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LAW OFFICES

WICK, STREIFF, MEYER, O'BOYLE & SZELIGO, P.C.

HENRY M. WICK, JR.
CHARLES J. STREIFF
CARL F. MEYER
DAVID M. O'BOYLE
VINCENT P. SZELIGO
LUCILLE N. WICK
RICHARD T. SCHADLE

1450 TWO CHATHAM CENTER
PITTSBURGH, PA 15219-3427

(412) 765-1600

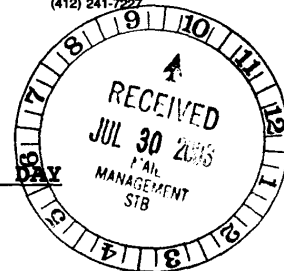
FACSIMILE
(412) 261-3783

E-MAIL
wsamos@sgi.net

DUFF OFFICE CENTER, SUITE 203
10 DUFF ROAD
PITTSBURGH, PA 15235-3206
(412) 241-7227

July 29, 2003

UPS NEXT DAY



The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street NW
Washington, DC 20423-0001

Re: Engelhard Corporation -- Petition for Declaratory
Order -- Springfield Terminal Railway Co., Inc. and
Consolidated Rail Corporation

STB Docket No. 42075

Dear Secretary Williams:

Please find enclosed an original and ten (10) copies of the
Rebuttal of Engelhard Corporation filed pursuant to the Board's
Decision in Engelhard Corporation - Petition For Declaratory
Order - Springfield Terminal Railway Company and Consolidated
Rail Corporation, STB Docket No. 42075, served April 1, 2003.

Also enclosed is a an electronic copy on 3.5 inch disk in
Word Perfect format. If you have any questions, do not hesitate
to call. Please date-stamp the enclosed extra copy of this
letter and return same in the self-addressed, stamped envelope.

Very truly yours,

ENTERED
Office of Proceedings

JUL 30 2003

Part of
Public Record

WICK, STREIFF, MEYER,
O'BOYLE & SZELIGO, P.C.

Vincent P. Szeligo
Vincent P. Szeligo

Enclosures

cc: David C. Ziccardi, Esq. (w/enc.)
Robert B. Culliford, Esq. (w/enc.)
Eric L. Hirschhorn, Esq. (w/enc.)
Engelhard Corporation (w/enc.)

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET No. NOR 42075

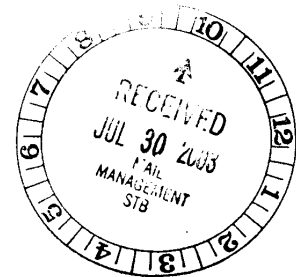
ENGELHARD CORPORATION
-- PETITION FOR DECLARATORY ORDER --
SPRINGFIELD TERMINAL RAILWAY COMPANY AND
CONSOLIDATED RAIL CORPORATION

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REBUTTAL OF ENGELHARD CORPORATION



Pursuant to the schedule established by the Board's Order of April 1, 2003, Petitioner, Engelhard Corporation, hereby files its Rebuttal in response to replies filed by Respondents, Springfield Terminal Railway Company ("ST") and Consolidated Rail Corporation ("Conrail").

1. Accrual of Cause of Action for Car Provider's Suit Involving Rail Carriers' Failure to Pay Compensation under 49 U.S.C. § 11122.

During the initial phase of this litigation, the District Court grappled with the task of selecting an appropriate statute of limitations for an action by a car provider to recover compensation required under 49 U.S.C. § 11122 of the Interstate Commerce Commission Termination Act (the "Act"); a task made difficult by the fact that while the Act sets forth periods of limitation for civil claims by carriers against shippers (Section 10705(a)) and by shippers against carriers (Section 11705(b)), it does not expressly provide a statute of limitations for a civil action by a car provider for compensation. See Engelhard v. Springfield Terminal and Conrail, 193 F. Supp. 385 (D.C. Mass., 2002). Now, in this phase of the litigation, the parties address a question referred by the Court to the Board concerning the point in time when the

involved cause of action arises. Specifically, the Court frames the question as being whether the cause of action arises:

- "one month and ten days after the payment comes due, or
- four months from the date on which a railroad refuses to pay or act on a claim, or
- some other date?"

Id., at 319.

In their replies, ST and Conrail argue that the accrual of the instant cause of action is governed by 49 U.S.C. § 11705(g), which provides:

A claim related to a shipment of property accrues under this section on delivery or tender of delivery by the rail carrier.

[Emphasis Added]. ST and Conrail urge the Board to conclude that Engelhard's claim for car compensation is "related to a shipment of property" and that the claim accrues at the time of delivery, or at the latest, on the date when the rail carrier is obligated to pay under Freight Tariff 6007, Item 180.2 (one month and ten days after the end of the month in which the mileage was earned).

Engelhard believes that the reference in Section 11705(g) expressly describes a limited sub-set of the universe of all claims relating to violations of the Act which are deemed to arise upon delivery or tender of a shipment of property. ST and Conrail cite a number of decisions which interpret 49 U.S.C. § 11705(g), or its predecessor provisions under prior codifications, which hold that a claim related to a shipment of property accrues on the delivery or tender of delivery by the rail carrier even though the involved claim is for demurrage accruing after the

time of delivery.¹ This proffered analogy is not helpful here because demurrage is factually connected with delivery and, therefore, can be seen to be logically related to contract of carriage between a carrier and a shipper. Here, Engelhard is not a shipper and, as is true for other car owners, is a not party to the contract of transportation governing a shipment of property. The interest Respondents see in a unified limitations period for all shipment related claims between shippers and carriers is not involved here.

Research indicates that this case presents a matter of first impression on the question of when a cause of action arises for recovery of private car compensation under Tariff 6007. No direct case law on this point has been discovered; however, a question concerning the accrual of a cause of action for recovery of "excess empty mileage" (a similar type claim also covered under the national allowance systems as reflected in Tariff 6007) was addressed in Chicago, R.I. & P. R. Co. v. Petroleum Refining Co., 39 F.2d 629, 631 (DC Ky, 1930). There, the Court noted that while accrual of a cause of action under former Section 16(3)(e) of the Interstate Commerce Act arose with respect of a shipment of property "upon delivery or tender of delivery thereof by the carrier", a suit for the recovery of excess empty tank car mileage did not accrue upon delivery because excess empty mileage charges did not related to "a shipment of property." Charges relating to the provision of an instrumentality of transportation cannot be said to rest on single shipments, but rather are related to a comprehensive national allowance system.

¹ Railroad Respondents conveniently urge that the Act should be broadly or narrowly construed as best fits their economic position. They urge that "shipment of property" should be broadly construed to cover compensation to non-shipper/ non-carriers car providers who are not parties to the contract of carriage. However, on other issues, they insist that since Engelhard is neither a carrier nor a shipper, any analysis which draws upon the freedom to contract created by the Staggers Act is misplaced because Section 10709 only exempts rail transportation contracts between a rail carrier and a shipper.

There is obvious logic in setting the accrual of shipper versus claims relating to a shipment with reference to the time of delivery. Both the carrier and the shipper are parties to a bill of lading or transportation contract and both are directly involved in the tender or delivery. However, car providers such as Engelhard, may not be involved in the shipment and may not be parties to the bill of lading. There is nothing associated with the action of delivery or tender of delivery which appraises a car provider that its car has been used in revenue service over so many miles of a rail carrier's line.

Conrail apparently acknowledges this problem and falls back by arguing that under the "discovery rule" Engelhard should have known of the existence of its mileage claims under the facts and circumstances. Conrail Reply at page 9, n.4. However, Conrail fails to address Engelhard's contention that Conrail had an obligation under Tariff 6007, Item 180.2 to report the mileage and allowances for loaded movements over the involved segment of its line. Conrail also fails to acknowledge the significance of its breach in connection with its argument that tolling should not be considered in determining when Engelhard's claim accrued, or when its limitations period expired. Conrail asserts that Engelhard engaged in "needlessly dilatory behavior" which should not be countenanced by the Board. Conrail Reply at page 11.

To the contrary, it is the railroads' behavior which should not be countenanced by the Board. The railroads' failure to report mileage, coupled with their refusal to disclose facts related to their positions concerning the Haulage Agreement, clearly prevented Engelhard from being able to ascertain the existence of the involved mileage obligations.

Here, Engelhard's mileage auditor points out that Engelhard had to rely on the railroads to honor their obligation to self-report mileage information. See, Rebuttal Verified Statement of Patrick F. Kelly. This is the method contemplated by Tariff 6007 by which Engelhard would normally "discover" that a railroad had an obligation to pay mileage allowances. However, Engelhard's discovery of the obligation under this method was prevented by the railroads' behavior. The failure of either Conrail or ST to self-report mileage caused a delay of such nature as to equitably bar them from maintaining that Engelhard's cause of action accrued at the time of delivery or at the time when the mileage should have been reported. The railroads' failure to follow the terms of the tariff make the instant case analogous to the body of transit tariff cases, which hold that a cause of action does not arise until the amount of the obligation can be ascertained.

Although in its opening, Engelhard has already cited this Board to the accrual determination set forth in one transit case, Bethlehem Steel Co. v. Consolidated Rail Corp., 515 F. Supp. 472, 474 (E.D. Pa. 1981), the inclusion of a breach of tariff obligation in Chicago N. W. R. Co. v. Connor Lumber & Land Co., 212 F.2d 712 (7th Cir. 1954)("Connor Lumber") provides a better reference.

In Chicago N. W. R. Co. v. Connor Lumber & Land Co., Id., the accrual of a cause of action was held to not commence on delivery. There, a shipper paid a lower tariff rate which was conditioned upon its reporting of outbound shipments over carrier's line of sufficient tonnage, after applying the proper "product equivalent," to equal the tonnage of inbound shipments. Although it could be argued that the carrier should have known that the shipper was not reporting

outbound tonnage, the carrier claimed that the accrual of its cause of action to recover freight charges commenced when it audited the shipper's books. The Connor Lumber Court agreed, holding that defendant could not be heard to say that the statute of limitations was running during the period of delay caused by its failure to comply with its obligation under the tariff to submit tonnage reports. Id., 212 F.2d at 718. This rationale is directly on point to the matter currently before the Board in light of the fact that here the railroads' failure to report mileage can be seen as amounting to concealment of the facts giving rise to their obligation.

The Connor Lumber Court held that the statute of limitations did not begin to run until the time when plaintiff conducted an audit of defendant's books because it was only at that time that the amount owing by defendant could be ascertained and payment refused. Id. See also, Arkansas Oak Flooring Co. v. Louisiana and Arkansas Ry. Co., 166 F.2d 98 (5th Cir., 1948), *cert. denied*, 334 U.S. 828 (1948).

In a line of reasoning similar to that employed by the Connor Lumber Court, the Interstate Commerce Commission, analyzing tolling rather than accrual, held that actions amounting to the concealment of information tolled a statute of limitations. In In the Matter of Investigation Into Lawfulness of Interchange Arrangements between the Bangor and Aroostook Railroad and CP Rail at Brownville Junction, Maine, 356 I.C.C. 749, 1977 ICC Lexis 148, pages *48 - *49, *63 - *67 (1977), *aff'd on other grounds sub nom. Bangor & Aroostook R.R. v. ICC*, 574 F.2d 1096, 1115 (1st Cir.), *cert. denied*, 439 U.S. 837 (1978), the Commission held that the 2 year statute of limitations under former Section 16(3) of the Interstate Commerce Act did not commence upon delivery or tender of a shipment. The case involved an action by the Maine Central Railroad

Company ("MEC") and the Boston and Maine Corporation ("B&M") to recover damages from the Bangor and Aroostook Railroad ("BAR") and CP Rail ("CP") for violations of an interchange agreement governed by the Act. The Commission concluded since that BAR and CP had concealed facts relating to the interchange agreement which MEC and B&M could not have learned through the exercise of reasonable care and diligence, the cause of action did not accrue until MEC and B&M obtained the necessary facts and were able to ascertain the existence of the liability. 1997 ICC Lexis at *64. The Commission concluded that the cause of action accrued when the Interchange Agreement was finally provided to the claimant railroads. Id. at *65.

Here, ST and Conrail selectively quoted the Haulage Agreement and misstated the law. See Petitioner's Exhibit No. 1 - Amended Complaint, ¶¶ 21 - 37. ST asserted its liability was based on Waybill routing information notwithstanding the fact that Waybill routing is an internal railroad process. See Rebuttal Verified Statement of Patrick F. Kelly, ¶¶ 5 - 6. Conrail blatantly asserted that the terms of the Haulage Agreement absolved it of responsibility for payment of mileage allowances and accordingly, it did not report mileage on the Selkirk/Barber segment despite the fact that under a literal reading of Tariff 6007, Item 25.2 and 180.2, it had an obligation to do so. Only after filing mileage claims with ST did Engelhard learn on which movements ST would pay. Springfield Terminal also hung its position squarely on the Haulage Agreement, although it was never able to cite the provision supporting its limited view that its obligation only applied to movements Waybilled at Barber Station. It also did not report mileage for the Selkirk/Barber segment under Item 180.2. Both railroads failed to honor the reporting required under the tariff and both were deceptive in their denials, refusing to provide a full copy of the Haulage Agreement and through their actions prevented Engelhard from

acquiring information needed to ascertain the existence of a claim until the point when each of Engelhard's audit claims were denied.

2. Are Assignments Permitted in Light of the ICC Prescription?

Engelhard maintains that it is a proper party to seek damages for unpaid private car compensation by virtue of both written assignments it holds from car lessors, as well as the long history of acquiescence of carriers and lessors in the course of dealing whereby Engelhard submitted mileage audit claims which the railroads addressed without questioning Engelhard's authority. Although it is true that the Interstate Commerce Commission prescribed that the tank car industry adhere to the Agreement appended to its 1986 Ex Parte No. 328 Order, it cannot be said that the terms of Tariff 6007 cannot be modified by agreement of the parties. The right of parties to voluntarily set the terms of tank car compensation by agreement was expressly noted in Ex Parte No. 328, Investigation of Tank Car Allowance System, 3 I.C.C.2d 196 , 199 (1986). There, the industry's adherence to a national allowance system developed by a Joint Negotiating Committee ("JNC") comprised of representatives from rail carriers, shippers, car manufactures, lessors and lessees was prescribed by the Commission. Although the uniform procedures negotiated by the JNC were prescribed, the Commission noted that the agreement presented to it assumed that the uniform system could be varied under certain circumstances. The Commission noted that:

the JNC emphasizes that these procedures do not take away two other means the parties now have and will continue to have to depart from the national allowance system. First, departures can be accomplished by private contracts under [former] 49 U.S.C. § 10713 [now § 10709]. Second, any party wishing to depart from the system contained in the agreement may file a petition to modify the order.

Id., 3 I.C.C.2d 196 at 199.

In its Reply at page 11, ST acknowledges that the mileage obligations can be modified through a departure tariff or a private contract, but citing the language of 49 U.S.C. § 10709, it urges a narrow restriction to limiting such private contractual modifications to those between "a rail carrier and a shipper". This position is somewhat disingenuous given the conduct of ST. By course of dealing under the Haulage Agreement between ST (a rail carrier) and Conrail (a rail carrier), ST has been shown to have processed mileage claims submitted to it for the disputed 155 mile segment, paying mileage for many of the movements.² See Verified Rebuttal Statement of Patrick F. Kelly. In fact, in its Reply at page 3, Conrail makes reference to the voluntary contractual nature of ST's obligation to pay mileage, stating that pursuant to the Haulage Agreement, "ST accepted responsibility for mileage between Selkirk and Barber St. when shipments were waybilled over Conrail to Rotterdam Jct., New York, but interchanged with ST a Barber St."

ST did not own the track between Selkirk, N.Y. and Barber Station, MA. The track was owned by Conrail. Operations over it were pursuant to Conrail's common carrier franchise. ST's performance under Item 182.2 for movements over this segment of Conrail track (after submission of audit claims under Item 182.2) obviously reflects some sort of contractual arrangement outside the four corners of the Tariff 6007 document.³ Whether the obligation is

²The Affidavit of Patrick F. Kelley, Engelhard's mileage auditor, (Petitioner's Exhibit No. 2, Paragraph 10), shows that ST "routinely paid many of [the] mileage claims for movements over Conrail's Selkirk to Barber line." In Engelhard's Amended Complaint at ¶ 32 (Petitioner's Exhibit No. 1), it is shown that ST paid mileage on 2,518 of the 6,055 shipments identified in the audits.

³ Although Tariff 6007's terms at Items 25.2 and 180.2 expressly obligate the railroad over whose line a tank car has moved to report mileage, neither Conrail nor ST complied with the Tariff 6007, Item 180.2 obligation

said to arise under the Haulage Agreement, or through a verbal understanding developed over the course of dealing of the parties⁴, it clearly is not a contract between "a rail carrier and a shipper". Therefore, ST's argument that the only legally permissible modifications to the national allowance system are those reflected in departure tariffs or Section 10709 contracts between a rail carrier and a shipper ignores the contract it has used to determine its mileage obligations.

A fair reading of the 1986 Order in Ex Parte No. 328, is that strict adherence to the terms of the prescribed national allowance system is not required where all parties in interest contractually provide otherwise. ST's contention that the terms of a filed tariff cannot be varied by an inconsistent private arrangement (Reply of ST, at p. 12), ignores the significant body of law on the issue of negotiated rates. See, Maislin Industries, U.S. v. Primary Steel, Inc., 497 U.S. 116 (1990)(recognizing that in light of prohibition against unreasonable carrier practices, privately negotiated agreements are a defense to the "filed rate doctrine"); later codified and refined in Negotiated Rates Act of 1993, Pub. L. 103-180, Dec. 3, 1993, 107 Stat. 2004. Here, ST's acquiescence in the course of dealing whereby Engelhard filed mileage claims with ST for leased cars whose marks were in the name of the Lessors precludes it from raising strict adherence to the tariff as a defense.

Significantly, Conrail expressly notes in its Reply, at page 5, n.3, that it does not join with ST in objecting to the right of the "owner of the mark to assign the right to payment to a

requiring reporting of mileage for the involved segment. Necessary information could therefore only be obtained in the course of the audit procedure provided by the tariff. Rebuttal Verified Statement of Patrick F. Kelly, ¶ 3.

⁴ Consolidated Rail Corp., v. Rail Services, Inc., 2001 U.S. Lexis 190, pages 8 - 9, (W.D. Mich. 2001)(terms of a contract may be oral, and they may be supplied or implied by the parties' conduct and course of performance.)

lessee of a car". Apparently, "Conrail takes no position on that issue in this proceeding insofar as it is limited to the question of the assignability of claims for purposes of litigation." Although Engelhard's arguments in support of its right to pursue this action are based on the ability of parties to vary by contract the terms of a tariff, Conrail's comment suggests an alternative analysis resting upon the right of a party to assign a cause of action for purposes of collection. While Conrail does not support its comment with citation to authority, Engelhard's research indicates that there is no case which prohibits the assignment of claims for recovery of damages and, in fact, the Interstate Commerce Commission has repeatedly recognized the validity of assigned claims and permitted successors in interest to maintain formal complaints for the recovery of reparations. See, McDonald Corp. v. Baltimore & Ohio R. R., 238 I.C.C. 252, 253 (1940)(objection that legal successor in interest was not the shipper entitled to sue is dismissed); Forrester-Nace Box Co. v. Director General, 93 I.C.C. 665 (1924)(complaint by corporate parent permitted on finding of implied agency); Midland Coal Co. v. Missouri Pacific Railroad Co., 89 I.C.C. 101, 102 (1924)(entity which assumed assets and liabilities of predecessor can maintain action on behalf of predecessor for reparations); and, Standard Roofing Co. v. Missouri, Kansas & Texas, Ry. Co., 47 I.C.C. 208, 212 (1917)(action founded upon an assignment of consignor's claim for reparations allowed over railroad's objection).

Furthermore, the United States Supreme Court has also specifically addressed the issue. The cause of action for recovery of damages is a property right and an assignee of that right may maintain an action for reparations in his own name. See Spiller v. Atchinson, T. & S. F. R. Co., 253 U.S. 117, 133 - 136 (1920). There, the appellate court below had held that the holder of a valid assignment could not bring suit against a carrier to force compliance with a Commission

award of damages for violation of the Act. Although the Act contained language which created a cause of action for one on whose benefit the award is made, the Supreme Court attributed no significance to the statute's absence of language expressly extending the remedy to representatives or assigns of the person actually aggrieved. The Supreme Court stated:

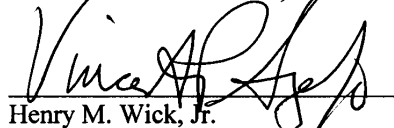
The provisions of the act giving redress, compensatory in its nature, to persons sustaining pecuniary injury through the violation of public duty by the carrier must receive a reasonably liberal and not a narrow interpretation. A claim for damages sustained through the exaction of unreasonable charges for the carriage of freight is a claim not for a penalty but for compensation, is a property right assignable in its nature.

Id. at 135.

3. Conclusion.

This case presents many novel questions of first impression concerning the rights and obligations of car providers (lessors and lessees) and rail carriers and their representatives and assigns arising under the Act, the Haulage Agreement and Tariff 6007. For the reasons discussed above, Engelhard urges the Board to issue a declaratory order which will assist the District Court in analyzing the questions discussed herein.

Respectfully submitted,
WICK, STREIFF, MEYER,
O'BOYLE & SZELIGO, P.C.


Henry M. Wick, Jr.
Vincent P. Szeligo
1450 Two Chatham Center
Pittsburgh, PA 15219
412-765-1600
vszeligo@wsmoslaw.com
Attorneys for Engelhard Corporation

July 29, 2003



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET No. NOR 42075

**ENGELHARD CORPORATION – PETITION FOR DECLARATORY ORDER –
SPRINGFIELD TERMINAL RAILWAY COMPANY AND CONSOLIDATED RAIL
CORPORATION**

VERIFIED REBUTTAL STATEMENT OF PATRICK F. KELLY

1. My name is Patrick F. Kelley and I am employed by Rail Transportation Management of Houston, Texas. I previously supplied a sworn statement relating to the course of dealing of the parties on various mileage allowance disputes between my client, Engelhard Corporation, Consolidated Rail Corporation and Springfield Terminal Railway Company. I am the person who audits mileage allowances and submits mileage claims under Tariff 6007 on behalf of Engelhard. See Petitioners Exhibit No. 2.
2. In reply pleadings submitted by Conrail and Springfield Terminal, it is argued that Engelhard had a right to sue for accrued mileage allowances at the time each shipment was delivered, or alternatively, on the date the railroads were obligated to report mileages under Item 180, paragraph 2 of Freight Tariff 6007 ("within one (1) month and ten (10) days from the last day of the month in which it is earned including payment for cars on hand at the end of that month.")
3. Neither Conrail nor Springfield Terminal complied with the obligations set forth in Item 180, paragraph 2. Since one or both railroads failed to comply with the self-reporting scheme of the Tariff, Engelhard's knowledge of the existence of its right to mileage had to be obtained through my efforts in auditing the traffic.

4. At the urging of Conrail, in reliance upon the terms of a Haulage Agreement which the parties quotes in part, but refused to disclose in full, I filed mileage claims for unpaid mileage accruing over the Selkirk/Barber segment with Springfield Terminal. Approximately half of the movement claims were allowed and paid by Springfield Terminal (on leased cars, the payment was made via a credit to the reporting marks of the lessor, ultimately getting credited to Engelhard's account with the lessor).

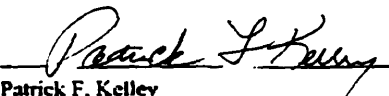
5. Where Springfield Terminal denied payment, it asserted that it was not liable because the shipment was Waybilled for interchange at Barber Station and, therefore, Conrail received the freight revenue over that segment.

6. For all the shipments involved in this suit, Engelhard's customers, not Engelhard arranged for the shipments. Engelhard does not control the Waybill routing. Waybill routing is an internal railroad function and Engelhard does not have access to Waybill information.

7. Here, the point in time when Engelhard first discovers that it needs to resort to legal action to collect mileage allowances required under Tariff 6007 is when Springfield Terminal advises in response to mileage audits I file on behalf of Engelhard pursuant to Item 182.2, that it has no obligation to pay mileage by virtue of the fact that a particular shipment moved under a Waybill describing the interchange point as "Barber Station".

8. Springfield Terminals never denied payment or refused to process a claim I filed on behalf of Engelhard on the grounds that the only proper claimant was the owner of the reporting mark (typically the lessor).

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief and that I am qualified and authorized to file this Statement.
Executed this 29th day of July, 2003.


Patrick F. Kelley

Kelley Rebuttal Statement.mpd

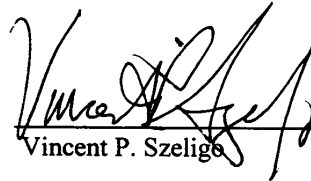
CERTIFICATE OF SERVICE

I, Vincent P. Szeligo, Esquire, certify that a true and correct copy the Rebuttal of Engelhard Corporation was served upon counsel identified below by overnight delivery, this 29th day of July, 2003.

David C. Ziccardi, Esq.
Consolidated Rail Corporation
Two Commerce Square
2001 Market Street, 16-A
Philadelphia, PA 19103-1416

Robert B. Culliford, Esq.
Guilford Transportation Industries, Inc.
Iron Horse Park
North Billerica, MA 01862

Eric L. Hirschhorn, Esq.
Winston & Strawn
1400 L St., NW
Washington DC 20005



Vincent P. Szeligo

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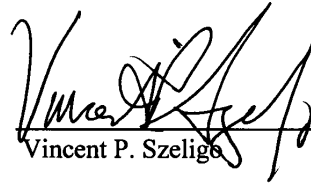
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