

UNITED STATES OF AMERICA

BEFORE THE SURFACE TRANSPORTATION BOARD

STB DOCKET NO. NOR 42094 Sub-No.1

PCI TRANSPORTATION, INC.

Complainant,

v.

FORT WORTH & WESTERN RAILROAD COMPANY

Respondent.

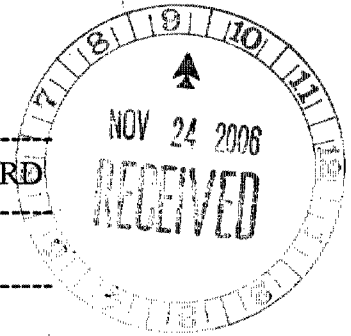
RESPONDENT'S MOTION TO DISMISS

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November 21, 2006

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MOTION TO DISMISS

Respondent Fort Worth & Western Railroad Company (FWWR) moves the Surface Transportation Board (STB or Board) to dismiss the Complaint filed October 26, 2006 by Complainant PCI Transportation, Inc. (PCI) on the grounds that the causes of action and claims for relief alleged therein are based on contract or state tort law, and thus fail to state claims cognizable by the Board upon which relief can be granted under the Interstate Commerce Act (ICA) as amended by the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. §§10101 *et seq.*

Specifically, FWWR moves to dismiss those extra-jurisdictional causes and claims alleged in the Complaint as Count I (Breach of Contract/Attorney's Fees), Count II (Intentional Interference with Existing and Prospective Contractual Relations), Count III (Application for Injunctive Relief) and (Application for Permanent Injunction), and Count IV (Declaratory Relief, Paragraphs 39 a., b. and c.)

In support of this motion, FWWR relies on the brief and the declaration of its counsel submitted in support of this motion.

Respectfully submitted November 21st 2006 by  for
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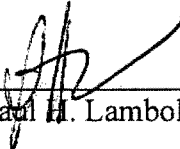
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served on Counsel of Record identified below via first class U.S. mail, postage prepaid, this 22nd day of November, 2006:

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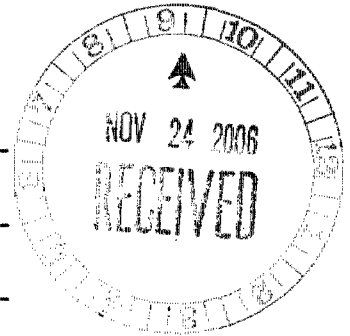


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BRIEF OF FORT WORTH & WESTERN RAILROAD COMPANY IN SUPPORT OF MOTION TO DISMISS

FWWR submits this Brief in support of its motion to dismiss the Complaint filed October 26, 2006 by Complainant PCI Transportation, Inc. (PCI) made on the grounds that the causes of action and claims for relief alleged therein are based on contract or state tort law, and thus fail to state claims cognizable by the Board upon which relief can be granted under the Interstate Commerce Act (ICA) as amended by the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. §§10101 *et seq.*

Specifically, the extra-jurisdictional causes and claims FWWR seeks to dismiss are alleged in the Complaint as Count I (Breach of Contract/Attorney's Fees), Count II (Intentional Interference with Existing and Prospective Contractual Relations), Count III (Application for Injunctive Relief) and (Application for Permanent Injunction), and Count IV (Declaratory Relief).

This is the second complaint PCI has filed against FWWR to initiate proceedings before the Board, the first complaint being dismissed without prejudice on FWWR's motion.

I. SUMMARY OF RELEVANT FACTS AND PROCEEDINGS

A. Parties.

FWWR, a Texas corporation with principle offices in Fort Worth, TX, is a Class III short line carrier providing interstate rail transportation to the public in the Fort Worth, TX area.

PCI, a Texas company with principle offices in Fort Worth, TX, is a member of the public to whom FWWR has provided rail transportation services in the Fort Worth, TX area.

B. Dispute between the Parties.

Sometime during 2001 a dispute arose between the parties regarding switching services and demurrage charges, as well as the purported agreements between the parties dating back to 1998 concerning those services and charges.

Unable to resolve the dispute, PCI filed action in the 141st District Court of Tarrant County, Texas, on March 5, 2004.

C. Proceedings in Texas State Court.

Following the filing of PCI's complaint and request for injunctive relief, the state court issued a Temporary Restraining Order (TRO) and set PCI's application for a temporary injunction for hearing on March 22, 2004.

On March 19, 2004, FWWR removed the matter to the United States District Court for the Northern District of Texas, Fort Worth Division, there assigned Civil Action No. 4:04cv211 Y

D. Proceedings in Federal Forums.

1. US District Court (Civil Action No. 4:04-cv-211 Y).

On March 19, 2005, accompanying its Notice of Removal, FWWR filed its initial Answer to PCI's complaint, and later, its First Amended Answer and Counterclaim in the District Court.

On March 23, 2004, PCI filed an emergency motion for remand. FWWR responded in opposition. The District Court denied PCI's motion on April 8, 2005

On April 29, 2004, PCI filed a motion for preliminary injunction. FWWR filed opposition. The District Court denied PCI's motion on July 6, 2004.

On August 4, 2004 PCI filed an Interlocutory Notice of Appeal over the District Court's denial of PCI's motions to remand and for injunctive relief. That same date, the District Court entered its order rendering moot reconsideration of those denials requested by PCI.

On August 30, 2004 PCI filed a motion for stay pending appeal. The same day, FWWR filed a motion for partial summary judgment and motion to dismiss claims for injunctive relief. FWWR's motions remain pending.

On November 4, 2004 the District Court granted PCI's motion for stay and administratively closed the civil action proceedings until the 5th Circuit issued its mandate.

2. US Court of Appeals – 5th Circuit (Case No. 04-10965).

On October 8 and 19, 2004 the USCA denied PCI's motion for stay pending appeal. As noted above, the District Court later entered stay.

Following Circuit-sponsored mediation efforts and briefing, on July 26, 2005 (revised August 9, 2005) the USCA issued decision in *PCI Transportation, Inc. v. Fort Worth & Western Railroad Company, Inc.*, 418 F.3d 535 (5th Cir. 2005)(*PCI Transp.*) affirming the District Court's denial of remand and injunctive relief, and its Judgment and Mandate thereon.

3. US District Court (Civil Action No. 4:04-cv-211 Y)(cont'd).

On August 18, 2005, PCI filed notice of filing a complaint with the STB on August 8, and also filed a motion to dismiss or stay the civil action pending STB action.

On August 19, 2005, the USCA's Opinion, Judgment and Mandate were filed in the District Court.

On August 22, 2005, the District Court reopened the civil action and ordered FWWR to respond to PCI's August 18 Motion to Dismiss on or before September 7, 2005. Subsequent extensions were granted.

On February 7, 2006 FWWR filed two responses: (1) an Amended motion for partial Summary Judgment and (2) an Amended Motion to Dismiss Injunctive Relief Claims.

On September 26, 2006 the Court entered its Order granting FWWR's Amended Motion to Dismiss and dismissing FWWR's Amended Motion for Partial Summary Judgment.

On October 5, 2006 FWWR filed a Motion for Reconsideration of the Court's September 26 Order, which motion the Court denied on November 6, 2006..

FWWR intends to timely file Notice of Appeal of the Court's September 26, 2006 and November 6, 2006 Orders as being contrary to the 5th Circuit's earlier decision.

The Declaration of Counsel supporting FWWR's Motion to Dismiss includes the docket history of District Court proceedings in civil action no. 4:04cv211 Y (Exhibit A), 5th Circuit Decision in *PCI Transportation, Inc. v. Fort Worth & Western Railroad Company, Inc.*, (Exhibit B), and District Court Orders dated August 26, 2006 (Exhibit C) and November 6, 2006 (Exhibit D) on reopening.

4. US Surface Transportation Board (STB) (Nos. 42094 and 42094 Sub-No.1).

On August 8, 2005, PCI filed its first complaint against FWWR. (Complaint I)

On August 29, 2005, FWWR filed stipulated motion for extension of time until September 9, 2005 to respond, which motion was granted by the Board on August 29, 2005.

On September 9 FWWR filed its responsive motion to dismiss, or alternatively, to stay.

By Decision dated October 28, 2005 and served October 31, 2005, the STB dismissed PCI's Complaint I without prejudice.

Following the District Court's August 26, 2006 order granting FWWR's Amended Motion to Dismiss and dismissing FWWR's Amended Motion for Partial Summary Judgment, PCI filed a second Complaint with the Board on October 26, 2006. (Complaint II).

On November 17, 2006 the Board granted the FWWR's stipulated motion for extension of time until November 27, 2006 in which to respond.

Complaint II is now the subject of FWWR's Motion to Dismiss.

II. ARGUMENT/DISCUSSION

A. PCI Fails to Allege Claims Cognizable by the Board Under the ICA.

PCI's Complaint II presents issues almost identical to those raised by Complaint I. As it did regarding PCI's Complaint I, FWWR argues that Complaint II should be dismissed because, on its face, the causes of action and claims for relief alleged therein are based on contract and state tort law, and thus fail to state claims cognizable by the Board upon which relief can be granted under the Interstate Commerce Act (ICA) as amended by the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. §§10101 *et seq.*

Specifically those extra-jurisdictional causes or claims are alleged in Complaint II as Count I (Breach of Contract/Attorney's Fees), Count II (Intentional Interference with

Existing and Prospective Contractual Relations), Count III (Application for Injunctive Relief) and (Application for Permanent Injunction), and Count IV (Declaratory Relief).

It is relevant to note that contract issues between the FWR and PCI have not as yet been resolved in any judicial forum. Thus, various contractual matters such as terms and conditions, scope, duration, breach and termination remain at issue. The STB, however, is not the proper forum to determine those contract issues.

B. Subject Matter Jurisdiction Is Threshold Issue.

FWR's contention that Complaint II should be dismissed for failure to state claims cognizable by the Board upon which relief can be granted under the ICA as amended, raises the threshold question of subject matter jurisdiction.

1. Statutory Framework.

The Board's subject matter jurisdiction under the ICA, as amended, is set out in Section 10501, augmented by the statutory definitions in Section 10102. Board jurisdiction is restricted by the contract-related provisions in Section 10709 and the statutory exclusions in Section 10906. See 49 U.S.C. §§10102, 10501, 10709, and 10906. Administrative exemptions authorized under Section 10502 remain subject to Board jurisdiction. Upon appropriate complaint the Board may initiate investigation and enforcement under Sections 11701 and 11702.

The Board may exercise jurisdiction over rail transportation services either as a matter of "exclusive" or "primary" jurisdiction: "exclusive" jurisdiction arises from the express Congressional grant in the statutory language of Section 10501(b); and "primary" jurisdiction flows from judicial recognition of Board expertise and the need for uniformity in Federal regulation over interstate rail transportation under the ICA. The

former gives rise to “complete” Federal pre-emption and original Federal subject matter jurisdiction. The latter gives rise to “ordinary” pre-emption.

Emphasizing deregulation of rail transportation in the ICCTA, Congress continued both the authorization of market-based, commercial contracts between rail carriers and customers for transportation services and the limitation that contracted-for rail services were removed from coverage of the Act, and consequently, Board jurisdiction. See Section 10709; *cf.* former Sections 10713(i)(1) and (2).

Authorizing contracts in Section 10709(a) and limiting duties of parties to those “specified by the terms of the contract” in Section 10709(b), Congress in Sections 10709(c)(1) and (2) expressly provided: (1) *“transportation under such contract shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part”* and (2) *“the exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree”*. (Italics added.)

Significantly, and for purposes of this case, Section 10709(f) provides: *“A rail carrier that enters into a contract as authorized by this section remains subject to the common carrier obligation set forth in section 11101, with respect to rail transportation not provided under such a contract”*.

2. Relevant Precedent.

(a) Board Decisions.

As the ICC did under former Section 10713, the Board has repeatedly recognized the limitations on its jurisdiction imposed by Section 10709(c).¹ Consistent with Section 10709(f), the Board has also made clear that, for purposes of jurisdiction, duties of contract carriage under Section 10709 are distinct and exist separate from obligations of common carriage under Sections 11101 and 10702. Consequently, while the Board may not exercise jurisdiction over contract carriage claims, it may do so over cognizable common carriage and reasonableness claims under the ICA in the rail transportation transaction(s) at issue.²

The Board has also found that, to the extent common carrier service may conflict with contract service, the rights and obligations of common carriage must *yield* to those contracted-for in transportation transaction(s) at issue.³

¹ See *H.B. Fuller Co. v. Southern Pacific Transportation Co.*, No. 41510, STB served August 22, 1997 (decided under former Sections 10713(i)(1) and (2) with notation that similar provisions exist in Sections 10709(c)(1) and (2)); *Omaha Public Power District v. Union Pacific Railroad Company*, STB Docket No. 42006, dismissal decision served October 17, 1997, reconsideration denied by decision served November 15, 2000; *Cross Oil Refining & Marketing, Inc. v. Union Pacific Railroad Co.*, STB Finance Docket No. 33582, served October 27, 1998; *South-Tec Development Warehouse, Inc. et al - Petition for Declaratory Order – Illinois Central Railroad Co.*, STB Docket No. 42050, served November 15, 2000; *Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Railway Co.*, STB Docket No. STB Docket No. 42038, served March 6, 2000; and *Parrish & Heimbecker, Inc. – Petition for Declaratory Order*, STB Docket No. 42031, served May 26, 2000, reconsideration denied by decision served May 24, 2001; and *Kansas City Power & Light Company v. Union Pacific Railroad Company*, STB Docket No. 42095, served July 27, 2006 (dismissal under 10709). Cf. *Wisconsin Central Ltd.-Petition for Declaratory Order-Certain Rates and Practices of Baltimore & Ohio Chicago Terminal Railroad Company and CSX Transportation, Inc.* STB Docket No. 41995, served June 20, 2001 (inter-carrier contract); *Boston and Maine Corp. et al. v. New England Central Railroad, Inc.*, STB Docket No. 34612, served February 24, 2005.

² See *Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Railway Co.*, STB Docket No. STB Docket No. 42038, served March 6, 2000; and *Parrish & Heimbecker, Inc. – Petition for Declaratory Order*, STB Docket No. 42031, served May 26, 2000, reconsideration denied by decision served May 24, 2001.

³ *Parrish & Heimbecker, Inc. – Petition for Declaratory Order*, STB Docket No. 42031, served May 26, 2000, reconsideration denied by decision served May 24, 2001; cf. *R. Franklin Unger, Trustee – Petition for Declaratory Order – Assessment and Collection of Demurrage and*

(b) Court Decisions.

Notwithstanding the fact that alleged claims for relief in PCI's original complaint were based solely on state law, the U.S. District Court in case no. 4:04-cv-211 Y assumed original Federal subject matter jurisdiction over transportation service claims at issue, and denied remand to state court. The District Court's decision rested on doctrine of "complete Federal pre-emption", the judicially recognized exception to the "well-pleaded complaint" rule, as well as the exclusive jurisdiction provisions of the ICA, Section 10501(b). Exercising jurisdiction the District Court denied PCI's request for remand and for injunctive relief.

The 5th Circuit affirmed the District Court's denial of remand as well as the denial of injunctive relief. Decision, Exhibit B.

Characterizing the FWR/PCI contract as "very limited in scope", the 5th Circuit rejected PCI's overly broad Section 10709 arguments, holding that (1) the STB is not precluded from exercising jurisdiction over claims that may be "*even related to*" an agreement, and (2) the injunctive relief PCI seeks exceeded contract coverage since "*at the very least, a portion of [PCI's] claims are governed by the ICCTA*".(Italics added.) Decision, Exhibit B. p. 14.⁴

For purposes of Federal subject matter jurisdiction, the 5th Circuit found that Section 10501 requires the application of the "complete" pre-emption doctrine to claims alleged in PCI's complaint, and concluded that "as the ICCTA provides the exclusive

Switching Charges, STB Docket No. 42030, served June 14, 2000 and *South-Tec Development Warehouse, Inc. et al. - Petition for Declaratory Order – Illinois Central Railroad Co.*, STB Docket No. 42050, served November 15, 2000.

⁴ FWR believes the 5th Circuit's decision, p. 14, contains a clerical error mis-describing "PCI claims" as "FWR claims", to find otherwise would be inconsistent with its holding and the applicable precedent.

cause of action for PCI's non-contractual relief, we hold that those claims 'only arise'[]under federal law". Decision, Exhibit B, p. 18.

C. Lack of Subject Matter Jurisdiction Requires Dismissal of Complaint II.

The precise issue now before the Board is whether Complaint II presents causes of action or claims for relief based on contract and state tort law that have been determined to be outside of the Board's exclusive jurisdiction by the 5th Circuit in *PCI Transportation, Inc. v. Fort Worth & Western Railroad Company, Inc.*, 418 F.3d 535 (5th Cir. 2005)(*PCI Transp.*), or whether, as PCI contends, *all* causes of action or claims for relief alleged in Complaint II are cognizable by the Board under the ICA.

FWWR contends the causes and claims alleged are purely extra-jurisdictional and not predicated on common carrier obligations. FWWR argues that, based on comparison of complaints, and despite a few new allegations, Complaint II represents a verbatim reiteration of the contract-based and state tort law claims for relief PCI has repeatedly relied upon in the complaint initially filed in the Texas State Court, in the U.S. District Court which the 5th Circuit has determined asserts claims beyond the Board's jurisdiction, and in Complaint I previously filed with this Board which was dismissed without prejudice.

Complaint II states PCI is "refilling this its Original Complaint". Complaint II, Paragraph No. 5, p.4. Generously sprinkled throughout the "Summary of Facts" and "Specific Facts" sections are express references to, and reliances on, the existence of a governing agreement, its terms, its breach, claims of default, cancellation and termination. Complaint II, Paragraph Nos. 6-21, pp. 4-11.

While initially stating PCI “complains that FWR has engaged in predatory practices”, citing NTP Section 10101(12), under the “Causes of Action” section, the *two bases* of PCI’s Complaint II against FWR are specifically asserted to be “*the continued oppression with and improper billing of demurrage fess in violation of the express contract between the parties and FWR’s tortiuous interference with PCI’s long term lease of the spur and contracts with its customer*”. (Italics added.) Complaint II, Paragraph Nos. 22-23, pp. 11-13.

And although Complaint II alludes to certain statutory violations under Sections 10702, 10704, 10741 and 10746, a critical and fair reading of Complaint II leaves little doubt that the specific conduct and charging allegations against FWR upon which PCI relies nonetheless are, and remain, firmly grounded on conduct that is alleged to be governed by contract and state law. *Compare* statutory references in Complaint II, Paragraph Nos. 24, 25 and 26, pp.14-15 *with* causes and claims alleged in Count I, Paragraph Nos. 28 and 29 (contract allegations), Count II, Paragraph Nos. 31-33 (tortious conduct), Count III, Paragraph Nos. 35-36 (preservation of contractual status quo), and Count IV, Paragraph 39 (express agreement controversy).

In sum, all of PCI’s alleged causes and claims for relief in Complaint II arise out of and are based on the agreement and state law. Violations of agreement are expressly removed from STB’s statutory jurisdiction. 49 USC 10709(c). Alleged violations of state law are federally preempted as attempts to regulate rail carrier operations but are not cognizable by the Board without appropriate charging allegations under the ICA. 49 USC 10501 and 11701.

As discussed above, both the Board and the 5th Circuit have concluded that the Board may exercise jurisdiction over claims for relief that do *not* arise from contracted-for duties, i.e. non-contractual claims for relief under the ICA based on common carrier obligations. Complaint II fails to allege such claims.

In this case, PCI's Complaint II headings, normally discounted for interpretive purposes, prove to be literally descriptive of the content of the contract claims and state law relief alleged therein. See for example Complaint II, Count I (Breach of Contract/Attorneys' Fees) p. 15, and Count II (Intentional Interference with Existing and Prospective Contractual Relations) p. 18.

Even the more generally denominated claims in Count III (Application for Injunctive Relief) and (Application for Permanent Injunction), pp. 17-19, and Count IV (Declaratory Judgment) p. 19, are predicated on the same facts supporting relief based on contract theories and state law alleged in the other Counts.

FWWR contends comparison and analysis of Complaint II leads to the conclusion it is nothing more than a reiteration of its initial state court complaint alleging causes of action for breach of contract and other relief under state law, and is the same as the second amended complaint filed in the District Court. See Declaration of Counsel, Exhibit E, Plaintiff's Second Amended Complaint. In Complaints I and II before the Board, PCI continues to allege claims for relief based on contract and state law violations. Such claims are not cognizable by the Board under the ICA.

On its face, PCI's Complaint II is utterly devoid of claims cognizable by the Board under the ICA, as amended by ICCTA. Mere mention of statutory provisions does state a claim cognizable under the ICA where, as here, the context and predicate for relief

remain fixed on a contracted-for arrangement and state law. In short, as a matter of law, PCI's complaint before the Board fails for want of subject matter jurisdiction and dismissal is required.

D. PCI's Reliance on Court Precedent is Misplaced.

PCI relies on the 5th Circuit decision for its complaint against FWR before the Board, but in jurisdictional allegations, PCI misconstrues and misstates the 5th Circuit's holdings. PCI asserts that *all* of its claims fall within the exclusive jurisdiction of the Board. See Complaint II, Paragraph No. 4, p 4. On the contrary, the 5th Circuit held that claims based on state law are completely pre-empted, and that *only some* of PCI's claims are governed by the ICCTA. Thus, *only* non-contractual claims based on ICA, as amended, are cognizable by Board. Decision, Exhibit B, pp. 14 and 18.

The 5th Circuit awkwardly suggest that claims "related to" contract may fall within Board jurisdiction. Decision, Exhibit B, pp.9-10. Not only does that view undercut the intended limits of Board jurisdiction under Section 10709 by effectively expanding jurisdiction, but such is not applicable where as here, Complaint II claims are not merely "related to" but are intrinsically derived from and dependant upon a contract.⁵

PCI also relies on recent decisions of the U.S. District Court alleging that on remand the District Court determined that *all parties'* claims are cognizable by the STB. See Complaint II, Paragraph No. 4, p. 4; District Court Orders dated September 26, 2006

⁵ See *Albemarle Corporation v. The Louisiana and Northwest Railroad Company*, STB Docket No. 42097, served August 1, 2006 (threshold jurisdiction issue whether contracts exist and apply to movements at issue); *Kansas City Power & Light Company v. Union Pacific Railroad Company*, STB Docket No. 42095, served July 27, 2006 (indicia of contract raises threshold jurisdiction issue); cf. *Savannah Port Terminal Railroad, Inc.-Petn. For Decl Order-Certain Rates and Practices as Applied to Capitol Cargo, Inc.*, STB Finance Docket No. 34920, served October 20, 2006 (extension for response to petition raising substantial and complex issues relating to contracts governing the parties relationship and applicability and interpretation of tariffs.)

and November 6, 2006. Exhibits C and D. After reviewing the 5th Circuit decision, the District Court erroneously concluded that “the *parties*’ claims fall within the STB’s exclusive jurisdiction.” and on reconsideration, that “(the STB) had exclusive jurisdiction over the *parties*’ claims” and the “Court lacked jurisdiction over the *parties*’ claims.” (Emphasis added.) Exhibit C, p. 5, and Exhibit D, p. 1. Because both these District Court decisions fail to distinguish the respective claims of the parties and lump the same altogether, the holdings are clearly contrary to the prior 5th Circuit’s decision and issues before the Court. Accordingly, FWWR intends to timely file a Notice of Appeal.

Even if one were to construe the District Court’s decisions as a *referral* to the Board, which it plainly is not, PCI may not now merely re-allege its prior contract and state law claims but must allege claims in terms cognizable by the Board under the ICA⁶. PCI has failed to do so for a second time in Complaint II.

Here, PCI repeats contract-based and state law claims for relief first asserted in a Texas state court, re-alleged those very same claims upon removal to the US District Court, and has alleged twice before the Board. The allegations are insufficient to invoke the subject matter jurisdiction of the Board and PCI’s complaint should be dismissed.

E. Dismissal With Prejudice Is Appropriate.

At this juncture, FWWR believes the Board should dismiss PCI’s Complaint II with prejudice. PCI has not been denied the opportunity to present a complaint that properly invokes the jurisdiction of the Board. Complaint II is PCI’s second attempt which ignores the judicial instruction in decisions of the 5th Circuit and applicable Board precedent, as well as the distinction between “exclusive” and “primary” jurisdiction.

⁶ Cf. *Savannah Port Authority Railroad, Inc.-Petn. for Decl. Order-Certain Rates and Practices As Applied to Capitol Cargo, Inc.*, STB Finance Docket No. 34920, served October 6, 2006.(demurrage issues)

Dismissal with prejudice simply brings closure to PCI's two failed attempts to invoke the Board's subject matter jurisdiction.

Significantly, PCI's Complaint II now before the Board is little more than an attempt to utilize the Board and by-pass District Court jurisdiction. Although referral has been the practice in matters of concurrent jurisdiction between the Courts and the Board, this is not such a case.⁷ The Board has recognized that in passing the ICCTA "Congress intended only to pre-empt state law and remedies, but did not intend to oust concurrent Federal district court jurisdiction over common carrier obligation claims under the ICA."⁸

The Courts have respected the Board's expertise and "primary" jurisdiction by use of the referral mechanism.⁹ Likewise, the Board has respected the Court's jurisdiction.¹⁰

Dismissal with prejudice is fair to PCI and accommodates the concurrent jurisdiction of two Federal forums over a case involving the same parties and basic issues.

⁷ See e.g. *Parrish & Heimbecker, Inc. – Petition for Declaratory Order*, STB Docket No. 42031, served May 26, 2000, reconsideration denied by decision served May 24, 2001; *South-Tec Development Warehouse, Inc. et al - Petition for Declaratory Order – Illinois Central Railroad Co.*, STB Docket No. 42050, served November 15, 2000; *Martin Gas Sales, Inc. – Petition for Declaratory Order – Certain Rates and Practices of Union Pacific Railroad Co.*, STB Docket No. 42082, served June 15, 2004; *Capitol Materials Inc. – Petition for Declaratory Order – Certain Rates and Practices of Norfolk Southern Railway Co.*, STB Docket No. 42068, served April 12, 2004;

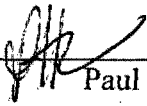
⁸ *Greenville County Economic Development Corp. – Petition for Declaratory Order*, STB Docket No. 34487, served July 27, 2005 and *Groome & Associates, Inc et al. v. Greenville County Economic Development Corp.*, STB Docket No. 42087, served July 27, 2005.

⁹ See e.g. *Consolidated Rail Corp. – Declaratory Order Proceeding*, STB Finance Docket No. 34319, served October 10, 2003.

¹⁰ See *Boston and Maine Corp. et al. v. New England Central Railroad, Inc.*, STB Docket No. 34612, served February 24, 2005.

III. CONCLUSIONS

For reasons argued and discussed above, FWWR submits the Board should dismiss PCI's Complaint II with prejudice. As pleaded, FWWR cannot adequately determine which of, and defend against, the *portions* of Complaint II arguably within Board jurisdiction, all to FWWR's prejudice.

Respectfully submitted November 21st 2006 by  for
Paul H. Lamboley

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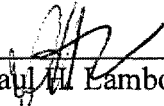
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Attorneys for Respondent Fort Worth & Western Railroad Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served on Counsel of Record identified below via first class U.S. mail, postage prepaid, this 22nd day of September, 2005:

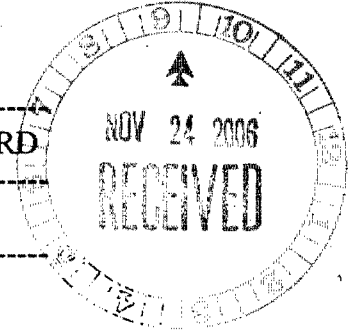
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Paul H. Lamboley

UNITED STATES OF AMERICA

BEFORE THE SURFACE TRANSPORTATION BOARD

STB DOCKET NO. NOR 42094 Sub-No. 1



PCI TRANSPORTATION, INC.

Complainant,

v.

FORT WORTH & WESTERN RAILROAD COMPANY

Respondent.

DECLARATION OF COUNSEL
IN SUPPORT OF MOTION TO DISMISS

ENTERED
Office of Proceedings

NOV 24 2006

Part of
Public Record

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November 21, 2006

Attorneys for Respondent
Fort Worth & Western Railroad Company

DECLARATION OF COUNSEL
IN SUPPORT OF MOTION TO DISMISS

Paul H. Lamboley, under penalty of perjury, makes the following declaration in support of the Motion to Dismiss submitted by Respondent Fort Worth & Western Railroad Company (FWWR):

1. I am one of the attorneys for Respondent FWWR, and make this declaration based on personal knowledge of the facts stated herein.
2. Attached hereto are true and correct copies of documents obtained and identified as follows:

- | | |
|-----------|--|
| Exhibit A | Docket History of Case No. 4:04-cv-211 Y before the United States District Court for the Northern District of Texas, Fort Worth Division entitled <i>PCI Transportation, Inc. v. Fort Worth & Western Railroad Company</i> , downloaded from Pacer System November 20, 2006. |
| Exhibit B | 5 th Circuit Decision in <i>PCI Transportation, Inc. v. Fort Worth & Western Railroad Company</i> file stamped July 26, 2005 and reported at 418 F.3d 535 (5 th Cir. 2005). |
| Exhibit C | District Court Order Granting Amended Motion to Dismiss and Dismissing Amended Motion for Partial Summary Judgment filed September 26, 2006. |
| Exhibit D | District Court Order Denying Motion for Clarification filed November 6, 2006. |
| Exhibit E | Plaintiff's Second Amended Complaint filed August 3, 2004, in the District Court by PCI Transportation, Inc. |

Respectfully submitted November 21st, 2006 by  for
Paul H. Lambole

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Attorneys for Respondent Fort Worth & Western Railroad Company

Exhibit A Docket History of Case No. 4:04-cv-211 Y before the United States District Court for the Northern District of Texas, Fort Worth Division entitled *PCI Transportation, Inc. v. Fort Worth & Western Railroad Company*, downloaded from Pacer System November 20, 2006.

CLOSED, ECF, JURY, STAYED

**U.S. District Court
Northern District of Texas (Fort Worth)
CIVIL DOCKET FOR CASE #: 4:04-cv-00211**

PCI Transportation Inc v. Fort Worth & Western Railroad
Company
Assigned to: Judge Terry R Means
Cause: 28:1441 Petition for Removal- Contract Default

Date Filed: 03/19/2004
Date Terminated: 09/26/2006
Jury Demand: Plaintiff
Nature of Suit: 450 Commerce ICC Rates,
Etc.
Jurisdiction: Federal Question

Plaintiff

PCI Transportation Inc

represented by **H Allen Pennington, Jr**
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817/332-5055
Email: apennington@phblaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

**Fort Worth & Western Railroad
Company**

represented by **Richard C DeBerry**
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ATTORNEY TO BE NOTICED**Counter Claimant****Fort Worth & Western Railroad
Company**represented by **Chad Parsons**

(See above for address)

ATTORNEY TO BE NOTICED**Russell A Devenport**

(See above for address)

V.

Counter Defendant**PCI Transportation Inc**

Date Filed	#	Docket Text
03/19/2004	<u>1</u>	NOTICE OF REMOVAL from 141st Judicial District Court Tarrant County TX, case number 141-204556-04. (Filing fee \$ 150 receipt number 48378.), filed by attorney Richard C DeBerry on behalf of Fort Worth & Western Railroad Company.(dld,) (Entered: 03/22/2004)
03/19/2004	<u>2</u>	CERTIFICATE OF INTERESTED PERSONS by Fort Worth & Western Railroad Company. (dld,) (Entered: 03/22/2004)
03/19/2004		ANSWER filed in state court on 3/18/04 by defendant Fort Worth & Western Railroad Company.(dld,) (Entered: 03/22/2004)
03/22/2004	<u>3</u>	ORDER EXPEDITING BRIEFING REGARDING MOTION TO REMAND....the deft's response, if any, to the motion to remand must be filed w/the clerk, and serving on opposing counsel so that it is rcvd nlt 4:30pm on Fri 26 2004; ptlf's reply to deft's response, if any, shall be filed nlt 4:30 Tue Mar 30 2004. (Signed by Judge Terry R Means on 3/22/04) (wrb,) (Entered: 03/22/2004)

		03/22/2004)
03/22/2004	<u>4</u>	First AMENDED ANSWER to, COUNTERCLAIM against PCI Transportation Inc by Fort Worth & Western Railroad Company. (dld,) (Entered: 03/23/2004)
03/22/2004	<u>5</u>	Emergency MOTION to Remand and brief in support thereof by PCI Transportation Inc (wrb,) (Entered: 03/23/2004)
03/22/2004	<u>6</u>	Unopposed MOTION for Voluntary Dismissal of a Specific Claim for Relief and brief in support thereof by PCI Transportation Inc (wrb,) (Entered: 03/23/2004)
03/23/2004	<u>7</u>	ORDER ON MOTION TO DISMISS SPECIFIC CLAIM...granting <u>6</u> Motion for Voluntary Dismissal of a Specific Claim for Relief against Defendant Fort Worth & Western Railroad Company Inc from "imposing or attempting to impose any demurrage charges upon PCI, or in the alternative, imposing or attempting to impose any demurrage charges upon PCI when timely delivery of PCI's cars on a first-in, first-out basis would have resulted in no demurrage charges, and in those situations where no demurrage charges would accrue but for FWWR's service failures"; see order for specifics. (Signed by Judge Terry R Means on 3/23/2004) (dld,) (Entered: 03/24/2004)
03/26/2004	<u>8</u>	ORDER TO SUBMIT JOINT STATUS REPORT AND PROPOSED DISCOVERY PLAN....jsrpt due w/in 30 days of the date of the filing of this order. (Signed by Judge Terry R Means on 03/26/04) (wrb,) (Entered: 03/26/2004)
03/26/2004	<u>9</u>	DEMAND for Trial by Jury by PCI Transportation Inc. (wrb,) (Entered: 03/29/2004)
03/26/2004	<u>10</u>	Defendant's RESPONSE to Plaintiff's <u>5</u> Emergency MOTION to Remand and brief in support filed by Fort Worth & Western Railroad Company. (wrb,) (Entered: 03/29/2004)
03/26/2004	<u>11</u>	Appendix in Support re <u>10</u> Response to Motion filed by Fort Worth & Western Railroad Company. (wrb,) (Entered: 03/29/2004)
03/30/2004	<u>12</u>	REPLY to Response to Motion re <u>5</u> MOTION to Remand filed by PCI Transportation Inc. (dld,) (Entered: 03/31/2004)
04/08/2004	<u>13</u>	ORDER denying <u>5</u> Motion to Remand (Signed by Judge Terry R Means on 4/8/04) (wrb,) (Entered: 04/08/2004)
04/16/2004	<u>14</u>	MOTION for Hearing on Temporary Injunction by PCI Transportation Inc with Brief in Support. (pdm,) (Entered: 04/16/2004)
04/19/2004	<u>15</u>	RESPONSE to re <u>14</u> MOTION for Hearing on Temporary Injunction filed by Fort Worth & Western Railroad Company. (dld,) (Entered: 04/20/2004)
04/20/2004	<u>16</u>	ORDER denying <u>14</u> Motion for Hearing. (Signed by Judge Terry R Means on 4/20/04) (wrb,) (Entered: 04/20/2004)

04/23/2004	<u>17</u>	JOINT STATUS REPORT and Proposed Discovery Plan by Fort Worth & Western Railroad Company, PCI Transportation Inc. (wrb,) (Entered: 04/23/2004)
04/29/2004	<u>18</u>	MOTION for Preliminary Injunction by PCI Transportation Inc (wrb,) (Entered: 04/30/2004)
04/29/2004	<u>19</u>	Brief in Support re <u>18</u> MOTION for Injunction filed by PCI Transportation Inc. (wrb,) (Entered: 04/30/2004)
04/29/2004	<u>20</u>	Appendix in Support re <u>18</u> MOTION for Injunction filed by PCI Transportation Inc. (wrb,) (Entered: 04/30/2004)
04/29/2004	<u>21</u>	MOTION for Leave to File Plaintiff's First Amended Complaint by PCI Transportation Inc (wrb,) (Entered: 04/30/2004)
04/29/2004	<u>22</u>	INITIAL SCHEDULING ORDER: parties to participate in formal settlement conf nlt Aug 16 2004 Amended Pleadings due by 7/1/2004. Discovery due by 7/30/2004. Joinder of Parties due by 5/21/2004. Motions due by 8/30/2004. (Signed by Judge Terry R Means on 4/29/04) (wrb,) (Entered: 05/03/2004)
05/17/2004	<u>23</u>	RESPONSE to Plaintiff's Motion re <u>18</u> MOTION for Injunction filed by Fort Worth & Western Railroad Company. (wrb,) (Entered: 05/17/2004)
05/17/2004	<u>24</u>	Appendix in Support re <u>23</u> Response to Motion filed by Fort Worth & Western Railroad Company. (wrb,) (Entered: 05/17/2004)
06/02/2004	<u>25</u>	ORDER granting <u>21</u> Motion to File Plaintiff's First Amended Complaint (Signed by Judge Terry R Means on 6/2/04) (wrb,) (Entered: 06/03/2004)
06/02/2004	<u>26</u>	Plaintiff's First AMENDED COMPLAINT against Fort Worth & Western Railroad Company , filed by PCI Transportation Inc.(wrb,) (Entered: 06/03/2004)
06/25/2004	<u>27</u>	ANSWER to Counterclaim by PCI Transportation Inc.(wrb,) (Entered: 06/28/2004)
06/25/2004	<u>28</u>	MOTION for Leave to File Plaintiff's Second Amended Complaint by PCI Transportation Inc (wrb,) (Entered: 06/28/2004)
07/01/2004	<u>29</u>	MOTION to File Second Amended Answer to Complaint & Counterclaim by Fort Worth & Western Railroad Company with Brief in Support. (pdm,) (Entered: 07/02/2004)
07/06/2004	<u>30</u>	ORDER denying <u>18</u> Motion for Injunction (Signed by Judge Terry R Means on 7/6/04) (wrb,) (Entered: 07/08/2004)
07/19/2004	<u>31</u>	MOTION for Reconsideration re <u>30</u> Order on Motion for Injunction by PCI Transportation Inc (wrb,) (Entered: 07/21/2004)
07/29/2004	<u>32</u>	ORDER granting <u>28</u> Motion for Leave to File Second Amended Complaint. (Signed by Judge Terry R Means on 7/29/04) (dld,) (Entered: 07/30/2004)

07/29/2004	<u>33</u>	SECOND AMENDED COMPLAINT against Fort Worth & Western Railroad Company , filed by PCI Transportation Inc.(dld,) (Entered: 07/30/2004)
07/29/2004	<u>34</u>	ORDER granting <u>29</u> Motion to Amend Answer and Counterclaim (Signed by Judge Terry R Means on 7/29/04) (dld,) (Entered: 07/30/2004)
07/29/2004	<u>35</u>	SECOND AMENDED ANSWER and COUNTERCLAIM by Fort Worth & Western Railroad Company. (dld,) (Entered: 07/30/2004)
07/30/2004	<u>36</u>	Unopposed MOTION for Leave to Substitute Verified Second Amended Complaint by PCI Transportation Inc (wrb,) (Entered: 08/03/2004)
08/03/2004	<u>37</u>	ORDER granting <u>36</u> Motion for leave to substitute verified second amended complaint (Signed by Judge Terry R Means on 8/3/04) (wrb,) (Entered: 08/03/2004)
08/03/2004	<u>39</u>	PLA'S SECOND AMENDED COMPLAINT against Fort Worth & Western Railroad Company , filed by PCI Transportation Inc.(mjw,) (Entered: 08/05/2004)
08/03/2004	<u>40</u>	AMENDED DOCUMENT by PCI Transportation Inc. Amendment to <u>31</u> MOTION for Reconsideration re <u>30</u> Order on Motion for Injunction...And Request for Hearing and Brief in Support (mjw,) (Entered: 08/05/2004)
08/03/2004	<u>41</u>	Supplemental Appendix in Support re <u>40</u> Amended Motion for Reconsideration filed by PCI Transportation Inc. (mjw,) (Entered: 08/05/2004)
08/03/2004	<u>43</u>	SETTLEMENT CONFERENCE REPORT re:RESPONSE to Order re <u>22</u> Scheduling Order, filed by PCI Transportation Inc. (dld,) (Entered: 08/06/2004)
08/04/2004	<u>38</u>	Interlocutory NOTICE OF APPEAL as to <u>30</u> Order on Motion for Injunction, <u>13</u> Order on Motion to Remand by PCI Transportation Inc. Filing fee \$ 255, receipt number 49738, filed by Atty H Allen Pennington Jr, No hrs held. (Entered: 08/05/2004)
08/04/2004	<u>42</u>	ORDER RENDERING MOTION MOOT; finding as moot <u>31</u> Motion for Reconsideration (Signed by Judge Terry R Means on 8/4/04) (wrb,) (Entered: 08/05/2004)
08/05/2004		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re <u>38</u> Notice of Appeal; along with a transmittal letter. (csw,) (Entered: 08/05/2004)
08/06/2004	<u>45</u>	DEFENDANT'S SETTLEMENT CONFERENCE REPORT by Fort Worth & Western Railroad Company. (wrb,) (Entered: 08/10/2004)
08/09/2004	<u>44</u>	ORDER RETAINING RECORD IN DISTRICT COURT: ORDERED by the Court, pursuant to Rule 11(e), FRAP, that the Clerk of this DC shall retain the record or parts thereof subject to the request of the Court of Appeals. FURTHER ORDERED that the pla, file with the Clerk of the Court, a designation of record and a Transcript Order within ten (10) days from the

		signing of this order. Upon receipt of the designation, and transcripts if ordered, the Clerk of the Court shall transmit a certified record to the Clerk of the US Court of Appeals for the Fifth Circuit. FURTHER ORDERED that the Clerk of the Court shall immediately transmit the partial record on appeal, which consists of a certified copy of this order and of the docket entries, to the Clerk of the US Court of Appeals for the Fifth Circuit. (Signed by Judge Terry R Means on August 9, 2004) (csw,) (Entered: 08/09/2004)
08/12/2004	<u>46</u>	Plaintiff's ANSWER to First Amended Counterclaim by PCI Transportation Inc.(wrb,) (Entered: 08/16/2004)
08/16/2004	<u>47</u>	Transcript Order Form: transcript not requested re <u>38</u> Notice of Appeal...no hrs. (csw,) (Entered: 08/17/2004)
08/16/2004	<u>48</u>	Statement of Issues for Appeal re <u>38</u> Notice of Appeal filed by PCI Transportation Inc. (csw,) (Entered: 08/17/2004)
08/16/2004	<u>49</u>	DESIGNATION of Record on Appeal by PCI Transportation Inc re <u>38</u> Notice of Appeal (csw,) (Entered: 08/17/2004)
08/23/2004		USCA Case Number 04-10965 for <u>38</u> Notice of Appeal filed by PCI Transportation Inc. (csw,) (Entered: 08/24/2004)
08/23/2004	<u>50</u>	RESPONSE to Plaintiff's Amended <u>31</u> MOTION for Reconsideration re <u>30</u> Order on Motion for Injunction filed by Fort Worth & Western Railroad Company. (wrb,) (Entered: 08/24/2004)
08/23/2004	<u>51</u>	Appendix in Support re <u>50</u> Defendant's Response to Plaintiff's Motion to Reconsider filed by Fort Worth & Western Railroad Company. (wrb,) (Entered: 08/24/2004)
08/30/2004	<u>52</u>	MOTION to Stay Action Pending Appeal by PCI Transportation Inc with Brief in Support. (dld,) (Entered: 08/31/2004)
08/30/2004	<u>53</u>	MOTION for Partial Summary Judgment by Fort Worth & Western Railroad Company (wrb,) (Entered: 08/31/2004)
08/30/2004	<u>54</u>	Memorandum in Support re <u>53</u> MOTION for Summary Judgment filed by Fort Worth & Western Railroad Company. (wrb,) (Entered: 08/31/2004)
08/30/2004	<u>55</u>	MOTION to Dismiss Claims for Injunction Relief and Brief in Support by Fort Worth & Western Railroad Company (wrb,) (Entered: 08/31/2004)
08/30/2004	<u>56</u>	Appendix in Support re <u>53</u> MOTION for Summary Judgment, <u>55</u> MOTION to Dismiss filed by Fort Worth & Western Railroad Company. (wrb,) (Entered: 08/31/2004)
09/02/2004		Certified and Transmitted Designated Record on Appeal to US Court of Appeals re <u>38</u> Notice of Appeal #04-10965 consisting of 3 volumes certified copies case papers designated by PCI Transportation; along with a cert cy of designation and docket entries and a transmittal letter. (csw,) (Entered: 09/02/2004)

09/07/2004	<u>57</u>	REPLY BRIEF to Response to Motion re <u>31</u> MOTION for Reconsideration re <u>30</u> Order on Motion for Injunction filed by PCI Transportation Inc. (mjlw,) (Entered: 09/08/2004)
09/10/2004	<u>58</u>	RESPONSE to Motion re <u>52</u> MOTION to Stay filed by Fort Worth & Western Railroad Company. (wrb,) (Entered: 09/13/2004)
09/13/2004	<u>59</u>	REPLY BRIEF to Response to <u>52</u> MOTION to Stay filed by PCI Transportation Inc. (dld,) (Entered: 09/14/2004)
09/21/2004	<u>60</u>	STIPULATION FOR ENLARGEMENT OF TIME FOR PLAINTIFF TO FILE A RESPONSE TO FWWR'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND TO DISMISS CLAIMS FOR INJUNCTION RELIEF by Fort Worth & Western Railroad Company, PCI Transportation Inc. (wrb,) (Entered: 09/22/2004)
09/28/2004	<u>61</u>	Second STIPULATION for Enlargement of Time for Plaintiff to File a Response to FWWR's Motions for Partial Summary Judgment and to Dismiss Claims for Injunction Relief by Fort Worth & Western Railroad Company, PCI Transportation Inc. (dld,) (Entered: 09/29/2004)
10/05/2004	<u>62</u>	ORDER EXTENDING TIME FOR PLAINTIFF TO FILE RESPONSE...the pltf's responses to the def't's motion for partial summary judgment and motion to dismiss claims for injunctive relief are due nlt 4pm Mon Oct 11 2004. (Signed by Judge Terry R Means on 10/5/04) (wrb,) (Entered: 10/05/2004)
10/08/2004	<u>63</u>	ORDER of USCA #04-10965 as to <u>38</u> Notice of Appeal filed by PCI Transportation Inc...ORDERED that appellant's motion for stay pending appeal is DENIED. (csw,) (Entered: 10/08/2004)
10/12/2004	<u>64</u>	MOTION for relief from order denying remand by PCI Transportation Inc (wrb,) (Entered: 10/13/2004)
10/12/2004	<u>65</u>	***UNFILED PER ORDER 10/13/04***Plaintiff's RESPONSE to Motion re <u>55</u> MOTION to Dismiss filed by PCI Transportation Inc. (wrb,) Modified on 10/14/2004 (pdm,). (Entered: 10/13/2004)
10/12/2004	<u>66</u>	**UNFILED PER ORDER 10/13/04***Plaintiff's RESPONSE to Motion re <u>53</u> MOTION for Summary Judgment filed by PCI Transportation Inc. (wrb,) Modified on 10/14/2004 (pdm,). (Entered: 10/13/2004)
10/12/2004	<u>67</u>	***UNFILED PER ORDER 10/13/04***Plaintiff's Brief in Support of <u>64</u> MOTION for relief from order denying remand, <u>65</u> Response to Motion filed by PCI Transportation Inc. (wrb,) Modified on 10/14/2004 (pdm,). (Entered: 10/13/2004)
10/12/2004	<u>68</u>	***UNFILED PER ORDER 10/13/04***Brief in Support re <u>66</u> Response to Motion for Partial Summary Judgment filed by PCI Transportation Inc. (wrb,) Modified on 10/14/2004 (pdm,). (Entered: 10/13/2004)
10/12/2004	<u>69</u>	***UNFILED PER ORDER 10/13/04***Appendix in Support of <u>66</u> Response

		to Motion, <u>65</u> Response to Motion filed by PCI Transportation Inc. (wrb,) Modified on 10/14/2004 (pdm,). (Entered: 10/13/2004)
10/12/2004	<u>70</u>	***UNFILED PER ORDER 10/13/04***OBJECTIONS TO THE DECLARATION OF JIM MARTIN in support of Defendant's Motion for Partial Summary Judgment and Defendant's Motion to Dismiss Claims for Injunctive Relief filed by PCI Transportation Inc. (wrb,) Modified on 10/14/2004 (pdm,). (Entered: 10/13/2004)
10/13/2004	<u>71</u>	Order Unfiling <u>66</u> Response to Motion filed by PCI Transportation Inc due to the following deficiency: Not in proper form, no case number. (Signed by Judge Terry R Means on 10/13/04) (pdm,) (Entered: 10/14/2004)
10/13/2004	<u>72</u>	Order Unfiling <u>68</u> Response in Support of Motion filed by PCI Transportation Inc due to the following deficiency: Not in proper form, no case number. (Signed by Judge Terry R Means on 10/13/04) (pdm,) (Entered: 10/14/2004)
10/13/2004	<u>73</u>	Order Unfiling <u>67</u> Response in Support of Motion filed by PCI Transportation Inc due to the following deficiency: Not in proper form, no case number. (Signed by Judge Terry R Means on 10/13/04) (pdm,) (Entered: 10/14/2004)
10/13/2004	<u>74</u>	Order Unfiling <u>65</u> Response to Motion filed by PCI Transportation Inc due to the following deficiency: Not in proper form, no case number. (Signed by Judge Terry R Means on 10/13/04) (pdm,) (Entered: 10/14/2004)
10/13/2004	<u>75</u>	Order Unfiling <u>70</u> Response in Opposition, filed by PCI Transportation Inc due to the following deficiency: Not in proper form, no case number. (Signed by Judge Terry R Means on 10/13/04) (pdm,) (Entered: 10/14/2004)
10/13/2004	<u>76</u>	Order Unfiling <u>69</u> Appendix in Support filed by PCI Transportation Inc due to the following deficiency: Not in proper form, not securely bound. (Signed by Judge Terry R Means on 10/13/04) (pdm,) (Entered: 10/14/2004)
10/15/2004	<u>77</u>	PLA'S RESPONSE to DFT'S Motion re <u>53</u> MOTION for Partial Summary Judgment filed by PCI Transportation Inc. (mjw,) (Entered: 10/18/2004)
10/15/2004	<u>78</u>	Appendix in Support re <u>77</u> Response to Motion for partial summary judgment filed by PCI Transportation Inc. (mjw,) (Entered: 10/18/2004)
10/15/2004	<u>79</u>	PLA'S RESPONSE to Motion re <u>55</u> MOTION to Dismiss Claims for Injunctive Relief filed by PCI Transportation Inc. (mjw,) (Entered: 10/18/2004)
10/15/2004	<u>80</u>	PLA'S Memorandum in Support re <u>79</u> Response to Motion to dismiss claims for injunctive relief filed by PCI Transportation Inc. (mjw,) (Entered: 10/18/2004)
10/15/2004		MOTION for Relief from Order Denying Remand of Case by PCI Transportation Inc (mjw,) (Entered: 10/18/2004)
10/15/2004	<u>81</u>	PLA'S Appendix in Support re <u>77</u> Response to Motion to dismiss, <u>79</u> Response to Motion for partial summary judgment filed by PCI Transportation Inc. (mjw,) (Entered: 10/18/2004)

10/15/2004	<u>82</u>	OBJECTIONS TO THE DECLARATION OF JIM MARTIN IN SUPPORT OF DFT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DFT'S MOTION TO DISMISS CLAIMS FOR INJUNCTIVE RELIEF filed by PCI Transportation Inc. (mjw,) (Entered: 10/18/2004)
10/19/2004	<u>83</u>	ORDER of USCA #04-10965 as to <u>38</u> Notice of Appeal filed by PCI Transportation Inc...ORDERED that appellant's motion for stay pending appeal is Denied. (csw,) (Entered: 10/20/2004)
11/01/2004	<u>84</u>	REPLY to Response to Motion re <u>53</u> MOTION for Summary Judgment filed by Fort Worth & Western Railroad Company. (wrb,) (Entered: 11/02/2004)
11/01/2004	<u>85</u>	REPLY to Response to Motion re <u>55</u> MOTION to Dismiss filed by Fort Worth & Western Railroad Company. (wrb,) (Entered: 11/02/2004)
11/01/2004	<u>86</u>	RESPONSE to Motion re MOTION for Relief from Order Denying Remand of Case filed by Fort Worth & Western Railroad Company. (wrb,) (Entered: 11/02/2004)
11/01/2004	<u>87</u>	RESPONSE to Plaintiff PCI's <u>82</u> Objections to the Declaration of Jim Martin filed by Fort Worth & Western Railroad Company. (wrb,) (Entered: 11/02/2004)
11/04/2004	<u>88</u>	ORDER granting <u>52</u> Motion to Stay...Case is STAYED until the 5th Circuit issues its mandate regarding the pla's appeals of this Court's July 6, 2004, order and April 8, 2004 order; case is ADMINISTRATIVELY CLOSED in an effort to manage court's docket more efficiently. Case may be reopened, without prejudice, upon the motion of either party, once the Fifth Circuit issues its mandate regarding the appeals. (Signed by Judge Terry R Means on 11/4/2004) (csw,) (Entered: 11/05/2004)
11/04/2004		Order Directing Administrative Closure per <u>88</u> order (Signed by Judge Terry R Means on 11/4/2004) (csw,) (Entered: 11/05/2004)
11/17/2004		Certified and Transmitted SUPPLEMENTAL Record on Appeal to US Court of Appeals re <u>38</u> Notice of Appeal #04-10965 consisting of 1 volume supplemental case papers which includes a cert cy of docket entries, 1 exhibit folder which contains appendix document #81; along with a transmittal letter. (Original record sent) (csw,) (Entered: 11/17/2004)
08/18/2005	<u>92</u>	NOTICE OF FILING OF CLAIMS BEFORE THE SURFACE TRANSPORTATION BOARD, MOTION TO DISMISS OR STAY COUNTERCLAIMS AND BRIEF IN SUPPORT THEREOF by PCI Transportation Inc (wrb,) (Entered: 08/19/2005)
08/18/2005	<u>93</u>	Appendix in Support of <u>92</u> PCI Transportation Inc's Motion to Dismiss filed by PCI Transportation Inc. (wrb,) (Entered: 08/19/2005)
08/19/2005	<u>89</u>	JUDGMENT/MANDATE of USCA #04-10965 as to <u>38</u> Notice of Appeal filed by PCI Transportation Inc...ordered and adjudged that the judgment of the DC is affirmed. Further ORDERED that pla-appellant pay to dft-appellee the costs on

		appeal to be taxed by the Clerk of this Court. Issued as Mandate: 8/17/2005. (csw,) (Entered: 08/19/2005)
08/19/2005	<u>90</u>	Opinion of USCA (certified copy) #04-10965 in accordance with USCA judgment re <u>38</u> Notice of Appeal filed by PCI Transportation Inc...the DC's orders denying PCI's motion for remand and denying PCI's motion for a preliminary injunction including its refusal to conduct a hearing are in all respects Affirmed. (csw,) (Entered: 08/19/2005)
08/19/2005	<u>91</u>	Appeal Record Returned: <u>38</u> Notice of Appeal re: USCA #04-10965 consisting of 3 volumes case papers, 1 vol supplemental case papers, appendix document #81, 2 sealed envelopes record supplemented at 5th. (csw,) (Entered: 08/19/2005)
08/22/2005	<u>94</u>	Order Designating Case for ECF - see order for specifics. (Signed by Judge Terry R Means on 08/22/05) (wrb,) (Entered: 08/23/2005)
08/22/2005	<u>95</u>	ORDER:, Case reopened. Because the reason for the stay and admin closure - the appeal- has been resolved, this court orders this case reopened and lifts the stay. The clerk shall note on the docket that this case is no longer administratively closed. (Signed by Judge Terry R Means on 8/22/05) (wrb,) (Entered: 08/23/2005)
09/07/2005	<u>96</u>	[unfiled per order of Sep 16 2005] Response to <u>92</u> Notice of Filing of Claims Before the Surface Transportation Board, Motion to Dismiss or Stay Counterclaim & Brief in Support filed by Fort Worth & Western Railroad Company. (Devenport, Russell) Modified on 9/8/2005 (wrb,). Modified on 9/19/2005 (wrb,). (Entered: 09/07/2005)
09/08/2005		NOTICE of Docket Text/Document Modification by Deputy Clerk regarding Objection <u>96</u> - cleaned up docket description to match pleading title (wrb,) (Entered: 09/08/2005)
09/15/2005	<u>97</u>	NOTICE by PCI Transportation Inc, PCI Transportation Inc <i>Lead Attorney Vacation Letter</i> (Pennington, H) (Entered: 09/15/2005)
09/16/2005	<u>98</u>	Order Unfiling <u>96</u> Objection, filed by Fort Worth & Western Railroad Company, due to the following deficiency: needs "judge's copy". (Signed by Judge Terry R Means on 9/16/05) (wrb,) (Entered: 09/19/2005)
09/19/2005	<u>99</u>	RESPONSE in Opposition re <u>92</u> Notice (Other) filed by Fort Worth & Western Railroad Company. (Devenport, Russell) (Entered: 09/19/2005)
09/21/2005	<u>100</u>	RESPONSE in Opposition re <u>99</u> Response in Opposition, <u>92</u> Notice (Other) <i>REPLY TO RESPONSE TO NOTICE OF FILING OF CLAIMS BEFORE THE SURFACE TRANSPORTATION BOARD, MOTION TO DISMISS OR STAY COUNTERCLAIMS AND BRIEF IN SUPPORT THEREOF</i> filed by PCI Transportation Inc, PCI Transportation Inc. (Pennington, H) (Entered: 09/21/2005)
09/21/2005	<u>101</u>	Appendix in Support re <u>100</u> Response in Opposition,, <u>92</u> Notice (Other)

		<i>NOTICE OF FILING OF CLAIMS BEFORE THE SURFACE TRANSPORTATION BOARD, MOTION TO DISMISS OR STAY COUNTERCLAIMS AND BRIEF IN SUPPORT THEREOF</i> filed by PCI Transportation Inc, PCI Transportation Inc. (Attachments: # <u>1</u> Appendix # <u>2</u> Appendix)(Pennington, H) (Entered: 09/21/2005)
10/05/2005	<u>102</u>	Unopposed MOTION for Leave to File Sur-Reply by Fort Worth & Western Railroad Company with Brief in Support. (Attachments: # <u>1</u> Exhibit proposed Sur-Reply)(Devenport, Russell) (Entered: 10/05/2005)
10/06/2005	<u>103</u>	ORDER granting <u>102</u> Motion for Leave to File Sur-Reply - deft shall electronically file its sur-reply w/in 3 days of this order. (Signed by Judge Terry R Means on 10/6/05) (wrb,) (Entered: 10/07/2005)
10/07/2005	<u>104</u>	RESPONSE in Opposition re <u>92</u> Notice (Other) <i>SUR-REPLY to Motion to Dismiss or Stay Counterclaims</i> filed by Fort Worth & Western Railroad Company. (Devenport, Russell) (Entered: 10/07/2005)
11/16/2005	<u>105</u>	NOTICE by Fort Worth & Western Railroad Company re <u>92</u> Notice (Other) of <i>Surface Transportation Board Decision</i> (Devenport, Russell) (Entered: 11/16/2005)
11/16/2005	<u>106</u>	Appendix in Support re <u>105</u> Notice (Other) of <i>Surface Transportation Board Decision</i> filed by Fort Worth & Western Railroad Company. (Devenport, Russell) (Entered: 11/16/2005)
11/16/2005	<u>107</u>	NOTICE by PCI Transportation Inc of <i>Surface Transportation Board Decision</i> (Attachments: # <u>1</u> Appendix)(Pennington, H) (Entered: 11/16/2005)
12/14/2005	<u>108</u>	ORDER REGARDING TERMINATED MOTIONS...On Aug 22 2005, this court reopened the case after Court of Appeals affirmed the order denying remand. The court determines that the parties must refile the three motions that were pending before the stay and administrative closure order (doc 53,55,64) if the parties determine that these motions continue to have merit. (Signed by Judge Terry R Means on 12/14/05) (wrb,) (Entered: 12/14/2005)
02/07/2006	<u>109</u>	Amended MOTION for Summary Judgment (<i>Partial</i>) by Fort Worth & Western Railroad Company (Devenport, Russell) (Entered: 02/07/2006)
02/07/2006	<u>110</u>	Brief/Memorandum in Support re <u>109</u> Amended MOTION for Summary Judgment (<i>Partial</i>) filed by Fort Worth & Western Railroad Company. (Devenport, Russell) (Entered: 02/07/2006)
02/07/2006	<u>111</u>	Amended MOTION to Dismiss <i>Claims for Injunctive Relief</i> by Fort Worth & Western Railroad Company with Memorandum in Support. (Devenport, Russell) (Entered: 02/07/2006)
02/24/2006	<u>112</u>	{construed as motion for extension per order of Feb 28 2006}STIPULATION re <u>109</u> Amended MOTION for Summary Judgment (<i>Partial</i>), <u>110</u> Brief/Memorandum in Support of Motion, <u>111</u> Amended MOTION to Dismiss <i>Claims for Injunctive Relief</i> by PCI Transportation Inc ; <i>Stipulation for</i>

		<i>Enlargement of Time.</i> (Attachments: # <u>1</u> Supplement Scanned Original Signatures)(Pennington, H) Modified on 2/28/2006 (wrb,). (Entered: 02/24/2006)
02/28/2006	<u>113</u>	ORDER GRANTING MOTION TO EXTEND RESPONSE TIME...doc. 112 - ptlf shall file its response to def't's amended motion for partial summary judgment and amended motion to dismiss claims for injunctive relief on or before Mar 9 2006; clerk shall note on docket that the stipulation is an extension motion. (Signed by Judge Terry R Means on 2/28/06) (wrb,) (Entered: 02/28/2006)
03/08/2006	<u>114</u>	RESPONSE to Motion re <u>109</u> Amended MOTION for Summary Judgment (<i>Partial</i>) filed by PCI Transportation Inc, PCI Transportation Inc. (Pennington, H) (Entered: 03/08/2006)
03/08/2006	<u>115</u>	Brief/Memorandum in Support re <u>114</u> Response to Motion (<i>Amended</i>) <i>Motion for Partial Summary Judgment of FWWR</i> filed by PCI Transportation Inc, PCI Transportation Inc. (Pennington, H) (Entered: 03/08/2006)
03/08/2006	<u>116</u>	RESPONSE to Motion re <u>111</u> Amended MOTION to Dismiss <i>Claims for Injunctive Relief</i> filed by PCI Transportation Inc, PCI Transportation Inc. (Pennington, H) (Entered: 03/08/2006)
03/08/2006	<u>117</u>	Brief/Memorandum in Support re <u>116</u> Response to Motion <i>to Dismiss Claims for Injunctive Relief</i> filed by PCI Transportation Inc, PCI Transportation Inc. (Pennington, H) (Entered: 03/08/2006)
03/08/2006	<u>118</u>	OBJECTION re <u>110</u> Brief/Memorandum in Support of Motion, <u>111</u> Amended MOTION to Dismiss <i>Claims for Injunctive Relief</i> , <i>Objections to the Declaration of Jim Martin in support of FWWR's Amended Motion for Partial Summary Judgment and Amended Motion to Dismiss Claims for Injunctive Relief</i> filed by PCI Transportation Inc, PCI Transportation Inc. (Pennington, H) (Entered: 03/08/2006)
03/23/2006	<u>119</u>	REPLY to Response to Motion re <u>111</u> Amended MOTION to Dismiss <i>Claims for Injunctive Relief</i> filed by Fort Worth & Western Railroad Company. (Devenport, Russell) (Entered: 03/23/2006)
03/23/2006	<u>120</u>	REPLY to Response to Motion re <u>109</u> Amended MOTION for Summary Judgment (<i>Partial</i>) filed by Fort Worth & Western Railroad Company. (Devenport, Russell) (Entered: 03/23/2006)
03/23/2006	<u>121</u>	RESPONSE in Opposition re <u>118</u> Objection, <i>to Declaration of Jim Martin</i> filed by Fort Worth & Western Railroad Company. (Devenport, Russell) (Entered: 03/23/2006)
09/26/2006	<u>122</u>	ORDER GRANTING AMENDED MOTION TO DISMISS AND DISMISSING AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT; dismissing <u>109</u> Motion for Summary Judgment, granting <u>111</u> Motion to Dismiss (Signed by Judge Terry R Means on 9/26/06) (wrb,) (Entered: 09/26/2006)

09/26/2006	<u>123</u>	FINAL JUDGMENT...parties claims are dismissed; costs under 28 USC 1920 shall be taxed against the party incurring same. (Signed by Judge Terry R Means on 9/26/06) (wrb,) (Entered: 09/26/2006)
10/05/2006	<u>124</u>	MOTION for Reconsideration re <u>123</u> Judgment, <u>122</u> Order on Motion for Summary Judgment, Order on Motion to Dismiss <i>or for Clarification under Rule 59(e)</i> by Fort Worth & Western Railroad Company, Fort Worth & Western Railroad Company with Brief in Support. (Devenport, Russell) (Entered: 10/05/2006)
10/18/2006	<u>125</u>	RESPONSE filed by PCI Transportation Inc re <u>124</u> MOTION for Reconsideration re <u>123</u> Judgment, <u>122</u> Order on Motion for Summary Judgment, Order on Motion to Dismiss <i>or for Clarification under Rule 59(e)</i> (Pennington, H) (Entered: 10/18/2006)
11/06/2006	<u>126</u>	ORDER denying <u>124</u> Motion for Reconsideration (Signed by Judge Terry R Means on 11/6/06) (wrb,) (Entered: 11/06/2006)

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11/20/2006 17:56:41			
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Description:	Docket Report	Search Criteria:	4:04-cv-00211
Billable Pages:	8	Cost:	0.64

Exhibit B 5th Circuit Decision in *PCI Transportation, Inc. v. Fort Worth & Western Railroad Company* file stamped July 26, 2005 and reported at 418 F.3d 535 (5th Cir. 2005).

United States Court of Appeals
Fifth Circuit

FILED

July 26, 2005

REVISED AUGUST 9, 2005

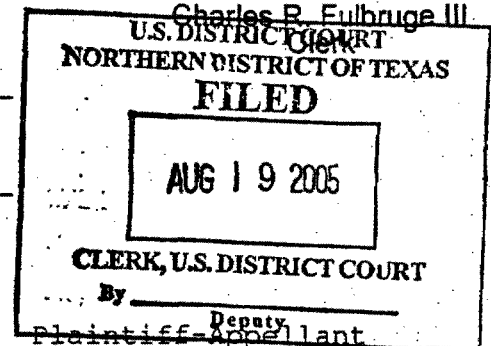
IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 04-10965

PCI TRANSPORTATION INC,

4:04-cv-211g



versus

FORT WORTH & WESTERN RAILROAD COMPANY,

Defendant-Appellee

On Appeal from the United States District Court
for the Northern District of Texas

Before HIGGINBOTHAM, WIENER and CLEMENT, Circuit Judges.

WIENER, Circuit Judge:

Appellant PCI Transportation, Inc. ("PCI") appeals the district court's orders denying (1) remand, and (2) a preliminary injunction. We affirm.

I. FACTS AND PROCEEDINGS

PCI receives and distributes rail cargo in Fort Worth, Texas, via a distribution warehouse serviced by a spur that comes off of railroad lines of the Union Pacific Railroad ("Union Pacific") and the Burlington Santa Fe Railroad ("BNSF"). Appellee Fort Worth & Western Railroad Co. ("FWWR") is a short-line railroad that

operates passenger and freight trains within Texas. FWWR operates a switching yard that, via PCI's spur, links its warehouse to the Union Pacific and BNSF railroads. Under various agreements, Union Pacific and BNSF deliver railcars to FWWR's switching yard, after which FWWR switches and delivers these cars to customers of Union Pacific and BNSF, such as PCI, for unloading. After the railcars are unloaded, FWWR returns the empty cars to the main railroads' lines. BNSF and Union Pacific compensate FWWR for its switching services, but the railroads also charge FWWR for the time that it retains the railcars at its switching yard. In turn, FWWR collects demurrage¹ fees from end-use customers such as PCI.

In August 2001, after a dispute had arisen concerning demurrage charges imposed on PCI by FWWR, these parties entered into a contract (the "contract") aimed at avoiding further conflict, a goal that the contract has obviously failed to attain. The entire contract is a one page letter, and is self-styled with two different names — "Confidential Demurrage Contractual Agreement" and "Confidential Contractual Agreement for Free Time." The language of the contract provides that (1) PCI will have four demurrage-free days, and (2) FWWR is committed to providing PCI with a minimum of one "switch" daily, seven days per week. The contract also establishes the demurrage rate applicable after free

¹ Demurrage is a charge assessed for detaining a freight car, truck, or other vehicle beyond any free time stipulated for loading or unloading.

time expires. (The contract was never placed in evidence before the district court, but following oral argument on appeal, it was submitted to us under seal.) PCI alleges that, since the execution of the contract and in conformity with common industry practice, FWR has delivered cars to PCI on a first-in, first-out ("FIFO") basis.

In February 2004, more than two years after execution of the contract, a new dispute arose between PCI and FWR concerning demurrage charges for the month of June 2003. PCI contends that FWR had engaged in several practices that resulted in improper demurrage fees being charged to PCI, to wit: (1) FWR varied from its practice of delivering cars to PCI on a FIFO basis, with the result that FWR held cars intended for PCI's customers for longer than four days; (2) at times, FWR had delivered rail cars on PCI's spur backwards, making it impossible for PCI to unload those cars and requiring FWR to move the cars out, reverse them, then bring them back in again with the next group of cars; (3) FWR provided PCI with a delivery schedule the effect of which virtually guaranteed that some of the cars would be held in the FWR yard for more than four days, thereby unnecessarily incurring demurrage costs.

PCI filed suit in state court alleging that FWR had breached the contract. PCI also claimed intentional interference with contractual relations and requested a TRO, a "temporary injunction," and a permanent injunction restraining FWR for a

period of ten years from (1) "providing purported notice of cancellation of any agreements between PCI and FWWR"; (2) "refusing to deliver less than ten (10) PCI-bound railroad cars with cargo per day to PCI on its spur, to the extent such cars are available"; (3) "delivering cars to PCI's spur on any basis other than on the basis of delivery of those PCI-bound cars which have been in FWWR's possession the most number of days"; and (4) "imposing or attempting to impose any demurrage charges upon PCI, or in the alternative, imposing or attempting to impose any demurrage charges upon PCI when timely delivery of PCI's cars on a first-in, first-out basis would have resulted in no demurrage charges, and in those situations where no demurrage charges would accrue but for FWWR's service failures". The state court granted PCI's request for a TRO.

FWWR then removed the case to federal court, asserting that PCI's state law claims were completely preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA").² The ICCTA overhauled the Interstate Commerce Act ("ICA"), including the elimination of the Interstate Commerce Commission and replacing it with the Surface Transportation Board ("STB"). PCI filed a motion for remand, arguing that the suit was outside the ambit of the ICCTA. The district court denied PCI's motion, concluding that removal was proper under the doctrine of complete preemption.

² 49 U.S.C. §§ 10101, et. seq.

PCI filed a request for a temporary injunction and hearing in the district court, seeking essentially the same relief that it had sought in state court. This was PCI's second motion for injunctive relief. Its first motion was denied for procedural reasons. The district court denied PCI's motion without a hearing, holding that, as a result of PCI's failure to proffer into evidence the contract on which it based its claims for relief, it had not demonstrated, prima facie, that the district court, as distinguished from the STB, had jurisdiction to entertain PCI's requested injunctive relief. The district court also held that PCI failed to demonstrate that it would suffer irreparable injury absent an injunction. PCI appeals the district court's denial of its remand motion, denial of its motion for a preliminary injunction, and refusal to hold a hearing on the motion for a preliminary injunction.

II. ANALYSIS

A. Appeal of the Remand Order

An order denying a motion to remand is not appealable as a final decision within the meaning of 28 U.S.C. § 1291; standing alone, such a ruling cannot be appealed unless certified by the district court under 28 U.S.C. § 1292(b).³ PCI nevertheless contends that we have jurisdiction to consider its appeal of the

³ Poirrier v. Nicklos Drilling Co., 648 F.2d 1063, 1064-65 (5th Cir. 1981); Lewis v. E.I. Du Pont De Nemours & Co., 183 F.2d 29, 31 (5th Cir. 1950).

we could consider the order denying remand, we looked solely to whether the Eleventh Amendment immunity issue was non-frivolous and properly before us on appeal.⁸ Implicit in that decision is the conclusion that, once appellate jurisdiction has been established, we are compelled to address questions of federal jurisdiction.

In the context of the collateral order doctrine, we perceive no difference in the distinction between Eleventh Amendment immunity and remand. We thus conclude that PCI's appeal of the denial of its motion for a preliminary injunction is both non-frivolous and properly before us. Consonant with our holding in Real Parties in Interest, we first consider the jurisdictional question whether the district court erred in denying PCI's motion to remand the case to state court.

B. Removal and Remand

The district court denied PCI's motion to remand the case, relying primarily on (1) the Northern District of Iowa's reasoning in Cedarapids, Inc. v. Chicago, Central & Pacific Railroad Co.⁹ and (2) § 10501 of the ICCTA. Section 10501 provides:

(b) The jurisdiction of the Board over--

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

⁸ Id.

⁹ 265 F. Supp.2d 1005 (N.D. Iowa 2003).

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.¹⁰

PCI contends that removal was improper because the relief that PCI requests is expressly excluded from the reach of the ICCTA by § 10709 of that act. "We exercise plenary, de novo review of a district court's assumption of subject matter jurisdiction."¹¹

1. PCI's § 10709 Argument

FWWR establishes rates for its transportation services, as well as rules and practices related to those services, including specifically the rules relating to the imposition of demurrage fees.¹² The injunctive relief PCI seeks would regulate the operation of FWWR's switching yard and would therefore fall squarely under § 10501(b). PCI argues nonetheless that its dispute with FWWR is purely over FWWR's compliance with the contract, and that, under 49 U.S.C. § 10709, such contracts are not subject to

¹⁰ 49 U.S.C. § 10501.

¹¹ Hoskins v. Bekins Van Lines, 343 F.3d 769, 772 (5th Cir. 2003).

¹² 49 U.S.C. § 10701.

the ICCTA and thus not under the jurisdiction of the STB. Section 10709 provides in relevant part:

(a) One or more rail carriers providing transportation subject to the jurisdiction of the Board under this part may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions.

(b) A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.

(c)(1) A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.

(2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree.

None disputes that FWR is a rail carrier and PCI is a purchaser of its services.¹³

PCI's position on the applicability of § 10709 can be distilled to two arguments. First, PCI argues that the STB has no jurisdiction to hear claims even related to agreements governed by § 10709, citing the language of the statute and decisions of the

¹³ "[R]ail carrier' means a person providing common carrier railroad transportation for compensation," 49 U.S.C. § 10102(5), and a "railroad" includes a "switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation." § 10102(6) (C).

STB refusing to consider such disputes.¹⁴ We see nothing in the statutory language that supports PCI's "related to" argument, however, and PCI fails to direct us to any such language. In fact, § 10709(b) specifies that a party entering into such a contract has only "those duties specified by the terms of the contract." The decisions of the STB cited by PCI also fail to support its argument. H.B. Fuller Co. v. Southern Pacific Transportation Co.¹⁵ is inapposite because the contract at issue there was a comprehensive one that purported to govern the entire relationship between the litigants. Fuller, a manufacturer, sued Southern Pacific, alleging that the railroad had imposed unreasonable storage and demurrage charges. The transportation in question was subject to a "contract for carriage." Fuller argued that its claims fell outside that contract and thus within the STB's jurisdiction, because the contract did not explicitly address demurrage or storage charges. The STB rejected Fuller's argument and held that the claims fell outside its jurisdiction. Although the contract did not explicitly address those areas, it did incorporate by reference the "tariffs, rules and regulations which would apply" if there was no contract to govern those areas not covered by the contract. Therefore, held the STB, the referenced

¹⁴ Reply Brief at 6. PCI did discuss the STB cases in its initial brief, but appears to have asserted the "even related to" argument for the first time on reply.

¹⁵ STB Docket No. 41510 (Aug. 20, 1997).

tariff terms became part of the contract. The other two STB decisions that PCI cites add nothing to the analysis.¹⁶

In Cross Oil Refining & Marketing, Inc. v. Union Pacific Railroad Co.,¹⁷ a decision not cited by PCI, the STB considered whether a series of purported contracts were the kind governed by § 10709. Cross Oil argued that § 10709 did not apply because, under the agreements in question, service and equipment were to be provided on the same basis as those provided to other shippers. The STB rejected Cross Oil's argument, ruling that the transportation at issue was provided under the contracts: Each contract affirmatively stated that it was made pursuant to § 10709, identified the origins and destinations, and specified the terms of the contract and the rates for the commodities. As in Fuller, the STB held that rail contracts can incorporate tariff provisions by reference yet still fall outside the STB's jurisdiction.

Unlike the agreements at issue in the cited cases, the contract in the instant case is very limited in scope, and does not incorporate any tariff provisions. As such, any relief requested

¹⁶ Minn. Power Inc. v. Duluth, Missabe and Iron Range Ry. Co., STB Docket No. 42038 (July 7, 1999), merely states that movement governed by a rail transportation contract is "beyond our regulatory purview under 49 U.S.C. 10709(c)" without providing any further analysis. Parrish & Heimbecker, Inc., STB Docket No. 42031 (May 22, 2000), discusses the Staggers Act, stating only that the statute removed contract service from the authority of the ICC (predecessor to the STB).

¹⁷ STB Finance Docket No. 33582 (Oct. 19, 1998).

by PCI that falls outside of the contract's express coverage is not governed by § 10709.

The second argument made by PCI is that all relief requested is within the contract's coverage and therefore within the reach of § 10709. In its reply to FWR's response to PCI's motion to remand, PCI contended in district court that even if the contract does not specifically address (1) whether FWR was required to place cars at PCI's spur on a FIFO basis, or (2) whether FWR is required to place a "full spot" of ten cars at PCI's spur each day, the consistent conduct of the parties under the contract constitutes their agreed interpretation, causing those requirements to be incorporated into the contract. On appeal, PCI no longer asserts that the parties' prior conduct interpreted or supplemented the contract, arguing instead that all requested relief is within the language of the contract, namely that the parties' prior conduct, as well as the Texas railroad industry's customs and practices, inform what the term "switch" means. PCI relies primarily on the deposition testimony of Charley Godsey, the operations manager for FWR, to establish that the term "switch" encompasses the portion of injunctive relief that FWR insists falls outside of the contract. FWR counters that the "switch" language in the contract was solely meant to change the number of days per week that switching services would be provided to PCI, but does not provide an alternative definition of "switch."

Under Texas law, the primary concern of a court construing a contract is to "ascertain the true intent of the parties as expressed in the instrument."¹⁸ Even when there is neither patent nor latent ambiguity in the wording of a contract, "[e]xtrinsic evidence may, indeed, be admissible to give the words of a contract a meaning consistent with that to which they are reasonably susceptible."¹⁹ "A specialized industry term may require extrinsic evidence of the commonly understood meaning of that term within the specialized industry."²⁰ PCI provides a string of citations to the Godsey deposition to support its definition of "switch". A review of the cited portions of the record reveals, however, that Godsey was never asked to explain or define the meaning of providing a "switch." His deposition lays out how FWWR deals with customers and states that FWWR (1) does not impose demurrage charges when the mistakes are its own, (2) uses a FIFO method to determine which cars to deliver, and (3) will fill the spot available on a customer's spur each day. None of this, however, is ever tied by the deposition to the meaning of providing a "switch."

¹⁸ Dell Computer Corp. v. Rodriguez, 390 F.3d 377, 388 (5th Cir. 2004); Mescalero Energy, Inc. v. Underwriters Indem. Gen. Agency, Inc., 56 S.W.3d 313, 319 (Tex. App. - Houston [1st Dist.] 2001, pet. denied).

¹⁹ Nat'l Union Fire Ins. Co. v. CBI Indus. Inc., 907 S.W.2d 517, 521 (Tex. 1995).

²⁰ Royal Maccabees Life Ins. Co. v. James, 146 S.W.3d 340, 345-46 (Tex. App. - Dallas 2004, pet. filed).

Even if we were to accept PCI's broad definition of "switch," the injunctive relief it seeks is still broader than that which the contract governed. The last portion of PCI's request seeks to control FWWR's ability to impose demurrage charges under any circumstances, or in the alternative, any circumstance in which no demurrage charges would accrue but for FWWR's service failures, not just those situations in which FWWR fails either to provide a full spot of cars or to deliver the cars on a FIFO basis. We hold that, at the very least, a portion of FWWR's claims are governed by the ICCTA.

2. Complete Preemption

For the district court to have removal jurisdiction, 28 U.S.C. § 1441 requires that "the case be one over 'which the district courts of the United States have original jurisdiction.'"²¹ Whether a claim arises under federal law is a question determined by reference to the plaintiff's "well-pleaded complaint."²² As a defendant may remove a case only if the claims could have been brought in federal court, "the question for removal jurisdiction must also be determined by reference to the 'well-pleaded complaint.'"²³ "Under the well-pleaded complaint rule, 'federal

²¹ Johnson v. Baylor Univ., 214 F.3d 630, 632 (5th Cir. 2000) (citation omitted).

²² Hoskins, 343 F.3d at 772 (citing Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152 (1908)).

²³ Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 808 (1986).

jurisdiction exists only when a federal question is presented on the face of plaintiff's properly pleaded complaint."²⁴ "As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim."²⁵ Potential defenses, including a federal statute's preemptive effect, do not provide a basis for removal.²⁶

In Beneficial National Bank v. Anderson, the Supreme Court recognized two exceptions to this last rule: (1) when Congress expressly provides for removal and (2) when a federal statute wholly displaces the state-law cause of action through complete preemption.²⁷ The latter exception is the one that is at issue in the instant case. As stated above, standard preemption does not provide a basis for removal. In contrast, complete preemption is jurisdictional in nature and, as such, "authorizes removal to federal court even if the complaint is artfully pleaded to include solely state law claims for relief or if the federal issue is initially raised solely as a defense."²⁸

²⁴ Hoskins, 343 F.3d at 772 (quoting Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987)).

²⁵ Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 6 (2003).

²⁶ Id. (citing Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1 (1983)) (emphasis added).

²⁷ Id. at 8.

²⁸ Johnson, 214 F.3d at 632 (citation omitted).

Prior to the decision in Beneficial, we considered complete preemption to be a narrow exception, noting that the Supreme Court had only recognized its existence in the areas of federal labor relations and the Employee Retirement Security Act of 1974 ("ERISA").²⁹ Our pre-Beneficial test for complete preemption required the defendant to show that

(1) the statute contains a civil enforcement provision that creates a cause of action that both replaces and protects the analogous area of state law; (2) there is a specific jurisdictional grant to the federal courts for enforcement of the right; and (3) there is a clear Congressional intent that claims brought under the federal law be removable.³⁰

In Hoskins, however, we modified the test in response to the Supreme Court's Beneficial decision, in which the Court extended the doctrine of complete preemption to the National Bank Act. It reasoned that because the National Bank Act provides the exclusive cause of action for claims of usury against a national bank, all such claims arise under federal law for purposes of federal jurisdiction.³¹ In light of the decision in Beneficial, we held in Hoskins that the proper focus of complete preemption analysis is on

²⁹ Id. (citing to Avco Corp. v. Machinists, 390 U.S. 557 (1968) and Metro. Life Ins. Co. v. Taylor, 481 U.S. 58 (1987)).

³⁰ Id. The district court, in concluding there was complete preemption, neither applied our circuit's test nor looked to the Supreme Court's decision in Beneficial.

³¹ Beneficial Nat'l Bank, 539 U.S. at 11.

whether Congress intended that the federal action be exclusive, as opposed to whether Congress intended that the claim be removable.³²

In Hoskins, we considered whether there is complete preemption of claims asserted under the Carmack Amendment to the Interstate Commerce Act.³³ As there is neither language in the statute expressing Congress's intent that the Carmack Amendment provide the exclusive cause of action for claims arising out of the interstate transportation of goods by a common carrier nor any legislative history to be examined, we looked to our own cases and those of the Supreme Court to determine whether Congress did indeed intend for the Carmack Amendment to provide the exclusive cause of action, holding that it did.³⁴ In the instant case, the plain language of § 10501 supports our conclusion that Congress intended actions regarding "rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers"³⁵ to be governed exclusively by the ICCTA. The House Report on the proposed ICCTA

³² Hoskins, 343 F.3d at 776. Our holding in Hoskins, reversing our prior holding that the Carmack Amendment did not support complete preemption, reflects Justice Scalia's conclusion that the majority's holding in Beneficial makes finding complete preemption easier than existed under Taylor. Beneficial Nat'l Bank, 539 U.S. at 16-19 (Scalia, J., dissenting).

³³ 49 U.S.C. § 14706. Section 14706 resides under the part of the ICA governing Motor Carriers. The Carmack Amendment also modified the Rail part of the ICA. 49 U.S.C. § 11706.

³⁴ Hoskins, 343 F.3d at 776.

³⁵ 49 U.S.C. § 10501(b)(1).

also supports the conclusion that the ICCTA provides the exclusive cause of action:

[Section 10501] replaces the railroad portion of former Section 10501. Conforming changes are made to reflect the direct and complete pre-emption of State economic regulation of railroads. The changes include extending exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or side tracks formerly reserved for State jurisdiction under former section 10907. The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system. Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive.³⁶

In light of the plain language of the statute and its legislative history, and in accordance with our holding in Hoskins, we hold that the complete preemption doctrine applies. And, as the ICCTA provides the exclusive cause of action for PCI's non-contractual relief, we hold that those claims "'only arise[] under federal law and could, therefore, be removed under § 1441.'" ³⁷ The district court's denial of remand was thus appropriate.

C. PCI's Preliminary Injunction Request

³⁶ H.R. REP. NO. 104-311, at 95-96 (1995). The Conference Report emphasized that the conference version of the bill was meant to preserve the exclusivity of federal remedies in the area of rail regulation that existed prior to the passage of the ICCTA. H.R. CONF. REP. NO. 104-422, at 167.

³⁷ Hoskins, 343 F.3d at 778 (quoting Beneficial, 539 U.S. at 11).

We review the denial of a preliminary injunction for abuse of discretion.³⁸ "Even though 'the ultimate decision whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion, a decision grounded in erroneous legal principles is reviewed de novo.'"³⁹

To obtain a preliminary injunction, the applicant must show (1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) that his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) that granting the preliminary injunction will not disserve the public interest.⁴⁰ "We have cautioned repeatedly that a preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has 'clearly carried the burden of persuasion' on all four requirements."⁴¹

PCI fails to establish that there is a substantial likelihood that it will prevail on the merits. As the district court noted in its denial of the injunction, PCI never submitted the contract to the court for it to review. Without the contract, the district

³⁸ Lake Charles Diesel, Inc. v. Gen. Motors Corp., 328 F.3d 192, 195 (5th Cir. 2003).

³⁹ Id. (quoting Women's Med. Ctr. v. Bell, 248 F.3d 411, 419 (5th Cir. 2001)).

⁴⁰ Id. at 195-96.

⁴¹ Id. at 196 (quoting Miss. Power & Light Co. v. United Gas Pipe Line Co., 760 F.2d 618, 621 (5th Cir. 1985)).

court could not possibly evaluate whether PCI was likely to prevail on the merits. In addition, PCI fails to show that it would suffer irreparable injury if an injunction were not granted. PCI's doom-and-gloom prediction that without an injunction it would lose the use of the track and be forced out of business is not borne out by the record and the briefs. The only consequence of contract cancellation appears to be a reversion to the terms and conditions provided by the federal tariff that governs such operations. Any damage resulting from a shorter period before demurrage is charged can be compensated for monetarily.⁴² We hold that there was no abuse of discretion by the district court in denying the injunction sought by PCI.

D. Failure to Conduct a Hearing

PCI makes the additional argument that the district court erred in failing to conduct a hearing before denying its motion for a preliminary injunction. Federal Rule of Civil Procedure 65(a)(1) specifies that "[n]o preliminary injunction shall be issued without notice to the adverse party." "We have interpreted the notice requirement of Rule 65(a)(1) to mean that 'where factual disputes are presented, the parties must be given a fair opportunity and a

⁴² See Morgan v. Fletcher, 518 F.2d 236, 240 (5th Cir. 1975) (citations and quotations omitted) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weights heavily against a claim of irreparable harm.").

meaningful hearing to present their differing versions of those facts before a preliminary injunction may be granted.'"⁴³

PCI relies on our decision in Commerce Park as support for its contention that, before a preliminary injunction motion can be denied, a hearing must be held. In Commerce Park, however, we merely assumed for the purpose of our analysis that Rule 65 required that a hearing be held prior to the denial of a motion for a preliminary injunction.⁴⁴ The plaintiff has the burden of introducing sufficient evidence to justify the grant of a preliminary injunction.⁴⁵ PCI's motion for a preliminary injunction was predicated on the breach of a contract that was never put before the district court. PCI also failed to adduce any probative evidence that it would suffer irreparable injury in the absence of an injunction; its only factual offering was the conclusional statement that the demurrage charges would be too costly for it to remain in business. PCI's failure to introduce the contract into evidence and its failure to establish the existence of a factual

⁴³ Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 628 (5th Cir. 1996) (quoting Commerce Park at DFW Freeport v. Mardian Constr. Co., 729 F.2d 334, 342 (5th Cir. 1984)).

⁴⁴ Commerce Park, 729 F.2d at 341.

⁴⁵ Canal Auth. of the State of Florida v. Callaway, 489 F.2d 567, 578-79 (5th Cir. 1974).

dispute on the question whether it would suffer irreparable injury made a hearing unnecessary.⁴⁶

The district court's orders denying PCI's motion for remand and denying PCI's motion for a preliminary injunction — including its refusal to conduct a hearing — are, in all respects, AFFIRMED.

⁴⁶ Kaepa, Inc., 76 F.3d at 628 ("If no factual dispute is involved . . . no oral hearing is required.").

Exhibit C **District Court Order Granting Amended Motion to Dismiss and
Dismissing Amended Motion for Partial Summary Judgment filed
September 26, 2006.**

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

PCI TRANSPORTATION, INC.,

Plaintiff,

v.

FORT WORTH & WESTERN
RAILROAD COMPANY, INC.,

Defendant.

CIVIL ACTION NO. 4:04-CV-211-Y

**ORDER GRANTING AMENDED MOTION TO DISMISS AND
DISMISSING AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT**

Pending before the Court are two motions filed by defendant Fort Worth & Western Railroad Company, Inc. (FWWR), on February 7, 2006: (1) Amended Motion for Partial Summary Judgment [doc. # 109] and (2) Amended Motion to Dismiss Injunctive-Relief Claims [doc. # 111]. After consideration, the Court GRANTS the amended motion to dismiss¹ and DISMISSES the amended motion for partial summary judgment based on the Surface Transportation Board (the STB)'s exclusive jurisdiction.

I. BACKGROUND

The underlying facts of this dispute have been repeatedly and exhaustively stated by this Court and the United States Court of Appeals for the Fifth Circuit. However, to give a proper context for the holdings in this order, the Court will restate the operative facts. Plaintiff PCI Transportation, Inc. (PCI), receives and distributes rail cargo in Fort Worth, Texas. PCI has a distribution warehouse on a railroad spur that is part of the Union Pacific and Burlington Northern Santa Fe (BNSF) railroads. FWWR, a short-line railroad, operates a switching yard near PCI's warehouse that connects PCI's spur to the Union Pacific and BNSF railroads. Under

¹PCI argues that only the injunctive-relief claims should be dismissed. However, for the reasons stated below, the Court concludes that all claims must be dismissed in favor of the STB's exclusive jurisdiction.

various agreements, Union Pacific and BNSF deliver railcars to FWWR's switching yard, where FWWR switches and delivers these cars to Union Pacific's and BNSF's customers, such as PCI, for unloading. Once unloaded, FWWR returns the empty cars to the main lines. BNSF and Union Pacific pay FWWR for its switching services, but the railroads also charge FWWR for the time it keeps the railcars at its switching yard. As a result, FWWR charges demurrage fees² to end-use customers, such as PCI.

In August 2001, PCI and FWWR entered into a contract to avoid disputes regarding demurrage charges imposed on PCI by FWWR. Although this Court has not been provided with a copy of this contract, the parties submitted the contract to the Fifth Circuit under seal. That Court stated that the contract was narrow in scope:

The entire contract is a one page letter, and is self-styled with two different names—"Confidential Demurrage Contractual Agreement" and "Confidential Contractual Agreement for Free Time." The language of the contract provides that (1) PCI will have four demurrage-free days, and (2) FWWR is committed to providing PCI with a minimum of one "switch" daily, seven days per week. The contract also establishes the demurrage rate applicable after free time expires.

PCI Transp., Inc. v. Fort Worth & W. R.R. Co., 418 F.3d 535, 537-38 (5th Cir. 2005). Despite the contract, PCI and FWWR had problems concerning demurrage charges.

PCI filed suit in state court alleging that FWWR had breached the contract. PCI also claimed intentional interference with contractual relations and requested a temporary and permanent injunction restraining FWWR from continuing its practices regarding delivering cars to PCI and demurrage charges.³ FWWR removed the case to federal court, and PCI sought to remand to state court. This Court concluded that removal was proper under the doctrine of

²A demurrage charge is assessed for holding a railcar beyond any free time stipulated for loading or unloading.

³The specifics of PCI's injunctive-relief requests are fully explained in the Fifth Circuit's opinion. *PCI*, 418 F.3d at 538.

complete preemption by the Interstate Commerce Commission Termination Act ("ICCTA") and denied the motion to remand. The Fifth Circuit affirmed. *Id.* at 546. On August 8, 2005, PCI filed its claims before the STB. On October 28, the STB dismissed PCI's claims without prejudice "given that a complaint and related matters are now pending before the District Court."⁴ *PCI Transp., Inc. v. Fort Worth & W. R.R. Co.*, Docket No. 42094, 2005 WL 2850077, at *1 (S.T.B. Oct. 28, 2005).

FWWR now argues that it is entitled to summary judgment on its counterclaim for a declaratory judgment and on PCI's claims for wrongful termination of and interference with the contract. PCI asserts that all claims should be referred to the STB.

II. DISCUSSION

First, it is clear that the STB has exclusive jurisdiction to decide PCI's injunctive-relief claims. Indeed, no party disputes that those claims are properly heard in that forum. The issue here, then, is whether FWWR's counterclaim for declaratory relief and PCI's remaining claims should also be heard by the STB. The Court concludes that they should.

The ICCTA grants to the STB exclusive jurisdiction over nearly all matters of rail regulation. *See Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001); *accord Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R. Co.*, 265 F. Supp. 2d 1005, 1012 (N.D. Iowa 2003). Specifically, § 10501(b) grants to the STB exclusive jurisdiction over:

- (1) transportation by rail carriers and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, facilities of such carriers; and

⁴Thus, FWWR's assertion that the STB "determined that PCI failed to allege or articulate any cognizable claim under the ICCTA on which the STB could grant relief" is patently incorrect. (FWWR's Reply to Am. Mot. for Summ. J. at 4.)

(2) the construction, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located or intended to be located, entirely in one state

49 U.S.C.A. § 10501(b) (West 1997). The ICCTA also contains a preemption clause:

Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

Id. § 10501(b)(2). Thus, it is clear that Congress intended for a broad grant of jurisdiction to the STB over railroad transportation and rail carriers. *See CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). However, breach-of-contract claims expressly are not preempted by the ICCTA:

The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree.

49 U.S.C.A. § 10709(c)(2) (West 1997).

As determined by the Fifth Circuit, only relief requested by PCI that can be provided by resort to the contract's narrow coverage is reserved from the STB's jurisdiction by § 10709(c)(2). *See PCI*, 418 F.3d at 542. PCI claimed that FWWR breached the August 2001 agreement by failing to deliver PCI cars on a first-in, first-out basis and by imposing demurrage charges even though the delivery delays were based on FWWR's failures. (PCI's 2d Am. Comp. at 12.) PCI also asserted that FWWR intentionally interfered with PCI's existing and prospective contractual relations by failing to provide cars to PCI within the required time. (PCI 2d Am. Comp. at 13.) In its counterclaim, FWWR requested a declaration that it is entitled to impose demurrage charges against PCI.⁵ (FWWR 2d Am. Answer at 12.) As concluded by the

⁵It is interesting to note that FWWR requested a declaration that "all of PCI's claims, causes of action and requested relief concerning FWWR's demurrage charges, practices and rail services and procedures fall within the exclusive jurisdiction of the Surface Transportation Board." (FWWR 2d Am. Answer at 13.) FWWR now argues that the STB only has jurisdiction over PCI's injunctive-relief

Fifth Circuit, these claims fall outside the terms of the parties' agreement. As this Court previously held in denying PCI's motion to remand, the claims seek to regulate FWWR's operations, services, practices, and rates—and the state laws upon which these requested remedies are based. Therefore, they are preempted by the ICCTA and fall within the exclusive jurisdiction of the STB. *See PCI*, 418 F.3d at 542-43; *cf. Ill. Cent. R.R. v. S. Tec. Dev. Warehouse*, No. 97C5720, 1999 WL 519042, at *3 (N.D. Ill. 1999) (holding the STB had exclusive jurisdiction over complaints regarding the method by which a railroad calculates the demurrage rate and whether the practice by which the rate accrues is discriminatory). Thus, this Court lacks jurisdiction over the parties' claims. *See Cedarapids, Inc.*, 265 F. Supp. 2d at 1016.

III. CONCLUSION

Because the parties' claims fall within the STB's exclusive jurisdiction, this Court must, and does hereby, dismiss the parties' claims.⁶

SIGNED September 26, 2006.


 TERRY R. MEANS
 UNITED STATES DISTRICT JUDGE

TRM/ah

claims.

⁶FWWR argues that this Court should not dismiss the claims, but should instead refer them to the STB. Referral would be appropriate if this Court found primary jurisdiction in the STB instead of exclusive jurisdiction. *See AT&T Commc'ns, Inc. v. Consol. Rail Corp.*, 285 F. Supp. 2d 649, 653-62 (E.D. Penn. 2003). FWWR's main concern appears to be that PCI will attempt to block any filing in the STB. But PCI states that "a dismissal would not prevent PCI from filing claims, cognizable under the ICCTA, before the STB in order to seek alteration of FWWR's services." (FWWR Reply to Am. Motion to Dismiss at 4.)

Exhibit D District Court Order Denying Motion for Clarification filed
November 6, 2006.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

PCI TRANSPORTATION, INC.

VS.

FORT WORTH & WESTERN RAILROAD
COMPANY, INC.

§
§
§
§
§
§

CIVIL ACTION NO. 4:04-CV-211-Y

ORDER DENYING MOTION FOR CLARIFICATION OR RECONSIDERATION

Pending before the Court is the Motion for Clarification and/or Reconsideration under Rule 59(e) [doc. # 124], filed by defendant Fort Worth & Western Railroad Company ("FWWR"), on October 5, 2006. After considering the motion and the response, the Court DENIES the motion.

Absent "highly unusual" circumstances, reconsideration under Rule 59(e) is appropriate only where: (1) the Court committed clear error or the initial decision was manifestly unjust, (2) the Court is presented with newly discovered evidence, or (3) there is an intervening change in controlling law. *See Sch. Dist. No. 1J, Multnomah County, Or. v. AC&S, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993). Plaintiff has failed to meet this high threshold and, indeed, does not even argue that unusual circumstances are present.

On September 26, this Court entered judgment that the Surface Transportation Board ("the STB") had exclusive jurisdiction over the parties' claims. FWWR now seeks clarification regarding what specific claims are within the STB's jurisdiction. This Court stated that it lacked "jurisdiction over the parties' claims." (Order Granting Am. Mot. to Dismiss at 5.) As plaintiff PCI Transportation, Inc., points out, this Court "obviously intended that the STB should determine which claims are litigable in its forum." (Resp. at 2.) Any further guidance or clarification is unnecessary and would be inappropriate given that this Court has found a lack of jurisdiction.

SIGNED November 6, 2006.



TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

Exhibit E Plaintiff's Second Amended Complaint filed August 3, 2004, in
the District Court by PCI Transportation, Inc.

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

U.S. DISTRICT COURT NORTHERN DISTRICT OF TEXAS FILED
AUG - 3 2004
CLERK, U.S. DISTRICT COURT BY _____ DEPUTY

PCI TRANSPORTATION, INC.,
Plaintiff,

v.

FORT WORTH & WESTERN
RAILROAD COMPANY, INC.,
Defendant.

CIVIL ACTION NO. 4-04CV-211-Y

PLAINTIFF'S SECOND AMENDED COMPLAINT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

PCI Transportation, Inc. ("PCI" or "Plaintiff") files this its Plaintiff's Second Amended Complaint, complaining of Defendant Fort Worth & Western Railroad Company, Inc. ("FWWR" or "Defendant"), and would respectfully show the Court the following:

PARTIES AND VENUE

1. Plaintiff is a Texas company with an office at 3201 N. Sylvania Ave., Fort Worth, Tarrant County, Texas.
2. Defendant FWWR is a corporation organized under the laws of, and with its principal place of business in, the State of Texas. FWWR may be served with citation on its President, Mr. Jim M. Martin, at 6300 Ridglea Place, Suite 1200, Fort Worth, Tarrant County, Texas.
3. Venue would be proper in the Fort Worth Division of the United States District Court for the Northern District of Texas because the claims and causes of action asserted herein arose in the Fort Worth Division.

FACTUAL BACKGROUND

4. PCI is in the business of receiving and handling rail cargo in Fort Worth, Texas, and is located on a railroad spur which comes off the Union Pacific and Burlington Northern railroad lines (the "Fort Worth Main Lines") which pass through the central north side of Fort Worth, Texas. These main railroad lines constitute a public utility which serves the public. FWWR either owns or controls the railroad tracks connecting PCI's spur to the Fort Worth Main Lines.

5. In approximately the Spring of 1998, FWWR and PCI entered into an agreement whereby FWWR would take into its business premises and rail yard, which is located at the Hodge railroad yard on Long Avenue in north Fort Worth, any railroad cars from the Fort Worth Main Lines bearing cargo ordered for delivery to Fort Worth by PCI.

6. PCI rents warehouse space of approximately 320,000 square feet at its Fort Worth location. The warehouses are served by the aforementioned railroad spur off the Union Pacific and Burlington Northern lines, which spur consists of an "A" and a "B" track. PCI's railroad spur can accommodate up to ten railroad cars for unloading into PCI's warehouse at one time when the cars are facing the correct way and are not positioned improperly on the spur tracks.

7. At the time of the original agreement between FWWR and PCI, FWWR agreed to provide PCI unlimited daily switches, that is, to provide PCI as many railroad cars as it desired from the available loaded cars located in FWWR's yard which were

bound for PCI. Based upon the agreement and commitment of FWWR, PCI was able to secure a long-term lease agreement of its warehouse space and spur with the Sylvania Industrial Park.

8. The business relationship between PCI and FWWR proceeded satisfactorily for a number of years. During that time, a course of dealing developed whereby FWWR would spot, or deliver, to PCI, the oldest cars first; that is, the cars would be delivered to PCI's spur by FWWR on a first-in, first-out basis. PCI would show that this has also been the custom and practice in the railroad industry, including, but not limited to, Tarrant County and the State of Texas, at all relevant times hereto.

9. In August, 2001, FWWR and PCI had a disagreement concerning a demurrage charge sought to be imposed by FWWR. Demurrage is a charge by a railroad company to a spur company, such as PCI, which is unable to take possession of a loaded railroad car within some agreed upon or legally imposed period of time after the car is received by the railroad company. On or about August 23, 2001, FWWR and PCI entered into a confidential written agreement regarding the parties' future relationship ("Agreement"). The Agreement is expressly made confidential and, therefore, Plaintiff will submit same to the Court for in-camera review in connection with any trial or hearing, and only the portions of the Agreement pertinent and necessary to this action are set forth herein. No monies exchanged hands between FWWR and PCI under this Agreement because FWWR receives its revenues for

receiving the loaded railroad cars from the mainland railroads, UPR and BN. Under this new Agreement, FWWR agreed to provide PCI one switch, or spot, of loaded cars per day to PCI's spur, and not to impose a demurrage charge to PCI unless it had to hold a loaded PCI-bound car for more than four days. Since execution of this Agreement, the parties' custom and practice has been that FWWR would deliver to PCI the oldest cars first; that is, the cars that have been in its possession the longest. This has also continued to be the standard practice in the industry, for obvious reasons, since August 23, 2001, and has been recognized and confirmed orally and in writing by FWWR as the parties' express agreement on several occasions since execution of the Agreement, including in correspondence between the parties attached hereto.

10. In reliance upon the new Agreement, and FWWR's express commitment to the four day demurrage agreement and the first-in, first-out delivery of cars under the Agreement, PCI entered into a renewal of the long term lease of its warehouse space and spur with the Sylvania Industrial Park. ✓

11. Recently, FWWR has varied from its first-in, first-out practice of delivery of PCI cars to the PCI spur, which has created situations where FWWR has held, against PCI's express wishes, railroad cars filled with important cargo belonging to PCI's customers for over four days. On some occasions, FWWR has then attempted to impose a demurrage charge to PCI because these cars have been in its yard for over four days. In these situations, which is certainly the case with the demurrage

charge referenced hereinafter, had FWWR honored its express agreement and its custom, practice and industry standard, the subject cars would not have been in the possession of FWWR for more than four days.

12. Similarly, there are so-called "service failures" which occur from time to time in the performance of FWWR's obligations under the Agreement. For example, FWWR sometimes spots cars on PCI's spur backwards or in locations where they obviously cannot be unloaded with PCI's equipment. These cars cannot be unloaded in these situations, and therefore must be removed by FWWR and brought back the next day with the next group of cars. On some occasions, FWWR has then attempted to impose a demurrage charge on the misplaced cars or on other cars which are delayed by FWWR's service failures of this type, and not by any conduct or action on the part of PCI.

13. By letter dated February 3, 2004, a true and correct copy of which is attached as Exhibit "A" and incorporated by reference, FWWR provided written notice to PCI that if an invoice for July, 2003 demurrage in the amount of \$2,340.00 was not paid by February 20, 2004, then FWWR would cancel the parties' August 23, 2001 Agreement. FWWR further threatened PCI in its letter that PCI would be placed on a cash basis and that, with respect to all PCI-bound cars presently in its possession (which contain goods owned not by PCI, but by PCI's customers), PCI would be held on "constructive placement accruing demurrage until all outstanding invoices are paid." The July, 2004 invoices which FWWR is attempting to collect are based upon

situations where railroad cars were in the possession of FWWR for greater than four days solely because of its failure to deliver PCI cars on a first-in, first-out basis.

14. PCI first received the attached February 3, 2004 letter by telecopy on February 26, 2004, and had no knowledge of its contents or existence prior to that date.

15. Randy Gaston, the PCI representative and officer in Fort Worth, met with FWWR representatives, Jim Martin and Steve George, on March 1, 2004, to demonstrate, using FWWR's own records, that the cars for which the July, 2004 demurrage charges were being imposed would not have been in FWWR's possession more than four days had the PCI-bound cars been delivered to PCI on a first-in, first-out, or oldest-car, basis. At the meeting, the FWWR representatives acknowledged their mistake, and indicated that the demurrage charge would be withdrawn.

16. Then, the next day, Mr. Martin emailed PCI a new demand letter, a true and correct copy of which is attached hereto as Exhibit "B" and incorporated by reference, again demanding payment of the July, 2003 demurrage charge and stating that FWWR would place PCI in default under the Agreement if such bill was not paid by March 8, 2004. The letter acknowledges that the oldest cars were not delivered first to PCI, but states that this was done on the verbal instructions from one of PCI's yard employees. These alleged instructions never occurred but, in any event, at the March 1, 2003 meeting, Mr. Martin stated that any such oral instructions "[don't] matter unless it was in writing and my people know that." Mr. Gaston of PCI responded to

this letter late on March 2, 2004, by email, a true and correct copy of which is attached hereto as Exhibit "C" and incorporated by reference, reminding Mr. George of the acknowledgments of FWWR the previous day and asking for reconsideration of the demand. No response had been received to this request as of the time of filing of the original petition in this matter.

17. The actions of FWWR appear to be calculated to cause PCI to incur demurrage charges under the parties' Agreement, since a normal delivery schedule of the ten cars per day which PCI and its facility can accommodate would have resulted in no cars being in FWWR's yard for more than four days. FWWR has also recently taken the shocking and untenable position that demurrage charges are due regardless of whether its actions and negligence cause a delay in delivery of cars, including in those situations involving obvious service failures on the part of FWWR.

18. FWWR's foregoing actions constitute an obvious interference with PCI's contractual relations with its customers and its ability to deliver goods owned by PCI's customers on a timely basis.

19. PCI has no adequate remedy at law for FWWR's breaches of the Agreement and its threatened unlawful conduct. PCI has contracts with its customers to receive freight in Fort Worth via rail and to deliver same to its customers, and FWWR's actions are preventing PCI from honoring its contracts with its customers. FWWR's threatened immediate termination of the Agreement with PCI would deny PCI's access to the United States' public railroad system and would likely put PCI's

Fort Worth operation out of business immediately. In addition, such action would prevent PCI from being able to perform its contracts with its customers. PCI's injuries and losses from FWWR's actions and threats are continuing.

20. This action was filed in State Court on March 5, 2004. At that time, a temporary restraining order was issued, which, among other things, prevented Defendant from providing any notice of cancellation of any agreements between PCI and FWWR. As shown in the sworn Plaintiff's Original Petition filed in the state court proceeding, the primary basis for the application for the temporary restraining order was a March 2, 2004 letter from FWWR (a copy of which is attached hereto as Exhibit "B"), which stated that if an alleged demurrage charge in the amount of \$2,130.00 was not paid by March 8, 2004, the contractual agreement dated August 23, 2001 between the parties would be cancelled. The state court enjoined this and other related actions by FWWR.

21. Plaintiff stated under oath in its Original Petition that the purported \$2,130.00 demurrage charge was based upon a demonstrable situation where no charges would have been incurred had FWWR delivered PCI's rail cars on an oldest-car-first basis, as it had agreed to do on many occasions, and as had become the course of dealing between the parties. In fact, Mr. Martin's March 2, 2004 letter expressly recognizes this obligation and course of dealing under the parties' agreement that the oldest cars would be delivered first, by stating, with reference to the August 23, 2001 contract:

You are aware of the discussions that ensued about the verbal instructions from PCI after receiving this demurrage bill and it was subsequently decided that the oldest cars would be placed first unless we received written instructions from PCI.

22. The purpose of the preliminary injunction sought herein is to prevent, among other things, FWWR from violating the parties' express agreements and, specifically, from taking any further actions to cancel the August 23, 2001 agreement, based upon false demurrage bills, such as that which was the subject of the March 2, 2004 letter.

23. The hearing on the temporary injunction in state court was set for Monday, March 22, 2004, at 8:30 a.m. On Friday, March 19, 2004, the case was removed to this Honorable Court, long before any deadline for such removal, and notice was received by the undersigned counsel very late that afternoon that the case had been removed.

24. This Court entered its order on April 8, 2004, denying the Emergency Motion to Remand. The undersigned counsel learned of this order on Good Friday, April 9, 2004. On Monday morning, April 12, 2004, PCI received in the mail a new purported demurrage bill from FWWR, a copy of which is attached hereto as Exhibit "D" and incorporated by reference. The bill is, quite obviously, not based upon the four-day demurrage period required by the parties' agreement, but appears instead to be based upon only two-day demurrage period. Thus, the demurrage bill is clearly not in compliance with the parties' agreement. The bill also seeks to charge PCI two-day

demurrage on several cars which were delivered in the weeks prior to the date of the March 2, 2004 letter from Mr. Martin referred to above. In other words, FWWR has now sent an invoice for two day demurrage for a period in which it recognizes that a four day demurrage agreement was in effect. Thus, this letter further demonstrates the false billing practices of FWWR which necessitated the filing of this lawsuit in the first place.

25. Counsel for FWWR has now delivered "notice type" correspondence dated April 20, 2004 that FWWR believes it is entitled to impose two day demurrage effective March 20, 2004, which would clearly evidence an attempt to cancel the Agreement while an injunction was in place prohibiting such action, and also is a clear attempt to take advantage of the timing of the removal of this case. Based upon the foregoing, it is clear that FWWR has utilized the removal of this case and the time which was necessary for this Court to consider the Emergency Motion to Remand, to attempt to change the status quo, or at least to take action from which it will argue that the status quo has changed.

26. The April 20, 2004 correspondence states that the Agreement is cancelled and terminated due to certain alleged conduct of PCI, and states that demurrage will be calculated based upon a Tariff, rather than the Agreement, effective March 20, 2004. Such correspondence states that the Agreement was terminated based upon one or more of the following factors:

- a. PCI's "repudiation" of the Agreement as to payment of future demurrage bills;
- b. failure to pay past demurrage bills; and
- c. breach of the Agreement by setting forth contents of the Agreement in public filings.

PCI promptly responded to such correspondence by pointing out that PCI had never stated any refusal to pay future legitimate demurrage bills, that PCI had never refused to pay any legitimate demurrage bills in the past and had in fact paid any such bills, and that PCI had not filed the Agreement in any public filings and had disclosed only terms of the Agreement in the courthouse necessary to enforce the Agreement. Nevertheless, FWWR continues to insist the Agreement is terminated and seeks to impose demurrage charges on any cars held by FWWR for more than two days, in violation of the Agreement.

27. Based upon FWWR's conduct and its attempts to take advantage of its removal of this case, PCI requests an immediate hearing on its temporary injunction in this matter. Counsel and PCI stand ready, willing and able to present their evidence, and to seek to obtain a temporary injunction from this Court, as prayed for herein.

CAUSES OF ACTION

Count I. Breach of Contract/Attorneys' Fees

28. The allegations of the foregoing paragraphs are incorporated herein by reference.

29. By FWWR's failure to deliver PCI cars on a first-in, first-out basis, and in attempting to impose demurrage charges when delays in delivery of cars is based upon FWWR's service failures, and then attempting to charge PCI demurrage on the cars that FWWR itself has caused to be delayed, Defendant FWWR has breached the August 23, 2001 Agreement. Defendant has also breached the agreement by attempting to impose demurrage charges based on a two day demurrage period as set forth in the April 12, 2004 demurrage bill. Upon the filing of this petition, PCI has been damaged as a result of such breach in an amount equal to the past demurrage charges which have improperly been imposed. However, if the actions of FWWR continue as outlined in the paragraphs above, PCI will be damaged in much greater amounts which will be proved at trial after appropriate discovery in this cause. Defendant FWWR has threatened to terminate the Agreement without providing Plaintiff notice of any plausible breach caused by Plaintiff.

30. PCI is also entitled to recovery of its attorneys' fees reasonably incurred in prosecuting these claims, in an amount and measure as shown at trial. Plaintiff has presented the contract claim and disputes contained herein to FWWR, and Defendant has refused to refund, write off or credit certain demurrage charges and has refused to act in accordance with the express terms of the parties Agreement.

Count II.
Intentional Interference with Existing and Prospective Contractual Relations

31. The allegations of the foregoing paragraphs are incorporated herein by reference.

32. Plaintiff PCI would show that Defendant FWWR, through its agents' and representatives' acts as set forth in the factual background above, have intentionally and/or wrongfully interfered with the contractual relations between Plaintiff and its customers. Specifically, Defendant has failed to provide PCI-bound railroad cars to PCI within the required time, which has resulted in delays in delivery of items to PCI's customers.

33. By engaging in the conduct outlined above, FWWR has intentionally deprived and interfered with PCI's business relationships, and its actual and prospective contractual relationships with all of PCI's customers for which it receives goods.

34. Based upon the foregoing facts, PCI would show that FWWR and its agents and representatives have tortiously and wrongfully interfered with existing and prospective contractual relations between PCI and its actual and prospective customers, for which PCI is entitled to its actual damages as proved at trial.

Count III.
Request for Temporary Restraining Order and Preliminary Injunction

35. The allegations of the foregoing paragraphs are incorporated herein by reference.

36. It is clear that (a) Plaintiff has a substantial likelihood of success on the merits of its case; (b) there is a substantial threat of irreparable injury to Plaintiff if the injunction is not issued; (c) that the threatened injury to Plaintiff outweighs any damage the preliminary injunction might cause to Defendant; and (d) that the preliminary injunction will not disserve the public interest in any way. Therefore, in order to preserve the status quo of Plaintiff's contractual rights during the pendency of this matter, it is essential that the Court immediately and temporarily restrain FWWR from the foregoing conduct, because of the imminent harm facing Plaintiff as described above. Therefore, PCI requests that the Court immediately and temporarily restrain FWWR, its officers, agents and employees, from the following acts:

- a. providing purported notice of cancellation of any agreements between PCI and FWWR;
- b. refusing to deliver a full spot of PCI-bound railroad cars with cargo per day to PCI on its spur, to the extent such cars are available;
- c. delivering cars to PCI's spur on any basis other than on the basis of delivery of those PCI-bound cars which have been in FWWR's possession the most number of days;
- d. imposing or attempting to impose any demurrage charges upon PCI when timely delivery of PCI's cars on a first-in, first-out basis would have resulted in no demurrage charges, and in those

situations where no demurrage charges would accrue but for FWWR's service failures;

- e. imposing or attempting to impose any demurrage charges upon PCI where the subject railroad car has been in FWWR's yard less than four days;
- f. refusing to deliver cars on the basis of alleged unpaid demurrage charges, which are based upon:
 - i. any cars held by FWWR in its yard for less than four days;
 - ii. any cars held by FWWR in its yard for more than four days, but having been in such yard for more than four days as a result of a) FWWR delivering less than a full spot of cars to PCI in the relevant preceding days; b) FWWR's service failures; or c) a combination of (a) and (b); and
- j. reporting to any credit reporting agency or any of PCI's creditors, brokers, or customers any alleged unpaid demurrage charges arising out of PCI's Fort Worth, Texas operation.

PCI further requests that the Court, after hearing the evidence, enter a preliminary injunction on the foregoing bases, or on such bases as modified by the Court, based upon the evidence presented and the Court's discretion as to the fashioning of the appropriate injunctive relief between the parties.

Count IV. Request for Permanent Injunction

37. The allegations of the foregoing paragraphs are incorporated herein by reference.

38. For the reasons stated in this pleading, PCI requests that, after trial, this Court grant a permanent injunction enjoining FWWR from all the foregoing activities. Plaintiff requests that the Court enjoin FWWR from these activities for a period of ten (10) years from the date of filing of this Petition or such other period found appropriate by the Court.

Count V. Alternative Wrongful Termination of Contract

39. The allegations of the foregoing paragraphs are incorporated herein by reference.

40. In the alternative to its injunctive claims herein, PCI would show that FWWR has wrongfully terminated the Agreement, if the Court finds that the April 20, 2004 correspondence referred to above, or any prior statements or conduct of FWWR proved at trial, has resulted in actual termination of the Agreement. None of the bases for such alleged termination are valid under the law or the facts, and such attempted termination is wrongful in all respects. The July, 2003 demurrage bill is not legitimate, and FWWR representatives expressly recognized its invalidity prior to the filing of this lawsuit. PCI has always recognized its obligation to pay legitimate demurrage bills and has done so in the past. FWWR cannot breach the Agreement by demanding payment of illegitimate demurrage bills and then complain about disclosure of

necessary terms of the Agreement in a lawsuit brought to enforce the very terms of the parties' Agreement.

41. Based upon the foregoing conduct of FWWR, it claims to have terminated the Agreement and, if effective, has wrongfully done so.

42. PCI's remedy at law for FWWR's potential wrongful termination of the Agreement is inadequate, given the fact that PCI will likely have to shut down its Fort Worth operation, and lose valuable customers and business if FWWR's purported termination of the Agreement is found to be effective. Nevertheless, in the alternative to its request for injunctive relief above, and in the event such relief is denied, PCI will seek to show its damages from the closure of its Fort Worth operation, which would likely result from termination of the Agreement, in an amount to be proved at trial, based upon its lost profits from the Fort Worth operation, the costs of closing such operation and the rental amounts which will have to be paid to the Sylvania Industrial Park as a result of such closure.

PRAYER

WHEREFORE, Plaintiff respectfully requests that Defendant FWWR be cited to appear and answer herein, and that upon hearing, Plaintiff PCI have and recover judgment against FWWR for all actual and consequential damages arising from the actions described herein as described above, pre- and post-judgment interest as allowed by Texas law, costs of court, and such other and further relief, both general

and special, at law and in equity, to which Plaintiff may show itself justly entitled. Plaintiff also seeks a preliminary and permanent injunction requiring defendants FWR to act in accordance with the terms of the Agreement and refrain from the acts described the injunctive relief section, Plaintiff further prays that it be granted such other and further legal and equitable relief to which it shows itself justly entitled.



H. Allen Pennington, Jr.
State Bar No. 15758500

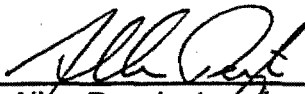
PENNINGTON, HILL & BAKER, LLP
777 Taylor Street, Suite 890
Fort Worth, Texas 76102
Telephone: (817) 332-5055
Facsimile: (817) 332-5054

ATTORNEY FOR PLAINTIFF
PCI TRANSPORTATION, INC.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been forwarded to counsel of record by hand delivery on this the 30th day of July, 2004.

Mr. Richard DeBerry
MCDONALD SANDERS
777 Main Street, Suite 1300
Fort Worth, Texas 76102
Via Hand Delivery


H. Allen Pennington, Jr.

R:\10\PC\REFD CT\COMPLAINT.2ND AMENDED.DOC

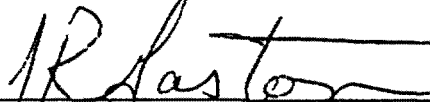
VERIFICATION

STATE OF TEXAS

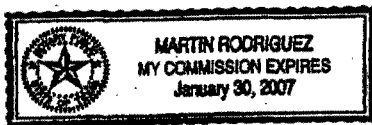
§
§
§

COUNTY OF TARRANT

Before me, the undersigned notary public, on this day personally appeared Randy Gaston, Vice President of PCI Transportation, Inc., known to me to be the person whose name is subscribed to the foregoing instrument and, being by me first duly sworn, and on oath depose that he has read Plaintiff's Second Amended Complaint, and the facts contained therein are within his personal knowledge and are true and correct.


Randy Gaston

Subscribed and sworn to before me on this the 24th day of July, 2004.




Notary Public - State of Texas

R:\10\PCI\Fed Ct\Second Amended Complaint.doc

FWWW

77310602

02/26

11:48 NO.685 01/01

FORT WORTH & WESTERN RAILROAD
A Tarantula Corporation Company

CERTIFIED MAIL #7001 1940 0000 7584 7689
Return Receipt Requested

February 3, 2004

Mr. Randy Gaston
PCI Transportation Inc.
3201 N. Sylvania Ave.
Fort Worth, TX 76111

Dear Randy:

The invoice for July 2003 demurrage in the amount of \$2,340.00 has not been paid. Charlie Godsey of our office has discussed this bill with you and has requested payment in full.

If payment in full is not received in our office by February 20, 2004, we will consider you in default of the Confidential Demurrage Contractual Agreement dated August 23, 2001 and demurrage provisions of FWWR Tariff 8001-F will be applied. Also, PCI will be placed on a cash basis and all cars destined to PCI will be held on constructive placement accruing demurrage until all outstanding invoices are paid.

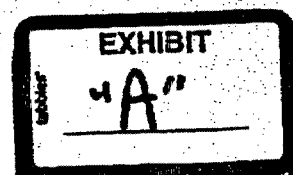
To avoid FWWR taking these actions, please pay all outstanding invoices as outlined above.

Sincerely,

Jim M. Martin
President and COO

6300 Ridgela Place, Suite 1200, Fort Worth, TX 76116-5738
Phone 817-763-8297 Fax 817-738-9657

000003



FORT WORTH & WESTERN RAILROAD
A Tarantula Corporation Company

Via Email

March 2, 2004

Mr. Randy Gaston
PCI Transportation Inc.
3201 N. Sylvania Ave.
Fort Worth, TX 76111

Dear Randy:

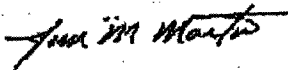
Thank you for meeting with Steve George and myself yesterday concerning the payment of the July 2003 demurrage invoice in the amount of \$2,340.00.

After further review it was determined that the outstanding demurrage due is \$2,130.00 as indicated in the letter you received from Charlie Godsey. The cars you indicated that were runaround were done so on the instructions of PCI. The instructions were verbal, but our managers have confirmed the verbal instructions from PCI personnel. You are aware of the discussions that ensued about the verbal instructions from PCI after receiving this demurrage bill and it was subsequently decided that the oldest cars would be placed first unless we received written instructions from PCI. The demurrage charges in the amount of \$2,130.00 are due and FWWR expects payment in full.

If payment in full is not received in our office by March 8, 2004, we will consider you in default of the Confidential Demurrage Contractual Agreement dated August 23, 2001 and demurrage provisions of FWWR Tariff 8001-F will be applied. Also, PCI will be placed on a cash basis and all cars destined to PCI will be held on constructive placement accruing demurrage until all outstanding invoices are paid.

To avoid FWWR taking these actions, please pay all outstanding invoices as outlined above.

Sincerely,



Jim M. Martin
President and COO

6300 Ridglea Place, Suite 1200, Fort Worth, TX 76116-5738
Phone 817-763-8297 Fax 817-738-9657

000004



-----Original Message-----

From: Randy Gaston [mailto:randy@thepcdgroup.net]
Sent: Tuesday, March 02, 2004 4:32 PM
To: Steve George
Subject: RE: July 2003 Demurrage Bill

Steve,

I beg you to reconsider your stand on this.

The scenario of blaming it on Mario is in direct contradiction of what Jim Martin said. He interrupted me when I said I had heard the reason the cars were gone around request and Jim said, "that doesn't matter unless it was in writing and my people I saying stating Mario denies asking for those cars to be gone around and even if it is not) he wouldn't of done it for 11 days.

Please reconsider,

Randy

-----Original Message-----

From: Steve George [mailto:spg@fwwr.net]
Sent: Tuesday, March 02, 2004 2:27 PM
To: randy@thepcdgroup.net
Subject: July 2003 Demurrage Bill

Randy,

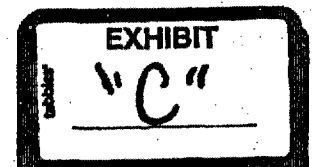
After our meeting yesterday, we have looked into the circumstances of the attached letter explains FWWR's position and payment in the amount of \$ 2004.

Sincerely,

Steve George

3/3/2004

000005



APR-12-2004 11:05 FROM:

8176380233

800 816 8260

P.002/00E

FORT WORTH & WESTERN RAILROAD**INVOICE**

P. O. Box 122269

Fort Worth, TX 76121-2269

Phone (817)763-8297 • Fax (817)737-8402

Customer Copy

Date	04/06/04
Invoice No.	1684
Page No.	1
Customer Code	P1

Bill To:

Ship To:

PCI TRANSPORTATION
3201 N. SYLVANIA
FORT WORTH, TEXAS 76111
USA

PCI TRANSPORTATION
3201 N. SYLVANIA
FORT WORTH, TEXAS 76111
USA

Order #	Order Date	Customer PO	SM	Payment Terms	Ship Date	Pr	Shipped Via
1684	03/31/04			10TH OF MONTH	04/01/04	COL	
Qty Ordered	Qty Shipped	Qty Backordered	Product Code Description	UM	Disc%	Unit Price	Extension
1.000	1.000	.000	DEMURRAGE DEMURRAGE	EA		4080.00	4080.00
Subtotal							4,080.00

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Federal Tax ID Number: 75-2267711

EXHIBIT

"D"

Shipping & Handling 0.00

TOTAL 4,080.00

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000007

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RBOX	38591	B	FENCE PICKETS	3/18/2004	8:00	3/19/2004	16:10	3/22/2004	14:40	4	3	30
BN	250327	A	SHINGLES ASPHLT	3/18/2004	8:45	3/19/2004	16:10	3/23/2004	15:30	4	3	30
CSS	1738	E	SHEET, JORS, NEG	3/21/2004	11:15	3/22/2004	18:30	3/23/2004	16:30	2	2	0
TBOX	660517	B	PLYWOOD	3/22/2004	8:00	3/22/2004	18:30	3/23/2004	16:30	1	2	0
BN	249015	A	SHINGLES ASPHLT	3/24/2004	19:05	3/24/2004	19:05	3/25/2004	10:55	1	2	0
BN	249037	A	SHINGLES ASPHLT	3/24/2004	19:05	3/24/2004	19:05	3/25/2004	10:55	1	2	0
BN	249598	A	SHINGLES ASPHLT	3/24/2004	19:05	3/24/2004	19:05	3/25/2004	10:55	1	2	0
BN	250424	A	SHINGLES ASPHLT	3/24/2004	19:05	3/24/2004	19:05	3/25/2004	10:55	1	2	0
BN	249020	A	SHINGLES ASPHLT	3/28/2004	16:40	3/28/2004	16:40	3/29/2004	16:10	3	3	0
BN	249815	A	SHINGLES ASPHLT	3/28/2004	16:40	3/28/2004	16:40	3/29/2004	16:10	3	3	0
BNSF	725833	A	SHINGLES ASPHLT	3/28/2004	16:40	3/28/2004	16:40	3/29/2004	16:10	3	3	0
SP	245853	A	LUMBER	3/27/2004	20:00	3/27/2004	22:35	3/31/2004	15:15	4	3	30
BCOL	60321	A	LUMBER	3/28/2004	14:00	3/28/2004	17:20	3/31/2004	16:15	3	2	30
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BN	250185	A	SHINGLES ASPHLT	3/28/2004	17:20	3/29/2004	17:20	3/30/2004	14:50	1	2	0
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ABOX	50470	B	SHINGLES ASPHLT	3/28/2004	17:20	3/29/2004	17:20	3/30/2004	14:50	1	2	0
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INITIAL	NUMBER	B TRACK	COMMODITY	PCON	TIME	PACT	TIME	REL	TIME	DAYS	CREDIT	AMOUNT DUE
TTZX	85410	F	LUMBER	2/24/2004	6:00	2/27/2004	18:25	3/1/2004	15:10	6	2	120
BCOL	730074	F	LUMBER	2/26/2004	8:20	3/1/2004	20:20	3/2/2004	10:20	6	3	60
CLC	10003	F	LUMBER	2/26/2004	8:20	3/1/2004	20:30	3/2/2004	10:20	6	3	60
BCOL	730377	F	LUMBER	2/26/2004	8:20	2/27/2004	18:25	3/1/2004	15:10	4	3	30
CRLE	20505	F	LUMBER	2/26/2004	8:20	2/27/2004	18:25	3/1/2004	15:10	4	3	30
SRV	288188	F	LUMBER	2/26/2004	7:18	2/27/2004	18:25	3/1/2004	15:10	4	3	30
CN	624182	F	LUMBER	2/27/2004	7:30	3/2/2004	20:15	3/4/2004	16:00	6	3	90
TTZX	863891	F	LUMBER	2/27/2004	7:30	3/2/2004	20:15	3/3/2004	16:40	5	3	60
CLC	9872	F	LUMBER	2/27/2004	7:30	3/2/2004	20:20	3/2/2004	10:20	4	3	30
CRLE	20298	F	LUMBER	2/27/2004	7:30	3/1/2004	20:20	3/2/2004	10:20	4	3	30
TTZX	863399	F	LUMBER	2/28/2004	7:05	3/2/2004	20:15	3/3/2004	16:40	4	3	30
ATW	50036	F	LUMBER	2/28/2004	11:05	3/3/2004	19:30	3/4/2004	16:00	4	2	60
TTZX	862249	F	LUMBER	2/29/2004	7:05	3/2/2004	20:15	3/3/2004	16:40	3	2	30
CLC	8857	F	LUMBER	3/1/2004	7:30	3/4/2004	18:00	3/8/2004	16:05	7	2	150
CLC	9902	F	LUMBER	3/1/2004	7:30	3/4/2004	18:00	3/8/2004	16:05	7	2	150
TTZX	862841	F	LUMBER	3/1/2004	7:30	3/4/2004	18:00	3/5/2004	14:55	4	2	60
BCOL	866504	F	LUMBER	3/1/2004	8:31	3/3/2004	18:20	3/4/2004	16:00	3	2	30
BNSF	584009	F	LUMBER	3/1/2004	8:31	3/3/2004	18:20	3/4/2004	16:00	3	2	30
NOKL	730647	F	LUMBER	3/2/2004	19:00	3/5/2004	20:00	3/8/2004	16:30	7	2	150
BNSF	862165	F	LUMBER	3/2/2004	8:00	3/4/2004	18:00	3/5/2004	14:55	3	2	30
TTZX	863232	F	LUMBER	3/3/2004	7:17	3/8/2004	18:15	3/9/2004	16:30	6	2	120
NOKL	732370	F	LUMBER	3/3/2004	7:17	3/5/2004	20:00	3/8/2004	16:05	6	2	90
CRLE	20510	F	LUMBER	3/4/2004	7:30	3/8/2004	18:15	3/9/2004	16:30	5	3	60
SRV	873036	F	LUMBER	3/5/2004	7:18	3/8/2004	18:15	3/11/2004	16:20	6	3	90
HLSC	2253	F	LUMBER	3/6/2004	12:00	3/8/2004	20:45	3/12/2004	17:00	6	3	90
CHTT	273226	F	LUMBER	3/6/2004	12:00	3/8/2004	20:45	3/11/2004	16:20	5	2	60
TTZX	861292	F	LUMBER	3/6/2004	7:20	3/11/2004	23:40	3/15/2004	16:15	6	2	120
TTZX	864459	F	LUMBER	3/10/2004	6:00	3/11/2004	23:40	3/15/2004	16:15	5	2	90
CHTT	273295	F	LUMBER	3/11/2004	7:21	3/12/2004	20:55	3/15/2004	16:15	4	3	30
BNSF	545819	F	LUMBER	3/12/2004	6:00	3/15/2004	18:45	3/17/2004	16:00	5	3	60
CLC	9846	F	LUMBER	3/12/2004	6:00	3/15/2004	18:45	3/18/2004	16:00	4	3	30
CLC	9896	F	LUMBER	3/12/2004	6:00	3/15/2004	18:45	3/18/2004	16:00	4	3	30
SSAM	38780	F	LUMBER	3/12/2004	20:55	3/12/2004	20:55	3/15/2004	16:15	3	3	0
CLC	9917	F	LUMBER	3/13/2004	7:05	3/15/2004	20:30	3/18/2004	16:00	3	3	0
CLC	9853	F	LUMBER	3/13/2004	7:05	3/15/2004	20:30	3/18/2004	16:00	3	3	0

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CLC	9705	F	LUMBER	3/14/2004	11:00	3/16/2004	18:30	3/19/2004	15:00	6	2	90
BNSF	564153	F	LUMBER	3/15/2004	8:00	3/16/2004	18:30	3/17/2004	16:15	2	2	0
BNSF	562712	F	LUMBER	3/16/2004	8:00	3/16/2004	18:30	3/19/2004	15:00	3	2	30
CLC	9884	F	LUMBER	3/18/2004	9:00	3/19/2004	18:15	3/22/2004	14:40	4	3	30
CN	624346	F	LUMBER	3/18/2004	9:00	3/19/2004	18:15	3/22/2004	14:40	4	3	30
GTW	923580	F	LUMBER	3/18/2004	9:00	3/19/2004	18:15	3/22/2004	14:40	4	3	30
TR	165957	F	LUMBER	3/18/2004	9:00	3/18/2004	18:45	3/19/2004	15:00	1	2	0
UP	273344	F	LUMBER	3/18/2004	8:00	3/18/2004	19:45	3/19/2004	15:00	1	2	0
SRY	286069	F	LUMBER	3/18/2004	6:45	3/22/2004	19:30	3/23/2004	15:30	4	3	30
TTZX	84594	F	LUMBER	3/19/2004	8:30	3/19/2004	18:15	3/23/2004	16:30	4	3	30
BNSF	545808	F	BOARDS, SAWDUST	3/23/2004	8:30	3/23/2004	20:10	3/24/2004	11:40	1	2	0
TTZX	881800	F	LUMBER	3/25/2004	23:30	3/25/2004	23:30	3/26/2004	14:55	1	2	0
BCOL	730100	F	LUMBER	3/26/2004	16:30	3/26/2004	16:30	3/30/2004	14:50	4	3	30
TTZX	864584	F	LUMBER	3/27/2004	20:00	3/27/2004	22:30	3/30/2004	14:50	3	3	0

204 125 \$2,480.00

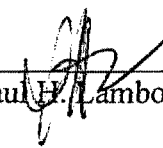
TOTAL AMOUNT DUE \$4,060.00

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served on Counsel of Record identified below via first class U.S. mail, postage prepaid, this 22nd day of September, 2005:

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