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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34483

PETITION FOR DECLARATORY ORDER
OF SMS RAIL SERVICE, INC.



**RESPONSE OF NORFOLK SOUTHERN RAILWAY COMPANY
TO THE PETITION FOR DECLARATORY ORDER
OF SMS RAIL SERVICE, INC.**

Norfolk Southern Railway Company ("NS") submits this response to the petition for declaratory order ("Petition") filed by SMS Rail Service, Inc. ("SMS") on March 4, 2004. For the reasons discussed below, NS concurs that the Board institute a proceeding and suggests that the Board establish a procedural schedule for the submission of written statements and evidence on the issues presented by the Petition. SMS concurs with the schedule NS proposes.

BACKGROUND

The Petition contends, among other things, that SMS provides common carrier rail transportation on track owned by Valero Refining Company -- New Jersey ("Valero") in Valero's industrial complex in Paulsboro, New Jersey. This facility is within the South Jersey Shared Assets Area ("SJSAA"), which was established by the transaction approved by the Board's Decision No. 89 in *CSX Corp. et al -- Control -- Conrail Inc., et al.*, 3 S.T.B. 196 (1996), *aff'd sub nom. Erie-Niagara Rail Steering Committee v. STB*, 247 F.3d 437 (2d Cir. 2001). The Petition asserts that SMS is providing such transportation pursuant to the authorization provided

in STB Finance Docket No. 33927, *SMS Rail Service, Inc.—Acquisition and Operation Exemption—Valero Refining Company—New Jersey*, served September 22, 2000. The Petition further asserts that NS has not been treating SMS as a rail common carrier, by failing to interchange cars with SMS and do various other things allegedly required by law with respect to SMS. *See* Petition at 4-8. SMS requests the Board to “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 [sic], allow for the uninterrupted movement of freight cars interlined with it and follow reasonable practices in dealing with it.” Petition at 8-9.

The parties have engaged in some informal discovery with respect to the issues presented by the Petition.

POSITION OF NORFOLK SOUTHERN

NS concurs that the Board should institute a proceeding to resolve the dispute between it and SMS. NS further concurs that the proceeding may be conducted under the Modified Procedures of 49 C.F.R. Part 1112.

There are a number of factual issues that must be resolved before the Board can determine whether SMS is operating as a common carrier at the Paulsboro, New Jersey facility under the principles established in the Board’s precedents. The limited information provided to NS so far has not persuaded NS that SMS is in fact operating as a common carrier in the Paulsboro facility; on the contrary, it tends to confirm NS’s view that SMS is acting in the facility solely as a contract switch operator for Valero.

The Board has no jurisdiction over the railroad operations of an entity if (1) the operations are conducted solely over “spur, industrial, team, switching or side tracks” (49 U.S.C. § 10906; *see Brotherhood of Locomotive Engineers v. Union Pacific R.R. and Chicago C. & P.R.R.*, ICC Finance Docket No. 32127 (served May 16, 1995), *aff’d sub nom. Brotherhood of Locomotive Engineers v. United States*, 101 F.3d 718 (D.C. Cir. 1996)), or (2) if the entity is providing service not as a common carrier but solely as a contract carrier. *See, e.g. Union Pacific Railroad Company—Operation Exemption—In Yolo County, CA*, STB Finance Docket No. 34252, (served December 5, 2002) (“Yolo”). As the Board has noted, these are often “complex, fact-bound issue[s] that must be resolved in light of precedents that often require considerable analysis.” *Comrail International R. , Inc. – Operation Exemption – Chicago Heights Railcar, Inc.*, STB Finance Docket No. 34291 (served December 10, 2002), *slip op.* at 2.

The track at Paulsboro over which SMS operates is owned by Valero and is entirely within a facility also owned by Valero. The services SMS is providing at the facility appear to consist solely of “switching” within the meaning given to that term by the Board’s precedents. SMS appears to be operating over those tracks [[

.]] Furthermore, the services performed by SMS appear to be no different from the contract switching services Conrail provided to Valero, under a switching contract, which were separate and distinct from the line haul transportation services Conrail provided to Valero. Indeed, SMS stated in its notice of exemption that there would be “no significant change in railroad operations” once it began

performing services for Valero. Verified Notice of Exemption of SMS Rail Service, Inc. in STB Finance Docket No. 33927 dated September 5, 2000 at 3.

SMS' petition relies heavily on the fact that SMS obtained authorization, pursuant to a notice of exemption filed under 49 C.F.R. § 1150.41, to operate as a common carrier in the Paulsboro facility in STB Finance Docket No. 33927, *SMS Rail Service, Inc. – Acquisition and Operation Exemption—Valero Refining Company—New Jersey*, served September 22, 2000. But the fact that an entity has obtained authority to operate as a rail common carrier through a notice of exemption proceeding does not by itself mean that the entity is a common carrier. *See Arkansas Central Ry. Co., Inc.—Operation Exemption—Line of Herzog Stone Products, Inc.*, Finance Docket No. 31405, 1995 ICC LEXIS 69 (ICC served April 7, 1995) (stating that the authority granted by the ICC under its notice of exemption procedures is permissive). Furthermore, authority received under a notice of exemption does not automatically transform services performed at a particular location into common carrier transportation. *See, e.g., Yolo.*

Additionally, a conclusion that SMS is actually operating as a common carrier in the Paulsboro facility would have important implications for Valero and its access to competitive rail service at Paulsboro, which, as noted in SMS's petition, is in the South Jersey Shared Assets Area. In the Conrail control proceeding, Finance Docket No. 33388,, a significant aspect of the Board-approved transaction was the establishment of three Shared Assets Areas that were formerly served solely by Conrail and that, post-Transaction, would be served by two competing Class I carriers – NS and CSX Transportation, Inc. ("CSX") – either through Conrail or directly. Given that background, it would be very surprising to conclude that Valero, in contracting with SMS to provide switching services on its premises, intended to make its Paulsboro facility a two-

to-one point and thereby to undo an important part of the competitive benefits that NS, CSX and the Board sought to achieve in establishing and approving the SJSAA.

In order to give SMS the opportunity to prove its claims and to give NS a full opportunity to respond to them as well as to obtain discovery of the relevant facts, NS respectfully requests the Board to establish the procedural schedule set forth below. There are no circumstances requiring extraordinary handling of this controversy. SMS has been operating in the Paulsboro facility for four years, and during that time, NS (though Conrail) has been delivering cars to and picking cars up from Valero without particular difficulties, and SMS has presumably been paid by Valero for its switching services within the industrial park. Although SMS apparently wishes to participate in the NS' line-haul rates to Valero, it would not be entitled to do so even if it were operating as a common carrier, and SMS' desire to be listed as a carrier in bills of lading has no consequences for the quality of the transportation provided to the shipper.

NS suggests that the Board require SMS to submit its opening statement and supporting evidence by June 21, 2004, require NS to submit a reply statement by July 19, 2004, and require SMS to submit a rebuttal statement by August 2, 2004. Counsel for SMS has advised

counsel for NS that SMS concurs with this schedule.

Respectfully submitted,



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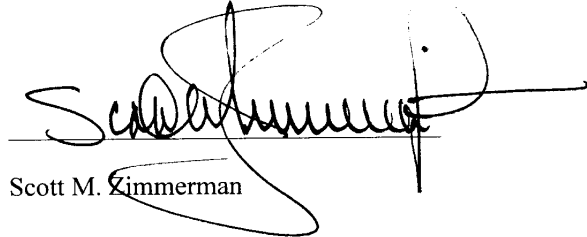
April 26, 2004.

CERTIFICATE OF SERVICE

I certify that on April 26, 2004, a true copy of the foregoing "Response Of Norfolk Southern Railway Company To The Petition For Declaratory Order Of SMS Rail Service, Inc." was served by hand delivery upon:

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