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BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings

AUG 06 2004

Part of
Public Record

STB Finance Docket No. 34483

SMS RAIL SERVICE, INC. –
PETITION FOR DECLARATORY ORDER



**MOTION OF NORFOLK SOUTHERN RAILWAY COMPANY
FOR LEAVE TO FILE SURREBUTTAL STATEMENT**

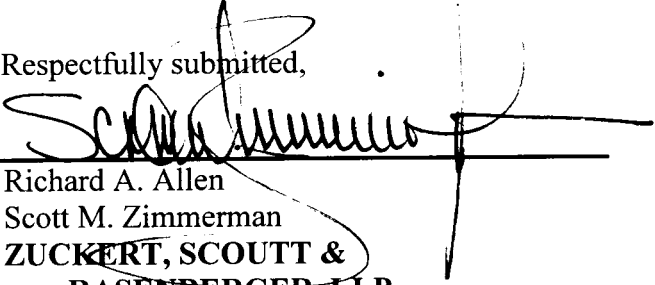
Norfolk Southern Railway Company (“Norfolk Southern”) hereby seeks leave to file the accompanying following limited surrebuttal to the Rebuttal Statement of SMS Rail Service Inc. filed on July 30, 2004 for the purpose of responding solely to certain incorrect factual assertions made by SMS for the first time in that Rebuttal Statement, which assertions are relevant to a central issue in this case. Although the procedural schedule in this proceeding does not provide for a surrebuttal by Norfolk Southern and under 49 C.F.R. § 1104.13(c) a reply to a reply generally is not permitted, Norfolk Southern seeks a limited modification of the schedule and a waiver of the general rule in this instance. *See* 49 C.F.R. § 1110.9. Good cause exists for a waiver because the allegations Norfolk Southern seeks to respond to here are ones raised by SMS for the first time in its rebuttal. *See, e.g., FMC Wyoming Corp. et al. v. Union Pac. RR. Co.*, STB Docket No. 42022, 1999 STB LEXIS 156 at *2 n.4 (decision served March 11, 1999) (accepting surreply addressed to argument raised for the first time in reply); *New York City Economic Development Corporation—Petition For Declaratory Order*, STB Finance Docket No. 34429, slip op. at 2 (served January 8, 2004) (accepting a reply to a reply “[i]n the interests of compiling a complete record” on the matter at hand).

Specifically, Norfolk Southern seeks leave to rebut the claim of SMS that the rates it charges Valero Refining Company for switching services at the Valero Refinery were not established by and pursuant to contracts between SMS and Valero but were pursuant to a specific common carrier tariff issued by SMS. This claim is directly relevant to the central issue in this case—whether SMS has operated as a contract carrier or common carrier at the Valero Refinery—and, as shown in the accompanying surrebuttal, it is refuted by the record evidence, including SMS’ own responses to Norfolk Southern’s discovery requests in this proceeding. SMS’ claim that its switching charge is set by tariff and not by agreement with Valero was not made in SMS’ Opening Statement, which in fact, took the position that the issue before the Board “is *not*, as NS would frame it, whether SMS’ operations with [the Valero Refinery] at Paulsboro are those of a common carrier or of a contract carrier.” SMS Opening Statement at 2 (emphasis supplied). Moreover, Norfolk Southern had no reason to anticipate that SMS might make this claim, inasmuch as SMS, in its answer to a Norfolk Southern interrogatory, stated that it agreed with the statement by its customer, Valero, that the “terms and conditions [of SMS’ service to Valero], including rates, would be governed by contracts.”

In recognition of the general “no reply to a reply” rule and the limited circumstances under which exceptions are permitted, Norfolk Southern does not presume to respond to each and every assertion, factual misstatement or faulty argument in SMS’ Rebuttal Statement. Thus, the absence here of a response to any particular assertion or argument in SMS’ Rebuttal should not be construed as any concession by Norfolk Southern that any unaddressed assertion is true or that any argument is meritorious.

John V. Edwards
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Respectfully submitted,



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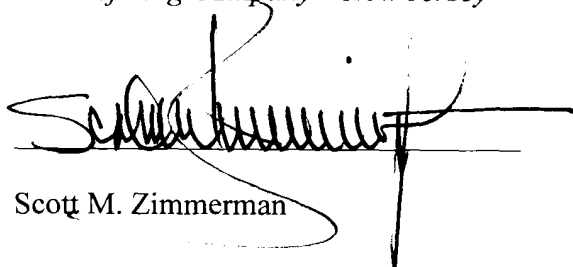
August 6, 2004

CERTIFICATE OF SERVICE

I certify that on August 6, 2004, a true copy of the foregoing "Motion Of Norfolk Southern Railway Company For Leave To File Surrebuttal Statement" was served by hand delivery upon:

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