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PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

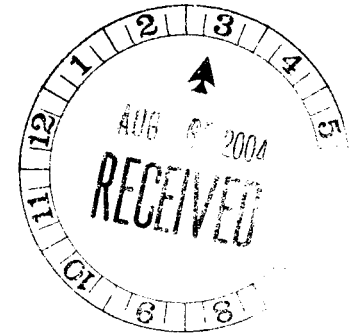
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Part of
Public Record

STB Finance Docket No. 34483

**SMS RAIL SERVICE, INC –
PETITION FOR DECLARATORY ORDER**



**SURREBUTTAL STATEMENT
OF
NORFOLK SOUTHERN RAILWAY COMPANY**

By accompanying motion, Norfolk Southern Railway Company (“Norfolk Southern”) requests leave to file this Surrebuttal Statement for the limited purpose of correcting an incorrect factual allegation in the Rebuttal Statement filed by SMS Rail Service, Inc. (“SMS”) on July 30, 2004, which is directly relevant to the issue in this case, in order to ensure that the Board has a complete and accurate record on which to make its decision.

In its Responsive Statement filed on July 19, 2004, Norfolk Southern set out the reasons it believes SMS has been operating at the Valero Refinery as a contract carrier, not as a common carrier. Among other reasons, Norfolk Southern noted that the terms of SMS’ switching service at the Valero Refinery, including the rates SMS charges for that service, appear to be governed by contracts between SMS and Valero rather than by common carrier tariff rates established unilaterally by SMS. *See* Responsive Statement of Norfolk Southern Railway Company (“NS Response”) at 10-11, 13 and n. 26, 16, 22.

In its Rebuttal Statement, SMS asserts that this is not the case and that SMS' switching rates have been governed by a tariff issued by SMS. SMS asserts, at page 8 of its Rebuttal:

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 is appended as Attachment E [also as Exhibit 21 to Norfolk Southern's Reply Statement]. The rate, originally set at \$225 per car was reduced to [REDACTED] per car, not pursuant to agreement with Valero, as NS alleges at p. 13 of its reply statement, but on its own by SMS pursuant to 49 U.S.C.10702.

In footnotes 6, SMS further asserts: "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." And in footnote 7, it states: "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 [REDACTED], but NS has produced no such agreement."¹

Although SMS' allegations are very relevant to the central issue in this case, they are squarely refuted by the record evidence, including by SMS' own responses to Norfolk Southern's interrogatories. On May 25, 2004, SMS' customer, Valero, filed a Petition to Intervene and Statement of Position in this proceeding, in which it stated: "When Valero invited SMS to take Conrail's place at Paulsboro, it was a matter of indifference to

¹ It is interesting to note that, although SMS claims it is operating as a common carrier at Paulsboro and that its switching rates there are tariff rates, it nevertheless redacts those rates from the public version of its filings. Valero, in its discovery responses, and Norfolk Southern in its pleadings, have redacted those rates, consistent with the view that the rates were set privately by agreement and thus should not be made public. SMS has not challenged that confidential treatment, and in fact appears to embrace it, redacting the rates from its own filings – a curious state of affairs for a party that claims the rates are publicly-available common carrier tariff rates.

Valero whether SMS would provide such service as a common carrier or as a private switching operator; *the service to Valero would be the same in either case, as its terms and conditions, including rates, would be governed by contracts.*” (Emphasis supplied.)

In interrogatories, Norfolk Southern asked SMS whether it agreed with this statement.

SMS responded: “SMS agrees with that statement.”²

Moreover, in Valero’s responses to Norfolk Southern’s interrogatories and document requests (Exhibit 3 to the NS Response), a copy of which Norfolk Southern supplied to SMS counsel, Valero stated:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

² See NS Response, Exhibit 2 (SMS Response to Interrogatory No. 6).

Finally, SMS' claim that its switching charges were established not by contracts with Valero but by the tariff attached to its rebuttal is refuted by the very terms of that tariff, which states a per-car switch charge of \$225.00. In response to Norfolk Southern's documents requests for "all tariffs in effect since January 1,2000," this is the only "tariff" SMS identified, and SMS further stated: "SMS has published no supplements or amendments thereto." Exhibit 2 to the NS Response (SMS' Response to Document Request No. 2). The fact that Valero paid SMS [REDACTED] per car for switching until January 2004 (as SMS appears to acknowledge on page 8 of its Rebuttal), and [REDACTED] since then, conclusively refutes SMS' contention that its switch charges were established by tariff rather than by contract.

⁴ See Exhibit 28, attached hereto.

CONCLUSION

For the foregoing reasons and those stated in Norfolk Southern's Responsive Statement, the Board should deny SMS' petition for declaratory order and should find that SMS has not been operating as a rail common carrier at the Valero Refinery.

Respectfully submitted,



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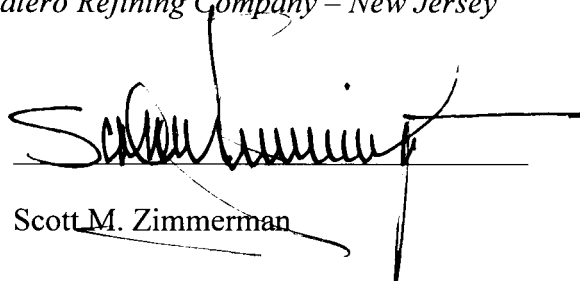
August 6, 2004

CERTIFICATE OF SERVICE

I certify that on August 6, 2004, a true copy of the foregoing Public version of the
“Surrebuttal Statement Of Norfolk Southern Railway Company” was served by hand
delivery upon:

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REDACTED

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REDACTED