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June 1, 2004

BY HAND DELIVERY

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001



Re: Finance Docket No. 34483, Petition For Declaratory Order
of SMS Rail Service, Inc.

Dear Secretary Williams:

I enclose for filing an original and 10 copies of the Reply of Norfolk Southern Railway
Company To SMS' Motion to Compel Discovery.

Sincerely,

Richard A. Allen

cc: (w/encl.) Fritz R. Kahn, Esq.

ENTERED
Office of Proceedings

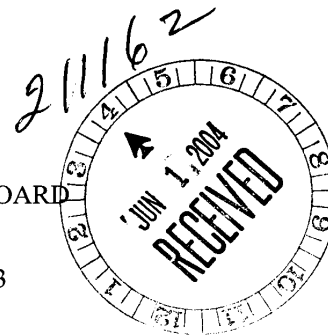
JUN - 2 2004

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 34483

SMS RAIL SERVICE, INC. –
PETITION FOR DECLARATORY ORDER



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JUN -2 2004

Part of
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**REPLY OF NORFOLK SOUTHERN RAILWAY COMPANY
IN OPPOSITION TO SMS' MOTION TO COMPEL DISCOVERY**

Norfolk Southern Railway Company ("NS") opposes the motion to compel filed by SMS Rail Service, Inc. ("SMS") on May 10, 2004. The motion contends that NS has failed to comply with its obligations under the Board's rules to respond to SMS' First Set of Document Production Requests served on NS on March 16, 2004. There is no merit to this contention, and SMS' motion should be denied.

SMS' First Set of Document Production Requests sought a wide range of documents from NS' files, including, among other things, "all documents in your possession . . . addressing or relating to SMS and its service at the Complex at Paulsboro and the Paulsboro Yard," "all documents addressing or relating to communications between [NS] and [five named shippers] including, but not limited to, all rate agreements and documents relating thereto, on shipments to and from the Complex at Paulsboro," and "all documents addressing or relating to shipment to and from the Complex at Paulsboro shipped by or consigned to [five named shippers] including, but not limited to, all bills of lading, waybills and statements for rates and/or charges assessed."

Several weeks before the April 30, 2004 due date for NS' production (see Decision served March 24, 2004), the undersigned counsel for NS advised counsel for

SMS that NS was undertaking a search for responsive documents but that it was doubtful that the search would be completed by April 30, 2004. That search has included not only a search of the paper files of a number of NS personnel involved in rail service to Valero Refining Company's facility at Paulsboro, New Jersey, but also a search of all electronic files likely to contain possibly responsive documents. Counsel for SMS expressed appreciation at NS' efforts to comply with SMS' extensive production request.

On April 30, 2004, NS served its first response to SMS' request. That response, which provided 50 pages of documents, expressly stated that NS was continuing to search for responsive documents and would promptly provide additional documents the production of which is not objected to. (At the same time, NS served its own First Set of Interrogatories and Requests For Production of Documents to SMS.)

On May 26, 2004, NS supplements its response to SMS' document production request, providing an additional 240 pages of documents. That response again stated that NS was continuing to search for responsive documents.

On May 28, 2004, NS again supplemented its third response to SMS' document request, providing an additional 62 pages of documents, and again stated that NS is continuing to search for responsive documents.

NS' responses to SMS' first document production request show that NS is fully in compliance with its obligation under the Board's rules to exercise reasonable diligence in searching for and producing requested documents. SMS' extremely broad and burdensome document requests have required NS to review a very large number of paper and electronic files and documents, many of which have contained highly confidential commercial information, such as confidential rate agreements, and many of which also

contain privileged attorney-client communications and attorney work-product. This has required NS personnel and counsel to determine how each document should be classified under the Protective Order the Board issued in this case and also, in many cases, to redact privileged or irrelevant portions from documents. Particularly in view of the discussion between counsel well before April 30, 2004, the characterization of NS' substantial efforts to comply in good faith with SMS' discovery as reflecting "disdain" and "arrogance" is not only completely unwarranted but also gratuitously insulting and utterly unhelpful to maintaining good commercial relations between NS and SMS.

NS has diligently made this very substantial effort despite the fact that there is no reason to expect that anything in NS' files would shed much light on the issue in this case: whether SMS' operations at Paulsboro, New Jersey are those of a common carrier or of a contract carrier. That issue should turn entirely on the nature of SMS' operations at Paulsboro and on SMS' agreements and relations with Valero and other shippers. All NS' communications and confidential agreements with Valero and other shippers, as well as many of the other requested documents (*e.g.*, all waybills and freight bills for thousands of movements over a four-year period), are likely to have little, if any, bearing on that issue.

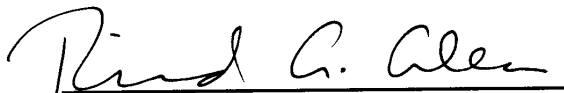
SMS's motion to compel also complains that, when NS redacted portions of documents based on a claim of attorney-client privilege or attorney work product, NS failed to provide the name of the attorneys involved, the recipients or the dates or subject matter of the documents. No such request or instruction, however, was contained in SMS's document production request.

In sum, there is no basis for SMS' motion to compel.

CONCLUSION

The motion of SMS to compel discovery should be denied.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Richard A. Allen", is written over a horizontal line.

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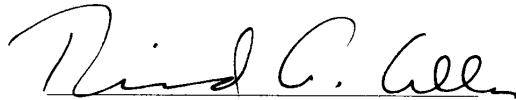
June 1, 2004

CERTIFICATE OF SERVICE

I certify that on June 1, 2004, a true copy of the foregoing "Reply Of Norfolk Southern Railway Company In Opposition To SMS' Motion to Compel Discovery" was served by hand delivery upon:

Fritz R. Kahn
Fritz R. Kahn, P.C.
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Washington, D.C. 20036-1601

Counsel for SMS Rail Service, Inc.

A handwritten signature in black ink, appearing to read "Richard A. Allen", written over a horizontal line.

Richard A. Allen