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ORIGINAL



July 30, 2004

VIA HAND DELIVERY - RETURN COPY

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

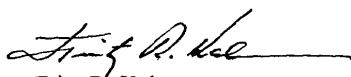
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Dear Secretary Williams:

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 Rebuttal 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.

Sincerely yours,


Fritz R. Kahn

enc.

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

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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

REBUTTAL STATEMENT
OF
SMS RAIL SERVICE, INC.

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Public Record

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Attorney for

SMS RAIL SERVICE, INC..

Dated: July 30, 2004

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

REBUTTAL STATEMENT
OF
SMS RAIL SERVICE, INC.

Petitioner, SMS Rail Service, Inc. ("SMS"), pursuant to the Board's Decision, served May 12, 2004, responds to the reply statement of Norfolk Southern Railway Company ("NS"), filed July 19, 2004, as follows:

I.

INTRODUCTION

Without filing a petition to revoke¹ or otherwise invoking the procedures of the Board, NS unilaterally took it upon itself to declare SMS a private switcher in rendering the intraplant or terminal switching service within the Complex at Paulsboro, notwithstanding that SMS had been authorized to render such service as a common carrier railroad, pursuant to its section-10902

¹ See, 49 U.S.C. 10502(d); 49 C.F.R. 1121.4(f).

exemption notice.² NS now for the first time has come up with the contrived argument that SMS was a contract carrier.³ The definitive contract between SMS and Valero Refining Company-New Jersey ("Valero"), however, was for Valero's ten-year lease of the lines within the Complex to SMS and for SMS to render the intraplant or terminal switching service within the facility. The only rate assessed Valero for the performance of its switching service was the common carrier rate which SMS published in a tariff and subsequently revised pursuant to 49 U.S.C. 10702. NS chose to ignore SMS' service to three industries in addition to Valero, its extension of operations to serve a fourth industry and its holding out to serve any other industry which located within the site. NS, moreover, failed to distinguish the circumstances relating to SMS' operations from those in the many decisions of the Board, cited in SMS' Opening Statement, in which the applicants rendering similar intraplant or terminal switching services uniformly were found by the Board to be common carrier railroads. Finally and deplorably, NS seeks to buttress its position by relying upon the non-binding informal opinion of Director Melvin F. Clemens, Jr., of the Office of Compliance and Enforcement, which he rendered on March 19, 2003, after a number of conversations with senior NS officials. The contents of his letter reflects a misapprehension of the pertinent facts, which, if known to him, well might have led him to conclude that SMS properly invoked the section-10902 class exemption to render the switching services as a common carrier railroad.

² See, STB Finance Docket No. 33927, SMS Rail Service, Inc.—Acquisition and Operation Exemption—Valero Refining Company-New Jersey, served September 22, 2000.

³ NS only received copies of the contracts between SMS and Valero as a result of SMS' and Valero's production of them in discovery herein. NS' failure to produce copies in response to SMS' document production requests confirms that NS had copies of none of them before then.

II.

ARGUMENT

A.

NS does not dispute
SMS' allegations.

NS' reply statement is as revealing for what it does not say as for what it does say. Thus, NS does not dispute, as SMS had alleged in both its Petition for Declaratory Order, filed March 4, 2004, and its Opening Statement, filed June 21, 2004, that, notwithstanding that SMS had been certificated to render the intraplant or terminal switching service at the Paulsboro Complex as a rail carrier pursuant to the section-10902 class exemption of 49 C.F.R. 1150.41, et seq., 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 NS has entered into no through routes or joint rates with SMS.

NS does not dispute, as SMS had asserted, that NS has refused to interchange carloads of freight with SMS consigned to, or originating at the industries within the Complex at Paulsboro.⁴ While NS may drop off cars on SMS' Track 234 inside the facility or pick them up from there, as far as NS is concerned, it thereby was delivering the cars directly to the consignee or receiving the cars directly from the shipper. In the view of NS, SMS was nothing more than a private plant switcher acting on behalf of the industries located within the Complex at Paulsboro in pulling or spotting their cars on SMS' Track 234.

⁴ NS does not dispute that NS has refused to enter into an interchange agreement with SMS.

NS does not dispute, as SMS had maintained, that NS 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 inside the facility, NS has not provided SMS with the waybills relating to the shipments, and, what is more alarming, if the freight shipments are of hazardous materials, NS has not provided 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 attempting to divert attention from its improper performance, NS, at page of 27 of its reply statement, contends that SMS erred in alleging that, as a result of the foregoing misdeeds, "NS has impeded the safe and efficient exchange of rail traffic with SMS at Paulsboro." See, also, page 5 of NS' reply statement. NS' is a strawman argument. SMS at no time leveled such an accusation against NS, for the simple reason that, notwithstanding the obstacles that NS placed in its way, SMS has managed to provide an expeditious and effective intraplant or terminal switching service to the industries within the Paulsboro Complex. Similarly, at page 28 of its statement, NS tries to explain away its wrongdoings by stating, "[T]he shipper, Valero, has voiced no complaint about the quality of the transportation service it has received." To the contrary, Valero is completely satisfied with the intraplant or terminal switching service which SMS has provided these past three and a half years. In its Petition to Intervene and Statement of Position, filed May 25, 2004, Valero declared, "Since SMS began operating at Paulsboro, Valero has been extremely pleased with its service, and wishes such service to continue." SMS would like nothing better than to be able to do so.

B.

NS wrongly contends
that SMS is a contract carrier.

In its reply statement, NS does not dispute that as a rail carrier it is obligated to establish through routes and joint rates with other rail carriers, pursuant to 49 U.S.C. 10703, interchange traffic with connecting rail carriers, pursuant to 49 U.S.C. 10742, and participate with other rail carriers in the uninterrupted carriage of freight, pursuant to 49 U.S.C. 10744. At page 3 of its reply statement, NS concedes that it has not done so; it has refused to treat SMS as a rail carrier at Paulsboro. NS endeavors to excuse its avoidance of the law's requirements by contending that SMS operated within the Complex at Paulsboro as a contract carrier, a falsehood that pervades NS' entire reply statement.

The argument that SMS has been operating within the Paulsboro Complex as a contract carrier is one that was concocted by NS for purposes of this proceeding. At no time before SMS filed its Petition for Declaratory Order did NS refer to SMS as a contract carrier. In his e-mail of December 2, 2000, to Mr. Joseph C. Osborne, Jr, NS' Group Vice President - Chemicals, and others, a copy of which is appended as Attachment A, Mr. John M. Kraemer, NS' Assistant Vice President - Shortline Marketing, referred to SMS as a ("

) In his e-mail to Mr. Donald W. Seale, NS' Senior Vice President - Merchandise Marketing, dated April 27, 2001, appended as Attachment B, Mr. Kraemer identified SMS as one of the "Short Lines/switch carriers that locate themselves in private industrial park and consumer locations." In his e-mail to Mr. Seale, dated October 17, 2000, a copy of which is appended as Attachment C, Mr. Osborne called SMS the

(()) Being a private switching carrier certainly is not synonymous with being a contract carrier and certainly not as NS uses the term. See, State of Tex. v. United States, 730 F.2d 409, 417 (5th Cir. 1984), cited at page 21 of NS' reply statement. That SMS was a contract carrier in the rendition of the switching service within the Paulsboro Complex was an NS fabrication as it is false.

The defining contract between SMS and Valero is the Rail Line Service Agreement, dated August 31, 2000, pursuant to which Valero agreed to lease to SMS for a period of ten years the approximately 5.8 miles of railroad lines within the Complex at Paulsboro and SMS agreed to perform the intraplant or terminal switching service within the facility. A copy of the lease was attached as Exhibit 2 to the Verified Statement of SMS' President, Mr. Jeffrey L. Sutch, filed with SMS' Opening Statement on June 21, 2004, and the copy produced by SMS to NS in this proceeding is appended as Exhibit 10 to NS' reply statement. As SMS noted at page 15 of its Opening Statement, 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. In none of the foregoing proceedings was the lessee deemed to be a contract carrier by virtue of the leases.

NS knew full well that Valero had leased its lines to SMS. In an e-mail from Mr. James B. Liddell, NS' Account Manager for Valero, addressed to Mr. Joseph C. Osborne, Jr., NS' Group Vice President - Chemicals, dated March 31, 2000, a copy of which is appended as Attachment D Mr. Liddell said, {{

}}

Among other things, the lease obliged SMS to maintain and repair the railroad lines within the Complex at Paulsboro. SMS was required to keep the rights-of-way of the lines clear of weeds, snow or ice and other potential obstructions, and SMS was to pay any taxes assessed against the rails and ties of the lines, as well as against SMS' locomotives and other equipment used by it in rendering its service within the Complex. The crews were those of SMS, and, as employees of a rail carrier under the Board's jurisdiction, were subject to the Railroad Retirement, Federal Employers Liability and Railway Labor Acts.

Unlike a typical contract between a rail carrier and a shipper, entered into pursuant to 49 U.S.C. 10709, however, the lease between Valero and SMS did not specify the rate that SMS would assess Valero for rendering the intraplant or terminal switching service within the Complex at Paulsboro. SMS established its rate as a common carrier railroad, pursuant to 49 U.S.C. 10702. Intraplant or terminal switching is a common carrier railroad service for which, before they were relieved of the tariff publishing requirement by the ICC Termination Act of 1995,⁵ rail carriers needed to publish the applicable rates in their tariffs. See, Increased Switching Charges, 315 I.C.C. 199 (1961), mod., 318 I.C.C. 485 (1962).

At page 30 of its reply statement, NS, however, contends that SMS could not possibly

⁵ Pub. L. No. 104-88, 109 Stat. 803, December 29, 1995.

have been a common carrier railroad in rendering the intraplant or terminal switching service within the Complex at Paulsboro because:

SMS ignores the most significant implications of its claim to common carrier status at Paulsboro. Those are, first, that as a common carrier, SMS could, in the absence of an applicable rate contract, charge Valero and others at the Valero Refinery rates for its services unilaterally established by SMS and constrained only by the statutory requirement of reasonableness. Second, if SMS were a common carrier at Paulsboro, at the end of the 10-year lease term, Valero could not exercise its contractual right to replace SMS without first obtaining regulatory authority.

NS repeats virtually the same argument at pages 5, 8, 10, and 21-22 of its reply statement.

NS, of course is dead wrong on both counts.

As for the rate which SMS assessed for its switching service, it was not set forth in a section-10709 rate agreement between it and Valero. The switching rate appeared as a common carrier rate in SMS' Freight Tariff SLRS 8500, effective March 1, 2001, a copy of which was faxed by SMS to NS' Mr. John Kraemer on February 20, 2001, and is appended as Attachment E. The rate, originally set at \$225 per car, subsequently was reduced to (()) per car, not pursuant to an agreement with Valero, as NS alleges at page 13 of its reply statement, but on its own by SMS, pursuant to 49 U.S.C. 10702.⁶ Indeed, Valero, at page 4 of its interrogatory response, appended as Exhibit 3 to NS' reply statement, said it paid the (()) per car charge (())⁷ In short, NS has offered no proof that Valero and SMS entered into any section-10709 agreement covering the rates that SMS would assess for rendering the intraplant or terminal switching.

⁶ Valero and SMS may have anticipated that SMS' switching rate would be the subject of an agreement between them. No such agreement, however, has been produced in this proceeding.

⁷ NS claims that SMS and Valero entered into River Rail Storage Project Contract some time in 2004, in which, according to NS, SMS and Valero agreed to increase the per car charge to (()) but NS has produced no such agreement.

As for replacing SMS with another operator at the expiration of SMS' ten-year lease of the lines within the Complex at Paulsboro without the need for securing the Board's abandonment authorization, such action has become the standard industry practice. In STB Finance Docket No. 34472, Columbia Basin Railroad Company-Lease and Operation Exemption-In Clark County, served March 11, 2004, Columbia Basin Railroad Company replaced Lewis & Clark Railway Company as the operator of the lines without Lewis & Clark Railway Company's abandonment having been authorized by the Board. In STB Finance Docket No. 34114, Yolo Shortline Railroad Company-Lease and Operation Exemption-Port of Sacramento, served November 20, 2001, Yolo Short Line Railroad Company replaced Union Pacific Railroad Company as the operator of the lines without Union Pacific Railroad Company's abandonment having been authorized by the Board. In STB Finance Docket No. 33414, Penn-Jersey Rail Lines, Inc.-Acquisition and Operation Exemption-WMI Properties, Inc., served June 24, 1997, Penn-Jersey Rail Lines, Inc., replaced Consolidated Rail Corporation as the operator of the lines without Consolidated Rail Corporation's abandonment having been authorized by the Board. In Finance Docket No. 32104, Burns Harbor Shortline Company-Acquisition and Operation Exemption-Indiana Port Commission, served August 13, 1992, Burns Harbor Shortline Company replaced Consolidated Rail Corporation as the operator of the lines without Consolidated Rail Corporation's abandonment having been authorized by the ICC.⁸

⁸ Of course, to restore a line to private status, its abandonment would be required. See, i.e., STB Docket No. AB-845X, CHS Holdings, Inc.-Abandonment Exemption-In Pembina County, ND, served March 14, 2003; STB Docket No. AB-592 (Sub-No. 1X), Fredonia Valley Railroad, Inc.-Abandonment Exemption-In Caldwell County, KY, served September 24, 2001.

C.

NS invoked no Board procedures
to question SMS' common carrier status.

As already noted, NS knew of SMS' lease of Valero's lines within the Complex at Paulsboro well before SMS filed its section-10902 class exemption notice on September 5, 2000. If, as NS now contends, SMS were a contract carrier in performing the intraplant or terminal switching operations and not a common carrier, SMS utilization of the section-10902 class exemption would have been improper. Nevertheless, NS, although it had ample time to bring the matter to the Board's attention, did nothing about it; it chose to sit on its hands. NS did not file comments, as it recently did, on May 26, 2004, in STB Finance Docket No. 34435, Ameren Energy Generating Company--Construction and Operation Exemption--In Coffeen and Walshville, IL, expressing its "concern over the use and misuse of the Board's notice of exemption procedures to create a new common carrier under questionable circumstances in order to provide a vehicle for non-carriers to take advantage of the Board's jurisdiction." See, also, STB Finance Docket No. 33995, SF&L Railway, Inc.--Acquisition and Operation Exemption--Toledo, Peoria and Western Railway Corporation Between LaHarpe and Peoria, IL, served October 17, 2002. After SMS' notice became effective, NS did not file a petition to revoke the section-10902 class exemption, as it recently did, on July 7, 2004, in STB Finance Docket No. 34514, Raritan Central Railway, L. L. C.--Operation Exemption--Heller Industrial Parks, Inc.

The reasons for NS' inaction are obvious. NS simply would have been unable to meet the burden of proof that would be its if it sought to revoke SMS' section-10902 class exemption. As the Board declared in STB Docket No. AB-493 (Sub-No. 7X), Track Tech, Inc.--Acquisition and

Operation–The Burlington Northern and Santa Fe Railway Company, served November 1, 1999:

When, as here, an exemption has become effective, a revocation request is treated as a petition to reopen and, under 49 CFR 1115.3(b), the petitioner must specify whether revocation is supported by material error, new evidence, or substantially changed circumstances. The petitioner has the burden of proof and must articulate reasonable, specific concerns to satisfy the revocation criteria [citations omitted].

Accord, STB Finance Docket No. 34177, Iowa, Chicago & Eastern Railroad

Corporation–Acquisition and Operation Exemption–Lines of I&M Rail Link, LLC, served

January 21, 2003; STB Finance Docket No. 34145, Bulkmatic Railroad Corporation–Acquisition

and Operation Exemption–Bulkmatic Transport Company, served November 19, 2002; STB

Finance Docket No. 33960, Central Illinois Railroad Company–Lease and Operation

Exemption–Lines of The Burlington Northern and Santa Fe Railway Company at Chicago, Cook

County, IL, served September 12, 2002.

NS in its reply statement has offered neither probative facts nor credible arguments establishing that SMS was not a common carrier railroad in rendering the intraplant or terminal switching service within the Complex at Paulsboro.

The essence of whether SMS was a common carrier railroad is whether it held itself out to serve the public. As the Board said in STB Finance Docket No. 34094, Santa Clara Valley Transportation Authority–Acquisition–Union Pacific Railroad Company, served November 16, 2001, "[T]he fundamental test for determining whether a party is a common carrier is whether there has been a holding out to the public as a common carrier . . . ' See Status of Bush Universal Inc., 342 I.C.C. 550, 564 (1973)." Accord, STB Finance Docket No. 34076, Los Angeles to Pasadena Blue Line Construction Authority d/b/a Los Angeles to Pasadena Metro Construction Authority–Acquisition Exemption–Los Angeles County Metropolitan Transportation Authority,

served September 3, 2003; Manufacturers Ry. Co. v. St. L., Iron Mtn. & Southern Ry. Co., 21 I.C.C. 304, 312 (1911).

At pages 23-24 of its reply statement, NS only casually mentions that, in addition to Valero, there were three other shippers within the Complex at Paulsboro for which SMS rendered the intraplant or terminal switching service: Air Products and Chemicals,⁹ Exxon Mobil Corporation and Oxbow Carbon & Minerals, Inc. Their presence was known to NS even before SMS began its operations at the site. In her e-mail message of September 25, 2000, a copy of which is appended as Attachment F, NS' Francis Hennessy advised NS' Sam Mason, ((

)) Appended as Attachment G are copies of representative SMS Daily Interchange Report(s) of Cars Received confirming that SMS actually has served those industries. In his Verified Statement, Mr. Sutch said that he chose to operate within the Paulsboro Complex as a common carrier railroad, because he wanted to be able to serve those industries, as well as any others which subsequently were to be located in the Complex at Paulsboro. He noted that, 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.

At pages 14 and 23-24 of its reply statement, NS seeks to make much of the fact that Valero pays for SMS' intraplant or terminal switching service performed for the other industries located within the Complex at Paulsboro. Whether that is because of the terms of the sales of

⁹ At page 7 of its reply statement, NS infers that Air Products and Chemicals may be outside the Complex by noting that it is on the far side of Billingsport Road. So is SMS' Track 234, the interchange track, which, at page 13 of its reply statement, NS acknowledges is "inside the Valero Refinery."

Valero's products to its customers,¹⁰ provisions in its leases with its tenants or some other arrangement of which SMS has no knowledge really is irrelevant. SMS could serve a single shipper, and, so long as it held itself out to serve the public, it nevertheless would be a common carrier railroad. That was settled more than sixty years ago by the Supreme Court in its opinion in Union Lime Co. v. Chicago & N. W. Ry. Co., 233 U.S. 211, 221-22 (1914), in which the Supreme Court said:

A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the products of a particular plant; its cost may be defrayed by those in special need of its services at the time. But none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service and are subject to the regulation of public authority.

Indeed, the Board in countless proceedings has authorized applicants to operate as common carrier railroads notwithstanding that they served but a single industry. See, i.e., 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. 34207, CHS Holdings, Inc.–Acquisition and Operation Exemption–J.K. Line, Inc., served June 20, 2002; STB Finance Docket No. 34155, Upper Merion and Plymouth Railroad Company, LLC–Acquisition and Operation Exemption–Upper Merion and Plymouth Railroad Company, served January 10, 2002; STB Finance Docket No. 34002, Alamo North Texas Railroad Corporation–Construction and Operation Exemption–Wise County, TX, served November 16, 2001; STB Finance Docket No. 33695, Fredonia Valley Railroad, Inc.–Acquisition and Operation Exemption–In Caldwell County, KY, served January 6, 1999; Finance Docket No.

¹⁰ Oxbow Chemical, for example, purchased petroleum coke from Valero.

32855, Alamo Gulf Coast Railroad Company–Lease and Operation Exemption–Certain Lines of Southern Pacific Transportation Company, served January 26, 1996.. In none of the foregoing proceedings was the applicant deemed to be a contract carrier because it served and, hence, was paid by only a single industry.

D.

NS ignored the Board's
many precedents supporting
SMS' common carrier status.

Astonishingly, at pages 3-4 and 19 of its reply statement, NS claims that in its Opening Statement SMS cited to no precedents supporting its position that it was a common carrier railroad in rendering the intraplant or terminal switching service within the Complex at Paulsboro. To the contrary, at pages 16-17 of its Opening Statement, SMS cited to 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. 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 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. In each of these, the applicant proposed to perform a intraplant or terminal switching service in an industrial park or plant site exactly as SMS is rendering within the Complex at Paulsboro, and in each of these proceedings the Board authorized the applicant to perform the service as a common carrier railroad. NS ignored those precedents and certainly failed to make the effort to distinguish the facts adduced in those proceedings from those which obtain in the instant situation.

In STB Finance Docket No. 34114, Yolo Shortline Railroad Company-Lease and Operation Exemption-Port of Sacramento, served January 31, 2003, the Board denied the Union Pacific Railroad Company's petitions to reject or revoke the applicant's section-10902 class exemption notice filing. There the owner of the track, the Port of Sacramento, dissatisfied with the service of the Union Pacific, which had operated the facility as excepted industrial track, leased its facilities to Yolo Shortline Railroad, which elected to operate them as a common carrier

railroad. The Port's action was very much like that of Valero, which, dissatisfied with the intraplant or terminal switching of Consolidated Rail Corporation rendered under a section-10709 contract, invited SMS to take over the operations, which SMS chose to undertake as a common carrier railroad. The Board concluded:

There is . . . no evidence to support UP's charge that the Port's and Yolo's actions here are improper. The Port, which indicates that it was dissatisfied with UP's service, had the contractual right to grant Yolo exclusive rights to operate on its trackage. UP has asked us to revoke Yolo's exemption to prevent Yolo from unilaterally discontinuing UP's service on the Port trackage. However, Yolo's actions with regard to the UP's excepted operations conducted under the 1951 agreement do not provide a basis for revoking Yolo's exemption. Additionally, UP has failed to show that its removal from the line would harm the public or that Yolo's service in the Port would unreasonably burden shippers.

The Board did not invalidate the applicant's section-10902 class exemption notice or its common carrier railroad status.

In STB Finance Docket No. 34145, Bulkmatic Railroad Corporation--Acquisition and Operation Exemption--Bulkmatic Transport Company, served November 19, 2002, the Board denied the request of the United Transportation Union-Illinois Legislative Board to revoke the section-10901 class exemption notice pursuant to which Bulkmatic Railroad Corporation undertook as a common carrier railroad to render service on the Chicago Heights Track, previously switched by the Union Pacific Railroad Company as exempt industrial track. The Board found:

The evidence falls short of establishing that [Bulkmatic Railroad Corporation] is not holding itself out to operate as a common carrier. Although BRC had a contractual relationship with [Bulkmatic Transport Company, the operator of the Distribution Center] when it began operating on April 2, 2002, that contract does not preclude BRC from providing rail service to other shippers or motor carriers in the Distribution Center.

* * *

Section 10906. Under our well established intended use test, the applicability of section 10906 is determined by the intended (future) use that the sublessee BRC will make of the Chicago Heights Track, not by the use to which the sublessor BTC put the trackage in the past. Applying this test, we find that section 10906 does not prevent our exercise of licensing authority over BRC's operations here [footnotes omitted].

The Board, accordingly, allowed the applicant to retain its section-10901 class exemption and its status as a common carrier railroad. As Bulkmatic Railroad Corporation in that proceeding, SMS has held itself out to operate as a common carrier railroad, and its section-10901 class exemption and status as a common carrier railroad should be reaffirmed.

In 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), the petitioner sought to avoid Board jurisdiction by contending that the tracks within the industrial park on which it would be operating would be used solely for switching purposes and, hence, be exempt under 49 U.S.C. 10906. The Board disagreed. 2 S.T.B. at 609-10, the Board declared:

Under the facts presented here, the character of the track may be switching, but the larger purpose and effect of ERRC's proposal is to construct what will constitute ERRC's entire line of railroad to serve a new rail shipper, Ready-Mix, or additional shippers whose facilities are to be constructed.

* * *

ERRC clearly intends to be a rail carrier and part of the national rail system, rather than merely a switching agent for line-haul carriers. It has negotiated and signed interchange agreements with both carriers, and accordingly it must assume the obligations of a common carrier in serving shippers in the new industrial park.

The Board, accordingly, directed the petitioner to secure the requisite section-10901 authority to become a common carrier railroad. Here, SMS intended to be a rail carrier and be part of the

national rail system. That was why it sought and secured the section-10902 class exemption authority, and it is evident that it acted properly in doing so.

In STB Finance Docket No. 33323, Chicago Rail Link-Lease and Operation Exemption-Union Pacific Railroad Company, served December 31, 1997, aff'd sub nom., United Transp. Union-Illinois v. Surface Transp., 169 F.3d 474 (7th Cir. 1999), the Board denied the union's petition for reconsideration, seeking to overturn the section-10902 class exemption notice which had been filed by the applicant. The union claimed that the applicant would be operating over track formerly operated by the UP as yard track. The Board denied the union's reconsideration request, saying:

We have stated that the jurisdictional status of track must be determined by its intended use, and that CRL's contemplated use of the subject track as "an extended or additional rail line" removes it from the exclusion of section 10906.

* * *

[T]he jurisdictional status of track must be determined by its intended use [with the qualification] that we must look beyond the immediate use of the track segment in question and examine the "purpose and effect" of the transaction. . . CRL intends to extend its operations to reach new customers and, thus, the transaction contemplates "an extended or additional line" within the meaning of section 10902.

The Board, therefore, did not revoke the applicant's section-10902 class exemption notice or its status as a common carrier railroad. So, too, SMS intended to hold itself out to serve additional industries and in fact did extend its operations to reach a new customer, and, thus, it correctly invoked the section-10902 class exemption to become a rail carrier in operating within the Paulsboro Complex.

In its reply statement, NS discussed none of the foregoing Board decisions. The decisions fully support SMS' claim to being a common carrier railroad in rendering the intraplant or terminal

switching service within the Complex at Paulsboro, because SMS commenced operations serving three industries within the site, extended its operations to serve yet another industry in 2002 and throughout held itself out to serve any additional industries which would locate within the facility. NS rejected SMS' bid to become a switching railroad or handling railroad for it, as it is at Bridgeport, and, therefore, NS needed to deal with SMS as a common carrier railroad.

E.

NS cites only to
inapposite decisions.

The Board, ICC and court decision upon which NS purports to rely in its reply statement are of no aid to it whatever.

In its Decision in Finance Docket No. 31405, Arkansas Central Railway Co., Inc.—Operation Exemption—Line of Erzog Stone Products, Inc., served April 7, 1995, discussed at pages 4 and 17 of NS' reply statement, the ICC held that its approval for the vacation of the applicant's section-10901 class exemption notice was unnecessary, because the applicant never consummated the operating authority. The ICC said:

ACR has neither hired employees nor acquired equipment to provide common carrier service over the track. Additionally, no new shippers have been attracted to the track, and Herzog Stone [the owner of the track] remains the sole shipper.

In sharp contrast, SMS has been operating within the Paulsboro Complex since November 28, 2000, operating its own locomotives crewed by its own employees. In addition to the owner of the track, Valero, SMS initially served three other industries, expanded its operations to serve a fourth industry beginning in 2002 and at all times has held itself out to serve additional industries which might locate within the facility.

In its Decision in Finance Docket No. 3452, Union Pacific Railroad Company--Operation Exemption--In Yolo County, CA, served December 5, 2002, discussed at pages 4, 17-18 and 21-22 of NS' reply statement, the Board rejected the UP's section-10901 class exemption notice, because "UP has not shown that this trackage is not properly categorized as section 10906 excepted track for purposes of UP's use of the track."

Here, the track within the Complex at Paulsboro before November 28, 2000, had been switched by Consolidated Rail Corporation pursuant to a section-10709 contract, a copy of which was attached as Exhibit 1 to Mr. Sutch's Verified Statement and is appended as Attachment H. Pursuant to the statute, 49 U.S.C. 10709(a), such a contract can only be entered into by a rail carrier, defined at 49 U.S.C. 10102(5) as "a person providing common carrier railroad transportation for compensation." In other words, a section-10709 rate agreement can only be entered into by a common carrier railroad. Significantly, NS was prepared to enter into a [[
]], a copy of which is appended as Attachment I. Accordingly, NS is in no position to contend that the performance of intraplant or terminal switching upon the tracks within the Paulsboro Complex is a service which a common carrier railroad cannot render pursuant to a contract.

In its Decision in STB Finance Docket No. 34277, H&M International Transportation, Inc.--Petition for Declaratory Order, served November 12, 2003, discussed at pages 19-20 and 22 of NS' reply statement, the Board held that the petitioner was not a rail carrier subject to the Board's jurisdiction. The Board noted:

H&M's operations are performed pursuant to agreements with UP that reserve for UP all common carrier rights and obligations and that, in fact, specifically bar H&M from providing common carrier service. Additionally, H&M has never received,

nor sought, a license from the Board for common carrier freight rail operations under 49 U.S.C. 10901 (or an exemption from the licensing requirements pursuant to 49 U.S.C. 10502). Further, there is no evidence that H&M has provided any type of rail service to the public for compensation or otherwise, or held itself out as willing to do so. Indeed, the record shows that any rail-related activity performed by H&M is strictly in-plant, for H&M's convenience and benefit, and in furtherance of its non-rail primary business purpose.

The contrast between H&M in that proceeding and SMS is startling as it is revealing. SMS has had no agreement with NS relating to its operations within the Complex at Paulsboro. It certainly never delegated to NS all common carrier rights and obligations or accepted a restriction upon its own ability to operate as a common carrier railroad. SMS did seek and was granted by the Board the section-10902 class exemption authority to conduct common carrier service within the Complex. It performed its operations for compensation and from the inception of its service at the facility held itself out to serve the public for compensation. All of SMS rail-related activity was tailored to provide a service to Valero and the other industries within the Complex and was conducted in furtherance of SMS' primary business, that of a common carrier railroad.

In its Decision in 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, discussed at page 20 of NS' reply statement, the Board granted the applicant's section-10901 application. Among other things, the Board found:

RTR will be providing railroad transportation as a common carrier. The record indicates that RTR intends to hold itself out to provide service to the general public, rather than to operate as a private carrier or a switching agent for line haul carriers. Using its rail connections with other established railroad common carriers and motor carriers providing local drayage service, RTR's terminal will play a part in the interstate transportation of goods before they reach a place of rest. To do this, RTR will use equipment and facilities that are a part of rail service [footnotes omitted].

Similar findings might be made relating to SMS. SMS has been, and will be, providing railroad transportation as a common carrier. The record indicates that SMS has held, and intends to hold, itself out to provide service to the general public, rather than to operate as a private carrier or a switching agent for NS. To play a part in the interstate transportation of goods before they reach their place of rest, SMS has used, and will use, equipment and facilities that are part of rail service.

By its Decision in STB Finance Docket No. 34013, B. Willis, C.P.A., Inc.—Petition for Declaratory Order, served October 3, 2001, discussed at pages 20-22 of NS' reply statement, the Board held that the proposed construction of a build-out by a utility to be used only by it in reaching the line of a second railroad was not subject to the agency's jurisdiction. The Board noted that the utility "has not been, and has no intention of becoming, a common carrier, and it has not held out to, or granted BNSF rights to, provide service over the line to any other shipper."

In the instant proceeding, however, SMS has every intention of operating as a common carrier railroad and sought and secured from the Board the section-10902 class exemption authority enabling it to do so.

The language, quoted at page 21 of NS' reply brief, taken from State of Tex. v. United States, 730 F.2d 409, 417 (5th Cir.1984), is dictum. The court upheld the ICC refusal to require the disclosure of the contract rates for intrastate shipments of wheat. The case offers no guidance for determining the status of SMS as a common carrier railroad.

Similarly, STB Docket No. 42031, Parrish & Heimbecker, Inc.—Petition for Declaratory Order, served May 26, 2000, cited at page 21 of NS' reply statement, provides no assistance in determining whether SMS is a common carrier railroad. In that proceeding the Board held that the

railroad's attempt to collect a light-density line surcharge on shipments moving pursuant to transportation contracts negotiated by the railroad constituted an unreasonable practice under 49 U.S.C. 10702.

Finally, by its Decision in STB Finance Docket No. AB-124 (Sub-No. 2), Waterloo Railway Co. – Adverse Abandonment – Lines of Bangor and Aroostock R.R. Co. and Van Buren Bridge Co. in Aroostock County, ME, served May 3, 2004, from which NS quoted an excerpt at page 32 of its reply statement, the Board denied the adverse abandonment application, because the railroad resisted its proposed abandonment and the affected shipper desired the competitive services of both the owning railroad and the trackage rights railroad.

In the instant proceeding, however, there has been no loss of competition between NS and CSX Transportation, Inc., as a result of SMS' performance of the intraplant or terminal switching operations within the Complex at Paulsboro. SMS receives cars from and delivers cars to NS as freely as it does CSXT. The whole notion, discussed at pages 5-6 and 30-32 of NS's reply statement, that SMS can exercise the discriminatory pricing of a bottleneck carrier and thereby defeat the purpose of providing two-carrier competition in the Philadelphia/South New Jersey shared assets area is utter nonsense. As a matter of fact, Mr. Joseph C. Osborne, NS' Group Vice President - Chemicals in his e-mail, dated June 1, 2001, to Mr. Donald W. Seale, NS' Senior Vice President - Merchandise Marketing, a copy of which is appended as Attachment J, boasted that NS

((

)) Mr. Seale, in turn, penned a note that same day to Mr. L. I. Prillaman, NS' Vice Chairman & Chief Marketing Officer, ((

))

NS failed totally to support by reference to any Board, ICC or court decision its trumped up proposition that SMS is a contract carrier in performing the intraplant or terminal switching service within the Paulsboro Complex.

F.

NS reprehensibly invokes
Director Clemens' letter
to try to buttress its case.

SMS deems it despicable and deplorable that NS should endeavor to find support for its contention that SMS was a contract carrier in the informal, non-binding opinion letter of Director Melvin F. Clemens, Jr., of the Office of Compliance and Enforcement, dated March 19, 2003, appended as Exhibit 1 to NS' reply statement and discussed at pages 3-4, 15-16, 25 and 27-28 of its reply statement.

SMS has nothing but the greatest respect and highest regard for Director Clemens. He always has held himself available to shippers and carriers alike to try to resolve whatever minor problems may have arisen; he delves into both sides of such disputes as are brought to his attention and renders his informal, non-binding opinions fairly and promptly. Indeed, SMS sought Director Clemens' assistance early on in trying to resolve its disagreement with NS, as NS correctly noted at page 13 of its reply statement.

As for the March 19, 2003, letter, Director Clemens can only have written the letter based upon such information as was available to him at the time. In his e-mail of May 14, 2002, to Mr. Joseph C. Osborne, Jr., NS' Group Vice President - Chemicals, a copy of which is appended as

Attachment K, Mr. James W. McClellan, NS' Senior Vice President - Planning, wrote:

((

))

That would have been the (()) time that Mr. McClellan would have spoke with Director Clemens about SMS. In his earlier e-mail of May 2, 2002, addressed to Mr. Donald W. Seale, NS' Senior Vice President - Merchandise Marketing, a copy of which is appended as Attachment L, Mr.

Osborne said, (())

Mr. Seale also spoke with Director Clemens. On July 14, 2002, Mr. Seale penned a note to Mr.

Osborne, a copy of which is appended as Attachment M, in which he said, ((

)) On November 12, 2002, in response to a

query from Mr. Osborne, Mr. Seale penned a note to Mr. Osborne, a copy of which is appended as

Attachment N, in which he said:

((

))

SMS, of course, was not privy to the conversations between Director Clemens and Messrs. McClellan and Seale. We suspect, however, that neither Mr. McClellan nor Mr. Seale advised Director Clemens that the defining contract between Valero and SMS was the lease of Valero's lines within the Complex at Paulsboro. Indeed, Messrs McClellan and Seale could not have known the contents of the contract between Valero and SMS, since NS did not then possess a copy of it. Nor do we believe that Messrs. McClellan and Seale told Director Clemens that NS, however, did have a copy of the tariff pursuant to which SMS assessed Valero its switching charge as a common

carrier railroad..

Director Clemens in his letter confirmed, as Mr. Seale had stated in his note to Mr. Osborne, that NS had committed itself to include SMS' switching charge in future statements to be submitted to Valero, thereby removing the Rule 11 problem and enabling Valero to issue a single check for both the switching and line-haul services. Director Clemens noted, however, that "Valero declined NS' offer to revise their contract to accommodate [SMS'] switching fee, and instructed you to that effect."

We doubt that Mr. Osborne advised Director Clemens, as he did Mr. Seale by his e-mail of November 13, 2002, a copy of which is appended as Attachment O, that Valero did not want SMS' switching charge added to NS' line haul rate ((

..))

We further suspect Mr. Seale did not tell Director Clemens that Valero's letter to SMS was written (()) as is made abundantly clear by the e-mail from Mr. James B. Liddell, NS' Account Manager for Valero, to Mr. Osborne, dated November 20, 2002, and Mr. Osborne's e-mail to Mr. Seale, dated December 18, 2002, copies of which are appended as Attachment P.

Director Clemens seemed to think that SMS had not executed an interchange agreement with Consolidated Rail Corporation. SMS, however, signed the interchange agreement providing for the interchange of cars on SMS' Track 234, as submitted by Conrail. See, Attachment Q appended hereto. NS knew full well that SMS had done so. In his e-mail, dated October 22, 2001, to Mr. Seale a copy of which is appended as Attachment R, Mr. Osborne said, ((

)) We doubt that Messrs.

McClellan and Seale bothered to bring that to Director Clemens attention when they spoke with him.

Finally, Director Clemens misapprehended that SMS was seeking a division of NS's line-haul rate. The pertinent sentences, which undersigned counsel drafted for inclusion in Mr. Petrone's letter to which Director Clemens responded, read, as follows, "The Supreme Court of the United States in its bellwether decision in The Tap Line Cases, 234 U.S. 1 (1914), settled that a railroad could serve a single shipper and nevertheless be a common carrier entitled to a division of the joint rates with its connecting carriers so long as it held itself out to serve the public. SMS meets that test, as it is ready, willing and able to serve all who seek its services" That is a far cry from claiming that SMS was asking to receive a division of NS' line-haul rate.

SMS in no way faults Director Clemens. It is persuaded that he did the very best he could with the limited information that then was available to him..

III.

CONCLUSION

It is a sad commentary that a major railroad, such as NS, can take it upon itself to disregard a grant of authority conferred by the Board to a short line railroad, such as SMS, to perform a proposed service as a rail carrier and to decide unilaterally that the applicant was a private switcher and deal with it accordingly. NS had every right to have questioned SMS' status in rendering the intraplant or terminal switching service within the Complex at Paulsboro. It might have objected to the section-10902 class exemption notice when filed by SMS, and, after the exemption became effective, NS might have filed a petition to revoke SMS' exemption. NS, however, chose to do nothing for three and a half years except to treat SMS as if it were a pariah short line railroad. NS'

intransigence might have continued indefinitely if SMS had not gone to the trouble and expense of filing its Petition for Declaratory Order and prosecuting its case. There now can be no doubt, as SMS first charged in its Petition for Declaratory Order, that NS failed to establish through routes and joint rates with SMS, as required by 49 U.S.C. 10703, failed to interchange traffic with SMS, as required by 49 U.S.C. 10742, and failed to participate with SMS in the uninterrupted carriage of freight, as required by 49 U.S.C. 10744. NS' avoidance of the law and disregard of the Board's processes should not be tolerated.

WHEREFORE, SMS Rail Service, Inc., asks the Board to enter a declaratory order finding that the Norfolk Southern Railway Company has failed to treat SMS Rail Service, Inc., as a rail carrier in handling shipments to and from industries located in the Complex at Paulsboro and that, in obedience with the requirements of the law, NS should enter into through routes and joint rates with SMS Rail Service, Inc., arrange for the interchange of shipments with it, allow for the uninterrupted movement of freight traffic interlined with it and follow reasonable practices in dealing with it.

Respectfully submitted,

SMS RAIL SERVICE, INC.

By its attorney,



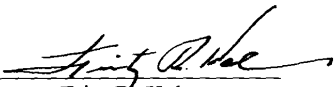
Fritz R. Kahn
Fritz R. Kahn, P.C.
1920 N Street, NW (8th fl.)
Washington, DC 20036-1601
Tel.: (202) 263-4152

Dated: July 30, 2004

CERTIFICATE OF SERVICE

I certify that I this day have served a copy of the foregoing Rebuttal Statement of SMS Rail Service, Inc., upon each of the parties by mailing copies thereof by prepaid first-class mail to counsel for Valero Energy Company-New Jersey and American Short Line and Regional Railroad Association and by arranging for the hand delivery of a copy to counsel for Norfolk Southern Railway Company.

Dated at Washington, DC, this 30th day of July 2004.


Fritz R. Kahn

ATTACHMENT B

From: Kraemer, John
Sent: Friday, April 27, 2001 7:01 PM
To: Seale, Don
Cc: Quesenberry, Brenda; Eisenach, Steve D.; McClellan, Jim W.
Subject: NS Short Line Meeting

Don Seale:

The following are agenda items that will be forthcoming at the Short Line meeting to be held in Norfolk on May 3, 2001. The meeting will begin at 8AM and conclude at 11AM to enable your early departure. We will have box lunches after your departure. I have outlined the issues first by the individual that has presented the item for discussion and then listed the outline that I believe Frank will follow for the meeting.

[Irrelevant material redacted]

3) NS position on interline relations with Short Lines/ switch carriers that locate themselves in private industrial park and customer locations. The example of the SLRS, at Paulsboro, NJ (Jeff Sutch) will be offered as an example
4) The CSAC Short Line position for the NS

[Irrelevant material redacted]

000192

ATTACHMENT E

FT SLRS 8500 (NEW)

SMS RAIL SERVICE, INC.

FREIGHT TARIFF SLRS 8500 (NEW)

CHARGES, RULES AND REGULATIONS
GOVERNING SWITCHING AND
LOCAL/PROPORTIONAL RATES
AT PAULSBORO, NJ
ON THE
SMS RAIL SERVICE, INC.

LOCAL TARIFF

This tariff is also applicable on intrastate traffic, except where expressly provided to the contrary in connection with particular items.

ISSUED: February 6, 2001

EFFECTIVE: March 1, 2001

ISSUED BY

Jellrey L. Sutch, President
P. O. Box 711
Bridgeport, NJ 08014

(The provisions published herein, if effective, will not result in an effect on the quality of the human environment.)

Post-it® Fax Note	7671	Date	2-20-01	# of pages	4
To	John KARIMAKA	From	Nas Prefect Shortline		
Co/Dept.	NS	Co.	SMS		
Phone #		Phone #	856-467-4800		
Fax #	548-985-6392	Fax #			

000135

FREIGHT TARIFF SLRS 8500

SECTION 1 SWITCHING (Rates and Charges in dollars and cents per car, except as noted.)		ITEM 1000 EXPLANATIONS OF ABBREVIATIONS AND REFERENCE MARKS SLRS - SMS Rail Service, Inc. FT - Freight Tariff (A) - Denotes Addition (C) - Denotes no change in rates (D) - Cancellation (I) - Denotes increase (N) - Denotes change in wording which results in neither an increase nor decrease (NC) - Denotes matter brought forward without change. (R) - Denotes reduction	
ITEM 100 INTERCHANGE/RECIPROCAL SWITCHING The SLRS will perform switching between industries located on the SLRS and interchange with connections at Paulsboro, NJ at charges provided below:			
COMMODITIES		CHARGES	
Commodities, All		\$ 225.00	
SECTION 2 LOCAL / PROPORTIONAL RATES AND CHARGES (Rates and Charges in dollars and cents per car, except as noted.)			
ITEM 200 Commodity: Freight, all kinds			
FROM	TO	CHARGE	ROUTE
Paulsboro, NJ	Paulsboro, NJ	\$ 225.00	1
Explanation of Routes: 1. SLRS direct.			

-END-

000137

FREIGHT TARIFF SLRS 2500

TABLE OF CONTENTS		RULES AND OTHER GOVERNING PROVISIONS GENERAL RULES AND REGULATIONS	
SUBJECT	ITEM(S)		
Abbreviations and Reference Marks, Explanation of.....	1000	ITEM 10	
General Rules and Regulations.....		REFERENCE TO TARIFFS, ITEMS, NOTES, RULES, ETC.	
Consecutive Numbers.....	30	Where reference is made in this tariff to tariffs, items, notes, rules, etc., such references are continuous and include supplements to and successive issues of such tariffs and revisions of such items, notes, rules, etc.	
Method of Cancelling Items.....	20	ITEM 20	
Reference in Tariffs, Items, Notes, Rules, Etc.....	10	METHOD OF CANCELLING ITEMS	
Section 1 - Switching.....		As this tariff is supplemented, numbered items with lesser suffixes cancel correspondingly numbered items in the original tariff, or in a prior supplement. Letter suffixes will be used in alphabetical sequence starting with A. Example: Item 100-A cancels Item 100 and Item 300-B cancels Item 300-A in a prior supplement which, in turn, cancelled Item 300.	
Interchange/Reciprocal Switching Charges.....	100	ITEM 30	
Section 2 - Local/Proportional Rates.....	200	CONSECUTIVE NUMBERS	
		Where consecutive numbers are represented in this tariff by the first and last numbers connected by the word "to" or a hyphen, they will be understood to include both of the numbers shown. If the first number only bears a reference mark, such reference mark also applies to the last number shown and to all numbers between the first and last numbers.	

For explanation of abbreviations and reference marks not explained herein, see Item 1000-series, this tariff.

ATTACHMENT G

728 S M S R A I L S E R V I C E 728

DAILY INTERCHANGE REPORT OF CARS RECEIVED

FROM: CSXT CSX TRANSPORTATION
DATE: 01/29/03

AT: 001001 SMS RAIL SERVICE, NJ
SHEET 00 PAGE 1

Car	L/E	Kind	Time	Waybill	Contents	Destination Online	Dest. City	ST
CGTX 013499	E	TN	08:00	815151	EMPTY			
CGTX 013625	E	TN	08:00	800294	EMPTY			
CSXT 801457	E	HO	08:00	681996	EMPTY	OXBCARMIN	PAULSBORO	NJ
CSXT 801587	E	HO	08:00	623715	EMPTY	OXBCARMIN	PAULSBORO	NJ
CSXT 812627	E	HO	08:00	343857	EMPTY	OXBCARMIN	PAULSBORO	NJ
CSXT 812892	E	HO	08:00	343858	EMPTY	OXBCARMIN	PAULSBORO	NJ
GATX 060065	E	TN	08:00	632689	EMPTY	VALREFINE	PAULSBORO	NJ
HLMX 009351	E	HO	08:00	747538	EMPTY	VALERO MARKETING &SU	PAULSBORO	NJ
HMJX 010032	E	HO	08:00	343859	EMPTY	OXBCARMIN	PAULSBORO	NJ
TASX 007118	E	TN	08:00	685257	EMPTY			
TCPX 070094	E	TN	08:00	685258	EMPTY			
TGOX 001801	E	TN	08:00	685256	EMPTY			
WAGX 003071	E	TN	08:00	632690	EMPTY	VALREFINE	PAULSBORO	NJ

000553

LOADS 0 EMPTIES 13

TOTAL CARS INTERCHANGED 13

RECEIVING ROAD
SIGNATURE.

DELIVERING ROAD
SIGNATURE

728 S M S R A I L S E R V I C E 728

DAILY INTERCHANGE REPORT OF CARS RECEIVED

FROM: CSXT CSX TRANSPORTATION
DATE: 06/21/02AT: 001001 SMS RAIL SERVICE, NJ
SHEET 00 PAGE 1

Car	L/E	Kind	Time	Waybill	Contents	Destination	Online	Dest. City	S
CITX 033931	L	TN	08:00	716788	ISOBUTANE	VALERO MARKETING		PAULSBORO	N
GATX 078093	E	TN	08:00	656788	EMPTY	VALERO MARKETING & S		PAULSBORO	N
GATX 078107	E	TN	08:00	656789	EMPTY	VALERO MARKETING & S		PAULSBORO	N
GATX 078110	E	TN	08:00	653895	EMPTY	VALERO MARKETING & S		PAULSBORO	N
HMJX 010033	E	HO	08:00	687395	EMPTY	OXBOW CARBON & MINER		PAULSBORO	N
HMJX 010044	E	HO	08:00	680761	EMPTY	OXBOW CARBON & MINER		PAULSBORO	N
HMJX 010058	E	HO	08:00	687396	EMPTY	OXBOW CARBON & MINER		PAULSBORO	N
HMJX 010063	E	HO	08:00	687397	EMPTY	OXBOW CARBON & MINER		PAULSBORO	NJ
HMJX 010085	E	HO	08:00	687398	EMPTY	OXBOW CARBON & MINER		PAULSBORO	NJ
HMJX 010119	E	HO	08:00	687399	EMPTY	OXBOW CARBON & MINER		PAULSBORO	NJ
HMJX 010229	E	HO	08:00	687400	EMPTY	OXBOW CARBON & MINER		PAULSBORO	NJ
MBLX 034304	E	TN	08:00	653888	EMPTY	VALERO MARKETING & S		PAULSBORO	NJ
MBLX 034320	E	TN	08:00	656988	EMPTY	VALERO MARKETING & S		PAULSBORO	NJ
MBLX 034343	E	TN	08:00	656987	EMPTY	VALERO MARKETING & S		PAULSBORO	NJ
MBLX 034344	E	TN	08:00	653891	EMPTY	VALERO MARKETING & S		PAULSBORO	NJ
MBLX 034392	E	TN	08:00	653890	EMPTY	VALERO MARKETING & S		PAULSBORO	NJ
MBLX 034857	E	TN	08:00	656990	EMPTY	VALERO MARKETING & S		PAULSBORO	NJ
MBLX 034875	E	TN	08:00	653889	EMPTY	VALERO MARKETING & S		PAULSBORO	NJ
SHPX 204795	E	TN	08:00	944532	EMPTY	VALENERGY		PAULSBORO	NJ
SHPX 204823	E	TN	08:00	988917	EMPTY	VALENERGY		PAULSBORO	NJ
SHPX 204856	E	TN	08:00	979797	EMPTY	VALEROENE		PAULSBORO	NJ
TEIX 033511	E	TN	08:00	656986	EMPTY	VALERO MARKETING & S		PAULSBORO	NJ
UTLX 083325	E	TN	08:00	656989	EMPTY	VALERO MARKETING & S		PAULSBORO	NJ

000523

DADS 1 EMPTIES 22

TOTAL CARS INTERCHANGED 23

RECEIVING ROAD

SIGNATURE: _____

DELIVERING ROAD

SIGNATURE: _____

SMS RAIL SERVICE 728

DAILY INTERCHANGE REPORT OF CARS RECEIVED

FROM: CSXT CSX TRANSPORTATION
DATE: 03/14/02

AT: 001001 SMS RAIL SERVICE, NJ
SHEET 00 PAGE 1

Car	L/E	Kind	Time	Waybill	Contents	Destination	Online	Dest. City	ST
CSXT 349984	E	HO	08:00	438154	EMPTY				
CSXT 812236	E	HO	08:00	438155	EMPTY				
CSXT 814717	E	HO	08:00	438153	EMPTY	OXBCARMIN		PAULSBORO	NJ
GATX 090284	E	TN	08:00	689267	EMPTY	EXXOIL		PAULSBORO	NJ

000500

0 EMPTIES 4

TOTAL CARS INTERCHANGED 4

WING ROAD
TURE: _____

DELIVERING ROAD
SIGNATURE: _____

ATTACHMENT H

 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 of this date.

3. Customer shall pay Conrail a monthly fee for all switching which Conrail performs at the Customer's facility located in Elizabeth/Elizabethport, NJ. Monthly switching charges for the contract term shall 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 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 required 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

torms, 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:

to CONRAIL:

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

to CUSTOMER:

BIL OIL CORPORATION
LOGISTICS SUPPORT
125 GALLOWES ROAD
LIRFAX, 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.

BIL OIL CORPORATION

: _____

TITLE: _____

DATE: _____

CONSOLIDATED RAIL CORPORATION

000826

BIL CONTRACT # ICC CR-C-21547

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: _____

TLE: _____

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AIL CONTRACT # ICC CR-C-21547

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ATTACHMENT Q

DRAFT

VIA MAIL AND FAX (215) 209-5346

Mr. Paul J. Deppen, Jr.
Manager, Joint Facility Contracts
Consolidated Rail Corporation
P.O. Box 41416
Philadelphia, PA

Dear Mr. Deppen:

This refers to your facsimile transmitted letter of November 21, 2000, and the attached Interchange Agreement for SMS Rail Service, Inc., to operate on track 234 in Consolidated Rail Corporation's Paulsboro Yard for the purpose of interchanging traffic originating or terminating at the site of the refinery of Valero Refining Company- New Jersey.

In the interest of providing the shippers at the facility with the service they desire, commencing November 28, 2000, I have signed and am returning SMS' acceptance of the Interchange Agreement, with the understanding, however, that, if there is a need for temporarily using additional tracks, within the Paulsboro Yard to effect the interchange and such track is made available by Conrail, the storage charge of Norfolk Southern Railway Company Tariff No. 6004-B, Section 2, page 16 shall apply.

SMS remains of the view that the refusal of Conrail and of Norfolk Southern and CSX Transportation, Inc., which control it, to provide additional interchange tracks violates the letter and the spirit of 19 U.S.C. 10742 and 10744. The traffic to and from the Valero site is handled on the Old Coke Storage tracks and the Paulsboro Yard's run-around track, and SMS knows of no good reason why it cannot have access to these facilities.

Similarly, SMS continues to believe the shippers at the Valero site can be better served if SMS were granted trackage rights to effect an interchange with NS and CSX Transportation within Paulsboro Yard limits. Conrail's refusal to grant SMS such trackage rights does not square with the trackage rights it recently granted the Moorestown and Erie Railroad to and from the Bayway Yard in rendering service to and from the Tasco Refining Company, and SMS is at a loss to understand why it should be singled out for such discriminatory treatment.

Sincerely,

Jeffrey L. Sutch
President
SMS/ Penn- Jersey
Rail Lines

Cc: Hon. Melvin F. Clemens, Jr.
T. L. Ingram, D. N. Nelson, R. A. Batory, J. M. Broder, G. Aspatore, F. R. Kahn, M. Mastro

000746