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ORIGINAL

June 21, 2004

VIA HAND DELIVERY - RETURN COPY

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

ENTERED
Office of Proceedings

JUN 21 2004

Part of
Public Record

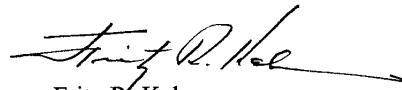
Dear Secretary Williams:

Enclosed for filing in STB Finance Docket No. 34483, SMS Rail Service, Inc.-Petition for Declaratory Order, are the original and ten copies of the Public Version - Confidential Information Deleted of the Opening Statement of SMS Rail Service, Inc., and an original and ten copies of the Statement Filed Under Seal - Contains Highly Confidential Information.

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

The Certificate of Service failed to indicate, and I hereby certify, that I this day have caused a copy of the Statement to be hand delivered to counsel for Valero Energy Company-New Jersey, Donald G. Avery, Esq., as well as to counsel for NS, Richard A. Allen, Esq.

Sincerely yours,


Fritz R. Kahn

enc.

cc: Richard A. Allen, Esq.
Donald G. Avery, Esq.
Mr. Jeffrey L. Sutch



211371

ORIGINAL

PUBLIC VERSION - CONFIDENTIAL INFORMATION DELETED

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Finance Docket No. 34483

SMS RAIL SERVICE, INC.
- PETITION FOR DECLARATORY ORDER

OPENING STATEMENT
OF
SMS RAIL SERVICE, INC.

ENTERED
Office of Proceedings
JUN 21 2004
Part of
Public Record

Fritz R. Kahn
Fritz R. Kahn, P.C.
1920 N Street, NW (8th fl.)
Washington, DC 20036-1601
Tel.: (202) 263-4152

Attorney for

SMS RAIL SERVICE, INC.

Due and dated: June 21, 2004

JUN 21 2004
RECEIVED

PUBIC VERSION - CONFIDENTIAL INFORMATION DELETED

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Finance Docket No. 34483

SMS RAIL SERVICE, INC.
– PETITION FOR DECLARATORY ORDER

OPENING STATEMENT
OF
SMS RAIL SERVICE, INC.

Petitioner, SMS Rail Service, Inc., of Bridgeport, New Jersey ("SMS"), pursuant to the Decision, served May 12, 2004, submits the following as its opening statement:

I.

INTRODUCTION

The issue before the Board is whether NS unilaterally could elect to ignore the Board's grant of common carrier authority and treat SMS as a private plant railroad.

As set out in the attached Verified Statement of Jeffrey L. Sutch, President of SMS, incorporated herein and made a part hereof, SMS is a short line railroad rendering services in three industrial parks: Pureland Industrial Complex at Bridgeton, NJ, pursuant to STB Finance Docket No. 32494, SMS Rail Service, Inc.–Lease and Operation Exemption–Pureland Association, Inc., served May 26, 1994; Penn Warner Industrial Park, pursuant to STB Finance

Docket No. 33835, Penn-Jersey Rail Lines, Inc.–Acquisition and Operation Exemption–Lines in Penn Warner Industrial Park, Falls Township, Bucks County, PA, served May 5, 2000,¹ and the Complex at Paulsboro, NJ, pursuant to STB Finance Docket No. 33927, SMS Rail Service, Inc.–Acquisition and Operation Exemption–Valero Refining Company–New Jersey, served September 22, 2000.

It is the last of these, the Complex at Paulsboro, which is the subject of the instant proceeding. It is there that Norfolk Southern Railway Company ("NS") has chosen not to work with SMS as a handling carrier or switching carrier but at the highest level of the railroad's management determined to treat SMS as if it were nothing more than a mere private plant railroad.

The question before the Board is not as NS would frame it, namely, whether SMS' operations within the Complex at Paulsboro are those of a common carrier or of a contract carrier.² The Board answered that question more than three years ago when it allowed SMS to acquire by lease and operate the lines of the Complex pursuant to the section-10902 class exemption, 49 C.F.R. 1150.41, et seq. The franchise thereby conferred by the Board allowed SMS to render operations within the facility as a common carrier railroad with all the rights and privileges, as well as duties and obligations, that attend.

Rather, the issue in the instant proceeding is, as it was framed in SMS' Petition for

¹ Penn-Jersey Rail Lines, Inc., was merged into SMS, pursuant to STB Finance Docket No. 34300, Jeffrey L. Sutch and Leonard J Smolsky–Notice of Exemption–Intra-Corporate Family Transaction, served January 17, 2003.

² Reply of Norfolk Southern Railway Company in Opposition to SMS' Motion to Compel Discovery, filed June 1, 2004, at page 3.

Declaratory Order, filed March 4, 2004, whether NS in fact has chosen to disregard SMS' status as a common carrier railroad subject to the jurisdiction of the Board and on its own determined that SMS is nothing more than a private plant railroad in rendering service within the Complex at Paulsboro.

If, as appears to be the case, NS believed that SMS improperly invoked the section-10902 class exemption to secure the authority to operate as a rail carrier within the Complex at Paulsboro, the proper action for NS to have taken would have been to petition the Board, pursuant to 49 U.S.C. 10502(d) and 49 C.F.R. 1121.4(f), to revoke SMS' exemption. See, STB Finance Docket No. 34114, Yolo Shortline Railroad Company–Lease and Operation Exemption, served February 3, 2003; STB Finance Docket No. 34145, Bulkmatic Railroad Corporation–Acquisition and Operation Exemption–Bulkmatic Transport Company, served November 19, 2002; Finance Docket No. 32112, Clark Shortline Railroad Company–Acquisition and Operation Exemption–Indiana Port Commission, served May 14, 1998. NS, however, chose not to bring an action before the Board seeking the revocation of SMS' section-10902 class exemption. Rather, NS took it upon itself for more than three years' time simply to ignore SMS' authority to operate as a rail carrier within the Complex and unilaterally relegated SMS to the role of a private operator of plant track. NS' total disregard of the Board's processes should not be countenanced by the Board, and the declaratory relief which SMS seeks should be granted.

II.

ARGUMENT

A.

NS has not included SMS in the routing
of shipments to and from the Paulsboro industries.

In its Petition for Declaratory Order, SMS asserted that 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. In the discovery which has occurred in the meantime, NS has produced no document containing information to the contrary.³

The documents which were produced by NS, however, do disclose that NS initially was uncertain how it should treat SMS in its operations within the Complex at Paulsboro. Mr. Wes. B. Alexander, Director, Agency/EDI, in his e-mail message of November 27, 2000, Attachment A, declared:

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³ SMS' Motion to Compel NS' greater document production, filed May 10, 2004, remains pending.

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Mr. John H. Kraemer, Assistant Vice President, Short Line Marketing, in his e-mail message of December 2, 2000, Attachment A, replied:

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Nevertheless, Mr. Kraemer not long thereafter entertained some doubt as to the status of SMS and in his e-mail message of April 12, 2001, Attachment B, declared:

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Mr. Thomas E. Rappold, Assistant Vice President, Domestic Utility and Industrial Coal, replied a day or two later, Attachment C, :

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By April 16, 2001, Attachment C, Mr. Kraemer had come around to the prevailing view and concluded that SMS should be regarded by NS as a private plant railroad:

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Mr. Kraemer reiterated NS' position in a memorandum to James W. McClellan, Senior Vice President, Planning, dated December 17, 2001, Attachment D, "[[

]]."

A NS memorandum reporting the results of a meeting between representatives of Valero and NS on July 24, 2002, Attachment E, stated flatly, "[[

]]."

NS, moreover, refused to absorb any of SMS' charges although its personnel understood full well that Conrail's costs and, hence, indirectly NS' costs would be reduced as a result of SMS' assuming the switching operations formerly performed by Conrail at the Paulsboro Complex. Ms. Jani Marie Creekmore, Manager, Strategic Planning, in an e-mail message dated October 19, 2000, Attachment F, said

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Ms. Creekmore reiterated her views as to the cost savings that would be realized in her e-mail message of November 22, 2000, Attachment G:

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Nevertheless, NS represented to SMS that neither it nor Conrail enjoyed any savings as a result of

⁴ SMS at times is referred to by its four-digit alpha code, SLRS.

SMS' assumption of the switching operations previously performed by Conrail. Mr. Francis X.

Hennessy, Account Manager, in his e-mail message to Mr. Sutch, dated October 17, 2000,

Attachment H, said:

This is in reference to your request to enter a switching agreement with the Norfolk Southern or Conrail Shared Asset RR at Paulboro, NJ.

We have reviewed your request and the Norfolk Southern can not absorb any portion of the \$225.00 you propose to charge. We have determined that there will be no savings to NS or the CSAO if SMS Rail does the switching for the Valero plant. Any charge that SMS assesses should be billed directly to Valero, Oxbow, Air Products or Exxon/Mobil.

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 . . . " See, Thompson v. United States, 343 I.S/ 549, 556 (1952); Through Routes and Through Rates, 12 I.C.C. 153, 166 (1907).

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.

B.

NS has not interchanged
loaded freight cars with SMS.

In its Petition for Declaratory Order, SMS maintained that 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 a private plant

railroad acting on behalf of the industries located within the Complex at Paulsboro in pulling or spotting their cars on SMS' Track 234. In the discovery which has taken place in the interim, NS produced no document containing information to the contrary.

NS did produce documents establishing that, notwithstanding that it was aware that SMS had been established as a common carrier serving the Complex, NS would refuse to interchange freight traffic with SMS. Ms. Jani Marie Creekmore, in her e-mail message of November 22, 2000, Attachment G, had noted, "[[

]]." Mr. Kraemer, however, in an e-mail message, dated March 5, 2003, Attachment I, explained:

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]].

On April 23, 2003, in an e-mail message, Attachment J, Mr. Kraemer, again, emphasized:

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As recently as October 16, 2003, Attachment K, Mr. James L. Pinson notified Mr. Kraemer:

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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 . . ." See, The No. 37, 288 U.S. 239, 241 (1933).

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

C.

NS has not cooperated with NS in the
continuous movement of freight shipments.

In its Petition for Declaratory Order, SMS alleged that 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. In the discovery which has taken place since then, NS produced no document containing information to the contrary.

NS did produce a copy of Mr. Kraemer's e-mail message of March 5, 2003, to Mr. Tim Miller, Attachment I, in which, as already noted, Mr. Kraemer declared:

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⁵ In sharp contrast, CSX Transportation, Inc., agreed to interchange with SMS, effective November 28, 2000. See, Attachment L.

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Similarly, as already noted, in his e-mail message of April 23, 2003, to Ms. Debbie Thomas,

Attachment J, Mr. Kraemer said:

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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 [sic] made in good faith for a necessary purpose, and with the intent of avoiding or unnecessarily interrupting the continuous carriage or evading this part.

See, Davis v. Cleveland, C. C. & St. L. R. Co., 217 U.S. 157, 178 (1910).

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.

D.

NS's practices have been unreasonable
in its three-year long dealings with SMS.

In its Petition for Declaratory Order, SMS contended that NS 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 did not permit 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, invoking Rule 11, 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. See, copy of letter from Valero's Marion L. Lewis, dated March 8, 2001, Attachment M.

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 collected -- and continues to collect -- car hire charges from SMS on foreign cars within its possession. In his e-mail message of August 13, 2001, Attachment N, Mr. Jim L. Pinson stated:

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SMS thereupon did adjust its system only to have NS withhold the car hire charges from the road charges due SMS under their handling carrier agreement at the Pureland Industrial Complex. As

Mr. Tim F. Miller explained in his e-mail message of March 12, 2003, Attachment O, to Mr.

Kraemer:

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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. NS sought to give the impression that access to additional tracks would need to be worked out between SMS and CR. Thus, in his letter to Mr. Sutch, dated November 21, 2000, Attachment P, Mr. T. L. Ingram, Vice President, Transportation Operations, said, "Although there are operational concerns with proposals for SMS to move and interchange traffic on Conrail's SAA lines, we also note that SMS has not offered to compensate Conrail for the use of the SAA property." The lack of candor on NS's part is evident from the e-mail message of November 22, 2000, Attachment G, from Ms. Jani Marie Creekmore, in which she stated, "((

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Similarly, in his note to Mr. Joseph C. Osborne, Jr., Group Vice President, Chemicals, dated

October 22, 2001, Attachment Q, Mr. Donald W. Seale, Senior Vice President, Merchandise Marketing, noted, "((
))." In fact, it was NS' position that SMS was to be afforded no additional interchange tracks. Mr. Osborne, in his e-mail of June 12, 2002, Attachment R, to Mr. Kraemer stated:

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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." See, Dubuque Shippers Assn. V. Chicago & N. W. Ry. Co., 26 I.C.C. 565, 566 (1913).

It is altogether evident that NS is piqued that SMS should have had the audacity to have reached an agreement with Valero and to have taken over the switching operations at the Complex at Paulsboro without first having discussed the arrangement with NS and having secured the railroad's concurrence if not approval. As Mr. Osborne stated in his e-mail message, dated July 18, 2002, Attachment S, suggesting what NS should say at an upcoming meeting with Valero, "((

))." Similarly, NS' Mr.

Crochet in his e-mail message, dated April 3, 2001, Attachment B, urged that NS "((

)))" Mr. Osborne, in his e-mail message of April 16, 2001,

Attachment T, made clear, "((

)))"

We really wonder whether NS believes that SMS would operate within the Complex at

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We don't believe that anyone seriously would contend that, because of that contract, Conrail was not a common carrier railroad when, before November 28, 2000, it performed the intraplant switching within Valero's facility. Indeed, before the enactment of the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), Conrail would have been required as a common carrier railroad to publish its intraplant switching charges in tariffs duly filed with the Interstate Commerce Commission, and changes in its intraplant switching charges could be ordered vacated if not shown to be just and reasonable. See, Increased Switching Charges, 315 I.C.C. 199 (1961), mod., 318 I.C.C. 485 (1962).

Moreover, the contract between SMS and Valero, a copy of which is attached as Exhibit 2 to Mr. Sutch's Verified Statement, provided for SMS' lease of the Valero owned tracks within the Complex at Paulsboro. Valero received \$(()) in lease payments from SMS in 2000, \$(()) in 2001, \$(()) in 2002 and \$(()) in 2003. Of course, the lease of lines is a common means of acquiring property under the section-10902 class exemption. See, STB Finance Docket No. 34496, Progressive Rail, Incorporated-Lease and Operation Exemption-Soo Line Railroad Company, served May 19, 2004; STB Finance Docket No. 34476, Progressive Rail, Incorporated-Acquisition and Operation Exemption-Rail Lines of Union Pacific Railroad Company, served April 7, 2004; STB Finance Docket No. 34472; Columbia Basin Railroad Company, Inc.-Lease and Operation Exemption-Clark County, WA, served March 11, 2004; STB Finance Docket No. 34443, Timber Rock Railroad, Inc.-Lease Exemption-The Burlington Northern and Santa Fe Railway Company, served March 3, 2004.

NS, also, seems to believe that SMS is not a common carrier railroad, because SMS' only function is to switch traffic within the Complex at Paulsboro and to and from the interchange track. Such service, however, is typical of the switching performed by short line railroads operating within industrial parks or plant sites, and yet these short line railroads uniformly have been authorized by the Board to operate as common carrier railroads. See, STB Finance Docket No. 34493, Old August Railroad, LLC–Acquisition and Operation Exemption–Assets of Old Augusta Railroad Company, served April 21, 2004; 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 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. 34295, Airlake Terminal Railway Company–Acquisition and Operation Exemption–Rail Line of Empire Builder Investment Incorporated and Progressive Rail, Incorporated, served December 27, 2002; STB Finance Docket No. 33997, Texas Central Business Lines Corporation–Operation Exemption–Midtexas International Center, served September 20, 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. 34145, Bulkmatic Railroad Corporation–Acquisition Exemption–Bulkmatic Transport Company, served January 15, 2002; STB Finance Docket No. 34114, Yolo Shortline Railroad Company–Lease and Operation Exemption–Port of Sacramento, served November 20, 2001; STB Finance Docket No. 33799, Riverport Railroad, L.L.C.–Lease and Operation Exemption–Jo-Davies/Carrol County Local Re-Development Authority, served September 16, 1999; STB Finance Docket No. 33764, Rock & Rail, Inc.–Acquisition and

Operation Exemption—Railroad Lines near Kelker, El Paso County, CO, served June 25, 1999; STB Finance Docket No. 33695, Fredonia Valley Railroad, Inc.—Acquisition and Operation Exemption—in Caldwell County, KY, served January 6, 1999; STB Docket No. 41986, Effingham RR Co.—Pet. For Declaratory Order, 2 S.T.B. 606 (1997), aff'd sub nom., United Transp Union v. Surface Transp. Bd., 183 F.3d 606 (7th Cir. 1999); STB Finance Docket No. 33323, Chicago Rail Link, L.L.C.—Lease and Operation Exemption—Union Pacific Railroad Company, served January 9, 1997, aff'd sub nom., United Transp. Union—Illinois v. Surface Transp., 169 F.3d 474 (7th Cir. 1999); Finance Docket No. 32112, Clark Shortline Railroad Company—Acquisition and Operation Exemption—Indiana Port Commission, served August 13, 1992.

Admittedly, many, if not most, of the short line railroads which were the subject of the foregoing proceedings are not included in the routing of freight shipments, do not share in the line haul revenues and do not interchange cars with their connecting Class I carriers. Rather, they decided to enter into switching carrier, handling carrier or other such agreements with the Class I carriers with which they connect. Pursuant to these agreements, it is the Class I railroads which are vested with the sole authority to negotiate rate contracts with the shippers, most normally covering the entire movement from origin to destination, and it is the Class I railroads which, wholly or partially, reimburse the short line railroads for the charges accruing in rendering the switching services within the industrial parks or plant sites by the payment of allowances to the short line railroads or by absorbing the short line railroads' rates. These arrangements, however, are entered into voluntarily by the short line railroads. They are the product of the short line railroads' free choice.

Indeed, as already noted, SMS and NS are parties to a handling carrier agreement relating

to SMS' switching operations within the Pureland Industrial Complex at Bridgeport, NJ. SMS sought to enter into a similar arrangement with NS pertaining to the switching operations within the Complex at Paulsboro, but NS would have none of it.

Instead, NS chose to disregard SMS' authority to operate as a rail carrier within the Complex, pursuant to its notice filing under the section-10902 class exemption, of which NS had full knowledge. NS did not question the propriety of SMS' availing itself of the section-10902 class exemption and to this day has not filed a petition to revoke SMS' exemption. NS simply took it upon itself to disregard the Board's precedents or procedures and as a matter of corporate policy established at the highest level undertook to deal with SMS as if it were nothing more than a mere private plant railroad.

If NS were allowed unilaterally to decide that SMS is not a Board authorized rail carrier in rendering the switching services within the Complex at Paulsboro but is simply a private plant railroad, what is to stop NS, or, for that matter, any Class I railroad, from taking similar actions at other industrial parks or plant sites? With the Class I railroads as desperate as they seem to be to improve their bottom lines, dismissing the originating or terminating short line railroads as mere private plant railroads would appear to be an obvious means of enhancing their revenues. The Class I railroads just would refrain from entering into switching carrier, handling carrier or other such agreements with the originating or terminating shortline railroads. Invoking Rule 11, the Class I railroads would require the short line railroads to collect their switching charges from the shippers, leaving to the Class I railroads the entirety of their line haul revenues. The result would be that the short line railroads would be handicapped in marketing their services and that the shippers would experience greater rail transportation costs.

ATTACHMENT H

Tubman, Dutch

From: Hennessy, Francis
Sent: Tuesday, October 17, 2000 12:57 PM
To: Poole, Robert; Liddell, Jim; Rappold, Tom; Osborne, Joe; Aspatore, George A.; Tubman, Dutch
Subject: FW: Paulsboro switching

All:
Jeff Sutch has been advised. I also spoke to his assistant and asked him to tell Jeff this memo was enroute.

Fran Hennessy

-----Original Message-----

From: Hennessy, Francis
Sent: Tuesday, October 17, 2000 12:06 PM
To: 'jeffs@sms-pennjerseyrail.com'
Cc: Mason, Sam
Subject: Paulsboro switching

Jeff Sutch
President
SMS /Penn Jersey Rail

Dear Jeff,

This is in reference to your request to enter a switching agreement with the Norfolk Southern or Conrail Shared Asset RR at Paulsboro, NJ .

We have reviewed your request and the Norfolk Southern can not absorb any portion of the \$ 225.00 you propose to charge . We have determined that there will be no savings to NS or the CSAO if SMS Rail does the switching for the Valero plant. Any charge that SMS assesses should be billed directly to Valero, Oxbow , Air Products or Exxon/ Mobil.

Sincerely

Francis X. Hennessy
Account Manager - Norfolk Southern
10/17/2000

000149

ATTACHMENT L

FEB 20 01 04:00P

Feb-15-2001 08:28 From-

Feb 12 01 03:00P

NOV -19' 00(WED) 15:25

T-306 P 001/001 F-416
55579/C1C1

P.002

JUNCTION INTERCHANGE UPDATE FORM

Junction Industry Reference File

FAX completed form to the

AAR at 914-651-5143

JUNCTION - unique identification of the LOCATION of an INTERCHANGE

JUNCTION ABBREVIATION: PL5BR

STANDARD POINT LOCATION CODE (SPLC): 198546 (---)

JUNCTION LOCATION NAME: Paulsboro

JUNCTION STATE / PROVINCE: NJ

INTERCHANGE - description of ACTIVITIES between two transportation entities at a JUNCTION

ACTION REQUESTED: A (A = add, C = change, E = expire)

INTERCHANGE TYPE: 0

Confidential

	INTERCHANGING CARRIER	REPORTING CARRIER	CSM STATION #SAC (when required)
MARK / SCAC 1	<u>CSXT</u>	<u>CSXT</u>	<u>39835</u>
MARK / SCAC 2	<u>SLRS</u>	<u>SLRS</u>	<u>00105</u>

DELIVERY ONLY FLAG: N (Y = yes, N = no)

INHIBIT JUNCTION ADVICES: N (Y = yes, N = no)

EFFECTIVE DATE OF ACTION: 2000-11-28 (CCYY-MM-DD)

AGREEMENT - signatures of transportation entity representatives (as required by interchange TYPE)

	MARK / SCAC 1	MARK / SCAC 2
SIGNATURE	<u>Kiran Hansen</u>	<u>Jeff Sutch</u>
CONDITIONAL AGREEMENT?	<u>N</u> (Y = yes, N = no. If yes, both MUST be accompanied by a complete description of the conditions of agreement)	<u>N</u> (Y = yes, N = no. If yes, both MUST be accompanied by a complete description of the conditions of agreement)
NAME (please print)	<u>Kiran Hansen</u>	<u>Jeff Sutch</u>
COMPANY	<u>CSX Transportation</u>	<u>Sms Rail Service, INC</u>
PHONE NUMBER	<u>904-279-6204</u>	<u>856-467-4800</u>
FAX NUMBER	<u>904-279-5681</u>	<u>856-467-2121</u>

SUBMISSION - FAX completed form to the AAR at 914-651-5143 (or mail to address in the instructions)

last revision Aug 01, 1998

000138

ATTACHMENT M

Valero
Marketing and Supply Company

One Valero Place □ San Antonio, Texas 78212 □ Telephone (210) 370-2869 □ Fax (210) 370-2853 □ Email
lewism@valero.com

March 8, 2001

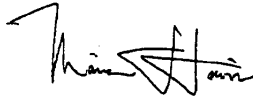
Mr. Jeffrey L. Sutch
President
SMS Rail Services, Inc.
P. O. Box 711
Bridgeport, NJ 08014

Dear Jeff:

Subject: Re-billed Norfolk Southern Switching Charges

As we discussed by telephone, Valero will process and pay the SMS February '01 re-billing of Norfolk-Southern switching charges. However, this payment is made "under protest" and with full reservation by Valero of all its rights under its contract with Norfolk Southern and otherwise. It is our understanding that these switching charges are Norfolk Southern's responsibility under our contract with them. Accordingly, Valero does not intend to pay any further such charges pending resolution of this matter with Norfolk Southern.

Sincerely,

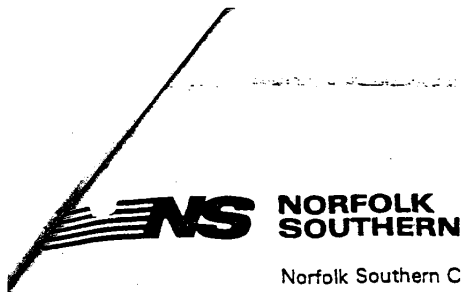


Marion L. Lewis
Manager, Rail Movements

cc: Kimberly S. Bowers, Esq. - Valero
C. Michael Loftus, Esq. - Slover & Loftus
Norfolk Southern Railway Company

0000093

ATTACHMENT P



Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191

T. L. Ingram
Vice President
Transportation Operations
Telephone: 757 629-2606
FAX: 757 629-2344

November 21, 2000

Mr. Jeffrey L. Sutch
President
SMS Rail Lines, Inc.
Post Office Box 711
Bridgeport, NJ 08014

Dear Mr. Sutch:

We recently received from the STB copies of your letter, the letter from Fritz Kahn, and the email from Marion Lewis. Norfolk Southern Railway Company, and we understand Consolidated Rail Corporation as well, stand ready to provide Valero Refining Company-New Jersey and SMS Rail Lines, Inc. with reasonable interchange services.

Norfolk Southern Railway Company has no objection to interchanging traffic with SMS on its facilities. However, we are not agreeable to interchanging traffic within Conrail's Paulsboro Yard. Although there are operational concerns with proposals for SMS to move and interchange traffic on Conrail's SAA lines, we also note that SMS has not offered to compensate Conrail for the use of the SAA property.

SMS has also requested that NS, CSX and Conrail absorb its switching charge. We are not required to absorb SMS's switching charge and chose not to do so.

It is our understanding that Consolidated Rail Corporation will send to SMS a proposed interchange agreement. Until an agreement is signed, we are prepared to provide interchange services to SMS, on its lines, based on those draft terms and conditions beginning on Tuesday, November 28, 2000, when we understand SMS will commence its services for Valero.

If you have any questions or need further information, please let me know.

Sincerely,

T. L. Ingram

cc: Mr. Melvin F. Clemens, Jr.
Mr. George A. Aspatore

PUBLIC VERSION - CONFIDENTIAL INFORMATION DELETED

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Finance Docket No. 34483

SMS RAIL SERVICE, INC.
– PETITION FOR DECLARATORY ORDER

VERIFIED STATEMENT
OF
JEFFREY L. SUTCH.

My name is Jeffrey L. Sutch, and I am the President of SMS Rail Service, Inc., with offices at 510 Heron Drive, Bridgeport, New Jersey 08014.

SMS is a short line railroad rendering services in three industrial parks: Pureland Industrial Complex at Bridgeport, NJ, pursuant to STB Finance Docket No. 32494, SMS Rail Service, Inc.–Lease and Operation Exemption–Pureland Association, Inc., served May 26, 1994, Penn Warner Industrial Park, pursuant to STB Finance Docket No. 33835, Penn-Jersey Rail Lines, Inc.–Acquisition and Operation Exemption–Lines in Penn Warner Industrial Park, Falls Township, Bucks County, PA, served May 5, 2000,¹ and the Complex at Paulsboro, NJ, pursuant

¹ Penn-Jersey Rail Lines, Inc., was merged into SMS, pursuant to STB Finance Docket No. 34300, Jeffrey L. Sutch and Leonard J Smolsky–Notice of Exemption–Intra-Corporate Family Transaction, served January 17, 2003.

to STB Finance Docket No. 33927, SMS Rail Service, Inc.—Acquisition and Operation

Exemption—Valero Refining Company—New Jersey, served September 22, 2000.

It is the last of these, the Complex at Paulsboro which is the subject of the instant proceeding.

The Complex at Paulsboro covers about 970 acres and includes approximately 5.8 miles of railroad lines. The facility formerly was that of Mobil Oil Corporation. The merger of Mobil and Exxon Company, U.S.A., occasioned the sale of the facility, bought in 1998 by Valero Refining Company—New Jersey, an affiliate of Valero Energy Corporation of San Antonio, Texas, one of the Nation's largest refining companies.

The site is in the South New Jersey Shared Asset Area, and, before SMS began performing its services, intraplant switching had been rendered by Consolidated Rail Corporation, pursuant to a section-10709 contract, 49 C.F.R. 1313.1, et seq., between it and Mobil, a copy of which is attached as Exhibit 1.

I sought to interest Mobil in allowing SMS to take over operations within the Complex at Paulsboro, but it was not until after Valero acquired the property that Valero, in order to obtain more responsive switching service, invited SMS to come in and take over responsibility from Conrail for rendering service within the facility.

Conceivably, SMS could have taken over the intraplant switching operations under a contract with Valero, acting in its name and in its stead. I, however, thought it better if SMS, already a Class III rail carrier subject to the Board's jurisdiction, were to render the services as a common carrier railroad. It was a matter of indifference to Valero whether SMS provided the services as a private operator or as a common carrier railroad, and I chose the latter course.

Moreover, in addition to Valero, three other shippers were situated at the site, Air Products and Chemicals, Inc., Exxon Mobil Corporation and Oxbow Carbon & Minerals, Inc., and I wanted SMS to be able to serve these industries, as well as any others which subsequently were to be located in the Complex at Paulsboro. As a matter of fact, Savage Industries, Inc., established a transload facility within the site late in 2002, and SMS has been serving it since then.

To effect the changeover from Conrail to SMS, SMS entered into a Rail Line Service Agreement with Valero providing for SMS' lease of the Valero owned lines within the Complex at Paulsboro. A copy of the at Agreement, dated August 31, 2000, is attached as Exhibit 2.

Valero received \$(()) in lease payments from SMS in 2000, \$(()) in 2001, \$(()) in 2002 and \$(()) in 2003.

Operations by SMS commenced November 28, 2000. Under the terms of the Agreement, SMS was required to provide the locomotives and the crews for rendering the services within the Complex at Paulsboro, including providing shifting services at least twice a day, seven days a week. SMS was responsible for the maintenance and repair of the approximately 5.8 miles of lines within the Complex, including the replacement of rails and ties as necessary, and for keeping the lines free of snow, ice, weeds or rubbish. The lines were maintained to FRA standards, and SMS' equipment and crews were FRA compliant. SMS was to engage sufficient clerical personnel to maintain the yard inventory, transmit bills of lading and prepare interchange reports. SMS' employees were covered by Railroad Retirement, Federal Employers Liability Act and Railway Labor Act.

NS has absorbed none of SMS' charges for services rendered at the Complex at Paulsboro. See, Exhibit 3. Valero pays SMS for the intraplant switching and NS for the line

haul transportation.

As best as I can understand it, it is the position of NS that, notwithstanding that SMS was authorized by the Board to operate within the Complex at Paulsboro as a rail carrier pursuant to the section-10092 class exemption, 49 C.F.R. 1150.41, et seq., its role as a common carrier railroad somehow is vitiated because of the contract between it and Valero

I would note, first, that the prior operator within the Complex at Paulsboro, Consolidated Rail Corporation, rendered its intraplant switching service pursuant to a section-10709 contract, 49 C.F.R. 1313.1, et seq., and yet I don't believe that anyone would argue seriously that, because of the contract, CR was not a common carrier railroad. Indeed, prior to the ICC Termination Act of 1995, Conrail would have had to publish its rates for performing intraplant switching in its tariffs filed with the Interstate Commerce Commission.

NS, also, seems to believe that SMS is not a common carrier railroad, because SMS' only function is to switch traffic within the Complex at Paulsboro and to and from the interchange track. Such switching service, however, is typical of short line railroads serving industrial parks or similar sites and, yet, the Board consistently has authorized such short line railroads to operate within the facilities as common carriers.

As a result of NS' considering SMS to be nothing more than a private plant railroad, NS 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 did not appear as a participating carrier on NS' bills of lading or on NS' waybills accompanying the shipments, and SMS shared in none of the revenue collected by NS on traffic moving from and to the industries situated within the Complex, whether from the shippers on prepaid shipments or the consignees on collect shipments, for the

switching services which SMS rendered.

NS refused to interchange carloads of freight with SMS consigned to, or originating at, the industries within the Complex at Paulsboro. While NS may have dropped off cars on SMS' Track 234 or picked up cars from there, as far as NS was concerned, NS was merely delivering the cars directly to the consignees or receiving the cars directly from the shippers. In the view of NS, SMS was nothing more than the agent acting under the direction and control of the industries in pulling and spotting their cars on SMS' Track 234.

NS refused to participate with SMS in the continuous through movement of freight shipments consigned to industries located within the Complex at Paulsboro. When dropping off cars on SMS' Track 234, NS failed to provide SMS with the waybills relating to the shipments and, more disturbing, if the shipments were of hazardous materials, NS did not provide SMS with the shipping papers.

Although SMS is a signatory of the Railway Accounting Rules of the Association of American Railroads, NS did not permit 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 subjected SMS to Rule 11, requiring 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.

Although NS refused to consider SMS to be a rail carrier and, therefore, did not interline shipments with it, NS, nevertheless, collected car hire charges from SMS on foreign cars delivered

to it. SMS, believing itself to be rail carrier, faithfully paid the car hire charges to NS until instructed by NS to discontinue doing so. Thereafter, NS deducted the car hire charges from payments due SMS for handling services rendered at Pureland. The car hire charges collected or retained by NS by now total close to \$100,000.

Finally, NS did nothing to aid SMS in securing adequate interchange tracks from Conrail. When Conrail was performing the switching at the Complex at Paulsboro, it used the Old Coke Storage Tracks and the run-around tracks of the Paulsboro Yard for the interchange of cars, but SMS was denied their use. In a letter from NS' Vice President, Mr. T. L. Ingram to me, dated November 21, 2000, a copy of which is attached as Exhibit 4, NS stated, "[W]e are not agreeable to interchanging traffic within Conrail's Paulsboro Yard." 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 need to be held within the Paulsboro Yard.

I spoke with Chairman Goode of NS in September 2001 to bring to his attention that NS was failing to recognize SMS' authority to operate as a common carrier railroad within the Complex at Paulsboro. I followed up my conversation with him with a letter, dated October 17, 2001, a copy of which is attached as Exhibit 5. Among other things, my letter stated:

As you know, last year we were selected as the rail service provider at the Valero energy plant in Paulsboro, NJ as a direct result of years of inadequate service and unsafe operation within the facility by Conrail/Shared Assets. While the STB approved our operating authority, the NS opted not to recognize our interchange and have since operated in direct contradiction to that ruling. Furthermore, the NS has refused to abide by AAR Accounting rules applicable to our services, but has insisted upon the enforcement of AAR Car Hire rules for those same services and chooses to deduct that amount from payments due to our Bridgeport, NJ operating division.

These actions have been carried out for nearly one year despite all our attempts to resolve this situation amicably. They have created an adversarial relationship between our two Companies and have left a very important joint Customer with a very bad taste in their mouth. Considering that NS handles the majority of the line haul moves originating at Valero in Paulsboro, NJ, it was our assumption that you would be as eager to resolve this situation as SMS. To the contrary however, the Customer's perception of this situation is one of utter dismay and that the handling of this situation is a definite example of the level of responsiveness they have experienced for many years and led them to change Carriers in the first place.

Chairman Goode chose not to reply to my letter but referred the matter to NS' Senior Vice President, James W. McClellan, who replied by letter, dated November 7, 2001, a copy of which is attached as Exhibit 6. I found Mr. McClellan's reply completely unsatisfactory and responded by my letter of November 30, 2001, a copy of which is attached as Exhibit 7. In part, I stated;

To date, we have not been contacted by Mr. Kraemer with regard to either the car hire or the misrouting issues. While there has been no recurrence of the misrouting since our last correspondence, we fail to see how either situation can be resolved without NS' acknowledging that Paulsboro is a station for SMS where a viable interchange should be effected. Furthermore, the "standard" interchange agreement you mentioned was not executed for reasons already known to Mr. Broder, namely that it covers only the Valero-owned track number 234, which is insufficient to handle the traffic, and our concerns have not changed over the past year. Finally, we do not question the manner in which your line-haul contracts with Valero are structured, but we are concerned that SMS is denied the opportunity to participate in the initial and/or final portions of the handling of the shipments covered by those rates as requested by Valero and SMS. Consequently, and contrary to your final statement, we strongly believe that the aforementioned issues are merely symptoms of NS' refusal to recognize SMS as a duly franchised railroad, which in our view is the single overriding issue that exists between our Companies, which must be addressed.

I renewed my request for a face-to-face meeting to try amicably to resolve our differences, whether with Chairman Goode or Mr. McClellan, but to date none has been scheduled.

NS' position vis-a-vis SMS' operations within the Complex at Paulsboro is one that I have great difficulty understanding. It is not that NS doesn't know SMS. To the contrary, NS and

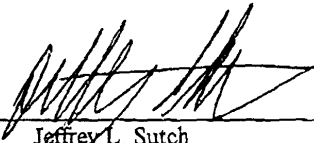
SMS work harmoniously at the Pureland Industrial Complex, one of the other industrial parks in which SMS performs the intraplant switching. As a matter of fact, NS and SMS are party to a Handling Line Agreement, dated July 9, 1999, a copy of which is attached as Exhibit 8. As far as I am concerned, I would welcome the opportunity of having SMS negotiate such a handling line agreement or switching line agreement with NS, but NS wants no part of it. See, Exhibit 3.

If NS were allowed unilaterally to relegating SMS to the status of a private plant railroad, notwithstanding that SMS had secured the authority to render its services in the Complex at Paulsboro as a common carrier railroad, pursuant to the section-10902 class exemption, there is no reason to believe that NS and the other Class I railroads won't act similarly at other locations. With NS and the other Class I railroads as desperate as they are to improve their earnings, they will seize the opportunities no longer to enter into line haul rate contracts or switching, handling or other carrier agreements through which they commonly have absorbed all or part of the connecting short line railroads' switching charges at the industrial parks or other sites which they serve. If NS at its discretion can invoke Rule 11 and require SMS separately to collect its charges for the services it performs for the industries situated within the Complex, NS and the other Class I railroads will be likely to treat other terminal short line railroads the same way. The marketing opportunities of the short line railroads will be impaired, and the rail transportation costs borne by the shippers will be increased.

I, therefore, respectfully ask that the Board enter a declaratory order finding that NS has failed to treat SMS as a rail carrier when handling shipments to and from industries located within the Complex at Paulsboro and that NS is under an obligation, in the absence of an agreement providing otherwise, to enter into through routes with SMS, to arrange for the interchange of

shipments with it, to allow for the uninterrupted movement of freight cars interlined with it and to follow reasonable practices when dealing with it.

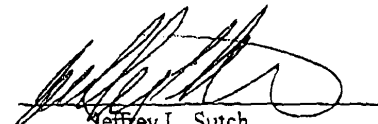
Dated at Bridgeport, New Jersey, this 15 day of June 2004.


Jeffrey L. Sutch

VERIFICATION

I, Jeffrey L. Sutch, President of SMS Rail Service, Inc., declare under penalty of perjury, under the laws of the United States of America, that I have read the foregoing Verified Statement and that its assertions are true and correct to the best of my knowledge, information and belief. I further declare that I am qualified and authorized to submit this verification on behalf of SMS Rail Service, Inc. I know that willful misstatements or omissions of material facts constitute Federal criminal violations punishable under 18 U.S.C. 1001 by imprisonment up to five years and fines up to \$10,000 for each offense. Additionally, these misstatements are punishable as perjury under 18 U.S.C. 1621, which provides for fines up to \$2,000 or imprisonment up to five years for each offense.

Dated at Bridgeport, New Jersey, this 15 day of June 2004.


Jeffrey L. Sutch

Post-it® Fax Note	7671	Date	6-15-04	# of pages	2
To	Fritz Kohn	From	Jeff Sutch		
Co./Dept.		Co.	SMS		
Phone #		Phone #			
Fax #	202-331-8330	Fax #			

EXHIBIT 1

 **COPY**

TRANSPORTATION CONTRACT

CONTRACT NUMBER ICC CR-C-21547

THIS TRANSPORTATION CONTRACT IS HEREBY ENTERED INTO BETWEEN CONSOLIDATED RAIL CORPORATION, PHILADELPHIA, PA., (Conrail), and MOBIL OIL CORPORATION, FAIRFAX, VA (Customer).

1. The initial term of this Contract shall be for a period of 1 year(s). If this Contract is to be filed with the Interstate Commerce Commission (ICC) or other regulatory body, it shall be effective with the date of such filing, subject to 49 C.F.R. 1313.2 and 1313.3. Performance under this Contract shall be governed by the Laws of Pennsylvania, except as otherwise provided herein.

2. The parties acknowledge and agree that the contract terms and conditions set forth in this contract were mutually agreed upon as of August 1, 1997 and that the parties intended to be bound by the contract as of this date.

3. Customer shall pay Conrail a monthly fee for all switching which Conrail performs at the Customer's facility located in Paulsboro/Gibbstown, NJ. Monthly switching charges for the contract term will be \$15,600. Payment of all charges shall be made within fifteen (15) days of presentation by Conrail of the monthly bill for charges under this Contract. Conrail's acceptance of a partial payment containing a restricted endorsement does not limit the obligation of Customer for payment to Conrail of the full amount of charges due under this Contract and/or otherwise applicable tariff charges for traffic covered hereby.

4. The amount named in Section 3 of this Contract was based on Conrail and Customer agreement of the actual switching services performed at the Customer's facility. At the conclusion of each quarter, Conrail and Customer shall review the amount of switching performed at the Customer's plant based on Conrail internal records and Customer information. Should the review indicate that the actual switching figures deviate from those stated herein on a quarterly basis in excess of five (5) percent, then both parties agree to negotiate in good faith and adjust the monthly charge.

5. In the event that any party(ies) is/are unable to perform as stated in this Contract due to or as a result of one or more of the following causes: Act of God, including, but not limited to, floods,

000825

 **COPY**

storms, earthquakes, hurricanes, tornadoes, or other severe weather or climatic conditions; Act of public enemy, war, blockade, insurrection, riot, vandalism, or sabotage; fire, accident, wreck, derailment, washout, or explosion; strike, lockout, or labor dispute; embargoes or AAR service orders; or governmental laws, orders, or regulations, this Contract shall be suspended with regard to the switching.

6. No party(ies) may assign this Contract, in whole or in part, without the prior written consent of the other party(ies).

7. Notices, statements, etc., which are required or permitted to be given under this Contract shall be sent to the parties identified below:

If to CONRAIL:

MANAGER-TRANSPORTATION CONTRACTS
CONSOLIDATED RAIL CORPORATION
RM.23A, 2001 MARKET STREET
PHILADELPHIA, PA 19101-1423

IF TO CUSTOMER:

MOBIL OIL CORPORATION
LOGISTICS SUPPORT
3225 GALLOWS ROAD
FAIRFAX, VA 22037

8. The parties agree that no change or modification to this Contract shall be of any force or effect unless it is incorporated in a written amendment executed by both parties.

9. When this Contract covers shipments of regulated commodities, this Contract is entered into pursuant to 49 U.S.C. 10713.

The parties, intending to be legally bound, have caused this Contract to be executed by their duly authorized representatives on the dates indicated below.

MOBIL OIL CORPORATION

BY: _____

TITLE: _____

DATE: _____

CONSOLIDATED RAIL CORPORATION

000826

CONRAIL CONTRACT # ICC CR-C-21547

PAGE 2

EXHIBIT 3

Jeff Sutch

From: "Francis Hennessy" <Francis.Hennessy@nscorp.com>
To: <jeffs@sms-pennjerseyrail.com>
Cc: "Mason, Sam" </o=nscorp/ou=roanoke/cn=Recipients/cn=SamM@nscorp.com>
Sent: Tuesday, October 17, 2000 4:06 PM
Subject: Paulsboro switching

Jeff Sutch
President
SMS /Penn Jersey Rail

Dear Jeff,

This is in reference to your request to enter a switching agreement with the Norfolk Southern or Conrail Shared Asset RR at Paulsboro, NJ.

We have reviewed your request and the Norfolk Southern can not absorb any portion of the \$ 225.00 you propose to charge.

We have determined that there will be no savings to NS or the CSAO if SMS Rail does the switching for the Valero plant. Any charge that SMS assesses should be billed directly to Valero, OXbow, Air Products or Exxon/ Mobil.

Sincerely

Francis X. Hennessy
Account Manager - Norfolk Southern
10/17/2000

000670

10/17/00

EXHIBIT 4



Norfolk Southern Corporation
Three Commercial Place
Norfolk, Virginia 23510-2191

T. L. Ingram
Vice President
Transportation Operations
Telephone: 757 629-2606
FAX: 757 629-2344

November 21, 2000

Mr. Jeffrey L. Sutch
President
SMS Rail Lines, Inc.
Post Office Box 711
Bridgeport, NJ 08014

Dear Mr. Sutch:

We recently received from the STB copies of your letter, the letter from Fritz Kahn, and the email from Marion Lewis. Norfolk Southern Railway Company, and we understand Consolidated Rail Corporation as well, stand ready to provide Valero Refining Company-New Jersey and SMS Rail Lines, Inc. with reasonable interchange services.

Norfolk Southern Railway Company has no objection to interchanging traffic with SMS on its facilities. However, we are not agreeable to interchanging traffic within Conrail's Paulsboro Yard. Although there are operational concerns with proposals for SMS to move and interchange traffic on Conrail's SAA lines, we also note that SMS has not offered to compensate Conrail for the use of the SAA property.

SMS has also requested that NS, CSX and Conrail absorb its switching charge. We are not required to absorb SMS's switching charge and chose not to do so.

It is our understanding that Consolidated Rail Corporation will send to SMS a proposed interchange agreement. Until an agreement is signed, we are prepared to provide interchange services to SMS, on its lines, based on those draft terms and conditions beginning on Tuesday, November 28, 2000, when we understand SMS will commence its services for Valero.

If you have any questions or need further information, please let me know.

Sincerely,

T. L. Ingram

cc: Mr. Melvin F. Clemens, Jr.
Mr. George A. Aspatore

EXHIBIT 5

Phone (856) 467-4800
Fax (856) 467-2121



Post Office Box 711
Bridgeport, NJ 08014

www.sms-pennjerseyrail.com

October 17, 2001

David R. Goode
Chairman, President and CEO
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-2191

Dear David:

I placed another call to your office today as a follow-up to our conversation last month with regard to Norfolk Southern's decision not to recognize our STB authority to operate as a Common Carrier in Paulsboro, NJ. (STB Finance Docket # 33927).

As you know, last year we were selected as the rail service provider at the Valero Energy plant in Paulsboro, NJ as a direct result of years of inadequate service and unsafe operation within the facility by Conrail/Shared Assets. While the STB approved our operating authority, the NS opted not to recognize our interchange and have since operated in direct contradiction to that ruling. Furthermore, the NS has refused to abide by AAR Accounting rules applicable to our services, but has insisted upon the enforcement of AAR Car Hire rules for those same services and chooses to deduct that amount from payments due to our Bridgeport, NJ operating division.

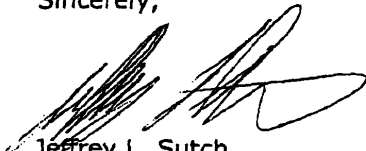
These actions have been carried out for nearly one year despite all our attempts to resolve this situation amicably. They have created an adversarial relationship between our two Companies and have left a very important joint Customer with a very bad taste in their mouth. Considering that NS handles the majority of the line haul moves originating at Valero in Paulsboro, NJ, it was our assumption that you would be as eager to resolve this situation as SMS. To the contrary however, the Customer's perception of this situation is one of utter dismay and that the handling of this situation is a definitive example of the level of responsiveness they have experienced for many years and that led them to change Carriers in the first place.

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Now, due to the tragic events of September 11 and the resulting edicts for increased security, a new light has been shed on the impact of these actions that significantly elevates the urgency of this matter above the current level of bruised egos and a fractured relationship. Over the past few days, seventeen (17) cars destined for Paulsboro, NJ were misrouted to our division in Bridgeport, NJ. These are obviously hazardous material cars traveling without their necessary paperwork at a time when our industry is operating under a level of heightened security and when we have all been advised to tighten the controls on movements of hazardous material.

While we have been patient and have exhausted every avenue to resolve this situation amongst ourselves, it is regrettable that we are now forced to take appropriate steps to ensure that this situation is resolved immediately and finally. Our offer to visit your office still stands as we are willing to meet face-to-face to resolve this situation, but we must interpret your continued failure to respond to our requests as your unwillingness to do so.

Sincerely,



Jeffrey L. Sutch
President

cc: Fritz R. Kahn, Esquire
Linda J. Morgan, US DOT/STB

*Called 10/19/01
Mc Clellan and Kramer called.
AAR car hire
Rule 11
Handling cars for \$225 per car*

000657

EXHIBIT 6



Norfolk Southern Corporation
Strategic Planning
Three Commercial Place
Norfolk, Virginia 23510-2191
757 629-2887

James W. McClellan
Senior Vice President
Planning
(757) 629-2665
(757) 533-4884 FAX

November 7, 2001

Jeffrey L. Sutch
President
SMS Rail Service, Inc.
P. O. Box 711
Bridgeport, NJ 08014

Post-It® Fax Note	7671	Date	11-13-01	# of pages	2
To	Jeffrey Sutch	From	James W. McClellan		
Co./Dept.		Co.	SMS		
Phone #		Phone #			
Fax #	202-331-8330	Fax #			

Dear Jeff:

David Goode asked me to look into the issues raised by your letter of October 17, 2001 as well as our subsequent telephone conversation. After a bit of investigation and prodding, I think that many of the issues should now be resolved.

John Kraemer of our Shortline Group assures me that he is on top of both the car hire issue and misrouting issue. These are issues that need to be – and will be – addressed, and John will be in touch with you to do so. Specifically with regard to the car hire issue, I ask that you cease sending to NS payments for car hire at Paulsboro. Please send to John an accounting of the car hire payments you have already sent, unsolicited, to us.

I understand that the interchange by all accounts appears to be working satisfactorily. I further understand that on November 21, 2000, Conrail sent to you a standard interchange agreement to govern the delivery of Valero traffic to Track 234 in Valero's Paulsboro Yard. Though you have not signed this agreement, its terms have governed operations at Valero's Paulsboro facility over the past year. We ask that you execute this agreement and return it to Jon Broder at Conrail. However, if you believe that changes need to be made to this agreement, please contact Mr. Broder.

We believe that with the resolution of the car hire and misrouting issues, and assuming that there are no significant issues regarding the interchange agreement, we should be well on our way to addressing all of the concerns that you have identified.

This summer NS and Valero entered into several single-line service transportation contracts. Although these are confidential contracts, I can state that they did not provide a role for SMS as part of the line-haul. Further, these contracts provided that NS would not be paying SMS for the in-plant switching services that Conrail used to provide to Valero. (Those in-plant switching services were provided to Valero under a single priced in-plant switching contract that was independent of any line-haul transportation contract.) Given this, it seems as if there is no need at this time to press the issue as to whether the

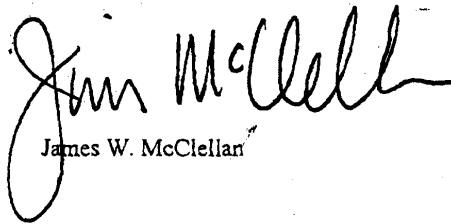
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Jeffrey L. Sutch
November 7, 2001
Page 2

lease of the in-plant tracks at Valera's facility and SMS's submission of the notice of exemption – and the Board's publishing of the notice of exemption in reliance on the SMS submission – creates a bona fide rail common carrier.

I hope that this addresses the issues you raised.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim McClellan". The signature is fluid and cursive, with a large initial "J" and "M".

James W. McClellan

cc: David Goode
Don Seale
Joe Osborne
Jon Broder (Conrail)

000655

EXHIBIT 7

Phone (856) 467-4800

Fax (856) 467-2121



Post Office Box 711
Bridgeport, NJ 08014

www.sms-pennjerseyrail.com

November 30, 2001

James W. McClellan
Senior Vice President, Planning
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-2191

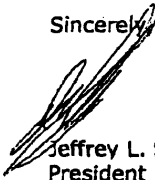
Dear Jim:

We are in receipt of your letter dated November 7, 2001 but regrettably do not share your optimism that we are anywhere near resolving the issue between our Companies.

To date, we have not been contacted by Mr. Kraemer with regard to either the car hire or the misrouting issues. While there has been no recurrence of the misrouting since our last correspondence, we fail to see how either situation can be resolved without NS' acknowledging that Paulsboro is a station for SMS where a viable interchange should be effected. Furthermore, the "standard" interchange agreement you mentioned was not executed for reasons already known to Mr. Broder, namely that it covers only the Valero-owned track number 234, which is insufficient to handle the traffic, and our concerns have not changed over the past year. Finally, we do not question the manner in which your line-haul contracts with Valero are structured, but we are concerned that SMS is denied the opportunity to participate in the initial and/or final portions of the handling of the shipments covered by those rates as requested by Valero and SMS. Consequently, and contrary to your final statement, we strongly believe that the aforementioned issues are merely symptoms of NS' refusal to recognize SMS as a duly franchised railroad, which in our view is the single overriding issue that exists between our Companies, which must be addressed.

We reiterate our request for a face-to-face meeting at the time and location of your choosing to resolve this issue once and for all in an informal and amicable manner - no Counsel, no STB. Alternatively, we would need to turn the issue over to our Counsel and seek assistance from the STB directly. We hope that reasonability will prevail and that we can put this matter behind us by year-end.

Sincerely,



Jeffrey L. Sutch
President

cc: Melvin F. Clemens, Jr., STB
Fritz R. Kahn, Esquire

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EXHIBIT 8

HANDLING LINE AGREEMENT

THIS AGREEMENT is made and entered into this 9th day of July, 1999 by and between NORFOLK SOUTHERN RAILWAY COMPANY, a Virginia corporation on its own behalf and on behalf of its subsidiary railroad companies (all collectively and singularly called "Railroad"), and SMS RAIL SERVICE (hereinafter "Shorline").

WITNESSETH

WHEREAS, Railroad, through contracts, exempt quotations and common carrier offerings, undertakes to provide through rail transportation to shippers and receivers of rail freight with facilities physically located on or adjacent to Shorline's railroad line; and

WHEREAS, Shorline, in order to facilitate the efficient pricing of such through rail transportation service is willing to allow Railroad to establish its stations on Shorline's railroad line so that Railroad will be able to provide direct rail rates to and from said stations; and

WHEREAS, Shorline, to further facilitate Railroad's direct pricing of Railroad transportation service to and from said stations, is willing to perform certain portions of the through transportation services on behalf of Railroad;

NOW, THEREFORE, in consideration of the premises, the mutual covenants, and the other good and valuable considerations set forth herein, Railroad and Shorline agree as follows:

I. APPLICATION AND EFFECT OF AGREEMENTS.

A. Interchange Agreement. An Interchange Agreement, between the parties shall govern the parties' obligations with regard to the interchange of cars and the maintenance, repair, and operation of tracks and equipment related to that interchange. The Interchange Agreement shall also govern all liabilities of Railroad and Shorline, both on the interchange tracks and beyond the interchange tracks. The parties intend for the Interchange Agreement to govern all claims for personal injury, death, property damage, environmental damage, labor grievances, losses arising from or growing out of loss, damage or delay to lading, and other matters as set forth in the Interchange Agreement.

B. Handling Line Agreement. This Agreement shall govern all arrangements between Shorline and Railroad with respect to Railroad's offerings of linehaul rail transportation originating or terminating on Shorline and moving over the lines of both Shorline and Railroad. Demurrage and associated rules are expressly agreed by the parties to be part of the linehaul transportation offering by Railroad.

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II. RELATIONSHIP OF PARTIES.

A. Independent Contractors. To the extent that Railroad or Shortline may engage in any activity required or permitted under the Interchange Agreement or this Agreement, each of them is and shall remain an independent contractor. Shortline and Railroad each shall be solely responsible for the employing or supervising of each person engaged in all of its activities with regard to any such activity and the other shall not participate in such employing or supervising; all such persons shall be the sole agents, servants and employees of the company employing him or her. Shortline and Railroad each will pay all expenses and charges for personnel, materials and supplies involved or incurred in any way in the performance of such activities, including, without limitation, compensation of personnel, fringe benefits, Social Security, Workmen's Compensation unemployment insurance (as may be required by State or Federal law) and the cost of fuel, lubrication, supplies, depreciation, parts and maintenance for the equipment used in performing that party's own obligations with regard to such activities.

B. Appointment and Authority to Act.

1. Subject to the conditions stated in subsection III.B. below, Shortline hereby appoints and authorizes Railroad to act on behalf of Shortline and in its place and stead for the limited purposes of establishing and disseminating common carrier rates, exempt rate quotes, and circulars and entering into transportation contracts for movements of freight to and from all points on Shortline's line of railroad;

Filing and amending applicable rate and route documents to show the stations on Shortline as stations on Railroad for rate making and rate application purposes only and for no other purpose; processing all claims concerning the calculation, collection or apportionment of revenues from traffic movements subject to this Agreement.

2. Railroad hereby authorizes Shortline to act in Railroad's place and stead as follows:

Shortline shall perform all the necessary operations to complete the transportation to and from Railroad's stations on Shortline's line of railroad pursuant to Railroad's undertakings with users of rail service under common carrier offerings, exempt quotes or private contracts ("Offerings");

Maintaining demurrage records and collecting demurrage charges established by Railroad as applicable to detention of rail cars at Railroad's stations on Shortline's line of railroad. Should Shortline for any reason fail to perform this function, Railroad shall have the option to immediately assume the maintenance of demurrage records, and collecting and retaining demurrage charges. Railroad, upon reasonable notice to Shortline, shall have the right to inspect the demurrage records of Shortline.

III. IMPLEMENTATION OF APPOINTMENT AND AUTHORITY ARRANGEMENT.

A. General. Subject to the conditions stated in subsection III.B. below, the form and content of any Offering, whether common carrier rate, exempt rate quote, circular, contract, or other, shall be at the discretion of Railroad. In establishing any such Offering, Shortline's name shall not appear in the rate document or waybill and except as provided in Section IV.D., Shortline shall not participate in the promulgation, publication or execution of the document establishing the pertinent transportation contract. In determining rights and obligations between Shortline and Railroad, Shortline will be deemed a party to, and subject to the terms of, the bill of lading or waybill as if it were an independent interline carrier.

B. Conditions. Railroad shall not commit Shortline to provide any particular local services not necessary for completion of the linehaul transportation (including, without limitation, loading or

000664

unloading, weighing of cars, intraplant switching, storage or warehousing) without prior approval of Shortline.

C. Service Failures. Shortline shall indemnify and hold Railroad harmless from and against, and reimburse it for, any actual loss, liability, cost, or expense incurred by Railroad to a third party (such as a shipper) because of Shortline's failure to perform transportation or related services which are properly included in an Offering by Railroad as authorized under this Agreement.

D. Revenue Collection and Interline Settlements. Railroad shall, on behalf of itself and Shortline, process all Revenue and Accounting Claims (including, without limitation, the collection of freight rates, from users of rail service, any claims for overpayment or underpayment thereof, allocation of those revenues with any other interline carriers, and any reclaims for improper allocation). Shortline shall not participate in the processing of Revenue and Accounting Claims. To the extent applicable, Railroad shall process all Revenue and Accounting Claims with other interline railroads in accordance with the Accounting Rules of the Association of American Railroads, as in effect from time to time.

E. Furnishing Billing Information. For all traffic originating on Shortline, Shortline will furnish electronically (or via another mutually agreed upon method of transmission) to a Railroad officer designated by Railroad, prior to the time the traffic is interchanged to Railroad, complete waybill data to cover the linehaul move, unless Railroad elects to receive such data directly from the shipper.

F. Car Hire. The practice of not designating Shortline in the routing will have no effect upon car hire and car accounting practices between the parties, and will place no obligation on either party to provide additional free time or car hire relief to the other party. The Association of American Railroads' Code of Car Hire Rules, Code of Trailer and Container Reporting Rules, and Tariff RPS 6007 J or any successor rules or tariffs will govern all car hire matters on rolling stock and equipment interchanged and settled pursuant to this Agreement.

G. Weighing. Railroad shall weigh cars originating on Shortline pursuant to this Agreement which require weighing to assess linehaul freight charges. Shortline may, at its election, publish and collect charges for scale fees for weighing cars on its own scales for purposes of other than linehaul freight charge assessment. Only Railroad may establish weight agreements for customers served by Shortline; provided, however, that Shortline may assume the responsibility for weight agreements for any customer(s) located on Shortline, following written notice of same to Railroad's Director Stations and Terminals.

H. Right to Hold Cars and Embargo. Nothing in this Agreement constitutes or will operate as a waiver of Railroad's or Shortline's right to hold cars prior to interchange for payment of all charges due it, or of Railroad's or Shortline's right to invoke or participate in any lawful embargo. If Shortline embargoes any customer or portion of its line subject to this Agreement, then in addition to industry, regulatory, and other required embargo notices and filings, Shortline will notify Railroad by facsimile or other electronic means of said embargo at or prior to issuance. Notice will be furnished to Railroad's Manager Shortline Marketing and Assistant Vice President of Transportation.

IV. HANDLING CHARGES; ASSIGNMENT OF REVENUES.

A. Handling Charges.

1. Amount. For each Movement handled by Shortline in accordance with an Offering by Railroad, Railroad will pay to Shortline the applicable handling charge as set forth in the Profile attached hereto as Appendix A. The Profile will govern charges and related terms and conditions.

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2. Adjustments. The handling charges will be effective on the effective date of this Agreement. If the charges due under any Offering by Railroad increase or decrease at any time this Agreement is in effect, the handling charge for Shortline's handling of the applicable Movement covered by that Offering shall, on the next annual anniversary date of this Agreement after that increase or decrease, be increased or decreased by the same percentage as the increase or decrease in the Offering. Each increase or decrease in handling charges shall be rounded off to the nearest whole dollar.

3. Other Charges. In addition, the charges may be changed, modified, increased or decreased, and other Profile information updated and amended, at any time, by mutual agreement of Shortline and Railroad. Upon request of either party, Shortline and Railroad will confer in good faith, at reasonable times and at a location convenient to the party not requesting the discussion, to discuss any changes to the charges, terms, and conditions reasonably requested by the other party.

B. Statement of Charges Due. Unless otherwise agreed by the parties, on the first and fifteenth day of each month, Shortline will transmit electronically (or via another mutually agreed upon method of transmission) to Railroad's agent responsible for interchange between Railroad and Shortline or to another Railroad officer designated by Railroad, a statement of charges due Shortline by Railroad and any supporting information or documentation required by Railroad to effect correct payment.

C. Reserved Revenues. Shortline may, at its sole discretion, with regard to any service provided by Shortline or cost incurred by it for any local services performed by it that are not necessary for the completion of the linehaul service under Railroad's Offering, such as, but not limited to, loading and unloading, weighing, storage or warehousing:

make any arrangements directly with shippers, consignees or other third parties for any charges for such services, and

bill and collect any such additional charges.

D. Demurrage. Subject to the reservations contained in Section II.B.2 hereof, as compensation for its administration and collection of demurrage under this Agreement, Shortline shall be entitled to retain all revenues from such charges.

V. OTHER CONTRACT PROVISIONS.

A. Assignment and Sole Benefit.

1. Assignment. This Agreement may be assigned by Shortline only with the written consent of Railroad, signed by an authorized officer, which consent will not be withheld arbitrarily or capriciously. As a condition to obtaining Railroad's consent to such an assignment, Shortline will provide written notice to Railroad of its desire to assign this Agreement, together with an agreement, in form and substance acceptable to Railroad, signed by the intended assignee and agreeing that the intended assignee will be bound by all provisions of this Agreement and the Interchange Agreement. Subject to the foregoing, this Agreement will be binding upon and inure to the benefit of successors and assigns of Railroad and successors and permitted assigns of Shortline.

2. Sole Benefit. Subject to the provisions of subsection VA above, this Agreement is intended for the sole benefit of the parties hereto. Nothing in this Agreement is intended or may be construed to give any person, firm, corporation, or other entity, other than the parties hereto and their respective officers, agents, employees, lessors, parent corporation, subsidiaries, affiliates, successors, and assigns, any right pursuant to any provision or term of this Agreement, and all provisions and terms of this

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Agreement are and will be for the sole and exclusive benefit of the parties to this Agreement, except as provided in subsection VA above.

B. Non-Waive. The waiver of any default of any of the terms and conditions hereof shall be limited to the act or acts constituting that default and shall not be construed as a continuing or permanent waiver of any such terms and conditions, all of which shall be and remain in full force and effect as to future acts or happenings notwithstanding that waiver. The parties intend that none of the provisions of this Agreement shall be thought by the other to have been waived by any act or knowledge of the parties, but only by a written instrument signed by the party waiving a right hereunder.

C. Amendment. This Agreement may be modified only by an instrument in writing signed by an authorized officer of Railroad and of Shortline.

D. Notices. All notices required to be given under this Agreement shall be in writing, signed by or on behalf of the party giving the same, and transmitted to the addresses shown on attached Appendix B or such successor address(es) as that party may specify by notice hereunder. Such notices shall be transmitted by United States registered or certified mail return receipt requested, or by telegram or fax, with confirmed receipt, addressed to the officers and addresses shown on Appendix B. All notices shall be effective on day following confirmed receipt of the letter, telegram, or fax.

E. Effective Date and Term. This Agreement will take effect on July 9, 1999 and will continue in effect until such time as Railroad or Shortline terminates this Agreement by serving upon the other sixty (60) days' written notice of its election to do so.

F. Captions. The captions of the sections herein are inserted for convenience only and shall in no way expand, restrict or modify the terms and provisions of any clause hereof.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in duplicate, each part being an original, as of the day and year first above written.

NORFOLK SOUTHERN RAILWAY COMPANY

By: _____
Manager Short Line Marketing

SMS RAIL SERVICE
By:  _____
President