stoppage, or interruption is not made in good faith for a necessary purpose, and with the intent of avoiding or unnecessarily interrupting the continuous carriage or evading this part.

Although only tangentially involved, the Supreme Court discussed the predecessor provision, 49 U.S.C. 7, in Davis v. Cleveland, C., C & St. L. R. Co., 217 U.S. 157, 178 (1910), in which it stated:

[The Interstate Commerce Act] restricts the powers of the railroads. It regulates interstate railroads and makes it unlawful for them, by any "means or devices," to prevent "the carriage of freight from being continuous from the place of shipment to the place of destination."

NS has chosen not only to interrupt but to block altogether the continuous movement by SMS of freight shipments consigned to industries within the complex at Paulsboro and thereby appears to be in violation of 49 U.S.C. 10744.

Four. NS has singled out SMS for unfair, discriminatory and unreasonable treatment altogether at odds with its status as a duly franchised rail carrier subject to the jurisdiction of the Board. For example, although SMS is a signatory to the Railway Accounting Rules of Association of American Railroads, NS has not permitted SMS to collect the prepaid freight charges on shipments originating at industries within the complex at Paulsboro and to settle its interline revenue accounts with NS in accordance with the Railway Accounting Rules' procedures. Rather, NS has required the shippers to issue two checks, one payable to SMS for its services rendered in picking up the shipments at the industries' plants and moving them to its Track 234 and the other payable to NS for picking up the shipments from SMS' Track 234 and

transporting them toward their destinations. Another example is NS' inconsistent treatment of SMS when it comes to car hire charges. Although, as already noted, NS does not believe SMS to be a rail carrier in rendering service within the complex at Paulsboro, NS nevertheless has sought to collect car hire charges from SMS on foreign cars within its possession. In other words, when it suited NS' purpose, it somehow managed to treat SMS as a rail carrier after all. Yet another example is NS's refusal to allow for the interchange of cars between it and SMS to occur within the Old Coke Storage Tracks and on the run-around tracks of the Paulsboro Yard, as had been the practice when Conrail was rendering service within the complex. To the contrary, NS proposed that SMS be assessed a storage charge as high as \$225 per car per day for every car consigned to an industry within the complex which could not be spotted on SMS' Track 234 and needed to be held within the Paulsboro Yard.

49 U.S.C. 10702 provides, "A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall establish reasonable . . . rules and practices on matters related to that transportation or service."

The predecessor provision was 49 U.S.C. 1(6), and speaking of it in Dubuque Shippers Assn. v. Chicago & N. W. Ry. Co., 26 I.C.C. 565, 566 (1913), the ICC said, "The law requires carriers to observe and enforce reasonable regulations and practices affecting the receipt, handling, transporting, and delivery of property . . . "

NS has chosen to act perfectly unreasonably when it comes to SMS' operations within the complex at Paulsboro and, thus, appears to be in violation of 49 U.S.C. 10702.

WHEREFORE, SMS Rail Service, Inc., asks that the Board enter a declaratory order finding that Norfolk Southern Railway Company has failed to treat SMS Rail Service, Inc., as a

rail carrier when handling shipments to and from industries located in the complex at Paulsboro, New Jersey, and that, in obedience with the requirements of the law, NS should enter into through routes with SMS Rail Service, Inc., arrange for the interchange shipments with it, allow for the uninterrupted movement of freight cars interlined with it and follow reasonable practices in dealing with it.

Respectfully submitted,

SMS RAIL SERVICE, INC.

By its attorney,



Fritz R. Kahn
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Washington, DC 20036-1601
Tel.: (202) 263-4152.

Dated: March 4, 2004

CERTIFICATE OF SERVICE

I certify that I this day have served a copy of the foregoing Petition for Declaratory Order upon Norfolk Southern Railway Company by mailing a copy thereof by prepaid first-class mail to Henry D. Light, Esq., Senior Vice President - Law..

Dated at Washington, DC, this 4th day of March 2004.


Fritz R. Kahn