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ENTERED
Office of Proceedings
October 4, 2024
Part of
Public Record

October 4, 2024

Via E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
U.S. Surface Transportation Board
395 E. Street SW
Washington, DC 20423

**Re: *SMS Rail Service, Inc.*
Petition for Declaratory Order of Township of Pilesgrove, Salem County, NJ; &
Petition for Leave to Intervene of Township of Mannington, Salem County, NJ
STB Finance Docket No. 36770**

Dear Ms. Brown:

Enclosed for filing is the Response of Respondent SMS Rail Service, Inc. to the Board's September 13, 2024 Decision Requesting a Jointly Submitted Proposed Procedural Schedule in the above-referenced declaratory order proceeding.

In light of Petitioners' unwillingness to propose a schedule to SMS, pursuant to the Board's Decision, SMS's Response includes its proposed procedural schedule and requests that schedule be approved by the Board.

Thank you for your consideration of this request.

Respectfully,

/s/ Robert A. Klein
Robert A. Klein

cc: All parties shown on the attached service list

Ms. Cynthia T. Brown
October 4, 2024
Page Two

FD 36770 Service List

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BEFORE THE
SURFACE TRANSPORTATION BOARD

TOWNSHIP OF PILESGROVE, N.J.)
PETITION FOR DECLARATORY ORDER)
FINANCE DOCKET
NO. 36770

**RESPONSE OF SMS RAIL SERVICE, INC. TO THE BOARD'S
SEPTEMBER 13, 2024 DECISION REQUESTING A JOINTLY SUBMITTED
PROPOSED PROCEDURAL SCHEDULE**

SMS RAIL SERVICE, INC.
513 Sharptown Road
Logan Township, NJ 08085

Respondent

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Attorney for Respondent

DATE FILED: October 4, 2024

To Honorable Board Chairman Primus, and Board Members Fuchs, Schultz, and Hedlund:

In accordance with the Board's Decision, served September 13, 2024, in the above-referenced declaratory order proceeding concerning the subject Salem Branch Rail Line in Salem and Gloucester Counties, New Jersey ("Line"), the following is a proposed procedural schedule and the reasons therefor, which is submitted on behalf of SMS Rail Service, Inc. ("SMS"). The Board's Decision directed that the current parties and SMS confer and jointly submit, by October 8, 2024, a proposed procedural schedule to govern this proceeding. As discussed below, despite SMS's request for a proposed schedule from the Petitioners, Pilesgrove Township and Mannington Township, and the Board's directive in its Decision, no schedule has been proposed by Petitioners.

On October 1, 2024, following various quasi-criminal proceedings against SMS and Salem County in the New Jersey Municipal Court, which were prosecuted and argued by the respective Solicitors for the Petitioners and concluded on September 26, 2024, those Solicitors and SMS and its undersigned counsel met via conference call to discuss an agreed upon procedural schedule. During the call, neither Township voiced any specific desires regarding the timing of the filings, and only advised that the Townships have objection to public input in the proceedings. The Solicitors indicated that they did not want to propose a schedule to the Board, and would rather the Board alone decide the schedule, rather than jointly submit a proposed schedule, notwithstanding the Board's directive in its Decision. Therefore, SMS is providing this response to the Board's Decision now.

SMS and its counsel reviewed with the Township Solicitors during the call on October 1 that consistent with other declaratory order proceedings before the Board, including in a decision

on which the Townships rely,¹ a three-tiered schedule would be reasonable for the instant proceedings: 1) opening statements by all parties supported by requisite verified statements, followed by 2) public input or amicus curiae, and then 3) replies by all parties.

In response to questions of the Township Solicitors during the October 1 call, the undersigned explained SMS's position that the above schedule is particularly proper here because a) there have been developments on the subject Line since the Petitions were filed last spring, b) considerable history and facts bearing on substantial developments on the Line over the last two years need to be addressed with appropriate evidence relevant to preemption, and c) there are issues bearing on the submissions by the Townships, including the lack of full and complete certifications supporting the allegations in the Petitions and other issues the Townships have advised that they intend to raise.² However, while the Township Solicitors indicated no objection to a date in late November for SMS's submissions, and expressed only that they have already submitted their "arguments" to the Board, SMS submits that the three-tiered schedule above makes sense and should be ordered. The three-tiered schedule is efficient and ensures the issues are addressed on a full and complete factual record. SMS's counsel expressed in the

¹ See, e.g., the procedural schedule ordered by the Board in *Borough of Riverdale—Petition for Declaratory Order—The New York Susquehanna and Western Railway Corporation*, STB Finance Docket No. 33466, served September 10, 1999, cited in Mannington Township' Petition at p. 4.

² Pilesgrove's Petition is not supported by any certifications or verified statements of witnesses, but rather contains a one-line form of verification signed by a paralegal of Pilesgrove's Solicitor's law firm, which is insufficient evidence to support Pilesgrove's allegations.

Mannington's Petition is supported by a scant page and a half certification of a zoning officer that only refers to one impromptu visit to a portion of the railroad last spring, efforts to serve orders to cease operations and remove railroad improvements, and issuance of criminal complaints, and acknowledges his receipt of a letter dated April 10, 2024, containing various conclusory statements of Mannington's Solicitor, which are hearsay at best.

Mannington's Petition at pages 8-9 expressly states that it may submit other "evidence or argument" in accordance with the schedule the Board issues. But doing so in a reply so as to get the "last word" without having first filed requisite verified statements of all facts supporting legal arguments, as the Townships prefer, should not be countenanced and will only serve to delay the development of a full record and an orderly proceeding.

October 1 call that opening statements allow the Townships to present evidence in proper form and include the additional points the Townships both have indicated are at issue and will be raised. By doing so only on reply by the Townships, the proceedings are likely to become protracted, which the three-tiered dates aim to avoid.

As mentioned, there have been developments since the Petitions were filed in the spring. Quasi-criminal charges were brought by the State of New Jersey against SMS and Salem County. Following the above-referenced hearings, SMS's motions to dismiss were most recently granted on September 26, 2024. A copy of the New Jersey Municipal Court's September 26, 2024 Order is attached as Exhibit "1"; an example of the motions filed in the criminal matter is attached as Exhibit "2". Transcripts of the state court hearings have been requested and have not yet been received.

The Line consists of 19.4 miles spanning parts of Salem and Gloucester Counties in the State of New Jersey, including a city, two boroughs, and six townships. The proceedings before the Board and the Board's decision regarding the two pending Petitions will impact future growth and development of railroad operations in those municipalities for years to come. This is because Salem County's agreement with SMS to take long-needed steps to revitalize freight service on the Line is producing results, which SMS plans to address by presenting to the Board both historical facts and current and ongoing developments as well as correcting Pilesgrove Township's and Mannington Township's misconceptions about the railroad.

SMS therefore proposes the following procedural schedule:

1. Opening statements by all parties by November 29, 2024.
2. Other interested persons' comments by December 30, 2024.
3. Replies by all parties by January 20, 2024.

The requested November 29 date for opening statements was not objected to by the Townships during the October 1 call, save only that the Townships wish to forego filing an opening statement and reserve to file a reply. That requested deadline takes into consideration the fact that the parties only recently concluded proceedings in the state court, transcripts of hearings held in the state court have been ordered and not yet received, these proceedings involve two Petitions and substantial developments on the Line that must be addressed and supported with appropriate evidence relevant to preemption, and the undersigned's current trial or arbitration schedule includes proceedings in two other matters, one of which involves an anticipated lengthy proceeding covering six separate state court cases, which are expected to go forward within the next 30-45 days.

Additionally, since, as the evidence will show, SMS has recognized the preservation of each Township's police powers and has repeatedly offered to submit to inspections at the Townships' convenience, and the Townships have failed to do so, there evidently are no emergent situations at hand.

For the foregoing reasons, and in light of Petitioners' unwillingness to propose a schedule to SMS, pursuant to the Board's Decision, SMS respectfully requests that the foregoing proposed procedural schedule be ordered by the Board.

Respectfully submitted,

/s/ Robert A. Klein

Robert A. Klein, Esquire

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Attorney for Respondent SMS Rail Service, Inc.

DATE FILED: October 4, 2024

EXHIBIT 1

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*Attorney for Defendants SMS Rail Service, Inc.
and Woodstown Central Railroad*

THE STATE OF NEW JERSEY vs. SMS RAIL SERVICE, INC. and THE STATE OF NEW JERSEY vs. WOODSTOWN CENTRAL RAILROAD and THE STATE OF NEW JERSEY vs. COUNTY OF SALEM	MID-SALEM COUNTY MUNICIPAL COURT (Woodstown, NJ; Court ID 1715) Docket Nos. SC-2024-007161, SC-2024-007162, and SC-2024-007163 Docket Nos. SC-2024-007164, SC 2024-007165, and SC-2024-007166 Docket Nos. SC-2024-007167, SC-2024-007168, SC-2024-007169
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ORDER GRANTING MOTIONS OF SMS RAIL SERVICE, INC. TO DISMISS

THIS MATTER coming before the Court on the motions of Defendants SMS Rail Service, Inc. and Woodstown Central Railroad, a fictitious name owned by SMS Rail Service, Inc. (“SMS”), by Robert A. Klein, Esquire appearing, to dismiss the above-captioned matters initiated by The State of New Jersey, in the presence of The State of New Jersey, by Municipal Prosecutor of the Township of Mannington, NJ, Ekaterine N. Eleftheriou, Esquire appearing, and the County of Salem, by Karin M. Wood, Esquire appearing, and the Court having considered

the papers in support of and in opposition to the motions and oral argument having been heard,
and for good cause having been shown,

IT IS on this 26th day of September, 2024,

ORDERED that the motions of SMS to dismiss are GRANTED and Complaint Nos.: SC-
2024-007161, SC-2024-007162, SC-2024-007163, SC-2024-007164, SC 2024-007165, SC-
2024-007166, SC-007167, SC-007168, and SC-007169 are DISMISSED, without prejudice.

IT IS FURTHER ORDERED that a copy of this Order shall be served upon all counsel of
record within 5 days of the date hereof.

Date: 9/26/24



Hon. Martin Whitcraft, J.M.C.

() Opposed

() Unopposed

EXHIBIT 2

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Robert A. Klein

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September 20, 2024

Via Email: Barbara.Garozzo@njcourts.gov

Ms. Barbara Garozzo
Court Administrator
Mid-Salem County Municipal Court
25 West Avenue
Woodstown, NJ 08098

**Re: State of New Jersey v. SMS Rail Service, Inc. et al.
NJ Municipal Court, Complaint Nos. 1715-SC-007161, 007162, 007163,
007164, 007165, 007166, 007167, 007168, 007169**

Dear Ms. Garozzo:

Enclosed please find Defendant SMS Rail Service, Inc.'s Notice of Motion to Dismiss and supporting Brief regarding the above matters, currently scheduled to be heard before the Court on September 26, 2024.

Thank you for your assistance.

Respectfully,

/s/ Robert A. Klein
Robert A. Klein

Encl.

cc (w/encl., via email):

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Karin M. Wood, Esq. (attorneywood@comcast.net)
Frank J. Hoerst, III, Esq. (fhoerstlaw@comcast.net)

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*Attorney for Defendants SMS Rail Service, Inc.
 and Woodstown Central Railroad*

<p>THE STATE OF NEW JERSEY</p> <p>vs.</p> <p>SMS RAIL SERVICE, INC.</p>	<p>MID-SALEM COUNTY MUNICIPAL COURT (Woodstown, NJ; Court ID 1715)</p> <p>Docket Nos. SC-2024-007161, SC-2024-007162, and SC-2024-007163</p>
<p>and</p> <p>THE STATE OF NEW JERSEY</p> <p>vs.</p> <p>WOODSTOWN CENTRAL RAILROAD</p>	<p>Docket Nos. SC-2024-007164, SC 2024-007165, and SC-2024-007166</p>
<p>and</p> <p>THE STATE OF NEW JERSEY</p> <p>vs.</p> <p>COUNTY OF SALEM</p>	<p>Docket Nos. SC-2024-007167, SC-2024-007168, SC-2024-007169</p>

NOTICE OF MOTION TO DISMISS PURSUANT TO N.J. RULE 7:8-5

<p>To: Hon. Martin Whitcraft Mid-Salem Municipal Court 25 West Avenue Woodstown, NJ 08098 c/o Barbara.Garozzo@njcourts.gov</p>	<p>Court Administrator Mid-Salem Municipal Court 25 West Avenue Woodstown, NJ 08098 Barbara.Garozzo@njcourts.gov</p>
<p>Ekaterine N. Eleftheriou, Esq. Mid-Salem County Municipal Prosecutor 99 North Main Street Mullica Hill, New Jersey 08602 kat@thevigilantlawfirm.com</p>	<p>Karin M. Wood, Esq. Salem County Solicitor 95 South Broadway Pennsville, NJ 08070 attorneywood@comcast.net</p>

PLEASE TAKE NOTICE that the undersigned, attorney for Defendants SMS Rail Service, Inc. and Woodstown Central Railroad, a fictitious name owned by SMS Rail Service, Inc. (“SMS”), moves before the Mid-Salem County Municipal Court for an Order dismissing Complaint Nos.: SC-2024-007161, SC-2024-007162, SC-2024-007163, SC-2024-007164, SC 2024-007165, SC-2024-007166, SC-007167, SC-007168, and SC-007169, against all Defendants therein. A proposed form of Order is attached to this Notice of Motion. In support of this Motion, the movant shall rely on the Brief submitted herewith.

If you do not want the Court to grant the relief sought in this Motion, you must respond in writing filed with the Court explaining your position and mail a copy to the undersigned attorney in accordance with the applicable rules.

Respectfully submitted,

Dated: September 20, 2024

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<p>THE STATE OF NEW JERSEY</p> <p>vs.</p> <p>SMS RAIL SERVICE, INC.</p> <p style="text-align: center;">and</p> <p>THE STATE OF NEW JERSEY</p> <p>vs.</p> <p>WOODSTOWN CENTRAL RAILROAD</p> <p style="text-align: center;">and</p> <p>THE STATE OF NEW JERSEY</p> <p>vs.</p> <p>COUNTY OF SALEM</p>	<p>MID-SALEM COUNTY MUNICIPAL COURT (Woodstown, NJ; Court ID 1715)</p> <p>Docket Nos. SC-2024-007161, SC-2024-007162, and SC-2024-007163</p> <p>Docket Nos. SC-2024-007164, SC 2024-007165, and SC-2024-007166</p> <p>Docket Nos. SC-2024-007167, SC-2024-007168, SC-2024-007169</p>
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BRIEF IN SUPPORT OF MOTIONS OF SMS RAIL SERVICE, INC. TO DISMISS

SMS Rail Service, Inc. (“SMS”), a common carrier under federal law and the operator of the railroad known as the Salem Branch,¹ submits this brief in support of its motions to dismiss the

¹ In 1994, SMS was first authorized to become a rail carrier providing common carrier railroad carriage by authority of the Interstate Commerce Commission (predecessor of the Surface Transportation Board – *see infra* n.2) Finance Docket No. 32494, *SMS Rail Service, Inc. – Lease and Operate Exemption – Pureland Associates*, 59 Fed. Reg. 27298 (May 26, 1994).

The requisite rail carrier authority to operate the subject Salem Branch was granted to SMS by the STB in its Decision in STB Finance Docket No. 36529, *SMS Rail Service, Inc. – Change in Operator Exemption Including Acquisition by Lease – Salem Brank Line in Salem and Gloucester Counties, N.J.*, 87 Fed. Reg. 42536 (July 15, 2022).

above-captioned related quasi-criminal matters brought against the named Defendants by the State of New Jersey (“State”). SMS’s motions are based on the following grounds and those set forth in its pending motion to dismiss for lack of subject matter jurisdiction, which was made by letter brief submitted to the Court on and dated July 18, 2024, which is incorporated herein by reference.

These matters are currently scheduled for hearing before this Court on September 26, 2024, at 9:00 a.m. SMS’s motions should be granted, the hearing should be cancelled, and the matters should be dismissed.

Preliminary Statement

These matters involve criminal charges brought against the Defendants by the State despite its admission in pleadings filed with the Surface Transportation Board (“STB” or “Board”)² that the charges may be based on nonexistent or unclear law. The charges should be dismissed for that reason alone.

Here, where charges are brought that by the State’s own admission may be based on nonexistent or, at best, unclear law, probable cause for the charges and fair and proper due process are lacking. This violates these Defendants’ constitutional rights, particularly the right to be properly informed of the nature and cause of the charges. As such, the charges violate the Defendants’ constitutional substantive and procedural rights under the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and Article 1, paragraphs 1 and 7 of the New Jersey State Constitution.

Accordingly, the charges should be dismissed.

² The STB was established by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), as the successor to the Interstate Commerce Commission as the agency charged with the responsibility for the economic regulation of our Nation’s railroads.

Factual Background

On or about April 30, 2024, the criminal charges were set forth in Complaints and Summons were issued executed by the Township of Mannington's ("Mannington") Zoning Officer. The Complaints appear to have been filed by the State on the recommendation and/or at the direction of Mannington's Solicitor.

The charges against the Defendants are for identical alleged violations: 1) No site plan approval; 2) No variance approval; and 3) No zoning permit. Among other things, the charges subject the Defendants to imposition of fines or penalties pursuant to the Mannington Township Code for failure to cease the alleged violations and require certain cessation of operations and removal of improvements. All of these quasi-criminal charges brought against each of the Defendants are hereinafter referred to as the "Charges."

Eight days before the Complaints were issued, on April 22, 2024, facts alleged by the State underlying the Charges were raised in a request to the STB for a declaratory order proceeding in a petition of Mannington's neighbor, the Township of Pilesgrove ("Pilesgrove"). Pilesgrove's petition to the STB was filed through the Mid-Salem County Municipal Prosecutor in these matters, ostensibly serving as Pilesgrove's Solicitor.

Prior to the July 25, 2024 hearing, by petition dated June 10, 2024, the Mannington Solicitor on behalf of Mannington sought to intervene in the declaratory order proceeding requested in Pilesgrove's April 22, 2024 petition, which, as noted, was filed by Pilesgrove through the Prosecutor herein who is also Pilesgrove's Solicitor.

Mannington's and Pilesgrove's petitions ask the STB to declare whether or not federal law prevents Mannington and Pilesgrove (also referred to herein as the "Townships") from imposing upon SMS local permitting and zoning requirements and fines or penalties for violations thereof.

Mannington and the State had a right and an obligation to obtain that answer from the STB before the State proceeded with the Charges against Defendants. They failed to do so.

The Court will recall that the Prosecutor/Pilesgrove Solicitor and the Mannington Solicitor appeared at the July 25, 2024 hearing when the Charges were aggressively presented by them against the Defendants. At the hearing, the Prosecutor and Mannington offered and handed up to the Court copies of Pilesgrove's and Mannington's STB petitions (cited herein as "STB Petitions"). Significantly since that hearing, on September 13, 2024, the STB issued a Decision accepting and instituting the declaratory order proceeding requested by both Mannington and Pilesgrove ("Declaratory Order Proceeding" or "STB Proceeding"). A copy of the STB's September 13, 2024 Decision is attached as Exhibit "A". The bottom line is that in the STB Proceeding, SMS will have an opportunity to present the relevant facts and circumstances necessary for the STB to make its declaratory ruling on the Petitions of the Townships. It is anticipated the STB Proceeding will also allow an opportunity for the public or other interested persons to be heard. In sum, the STB Proceeding is the only viable legal proceeding relating to SMS's operation of the Salem Branch that should take place at this time. The Charges should never have been brought.

SMS submits that the Charges are preempted by federal law and that these issues are committed to the exclusive jurisdiction of the STB which will decide them in the Declaratory Order Proceeding. Despite SMS's request to the Prosecutor to withdraw the Charges, made prior to the July 25, 2024 hearing³ and most recently on September 17, 2024, the Prosecutor has not withdrawn the Charges. Therefore, SMS respectfully requests that this Court dismiss the Charges.

³ As noted in the STB's September 13, 2024 Decision, the Prosecutor herein apparently responded to the undersigned SMS's counsel's letter dated July 16, 2024, in which the undersigned requested the Prosecutor to dismiss these matters, by writing a letter directly to the STB dated July 18, 2024 enclosing a copy of the undersigned's letter. The Prosecutor, however, failed to copy SMS's undersigned counsel on her letter to the STB, as the Board took note in its Decision.

It is worth emphasizing again that the Charges were brought even though both the Prosecutor and Mannington in their Petitions filed in the STB Proceeding indicate that it is unclear to them whether or not local permitting and zoning requirements and fines and penalties sought to be imposed against Defendants that are the subject of the Charges are preempted by federal law. The Declaratory Order Proceeding seeks to have the STB clarify and determine the law that should be applied under the facts and circumstance of these matters, which alone aptly demonstrates the Charges were not cognizable to the State when they were brought, which clearly shows the Defendants' constitutional rights (including lack of probable cause and due process) are being violated. While SMS anticipates the factual record that will be made in the Declaratory Order Proceeding will show that it is entitled to federal preemption, the Charges must be dismissed now in light of the fact that at the time the Charges were brought, they were based on what Mannington and the State concede may be nonexistent or unclear law. *See* STB Petitions.

Legal Argument

A. There is No Question That the STB Process Should Have Come First and That There Was No Probable Cause for Bringing the Charges Against the Defendants.

1. The Charges must be dismissed.

The Charges affect regulation of a railroad that is part of the national railroad system and that is entrusted to the exclusive jurisdiction of the STB. (*See* SMS's pending July 18, 2024 motion to dismiss for lack of subject matter jurisdiction). The Charges present predicate questions of fact underlying whether permitting and zoning requirements and certain fines and penalties apply to the railroad. Those questions should have been decided first by the STB, and not by Mannington's Solicitor as occurred here. *Village of Ridgefield Park v. New York Susquehanna & Western Railway Corporation*, 163 N.J. 446, 453, 750 A.2d 57, 60 (2000).⁴ The Charges present issues that lie within

⁴ *Cf. Curzi v. Raub*, 415 N.J. Super. 1, 21, 999 A.2d 1182, 1194 (App. Div. 2010); *Muise v. GPU, Inc.*, 332 N.J. Super. 140, 158, 753 A.2d 116, 126 (App. Div. 2000).

the STB's special expertise regarding federal preemption applicable to common rail carriers and cannot and should not have been brought given that under these circumstances no notice of the basis of the Charges could have been properly provided to Defendants. Indeed, even the State concedes by virtue of the Townships' STB Petitions that the Charges may be based on nonexistent or unclear law. Therefore, unlike in civil matters, retaining jurisdiction in this Court regarding criminal Charges that should not have been brought in the first place, for the reasons stated above, not only would dislocate here the intricate regulatory structure governing a sensitive industry (*see Campione v. Adamar of N.J.*, 155 N.J. 245, 264, 714 A.2d 299, 308 (1998)), it would continue to violate the Defendants' constitutional rights under the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, and Article 1, paragraphs 1 and 7 of the New Jersey State Constitution.

In civil actions, the courts of New Jersey refer to governmental agencies when the claims are based on a theory affecting regulation entrusted to the exclusive jurisdiction of a governmental agency. But here the Charges are quasi-criminal which implicates Defendants' constitutional rights to be informed of the nature and basis of the Charges. The Charges state a rail carrier, SMS, has violated local permitting and zoning requirements, the applicability of which is dubious at best by the State's own admissions.

No future prosecution can be based on the Charges brought in April 2024 because they were admittedly without a cognizable legal basis. If, *arguendo*, a subsequent ruling of the STB was to provide that the local permitting and zoning regulations apply to the railroad, charges could not be based on offenses allegedly committed on April 8, 2024 (the date of the offenses alleged in the existing Complaints) when by the State's admission it was unsure that a basis for those Charges existed as of that time. *See* STB Petitions.

For these reasons, the current Charges must be dismissed.

2. A stay is not the proper course in these criminal matters.

For the same reasons as set forth above, a stay of the Charges based on offenses allegedly occurring on April 8, 2024, i.e., before the STB rules, would make no sense. Not only would a stay burden the Court's docket and administration, such as further tracking and revisiting the matters periodically, the existing Charges should not be permitted to remain pending or be ever prosecuted given that at the time they were brought even the State admits it was unclear a basis for the Charges existed. *See* STB Petitions.

Where, as here, the Defendants' constitutional rights are implicated, the Court should be even more sensitive to the purported Charges that are civil federal regulatory issues trusted to the STB. *Cf. Boss v. Rockland Elec. Co.*, 95 N.J. 33, 42, 468 A.2d 1055, 1060 (1983). While in a civil case referral to the STB and a stay pending referral and determination of subject matter jurisdiction would ordinarily be proper,⁵ there is a significant difference here in that the matters involve quasi-criminal Charges that were not based on cognizable offenses (admitted by the Petitions filed by both the Prosecutor and Mannington's Solicitor by virtue of their conceding that the STB's special expertise in this regard is required), and Defendants' constitutional rights to due process are thus clearly implicated and violated. These matters in this Court therefore must be dismissed.

Dismissal is also in the interest of judicial efficiency, and there will be no prejudice to the State caused thereby. It was simply wrong for the Charges to have been brought when the State clearly knew that resolution of the issues involved a federal regulatory scheme placed within the special competence of the STB. *See* STB Petitions. No criminal charges should be permitted to stand on this record.

⁵ *E.g., Lemelledo v. Beneficial Management Corp. of Am.*, 150 N.J. 255, 275, 696 A.2d 546, 556 (1997) (staying the judicial process in a civil case pending referral). *See also Curzi*, 415 N.J. Super. at 21, 999 A.2d at 1194; and *Muise*, 332 N.J. Super. at 159, 753 A.2d at 126, both also involving civil cases.

Conclusion

For the foregoing reasons, it is respectfully requested that the Court grant SMS's motions to dismiss the Charges against all Defendants.

Respectfully submitted,

Dated: September 20, 2024

By: /s/ Robert A. Klein
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and Woodstown Central Railroad*

EXHIBIT A

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36770

TOWNSHIP OF PILESGROVE, N.J.—PETITION FOR DECLARATORY ORDER

Digest:¹ This decision grants the Township of Mannington, N.J.’s petition to intervene, institutes a proceeding, and orders that the parties file a proposed procedural schedule to develop the record before the Board.

Decided: September 13, 2024

On May 1, 2024, the Township of Pilesgrove, N.J. (Pilesgrove), filed a petition for a declaratory order asking the Board to determine whether and to what extent 49 U.S.C. § 10501(b) preempts certain local and state laws regarding land use and land development by SMS Rail Service, Inc. (SMS). The petition was accompanied by a certificate of service stating that attorneys for SMS had been served with a copy of the petition. No reply has been filed with the Board on behalf of SMS, and the deadline for such a reply under 49 C.F.R. § 1104.13 has passed.

On June 10, 2024, the Township of Mannington, N.J. (Mannington), filed a petition for leave to intervene, asserting that it has a legitimate interest in the proceeding because SMS’s rail line also extends through Mannington, and Mannington has similarly attempted to enforce its municipal land regulations on SMS and its apparent operational affiliate Woodstown Central Railroad (WCR). Mannington served its petition on SMS and WCR, as well as their counsel. Neither SMS nor WCR has replied, and the deadline for doing so under 49 C.F.R. § 1104.13 has passed.

On July 18, 2024, Pilesgrove filed a letter requesting an update on the status of its petition and enclosing a letter it had received from an attorney on behalf of SMS. The letter from SMS’s counsel requested that Pilesgrove withdraw complaints in certain enforcement cases brought by Pilesgrove and Mannington in the Mid-Salem County (N.J.) Municipal Court that are related to the issues sought to be determined by a declaratory order in this case. Based on this letter, it appears that SMS is represented by counsel other than the attorneys served with Mannington’s and Pilesgrove’s petitions.

Service on SMS by Pilesgrove. Although the certificate of service accompanying Pilesgrove’s petition states that it was served on counsel for SMS, it does not appear that either

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Pol’y Statement on Plain Language Digs. in Decisions, EP 696 (STB served Sept. 2, 2010).

of the attorneys identified by Pilesgrove has represented SMS before the Board,² nor is there any indication in the petition or its attachments that they represent SMS in this proceeding. And although Mannington did serve its petition to intervene on corporate officers of SMS, its submission did not include Pilesgrove's petition for declaratory order. While it appears that SMS has some knowledge of this proceeding, to remove any doubt about whether it has properly been served the pending petition, Pilesgrove will be directed to serve a copy of its petition for declaratory order and this decision on both a corporate officer of SMS at SMS's home office or principal place of business and the attorney who wrote to Pilesgrove on SMS's behalf on July 16, 2024, by September 18, 2024, and contemporaneously certify to the Board that it has done so.

Intervention. Mannington satisfies the standard for intervention. Its participation will not disrupt the filing schedule and will not unduly broaden the issues raised in this proceeding. See 49 C.F.R. § 1112.4. Mannington, like Pilesgrove, is a municipal corporation in which SMS operates its passenger excursion rail operations through WCR. Further, Mannington's petition raises the same legal issues as those presented by Pilesgrove's petition for declaratory order. Mannington's unopposed petition to intervene therefore will be granted.

Institution of Declaratory Order. The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to eliminate a controversy or remove uncertainty. The petition raises questions that should be addressed by SMS to facilitate development of a more complete record. To date, SMS has not participated in this proceeding, and the apparent controversy surrounding the scope of preemption over activities performed by SMS in both Pilesgrove and Mannington has implications for how the townships can regulate those activities.

Accordingly, a declaratory order proceeding will be instituted. Pilesgrove and Mannington are directed to confer with the SMS counsel who sent the July 16, 2024 letter and jointly submit, by October 8, 2024, a proposed procedural schedule to govern the proceeding. Should the current parties and SMS fail to agree on a procedural schedule, each shall file its own proposed schedule by that same date.

It is ordered:

1. Pilesgrove is directed to serve a copy of its petition for declaratory order and this decision on a corporate officer of SMS at SMS' home office or principal place of business and on the attorney representing SMS in the July 16, 2024 letter by September 18, 2024, and contemporaneously certify to the Board that it has done so.
2. Mannington's request to intervene is granted.

² The attachments to the petition indicate that the attorneys who were served represented SMS in certain proceedings before Pilesgrove. However, SMS was represented by different counsel in the Board proceeding in which it received operating authority over the line at issue in this proceeding. See Verified Notice of Exemption, June 10, 2022, SMS Rail Serv.—Change in Operator Exemption Including Acquis. by Lease—Salem Branch Line in Salem & Gloucester Cntys., N.J., FD 36529.

3. A declaratory order proceeding is instituted.

4. Pilesgrove and Mannington are directed to confer with the SMS counsel who sent the July 16, 2024 letter and jointly submit, by October 8, 2024, a proposed procedural schedule to govern this proceeding. Should the current parties and SMS fail to agree on a procedural schedule, each shall file its own proposed schedule by that date.

5. This decision is effective on its service date.

By the Board, Board Members Fuchs, Hedlund, Primus, and Schultz.

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 and Woodstown Central Railroad*

THE STATE OF NEW JERSEY	MID-SALEM COUNTY MUNICIPAL COURT (Woodstown, NJ; Court ID 1715)
vs.	Docket Nos. SC-2024-007161, SC-2024-007162, and SC-2024-007163
SMS RAIL SERVICE, INC.	
and	
THE STATE OF NEW JERSEY	
vs.	Docket Nos. SC-2024-007164, SC 2024-007165, and SC-2024-007166
WOODSTOWN CENTRAL RAILROAD	
and	
THE STATE OF NEW JERSEY	
vs.	Docket Nos. SC-2024-007167, SC-2024-007168, SC-2024-007169
COUNTY OF SALEM	

PROOF OF FILING AND SERVICE

I hereby certify that the foregoing Notice of Motion to Dismiss, together with supporting Brief and proposed Order, was submitted to the Mid-Salem County Municipal Court, and that a copy of thereof was served by email as follows on the date set forth below:

Hon. Martin Whitcraft Mid-Salem Municipal Court 25 West Avenue Woodstown, NJ 08098 c/o Barbara.Garozzo@njcourts.gov	Court Administrator Mid-Salem Municipal Court 25 West Avenue Woodstown, NJ 08098 Barbara.Garozzo@njcourts.gov
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Karin M. Wood, Esq.
Salem County Solicitor
95 South Broadway
Pennsville, NJ 08070
attorneywood@comcast.net

A courtesy copy of the same was also served by email upon the Mannington Township

Solicitor, as follows:

William L. Horner, Esq.
Horner & Horner, LLC
67 Market Street
Salem, NJ 08079
wlh@hornerlaw.net

Dated: September 20, 2024

/s/ Robert A. Klein
Robert A. Klein, Esquire (NJ ID #009731986)
*Attorney for Defendants SMS Rail Service, Inc.
and Woodstown Central Railroad*

VERIFICATION

Robert A. Klein, Esquire, counsel for SMS Rail Services, Inc., hereby verifies that the facts set forth in the foregoing Response of Respondent SMS Rail Service, Inc. to the Board's September 13, 2024 Decision Requesting a Jointly Submitted Proposed Procedural Schedule, are true and correct to the best of his knowledge, information and belief, and further acknowledges and understands that all statements made herein are subject to the penalties relating to unsworn falsification to authorities.

Date: October 4, 2024

/s/ Robert A. Klein
Robert A. Klein, Esq.

CERTIFICATION OF SERVICE

It is hereby certified that on this 4th day of October, 2024, I served a true and correct copy of the foregoing Response of Respondent SMS Rail Service, Inc. to the Board's September 13, 2024 Decision Requesting a Jointly Submitted Proposed Procedural Schedule in the manner indicated below upon the following counsel for the parties:

By Email:

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Date: October 4, 2024

/s/ Robert A. Klein
Robert A. Klein, Esq.