

SERVICE DATE - MAY 12, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34483

SMS RAIL SERVICE, INC. —
PETITION FOR DECLARATORY ORDER

Decided: May 10, 2004

On March 4, 2004, SMS Rail Service, Inc. (SMS) filed a petition for declaratory order to resolve an alleged dispute between it and Norfolk Southern Railway Company (NS) concerning SMS's common carrier status and the provision of rail service to SMS-served customers located within an industrial complex in Paulsboro, NJ. On March 5, 2004, in connection with its petition for declaratory order, SMS filed a motion for a protective order, which the Board granted in a decision served on March 15, 2004.

Subsequently, by letter filed by counsel for SMS on March 18, 2004, SMS and NS jointly requested that this proceeding be held in abeyance for 30 days (until April 26, 2004) to permit the parties to explore an amicable resolution of their disagreements outside of the Board's processes. To facilitate a possible settlement, the Board held the proceeding in abeyance in a decision served on March 24, 2004.

On April 26, 2004, NS filed a response to SMS's petition for declaratory order. NS contends that SMS is not operating as a common carrier in the Paulsboro facility but, rather, is acting as a contract switch operator for the owner of the facility and the track – Valero Refining Company - New Jersey (Valero). Moreover, reflecting the parties' inability at this point to resolve their dispute informally, NS concurs with SMS's request that a proceeding be instituted to resolve the dispute under the Board's modified procedure rules at 49 CFR 1112.1, et seq. According to NS, the parties have agreed upon a proposed procedural schedule wherein SMS would submit its opening statement and supporting evidence by June 21, 2004, NS would submit its reply by July 19, 2004, and SMS would submit its rebuttal by August 2, 2004.

Under 5 U.S.C. 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or to remove uncertainty. The Board and its predecessor, the Interstate Commerce Commission, have exercised broad authority in handling such requests, considering a number of factors, including the significance to the industry and the ripeness of the controversy.

Pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721, a proceeding is instituted to resolve the controversy here. In accordance with the parties' request, the Board will resolve this matter pursuant to the modified procedural rules at 49 CFR 1112.1, et seq. Also in accordance with

their request, the Board will adopt the parties' proposed procedural schedule. In addition, because it appears that SMS is operating over the Paulsboro trackage under an agreement with Valero, the Board will direct SMS to serve a copy of this decision upon Valero within 5 days of the service date of this decision and certify to the Board that it has done so.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. A declaratory order proceeding is instituted. This proceeding will be handled under the modified procedure rules, on the basis of written statements submitted by the parties. All parties must comply with the Rules of Practice at 49 CFR subchapter B, including parts 1112 and 1114.

2. The procedural schedule for this proceeding is as follows:

June 21, 2004	SMS opening statement due
July 19, 2004	NS reply statement due
August 2, 2004	SMS rebuttal statement due

3. Within five days of the service date of this decision, SMS will serve a copy of this decision upon Valero, and will certify to the Board that it has done so.

4. This decision is effective on the date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary