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SERVICE DATE - JANUARY 24, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34483

SMS RAIL SERVICE, INC. –
PETITION FOR DECLARATORY ORDER

Decided: January 19, 2005

SMS Rail Service, Inc. (SMS) has filed a petition for a declaratory order asking the Board to resolve a dispute between it and Norfolk Southern Railway Company (NS) concerning whether SMS's operations in Paulsboro, NJ, are those of a rail common carrier. SMS also asks that we direct NS to interact with SMS in certain specified ways. As set forth below, we will grant the petition for a declaratory order. We find that SMS is functioning as a rail common carrier at Paulsboro and that it must be considered and treated as such. We decline, however, to prescribe any specific parameters to the relationship between SMS and NS, except as specified herein.

BACKGROUND

Facts of the Case

SMS is a Class III railroad based in Bridgeport, NJ. It provides rail service at three separate industrial facilities – the Pureland Industrial Complex in Bridgeton, NJ, the Penn Warner Industrial Park in Falls Township, PA, and the Paulsboro Complex in Paulsboro, NJ. SMS filed separate notices of exemption to operate as a common carrier at each of the three industrial facilities. See SMS Rail Service, Inc. – Lease and Operation Exemption – Pureland Association, Inc., Finance Docket No. 32494 (ICC served May 26, 1994); Penn-Jersey Rail Lines – Acquisition and Operation Exemption – Lines in Penn Warner Industrial Park, Falls Township, Bucks County, PA, STB Finance Docket No. 33835 (STB served May 5, 2000);¹ and SMS Rail Service, Inc. – Acquisition and Operation Exemption – Valero Refining Company-New Jersey, STB Finance Docket No. 33927 (STB served Sept. 22, 2000) (Paulsboro Notice).

¹ Penn-Jersey Lines, Inc., was merged into SMS pursuant to Jeffrey L. Sutch and Leonard J. Smolsky – Notice of Exemption – Intra-Corporate Family Transaction, STB Finance Docket No. 34300 (STB served Jan. 17, 2003).

This case involves the Paulsboro facility, which covers about 970 acres, includes approximately 5.8 miles of trackage, and is owned by Valero Refining Company-New Jersey (Valero). Paulsboro is located within the Philadelphia/South Jersey Shared Assets Area (SJSAA), one of three shared assets areas established by the transaction (Conrail Transaction) approved by the Board in CSX Corp. et al. – Control – Conrail Inc. et al., 3 S.T.B. 196 (1998), aff'd sub nom. Erie-Niagara Rail Steering Committee v. STB, 247 F.3d 437 (2d Cir. 2001). As a consequence of the Conrail Transaction, Consolidated Rail Corporation (Conrail) provides the service within the SJSAA, but it does so as an agent for line-haul carriers CSX Transportation, Inc. (CSX) and NS.

Prior to the Conrail Transaction and for some period thereafter, Conrail provided intra-plant switching services for Valero and its predecessor pursuant to a switching contract that was separate from the common carrier line-haul services provided by Conrail (and, after the Conrail Transaction, by CSX and NS) to and from Paulsboro. Following the Conrail Transaction, SMS and Valero entered into an agreement under which SMS would operate Valero's tracks to serve Valero and other shippers located at Paulsboro.² In connection with that agreement, SMS filed its Paulsboro Notice, announcing its intent to commence common carrier service within the Paulsboro facility.

Although the record indicates that the two railroads cooperate at the other two industrial facilities in which SMS operates, SMS and NS have had a difficult time establishing a harmonious working relationship at Paulsboro. For example, although traffic is flowing to and from shippers at Paulsboro, NS and SMS cannot agree upon a location at which carload traffic should be exchanged. In addition, NS has declined to absorb some or all of SMS's switching charges at Paulsboro. Beyond these and other areas of contention between NS and SMS detailed in the record, the principal point of dispute between the parties is whether SMS's operations at Paulsboro are those of a rail common carrier. SMS believes that common carrier status would accord it additional rights in its interactions with NS. SMS asserts that it is a common carrier at the facility, while NS maintains that SMS is not.

Procedural Background

On March 4, 2004, SMS filed its petition for a declaratory order. SMS then filed a motion for a protective order on March 5, 2004, which the Board granted in a decision served on March 15, 2004. On March 18, 2004, SMS and NS jointly requested that this proceeding be held in abeyance until April 26, 2004, to permit the parties to explore an amicable resolution of their disagreements. The Board granted that request in a decision served March 24, 2004.

² The record reflects that four other shippers – Air Products and Chemicals, Inc., Exxon Mobil Corporation, Oxbow Carbon & Minerals, Inc., and Savage Industries, Inc. – are situated at or near the Paulsboro industrial site, and that each is capable of receiving service from SMS.

On April 26, 2004, after discussions failed to produce a settlement, NS filed a response to SMS's petition, in which NS concurred with SMS's request to institute a proceeding under the modified procedure rules at 49 CFR 1112.1, et seq. In a decision served on May 12, 2004, the Board instituted this proceeding pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721, and adopted the procedural schedule requested by the parties.

While a decision to institute the declaratory order proceeding was pending, SMS filed a motion to compel discovery against NS on May 10, 2004. In its motion, SMS sought an order directing NS to comply with SMS's document production requests, so that SMS could prepare a complete opening statement in support of its requested declaratory relief. In its June 1, 2004 reply to the motion to compel, NS asserted that, since the filing of SMS's motion, it had submitted numerous additional documents to SMS that, in NS's view, fully satisfied SMS's document production requests.

On June 21, 2004, SMS filed its opening statement.³ NS filed its reply statement on July 19, 2004, and SMS filed its rebuttal on July 30, 2004. On August 6, 2004, NS filed a motion for leave to file a surrebuttal statement to address allegedly incorrect statements included in SMS's rebuttal, along with the surrebuttal. SMS replied to the motion and surrebuttal statement on August 26, 2004. On May 25, 2004, and July 15, 2004, respectively, Valero and the American Short Line and Regional Railroad Association (ASLRRA) filed separate petitions to intervene in the proceeding, and each included in its petition a statement of its interest in the case and its position on the merits.

Preliminary Matters

As indicated, NS has requested leave to file a surrebuttal statement in this proceeding, which SMS opposes. In the interest of compiling a complete record, we will accept and consider the surrebuttal. Moreover, because we will also accept and consider SMS's response thereto, SMS will not be prejudiced by our actions. In addition, we will permit Valero and ASLRRA to intervene in the proceeding and will accept and consider their respective statements. Valero and ASLRRA have demonstrated an interest in this matter, and allowing them to intervene will neither disrupt the filing schedule nor unduly broaden the issues before us.

Positions of the Parties

SMS argues that, despite its having invoked Board authority to operate at Paulsboro, and its commencement of operations pursuant to that authority, NS has improperly refused to

³ SMS's decision to proceed with its opening statement on that date indicates to us that the additional documents that NS has produced satisfy SMS's needs. For that reason, it appears that the discovery dispute has been resolved without the need for further Board action.

recognize SMS as a common carrier at Paulsboro. SMS also argues that NS has: (1) refused to include SMS in the through routing of shipments to and from Paulsboro industries in violation of 49 U.S.C. 10703; (2) refused to interchange loaded freight cars with SMS at Paulsboro in violation of 49 U.S.C. 10742; (3) failed to cooperate with SMS in the continuous movement of freight shipments in violation of 49 U.S.C. 10744; and (4) treated SMS in an unfair, discriminatory, and unreasonable manner in violation of 49 U.S.C. 10702.

SMS asserts that it is a common carrier at Paulsboro, contrary to NS's position in this matter. In support of its position, SMS maintains that the only rate assessed to Valero for the performance of SMS's switching service was the common carrier rate which SMS published in a tariff (SMS Freight Tariff SLRS 8500, effective March 1, 2001) and subsequently revised pursuant to 49 U.S.C. 10702. In addition, SMS stresses that it is holding itself out at Paulsboro to serve the general public as a common carrier, and that it is presently serving four shippers there in addition to Valero. SMS Rebuttal at 12.

For these reasons, SMS asks the Board to find that NS has failed to treat SMS as a rail common carrier when handling shipments to and from industries located at Paulsboro. It also seeks an order directing NS to enter into through routes with SMS, arrange for the interchange of shipments with SMS, allow for the uninterrupted movement of freight cars interlined with SMS, and follow reasonable practices in dealing with SMS.

In response, NS acknowledges that, for "accounting, interline settlement and other purposes," it has not treated SMS at Paulsboro as a rail common carrier. NS Responsive Statement at 12. NS maintains that the issue for us to resolve in this proceeding is not whether it has refused to acknowledge SMS's common carrier status at Paulsboro but, rather, whether SMS is operating at Paulsboro as a common carrier or as a contract switching carrier. NS does not challenge the validity of the Paulsboro Notice; instead, it asserts that the authority SMS obtained via that notice merely is permissive, and that SMS never commenced common carrier operations at the facility pursuant to that authority.

NS maintains that SMS operates at Paulsboro as a contract switching carrier,⁴ and it provides a letter dated March 19, 2003, from the Director of the Board's Office of Compliance and Enforcement to SMS (OCE Letter) (attached as Exhibit 1 to NS's Responsive Statement). NS asserts that the services that SMS provides at Paulsboro are furnished pursuant to one or more switching contracts exclusively. In addition, NS argues that SMS's common carrier operations elsewhere do not automatically confer common carrier status upon SMS at Paulsboro.

⁴ NS cites a number of cases in which the agency has distinguished common carriage from contract or private carriage, and which it argues warrant a finding that SMS is a contract carrier at Paulsboro.

SMS responds that OCE misapprehended the facts and notes that the OCE opinion was nonbinding and informal. SMS Rebuttal at 2, 24-27.

NS takes the position that the Board need not provide any relief to SMS in this proceeding even if SMS is found to be a common carrier. Specifically, NS argues that SMS provides no part of the line-haul transportation for traffic flowing to and from Paulsboro, so NS could not enter into through routes with SMS, even if it were a common carrier. With regard to SMS's complaint that NS refuses to share with SMS the revenue that NS collects for moving traffic to and from Paulsboro, NS states that, even if SMS were a common carrier at Paulsboro, the type of revenue sharing arrangement that SMS appears to desire would be a matter of consensual arrangement between the parties, not legal mandate, and that NS would not be obligated by statute to absorb the cost of SMS's switching.

NS argues that none of the requested affirmative relief is necessary, because it already does what SMS would have the Board order NS to do. NS states that it already "interchanges"⁵ shipments with SMS, because Conrail (NS's agent) exchanges traffic with SMS at Paulsboro, and rail traffic is already flowing without interruption or difficulty to and from Paulsboro industries. NS argues that a Board order directing it to engage in reasonable practices is unwarranted, because it does not deal unreasonably with SMS. NS also questions whether Valero and SMS comprehend the significance of SMS's efforts to be classified as a common carrier at Paulsboro.

In its surrebuttal, NS challenges certain evidence that SMS introduced into the record on rebuttal to show that SMS service to shippers at Paulsboro is governed by a common carrier tariff rather than by contract. Reasserting its position that SMS at Paulsboro is only a contract switching carrier, NS maintains that, even if SMS has published tariffs, SMS service at Paulsboro is provided pursuant to contract exclusively.

In its statement, Valero acknowledges that it has entered into an agreement that permits SMS to provide rail service over Valero-owned tracks at Paulsboro, and it indicates that it is extremely pleased with SMS's service. Valero also states that it is indifferent as to whether SMS would provide such service at Paulsboro as a common carrier or as a contract switching operator because, in either case, service rendered to it would be governed by contracts. Valero Petition to Intervene at 2. Valero adds that it is aware of SMS's ability to serve other, unaffiliated shippers

⁵ NS states that, technically, "interchange" of rail traffic occurs only as between multiple common carriers. See Responsive Statement of NS at 28. However, NS states that Conrail unsuccessfully has attempted to secure an agreement with SMS concerning the exchange of cars at Paulsboro. Evidently, SMS has declined to enter into such an agreement because it wants interchange to occur at a location not acceptable to Conrail.

at Paulsboro, and it observes that SMS has provided such services. Finally, Valero states that it takes no position regarding the merits of SMS's dispute with NS.

ASLRRA, a trade association representing over 400 regional and short line railroads, states that it supports the relief SMS seeks in its petition.

DISCUSSION AND CONCLUSIONS

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 (ICC), 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. Here, the parties clearly present a controversy that is appropriate for us to resolve under our declaratory order authority. Accordingly, we will do so.

SMS's Status at Paulsboro

The principal controversy between SMS and NS is the question of whether SMS is functioning as a common carrier at Paulsboro. Under the circumstances presented in the record, we find that SMS is functioning as a common carrier at that facility. Therefore, NS should regard SMS as a common carrier at Paulsboro.

The fundamental test for determining whether an entity is a common carrier is whether there has been a holding out to serve the public as a common carrier. See, e.g., Santa Clara Valley Transportation Authority – Acquisition – Union Pacific Railroad Company, STB Finance Docket No. 34094, slip op. at 3 (STB served Nov. 16, 2001). The record here demonstrates that SMS is holding itself out to the public as a common carrier at Paulsboro.

SMS filed the Paulsboro Notice to lease and operate the Valero-owned trackage as a common carrier and commenced operations pursuant to the notice in November 2000. Thereafter, SMS issued a tariff offering common carrier rates for its services at Paulsboro. SMS states that it can serve and is serving multiple shippers at Paulsboro, and that it is both capable and willing to provide common carrier service to all shippers that request it.

Although NS suggests that SMS does not fully appreciate the implications of its asserted common carrier status at Paulsboro, NS does not challenge the Paulsboro Notice, nor does it argue that SMS could not commence common carrier service at Paulsboro pursuant to that notice. Rather, NS argues that SMS has never actually acted upon the Paulsboro Notice or commenced common carrier operations at Paulsboro, and that SMS's relationship with the shippers at Paulsboro is governed entirely and exclusively by contract. According to NS, by allowing its relationship with shippers to be established entirely by contracts, SMS is not

offering to serve the general public at Paulsboro, and thus SMS is not acting as a common carrier there.

NS's argument is unpersuasive because it disregards considerable evidence showing that SMS is holding itself out to the public as a common carrier at Paulsboro. A common carrier may agree to provide service to shippers pursuant to contracts, and, in so doing, can still fulfill its statutory common carrier obligation if: (1) the shippers choose such an arrangement voluntarily, and (2) the railroad is ready and willing to offer shippers common carrier rates upon request. Even assuming that SMS's service to Paulsboro shippers were governed by contract only, its operations there could nonetheless satisfy the criteria for functioning as a common carrier.

Here, SMS could agree to provide service to one or all of its customers at Paulsboro under contracts. (The record indicates, for example, that at least a portion of NS's service to Valero is governed by contract, although NS is clearly a common carrier.) But that does not mean, as NS seems to argue, that SMS is not functioning as a common carrier. SMS has neither demanded that its shippers agree to contracts as a prerequisite to service, nor has it engaged in any other action that limits or contravenes the common carrier obligations it assumed in commencing service pursuant to the Paulsboro Notice. Even if all of SMS's service to shippers at Paulsboro were provided under contracts, the record indicates that this would have been the result of shipper preference and not SMS's insistence. Moreover, the existence of an SMS common carrier rate for service at Paulsboro indicates that SMS is willing to furnish Paulsboro shippers with common carrier rates upon request, even if these rates are not presently moving any traffic. These factors convince us that SMS is holding itself out as a common carrier and fulfilling its common carrier obligations at Paulsboro.

NS's reference to certain decisions in which the Board or the ICC has distinguished common carrier service from contract or private carriage does not alter our conclusion. None of them supports a finding that SMS is not a common carrier at Paulsboro. Rather, these decisions reinforce the view that whether an entity is functioning as a common carrier, or not, at any given location depends upon a variety of factors, including: (1) whether the entity providing the service is holding itself out to the public as a common carrier and intends to be so classified;⁶ (2) whether the track owner and the operator have taken steps to clarify the status of the trackage

⁶ See, e.g., H&M International Transportation, Inc. – Petition for Declaratory Order, STB Finance Docket No. 34277 (STB served Nov. 12, 2003). In that case, an intermodal terminal operator that neither sought to be classified as a common carrier nor invoked the Board's procedures to commence operations requested clarification from the Board that it was not a common carrier, despite a prior, contrary determination by the U.S. Railroad Retirement Board. The Board found the terminal operator not to be a common carrier.

and the operations over it;⁷ and (3) whether the track owner consents or objects to the railroad's provision of common carrier service over its tracks.⁸ Here, as discussed, all three of the factors weigh in favor of a finding that SMS is functioning as a common carrier at Paulsboro.

The OCE letter does not support NS's claim that the Board has already deemed SMS to be a contract carrier at Paulsboro. The letter never specifically identifies SMS at Paulsboro as a "contract carrier." Instead, it clearly acknowledges that SMS was "designated as a common carrier" at Paulsboro pursuant to the Paulsboro Notice, and briefly discusses SMS's role there as that of a common carrier. The letter describes SMS as a common carrier whose relationship with its customers at Paulsboro is governed by a contract. This is consistent with the view that a railroad's provision of service to some or all of its customers pursuant to a contract does not mean that the railroad is not a common carrier.

NS Practices

Although we find that SMS is a common carrier at Paulsboro and that NS should interact with it accordingly, we will not order the affirmative relief that SMS requests. To do so would insert the Board unnecessarily into the carrier-to-carrier relationship between SMS and NS. SMS argues that NS has refused to include SMS in through routes to and from Paulsboro. But traffic appears to be flowing to and from industries at Paulsboro without difficulty, and no shipper claims to have been deprived of a requested through route. We expect that the parties will resolve this issue between themselves in light of our clarification of SMS's common carrier status.

SMS also complains that NS refuses to absorb SMS's Paulsboro switching charges or share in the revenues that NS collects for its line-haul movement of traffic to and from shippers at that location. Regardless of SMS's common carrier status, carriers are entitled to establish their own rates for the services they provide to a shipper, and they may choose to do so either

⁷ See, e.g., B. Willis, C.P.A., Inc. – Petition for Declaratory Order, STB Finance Docket No. 34013 (STB served Oct. 3, 2001), aff'd sub nom. B. Willis, C.P.A., Inc. v. STB, 51 Fed. Appx. 321 (D.C. Cir. 2002). In that case, both the track owner and the operator (a rail common carrier) persuaded the Board that the parties had agreed that the track in question would be constructed and operated as private track.

⁸ See Union Pacific Railroad Company – Operation Exemption – In Yolo County, CA, STB Finance Docket No. 34252 (STB served Dec. 5, 2002) (Yolo County). In that case, Union Pacific Railroad Company (UP) attempted, over the objections of the track owner, to convert its operations within a port facility into those of a common carrier. UP's notice of exemption for the proposed transaction was rejected because there was no change in UP's operations to justify the change in status, and because the proposed transaction would frustrate the track owner's ongoing efforts to replace UP.

individually or jointly with connecting carriers. Whether NS chooses to absorb SMS's switching charges or share revenues with SMS at Paulsboro or at any other location is a matter within its discretion.

Although SMS alleges that NS (through Conrail) has refused to interchange traffic with it at Paulsboro, it appears that the parties are exchanging traffic there. Because we have determined that SMS is functioning as a common carrier at Paulsboro, we expect the parties to agree on appropriate interchange facilities.⁹ Furthermore, we see no reason to order NS to allow for the "uninterrupted movement" of freight cars at Paulsboro, because traffic appears already to be moving to and from Paulsboro shippers without undue complication or delay. Finally, in light of our clarification of SMS's common carrier status at Paulsboro, an order directing NS to follow reasonable practices in dealing with SMS is unnecessary and unwarranted.

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

It is ordered:

1. The Valero and ASLRRA petitions for leave to intervene are granted and their statements are accepted.
2. NS's motion for leave to file a surrebuttal is granted and its surrebuttal is accepted.
3. The petition for declaratory order is granted to the extent provided herein.
4. This proceeding is discontinued.
5. This decision is effective 30 days after its service date.

By the Board, Chairman Nober, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary

⁹ We note, however, that there is nothing in the record to indicate that the facilities currently used are inadequate for traffic interchange purposes.