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August 26, 2004

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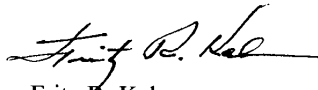
Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, NW (7th fl.)
Washington, DC 20423-0001

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 Reply of SMS Rail Service, Inc..

Additional copies of this letter and of the Reply 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. (202) 342-0683
Donald G. Avery, Esq. (202) 347-3619
Keith T. Borman, Esq. (202) 628-6430
Mr. Jeffrey L. Sutch (856) 467-2121

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BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.



STB Finance Docket No. 34483

SMS RAIL SERVICE, INC.
- PETITION FOR DECLARATORY ORDER

REPLY
OF
SMS RAIL SERVICE, INC.

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Section
Public Records

Fritz R. Kahn
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Attorney for

SMS RAIL SERVICE, INC.

Due and dated: August 26, 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Finance Docket No. 34483

SMS RAIL SERVICE, INC.
- PETITION FOR DECLARATORY ORDER

REPLY
OF
SMS RAIL SERVICE, INC.

Petitioner, SMS Rail Service, Inc. ("SMS"), pursuant to 49 C.F.R. 1104.13(a), replies in opposition to the Motion of Norfolk Southern Railway Company for Leave to File Surrebuttal Statement, filed August 6, 2004, and in support thereof SMS states, as follows:

1. As appears to be its custom,¹ NS seeks leave to file an impermissible reply to a reply. The Board's rule, 49 C.F.R. 1104.13(c), however, is explicit in stating that a reply to a reply shall not be allowed. As the Board said in Docket No. 41192, The TJX Companies-Petition for Declaratory Order-Certain Rates and Practices of Sweeney Transportation, Inc., and Knickerbocker East-West, Inc., served January 6, 1998, "A reply to a reply is not permitted under our rules of procedure. 49 CFR 1104.13(c)." To be sure, the Board on occasion has waived the

¹ See, i.e., NS' Petition for Waiver and Leave to File, filed April 14, 2003, in STB Docket No. 42078, Norfolk Southern Railway Company-Petition for Declaratory Order-Interchange with Reading Blue Mountain & Northern Railroad Company.

rule upon a showing that the tendered evidence could not have been submitted earlier or for other compelling reasons. See, i.e., STB Docket No. 41989, Potomac Electric Power Company v. CSX Transportation, Inc., served June 27, 1997. In its Motion, however, NS has failed to make the requisite showing why a waiver of the rule is warranted.

2. The arguments which NS would have the Board consider if the waiver were granted are largely repetitive of ones NS already has made in this proceeding. Thus, for example, the references to the expectation of Valero Refining Company-New Jersey ("Valero") as to how SMS' switching service would be priced and to SMS' agreement with Valero's statement, appearing at the top of page 3 of NS' tendered Surrebuttal Statement, were included as well at the top of page 11 of NS' Responsive Statement, filed July 19, 2004. Similarly, the alleged agreement by Valero with the rate actually assessed by SMS throughout most of the time that it has performed the switching service within the Complex at Paulsboro, set out in the middle of page 3 of NS' tendered Surrebuttal Statement, appeared, also, toward the bottom of page 13 of NS' Responsive Statement. Indeed, at page 4 of its tendered Surrebuttal Statement, NS acknowledges that its argument about the contents of the Rail Service Agreement between Valero and SMS already had been made by it at pages 9-11 of NS' Responsive Statement. The rule of 49 C.F.R. 1104.13(c) should not be waived merely to allow NS to advance again arguments it already has offered. A waiver of the rule is not designed to give a party a proverbial second bite at the apple.

3. Moreover, the documents which NS now for the first time seeks to introduce into the record in this proceeding had been in NS' possession since well before it filed its Responsive Statement. The undated agreement in principle between Valero and SMS, which NS marked as Exhibit 27, evidently was furnished NS on July 1, 2004, when Valero responded to NS' discovery

requests.² And the copies of the four bills submitted by SMS to Valero,³ which NS marked as Exhibit 28, were provided by SMS to NS on June 21, 2004. NS in its Motion offers no credible reason why these documents could not have been offered into evidence in a timely fashion when it filed its Responsive Statement. A waiver of the section-1104.13(c) rule to accommodate NS' late tender of the documents has not been shown by NS to be justified.

4. NS contends that the tendered Surrebuttal Statement should be received into evidence belatedly because of allegations said to have been raised by SMS for the first time in its Rebuttal Statement, filed July 30, 2004, namely, that its switching rate was a common carrier rate and not a section-10709 contract rate. Of course, NS errs. Attached as Exhibit 2 to the Verified Statement of Jeffrey L. Sutch, President of SMS, included as part of SMS' Opening Statement, filed June 21, 2004, was a copy of the definitive agreement between Valero and SMS, the Rail Line Service Agreement, dated August 31, 2000. That agreement was not a section-10709 contract and did not set forth the rate at which SMS would perform the switching service within the Complex at Paulsboro. Rather the contract between Valero and SMS provided for SMS's lease of the Valero owned tracks within the facility, as SMS clearly stated at page 15 of its Opening Statement.

5. In a further effort to justify its waiver request, NS blatantly misrepresents SMS' position in this proceeding. At page 2 of its Motion, NS contends that in its Rebuttal Statement SMS had claimed that the applicable switching rate was promulgated "pursuant to a specific

² Contrary to NS' assertion, at page 3 of its tendered Surrebuttal Statement, a copy of the agreement in principle between Valero and SMS was not included with the Valero produced documents, copies of which were provided to SMS by NS on July 7, 2004.

³ The statements were for switching services subsequent to the date when SMS filed its Petition for Declaratory Order on March 4, 2004.

common carrier tariff issued by SMS." Later on that same page, NS maintains that SMS had "claim[ed] that its switching charge is set by tariff." Similarly, at page 4 of its tendered Surrebuttal Statement, NS falsely contends that SMS had claimed that the applicable switching charge was established "by the tariff attached to its rebuttal." That, however, was not what SMS had said in its Rebuttal Statement. SMS is well aware, as NS surely must be, that railroads have not had to publish tariffs since the enactment of the ICC Termination Act of 1995. Thus, at page 2 of its Rebuttal Statement, SMS had said, "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 [emphasis added]." Again, at page 7 of its Rebuttal Statement, SMS had declared, "SMS established its rate as a common carrier railroad, pursuant to 49 U.S.C. 10702." Finally, at page 8 of its Rebuttal Statement, SMS had stated:

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 [\$ ____] 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 [footnote omitted].

In short, NS should not feign surprise that in discovery it was not provided with a copy of the common carrier rate actually assessed by SMS for most of the time it performed the switching service within the Complex at Paulsboro. The publication of a tariff, supplement or amendment no longer is required of a rail carrier, and, furthermore, pursuant to 49 U.S.C. 11101(b)(1), the applicable common carrier rate need not even be in writing except when requested of the rail carrier. See, i.e., STB Finance Docket No. 33989, Pejepscot Industrial Park, Inc., d/b/a Grimm

Industries-Petition for Declaratory Order, served May 15, 2003. There is nothing of record to suggest that Valero requested SMS to provide it with a written statement of the reduced common carrier rate which it assessed for rendering the switching service.⁴

6. The only incorrect factual statements which have been made have been those of NS and not SMS, as NS falsely charges at page 1 of its Motion. Therefore, no further arguments or evidence need be received by the Board to enable it to have a complete and accurate record upon which to render its decision on SMS's Petition for Declaratory Order.

7. NS has failed to make a persuasive showing that an exception to the rule of 49 C.F.R. 1104.3(c) should be made, and its Motion, accordingly, should be denied. STB Docket No. WCC-102, Ocean Logistics Management, Inc. V. NPR, Inc., and Holt Cargo Systems, Inc., served January 14, 2000. STB Docket No. AB-33 (Sub-No. 140), Union Pacific Railroad Company-Abandonment-In Lancaster and Gage Counties, NE, and Marshall County, KS, served December 17, 1999; Finance Docket No. 28905 (Sub-No. 27), CSX Corporation-Control--Chessie System, Inc., and Seaboard Coast Line Industries, Inc., et al., served July 15, 1997; STB Docket No. 41989, Potomac Electric Power Company v. CSX Transportation, Inc., served June 27, 1997.

8.. If, however, the Board were to disagree and were to grant NS' Motion, SMS asks that it be allowed to file a responsive pleading to NS' tendered Surrebuttal Statement. It is customary for the procedural schedules in declaratory order proceedings to allow the petitioner to open and close in the presentation of argument and evidence. See, i.e., STB Finance Docket No. 34425,

⁴ At the top of page 5 of its Response to Interrogatory 2, attached as Exhibit 3 to NS' Responsive Statement, Valero acknowledged that it "is unaware of any written agreement pertaining to its payment of this [\$ _____] per car fee to SMS."

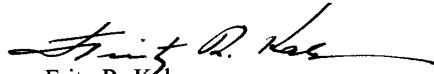
City of Lincoln–Petition for Declaratory Order, served December 8, 2003; STB Finance Docket No. 33697, National Railroad Passenger Corporation–Petition for Declaratory Order–Weight of Rail, served May 10, 2002; STB Finance Docket No. 33989, Pejepscot Industrial Park, Inc., d/b/a Grimm Industries–Petition for Declaratory Order, served February 12, 2001; STB Finance Docket No. 33853, Cemex USA–Petition for Declaratory Order–The Burlington Northern and Santa Fe Railway Company, served May 10, 2000. In any event, the Board has received rebuttal statements in instances in which it has allowed a party to file a reply to a reply. See, i.e., STB Finance Docket No. 34425, City of Lincoln–Petition for Declaratory Order, served December 8, 2003; STB Finance Docket No. 33950, Jefferson Terminal Railroad Company–Acquisition and Operation Exemption–Crown Enterprises, Inc., served March 29, 2001; STB Finance Docket No. 33824, Great Salt Lake and Southern Railroad L.L.C.–Construction and Operation–In Tooele County, UT, served December 15, 2000; STB Docket No. 42030, B. Franklin Unger, Trustee of the Indiana Hi-Rail Corporation, Debtor–Petition for Declaratory Order–Assessment and Collection of Demurrage and Switching Charges, served June 14, 2000.

WHEREFORE, SMS Rail Service, Inc., asks that the Motion of Norfolk Southern Railway Company for Leave to File Surrebuttal Statement, filed August 6, 2004, be denied and, alternatively, that if the Motion were granted, that be given leave to file a pleading responsive to the tendered Surrebuttal Statement.

Respectfully submitted,

SMS RAIL SERVICE, INC

By its attorney,



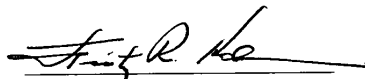
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Due and dated: August 26, 2004

CERTIFICATE OF SERVICE

I certify that I this day have served copies of the foregoing Reply upon the parties to this proceeding by facsimile transmitting a copy thereof to each of their counsel.

Dated at Washington, DC, this 26th day of August 2004.


Fritz R. Kahn