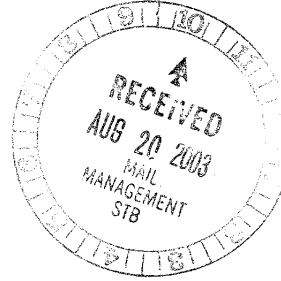


CONRAIL®



208731



August 19, 2003

VIA UPS NEXT-DAY AIR

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. and Consolidated Rail
Corporation--STB Docket No. NOR 42075**

Dear Secretary Williams:

Enclosed for filing in the above-referenced action is the original and ten (10) copies of the Motion of Respondent Consolidated Rail Corporation for Leave to File a Surrebuttal and proposed Surrebuttal. Pursuant to 49 C.F.R. § 1104.2, the original and all copies are paginated consecutively to assist with scanning. Because the textual submission is less than twenty pages in length, no electronic copies are included. *See* 49 C.F.R. § 1104.3(b)(1).

Very truly yours,

A handwritten signature in black ink, appearing to read "David C. Ziccardi".

David C. Ziccardi

Encls.

C: Robert Culliford, Esq.
Eric L. Hirschhorn, Esq.
Vincent P. Szeligo, Esq.
(all *via* UPS Next-Day Air w/encl.)

**ENTERED
Office of Proceedings**

AUG 20 2003

**Part of
Public Record**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET No. NOR 42075

**ENGELHARD CORPORATION—PETITION FOR
DECLARATORY ORDER—SPRINGFIELD TERMINAL
RAILWAY CO., INC. AND CONSOLIDATED RAIL CORPORATION**



**MOTION OF RESPONDENT
CONSOLIDATED RAIL CORPORATION
FOR LEAVE TO FILE A SURREBUTTAL**

Respondent Consolidated Rail Corporation ("Conrail") respectfully requests that this Board grant it leave to file the accompanying Surrebuttal. In support of its motion Conrail submits that the Rebuttal filed by Petitioner Engelhard Corporation ("Engelhard") raises the issue of fraudulent concealment--an issue which was not referred to this Board by the District Court and which was, in fact, withdrawn by Engelhard prior to the District Court's referral order. Conrail requests leave to file the accompanying Surrebuttal solely for the purpose of supplementing the record with materials from the District Court

proceedings which demonstrate that the issue of fraudulent concealment is not part of the District Court case, much less this proceeding.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Broder', is written over a horizontal line.

JONATHAN BRODER (38475)

DAVID C. ZICCARDI (63148)

Consolidated Rail Corporation

Two Commerce Square

2001 Market Street, 16-A

Philadelphia, PA 19101-1416

(215) 209-5028

Attorneys for Respondent,

CONSOLIDATED RAIL CORPORATION

Dated: August 19, 2003

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET No. NOR 42075

**ENGELHARD CORPORATION—PETITION FOR
DECLARATORY ORDER—SPRINGFIELD TERMINAL
RAILWAY CO., INC. AND CONSOLIDATED RAIL CORPORATION**

**SURREBUTAL OF RESPONDENT
CONSOLIDATED RAIL CORPORATION TO
REBUTTAL OF ENGELHARD CORPORATION**

I. INTRODUCTION

Engelhard Corporation's ("Engelhard's") Rebuttal is replete with accusations calculated to persuade this Board that, despite the clear and convincing evidence to the contrary, Respondents Consolidated Rail Corporation ("Conrail") and Springfield Terminal Railway Company ("ST") fraudulently concealed the basis of Engelhard's claim from it. What Engelhard fails to point out to this Board is that it pursued this same avenue in the District Court (the "Court") and failed and that as a result of that failure it withdrew its fraudulent concealment claim.

II. FRAUDULENT CONCEALMENT IS NOT BEFORE THIS BOARD

Engelhard knew it was facing a serious statute of limitations impediment when it filed its original complaint. In an effort to breath life into its stale claims, Engelhard attempted to allege fraudulent concealment in the original complaint. *See* Exhibit "A" at ¶¶ 11, 25.¹ Conrail filed a motion to dismiss the original complaint, arguing, *inter alia*,

¹ Fraudulent concealment (or "equitable tolling") tolls the statute of limitations only where a plaintiff has been injured by fraud and remains unaware of his injury "without any fault or want of diligence of his

that Engelhard had failed to plead adequately the elements of fraudulent concealment. See Exhibit "B" at 7-12. Indeed, Engelhard never alleged that Conrail and ST had successfully concealed the nature of its claim, only that they had *attempted* to do so. *Id.* at 8-9.²

The Court held oral argument on the railroads' motions to dismiss the complaint. During that proceeding Engelhard's counsel was forced to admit what was obvious to the Court (and what the evidence submitted to this Board demonstrates):

The Court: I mean, I honestly do not think there is much to the fraudulent concealment. I assume that is a discovery rule argument.

Mr. Szlegio: I think so, your honor. I am still asking for the agreement, and I have been told that I have to wait --

The Court: I agree that you clearly had notice that you were not being paid.

Mr. Szlegio: Yes. We had notice that we weren't being paid.

Exhibit C at 11-12 (emphasis added).³

In light of this admission, Engelhard deleted all fraudulent concealment allegations from the Amended Complaint. See Petitioner Exhibit No. 1 Engelhard's Opening Statement.

Thus, not only was Engelhard's abandoned fraudulent concealment claim not referred to

own." *Salois v. Dime Bank of New York, FSB*, 128 F.3d 20, 25 (1st Cir. 1997)(quoting *Holmberg v. Ambrecht*, 327 U.S. 392, 397 (1946)).

² Actual (and wrongful) concealment is a necessary element of fraudulent concealment. *Berkson v. DelMonte Corp.*, 743 F.2d 53, 55 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985).

³ The furnishing of a complete copy of the Haulage Agreement is a red herring. In fact, Engelhard initially alleged that it was entitled to the claimed mileage allowances *despite the existence of the Haulage Agreement*. See Exhibit A at ¶¶ 19, 27. Engelhard did not request a complete copy of the Haulage Agreement until a meeting held in April 2001--*one month prior to the commencement of this action*. See Engelhard's Opposition to Defendants' Motions to Dismiss the Complaint, Exhibit "D" at 10. More importantly, Engelhard commenced this action *without the benefit of a complete copy of the Haulage Agreement*. If it was able to do so in 2001 it could have done so in 1998, or earlier.

this Board, it is no longer part of this action. As such, this Board should not consider Engelhard's fraudulent concealment assertions in deciding the accrual issue referred to it by the Court.⁴

III. CONCLUSION

For the foregoing reasons, as well as those set forth in its Reply, Conrail respectfully requests that this Board rule that the applicable two-year statute of limitations prohibits Engelhard from recovering any mileage allowances allegedly earned in connection with shipments which were delivered (or tendered for delivery) prior to May 15, 1999. In the alternative, Conrail respectfully requests that this Board rule that the applicable two-year statute of limitations prohibits Engelhard from recovering all mileage allowances allegedly earned through March 1999.

Respectfully submitted,



JONATHAN BRODER (38475)
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(215) 209-5028

Attorneys for Respondent,
CONSOLIDATED RAIL CORPORATION

Dated: August 19, 2003

⁴ This is not the first time Engelhard has tried to get before this Board matters beyond those expressly identified by the Court in its April 2, 2002 Memorandum and Order: "Plaintiff Engelhard's proposed [referral] order in essence asks the [STB] to redetermine matters already decided adversely to Engelhard by this court, or to opine on issues outside of its competence." Exhibit "E."

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ENGELHARD CORPORATION, a)
Delaware Corporation,)
)
Plaintiff,)
)
vs.)
)
SPRINGFIELD TERMINAL)
RAILWAY CO., INC., a)
Vermont Corporation and)
CONSOLIDATED RAIL)
CORPORATION, a)
Pennsylvania Corporation)
)
Defendants.)

Civil Action No. *C.A. 01-10829-RGS*

COMPLAINT

Engelhard Corporation ("Plaintiff"), by and through its undersigned counsel, hereby files this Complaint and in support thereof states as follows:

1. This Court has diversity jurisdiction over the claims set forth in this Complaint pursuant to 28 U.S.C. §1332(a)(1) and §1367(a) in that the amount in controversy exceeds \$75,000.00, and there is complete diversity between Plaintiff and Defendants.

2. This Court has venue over Defendants in that both are railroad common carriers who operated rail lines within the Commonwealth of Massachusetts during the period relevant to this action. Furthermore, the claims stated in both Count I and Count II involve a 155 mile segment of rail line from Selkirk, New York to Barber Station, Massachusetts.

3. Plaintiff is a corporation organized and existing under the laws of the State of Delaware with its principal office located in Iselin, New Jersey. Plaintiff is a specialty chemical company engaged in a number of businesses, including the mining and sale of high quality kaolin clay at origins in Georgia, which clay is transported in bulk in dry and slurry form in rail tank cars, and to a much lesser extent in hopper and sparger cars from Georgia origins to numerous customers of Plaintiff in the Northeastern United States and Canada.

4. Defendant Springfield Terminal Railway Co., Inc. ("Springfield Terminal") is a corporation organized and existing under the laws of the State of Vermont with a principal place of business located at Iron Horse Park, North Billerica, Massachusetts 01862. Defendant Springfield Terminal is a railroad common carrier engaged with its connecting rail lines in the business of providing railroad freight service, including the transportation of clay, for Plaintiff to various points in the Northeastern United States, through Massachusetts.

5. Defendant Consolidated Rail Corporation ("Conrail") is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal corporate office located in Philadelphia, Pennsylvania. Defendant Conrail was, at all times relevant to this Complaint, a railroad common carrier engaged with its connecting rail lines in the business of providing railroad freight service, including the transportation of clay, for Plaintiff to various points in the Northeastern United States, through Massachusetts.

6. Defendant Springfield Terminal and Conrail, as rail common carriers are subject to the laws applicable to railroad common carriers provided in the Interstate Commerce Act, 49 U.S.C.

§10101 et seq., and specifically §11121 and 11122 thereunder, and are subject to the regulations and orders of the Surface Transportation Board ("STB"), which is the successor agency to the Interstate Commerce Commission ("ICC").

7. Historically, the nations' railroads have not furnished tank cars and other speciality cars, as a result, parties interested in the movement of commodities requiring the use of tank, hopper and sparger cars have been compelled to arrange for their own equipment. The acquisition or lease by Plaintiff of rail equipment over a period of many years has been made in reliance upon outstanding orders of the ICC, predecessor of the present regulatory agency STB, whose orders and regulations prescribed the statutory compensation to be paid by Defendants and other railroads to tank car suppliers such as Plaintiff for the use of such tank cars. The prescribed compensation known as "Mileage Allowances" is based on the statutory criteria set forth in the governing statute 49 U.S.C. §11122 and tariffs of railroads, including Defendants, establishing just, reasonable and otherwise lawful practices and rules.

8. Mileage Allowances payable by the railroads to tank car providers have been prescribed by orders of the ICC in a number of proceedings, the most recent of which is entitled Ex Parte No.328, Investigation Of Tank Car Allowance System, 3 I.C.C. 2d 196 (1986). In that decision the ICC adopted an agreement presented by members (including the Nations' railroads) of the Joint Negotiating Committee ("JNC"), establishing a mandatory, uniform National Tank Car Mileage Allowance System. The agreement was developed after three years of negotiations by members of the JNC, which included the Association Of American Railroads ("AAR") and major shipper groups involved in the transportation of commodities in tank cars. The JNC agreement, adopted as a order

(the 1986 Order) by the ICC effective September 26, 1986, ordered all railroads, including Defendants, to publish mileage tariffs establishing mileage allowance payments to tank car suppliers. Such tariffs have been designed as Series 6007 Mileage Allowances and Rules. The 6007 Mileage Tariff included elaborate rules concerning the calculation and payment of mileage allowances for use of tank cars as well as other rules implementing the ICC order. The 1986 Order, which remains in effect today, included a requirement that railroads such as Defendants could not publish tariffs which in any way "departed" from the prescribed allowance system, except under specific procedures subject to review by the regulatory commission, which is now the STB.

9. Although the ICC and STB have not prescribed a mandatory compensation formula for hopper and sparger cars, railroad are nevertheless under a statutory obligation to pay fair compensation to providers of such cars.

10. Pursuant to the 1986 Order, at all times relevant to this case, Defendants Springfield Terminal and Conrail participated in the series of tariffs identified as a Mileage Allowance on Private Cars - Tariff 6007 (Series) implementing the 1986 Order in Ex Parte No. 328 (for tank cars) and also providing terms governing compensation on private cars other than tank cars. Such tariffs contained rules regarding the handling of mileage allowances, including rules obligating railroads to calculate and "report" mileage allowances for their transportation of private cars over their lines via the actual route of movement. Such tariffs also included procedures for the car provider's auditing of railroad mileage reports and submission of claims for discrepancies.

11. The Miles Allowance Tariff set forth contractual obligations of participating railroads, which in the context of the instant action, are interpreted differently by the two Defendants. In particular, each Defendant asserts that the other is responsible for reporting and paying mileage allowances on private cars transported over a 155 mile segment of track owned by Conrail between Selkirk, NY, and Barber Station, MA. As a result, neither Conrail nor Springfield Terminal have honored their obligation to self-report the mileages pertaining to Plaintiff's private cars transported by them over this segment. In addition, both Conrail and Springfield Terminal have concealed and or misrepresented certain railroad operating agreements which pertain to the issue of which railroad actually transported Plaintiff's cars over the 155 mile Selkirk/Barber track. Defendants have stated to Plaintiff that the issue of which carrier is liable for the 155 mile segment is based on the terms of one or two or more private agreements which have been partially disclosed to Plaintiff, but which Defendants refuse to disclose in full. These actions by Defendants were intended to mislead Plaintiff concerning the true state of facts. Defendants' failure to truthfully report the fact that they transported Plaintiff's cars over the 155 mile segment, plus their misrepresentations and incomplete disclosures of private agreements, were actions which were calculated to deceive and mislead Plaintiff to hinder its collection outstanding mileage allowance payments and, therefore, constitute sufficient grounds for the tolling of any relevant statute of limitations which might otherwise apply.

12. Over a period of many years has made substantial capital investments in the acquisition, by purchase or long term lease, of rail equipment suitable for the transportation of clay over Defendants' lines and other railroads' lines in serving Plaintiff's customers. Plaintiff has made such investment in specialized rail equipment for the transportation by rail of clay because of the

failure and refusal of Defendants and other railroads to provide specialized equipment despite their statutory obligation to furnish safe and adequate car service pursuant to 49 U.S.C. § 11121(a)(1). Since such private cars and other specialized equipment are utilized by rail common carriers in fulfilling their common carrier obligations, Plaintiff has a statutory right to just compensation.

13. Plaintiff has purchased tank cars which it owns and has leased other tank, hopper and sparger cars from the following lessors: ACF Industries, Incorporated; General American Tank Corporation; General Electric Capital Rail Car Corporation; and Union Tank Car Company. For both owned and leased cars, Engelhard is the ultimate recipient of mileage allowance payments. With the consent and/or acquiescence of lessors and railroads, including Defendants Conrail and Springfield Terminals, for many years Engelhard has pursued claims for unpaid mileage allowances in its own right on the basis of oral and/or written assignments from said private car lessors. For the cars involved in this action, Engelhard is authorized to pursue collection of mileage allowances from Defendants.

14. Upon information and belief, Plaintiff avers that Defendant Springfield Terminal and Conrail have private, undisclosed operating agreements pertaining to transportation operations over the involved 155 mile segment of line from Selkirk, NY to Barber, MA, and that such arrangements constitute a joint venture which in turns makes both Defendants jointly and severally liable for the outstanding mileage allowances earned by Plaintiff for the movement of its private cars over said line.

COUNT I - ENGELHARD v. SPRINGFIELD TERMINAL

15. The averments of Paragraphs 1 through 14 are incorporated herein by reference.

16. During the years 1990 to the present, Defendant Springfield Terminal and/or Defendant Conrail transported Plaintiff's clay in private cars owned or leased by Plaintiff in interstate commerce. In particular, Springfield Terminal and Conrail served as common carriers transporting the private cars over various segments of line, but with regard to a 155 mile segment between Selkirk, New York, and Barber, Massachusetts, Defendants failed to report and pay mileage allowances. Furthermore, each deny responsibility for payment of mileage allowances and point to each other as having the responsibility for payment of mileage allowances on the involved 155 mile segment. Plaintiff, on information avers, that Springfield Terminal was the "carrier" performing the actual transportation of such cars from Selkirk, New York to Barber Station, Massachusetts. (Alternatively, in Count II, Plaintiff pleads that Conrail was the "carrier" and bears responsibility for payment.)

17. In violation of its obligation under the Mileage Allowance Tariff 6007 Series, Springfield Terminal has failed to report mileage allowances on private cars transported by it over the 155 mile Selkirk/Barber segment.

18. Plaintiff during all times relevant to this Complaint employed auditors who reviewed the railroad mileage allowance reports of Defendants and filed claims on unreported mileage. Such mileage claims were submitted to Defendant Springfield Terminal for payment of the unreported mileage in accordance with the implementing tariffs and the 1986 Order, but Springfield Terminal has refused and continues to refuse to make payment of mileage allowances for the use of those of

Plaintiff's cars which it maintains were interchanged at Barber Station, Massachusetts, alleging that the responsibility for the mileage allowance payments on Plaintiff's cars is that of Defendant Conrail if the cars were interchanged at Barber Station.

19. The "interchange" of rail cars is a term of art which signifies the location at which one railroad's common carrier responsibility for transportation normally ends and another railroad's responsibility begins. In most instances, the point of actual interchange is controlled by the railroads. In the instant case, Plaintiff believes and avers that question of where cars were interchanged is made complex by the actual joint operations of Springfield Terminal and Conrail over the involved 155 mile segment and the existence of a March 31, 1990 Haulage Agreement between Springfield Terminal and Conrail. Conrail maintains (and for purposes of pleading in the alternative Engelhard therefore avers on information and belief) that Springfield Terminals is responsible for all mileage allowances over the 155 mile route. Engelhard has never been a party to said Haulage Agreement and any provision which purports to reassign railroad responsibility for payment of mileage allowances is not binding upon Engelhard.

20. Notwithstanding the terms of said Haulage Agreement, Springfield Terminal has denied having any obligation for payment on those mileage claims over the 155 mile segment for Plaintiff's cars which it maintains were interchanged at Barber Station, Massachusetts.

21. Plaintiff believes and avers that Springfield Terminals is responsible for said mileage allowances and is obligated to it in the sum of \$568,155.13 as detailed in the separate Appendix Booklet, Sections A - E.

WHEREFORE, Plaintiff seeks the following relief:

- A. That Defendant Springfield Terminal be required to account for and pay mileage allowances in the amount of \$568,155.13 to or for the benefit of Plaintiff on all cars transported from Selkirk, New York to Barber Station, Massachusetts;
- B. That this Honorable Court refer any necessary technical issues embodied in this action to the Surface Transportation Board (STB) for a determination of the applicable principles underlying the mileage allowance system, and consideration of disputes concerning the point of "interchange" in light of the joint operations performed under the Haulage Agreement, so as to assist this Court in ruling on questions of liability of Defendant Springfield Terminal and/or Defendant Conrail for the payment of the mileage allowances to or for the benefit of Plaintiff for transportation over the 155 mile Selkirk/Barber segment;
- C. That this entire proceeding, including discovery, be stayed pending the issuance of a declaratory order by the Surface Transportation Board;
- D. That Springfield Terminal be ordered to comply with its obligations under the Mileage Allowance Tariff 6007, to report mileage allowances within one (1) month and ten (10) days from the last day of the month in which mileage allowances are earned;

- E. That this Court determine that a reasonable period for Springfield Terminal's tender of payment on reported mileage allowances be established as within 30 days of the report or allowance of a mileage claims;
- F. That the award of damages include interest at the rate of 12% per annum on the outstanding amounts commencing 30 days after liability for payment has accrued; and,
- G. That the Court shall grant such other relief as the Court finds proper.

COUNT II - ENGELHARD v. CONRAIL

22. The averments of Paragraphs 1 through 21 above are hereby incorporated by reference as if set forth in detail herein, except to the extent required in the context of alternative pleading.

23. In violation of its obligation under the Mileage Allowance Tariff 6007 Series, Conrail has failed to report mileage allowances on private cars transported by it over the 155 mile Selkirk/Barber segment.

24. Plaintiff's auditors have advised Defendant Conrail that Springfield Terminal has refused to make payment of mileage allowances for the use of Plaintiff's cars for the transportation of clay in Plaintiff's private cars over Defendant Conrail's lines from Selkirk, New York to Barber Station, Massachusetts, and have requested payment from Conrail. However, Defendant Conrail has

also refused to make any payment for the use of Plaintiff's cars over such line, contending that such mileage allowances are the obligation of Defendant Springfield Terminal.

25. Defendant Conrail has provided incomplete copies of inter-railroad operating agreements between it and Springfield Terminal which it maintains relieve it of liability. Conrail has refused to provide further information, including complete copies of relevant agreements. Conrail's actions have been designed to mislead and confuse Plaintiff as to the true state of facts relative to the subject transportation.

26. Under 49 U.S.C. § 11122 and pursuant to the terms of the ICC's 1986 Order and the carriers' implementing tariffs, Plaintiff is entitled to receive payment for the use of its cars from one or both Defendants. Since Defendants are entrusted with the cars and required to accurately report the facts underlying their responsibility for payment of mileage allowances, Plaintiff may not have been given the true facts enabling it to establish which of the two railroads is responsible for payment. Nevertheless, as the result of Defendants' actions, neither Defendant has paid Plaintiff. Plaintiff has incurred substantial economic loss, having been deprived of mileage allowance payments due and owing under the implementing tariff. Plaintiff's Auditors advise that mileage allowance payments of approximately \$568,155.13 are due Plaintiff from Defendants for their use of Plaintiff's private cars over the 155 mile segment.

27. For purposes of alternative pleading, Engelhard avers that in instances where cars were interchanged at Barber Station, Conrail was the common carrier having the obligation to pay mileage allowances for the 155 mile segment, and that notwithstanding any side agreement which may exist

between Springfield Terminal and Conrail for assignment of that obligation, Conrail continues to bear ultimate responsibility for payment.

28. Plaintiff believes and avers that Conrail is responsible for said mileage allowances and is obligated to it in the sum of \$568,155.13 , as detailed in the separate Appendix Booklet, Sections A - E.

WHEREFORE, Plaintiff seeks the following relief:

- A. That Defendant Conrail be required to account for and pay mileage allowances in the amount of \$568,155.13 to or for the benefit of Plaintiff on all cars transported from Selkirk, New York to Barber Station, Massachusetts;
- B. That this Honorable Court refer any necessary technical issues embodied in this action to the Surface Transportation Board (STB) for a determination of the applicable principles underlying the mileage allowance system, and consideration of disputes concerning the point of "interchange" in light of the joint operations performed under the Haulage Agreement, so as to assist this Court in ruling on questions of liability of Defendant Springfield Terminal and/or Defendant Conrail for the payment of the mileage allowances to or for the benefit of Plaintiff for transportation over the 155 mile Selkirk/Barber segment;
- C. That this entire proceeding, including discovery, be stayed pending the issuance of a declaratory order by the Surface Transportation Board;

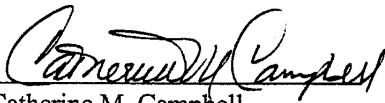
- D. That the award of damages include interest at the rate of 12% per annum on the outstanding amounts commencing 30 days after liability for payment has accrued; and,
- E. That the Court shall grant such other relief as the Court finds proper.

Respectfully submitted,

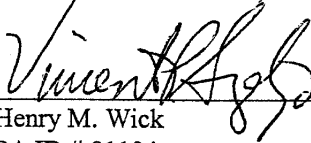
FEINBERG, CAMPBELL & ZACK, P.C.

Dated: May 15 , 2001

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EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ENGELHARD CORPORATION, a)
Delaware Corporation,)
)
Plaintiff)
)
vs.)
)
SPRINGFIELD TERMINAL)
RAILWAY CO., INC., a)
Vermont Corporation and)
CONSOLIDATED RAIL)
CORPORATION, a)
Pennsylvania Corporation)
)
Defendants.)

Civil Action No. C.A. 01-10829-RGS

**CONSOLIDATED RAIL CORPORATION'S
MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

I. INTRODUCTION

Plaintiff Engelhard Corporation ("Engelhard") has waited more than ten years to seek damages for violations of certain federal laws governing interstate rail carriers which allegedly began in 1990. A detailed examination of Engelhard's complaint and accompanying exhibits reveals that a substantial portion (possibly the majority) of its claims are barred by the applicable two-year statute of limitations. Although Engelhard tries to resuscitate its expired claims with allegations of "fraudulent concealment," it has failed to plead the elements of that doctrine.

earned.⁴ As such, by May 15, 1999--the limitations cut off--Engelhard knew (or should have known) that the railroads had not paid mileage allowances for all shipments moving over the Selkirk-Barber segment through March 1999.⁵ Claims based on shipments moving over the segment prior to April 1999 are, therefore, time-barred by the ICCTA's two-year statute of limitations.

E. Engelhard Has Failed To Plead Fraudulent Concealment.

In a fruitless attempt to stave off the statute of limitations bar, Engelhard recites the mantra of fraudulent concealment. However, Engelhard has failed to plead the necessary elements of that limited doctrine with the particularity mandated by federal law.

Fraudulent concealment (or "equitable tolling") tolls the statute of limitations only where a plaintiff has been injured by fraud and remains unaware of his injury "without any fault or want of diligence of his own." Salois v. Dime Sav. Bank of New York, FSB, 128 F.3d 20, 25 (1st Cir. 1997)(quoting Holmberg v. Armbrrecht, 327 U.S. 392, 397 (1946)).⁶ Courts take a narrow view of equitable exceptions to limitations periods. Salois, 128 F.3d at 25 ("equitable tolling . . . is 'appropriate only when the circumstances that cause a plaintiff to miss a filing deadline are out of his hands.'"(quoting Heideman v. PFL, Inc., 904 F.2d 1262, 1266 (8th Cir. 1990), cert. denied, 498 U.S. 1026 (1991))). In order to toll the statute of limitations, a plaintiff must allege: "(1) wrongful concealment

⁴ This payment provision is set forth in Item 180 of Freight Tariff RPS 6007-J, which tariff Engelhard relies on in its complaint (¶¶ 8, 10, pg. 9) but does not include therewith. See Exhibit "A." This provision was still in effect in March 1999. See Exhibit "B," Item 180-C.

⁵ As explained infra, the Appendix filed with the complaint demonstrates that, by May 15, 1999, Engelhard had actual knowledge of thousands of instances of unpaid mileage allowances for the Selkirk-Barber segment.

⁶ Federal (as opposed to state) common law governs Engelhard's fraudulent concealment claim. Holmberg, 327 U.S. at 395-96; Maggio v. Gerard Freezer & Ice. Co., 824 F.2d 123, 127 (1st Cir. 1987).

of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts." Berkson v. Del Monte Corp., 743 F.2d 53, 55 (1st Cir. 1984), cert. denied, 470 U.S. 1056 (1985); Hodas v. Sherburne, Powers & Needham, P.C., 938 F. Supp. 60, 63 (D. Mass. 1996), aff'd, 114 F.3d 1169 (1st Cir. 1997)(TABLE TEXT IN WESTLAW). See also Salois, 128 F.3d at 25 (noting due diligence requirement); Maggio v. Gerard Freezer & Ice Co., 824 F.2d 123, 128 (1st Cir. 1987)(same). Importantly, it is Engelhard's "burden under Federal Rule of Civil Procedure 9(b) to plead with particularity the facts giving rise to a fraudulent concealment claim." J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1255 (1st Cir.), cert. denied, 519 U.S. 823 (1986). See also Berkson, 743 F.2d at 55 (burden rests squarely on party pleading fraudulent concealment).

Engelhard alleges that Conrail and ST have refused to disclose completely "and or" misrepresented certain agreements between the two railroads (the "Conrail-ST agreements"). Complaint ¶ 11. Engelhard alleges further that Conrail and ST did not report the fact that they transported Engelhard's cars over the Selkirk-Barber segment. Id. According to Engelhard, these actions were calculated to deceive and mislead it and to hinder its ability to collect the mileage allowances it is seeking here and thus constitute sufficient grounds to toll any applicable statute of limitations. Id. In this case, the inquiry into plaintiff's fraudulent concealment allegations "is over before it begins." Salois, 125 F.3d at 26.

First, Engelhard does not allege that the enumerated acts of concealment prevented it from discovering the operative facts underlying its claims within the

limitations period. It merely avers that those acts were "calculated to deceive."

Complaint ¶ 11. As explained above, however, a plaintiff must allege that a defendant's actions actually prevented it from bringing its claim within the limitations period.

Berkson, 743 F.2d at 55; Hodas, 938 F. Supp. at 63 (plaintiff must demonstrate that defendants concealed "the facts that might lead one to suspect anything.")

Engelhard's failure in this respect is not surprising in light of its admission that, at "all times relevant to its Complaint," it employed auditors who knew that Conrail and ST were not reporting and paying mileage allowances for the Selkirk-Barber segment, Complaint ¶ 18 (emphasis added), and that "for many years" it pursued mileage claims against Conrail and ST. Id. at ¶ 13 (emphasis added). The Appendix to the Complaint confirms these admissions. Prior to April 1999 Engelhard filed more than fifteen hundred mileage allowance claims for the Selkirk-Barber segment for shipments dating back to 1995. See Appendix, Sheet E. Sheet C details nearly two-hundred additional claims filed prior to the limitations cutoff. The more than one thousand claims reflected in Sheets B and D were either filed between 1990 and 1996 or are based on shipments during those years.⁷

Engelhard does not allege that Conrail successfully concealed its untimely claims and that it did not discover those claims within the limitations period because it cannot do so. Instead, it seems that Engelhard is relying on this Court to infer that it remained ignorant of its claims even though it concedes that, well outside the limitations period, it knew the railroads were withholding the mileage allowances sought in this action. Such

⁷ Sheets B and D do not specify whether the dates shown therein are claim dates or shipping dates. Either way, Engelhard had actual knowledge of over one thousand additional instances in which the defendants had not paid mileage allowances for the Selkirk-Barber segment years before the limitations cutoff.

an inference is unwarranted. See Holman v. Indiana, 211 F.3d 399, 407 (7th Cir. 2000)(court should not draw inferences which contradict allegations in complaint). See also Pesci v. IRS, 67 F. Supp.2d 1189, 1191-92 (D. Nev. 1999)(internally inconsistent allegations not considered true in ruling on motion to dismiss), aff'd, 225 F.3d 663 (9th Cir. 2000)(TABLE TEXT IN WESTLAW); Campos v. Immigration and Naturalization Serv., 32 F. Supp.2d 1337, 1343 (S.D. Fla. 1998)(same).

Needing to fortify its anemic fraudulent concealment claim, Engelhard next alleges that "Conrail and . . . [ST] have concealed and or misrepresented . . . [the Conrail-ST agreements]" Complaint ¶ 11 (emphasis added). Even if this Court construes this allegation as a definitive statement, the bald allegation that Conrail "misrepresented" the Conrail-ST agreements does not satisfy the particularity requirement of Federal Rule of Civil Procedure 9(b). See Doyle v. Hasbro, Inc., 103 F.3d 186, 194 (1st Cir. 1996)(Rule 9(b) "requires specification of the time, place and content of the alleged false representations" and "mere allegations of fraud . . . or conspiracy . . . or referrals to plans and schemes are too conclusional to satisfy the particularity requirement, no matter how many times the accusations are repeated.")(internal quotations omitted); Learning Express, Inc. v. Ray-Matt Enters., Inc., 74 F. Supp.2d 79, 85 (D. Mass. 1999)(Rule 9(b) "requires particular times, dates places or other details of alleged fraudulent involvement").

The alleged incomplete disclosure of the Conrail-ST agreements likewise cannot help establish fraudulent concealment. Engelhard twice maintains that any private agreements between Conrail and ST had no impact whatsoever on its right to the claimed mileage allowances. Complaint ¶¶ 19, 27. Thus, under Engelhard's own theory of this

case, Conrail's alleged failure to disclose completely those agreements could not (and did not) hinder Engelhard's ability to commence timely an action. Indeed, Engelhard has filed this action without the aid of the complete Conrail-ST agreements (Complaint ¶ 11), and it does not explain why it could not have done so when it first realized in 1990 that defendants were not paying mileage allowances for the Selkirk-Barber segment. The alleged non-disclosure of the Conrail-ST agreements is nothing more than a red herring served up by Engelhard in a vain attempt to rescue its expired claims.

Finally, Engelhard's complaint is devoid of due diligence allegations. At no point does Engelhard describe any efforts to uncover the operative facts underlying its claims. Once again, this pleading deficiency is not surprising since Engelhard admits knowing that Conrail and ST were not paying mileage allowances for the Selkirk-Barber segment. Even absent this admission, Engelhard has not pled due diligence at all and thus is not entitled to wander down the path of fraudulent concealment. See Salois, 128 F.3d at 26 & n.11 (affirming district court's grant of 12(b)(6) motion where nothing in record supported conclusion that, as a matter of law, plaintiff had exercised due diligence, noting that "even if plaintiffs' allegations regarding fraud . . . are true, plaintiffs still fail the ultimate test, that of reasonableness in discovering and pursuing their claims."); Truck Drivers and Helpers Union, Local No. 170 v. N.L.R.B., 993 F.2d 990, 998 (1st Cir. 1993)("Irrespective of the extent of the effort to conceal, the fraudulent concealment doctrine will not save a charging party who fails to exercise due diligence . . .").

Engelhard's complaint is replete with conclusory and contradictory allegations offered in support of equitable tolling. None of those allegations, no matter how liberally construed, support the conclusion that the circumstances which caused Engelhard to miss

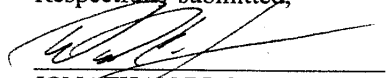
its filing deadline were "out of . . . [its] hands." Salois, 128 F.3d at 25. To the contrary, they demonstrate that Engelhard had actual knowledge of the facts underlying its claims for the better part of a decade. For some unknown reason, Engelhard sat on its rights and is now crying (albeit meekly) "fraudulent concealment" in order excuse the inexcusable. This Court should ignore such cries. See LaChapelle, 142 F.3d at 509 (affirming dismissal on statute of limitations grounds where dates in complaint demonstrated untimeliness and the facts alleged "were insufficient to ground an estoppel claim."); Berkson, 743 F.2d at 56-57 ("[W]here a plaintiff has utterly failed to make even requisite

allegations, he cannot claim that his underlying cause of action was fraudulently concealed").

IV. CONCLUSION

For the foregoing reasons, this Court should dismiss Engelhard's complaint to the extent it encompasses mileage allowances earned on shipments moving over the Selkirk-Barber segment prior to April, 1999.

Respectfully submitted,



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CONSOLIDATED RAIL CORPORATION

Dated: July 12, 2001

EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ENGLEHARD CORPORATION
Plaintiff

vs.

CONSOLIDATED RAIL
CORPORATION AND SPRINGFIELD
TERMINAL RAILWAY, CO., INC,
Defendants

CIVIL ACTION
No. 01-10829-RGS

BEFORE THE HONORABLE RICHARD G. STEARNS
UNITED STATES DISTRICT JUDGE
HEARING
October 24, 2001

APPEARANCES:

WICK, STREIFF, MEYER, O'BOYLE & SZELIGO, P.C., (By
Vincent P. Szeligo, Esq.), 1450 Two Chatham Center,
Pittsburg, PA 15219, on behalf of Plaintiff

SPRINGFIELD TERMINAL RAILWAY, CO. (By Robert B.
Culliford, Esq.,) Iron Horse Park, N. Billerica, MA
01862, on behalf of Defendant Springfield Terminal
Railway Co., Inc.

CONSOLIDATED RAIL CORPORATION, (By David C.
Ziccardi, Esq.), 2001 Market Street, Two Commerce
Square, Philadelphia, PA 19101-1416, on behalf of
Defendant Consolidated Rail Corporation

Courtroom 21
1 Courthouse Way Bldg.
Boston, Massachusetts 02110

James P. Gibbons, CSR, RPR-RMR
Official Court Reporter
1 Courthouse Way, Suite 7205
Boston, Massachusetts 02210

1 notice that you were not being paid.

2 MR. SZELIGO: Yes. We had notice we weren't
3 being paid.

4 THE COURT: I think under Massachusetts state
5 law it would be very hard to make that argument, but I think
6 you are on, perhaps, firmer ground in the six-year statute
7 of limitations argument.

8 Where do the defendants come out on this, other
9 than blaming each other for the problem?

10 MR. ZICCARDI: Well, your Honor, Engelhard's
11 counsel has said a lot of things here, most of which don't
12 appear in the complaint, which I think is the operative
13 document, since this is a 12(b)(6) motion, and most of
14 which -- probably all of which, I disagree with,
15 particularly in terms of Conrail's -- some admission on the
16 part of Conrail that we are liable for this.

17 I don't know that the claimed shipments that are
18 reflected in the documents attached to the complaint
19 actually occurred.

20 Conrail's argument -- excuse me -- merely at this
21 point is that plaintiff has clearly asserted a cause of
22 action under the ICCTA and possibly it's predecessor, the
23 Interstate Commerce Act. I don't think it makes a
24 difference that one is now in place while the other is not.

25 What we have to do is look at the allegations in

1 the complaint. Paragraph 6, Engelhard alleges that the
2 defendant are subject to the ICA in general and specifically
3 Section 11121 and 11122.

4 Paragraph 7, The compensation it seeks is based on
5 Section 11122 of the Interstate Commerce Commission
6 Termination Act.

7 And again in Paragraph 26, Engelhard alleges
8 basically the same thing, that its right, its substantive
9 right, to proceed against Conrail for these mileage
10 allowances flows from the federal law governing rail
11 carriers.

12 Now, as far as the terms of the statute of
13 limitations, I don't think Engelhard has to be a rail
14 carrier, as that term may be defined under the Interstate
15 Commerce Act, for that section to apply. The statutory
16 framework allows anyone injured by a violation of the
17 Interstate Commerce Act. That would be Section 11704(b).
18 It simply states that a rail carrier is liable for damages
19 for violation of the Act.

20 And then Section 1104 -- 11704(c)(1) allows a
21 person, not just a rail carrier, to file an action with
22 either the Surface Transportation Board or in court to
23 recover, to enforce liability against a rail carrier for
24 violating Section 11704.

25 And then, finally, the statute of limitations in

C E R T I F I C A T E

I, James P. Gibbons, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.



JAMES P. GIBBONS, CSR, RPR, RMR
Official Court Reporter
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EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ENGELHARD CORPORATION,)
a Delaware Corporation,)
)
Plaintiff,)
)
vs.)
)
SPRINGFIELD TERMINAL)
RAILWAY CO., INC., a)
Vermont Corporation and)
CONSOLIDATED RAIL)
CORPORATION, a)
Pennsylvania Corporation)
)
Defendants.)

Civil Action No. 01-10829 RGS

ENGELHARD'S OPPOSITION TO MOTIONS TO DISMISS
FILED BY DEFENDANTS CONSOLIDATED RAIL CORPORATION AND
SPRINGFIELD TERMINALS RAILWAY CO.

INTRODUCTION

Engelhard's complaint seeks the imposition of joint and several liability against defendants Consolidated Rail Corporation ("Conrail") and Springfield Terminal Railways Co. ("ST") for private tank car compensation (also known as "mileage allowances") which defendants have separately acknowledged as being owed to Engelhard, but which each refuses to pay on the basis of a private March 31, 1990 Haulage Agreement¹ ("Haulage Agreement") which specifically applies to the obligation for payment of mileage allowances over a 155 mile segment of Conrail line from Selkirk, New York, to Barber Station, Massachusetts. In its complaint, Engelhard describes the history and

¹ Defendants refuse to provide a full copy of the Haulage Agreement to Engelhard as recent as the April, 2001 meeting between the parties. A partial copy provided to Engelhard is attached as Appendix 1: the relevant portion of which states:

Section 4 Mileage and Car Hire. Except as otherwise be provide in October 27, 1989 agreement, for the purpose of determining per diem, car hire and car mileage payments, and for no other purpose, cars interchanged at Barber, Massachusetts shall be treated as if interchanged at Conrail's Selkirk Yard, in the vicinity of Albany, New York..

it is deemed to be a "valid claim as last presented and must be honored." Therefore, the earliest time a civil claim for would accrue for any specific shipment would be the date on which an Item 182 mileage claim was denied or allowed,¹⁰ or four months after the claim was submitted.

**Engelhard's Response to Conrail's and ST's Motion To Dismiss
Based on the Alleged Failure to Sufficiently Plead Fraud**

Both Conrail and ST seek dismissal of Engelhard's request for tolling of the applicable statute of limitations on the grounds that the complaint does not plead the requisite elements for tolling.¹¹ However, it is well settled that the particularity requirement of Rule 9(b) must be read in conjunction with the principles of notice pleading under Rule 8 (complaint need only give defendant fair notice of what plaintiff's claim is and grounds upon which it rests).

Here, both defendants know far more about the complete terms of the Haulage Agreement than Engelhard. Both have cited it in conjunction with their assertions that mileage allowances are owed by the other railroad. Both attended a meeting with Engelhard in April, 2001 in which a request for a copy of the full agreement (including any supplements or modifications) was denied. In light of defendants' familiarity with the negotiations, Engelhard has sufficiently put them on notice of the basis for its request that the statute be tolled. Defendants mislead Engelhard as to the true state of facts by presenting only partial sections of the Haulage Agreement and then arguing it was or was not applicable and obfuscating the issue based on interchange factors not known to Engelhard. Complaint ¶¶ 11, 20.

¹⁰ In reliance upon the Haulage Agreement, Engelhard submitted claims to ST. ST did not deny that Engelhard was entitled to the mileage allowances, but rather responded that Conrail, not it, was responsible for payment. Since ST was Conrail's agent, this response is an admission of a valid claim binding against both.

¹¹ Neither defendant filed for a motion for a more definite statement under Rules 9(b) and 12(e).

EXHIBIT E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NUMBER 01-10829-RGS

ENGELHARD CORPORATION, A
DELAWARE CORPORATION

v.

SPRINGFIELD TERMINAL RAILWAY CO., INC., A
VERMONT CORPORATION AND CONSOLIDATED RAIL
CORPORATION, A PENNSYLVANIA CORPORATION

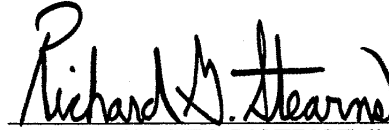
MEMORANDUM AND ORDER ON THE PARTIES'
PROPOSED ORDERS OF REFERENCE TO
THE SURFACE TRANSPORTATION BOARD

May 22, 2002

STEARNS, D.J.

Upon review of the parties' submissions, the court will ADOPT the Order proposed by defendants Springfield Terminal and Consolidated Rail Corp. as a faithful reflection of the issues identified in the court's April 2, 2002 opinion. Plaintiff Engelhard's proposed order in essence asks the Surface Transportation Board to redetermine matters already decided adversely to Engelhard by this court, or to opine on issues outside of its competence.

SO ORDERED.



UNITED STATES DISTRICT JUDGE

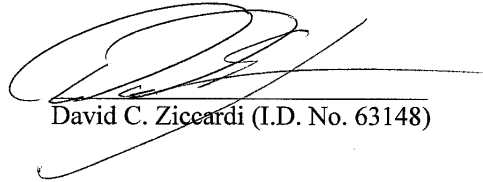
CERTIFICATE OF SERVICE

I, David C. Ziccardi, do hereby certify that on August 19, 2003, I served a copy of the Motion of Respondent Consolidated Rail Corporation for leave to File a Surrebuttal and accompanying Surrebuttal *via* UPS Next-Day Air on the following individuals:

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