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July 19, 2004

BY HAND DELIVERY

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001



Re: Finance Docket No. 34483, Petition For Declaratory Order
of SMS Rail Service, Inc.

Dear Secretary Williams:

I enclose for filing an original and 10 copies of each of two versions of the Responsive Statement of Norfolk Southern Railway Company in this proceeding. One version is marked "Highly Confidential – Subject to STB Protective Order" and should not be placed in the public file. The other is marked "Public Version," from which materials designated Highly Confidential and Confidential by the parties have been redacted.

We have also prepared a third version, marked "Confidential – Subject to STB Protective Order," from which only Highly Confidential materials have been redacted, for service on parties who, under the Protective Order, are entitled to access to Confidential but not Highly Confidential materials. We do not propose to serve this version on the Board unless requested.

I also enclose a 3.5" floppy disc containing the text of all three versions of the Responsive Statement.

ENTERED
Office of Proceedings

JUL 20 2004

Part of
Public Record

Sincerely,

Richard A. Allen

cc: (w/encl.)
Fritz R. Kahn, Esq.
Donald G. Avery, Esq.
Keith T. Borman, Esq. (Public Version)

PUBLIC VERSION

Before The
Surface Transportation Board

STB Finance Docket No. 34483



SMS RAIL SERVICE, INC –
PETITION FOR DECLARATORY ORDER

211606

**RESPONSIVE STATEMENT
OF
NORFOLK SOUTHERN RAILWAY COMPANY**

ENTERED
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Public Record

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July 19, 2004

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 34483

SMS RAIL SERVICE, INC –
PETITION FOR DECLARATORY ORDER



**RESPONSIVE STATEMENT
OF
NORFOLK SOUTHERN RAILWAY COMPANY**

Introduction and Summary

This case involves an industrial facility in Paulsboro, New Jersey owned by Valero Refining Company (“Valero”). This facility is within the Philadelphia/South Jersey Shared Assets Area (“SJSAA”), one of three shared assets areas established by the transaction (hereafter “the Conrail Transaction”) approved by the Board’s Decision No. 89 in *CSX Corp. et al – Control – Conrail Inc., et al.*, 3 S.T.B. 196 (1996), *aff’d sub nom. Erie-Niagara Rail Steering Committee v. STB*, 247 F.3d 437 (2d Cir. 2001). The Conrail Transaction provided shippers in the shared assets areas with competitive rail service from two Class I rail carriers, whereas before the transaction the shippers were served only by Consolidated Rail Corporation (“Conrail”). Norfolk Southern Railway Company (“NS”) and CSX Transportation (“CSXT”) provide line haul transportation services to Valero at this facility.

Since 2001, SMS Rail Service, Inc. (“SMS”) has provided switching service within Valero’s facility. Inbound cars are placed by Conrail, as agent for either NS or CSXT, on an interchange track (Track 234) inside the facility, from which they are picked up and distributed within the facility by SMS; SMS delivers outbound cars to

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Conrail at Track 234, and Conrail takes them to the appropriate line haul carrier, NS or CSXT.

In the petition for declaratory order instituting this proceeding, SMS claims that NS has wrongfully refused to treat SMS as a rail common carrier, a status SMS claims was conferred upon it by the notice of exemption it filed in STB Finance Docket No. 33927, *SMS Rail Service, Inc.—Acquisition and Operation Exemption—Valero Refining Company—New Jersey*, served September 22, 2000. NS does not dispute that it has not treated SMS at Paulsboro as a rail common carrier. It has not done so for the simple reason that NS believes that SMS, despite the *permissive* authority it received from the Board, is not using that authority to provide common carrier services at Paulsboro, but is providing services at that facility strictly as a contract carrier pursuant to a contract between SMS and Valero. NS' belief is reinforced by information and documents obtained by NS in discovery in this proceeding. Indeed, a document obtained from SMS in discovery (but not mentioned by SMS in its opening statement) shows that the Board staff came to the same conclusion a year ago and so advised SMS.¹

Accordingly, notwithstanding SMS' view of the matter, the central issue for the Board to resolve in this case is whether SMS is operating at Paulsboro as a common or a contract carrier.² SMS' Opening Statement makes no effort to prove its case by reference to the facts relating to its services and operations or to any of the Board precedents delineating the differences between common carriage and contract carriage.

¹ See Exhibit 1.

² SMS in its Opening Statement claims this is not the issue (see SMS O.S. at 2-3) and that the only issue is whether "NS in fact has chosen to disregard SMS' status as a common carrier railroad." SMS O.S. at 2-3. But SMS' framing of the issue merely assumes as a premise the very issue ("SMS' status as a common carrier railroad") that is in dispute, and is plainly incorrect.

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The facts are hardly discussed and the precedents are not even cited. Instead, SMS relies entirely on the contention that the operating exemption obtained in Finance Docket No. 33927 conferred on SMS the “status” of a common carrier and made its services at Paulsboro conclusively those of a common carrier.

This contention is manifestly incorrect. The notice of exemption that SMS filed in Finance Docket No. 33927 may have given SMS the *authority* to operate as a common carrier at Paulsboro, but it is well established that operating authority granted by the Board, whether by grant of an application or by exemption, is entirely permissive and need not be exercised by the entity obtaining it. *See, e.g., Arkansas Central Ry. Co., Inc.—Operation Exemption—Line of Herzog Stone Products, Inc.*, Finance Docket No. 31405, 1995 ICC LEXIS 69 (ICC served April 7, 1995). That a carrier has the authority to operate as a common carrier and may be operating as a common carrier at other locations does not establish that a carrier is operating as a common carrier at a particular location. *See, e.g., Union Pacific Railroad Company—Operation Exemption—In Yolo County, CA*, STB Finance Docket No. 34252 (served December 5, 2002).

Under the Board’s precedents, whether a carrier is operating as a common or contract carrier at a location depends on a number of factors. As we will show, application of those precedents and factors to the facts of this case strongly supports NS’ belief – and the conclusion of the Board’s staff – that SMS’ services at Paulsboro are those of a contract carrier, not a common carrier. Indeed, SMS seems to have conceded

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this when it acknowledged, in discovery, that the “terms and conditions [of SMS’ service to Valero], including rates, would be governed by contracts.”³

Furthermore, there is no basis in fact for SMS’ claims that NS’ refusal to deal with SMS as a common carrier has improperly deprived SMS of an alleged right to have its switching charges included in NS’ line haul rates. Although SMS evidently sold its switching services to Valero by making this false claim, in fact SMS would have no right to be included in NS’ line haul rate *even if SMS were* operating as a common carrier at Paulsboro. Similarly, there is no truth to SMS’ implication that NS’ refusal to deal with SMS as a common carrier has somehow impeded the exchange of traffic between NS and SMS to the detriment of shippers. Nor is there any basis for SMS’ claim that, as a common carrier, SMS would have a right to interchange with NS at a different location.

Although SMS’ Opening Statement focuses on its erroneous arguments about its alleged rights to be included in NS’ rates and routes and to “interchange” traffic with NS, SMS ignores the real and only significant implications of its claim to common carrier status at Paulsboro: If it were a common carrier, then (1) in the absence (or upon the expiration or termination) of an applicable rate agreement, the rates SMS could charge Valero and others at the Paulsboro facility would be constrained only by the statutory requirement of reasonableness, which its customer would have to enforce by pursuing a rate complaint at the Board; and (2) Valero could not unilaterally evict SMS at the end of its 10-year lease but would have to file and win an adverse discontinuance proceeding at the Board. In effect, as a common carrier, SMS would have a bottleneck monopoly at a

³ See Response of SMS Rail Service, Inc. to Norfolk Southern Railway Company’s Second Set of Interrogatories and Requests for Production of Documents, set forth in Exhibit 2 (SMS response to Interrogatory No. 6.)

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facility that had previously been directly accessible by two competing line haul carriers. While it is conceivable that Valero could have intended that result when it engaged SMS to provide switching at Paulsboro, such a conclusion would be very surprising with respect to a facility that had only recently, in the Conrail Transaction, gained direct, two-carrier competition; and, indeed, information obtained from Valero in discovery confirms that Valero intended no such result.

In sum, the facts show that NS' belief that SMS' operations at Paulsboro are those of a contract carrier is reasonable and supported by the facts, and SMS' petition for declaratory order should therefore be denied.⁴

STATEMENT OF FACTS

1. Background.

The facility at issue in this case (hereafter "the Valero Refinery") is a 970-acre facility in the SJSAA containing some five miles of industrial track. It was purchased in September 1998 by Valero from ExxonMobil Corporation, which retained a small technical center immediately adjacent to the Valero Refinery and has a larger facility across the street. Three other companies not affiliated with Valero have occupied or used facilities at or adjacent to the Valero Refinery site since January 1, 2000: (1) until early 2002, Oxbow Carbon & Minerals, Inc. operated a petroleum coke loading facility at

⁴ We note that the American Short Line and Regional Railroad Association ("ASLRRA") recently petitioned to intervene in this proceeding in support of the relief sought by SMS. NS does not oppose ASLRRA's petition to intervene and does not disagree with the general propositions that "the law grants important rights and imposes serious obligations upon" common carrier railroads and that the Board should "protect and uphold the significance of 'common carrier' status as well as the rights and obligations inherent therein. . . ." (ASLRRA Statement). Those are rights and obligations, however, that should be reserved for bona fide common carrier operations. The facts of this case, which ASLRRA does not address, indicate that SMS is not functioning as a common carrier at Paulsboro.

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the Refinery, where it purchased petroleum coke from Valero, loaded it onto railcars and sold it to purchasers elsewhere; (2) in early 2002, Savage Industries, Inc. took over the petroleum coke loading function from Oxbow, but Valero now markets the coke for its own account; and (3) Air Products and Chemicals, Inc. operates a facility across the street from the Refinery.⁵

Before the Conrail Transaction, the Valero Refinery received line-haul rail service exclusively from Conrail. At that time, Conrail provided not only line-haul service to the facility but also, under a separate contract, provided in-plant switching services. This switching contract provided that Conrail was to perform all the in-plant switching at the Valero Refinery for a fixed monthly fee of \$ 15,600.00.⁶

On June 1, 1999, NS and CSXT implemented the Conrail Transaction, and each railroad commenced providing service to shippers previously served by Conrail over Conrail lines allocated to that railroad. In the three shared assets areas, including SJSAA, Conrail continues to be the owner and operator of the rail lines and operates over them as agent for NS and CSXT. Both NS and CSXT have direct commercial and physical access to shippers in those areas, but in most cases, Conrail transports cars as the agent for NS or CSXT between the shipper's facility and rail yards in those areas.⁷ As a result of the Conrail Transaction, the Paulsboro Refinery gained new competition between two Class I carriers, NS and CSXT.

⁵ See Response of Valero Refining Company – New Jersey to Norfolk Southern Railway Company's First Set of Interrogatories and Requests for Production of Documents, attached as Exhibit 3 (Response to Interrogatory No. 5).

⁶ Exhibit 4.

⁷ Under the Shared Assets Areas Agreements, which the Board approved as part of Conrail Transaction, NS and CSXT have trackage rights over the rail lines in the SAAs and have the right to deliver or pick up full trains from the shippers in those areas, but they usually do so only in the case of unit trains.

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2. SMS Operations at the Valero Refinery

Conrail continued to provide in-plant switching for the Valero Refinery until November 2000, when SMS commenced providing that service. Although the question appears never to have been discussed, it seems clear -- and assumed by all parties -- that Conrail's in-plant switching services were those of a contract carrier not subject to the Board's jurisdiction, not those of a common carrier. Had they been common carrier services, Valero could not have unilaterally replaced Conrail with SMS as its in-plant switching company without discontinuance authority from the Board. *See Thompson v. Texas Mexican Railway Company*, 328 U.S. 134, 146-147 (1946).⁸

SMS provides rail services in two other industrial complexes in addition to the Valero Refinery: the Pureland Industrial Complex, in Bridgeport, New Jersey, and the Penn Warner Industrial Park in Falls Township, Pennsylvania.⁹ In early 2000, SMS approached Valero, offering to provide in-plant switching to Valero at Paulsboro. SMS advised Valero that if Valero engaged SMS to provide the service, NS and CSXT would pay for SMS' switching serves by absorbing SMS' switching fees in their line-haul rates, thereby saving Valero the switching expenses it had been paying to Conrail.¹⁰ SMS

⁸ After June 1, 1999, Conrail continued to perform the in-plant switching under its switching contract, but did so as agent for NS and CSXT, who assumed the responsibility of billing Valero for the switching services. There appears to have some confusion after June 1, 1999 among NS, Valero and ExxonMobil about the applicable switch charge and the appropriate payor, which is detailed in an e-mail from Jim Liddell of NS to Joe Osborne on October 30, 2000 and which concluded: "The bottom line is simple: we have not assessed, or collected, a switching charge from Valero from 10/1/99 thru 9/30/00." Exhibit 5

⁹ *See* Response of SMS Rail Service, Inc. to Norfolk Southern Railway Company's First Set of Interrogatories and Requests For Production of Documents, set forth as Exhibit 6 (Response to Interrogatory 1).

¹⁰ *See* documents in Exhibit 7. [REDACTED]

(Footnote continued on next page . . .)

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appears to have stated or implied to Valero that NS and CSXT would be legally required to absorb SMS' switching charges and that [[REDACTED]]¹¹ SMS made these representations without having discussed the matter with NS or, apparently, CSXT.¹²

Apparently based on these representations and on some dissatisfaction with the switching performed by Conrail, Valero agreed to engage SMS to provide the in-plant switching that had been provided by Conrail. Valero and SMS negotiated and ultimately signed an agreement on August 31, 2000 styled "Rail Line Service Agreement" (hereafter, the "RLSA.")¹³ The agreement [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(... Continued from previous page)

[REDACTED] In a conversation with Mr. Liddell of NS about this proposal on or about March 31, 2000, Mr. Marion Lewis of Valero said that "SMS tells Valero that no additional charges will be due to SMS from Valero. On the surface, Valero views this as a savings of +/- \$15,600 per month that it has been paying to CR (old CR and new CR) for intraplant switching." Document 000153. Mr. Liddell explained to Mr. Lewis that the cost of the in-plant switch "would not go away" if SMS assumed the switching, and that "Valero could possibly be exposed to potential rate increases or find that SMS is not about to provide the service for free."

¹¹ Exhibit 8. In this document, material designated Highly Confidential under the applicable protective order is enclosed in bold double-brackets; material designated Confidential is enclosed by bold single-brackets.

¹² See Exhibit 9, which indicates that SMS appears to have asked Valero *not* to inform NS or CSXT of its negotiations and agreement with SMS until SMS' notice of exemption became effective.

¹³ Exhibit 10.

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[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁴

In response to interrogatories propounded by NS, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹⁵

Valero also stated that it is not aware that SMS ever advised it that regulatory authorization would be required for Valero to engage the services of another entity at the expiration of the RLSA term.¹⁶

Although SMS advised Valero that SMS' switching rates would be incorporated in NS' and CSXT's line haul rates [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

¹⁴ Interestingly, Section 2 of the RLSA provides that [REDACTED]

[REDACTED]
[REDACTED] Although SMS never entered into an agreement to be included in Valero's freight rate contract (which the RLSA does not define), the parties appear to be acting as if the RLSA is in effect, and SMS asserts that the Commencement Date of the RLSA was November 1, 2000. Exhibit 6, SMS Response to Interrogatory 11.

¹⁵ Exhibit 3, Response to Interrogatory No. 11.

¹⁶ Exhibit 3, Response to Interrogatory No. 12.

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[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Moreover, Valero, in its petition to intervene in this proceeding, squarely stated that the terms and conditions of SMS' services at Paulsboro, including its rates, are "governed by contracts," and SMS itself has stated agreement with that proposition. [REDACTED]
[REDACTED]

On September 5, 2000, SMS filed a notice of exemption with the Board pursuant to 49 U.S.C. 10902 and 49 C.F.R. 1150.41 *et seq.* concerning its proposed service at Paulsboro and its agreement with Valero.¹⁷ The notice stated that the transaction "will result in no significant changes in railroad operations" Notice at 3. The Board published this notice in STB Finance Docket No. 33927, *SMS Rail Service, Inc.—Acquisition and Operation Exemption—Valero Refining Company—New Jersey*, served September 22, 2000.

On September 21, 2000, NS personnel met with SMS President Jeffrey Sutch to discuss SMS' plan of operation. Mr. Sutch stated that he would charge NS \$225 per car for doing the in-plant switching at the Valero Refinery.¹⁸ NS advised Mr. Sutch at that meeting that NS would not absorb (*i.e.*, pay) any part of SMS' switch charge unless it could be shown that SMS' service would result in cost savings to NS. On October 17, 2000, Francis Hennessy of NS informed Mr. Sutch by e-mail that NS would not absorb

¹⁷ Exhibit 11.

¹⁸ Exhibit 12

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any portion of the \$225.00 per car switch fee that SMS proposed to charge.¹⁹ Mr.

Hennessy stated: “We have determined that there will be no savings to NS or the CSAO [Conrail] if SMS does the switching for Valero plant [sic]. Any charge that SMS assesses should be billed directly to Valero, Oxbow, Air Products or Exxon/Mobil.”²⁰ Apparently, CSXT also declined to absorb any part of SMS’ proposed switch fee.²¹

Despite some initial uncertainty, NS also reached the conclusion that, for accounting, interline settlement and other purposes, it was appropriate to regard SMS at Paulsboro as a contract switching operator rather than as a rail common carrier.²² NS’ conclusion in this respect, however, did not affect the flow of traffic or service to the shipper. Thus, on November 21, 2000, T.L. Ingram, NS’ Vice President Transportation Operations, wrote Mr. Sutch that NS “has no objection to interchanging traffic with SMS on its facilities.”²³ Mr. Ingram said that NS was not agreeable to interchanging with SMS at a location outside the Paulsboro Refinery desired by SMS as an interchange location –

¹⁹ Exhibit 13.

²⁰ Despite this advice, SMS continued to contend – and still asserts – that SMS’ switching at Paulsboro saves NS money by eliminating Conrail’s switching costs and that NS should therefore absorb SMS’ switching fees without adjusting its line haul rates to Valero. It did so even after James McClellan of NS specifically advised Mr. Sutch on November 7, 2001 that NS’s line haul contracts with Valero did not include in-plant switching and that Conrail’s “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,” and Mr. Sutch replied that “we don’t question the manner in which your line-haul contracts are structured. See Exhibit 14.

²¹ Exhibit 15. Evidently, CSXT at first agreed to bill Valero for SMS’ switch charges as a separate charge from CSXT’s line haul charges and to remit those payments to SMS through interline settlement procedures (as SMS wants NS to do), but errors in SMS’ billing procedures, which led to “confusion” and “double billing,” seem to have resulted in CSX informing SMS that, effective November 1, 2001, CSXT would “discontinue the handling of SMS switch charges through the interline switch settlement process. As of that date, SMS must look to its on-line customers for the payment of any [switching charges].” See documents at Exhibit 16.

²² See, e.g., documents cited at SMS’ Opening Statement at 4-5.

²³ Exhibit 17.

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Conrail's Coke Storage Yard – which would require SMS to operate substantial distances over Conrail track (on which SMS had no authority to operate) in a busy industrial area.²⁴

Mr. Ingram noted that such an interchange would present “operational concerns,” and observed that “we also note that SMS has not offered to compensate Conrail for the use of the SAA property.” With regard, however, to interchanging on SMS’ tracks, Mr.

Ingram concluded:

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.

Subsequently, Conrail did send SMS a standard interchange agreement, but SMS refused to sign it because it did not provide for an interchange at Conrail's Old Coke Storage Yard.²⁵ Since that time, Conrail and SMS have been exchanging cars on Track 234, inside the Valero Refinery under the terms of the proposed, but unexecuted, standard interchange agreement.

[[REDACTED]]
[REDACTED]
[REDACTED]²⁶

On November 9, 2000, Mr. Sutch wrote to the Board's Director of Compliance and Enforcement complaining about the refusal of NS, CSX and Conrail to absorb SMS'

²⁴ See map at Exhibit 18

²⁵ Exhibit 19.

²⁶ Exhibit 3, Response to Interrogatory 2. *See also* Exhibit 20. Apparently to buttress its claim of common carrier status, SMS issued a tariff on February 6, 2001 covering its services at Paulsboro, which showed a switching charges of \$225.00 per car. Exhibit 21.

[[REDACTED]]

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switch fee and also about their declining to interchange with SMS at a location outside the Valero Refinery.²⁷ The Director referred this complaint to NS, which responded to SMS in Mr. Ingram's letter, referred to above.

On or about November 28, 2000, SMS commenced operating at the Valero Refinery. Since that time, Conrail, as agent for NS and CSX, has been placing cars for Valero and picking cars up from Valero at Track 234 without apparent difficulty or complaint from Valero. Having been unsuccessful in persuading NS (and apparently CSXT) to absorb its switch charges in NS' line haul rates to Valero, SMS has billed Valero separately for its switching services. Although its Petition for Declaratory Order alleged that SMS has provided switching services for Exxon Mobil, Air Products & Chemicals and Oxbow Chemicals at the Valero Refinery (Pet. At 3-4), SMS acknowledged in response to interrogatories that SMS only billed Valero for such services and only Valero has paid SMS for such services.²⁸

Although Valero initially supported SMS' efforts to have NS and CSXT absorb SMS' switch charges in their line haul rates, in December 2002 Valero expressly advised SMS that it did *not* want NS to include SMS' charges in NS' rates.²⁹

Although Valero appears satisfied with the service it is receiving both from NS and SMS at Paulsboro, SMS continued to press for inclusion in NS' rates and to complain

²⁷ Exhibit 22.

²⁸ Exhibit 2, Responses to Interrogatories Nos. 3, 4 and 5.

²⁹ Exhibit 23. In a previous request to NS in November 2002, SMS had again asked NS to "incorporate our contract switching rate with Valero into your rate. . . . Our contract rate is \$225 per car. [REDACTED]

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informally to the Board about its alleged ill treatment by NS.³⁰ Although not mentioned in SMS' Petition for Declaratory Order or its Opening Statement, the Board's Director of Compliance and Enforcement responded to SMS' complaints in a letter dated March 19, 2003.³¹ In that letter, the Director stated, among other things: "Although SMS was designated as a common carrier pursuant to its filing of a Notice of Exemption to operate the Valero facility, it would appear that SMS' role as a common carrier at Paulsboro is *purely contractual*." (Emphasis supplied.) With respect to SMS' complaint about not being included in NS' line haul rates, he observed that "we requested and Norfolk Southern (NS) agreed to consider absorbing your switching fee to Valero through a revision in its transportation contract with Valero. *However, as you know, Valero declined NS' offer to revise their contract to accommodate your switching fee, and instructed you to that effect.*" (Emphasis supplied.) With regard to SMS' complaints about the interchange arrangement, the Director stated: "While it would seem that the interchange arrangement for Valero traffic that has been in effect since you assumed operation of Valero's Paulsboro facility in 2000 is working, it would seem also that Conrail has extended you an opportunity to execute a formal interchange agreement and to comment on its terms, and to the best of my knowledge you have declined."

Finally, the Director advised Valero that he did not agree with SMS' claim that it was entitled to a division of NS' line-haul rate. He stated: "In addition to the fact that SMS is not a party to NS' contract with Valero, it is my opinion that SMS provides no

³⁰ These complaints included a letter to the Board dated May 3, 2002, provided to NS in discovery by Valero by not by SMS, despite NS' document request to SMS for all communications with the Board about its service at Paulsboro. Exhibit 24.

³¹ Exhibit 1. This letter was specifically in response to a letter dated February 24, 2003 from Mr. Richard Petrone of SMS to STB Chairman Roger Nober complaining about NS' refusal to regard SMS as a common carrier.

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part of the line-haul transportation, and this view is supported by the fact that the Valero traffic is at destination when Conrail delivers it to the Valero interchange at Paulsboro. Thus, SMS' only function is to switch into and within the refinery."

[REDACTED]

Despite the conclusions in the March 19, 2003 letter from the Board's Office of Compliance and Enforcement, which SMS' petition does not mention and does nothing to rebut, SMS filed its Petition for Declaratory Order in this proceeding on March 4, 2004.

ARGUMENT

I. SMS' OPERATIONS AT PAULSBORO ARE THOSE OF A CONTRACT CARRIER.

A. The Issues In This Case Involve the Character of SMS' Operations at Paulsboro, and those Issues Were Not Determined by SMS' Notice of Exemption Filing.

The issues in this case are whether SMS' operations at the Valero Refinery are those of a contract carrier or a common carrier and whether NS has failed to accord SMS any rights or privileges to which SMS is legally entitled. SMS in its Opening Statement attempts to frame the issue differently, but its view of the matter is not correct.

SMS asserts (O.S. at 2):

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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. 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. 11540.41, *et seq.* The franchise thereby conferred by the Board allowed SMS to render operations within the facility as a common carrier with all the rights and privileges, as well as duties and obligations, that attend.

SMS' claim that its filing of a notice of exemption necessarily and automatically rendered its operations at the Valero Refinery those of a common carrier is plainly incorrect. It is settled that operating authority conferred by the Board, whether by grant of an application or by exemption, is entirely permissive, and need not be exercised by the entity obtaining it. *See, e.g., Arkansas Central Ry. Co., Inc.—Operation Exemption—Line of Herzog Stone Products, Inc.*, Finance Docket No. 31405, 1995 ICC LEXIS 69 (ICC served April 7, 1995). The Board squarely so held in the *Yolo* case, where it ruled that operations by the Union Pacific Railroad over industrial track that the Union Pacific had been performing as a contract carrier were not converted to regulated common carrier operations by the Union Pacific's filing a notice of exemption to obtain common carrier authority. In that case, the Board said:

. . . UP made clear in its notice [of exemption] that there has been no significant change in its operations it conducts on this trackage. UP has been performing as a contract operator over the track owned by the Port, doing work the Port could have done itself or hired another operator to perform. The contract terms allow either party to terminate by giving notice as specified in the contract.

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Union Pacific Railroad Company—Operation Exemption—In Yolo County, CA, STB Finance Docket No. 34252 (served December 5, 2002) (slip op. at 4.)³² Indeed, the *Yolo* decision is very apposite here. In this case, Conrail, like Union Pacific in *Yolo*, had been performing switching services for many years as a contract carrier over track owned by the shipper – services that the shipper could have performed itself or hired another operator to perform. Like the Union Pacific’s notice of exemption in *Yolo*, SMS’s notice of exemption stated that it “will result in no significant change in railroad operations . . .” Verified Notice of Exemption of SMS Rail Service, Inc. in STB Finance Docket No. 33927 dated September 5, 2000 at 3. [REDACTED]

[REDACTED]

[REDACTED]

Accordingly, SMS is wrong in claiming that its notice of exemption automatically rendered SMS’ operations at Paulsboro those of a common carrier, and it is wrong in claiming that only a petition for revocation of the exemption could change its asserted common carrier status at Paulsboro. If, as NS believes to be the case, SMS never commenced common carrier operations at Paulsboro, it is not operating as a common carrier whether or not its exemption is revoked.

SMS is also wrong in contending that “the issue in this proceeding is . . . whether NS in fact has chosen to disregard SMS’ status as a common carrier . . .” O.S. at 2-3.

³² In a later decision involving the same facility, the Board rejected a petition to revoke a notice of exemption filed by Yolo Shortline Railroad Company to operate in the facility because, the Board found, “Yolo’s notice was not defective on its face.” *Yolo Shortline Railroad Company – Lease and Operating Exemption—Port of Sacramento*, STB Finance Docket No. 34414 (served February 3, 2003), slip op. at 5. This decision made no determination about the nature of Yolo’s operations in the Port or whether it was operating as a common carrier or a contract operator, issues that would turn on the particular facts of those operations.

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Although SMS devotes the bulk of its Opening Statement to arguing the affirmative of this alleged “issue,” it is plainly not an issue, because the proposition is not disputed: NS has made clear from the outset that it believes SMS is not operating at Paulsboro as a common carrier, and it has treated SMS’ operations as those of a contract switcher, not a common carrier. The only issues for Board to resolve are whether NS’ view is reasonably grounded and whether NS has deprived SMS of any rights or privileges to which SMS is entitled.

Because SMS’ position is based entirely on the erroneous contention that its common carrier status at Paulsboro was conclusively established by its notice of exemption, SMS’ opening statement provides no explanation or analysis of the facts of its service or of the applicable legal principles established by the Board’s precedents that delineate the characteristics of common and contract carriage. We have outlined the facts earlier and proceed now to address the applicable principles and their application to the facts of this case.

B. Applicable Legal Principles.

The Board only has jurisdiction over rail transportation that is provided by a “rail carrier” (49 U.S.C. 10501(a)(1)), which the statute defines as “a person providing common carrier railroad transportation for compensation.” 49 U.S.C. 10102(5). As the Board stated in *H&M International Transportation, Inc.—Petition for Declaratory Order*, Finance Docket No. 34277 (served November 12, 2003)(slip op. at 3): “To fall within the Board’s jurisdiction, the transportation activities must be performed by a rail carrier, and the mere fact that H&M moves rail cars inside the Marion facility does not make it a rail carrier. To be considered a rail carrier under the statute, there must be a

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holding out to the public to provide common carrier service.” *See also, e.g., 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*, Finance Docket No. 34040 (served May 15, 2003) (slip. op. at 9) (issue is whether carrier is “hold[ing] 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.”)

Of particular relevance to this case, the Board and the courts have applied the foregoing principles to hold that the Board has no jurisdiction over the construction and operation of what it considers to be “private track.” For example, in *B. Willis, C.P.A., Inc. – Petition for Declaratory Order*, Finance Docket No. 34013 (served October 3, 2001), *aff’d sub nom. B. Willis, C.P.A., Inc. v. STB*, (D.C. Cir. No. 01-1441, January 10, 2002), *cert. denied*, ___ U.S. ___ (October 6, 2003), the Board (per Director Konschnik) held that it had no jurisdiction over the construction and operation of a line by a power company that was to be operated under a contract by the Burlington Northern and Santa Fe Railway Company because the line was to be operated solely as a private line. The Board stated (slip op.2-3):

Private tracks constitute a narrow, limited category of rail operations. But as long as rail track is constructed and operated in a manner that does not constitute common carriage, rail track can be built and operated in private status not subject to the Board’s jurisdiction. . . . Operation over private tracks can be conducted by the shipper/owner itself, *or the shipper/owner of the private track may arrange for a contractor to conduct operations over the track.*

(emphasis supplied; citations omitted.) The Board applied the same principle in the *Yolo* case, discussed earlier, to conclude that switching service provided by the Union Pacific Railroad within an industrial facility was not common carrier transportation

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notwithstanding UP's claim that it was and despite UP's having filed a notice of exemption to authorize common carrier transportation.

These and other cases reflect the proposition that if the essence of what the carrier is offering is to serve less than the general public and to do so on terms that are established exclusively by contract between the shipper and the carrier, then the carrier is not providing common carriage but is providing contract carriage. *See, e.g., Hanson Natural Resources – Non-Common Carrier Status – Petition for Declaratory Order*, ICC Finance Docket No. 32248 (served December 5, 1994), 1994 MCC LEXIS 11 at *44, n. 10. Cases like *Yolo* also establish that the service can be contract carriage even if the carrier *purports* to be holding itself out to provide common carrier service to the general public, and even if the carrier is providing common carrier services elsewhere. Indeed, it is well settled that a carrier can provide common carriage and contract carriage, via transportation contracts, on the same lines to different shippers or at different times. *Texas v. United States*, 730 F.2d 409, 417 (5th Cir. 1984), *rehearing denied*, 749 F.2d 1144 (5th Cir. 1985), *cert. denied sub nom. ICC v. Texas*, 472 U.S. 1032 (1985) (“*Texas*”) (“railroads are common carriers when they serve all comers at a general publicly disclosed rate, and contract carriers when they enter into private contracts authorized by the [Staggers] Act”). *See also Parrish & Heimbecker, Inc. – Petition for Declaratory Order*, STB Finance Docket No. 42031 (served May 26, 2000), slip op. at 5-6.

Cases like *Yolo* also reflect that another relevant factor is whether the contract determines the operating rights of the carrier and gives the shipper the right to replace the carrier on termination or expiration of the contract without regulatory authorization. In finding UP's operations in *Yolo* to be those of a contract operator, the Board noted that

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the contract terms between the shipper and UP “allow either party to terminate by giving notice as specified in the contract.” Slip op. at 4. Under the regulatory scheme of Title 49, in contrast, an important attribute of being a common carrier subject to the Board’s regulation is that a shipper may *not* terminate the services of the carrier without regulatory authority even if the shipper has a contractual right to do so. *Thompson v. Texas Mexican Railway Company*, 328 U.S. 134, 146-147 (1946).

C. Application of the Relevant Principles to the Facts of this Case.

Application of the pertinent legal principles to the facts of this case strongly supports NS’ view that the operations of SMS at Paulsboro are contract carrier operations, not common carrier operations. As in *H&M International*, *B. Willis*, and *Yolo*, the carrier’s operations are exclusively on tracks owned by the shipper. Moreover, SMS’ right to operate on that track and the terms of its service, including its rates, are established and governed by its contracts with the shipper, Valero. Indeed, SMS expressly conceded as much in discovery. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³³

In this regard, it is also significant that SMS’ service replaced service formerly provided by Conrail, which had also been provided pursuant to contract, and which all parties, including SMS, clearly viewed as non-jurisdictional contract carriage, as evidenced by the fact that no application for discontinuance accompanied Conrail’s

³³ Exhibit 10; Exhibit 3, Responses to Interrogatories Nos. 11 and 12.

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termination of service. Significantly, SMS' notice of exemption stated that its service would result in "no change in operations."

[REDACTED]

SMS' assertion it has provided switching services to three other companies located at the Valero Refinery does nothing to advance its claim to common carrier status. Not only does SMS say it does not know how much (if any) of those services it has provided, SMS also conceded in discovery that it only billed Valero for those services and was paid for them only by Valero.³⁴ [REDACTED]

[REDACTED]

[REDACTED]³⁵ Valero, however, asserts that the facilities of ExxonMobil and Air Products are adjacent to, not within, the Valero Refinery,³⁶ and it says it does not know whether SMS has provided switching services to Exxon Mobil or Air Products.³⁷ Accordingly, if SMS performed switching for Exxon Mobil and Air Products, it is not clear whether it informed Valero of that fact when it billed Valero for the services. In any event, however, it is clear that SMS regards the services it has rendered to other

³⁴ Exhibit 6, Response to Interrogatory No. 8; Exhibit 2, Response to Interrogatory No.

3.

³⁵ Exhibit 3, Response to Interrogatory No. 7.

³⁶ Exhibit 3, Response to Interrogatory No. 5.

³⁷ Exhibit 3, Response to Interrogatory No. 8

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companies at Paulsboro as having been pursuant to, and governed by, SMS' contracts with Valero, whom it billed for the services. To the extent SMS has provided services to those companies, it does not reflect an offering of common carrier service to the general public; rather, it was simply as part of its contract service to Valero.

In sum, the facts indicate that SMS' services at Paulsboro have not been common carrier services and are therefore not subject to the Board's jurisdiction.³⁸

II. NS HAS NOT REFUSED TO PROVIDE SMS ANY RIGHTS AND PRIVILEGES TO WHICH SMS IS LEGALLY ENTITLED.

Nor is there any merit to SMS' claims that NS has failed to accord SMS rights and privileges to which SMS would be legally entitled as a common carrier. SMS' principal substantive complaint in this regard appears to be that "SMS shares in none of the revenue collected by NS on traffic moving from and to the Paulsboro industries," because NS has "refused to absorb any of SMS' charges" (O.S. at 4, 6.) Although SMS apparently sold its services to Valero on the representation that NS and CSX would absorb SMS' switch charges and that Valero would thereby save all of the switching

³⁸ The foregoing discussion has been based on Board precedents differentiating common carrier service on the one hand from contract carrier service or service over "private tracks" on the other hand. A related exemption from Board jurisdiction is established by 49 U.S.C. 10906, which provides that the Board lacks entry and exit authority "over construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching, or side tracks." It may well be that the tracks within the Valero Refinery would also be exempt from Board entry and exit jurisdiction under section 10906 as well, but that issue is not directly presented by this case, which involves only the question whether SMS is operating as a common carrier at Paulsboro. If the tracks were exempt under section 10906 but SMS were operating in the Valero Refinery as a common carrier, it appears that the Board would have jurisdiction over some aspects of its operations. See *SierraPine—Lease and Operation Exemption—Sierra Pacific Industries*, Finance Docket No. 33679 (served November 27, 2001; slip op., n. 6); *United Transportation Union-Illinois Legislative Board v. STB*, 183 F.3d 607, 612 (7th Cir. 1999).

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expenses it had previously paid to Conrail, there is absolutely no basis in law or common sense for the claim that SMS, either as a common or a contract carrier, would be entitled to require NS or CSX to absorb SMS' switch charges, or to "share" in "the revenue collected by NS on traffic moving from and to the Paulsboro industries." The Director of Compliance and Enforcement specifically advised SMS of this fact in his letter of March 19, 2003. As he pointed out, NS' line haul charge for that traffic, which is contained in confidential transportation contracts between NS and Valero to which SMS is not a party, is for NS' service in transporting cars between the Valero Refinery and other points on NS' system, which does not include in-plant switching services, for which Conrail had been paid separately.³⁹ He correctly stated that "SMS provides no part of the line-haul transportation, and this view is supported by the fact that the Valero traffic is at destination when Conrail delivers it to the Valero interchange."

SMS offers no explanation for its claim that it is entitled to share in the revenue collected by NS for NS' services in moving traffic to the Valero Refinery; nor does it cite any authority supporting that proposition. It is true that connecting common carriers that participate together in interline movements typically subscribe to arrangements whereby one of the carriers (usually the delivering carrier) collects the freight charges from the shipper, which are then distributed among participating carriers pursuant to an interline settlement process. But these are matters of consensual arrangement, not legal mandate. It is well settled that carriers are entitled to establish their own rates for their portion of

³⁹ NS' line-haul transportation *does* include the service provided by Conrail, as NS' agent, in moving cars between the Valero Refinery and nearby Pavonia Yard, where they are picked up or set out by NS. Conrail does not bill Valero for this service, but is paid by NS for it.

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the movement⁴⁰ and also to separately invoice and collect those rates from the shipper. In industry parlance, separately invoiced rates are known as “Rule 11” rates, after Rule 11 of the Railway Accounting Rules promulgated by the Association of American Railways.⁴¹ This rule applies “[w]hen a shipment is to move from origin to destination on a through waybill with more than one road haul carrier responsible to assess and collect freight and accessorial charges” Indeed, in response to NS’ discovery, SMS claims that it “bills for its services [at Paulsboro] under AAR accounting rule 11.”⁴²

Equally baseless is the notion that NS is required to absorb the cost of the in-plant switching at the Valero Refinery themselves, thereby saving Valero the cost of that switching that it previously paid Conrail to provide. This version of a “free lunch” that SMS evidently sold to Valero borders on the fraudulent. SMS’ claim that its assumption of the switching function at the Valero Refinery from Conrail would reduce “Conrail’s cost and, hence, indirectly, NS’ costs” (O.S. at 6) ignores the fact that Conrail’s in-plant switching costs were not included in NS’ line haul rates to Valero but were charged and collected by Conrail separately. The fact that SMS’ assumption of the switching function may have saved Conrail the costs of performing that switching (and deprived it of the associated revenues), provides no basis whatsoever for imposing the costs of SMS’ switching on the line haul carriers rather than on the shipper for whose benefit services

⁴⁰ See, e.g., *Central Power & Light Co. v. Southern Pacific Transp. Co.*, 1 S.T.B. 1059, 1060, n.3, 1064 (1996), *modified in part*, 2 S.T.B. 235 (1997), *aff’d sub nom. MidAmerican Energy Co. v. STB*, 169 F.3d 1099 (8th Cir. 1999), *cert. denied*, 528 U.S.950 (1999).

⁴¹ Exhibit 25.

⁴² Exhibit 6, Response to Interrogatory No. 7.

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were performed.⁴³ In any event, whether or not line haul carriers elect to absorb switching charges or establish joint rates or interline settlement arrangements with connecting carriers (whether common or contract) are matters for the carriers, not the Board, to decide.⁴⁴

III. NS IS NOT IMPEDING THE SAFE AND EFFICIENT EXCHANGE OF TRAFFIC.

SMS also claims that NS has breached its legal duties to SMS by failing “to participate with SMS in establishing through routes to and from the industries located in the Complex at Paulsboro,” and “has refused to interchange carloads of freight with SMS” O.S. at 7. Indeed, SMS goes so far as to assert that NS has “block[ed] altogether” the movement of freight to and from the Valero Refinery. O.S. at 10. These claims, which erroneously assert that NS has impeded the safe and efficient exchange of rail traffic with SMS at Paulsboro, are specious.

⁴³ SMS cites several e-mails in late 2000 from Ms. Jani Marie Creekmere agreeing that SMS’ assumption of switching at Paulsboro would result in savings to Conrail (O.S. at 6), but nothing in those e-mails suggested that NS should therefore absorb SMS’ switching charges without adjustment to NS contract rates; nor do they indicate whether Ms. Creekmere was aware that Conrail had been paid separately for its in-plant switching service.

⁴⁴ See Exhibit 26, [REDACTED]

[REDACTED] As the Director in his letter of March 19, 2003 to SMS, any decision by NS to absorb SMS’ line haul rate would likely entail a revision to NS’ transportation contracts with Valero. He also noted that “[the Board] requested and Norfolk Southern (NS) agreed to consider absorbing your switching fee to Valero through a revision in its transportation contract with Valero. However, as you know, Valero declined NS’ offer to revise their contract to accommodate your switching fee, and instructed you to that effect.”

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In the first place, inasmuch as SMS is not functioning at the Valero Refinery as a common carrier, for the reasons discussed earlier, the statutory obligations on connecting carriers to establish “through routes” and to “interchange”, cited by SMS, do not in fact apply to SMS at Paulsboro, since they apply only to connecting common carriers. More importantly, even if SMS were a common carrier, the substance of those obligations – ensuring the efficient and continuous movement of freight from the shipper’s origin to the shipper’s destination – has clearly been satisfied at Paulsboro. Most importantly, the shipper, Valero, has voiced no complaint about the quality of the transportation services it has received.

With respect to interchange, as noted in the March 19, 2003 letter from the Office of Compliance and Enforcement, SMS declined to execute an interchange agreement tendered to it by Conrail. Nevertheless, as Mr. Ingram of NS wrote to Mr. Sutch on November 21, 2001: “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.” And NS has been providing such services since SMS started switching at Paulsboro.⁴⁵

⁴⁵ Purportedly to demonstrate superior treatment from CSXT, SMS claims that CSXT agreed to interchange with SMS, effective November 28, 2000, citing “Attachment L” to its Opening Statement. O.S. at 9, n. 5. Attachment L, however, is not an interchange agreement but is nothing more than a one-page “Junction Interchange Update Form” There is no indication that CSXT has agreed to anything more than NS has agreed to; on the contrary, documents obtained from SMS in discovery reveal that CSXT, like NS, declined to absorb any part of SMS’ switch charges and required SMS to bill Valero separately for switching services performed on CSXT traffic. Indeed, in Exhibit 24, Mr. Sutch complained to the Board on May 5, 2002 that all of SMS’ “connecting carriers [*i.e.*, NS, Conrail and CSXT] prefer not to recognize SMS as a connecting common carrier railroad subject to the Board’s jurisdiction.”.

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Ever since SMS began service, cars have been moving between it and Conrail (on behalf of NS). There has never been an interruption of the flow of traffic. Inasmuch as cars have moved efficiently from shipper origin to shipper destination without difficulty, NS and SMS have established what is in effect a through route. SMS complains that “[t]he name of SMS does not appear as a participating rail carrier on NS’ bills of lading or on NS’ waybills accompanying the shipments” (O.S. at 4), but this fact is of no significance to the shipper. SMS has also complained that NS does not provide SMS with waybills or, in the case of shipments containing hazardous materials, with shipping papers as allegedly required by Department of Transportation regulations. O.S. at 9. NS, however, provides those documents to Valero, SMS’ principal, and Valero can certainly provide them to SMS if it wishes. Furthermore, Valero, at NS’ request to accommodate SMS, has authorized NS to provide SMS, for each inbound car, certain information sufficient to alert SMS to any potential safety concern, including car initial and number, loaded or empty status, car type, commodity description, consignee and destination. NS is working to make this information available to SMS electronically through NS’ AccessNS system, a web-based electronic customer interface that provides access to information pertaining to active rail shipments.

SMS also claims that NS has been inconsistent in its treatment of SMS, by collecting car hire charges from SMS with respect to non-SMS cars in SMS’ possession at Paulsboro, which charges are payable only by common carriers. O.S. at 11. As SMS acknowledges, however (O.S. at 11), SMS had been paying NS car hire both for cars held by SMS at Pureland Industrial Complex at Bridgeport, N.J., where SMS is operating as a common carrier, and at Paulsboro. As NS advised SMS, NS had no way to know which

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payments were for which. Indeed, NS specifically asked SMS to *stop* paying NS car hire on cars at Paulsboro, since NS cannot separate the Paulsboro payments from the Pureland ones, but SMS continues to pay car hire on these cars.⁴⁶

IV. SMS HAS IGNORED THE SIGNIFICANT IMPLICATIONS OF ITS CLAIM FOR COMMON CARRIER TREATMENT.

Although SMS' arguments about its alleged common carrier status focus on baseless claims about its alleged entitlement to share in NS' line-haul revenues and NS' alleged failure to interchange traffic and establish through routes, 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. If SMS wished to continue providing service, Valero would have to file and win an adverse abandonment proceeding at the Board. *Thompson v. Texas Mexican Railway*. Indeed, SMS acknowledged this in discovery and stated: "Until such time as SMS' discontinuance of service within the Complex at Paulsboro has been authorized, SMS has every intention to fulfill its contractual obligations and its commitments as a common carrier railroad."⁴⁷

In effect, common carrier status would give SMS a bottleneck monopoly at a facility that had previously enjoyed direct access from two line-haul carriers as a result of

⁴⁶ Exhibit 27.

⁴⁷ Exhibit 6, Response to Interrogatory No. 15.

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the Conrail Transaction. There is no basis for concluding that Valero intended such a result when it gave SMS permission to operate on Valero's property at Paulsboro. On the contrary, Valero has stated in this proceeding that the "terms and conditions [of SMS' service], including rates, would be governed by contracts," and that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁴⁸ Valero stated in its petition to intervene in this proceeding that it "remains indifferent to whether SMS is or is not a common carrier today, and therefore takes no position regarding the merits of SMS' dispute with NS over SMS' status," (Valero Petition to Intervene and Statement of Position at 2), but its statements that SMS' rates and service would be governed by contract and that it could be replaced without regulatory approvals clearly indicate that Valero contemplated obtaining a contract carrier, not common carrier, service at Paulsboro. Moreover, whether or not Valero is concerned that SMS would abuse a position as a bottleneck common carrier, SMS' efforts to obtain shares of NS' and CSXT' line haul revenues certainly suggest a propensity on SMS' part to leverage its asserted common carrier status to maximize its revenues.

In any event, the Board should not conclude that parties have intended or effected a reduction in rail competition at a point from two carriers to one in the absence of the most compelling evidence. Indeed, the Board recently stressed its strong presumption

⁴⁸ Valero Petition to Intervene and Statement of Position at 2; Exhibit 3, Response to Interrogatory No. 11.

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against any such conclusion, when it said:

The burden to show that the Board should extinguish competition where it already exists is a difficult one to meet because the Board is guided by its governing statutes and policies, which make competition important. In particular, the [Rail Transportation Policy] emphasizes the role of competition, as 49 U.S.C. 10101(1),(4) and (5). Thus, the Board and its predecessor the Interstate Commerce Commission (ICC), have always been particularly vigilant to protect existing competition produced by market forces. For example, in the rail merger context, which is where the issue usually arises, the Board and the ICC have consistently sought to assure that the agency –approved transactions would not result in the creation of “2-to-1” points, where shippers lose existing intramodal competition.”

Waterloo Railway Co. – Adverse Abandonment – Lines of Bangor and Aroostook R.R.

Co. and Van Buren Bridge Co. in Aroostook County, ME, Finance Docket No. AB-124

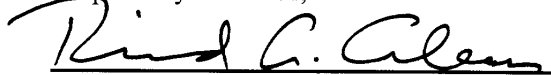
(Sub-No. 2)(served May 3, 2004) (slip op. at 5-6), petition for judicial review pending.

The same considerations strongly militate against concluding that Valero established a bottleneck monopoly carrier at Paulsboro.

CONCLUSION

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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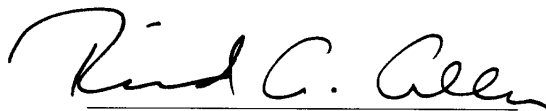
CERTIFICATE OF SERVICE

I certify that on July 19, 2004, a true copy of the foregoing Public version of the
“Responsive Statement Of Norfolk Southern Railway Company” was served by hand
delivery upon:

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A handwritten signature in black ink, appearing to read "Richard A. Allen", written over a horizontal line.

Richard A. Allen

<



Surface Transportation Board

Washington, D.C. 20423-0001

March 19, 2003

Office of Compliance and Enforcement

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Post-It® Fax Note	7671	Date	4-3-03	# of pages	2
To	Fritz Kohn	From	Jeff Sutch		
Co./Dept.		Co.	SMS		
Phone #		Phone #			
Fax #	202-331-8330	Fax #			

Dear Mr. Petrone:

Chairman Nober is in receipt of your February 24th letter, which was received March 3rd, regarding issues involving SMS's operations at the Valero Refinery in Paulsboro, New Jersey, and has asked me to respond.

First, we have provided the opportunity on several occasions for you to meet with Former Chairman Morgan, Chairman Nober, and Board Staff about your concerns. Based on those discussions, it is our understanding that Valero contracted with SMS for SMS to provide rail-related services within Valero's Paulsboro refinery, and that any SMS operations authorized by the Board are confined to the Valero refinery and its interchange track. This would include the track on which SMS interchanges traffic with Conrail. Although SMS was designated as a common carrier pursuant to its filing of a Notice of Exemption to operate the Valero facility, it would appear that SMS's role as a common carrier at Paulsboro is purely contractual.

Also, in your letter to Chairman Nober you suggest that there are open issues before the Board pertaining to the status of your railroad. While you have brought concerns regarding your Paulsboro operation to the attention of this office, I believe it would be an incorrect statement to suggest that there are matters involving SMS currently before the Board. Nevertheless, in our meetings and discussions we have explored your concerns and, where possible, have acted on them. For example, we requested and Norfolk Southern (NS) agreed to consider absorbing your switching fee to Valero through a revision in its transportation contract with Valero. However, as you know, Valero declined NS's offer to revise their contract to accommodate your switching fee, and instructed you to that effect.

I have also explored your claim that the interchange arrangements with Conrail at Paulsboro are inadequate. However, as recently as May of 2002, Conrail's General Counsel contacted SMS President, Jeff Sutch, regarding SMS's failure to execute an interchange agreement with Conrail or to provide "reasonable comments on such an agreement". While it would seem that the interchange arrangement for Valero traffic that has been in effect since you assumed operation of Valero's Paulsboro facility in 2000 is working, it would seem also that Conrail has extended you an opportunity to execute a formal interchange agreement and to comment on its terms, and to the best of my knowledge you have declined.

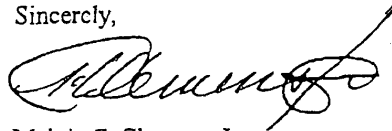
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Letter to Richard Petrone, Page 2.

Further, I have discussed with you your claim that SMS is entitled to a division of NS's line-haul rate contained in its transportation contract with Valero, and I disagree. In addition to the fact that SMS is not a party to NS's contract with Valero, it is my opinion that SMS provides no part of the line-haul transportation, and this view is supported by the fact that the Valero traffic is at destination when Conrail delivers it to the Valero interchange at Paulsboro. Thus, SMS's only function is to switch it into and within the refinery. Regarding your further assertion of problems within the Conrail-operated Shared Assets Areas, our Annual Conrail Oversight proceeding would be the appropriate mechanism through which to introduce any issues relevant to the effectiveness of that transaction.

Finally, I believe that we have fully addressed your issues. While I cannot speak for the Chairman with respect to future opportunities for him to discuss these issues with you further, I am always available to hear from shippers and carriers about issues adversely affecting rail service. In that regard, please feel free to have Valero representatives contact me regarding any matter that impacts adversely on their service at Paulsboro or elsewhere.

Sincerely,



Melvin F. Clemens, Jr.
Director

cc: Chairman Nober

000763

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423

STB Finance Docket No. 34483

SMS RAIL SERVICE, INC. –
PETITION FOR DECLARATORY ORDER

RESPONSE OF SMS RAIL SERVICE, INC., TO
NORFOLK SOUTHERN RAILWAY COMPANY'S
SECOND SET OF INTERROGATORIES AND
REQUESTS FOR PRODUCTION OF DOCUMENTS

Petitioner, SMS Rail Service, Inc. ("SMS"), hereby responds to the Second Set of Interrogatories and Requests for Production of Documents of Norfolk Southern Railway Company ("NS").

The attached documents are responsive to NS' requests which SMS and its counsel have been able to collect in the exercise of due diligence the production of which is not objected to. SMS and its counsel will continue their search for documents responsive to the requests and promptly will provide counsel for NS any additional documents the production of which is not objected to.

Pursuant to the protective order served by the Board on March 15, 2004, interrogatory responses and documents which are produced which are deemed highly confidential by SMS will be marked "Highly Confidential," and interrogatory responses and documents which are deemed confidential will be marked "Confidential," and SMS expects that they will be treated a such in accordance with the protective order.

GENERAL OBJECTIONS

SMS hereby adopts and incorporates by reference its General Objections as set out in its June 1, 2004, Response to NS' First Set of Interrogatories and Requests for Production of Documents.

INTERROGATORIES

1. Has Valero paid SMS for switching rail cars within the Valero Refinery performed by SMS to and from the facilities of any of Air Products and Chemicals, Exxon Mobil Corporation, Oxbow Carbon & Minerals, Inc., and/or Savage Industries, Inc.

Petitioner objects to the interrogatory on the ground that it is not relevant to the subject matter involved in the pending proceeding and is not reasonably calculated to lead to the discovery of relevant information. Notwithstanding the objection, Petitioner states, as follows: Yes, Valero has paid SMS for performing such switching services.

2. If the answer to Interrogatory No. 1 as to any of the named companies is affirmative, were such payments pursuant to any written or unwritten communications between SMS and Valero? If so, identify such written communications and describe in detail such unwritten communications.

Petitioner objects to the interrogatory on the ground that it is not relevant to the subject matter involved in the pending proceeding and is not reasonably calculated to lead to the discovery of relevant information. Notwithstanding the objection, Petitioner states, as follows: There is neither a written nor an unwritten communication between SMS and Valero relating to Valero's payments to SMS for the performance of switching services for the named companies. SMS has no knowledge of what, if any leases, invoices or other agreements there may be between Valero and the named companies containing terms and conditions relating to the performance by SMS of switching services for the named companies.

3. Has any entity other than Valero paid for switching of rail cars within the Valero Refinery performed by SMS to and from the facilities of Air Products and Chemicals, Exxon Mobil Corporation, Oxbow Carbon & Minerals, Inc., and/or Savage Industries, Inc.?

Petitioner objects to the interrogatory on the ground that it is not relevant to the subject matter involved in the pending proceeding and is not reasonably calculated to lead to the discovery of relevant information. Notwithstanding the objection, Petitioner states, as follows:

No, only Valero has paid SMS for the services performed by SMS to and from the named companies.

4. If the answer to Interrogatory No. 3 is affirmative, identify each such entity and explain why the entity paid for such switching.

Not applicable.

5. Has SMS sought payment from any entity other than Valero, NS or CSX for switching of rail cars performed by SMS within the Valero Refinery and been refused payment by such entity. If so, identify each such entity.

Petitioner objects to the interrogatory on the ground that it is not relevant to the subject matter involved in the pending proceeding and is not reasonably calculated to lead to the discovery of relevant information. Notwithstanding the objection, Petitioner states, as follows: No, it has not.

6. Does SMS agree with the statement made by Valero in the Petition to Intervene and Statement of Position of Valero Refining Company—New Jersey filed in this proceeding on May 25, 2004 that the terms and conditions of service to be provided by SMS at the Valero Refinery “including rates, would be governed by contracts.”

Petitioner objects to the interrogatory on the ground that it is not relevant to the subject matter involved in the pending proceeding and is not reasonably calculated to lead to the discovery of relevant information. Notwithstanding the objection, Petitioner states, as follows: The correct and complete statement was “When Valero invited SMS to take Conrail’s place at Paulsboro, it was a matter of indifference to 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.” SMS agrees with that statement.

DOCUMENT PRODUCTION

1. Please produce all documents identified in response to Interrogatory No. 2.

Not applicable.

2. Produce all SMS tariffs in effect at any time since January 1, 2000, including all supplements or amendments thereto.

Petitioner objects to the request on the ground that it seeks information readily available to the Respondent upon an examination of its own files, which contain a copy of Freight Tariff SLRS 8500, issued February 6, 2001, effective March 1, 2001, facsimile transmitted to Mr. John H. Kraemer on February 20, 2001, and produced by NS as part of its May 26, 2004, Second

Response to SMS' First Set of Document Production Requests. Notwithstanding the objection, Petitioner states, as follows: SMS has published no supplements or amendments thereto.

Respectfully submitted,



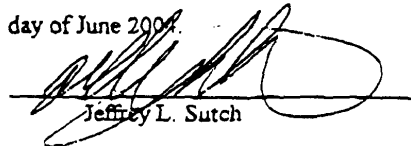
Fritz R. Kahn
Fritz R. Kahn, P.C.
1920 N Street, NW (8th fl.)
Washington, DC 20036
Tel.: (202) 263-4152

Dated: June 21, 2004

VERIFICATION

I, Jeffrey L. Sutch, President of Petitioner, SMS Rail Service, Inc., declare that I am the person responsible for having answered the foregoing Interrogatories and that, under penalty of perjury pursuant to the laws of the United States, the answers are truthful and complete to the best of my knowledge and belief. Moreover, I declare that, in response to the foregoing Requests for the Production of Documents, I have undertaken and caused to be undertaken a thorough and comprehensive search of the files and records of SMS Rail Service, Inc., and its special counsel, and the attached are copies of the documents which were located.

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


Jeffrey L. Sutch

BEFORE THE
SURFACE TRANSPORTATION BOARD

In the Matter of	)	
	)	
SMS RAIL SERVICE, INC. --	)	Finance Docket No. 34483
PETITION FOR DECLARATORY ORDER	)	

RESPONSE OF VALERO REFINING COMPANY - NEW JERSEY
TO NORFOLK SOUTHERN RAILWAY COMPANY'S
FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Valero Refining Company - New Jersey ("Valero") hereby responds to the interrogatories and document production requests served upon it by Norfolk Southern Railway Company ("NS") in the captioned proceeding on June 14, 2004. Verifications in compliance with 49 C.F.R. § 1114.27(a) will be provided upon request.

General Responses and Objections

1. Valero has conducted a reasonable search for information and documents responsive to NS's Interrogatories and Document Requests. Subject to the objections set forth herein, responsive information and documents are being produced.

2. The following General Responses and Objections are made with respect to each of the Interrogatories and Requests, and should be deemed a part of each of Valero's responses and objections thereto. Any additional, specific responses/objections are stated in the response to each Interrogatory and Request.

3. Valero objects to the Interrogatories and Requests to the extent that they

seek information or documents that are protected by the attorney-client privilege, and to the extent Valero believes the attorney-client privilege applies, such documents have not been provided.

4. Valero objects to the Interrogatories and Requests to the extent that they seek information or documents that are subject to protection under the attorney work-product doctrine, including without limitation any materials prepared in anticipation of litigation, or that constitute, reflect or disclose the mental impressions, conclusions, opinions, advice or legal theories of Valero's counsel, and to the extent Valero believes any such privilege applies, such documents have not been provided.

5. Valero objects to the Requests to the extent that they seek confidential and/or commercially sensitive information or documents. Notwithstanding this objection, Valero will produce these documents, designated "Confidential" or "Highly Confidential," as the case may be, subject to the protective order issued in these proceedings on March 15, 2004. Valero's responses to the Requests cover the time period requested, ending with the date hereof.

6. Valero objects to the Interrogatories and Requests to the extent that they seek information or documents in a form other than that maintained by Valero in the ordinary course, or not readily available in the form requested, or are more appropriately obtained from another party to this proceeding.

7. Valero objects to the Requests as unduly burdensome and oppressive to the extent that they seek documents or information that already are contained in NS's own

files or otherwise are in its possession or control, or are readily available from public sources or from another party to this proceeding.

8. Valero objects to the Interrogatories and Requests as unduly burdensome and oppressive to the extent that any of them would require Valero to conduct a special study or analysis to produce the information sought.

9. Valero objects to definition of "Document" as is applies to the Interrogatories and Requests as unduly burdensome and oppressive and seeking irrelevant information, and without waiving this objection, Valero is providing responsive answers and documents, except that Valero is not providing copies of drafts of documents being provided in final form.

While reserving each and every one of the foregoing objections, Valero affirms that it is not intentionally withholding any responsive information or documents on the basis of any of the foregoing general objections at this time, except as specifically noted in paragraphs 3, 4 and 9 above.

Responses to Interrogatories

1. *Identify all written contracts between Valero and SMS pertaining to services provided by SMS to Valero.*

A review of Valero's files has uncovered three responsive written contracts between Valero and SMS pertaining to such services: (1) a "Rail Line Service Agreement" dated June 2000 (the day is not filled in), (2) a "Railcar Loading Service Agreement" dated September 28, 2001, and (3) an undated (but apparently signed in

REDACTED

17. *Has SMS provided Valero with copies of tariffs purporting to state SMS' charges for switching services performed at the Valero Refinery? If so, identify such tariffs and state when SMS first provided copies of them to Valero.*

Valero has not been able to locate such tariffs, if any, and therefore believes that either such tariffs do not exist or that such tariffs were not provided to Valero.

18. *When did Valero commence operations at the Valero Refinery?*

Valero commenced operations at the Paulsboro refinery on September 16, 1998, the day on which Valero purchased the refinery from Mobil Oil (now ExxonMobil).

Valero believes that SMS commenced its services at the Paulsboro Refinery on or about December 1, 2000.

19. *Before SMS began providing switching services at the Valero Refinery, did Conrail provide such services pursuant to a switching contract that was separate from the contracts between Valero and NS and Valero and CSX Transportation, Inc. for line-haul transportation services provided to Valero? If so, identify such contract.*

So far as Valero has been able to determine, such services were provided as common carrier services by Conrail.

Document Production Requests.

1. *Please produce all documents identified in response to Interrogatory No. 1 other than the Rail Line Service Agreement.*

Valero is providing responsive documents, subject to protection as "Confidential" under the March 15 protective Order.

2. *Please produce all documents identified in the response to Interrogatory No. 7.*

Valero is providing responsive documents , subject to protection as "Highly

Confidential” under the March 15 Protective Order.

3. *Please produce all documents identified in the response to Interrogatory No. 17.*

Valero has not located any responsive documents.

4. *Please produce all documents identified in the response to Interrogatory No. 19.*

Valero has not located any responsive documents.

5. *Please produce all documents reflecting, addressing or relating to communications between you, and SMS related to the services provided by SMS or proposed to be provided by SMS at the Valero Refinery, including, but not limited to, all marketing presentations and proposals furnished by SMS relating to its service at the Valero Refinery.*

6. *Please produce all documents reflecting communications between you and any of the companies identified in response to Interrogatory No. 5 addressing or relating to SMS and its service at the Valero Refinery and the Paulsboro Yard.*

7. *Produce all documents reflecting communications between you and CSX addressing or relating to SMS and its service at the Valero Refinery and the Paulsboro Yard.*

Valero objects to Requests 5, 6, and 7 as overly broad and unduly burdensome, and seeking irrelevant information. Without waiving that objection, Valero is providing responsive documents, subject to protection as “Confidential.” Certain financial impact quantifications have been redacted from included internal Valero communications; if those numbers must be included the affected documents will be reclassified as “highly confidential.”

8. *Produce all documents reflecting communications between you and Conrail addressing or relating to SMS and its service at the Valero Refinery and the Paulsboro Yard.*

Valero objects to this request as overly broad and unduly burdensome, and seeking

irrelevant information. Without waiving that objection, Valero affirms that it has not located any responsive documents.

9. *Produce all documents reflecting communications between you and the Surface Transportation Board addressing or relating to SMS and its service at the Valero Refinery and the Paulsboro Yard.*

Responsive documents are included in the response to Document Production

Request No. 5.

Respectfully submitted,

VALERO REFINING COMPANY - NEW
JERSEY

By: Andrea M. Decker
Associate Counsel
Valero Energy Corporation
One Valero Way
San Antonio, Texas 78249
Phone: (210) 345-3098

Of Counsel:

Slover & Loftus
1224 17th Street NW
Washington, DC 20036

Dated: July 1, 2004

C. Michael Loftus
Donald G. Avery
Kendra A. Ericson
Slover & Loftus
1224 17th Street NW
Washington, DC 20036
Phone: (202) 347-7170

HIGHLY CONFIDENTIAL
SUBJECT TO STB PROTECTIVE ORDER

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 \$18,600. 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,

CONRAIL CONTRACT # ICC CR-C-21547

000144

PAGE 1

TRANCO WISE:ED 25. TY 070

PAGE 03

HIGHLY CONFIDENTIAL
SUBJECT TO STB PROTECTIVE ORDER

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; strikes, 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.

5. 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-22A, 2001 MARKET STREET
PHILADELPHIA, PA 19101-1423

IF TO CUSTOMER:

MOBIL OIL CORPORATION
LOGISTICS SUPPORT SURFACE TRANSPORTATION FCA
1235 GALLOWAY ROAD RM 8A701
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: _____

FEB

TITLE: _____

DATE: _____

CONSOLIDATED RAIL CORPORATION

CONRAIL CONTRACT # ICC CR-C-21547

PAGE 2

000145

SEP-08-1997 18:00 FROM PUBLIC US58L 003-846-5446 TO

012102051022 P.04

HIGHLY CONFIDENTIAL
SUBJECT TO STB PROTECTIVE ORDER

BY: _____
TITLE: _____
DATE: _____

CONTRACT CONTRACT # IDC CR-C-21547

PAGE 3

000146

TURNED IN 100 26. 11 578

4/4/0
OCT 27 2000 17:51

TOTAL P.04
PAGE.05

Poff, Brenda

HIGHLY CONFIDENTIAL
SUBJECT TO STB PROTECTIVE ORDER

From: Liddell, Jim
Sent: Tuesday, November 14, 2000 4:58 PM
To: Poff, Brenda
Subject: FW: Valero Switching Contract/CR C 12325

Brenda:
For your files.
Jim Liddell

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

From: Liddell, Jim
Sent: Monday, October 30, 2000 12:41 PM
To: Osborne, Joe
Cc: Williams, Bill
Subject: Valero Switching Contract/CR C 12325

Joe Osborne, Roanoke:

Please refer to your note and questions appended to the fax copy of CR C 12325, a contract covering switching at Mobil Oil and its successor Valero, at Paulsboro, NJ.

Question #1: Does this apply to Valero?

Answer: The file indicates that Mobil would not assign its contracts to Valero. On 9/16/99, Valero started on its own and had no knowledge of this contract. The agreement, expired on 8/31/99.

Question #2: Was it ever executed?

Answer: Yes, it was executed by Mobil and has now expired per the agreement.

Question #3: Has Mobil/Valero ever been billed?

Answer: Yes. Mobil paid the monthly the contract rate. After it sold its plant on 9/16/99, to Valero, Mobil was retained by Valero to handle administration of contracts and payment of freight bills until such time as Valero had the infrastructure to handle these matters.

Although the contract actually expired on 7/31/99, NS continued to send bills to Mobil. Mobil paid the August bill but did not pay September 1999.

I was involved with a freight collection effort with Valero and found out about this switching contract. As Valero had no knowledge of the agreement and it was not on the list of contracts, it had no basis on which to pay the bill. We negotiated a settlement that resulted with Mobil paying half and Valero paying half.

The request from Valero to NS for future switching bills was for NS to assess Valero based on the actual switches, starting with October 1, 1999, and Valero would pay those bills when received.

Question #4: About this contract, what switch rate applies?

Answer: Subsequent to 7/31/99, to date, the only rate that applies is the existing tariff rate. When the contract expired Mr. Marion Lewis, Valero, insisted on not renewing the agreement. He felt that the plant may have become somewhat loose in management and was asking for unnecessary switches. He wanted to tighten the process and see exactly what would be necessary to provide actual service for plant operation.

We were to provide switch bills based on tariff rates but were never able to get the detail to support such billing.

Earlier this month, I was involved with a conference call involving RACS, CYO, AOC, & CR. The meeting was address how to resolve these old switching charges and how to proceed in the future. The result was Wes Alexander providing RACS, Melanie Price, an authority to waive the old bills and to start fresh. There would have been no way to realistically resurrect the old switching charges without a major manual effort, and even that may have been less than complete. Copies of those notes are available if you wish.

The bottom line is simple: we have not assessed, or collected, a switching charge from Valero from 10/1/99 thru 9/30/00. This was covered in other emails between RACS, AOC, and me.

If I may be of further assistance, please let me know.

Jim Liddell

cc: Bill Williams

Exhibit to Conrail Contract

CR-C-12325

This Exhibit applies only to the origin/destination pairs listed in this Amendment.

Carrier (Conrail) and Shipper acknowledge that CSX Corporation ("CSX") and Norfolk Southern Corporation ("NS") have filed a joint application to the Surface Transportation Board to acquire control over the business and properties of Carrier, which application - if approved - will result in the business and properties of Carrier being divided and made available to CSX Transportation, Inc. and Norfolk Southern Railway Company, the railroad subsidiaries of CSX and NS. Shipper acknowledges and agrees that at any time within 180 days after the entry of a formal written order by the STB approving such transaction, this contract may, on written notice, be reopened for renegotiation by CSX Transportation, Inc. or Norfolk Southern Railway Company, or both as the case may be (depending upon which railroad(s), under the STB's approval order, has or have been allocated the rail operating responsibility for the rail lines used to carry out the contract movement(s) covered hereby) or by Shipper, and if no renegotiation is consummated within ninety days after such notice, this contract shall terminate immediately.

Jay - 880-3127

Jim Liddell:

More on Valero &
JMS. Please review with
Tom Tomaney & advise:

- ① Does this apply to Valero?
- ② Was it ever repudiated?
- ③ Has Mobil / Valero ever been billed?
- ④ About this contract, what sweetest rate option?

Joe/10-30

cc: Pat Lewis: Do you have
any record of this
contract?

Follow up - 11/6/00?
Jim - Any response?
Please send to me
or to Joe with
cc to me.
B. Post

JOE OSBORNE
FAX 985-6706

000142

REDACTED

Liddell, Jim

HIGHLY CONFIDENTIAL
SUBJECT TO STB PROTECTIVE ORDER

To: Osborne, Joe
Cc: Williams, Bill; Plain, Bob
Subject: RE: Valero*HOT* Paulsboro NJ, SMS Plan

Joe Osborne, Roanoke:

Joe:

This is SMS' 3rd attempt to do this. Twice before with Valero's predecessor at Paulsboro, Mobil Oil, SMS doing 3rd party switching was discussed. This is not an issue that is being pushed by Valero HQ but instead is a plant-proposed issue. The plant budget is charged for the intraplant switching cost and the SMS proposal, on the surface, helps the plant operating budget.

Today, Valero has leased trackage on SMS to support its operation. SMS approached the plant personnel and proposed that it take over plant switching with the usual offerings: No percar switching charges, constant availability of a locomotive & crew, and not having to deal with the associated issues of a large railroad. All of this at no cost to Valero.

SMS told Valero, according to Mr. Marion Lewis, Manager Rail, Valero HQ, San Antonio, that SMS would incorporate Valero into the SMS system, establish an interchange with CR, and receive revenue from CR in an amount equal to what CR has built into its linehaul rates for terminal switching costs. Further, SMS tells Valero that no additional charges will be due to SMS from Valero. On the surface, Valero views this as a savings of +/- \$15,600 per month that it has been paying to CR (old CR and New CR) for intraplant switching.

We should understand that Valero did not utilize any transportation experience when it built its transportation department, and while Marion is quick to understand, he has no point of reference on what we do. He was told by SMS that each linehaul rate included a switch to spot and a pull from spot as part of the cost. He was of the understanding, from SMS, that SMS would be recouping from each carrier, the entire cost of the Paulsboro move.

I explained to him, yesterday, that SAA/CR incurred costs of switching the cars between NS and CSXT and then positioning cars somewhere for SMS would not go away. I asked Marion to be very careful in reviewing his package and did not encourage the operation. He understands that if SMS were to be successful in getting the plant approval, Valero could possibly be exposed to potential rate increases or find that SMS is not able to provide the service for free.

We had a good dialog and he seems to understand the situation better than before; however, he was willing to let the plant make the final call. He did tell me that he has instructed the plant to make a total review and either do it or bury it where it never resurfaces. HQ has too much involved with its current acquisition of the ExxonMobil Benicia, CA, plant to do multiple reviews of the same issue. Marion will be on vacation next week, so if I need to talk further to him, please let me know quickly.

Jim Liddell
Houston Sales

cc: Bill Williams, Houston

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

From: Osborne, Joe
Sent: Friday, March 31, 2000 11:44 AM
To: Liddell, Jim
Cc: Williams, Bill
Subject: Valero, Paulsboro NJ

Jim:

I understand that Valero is your customer.

SMS apparently wants to become the switching railroad at their plant. This is a bad idea for Valero, and for NS/CSX.

Would you investigate this and tell me what is going on?

Then let's discuss.

Joe

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

000153

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REDACTED

Jeff Sutch

From: <BowersC@valero.com>
To: <brochup@valero.com>; <EisenmannJ@valero.com>; <ChristensenG@valero.com>;
<PechulisG@valero.com>; <GoatsL@valero.com>; <BenjaminN@valero.com>;
<QuinnW@valero.com>; <CarpenterJ@valero.com>; <DuganT@valero.com>;
<KryniskiS@valero.com>; <HorbiakR@valero.com>; <PhairM@valero.com>;
<ArneyJ@valero.com>; <MinnitiF@valero.com>; <EllisL@valero.com>; <VillariP@valero.com>;
<GoatsL@valero.com>; <DurhamW@valero.com>; <KingEdward@valero.com>;
<MichaelA@valero.com>
Cc: <jeffs@sms-pennjerseyrail.com>
Sent: Wednesday, October 04, 2000 1:41 PM
Subject: SMS Rail Transition

Since the beginning of the year, Valero has been negotiating with a short line rail carrier, SMS, to handle the Refinery's switching and rail maintenance. A contract was finally approved on August 31st.

 CONF.

SMS wanted the agreement kept quite until Federal approval had been obtained.

This was acquired on September 13th.

SMS is now negotiating with the rail carriers for a workable interchange outside the Refinery.

Now that all rail carriers are aware of the agreement, we would like to bring SMS's manager, Jeff Sutch, in to be introduced to everyone and answer any questions.

It has been agreed, the best time for all to meet with Mr. Sutch, would be Wednesday, 10/11, at 9:15 A.M. in the DCS large meeting room.

The agenda will consist of introductions, a short progress report, current status, and pending requirements.

Questions and concerns can be addressed at this time.

0000277

10/5/00

REDACTED

- C058.59.206

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Finance Docket No. 33927

SMS RAIL SERVICE, INC.
-- ACQUISITION AND OPERATION EXEMPTION --
IN GLOUCESTER COUNTY, NJ

VERIFIED NOTICE OF EXEMPTION
OF
SMS RAIL SERVICE, INC.

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.

Dated: September 5, 2000

- 1 -

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Finance Docket No. 33927

SMS RAIL SERVICE, INC.
-- ACQUISITION AND OPERATION EXEMPTION --
IN GLOUCESTER COUNTY, NJ

VERIFIED NOTICE OF EXEMPTION
OF
SMS RAIL SERVICE, INC.

SMS Rail Service, Inc., of Bridgeport, New Jersey ("SMS"),
pursuant to 49 U.S.C. 10902 and 49 C.F.R. 1150.41, et seq.,
states, as follows:

1. Applicant's name and address:

SMS Rail Service, Inc.
P. O. Box 711
Bridgeport, NJ 08014
Tel.: (856) 467-4800

BHP is a Class III common carrier railroad subject to
the Board's jurisdiction, pursuant to the Verified Notice of
Exemption in Finance Docket No. 32494, SMS Rail Service, Inc.--
Lease and Operate Exemption--Pureland Association, Inc., served
May 26, 1994.

2. Name and address of applicant's representative:

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

3. Agreement:

SMS has reached an agreement with the Valero Refining Company - New Jersey, a State of Delaware corporation ("Valero"), to acquire pursuant to their Rail Line Service Agreement, dated August 31, 2000, maintain and operate the railroad track within Valero's 970-acre Paulsboro refinery, formerly the refinery of Mobil Oil Corporation, extending northward from a connection 950 feet to the west of Milepost 14 on the Paulsboro Industrial Track of Consolidated Rail Corporation, a distance of approximately 5.8 miles in Gloucester County, New Jersey. The railroad line in question, which is owned by Valero, currently is maintained by Valero but operated by Consolidated Rail Corporation.

4. Operator:

The operator of the line will be SMS.

5. Summary of proposed transaction:

a. Grantor's name and address:

Valero Refining Company - New Jersey
800 Billingsport Road
Paulsboro, NJ 08066

b. Consummation date:

On or after September 12, 2000.

c. Milepost designations:

The railroad line extends northward from a connection 950 feet to the west of Milepost 14 on the Paulsboro Industrial Track of Consolidated Rail Corporation, a distance of approximately 5.8 miles in Gloucester County, New Jersey.

d. Mileage:

The total miles of railroad line proposed to be acquired, maintained and operated by SMS is approximately 5.8 miles.

6. Map:

Maps of the railroad line are attached.

7. Environmental certification:

Since the proposed transaction is a Class III railroad acquisition under a class exemption from the provisions of 49 U.S.C. 11323, et seq., which will result in no significant changes in railroad operations, that is, no increase in rail traffic of more than fifty percent or three trains a day on any segment of rail line or a twenty percent increase of rail yard activity, no environmental documentation is required, pursuant to 49 C.F.R. 1105.6(c)(2). Similarly, since the proposed transaction will not result in the disposition or alteration of properties subject to Commission jurisdiction that are 50 years old or older, no historic report is required, pursuant to 49 C.F.R. 1105.8(b).

8. Revenue certification:

The annual revenue of the line to be acquired, maintained and operated by SMS, together with SMS' projected annual revenue, do not exceed \$5 million; neither do they exceed that of a Class III railroad.

- 4 -

Respectfully submitted

SMS RAIL SERVICE, INC.

By its attorney,

A handwritten signature in dark ink, appearing to read 'Fritz R. Kahn', with a stylized flourish at the end.

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

Dated: September 5, 2000

Sep 05 00 03:19p

SMS/ nnn- Jersey Rail

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SEP 05 2000 14:46 FR THOMPSON, HINE, FLORY

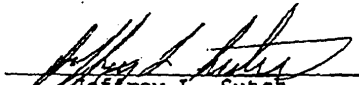
TO *04152* 36000 P.07/08

- 0 -

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 Petition for Exemption 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 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, NJ, this 5th day of September 2000.


Jeffrey L. Sutch

Post-it® Fax Note	7671	Date	9-5-00	# of pages	1
To	Fritz Kahn	From	JEFF Sutch		
Co./Dept.		Co.	SMS		
Phone #		Phone #			
Fax #	202-331-8330	Fax #			

CAPTION SUMMARY

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

STB Finance Docket No. 33927

SMS RAIL SERVICE, INC.
-- ACQUISITION AND OPERATION EXEMPTION --
IN GLOUCESTER COUNTY, NJ

SMS Rail Service, Inc., has filed a Verified Notice of Exemption under 49 U.S.C. 10902 and 49 C.F.R. 1150.41, et seq., to acquire, maintain and operate the railroad track within the refinery of Valero Refining Company - New Jersey, extending northward from a connection 950 feet to the west of Milepost 14 on the Paulsboro Industrial Track of Consolidated Rail Corporation, a distance of approximately 5.8 miles in Gloucester County, New Jersey. The transaction was expected to be consummated on or after September 12, 2000. Comments must be filed with the Board and served on Fritz R. Kahn, Fritz R. Kahn, P.C., 1920 N Street, NW (8th fl.), Washington, DC 20036-1601. The Notice of Exemption is filed under 49 C.F.R. 1150.41, et seq. If the Notice of Exemption contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10505(d) may be filed any time. The filing of a petition to revoke will not automatically stay the transaction.

Tubman, Dutch

HIGHLY CONFIDENTIAL
SUBJECT TO STB PROTECTIVE ORDER

From: Mason, Sam
Sent: Monday, November 27, 2000 3:38 PM
To: Osborne, Joe
Cc: Tubman, Dutch; Hennessy, Francis
Subject: FW: SMS RR

Follow Up Flag: Follow up
Due By: Monday, November 27, 2000 8:30 AM
Flag Status: Flagged

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

From: Mason, Sam
Sent: Wednesday, November 22, 2000 4:30 PM
To: Mason, Sam
Subject: FW: SMS RR

Joe Osborne:

I have gathered several of the SMS e-mail info that I have available and copied it into one below e-mail. Not all of the e-mail dates copied over but the context is there. **SOME OF THE MORE IMPORTANT ISSUES and DATES ARE AS FOLLOWS:**

--Sept. 16th--e-mail from Kraemer advising of SMS's intent to do the swithing for these customers.

--Sept 21st--Fran Hennessy/Dutch Tubman met with SMS to discuss their plan of operation, noting that Jeff Sutch-SMS advised he would be charging NS \$225 p/c to do the intra plant switching for Valero, including Oxbow Carbon, Exxon/Mobil Research and Air Products. At this point, SMS had only been advised by us that we would look into any savings, but was not going to absorb any additional cost.

--Oct. 3rd--my e-mail to you recommending no absorbtion , unless SAA can assure us a cost savings.

--Oct. 16th--e-mail from Robert Poole stating that cost dept. advised NS would be paying SAA a certain figure regardless who does the switching at Paulsboro.

--Oct 17th -Dutch Tubman advised by e-mail that no reduction paid to SAA would be incurred by SMS doing this intra plant switching at Paulsboro NJ, thus Coal and Merchandise Mkt agreed NS WILL NOT absorb ANY of the \$225 p/c switch charge.

--Oct. 17th ---Fran Hennessy advised Jeff Sutch- SMS verbally and by e-mail that NS **would not absorb any** of their \$225 p/c switching charges.

--Oct 10th --Tom Torsney advised Fred Sitzler- Mobil/Exxon Research that NS would not absorb any of the \$225 p/c SMS switching charge

--Oct. 26th---Jim Liddell advised Valero that NS would not absorb any of the \$225 p/c SMS switching charge.

--Oct. 25th--Pat McCarthy advised Air Products that NS would not absorb any of the \$225 p/c SMS switching charge

--Nov 10th--Tony Ingram advised NS would not create an interchange agreement at Paulsboro with SMS I'm advised by SAA--Bob Dawson & John Scullin that all cars will be placed on the Valero lead track for I interchanging of traffic to these four customers.

-- Nov.14th--Robert Poole-Coal Dept officially notified Ed Merwin Oxbow that NS would not absorb any of the \$225 p/c SMS switching charge, however, had verbally discussed the same weeks prior.

--Nov. 22nd--SMS sent Dutch Tubman advising operations for the four customers would commence 11/28 and SMS will now be a junction settlement carrier with a rate of \$165 p/c. Dutch advised he has gone to George Aspatore for interpretation of the SMS profile agreement. IF SMS is allowed to be a junction settlement carrier, presume all rates will need to be increased by \$165 p/c.

If you need anything further, please let me know.

CONFIDENTIAL
SUBJECT TO STB PROTECTIVE ORDER

Sam Mason

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

From: Mason, Sam
Sent: Wednesday, November 22, 2000 3:53 PM
To: Mason, Sam
Subject: FW: SMS RR

Sam:

Understood that SMS's switch cost will not be absorbed. However, next steps must be 1) per the STB filing and its approval designating SMS as the Common Carrier, interchange point between CSX and NS will have to be established and accounting procedure set up (CR, per its Operating Agreement, cannot enter into interchange agreements, it exists only in behalf of CSX & NS);

[Privileged material redacted (Attorney-client communication)]

2)as this work will no longer be done by SAC crews, and as this work accounts for 60% to 70% of the work done by Paulsboro SAC crews, therefore, a savings should be reflected in our monthly SAC expense. Once the i/c is established, the only SAC charge incurred should be M of W zone charges.

Also, according to Valero in Paulsboro, a meeting was held and those affected customers in Paulsboro have been notified that SMS will be the serving railroad.

Cy: Mike Haig - Sr. Manager-Jt. Facilities

By copy of this e-mail, I am informing Jt. Facilities of the above facts so that when the monthly invoice from SAC is presented, starting December 1 (for services rendered in November), the invoice should reflect a savings. I will be in Atlanta 10/27 and will bring file re: this issue and, hopefully, be able to answer questions you may have and/or apprise you of all that has transpired.

Thanks, Jani Marie

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

From: Eisenach, Steve D.
Sent: Friday, October 20, 2000 9:59 AM

000174

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



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	Jeff Sutch		
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

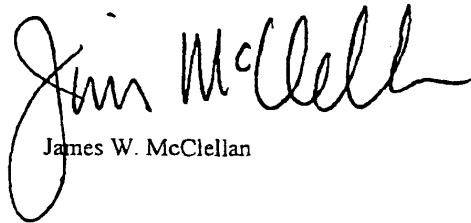
000854

Jeffrey L. Sutch
November 7, 2001
Page 2

lease of the in-plant tracks at Valero'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 cursive script, appearing to read "Jim McClellan".

James W. McClellan

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

000555

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

000353

Fax (856) 467-2121
Fax (610) 828-7481



Your Destination in Rail Freight

Post Office Box 711
Bridgeport, NJ 08014
NJ (856) 467-4800
PA (610) 828-1863

VIA MAIL AND FAX (202) 565-1573

Melvin F. Clemens, Jr.
Director
Office of Compliance and Enforcement
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

RECEIVED
SURFACE TRANSPORTATION
BOARD
NOV 13 12 04 PM '00
OFFICE OF COMPLIANCE
AND ENFORCEMENT
DIRECTOR'S OFFICE

Dear Mr. Clemens:

Pursuant to an agreement, dated August 31, 2000, Valero Refining Company- New Jersey, sought to replace consolidated Rail Corporation with SMS Rail Lines, Inc., to switch cars to, from and within its 970-acre refinery at Paulsboro, in the shared-assets area of New Jersey.

By its verified notice of exemption in STB Finance Docket No. 33297, SMS Rail Service- Acquisition and operation exemption- Valero Refining Company- New Jersey, served September 22, 2000, SMS secured the requisite authority to provide the requested service, effective September 12, 2000.

In the intervening time, SMS has had any number of meetings with representatives of Conrail and Norfolk Southern Railway Company, which together with CSX Transportation, Inc., is the line haul carrier over which the incoming and outbound cars are transported. SMS and NS have been parties to a handling agreement, similar to a joint marketing agreement.

The final meeting was held on October 27, 2000. SMS was prepared to start operations on November 01, 2000. It was agreed to extend the start up operation date until November 15, 2000, in hopes that the interchange issue could be resolved among all parties.

The final result of the meetings has been that NS, CSXT and Conrail have refused to designate interchange tracks in the coke yard area of the Paulsboro Yard adequate to permit the orderly interchange of traffic.

Moreover, NS, CSXT, Conrail have declined to absorb SMS' proposed switching charge or refused to reduce the rates to and from Valero to reflect the fact that neither one will continue to provide a service that heretofore has been rendered.

Finally, NS, CSXT, Conrail propose to assess Valero a \$225.00 per car storage charge for any cars consigned to or received from Valero that cannot be accommodated on the single interchange track they are prepared to make available to SMS.

000047



Sales & Marketing
500 Water Street
Jacksonville, FL 32202

September 11, 2001

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

Dear Jeff:

As a follow-up to our recent conversation, be advised that CSX Transportation will, effective for all traffic waybilled on or after November 1, 2001, discontinue the handling of SMS switching charges at Paulsboro, NJ through the interline switch settlement process. As of that date, SMS must look to its on-line customers for the payment of any charges due for the movement of cars between the CR/CSXT - SMS interchange and the SMS served location.

Please note that our decision to discontinue the interline switching arrangement is limited to the Paulsboro location and that there will be no change in the existing arrangement at Bridgeport.

CSXT feels that the recent meeting with Valero was quite constructive in that the concerns of all parties are more clearly understood, there remain, however, significant differences over how to shape our common commercial relationship at this location. While our commercial interface will take on a new form, be assured that CSXT will continue to work with SMS and Valero to ensure the availability of effective rail service.

If you have any questions about the transition process, please give me a call

Very truly yours,

Mark S. Bennett, Director
Shortline and Regional Railroad Developm

CC: R. C. Moody

000583

Post-it® Fax Note	7671	Date	10-1-01	# of pages	1
To	FAIR Kohn	From	JEFF SUTCH		
Co./Dept.		Co.	SMS		
Phone #		Phone #	856-467-4900		
Fax #	202-331-9330	Fax #			

Jeff Sutch

From: <KingEdward@valero.com>
To: <SiranoC@valero.com>; <jeffs@sms-pennjerseyrail.com>
Cc: <MichaelA@valero.com>; <PechulisG@valero.com>
Sent: Thursday, August 16, 2001 9:08 PM
Subject: CSX / SMS_edi problem

Gentlemen,

We need to discuss this issue (below e-mail) immediately. What is described is not only truly bad business but is bad press for us.

Can we meet 8/17 in the morning or at least by phone? I want to understand what is happening here and offer our action plan right away. Please contact me when you can.

thanks,
ed k

Edward King
Economics and Planning Manager
Valero Refining Company - New Jersey
Office - 856.224.4334
Pager - 856.277.4563

----- Forwarded by Edward King/PEUSA on 08/16/2001 05:04 PM -----

Marion Lewis

To: Edward King/PEUSA@PEUSA
cc: Andrea Chionsini/PEUSA@PEUSA, Al Michael/PEUSA@PEUSA, Debbie Freer/PEUSA@PEUSA
Subject: CSX / SMS_edi problem(Document link: Edward King)

I'm disturbed to learn today that CSX carries a very large "aged" accounts receivable for Valero stemming from incorrect SMS edi billing to CSX. Incorrect PCS freight bills are a part of the problem; our shipments of lpg to NGL are another component. Basically, incorrect information in SMS edi billing, and the very fact that SMS is rebilling Paulsboro freight following Paulsboro's billing of the cars, have both contributed to this "aged receivable". Also contained in this aged receivable is "double billing" - - our faxed billing has one date and SMS billing has another for the same load.

This is very bad business - - I've asked CSX to contact Jeff Sutch at SMS and ask that SMS stop the edi communication to CSX for Paulsboro billing. CSX does not want to continue to receive both Valero and SMS billing for the same freight. We are currently perfecting our own edi application which will replace our fax bill of lading routine with the railroads.

000718

8/16/01

Hence, SMS will ultimately have to discontinue their edi routine sooner or later.

SMS has contended that they must perform this edi function in order to (i) be compensated by CSX, and (ii) be shown in the routing. Our faxed bill of lading to CSX (i) includes SMS in the routing and (ii) triggers the process for CSX to receive their compensation.

I have initiated a new invoicing procedure with CSX whereby invoices from CSX will no longer be received. We will begin a procedure called "suppressed billing" - already underway with Norfolk Southern. Basically we will pay freight to CSX based on our faxed bills of lading to CSX. We will tally the bills of lading every 15 days, and send to CSX an Excel backup document along with our payment. SMS edi billing will continue to confuse/complicate our business with CSX after this new routine is in place.

I must first clean up this "aged" receivables problem with CSX before they will consider beginning "suppressed billing".

The SMS edi issue is something that has been "festering" for some time. As it has continued to cause problems for Valero with CSX, I would like you to please support S.A. in ending the SMS edi routine for Valero freight. Thanks very much. rgds MLL

ED KING:

Andrea
Chionsini To: lewism@valero.com, Al Michael, Jack J
Ciallella@PEUSA@PEUSA
08/16/2001 cc: Steve Simpson
11:46 AM Subject: CSX bills for PCS

000719

8/16/01

Marion,

Jeff Sutch, SMS President, has asked me to respond to your recent e-mail regarding CSX/SMS_edi problem.

Thank you for bringing this "double billing" problem to our attention. Currently, Jack and I create a Bill of Lading and fax this to Conrail (Shared Assets) to satisfy FRA regulations. We then fax the BOL's to either the NS or CSXT to dictate car movement. Finally, we fax the BOL to SMS Headquarters in Bridgeport, NJ because they are either the originating or terminating carrier. They use the BOL's to generate an electronic EDI waybill. This waybill is then electronically sent to Kleinschmidt, who forwards the information to the other carriers. In our instance, this is either NS or CSXT.

It is our understanding that because CSXT is receiving both the Bill of Lading and a waybill for the same cars, it is causing confusion, which in turn is creating "double billing."

We spoke to RMI (Railcar Management) the company that supplies SMS with their EDI package. They have instructed SMS on how to disconnect the function that transmits the waybills to Kleinschmidt. According to Dave, RMI Technical Support, the CSXT and NS will no longer receive an electronic waybill. They will only receive the Bill of Lading Jack and I fax. This should eliminate the confusion thus the problem. We will keep an eye on this new process just to be sure.

Regards,

Tina Crispi



COPY

000721



**NORFOLK
SOUTHERN**

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,

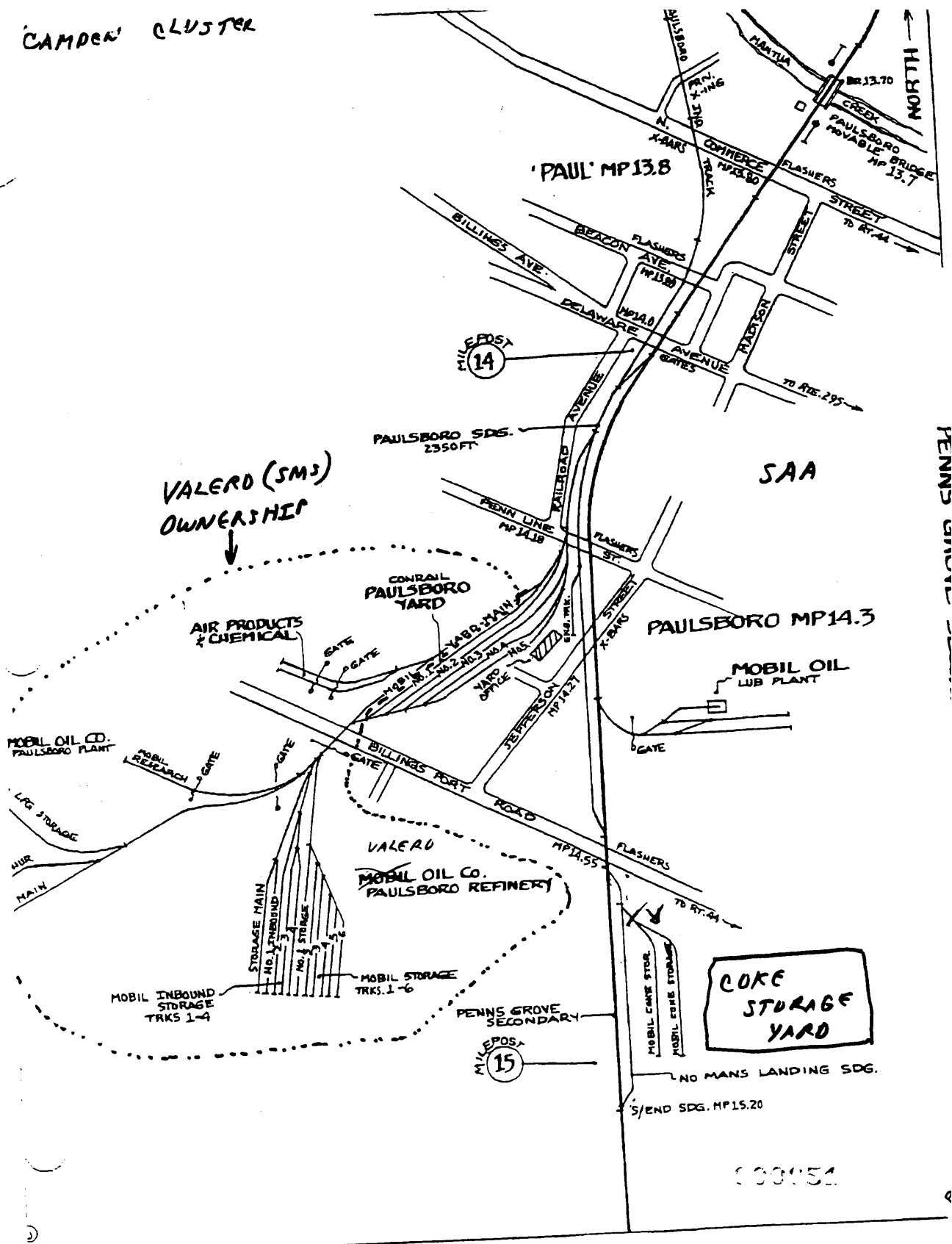
A handwritten signature in dark ink, appearing to read "T. L. Ingram", followed by a horizontal line.

T. L. Ingram

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

00001

'CAMPER' CLUSTER



Nov 21 00 03:04p

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P. 1

NOV 21 '00 02:42PM TREAS

P.1/15

CONRAIL



November 21, 2000

Post-it® Fax Note 7671		Date 11-21-00	# of pages 15
To Fritz KAHN	From Jeff Sutch		
Co/Dept	Co. SMS		
Phone #	Phone #		
Fax # 202-331-8330	Fax #		

PLEASE Call After Review Thank. PK

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

Transmission via fax: 856-467-2121

Dear Mr. Sutch:

Attached is the Interchange Agreement for Conrail to operate on Track 234 in Paulsboro Yard, New Jersey for the purpose of interchange.

It is Conrail's understanding that you desire to start this interchange service on November 28, 2000. After you have reviewed and agreed to the terms, Conrail is required to obtain Board of Directors' approval. However, Conrail is willing to provide this service on an interim basis, pursuant to the terms and conditions of the attached agreement. Should Conrail's Board of Directors approve the agreement, Conrail will then execute it. If it is not approved, we will renegotiate new terms and this agreement will be of no further effect.

Please acknowledge your concurrence on behalf of SMS Rail Service, Inc. in the space provided below, returning by fax (215-209-5346) this executed letter agreement for our records.

Very Truly Yours,

Paul J. Deppen, Jr.
Manager-Joint Facility Contracts

ACCEPTED ON BEHALF OF SMS RAIL SERVICE, INC.:

BY: _____

TITLE: _____

DATE: _____

Attachment

CONSOLIDATED RAIL CORPORATION 2001 MARKET STREET P. O. BOX 41410 PHILADELPHIA, PA 19101-1416

000747

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

000743

CONRAIL®



Jonathan M. Broder
Assistant Vice President-Law
(215) 209-5020
FAX (215) 209-4819

VIA TELECOPIER

November 27, 2000

Mr. Fritz Kahn, Esquire
Law Offices
Eighth Floor
1920 N Street, N.W.
Washington, D.C. 20036-1601

Re: Paulsboro Interchange

Dear Fritz:

I have received a copy of a letter marked "draft", sent by your client, SMS/Penn-Jersey Rail Lines to Mr. Paul Deppen, Manager of Joint Facility Contracts at Conrail on November 22 concerning the above. I am responding because of the legal issues raised by the letter.

Conrail has provided to SMS a standard form of interchange agreement to implement the service the customers at the Valero Refining Company apparently have requested that your client perform in place of Conrail. I say apparently because it is not clear to us that all of the affected customers were ever informed about the change in operations. Nevertheless, we have had several conversations and meetings with your client and have mutually agreed to the proposed interchange operation, effective November 28, 2000.

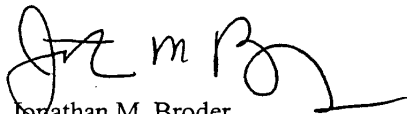
Your client's attempt to condition the acceptance of the interim agreement on the applicability of a Norfolk Southern tariff is not, of course acceptable. This was never discussed before. More importantly, Conrail is not a party to such a tariff and cannot bind the Norfolk Southern. You should direct your request to the appropriate parties at that company. Finally, your reference to other interchange arrangements with other parties at other locations is irrelevant. Each arrangement is made based upon the specific situation presented to our transportation department and our Company. Conrail has made reasonable interchange facilities available to SMS in compliance with applicable law. Whether that arrangement is to SMS's liking or is the optimal arrangement from SMS's perspective does not equate to a legal violation.

000744

Mr. Fritz Kahn
Page 2
November 27, 2000

We will work in good faith to meet our legal obligations and to meet our customers' needs.

Sincerely,


Jonathan M. Broder
Assistant Vice President-Law

cc: Honorable Melvin F. Clemens, Jr. – Surface Transportation Board
-33 *Paul* T. T. O'Toole
D. Nelson
R. Batory
Paul Deppen

000745

LAW OFFICES
FRITZ R. KAHN, P.C.
EIGHTH FLOOR
1920 N STREET, N.W.
WASHINGTON, D.C. 20036-1601

(202) 263-4152
FAX (202) 331-8330
e-mail: xiccgc@worldnet.att.net

November 29, 2000

VIA MAIL AND FAX (215) 209-4819

Jonathan M. Broder, Esq.
Assistant Vice President-Law
Consolidated Rail Corporation
P.O. Box 41416
Philadelphia, PA 19101-1416

Dear Jon:

Thank you for your letter, dated November 27, 2000, relating to the Interchange Agreement between this firm's client, SMS Rail Service, Inc., and Consolidated Rail Corporation, which assigns Track 234 in Conrail's Paulsboro, NJ, yard for the handling of cars to and from the industries at the refinery of Valero Refining Company-New Jersey.

You state that, if there is a need for temporarily using additional track within the Paulsboro Yard to effect the interchanges and such track is made available, the storage charge of Norfolk Southern Railway Company Tariff No. 6004-B, Section 2, page 16, would be inapplicable. You do not state, however, what charges will be assessed.

In a transparent attempt to discourage Valero's use of SMS, Conrail's representatives advised Valero that Conrail planned to charge anywhere from \$185 per car to \$225 per car whenever additional trackage in the Paulsboro Yard is utilized for effecting the interchange. May I trouble you to please provide me with a copy of Conrail's tariff item that would support such charges.

Although SMS commenced serving Valero yesterday, SMS remains of the view that Conrail's assignment of the single track, Track 234, is insufficient to accommodate the cars originating or terminating at the Valero refinery. That traffic heretofore was handled on the Old Coke Storage Tracks and the Paulsboro Yard's run-around track. Conrail refusal to designate additional interchange tracks within its Paulsboro Yard, in the view of SMS,

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Jonathan M. Broder, Esq.
November 29, 2000
Page Two

violates the letter and the spirit of 49 U.S.C. 10742 and 10744.

Moreover, I am not as willing as you seem to be to dismiss as irrelevant the fact that Conrail has granted Moorestown and Erie Railroad trackage rights within its Bayway Yard in rendering service to and from Tasco Refining Company. It well may be, as you state in your letter, that each interchange arrangement is based upon the specific situation presented; however, the disparate treatment of the two companies seems to underscore Conrail's animus toward SMS for having won the Valero account.

If you have any question concerning the foregoing which you believe I may be able to answer or if I otherwise can be of assistance, please let me know.

Best regards.

Sincerely yours,


Fritz R. Kahn

cc: Hon. Melvin F. Clemens, Jr.
Mr. Timothy T. O'Toole
Mr. Paul J. Deppen Jr.
Mr. Jeffrey L. Sutch

000743

REDACTED

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

Jedrey 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 KARLMA	From	Non Pre Paid ShortLine		
Co./Dept.	NS	Co.	SMS		
Phone #		Phone #	856-467-4800		
Fax #	540-995-6392	Fax #			

000135

FREIGHT TARIFF SLRS 2500

TABLE OF CONTENTS		RULES AND OTHER GOVERNING PROVISIONS GENERAL RULES AND REGULATIONS	
SUBJECT	ITEM(S)	ITEM 10	
Abbreviations and Reference Marks, Explanation of.....	1000	REFERENCE TO TARIFFS, ITEMS, NOTES, RULES, ETC.	
General Rules and Regulations:		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.	
Consecutive Numbers	30		
Method of Cancelling Items	20	ITEM 20	METHOD OF CANCELLING ITEMS
Reference to Tariffs, Items, Notes, Rules, Etc	10	As this tariff is supplemented, numbered items with letter 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.	
Section 1 - Switching		ITEM 30	CONSECUTIVE NUMBERS
Interchange/Reciprocal Switching Charges	100	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.	
Section 2 - Local/Proportional Rates	200		

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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	
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:		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	
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

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Fax (610) 828-7481



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PA (610) 828-1863

VIA MAIL AND FAX (202) 565-1573

Melvin F. Clemens, Jr.
Director
Office of Compliance and Enforcement
Surface Transportation Board
1925 K Street, NW
Washington, DC 20423-0001

Nov 9, 2006
 **COPY**

Dear Mr. Clemens:

Pursuant to an agreement, dated August 31, 2000, Valero Refining Company- New Jersey, sought to replace consolidated Rail Corporation with SMS Rail Lines, Inc., to switch cars to, from and within its 970-acre refinery at Paulsboro, in the shared-assets area of New Jersey.

By its verified notice of exemption in STB Finance Docket No. 33297, SMS Rail Service- Acquisition and operation exemption- Valero Refining Company- New Jersey, served September 22, 2000, SMS secured the requisite authority to provide the requested service, effective September 12, 2000.

In the intervening time, SMS has had any number of meetings with representatives of Conrail and Norfolk Southern Railway Company, which together with CSX Transportation, Inc., is the line haul carrier over which the incoming and outbound cars are transported. SMS and NS have been parties to a handling agreement, similar to a joint marketing agreement.

The final meeting was held on October 27, 2000. SMS was prepared to start operations on November 01, 2000. It was agreed to extend the start up operation date until November 15, 2000, in hopes that the interchange issue could be resolved among all parties.

The final result of the meetings has been that NS, CSXT and Conrail have refused to designate interchange tracks in the coke yard area of the Paulsboro Yard adequate to permit the orderly interchange of traffic.

Moreover, NS, CSXT, Conrail have declined to absorb SMS' proposed switching charge or refused to reduce the rates to and from Valero to reflect the fact that neither one will continue to provide a service that heretofore has been rendered.

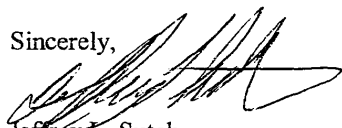
Finally, NS, CSXT, Conrail propose to assess Valero a \$225.00 per car storage charge for any cars consigned to or received from Valero that cannot be accommodated on the single interchange track they are prepared to make available to SMS.

000670

Conrail and NS appear to be in violation of the letter and the spirit of 49 U.S.C. 10742 and 10744, for their actions are disruptive of the continuous carriage of freight and the free interchange of traffic that statutory provisions contemplate. Moreover, they appear to be violating the agreement between the Class I Railroads and the American Short Line and Regional Railroad Association, which the Board tacitly, if not directly, has approved.

Your assistance in this matter would be greatly appreciated with great optimism that SMS could start serving Valero on November 15, 2000.

Sincerely,



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



COPY

000680

REDACTED

REDACTED

FREIGHT MANDATORY

#11
THROUGH WAYBILLING SHIPMENTS NOT TO BE INCLUDED IN
INTERLINE SETTLEMENT

Rule 11 is intended for use by the rail industry to ensure confidential rates and charges are not revealed. It is therefore incumbent upon the industry to properly identify and waybill these shipments to prevent inadvertent disclosure.

WAYBILL PREPARATION

The term "Rule 11 Waybill" used herein refers to that document conforming with Mandatory Rules governing waybill preparation. (See also Rules 8 & 15). A Rule 11 waybill is different from a revenue waybill in that it does not show the rates or charges and is modified as specified in paragraph B to maintain confidentiality.

When a shipment is to move from origin to destination on a through waybill with more than one road haul carrier responsible to assess and collect freight and accessorial charges, the shipment must be waybilled in accordance with the follow instructions:

A. When it is known at the time of movement whether the shipment is moving under the provisions of this rule, a car movement or memorandum waybill (see Rule 15) should be prepared. This will notify the carriers involved in the movement that a revenue or Rule 11 waybill will follow which will state the exact conditions of the movement.

B. The Rule 11 waybill must contain the following information:

(1) The Route Code "R" must be shown in the route code block of the waybill in lieu of "A" Agents, or "S" Shipper.

(2) The notation "ACCOUNTING RULE 11 SHIPMENT - WAYBILL NOT TO BE INCLUDED IN INTERLINE SETTLEMENT", must be printed across the rate, freight, advances, and prepaid columns of the waybill form in lieu of the rate and charges. This notation must not be abbreviated nor altered in format.

(3) The complete spelling of the name and freight billing address of each patron responsible for payment of the freight charges must be shown for each portion of the movement beyond the origin carrier's freight billing responsibility, directly below the notation required in paragraph B.2. This "Send Freight Bill To" information must be shown even if it is the same as the information shown in the information block of the waybill. If the "Send Freight Bill To" patron is the same for

RAILWAY ACCOUNTING RULES

each portion of the movement, it only needs to be shown once. If more than one "Send Freight Bill To" is shown, the road responsible for collection must also be shown.

(4) All shipper furnished information relative to the assessment of charges, such as rebilling points or contact references must be shown in the "Description of Articles" block of the waybill.

C. In accordance with the following, a Rule 11 waybill must be mailed at the time of issuance to the Revenue Officer of each carrier in the route as shown in the AAR Directory of Freight Accounting Offices and Overcharge Claims, (hereafter referred to as the Directory) but no later than fifteen (15) days from the date of the movement waybill.

(1) If the car moves as a Rule 11 shipment and all information (as outlined in paragraph B) is known at the time of movement.

(2) If the car moves as a Rule 11 shipment and all information as outlined in paragraph B is not available at the time of movement.

(3) If the shipment initially moved on a non-revenue car movement or memorandum waybill without reference to Rule 11, and is subsequently determined to be a Rule 11, a waybill conforming with paragraph B must be mailed as soon as the information become available.

D. Each railroad will designate one "freight Rule 11 Contact: who is responsible for communication and resolution of Rule 11 problems when handling through normal channels fails. The appropriate office and mailing address will be listed in the Directory. (Rules 71, 101, 211)

[AMENDED EFFECTIVE July 1, '91]

14

Waybills Covering Bonded Import Shipments

A. Shipment imported via United States Seaboard Port, moving from the Seaboard Port under United States Customs Bond for release at

RAILWAY ACCOUNTING RULES

#15

Revenue Waybill - Mailing, Receiving, Tracing

A. The waybilling carrier must forward the original revenue waybill to the destination carrier not later than 15 days from the date of the non-revenue waybill. Each railroad will designate one officer who is responsible for the receipt of revenue waybills.

Use of Transaction Set 426 Revenue Waybill:

1. Use of Transaction Set 426, Revenue Waybill, is mandatory for all Class I railroads on July 1, 1991.

2. Use of Transaction Set 426, Revenue Waybill, will be mandatory for all Class II and Class III railroads on July 1, 1992.

3. On September 23, 1991, the Accounting Division General Committee approved the action that division information be targeted for inclusion on the EDI Revenue Waybill transaction set 426 for Class I railroads by January 1, 1992 and for Class II and III railroads on July 1, 1992.

B. Each railroad will designate one officer who is responsible for furnishing the revenue waybill. The appropriate office and mailing address will be listed in the AAR Directory of Freight Accounting Offices. Requests for revenue waybills under provisions of this rule must be made to the officially designated officer of the waybilling road.

C. Should the destination carrier fail to receive a revenue waybill within 20 days from the date of the non-revenue waybill, the destination carrier can serve notice that the bill will be settled in 20 days on the prepaid basis absent receipt of a response as provided in Rule 15E from the waybilling carrier. A copy of the non-revenue document must accompany this notice.

D. The origin carrier must furnish a revenue bill, or reason for not furnishing a revenue bill within 15 days from the date of the destination carrier's letter of intent.

E. If no response is received within 20 days from the date a notice is issued in accordance with Rule 15C, the destination carrier can settle the non-revenue document on a prepaid basis. The weight will be the marked capacity of the car used, if actual weight is not available.

FREIGHT MANDATORY

F. Where the destination carrier settles a waybill on a prepaid basis under Rule 15-E and is later presented with a proper revenue waybill showing shipment to be collect, the destination carrier will promptly adjust interline account.

[AMENDED EFFECTIVE Jan. 1, '92]

16

Waybilling of Empty Private Owned Cars

All empty private owned cars as described in Mileage Tariff No. 6007 Series subject to revenue charges must be waybilled under existing waybilling instructions applicable to ordinary commercial traffic. Those entitled to free movement or empty mileage allowances under Mileage Tariff No. 6007 Series must be waybilled to destination via route designated in shipping instructions.

[AMENDED EFFECTIVE Jan. 1, '90]

17

Waybilling Transit Shipments

Transit waybilling must follow one of the following formats:

(1) Through rate assessment from the origin to the final destination less the paid in rate, the balance remaining and the transit charge. The transit charge may be advanced.

(2) Same as #1 above, but the inbound charges may be advanced out for collection from the final road haul carrier, if the inbound charges are refunded.

(3) As a proportional/local rate from the transit station.

In all instances, reference must be made to the origin point(s), the inbound waybill reference, route, rate paid in to the transit station and weight applied outbound.

[ADOPTED EFFECTIVE Jan. 1, '90]

18

Waybilling of Freight Transferred

When carload freight is transferred to another car, the initials and numbers of the car to which the freight is transferred must be added to the waybill showing the date and point of transfer and the reason.

[AMENDED EFFECTIVE Jan. 1, '91]

REDACTED

03-03 SMS Car Hire Offset

From: Miller, Tim F.
Sent: Wednesday, March 12, 2003 12:01 PM
To: Kraemer, John
Cc: Catron, Lynnanne; Lewis, Jim R. (Accounting); Pinson, Jim L.;
Spangler, Regina M.
Subject: FW: SMS Rail Car Hire- CONFIDENTIAL

Sensitivity: Confidential

Mr. Kraemer:

This refers to the previous correspondence concerning SMS Rail Service. We show that SMS currently owes NS \$153,000 in car hire. This total is increasing by approximately \$7,000 - \$8,000 each month since they continue to refuse to pay any amount.

Jim Pinson advised on March 7th that he has no way to separate out car hire from SMS based upon interchange location. SMS actually reports to NS the amount that is owed by them. If SMS does not want to pay the amount for traffic at Paulsboro, then they should not be reporting that they owe it to us. They should only report car hire for the interchange at Bridgeport.

NS pays SMS approximately \$50,000 per month for handling road charges. We began offsetting some old car hire amounts from this payment last month. We advised SMS that we would deduct 2-3 months of the oldest car hire money due NS from our payments for the 2nd half of each month. This is an attempt to slowly recover the amounts due NS without placing an undue financial burden on SMS.

It is my understanding that the dispute over Paulsboro is not likely to be resolved in the foreseeable future. This office obviously cannot separate out the car hire by location.

In view of the above, do you want us to pay them the amount that was previously offset? Are you requesting that we not attempt to collect any car hire amounts until this matter is resolved?

Tim Miller

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

From: Pinson, Jim L.
Sent: Friday, March 07, 2003 7:45 AM
To: Kraemer, John
Cc: Miller, Tim F.
Subject: RE: SMS Rail Car Hire- CONFIDENTIAL
Sensitivity: Confidential

John:

As I understand the situation, Tim is trying to collect monies SMS reported as due NS. We have no way to separate SMS car hire by interchange point. If SMS does not want to pay car hire they should not report it.

Jim

Cc: Tim Miller

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

From: Kraemer, John
Sent: Wednesday, March 05, 2003 6:10 PM
To: Miller, Tim F.
Cc: Pinson, Jim L.; Osborne, Joe; Carter, Randy; Edwards, John, V;
Pratcher, Dan; Tubman, Dutch
Subject: FW: SMS Rail Car Hire- CONFIDENTIAL
Sensitivity: Confidential

03-03 SMS Car Hire Offset

CONFIDENTIAL

Tim Miller :

Reference the recent action to withhold SMS shortline settlements against unpaid car hire for traffic moving to /from Paulsboro, NJ, NS does not and has not recognized the SMS as an interchange carrier at Paulsboro so I would not expect them to pay car hire at this location. Thus we should not withhold their settlements to offset unpaid car hire at Paulsboro. When we (SAA) deliver/pull cars for Valero at Paulsboro they are considered constructively placed/delivered/picked up when we give them/receive them from Valero's CONTRACT switch carrier... SMS. The SAA should be showing the cars placed and pulled when we get them from SMS as their contract switcher and not as a common carrier interchange connection. Demurrage should be billed if/when cars are on the Valero property in excess of the allowed demurrage provisions.

It is only appropriate to bill (and expect them to pay car hire) for the interchange at Bridgeport, NJ. You or someone must determine which car hire bills relate to Bridgeport and which are excluded as they apply to Paulsboro.

I have talked to SMS and they are willing to pay for the Bridgeport car hire but take exception to paying car hire at Paulsboro when we have refused to recognize them as a common carrier.

Your assistance to resolve this issue and not withhold payments for the SMS will be appreciated. SMS will pay the Bridgeport car hire if we will bill them correctly.

JMK

CY: Jim Pinson

Joe Osborne: I am not sure if NS(SAA) is assessing detention /demurrage to Valero but

Randy Carter: you may want to investigate if you also question this issue.

JMK

John Edwards: Our conversation.
Dan Pratcher
Dutch Tubman

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

From: Miller, Tim F. [mailto:Tim.Miller@nscorp.com]

Sent: Tuesday, March 04, 2003 7:29 AM

To: 'SMSRail@aol.com'

Cc: Lewis, Jim R. (Accounting); Spangler, Regina M.; Pinson, Jim L.; Harris, Herman B.

Subject: SMS Rail Car Hire

Mr. Rich Patrone:

This refers to our previous phone conversation as well previous correspondence between our companies concerning past due car hire owed by your company to NS.

You have suggested that we break out the car hire for your Bridgeport location and bill you only for it. It is my understanding that we have no way of breaking out this information. We bill you for car hire based upon information that your company supplies NS via Railinc, and NS only has the information that SMS submitted to Railinc. In any event, we do not believe that the dispute over Paulsboro justifies your company not paying any car hire for almost 2 years.

In view of the above, we must continue to deduct 2-3 months of the oldest car hire amounts due NS from our handling road payments for the 2nd half of the month. We are attempting to collect some money owed to NS without imposing an undue financial hardship on your company.

Page 2

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03-03 SMS Car Hire Offset

Tim Miller