



BOSTON & MAINE CORPORATION
MAINE CENTRAL RAILROAD COMPANY
SPRINGFIELD TERMINAL RAILWAY COMPANY

IRON HORSE PARK
NO. BILLERICA, MASS. 01862

LAW DEPARTMENT

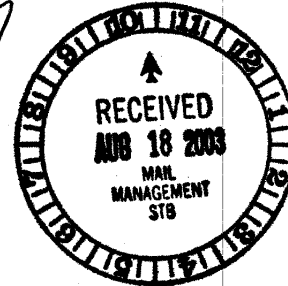
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208 727



August 15, 2003

Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

By Federal Express

Re: Docket No. NOR 42075, Engelhard Corporation—Petition for Declaratory Order—Springfield Terminal Railway Company and Consolidated Rail Corporation.

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are an original and ten copies of the *Motion of Respondent Springfield Terminal Railway Company to File Surrebuttal and Surrebuttal of Respondent Springfield Terminal Railway Company*.

Thank you for your attention to this matter. Please feel free to contact me if you should have any questions or comments.

Sincerely,

Robert B. Culliford
Corporate Counsel

cc: Service List

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET No. NOR 42075

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



**MOTION OF RESPONDENT
SPRINGFIELD TERMINAL RAILWAY COMPANY
TO FILE SURREBUTTAL**

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Respondent Springfield Terminal Railway Company ("ST") hereby moves for leave to file a surrebuttal in the above-referenced action. In support of this motion, ST submits that the Rebuttal filed by Petitioner Engelhard Corporation ("Engelhard") raised an issue that was not referred to the Board by the District Court—whether the alleged acts or omissions of ST or Consolidated Rail Corporation are sufficient to toll the applicable statute of limitations. Because this issue was not before the District Court—and hence not included in the referral order—ST requests leave to file the attached Surrebuttal to clarify why Engelhard's references to a tolling of the applicable statute of limitations are not relevant to this proceeding.

Counsel for Engelhard have been advised of ST's intention to file this motion but have not yet determined whether Engelhard will oppose it.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Eric L. Hirschhorn", written over the printed name.

Eric L. Hirschhorn
Winston & Strawn
1400 L Street, N.W.
Washington DC 20005

Robert B. Culliford
Law Department
Iron Horse Park
North Billerica MA 01862

*Attorneys for Respondent
Springfield Terminal Railway Company*

Dated: August 15, 2003

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET No. NOR 42075

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

**SURREBUTTAL OF RESPONDENT
SPRINGFIELD TERMINAL RAILWAY COMPANY**

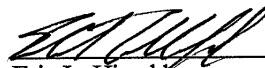
This action was first brought in the District Court by a complaint filed by Engelhard Corporation (“Engelhard”) on or about May 15, 2001 (the “Complaint”), alleging that the Springfield Terminal Railway Company (“ST”) and the Consolidated Rail Corporation (“Conrail”) jointly and severally owed Engelhard in excess of \$500,000 in car mileage payments. Exhibit A hereto. Apparently recognizing that most of its claims were likely barred by the two-year statute of limitations applicable to causes of action brought pursuant to the Interstate Commerce Act, *see* 49 U.S.C. § 11705(c) (2000), Engelhard employed two alternative strategies in an effort to avoid this obvious problem. First, Engelhard attempted to characterize its cause of action as both a state law contract claim and a claim under the ICA, which would be subject to a longer statute of limitations. Complaint, at 10, 13. Second, Engelhard alleged that ST and Conrail had engaged in a pattern of behavior that was designed to conceal material facts in an effort to prevent Engelhard from pursuing its claims in a timely manner. Complaint, ¶¶ 18, 25.

In response to Motions to Dismiss the Complaint filed by ST and Conrail, the District Court held a hearing on October 24, 2001 to further explore the respective positions of the parties. October 24, 2001 Hearing Transcript attached hereto as Exhibit B ("Transcript"). During that hearing, the Court questioned the merits of Engelhard's fraudulent concealment argument, flatly stating, "I mean, I honestly do not think there is much to the fraudulent concealment ... I agree that you clearly had notice that you were not being paid.", a statement with which Engelhard concurred. Transcript, at 11-12. Rather than rule on the Motions to Dismiss, the Court instead allowed Engelhard leave to amend the Complaint, subject to the rights of ST and Conrail to renew their motions to dismiss. Transcript, at 20-21.

Subsequently, Engelhard filed an amended complaint on or about November 14, 2001, which does not allege fraudulent concealment. Amended Complaint, Exhibit No.1 to Opening Statement of Engelhard Corporation. In response, ST and Conrail renewed their motions to dismiss, leading to dismissal of most of the Amended Complaint and referral of two specific issues to the Board for guidance, without any reference to tolling of the statute of limitations. Consequently, the referral from the District Court requests the Board's guidance on two specific issues, neither of which involves tolling of the statute of limitations. In fact, in deciding which of the proposed referral orders to accept, the District Court declined to adopt Engelhard's proposed order that would include a reference to the Haulage Agreement and the nature of operations over the Selkirk to Barbers line, effectively foreclosing any opportunity for Engelhard to raise the tolling issue before the Board. *Memorandum and Order on the Parties' Proposed Orders of Reference to the Surface Transportation Board*, May 22, 2002 (copy annexed hereto as Exhibit C).

Accordingly, because the issue of fraudulent concealment was not referred to the Board (and indeed, isn't even included in the Amended Complaint), ST respectfully requests that the Board not acknowledge Engelhard's attempt to re-introduce this argument at this late juncture. If this issue is to be addressed at all, it should be heard in the District Court (assuming that that tribunal even permits Engelhard to reintroduce it).

Respectfully submitted,



Eric L. Hirschhorn
Winston & Strawn
1400 L Street, N.W.
Washington DC 20005

Robert B. Culliford
Law Department
Iron Horse Park
North Billerica MA 01862

*Attorneys for Respondent
Springfield Terminal Railway Company*

August 15, 2003

ATTACHMENT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ENGELHARD CORPORATION, a)
Delaware Corporation,)

Plaintiff,)

vs.)

SPRINGFIELD TERMINAL)
RAILWAY CO., INC., a)
Vermont Corporation and)
CONSOLIDATED RAIL)
CORPORATION, a)
Pennsylvania Corporation)

Defendants.)

Civil Action No. 01-10829-RGS

COMPLAINT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COUNT I - ENGELHARD v. SPRINGFIELD TERMINAL

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

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

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

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

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

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

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

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

WHEREFORE, Plaintiff seeks the following relief:

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

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

COUNT II - ENGELHARD v. CONRAIL

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

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

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

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

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

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

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

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

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

WHEREFORE, Plaintiff seeks the following relief:

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

D. That the award of damages include interest at the rate of 12% per annum on the outstanding amounts commencing 30 days after liability for payment has accrued; and,

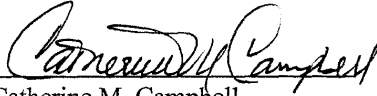
E. That the Court shall grant such other relief as the Court finds proper.

Respectfully submitted,

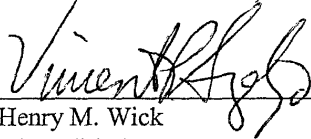
FEINBERG, CAMPBELL & ZACK, P.C.

Dated: May 15 , 2001

Of Counsel:
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Attorneys for Plaintiff,
Engelhard Corporation

ATTACHMENT B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* * * * *

ENGLEHARD CORPORATION *

Plaintiff *

vs. *

CIVIL ACTION

No. 01-10829-RGS

CONSOLIDATED RAIL *

CORPORATION AND SPRINGFIELD *

TERMINAL RAILWAY, CO., INC, *

Defendants *

* * * * *

BEFORE THE HONORABLE RICHARD G. STEARNS

UNITED STATES DISTRICT JUDGE

HEARING

October 24, 2001

APPEARANCES:

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

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

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

Courtroom 21
1 Courthouse Way Bldg.
Boston, Massachusetts 02110

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

P R O C E E D I N G S

THE CLERK: Civil Action No. 01-10829,
Englehard Corporation versus Springfield Terminal and
Consolidated Rail.

If counsel who will be arguing to the Court would
please state their name for the record.

MR. ZICCARDI: May it please the Court, David
C. Ziccardi for Consolidated Rail Corporation.

MR. CULLIFORD: Robert B. Culliford for
Springfield Terminal Railway Company.

MR. SZELIGO: May it please the Court, I am
Vincent Szeligo for Englehard Corporation.

THE COURT: I think Marsha explained that we
just finished a five-week criminal case. So the time,
unfortunately, has compressed itself a little bit today.

The first issue I would like the parties to address
is exactly what are you asking me to do, as opposed to what
you are asking the Surface Transportation Board to do.

I received the statute of limitations issues, which
is not itself defining necessarily under the law, but there
is a kind of schizophrenia in Engelhard's presentation. The
complaint does not really allege a common law contract
action. It is alleged under federal law, and the principal
relief, it seems that you are asking from me, is to simply
follow Judge Lynch's direction and under the Primary

1 Jurisdiction Doctrine refer the case to the Surface
2 Transportation Board for resolution.

3 **MR. SZELIGO:** Well, let me clarify that, your
4 Honor, for Engelhard, if I may speak first.

5 Engelhard has pled a good deal of the background
6 facts to set forth the basis for the mileage allowance, and
7 the reason for doing that is to establish that one way or
8 the other for these shipments to travel a thousand miles,
9 and for their -- mileage has been paid for every single mile
10 except for this 155 mile segment, that the mileage allowance
11 is owed on this segment, and that that's a well-established
12 principle, and that the only dispute arises from Engelhard's
13 efforts to collect on that 155 mile segment, that this is a
14 rather complex and unique situation. It's not even a
15 typical transportation law question involving loss and
16 damage or the reasonableness of freight rates.

17 It involves the plaintiff, who ships product but is
18 not a shipper. It doesn't pay the freight. The customers
19 in Maine, the paper mills, pay the freight. The plaintiff
20 here ships its product, and it provides the cars, which is
21 something a common carrier typically does.

22 And as Engelhard and Springfield terminal have
23 pointed out, there is an obligation under the Interstate
24 Commerce Act to provide compensation.

25 So one way or the other, Engelhard is entitled to

1 compensation for this 155 mile segment.

2 **THE COURT:** The defendant may disagree as to
3 who owes what and for how much, but I am not sure that that
4 really is the issue.

5 But let me ask this. Do you believe that Engelhard
6 is, as you have described its operation, a "rail carrier"
7 under the law?

8 **MR. SZELIGO:** No. Engelhard would not be a
9 rail carrier under the law, but what its status is is it has
10 provided instrumentalities of transportation which rail
11 carriers need in order to fulfill their obligations and --

12 **THE COURT:** Do you think it would have the
13 statutory rights that a rail carrier has under federal law?

14 **MR. SZELIGO:** It is not considered a rail
15 carrier under federal law.

16 **THE COURT:** What is it then?

17 **MR. SZELIGO:** It is a provider of equipment.
18 It provides the cars to these common carriers, and it --
19 when it looks for compensation, it looks to a system that
20 has been established under the Interstate Commerce Act.

21 However, this case is complex, first of all,
22 because we have fashioned a complaint which is an
23 alternative pleading alleging that one or the other railroad

24 **THE COURT:** That's kind of common because the
25 dispute seems to be who owes, and, if they do, which

1 everyone seems to agree somebody does, it's how much and for
2 how long.

3 **MR. SZELIGO:** That's right.

4 The other thing is that the defense that has been
5 asserted when the claims were made for payment by Conrail is
6 that this is not an obligation that we, Conrail, owe under
7 the Interstate Commerce Act. This obligation is governed by
8 a haulage agreement.

9 What has happened is that Conrail has said that
10 Springfield Terminal -- which is Conrail's subcontractor in
11 this case, it's not acting as a common carrier, it's acting
12 as a subcontractor -- is responsible for the payment. So it
13 has invited Engelhard to pursue its claims against
14 Springfield Terminal, which it has done.

15 I think Conrail's argument is somewhat disingenuous
16 because it's saying that this is a claim that has to be
17 pursued under the Interstate Commerce Act, but deep down the
18 fact is that when they were asked to pay, they said, No, the
19 Interstate Commerce Act doesn't apply. This is a private
20 agreement that we're referring --

21 **THE COURT:** Wouldn't it be --

22 **MR. SZELIGO:** -- to you that says Springfield
23 Terminal.

24 **THE COURT:** Is your jurisdictional claim then
25 a federal question or diversity?

1 **MR. SZELIGO:** It's a diversity question the
2 way that we view it.

3 The defendants view it as an effort to enforce the
4 Interstate Commerce Act, but --

5 **THE COURT:** Doesn't your prayer to have me
6 refer whatever "technical issues" are -- I'm not sure what
7 you mean by that term -- to the Surface Transportation
8 Board? Doesn't that raise a federal question?

9 **MR. SZELIGO:** That is a typical procedure, and
10 Judge -- I believe his name is Tauro of this court -- has
11 done this recently in a case involving the Boston & Maine.
12 The Surface Transportation Board will issue advisory
13 opinions. They're not formal binding opinions, but will
14 express views on jurisdictional matters and matters
15 involving definitions of who is a carrier and what is an
16 interchange agreement, and courts may send questions to the
17 Surface Transportation Board, which they will entertain and
18 write opinions on.

19 It's --

20 **THE COURT:** Well, is --

21 **MR. SZELIGO:** The likelihood of the need to go
22 to them would arises more from determining which of the two
23 defendants is obligated to pay rather than the question of
24 whether Engelhard --

25 **THE COURT:** What about the question whether or

1 not Engelhard, by analogy, is a rail carrier for purposes of
2 11705 and, therefore, subject to the statute of limitations
3 set out in that provision?

4 **MR. SZELIGO:** That would be the type of
5 question that they would address in terms of providing
6 guidance to the Court.

7 I know in one of the footnotes in my brief I gave
8 the docket number of the case that came from this district
9 court, and the name of the judge, and also the citation on
10 the Surface Transportation Board's website to show what they
11 do.

12 I mean, in that case there was a jurisdictional
13 question over a local municipality's zoning ordinances in an
14 attempt to prevent the construction of a rail facility. So
15 the Surface Transportation Board discussed the principles of
16 preemption. And then when that decision was issued, the
17 case went back to the district court.

18 This is a practice that the Surface Transportation
19 Board will use if the Court feels that guidance is
20 necessary, and that's the reason why that is there in the
21 prayer for relief.

22 Our question, the way that we view it, is who owes
23 the money under the haulage agreement, because the haulage
24 agreement is the document that has been presented to us as
25 the reason why Conrail doesn't owe the money.

1 They, Conrail, owns this 155 mile segment. They
2 are the only carrier that has certification from the Surface
3 Transportation Board to conduct common carrier operations
4 over the line.

5 If Springfield Terminal is doing an operation over
6 the line, it's doing that in the shoes of Conrail as a
7 subcontractor.

8 The arrangement between Conrail and Springfield
9 Terminal is a private contract, and the cases that I've
10 cited show that these haulage agreements are matters which
11 the Surface Transportation Board and its predecessor, the
12 ICC, has said are business contracts. They don't invoke the
13 jurisdiction of the Interstate Commerce Commission.

14 Here, if it was not for the existence of a haulage
15 agreement, Conrail would have paid money, but they invited
16 us to rely on this haulage agreement and send the bills to
17 Springfield Terminal, saying that the haulage agreement
18 makes Springfield Terminal liable for these mileage
19 allowances.

20 Engelhard, in reliance on this, did not pursue any
21 violation of the Interstate Commerce Act and sue Conrail on
22 that basis but submitted its claims to Springfield Terminal,
23 who has paid mileage allowances on this 155 mile segment for
24 a fraction of the shipments. They have come up with an
25 explanation of why on some of the shipments they do not owe

1 the money, but their denial of payment on some of these
2 shipments is, once again, based on the terms of this haulage
3 agreement.

4 So we have both the defendants during the course of
5 business telling us to rely on the haulage agreement, to
6 look to the haulage agreement for payment.

7 The haulage agreement is a private contract and, as
8 is true with many other forms of federal transportation, it
9 is subject to state laws.

10 There is a lot of discussion about Section 10709 of
11 the Interstate Commerce Act which allows for private
12 transportation contracts, and I don't think there is any
13 dispute that if you contract for transportation and pay the
14 freight rate under one of these contracts, that is a matter
15 of state law. This has been a theme of federal
16 transportation regulation since 1980 with the Staggers Act,
17 and it's entirely consistent with the arguments that we are
18 presenting. The Congress has been striving to make
19 railroads susceptible to the normal laws that govern all
20 business, rather than having a unique agency that governs
21 all aspects of railroad transportation.

22 And, in fact, the Interstate Commerce Commission
23 has been terminated. It doesn't exist anymore because there
24 is not a need for that pervasive federal regulation.

25 **THE COURT:** But if the Board decided that your

1 rights were defined by rights that are accorded a rail
2 carrier, then wouldn't their next decision be whether the
3 three- or two-year statute of limitations applies, depending
4 upon whether they thought that the action was, in effect, an
5 action to recover charges or, in effect, an action to
6 recover overcharges?

7 **MR. SZELIGO:** They would look to what the
8 nature of the relief sought was. And, in my view, they
9 would not -- they would not conclude that this was a matter
10 arising under the Interstate Commerce Act.

11 They may very well say that the obligation to pay
12 milage does exist in the Interstate Commerce Act, but they
13 would, in all likelihood, say that a private contractual
14 arrangement has altered this; that this haulage agreement is
15 something that the parties, in the course of their dealing,
16 have relied on, and they have voluntarily stepped away from
17 the Interstate Commerce Act, and that they would say that
18 they are not the appropriate forum to resolve the question
19 of which of these two carriers, Conrail or Springfield
20 Terminal, is responsible for the payment.

21 This is why we did not go to the Interstate
22 Commerce Commission, because we feel that they would not
23 resolve the ultimate question of which of the two carriers
24 is responsible. They may give some guidance along that
25 line, but ultimately it's going to be for a civil court to

1 order the relief.

2 THE COURT: So you do not really want me to
3 refer the case to --

4 MR. SZELIGO: No, no, we don't want you to
5 refer the case, but it is an option that is available if the
6 arguments of the parties do not clearly set forth their
7 status in the operation of the law --

8 THE COURT: Wouldn't their guidance be
9 helpful? It seems to me there's only one difficult
10 preliminary issue, and that is this issue of the statute of
11 limitations, and if you are a rail carrier subject to 11705,
12 and that leads to one set of conclusions about the statute
13 of limitations.

14 If the Board said that no, you were not under that
15 statute because, in fact, your argument prevails that this
16 is a private arrangement, therefore governed by state law,
17 then, of course, the six-year statute of limitations would
18 apply.

19 I mean, I honestly do not think there is much to
20 the fraudulent concealment. I assume that is a discovery
21 rule argument.

22 MR. SZELIGO: I think so, your Honor. I am
23 still asking for the agreement, and I've been told that I
24 have to wait --

25 THE COURT: I agree that you clearly had

1 notice that you were not being paid.

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

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

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

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

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

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

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

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

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

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

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

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

25 And then, finally, the statute of limitations in

1 Section 11705(c) again refers to a person filing a complaint
2 to enforce liability under 11704(b).

3 **THE COURT:** But if (c)(1) defines the right to
4 proceed under the Act, doesn't 11705(b) make it pretty clear
5 that a three-year statute of limitations applies?

6 **MR. ZICCARDI:** I think the statute is poorly
7 drafted in that sense.

8 **THE COURT:** That is the understatement of the
9 year.

10 (Laughter.)

11 **MR. ZICCARDI:** Yes, it is an understatement.

12 But why -- the basis for imposing liability would
13 sort of be -- the enabling provision is 11704(b), which
14 imposes general liability for a violation of the Act. And
15 then if you follow that, Section 11704(c)(1) is merely a
16 forum selection provision which allows you to seek redress
17 either in front of the Board or in court.

18 **THE COURT:** But doesn't the principle that
19 what is specifically mentioned excludes what is not? I have
20 forgotten the Latin phrase for it.

21 I mean, under 704(b) it seems clear that what we
22 are talking about there are torts, that is, injuries
23 incurred, or in the alternative, overcharging by a rail
24 carrier; whereas, (c)(1) seems to basically allow a right of
25 action in a more generalized sense, that is, regarding

1 matters that are not covered by 704(b). The reason I say
2 three years strikes me as the appropriate statute of
3 limitations is that 705(b) cross-references (c)(1) by
4 designation.

5 I agree it is a terribly drafted statute, but
6 giving the drafters every benefit of the doubt, it would
7 seem that they were thinking that, except where they
8 provided a shorter statute of limitations, and we know from
9 our experience with state law that torts often have shorter
10 statute of limitations than do contract actions, and I think
11 that is probably generally the rule almost everywhere, that
12 it would seem that that is the result that they intended.

13 But assume that I came out that way. Let's say I
14 have decided that issue. I decided, first, there is no
15 fraudulent concealment on a discovery rule analogy, but you
16 are right that this is an action under the Act and that my
17 view is that, while I agree with you there, the three-year
18 statute of limitations applies.

19 What is there for me to do next, wait until you
20 finish discovery with respect to the contract and then treat
21 it like an ordinary contract dispute?

22 **MR. ZICCARDI:** I think what would be the
23 result was an order prohibiting them -- or an opinion which
24 basically prohibits them from going back any further than
25 that time limit.

1 **THE COURT:** That would be explicit in that
2 finding.

3 **MR. ZICCARDI:** Then I think the case would
4 proceed in this forum as a cause of action under the ICCTA,
5 not a breach of contract action.

6 There has been no contract alleged between
7 plaintiff and --

8 **THE COURT:** You make that point pretty
9 powerfully in the pleadings, that they're not suggesting
10 that they were either a beneficiary, a third-party
11 beneficiary, or a direct party --

12 **MR. ZICCARDI:** They certainly haven't alleged
13 that they're a third-party beneficiary of any agreement
14 between the defendants. In fact, they state in their
15 complaint in several places, in Paragraph 19 and in
16 Paragraph 27, that they are entitled to recover in spite of
17 any agreement between the two defendants, which is why --

18 **THE COURT:** Put aside the dispute about
19 whether this shipment actually occurred or did not occur.
20 The defendants generally agree that somebody owes them
21 money.

22 **MR. ZICCARDI:** If all the conditions necessary
23 for being entitled to the milage allowances have taken
24 place, then that is a distinct possibility, but we don't
25 know that at this stage.

1 **THE COURT:** I agree. You have not had
2 discovery yet.

3 So really what you are looking for me to do is
4 decide the statute of limitations issue --

5 **MR. ZICCARDI:** Exactly, your Honor.

6 **THE COURT:** -- and where jurisdiction properly
7 lies.

8 **MR. ZICCARDI:** Well, jurisdiction, I think, is
9 clearly --

10 **THE COURT:** I mean under what law it lies.

11 **MR. ZICCARDI:** Yes, the substantive basis of
12 the cause of action.

13 **THE COURT:** Does codefendant agree that the
14 statute of limitations is issue before the Court?

15 **MR. CULLIFORD:** Springfield Terminal views the
16 complaint slightly different from the way Conrail does, your
17 Honor.

18 We see it as an attempt to plead the violation of
19 the ICCTA but with a twist geared towards triggering a
20 longer statute of limitations.

21 But what I'm concerned with is, as Mr. Szeligo was
22 speaking this afternoon, the contract mentioned in the
23 complaint was a violation of a tariff. The contract
24 mentioned in the reply is supposedly this haulage agreement
25 between Conrail and ST but not Engelhard.

1 I think it's important to focus what was alleged in
2 the complaint versus what is being alleged in the reply, and
3 I would -- as we discussed referral of this matter to the
4 STB, your Honor, I would make it known that I am cocounsel
5 in the Boston & Maine case that was referred to the STB.
6 That was not necessarily referred on primary jurisdiction
7 grounds. It was referred by agreement of the parties and
8 resulted in a declaratory order which, under the
9 Administrative Procedure Act, is essentially binding on
10 several of the parties.

11 If we are discussing that route, I would ask the
12 Court that the issue presented to the Board be very limited.

13 One, is this a claim under the ICCTA?

14 Two, is any portion of that claim preempted, and,
15 if this is a claim under the ICCTA, is the two-year statute
16 of limitations applicable or does the contract have some
17 issue?

18 **THE COURT:** Or the three-year statute of
19 limitations.

20 **MR. CULLIFORD:** Yes.

21 My concern with going beyond that to the Board and
22 making factual determinations such as who ultimately would
23 be liable if there was payment due, the Board, in our
24 experience, has been loathe to do that. They did not make
25 any factual findings in the Ayer case. They have a full set

1 of procedures that limits most of the presentations to
2 presentations in writing. There is very little oral
3 testimony or hearings allowed.

4 And, in addition, I think if we present that issue
5 to the Board at this point, we'd be, essentially, allowing
6 Engelhard to avoid the fact that they had not stated a claim
7 yet.

8 Other than that, that's about all I have to say.

9 **THE COURT:** I have read the pleadings. Taking
10 what guidance from the statute that I can, it seems to me
11 that at this point -- I gather Engelhard has no intention of
12 amending its complaint?

13 **MR. SZELIGO:** Your Honor, our view is we've
14 seen in the reply briefs that it's been alleged that we're
15 not alleging any claims for violation of the haulage
16 agreement.

17 We believe that we have, but that due to
18 alternative pleadings and our intent of setting forth the
19 background, it may appear to defendants that we've not
20 alleged that. It was our intention to allege, and if we
21 haven't, we seek leave to amend. But it's been our
22 intention to allege that our harm has been caused by our
23 reliance on the haulage agreement and by the fact that
24 Conrail has invited us to rely on the haulage agreement
25 rather than suing it for damages, and that we did rely on

1 that and present our claim to Springfield Terminal, who did
2 make some payments to us under the haulage agreement, not
3 under the Interstate Commerce Act, and that I believe that
4 the issue here is more like an interpleader.

5 We're asking the Court to determine which of these
6 two railroads has the obligation under the haulage
7 agreement, and we have also pointed out that we think that
8 Conrail as the principal and Springfield Terminal as the
9 subcontractor, that under principles of master/servant that
10 perhaps it doesn't matter from our standpoint who pays us.
11 Perhaps Conrail may be ultimately liable for the breach of
12 its subcontractor, but that this is a dispute that the two
13 railroads have framed as one arising under this private
14 haulage agreement.

15 And this has been our intention, to plead that type
16 of a cause of action to this Court, and we would be willing,
17 if the Court so desired, to amend our complaint to conform
18 with the theories that we've expressed in our briefs and in
19 our oral argument, as we believe it should be afforded under
20 the rules of liberal --

21 **THE COURT:** That's my instinct, only because I
22 agree with the defendants that the target is not exactly
23 clear to me as to what your precise theory is.

24 Why don't we do this. Why don't I give you 21
25 days, and I will allow an amendment of the complaint to

1 clarify the theory.

2 I will give 14 days to the defendants, if you want
3 to supplement the pleadings that you have already filed on
4 the motion to dismiss.

5 I will decide then at that point whether I think
6 jurisdiction under the amended complaint as pled is either
7 under the Act or whether we are dealing with a simple
8 diversity contract issue. And then that decision, I think,
9 depending on how I come out on that issue, I see the way of
10 the statute of limitations' issue. It will either be a
11 three-year or six-year statute of limitations that will
12 apply.

13 I think once those decisions are rendered, then I
14 think we are dealing with a fairly conventional contract
15 issue. We've got to go out and count cars and add up
16 whatever the reimbursements are supposed to be and decide
17 ultimately who has the liability for whatever payments are
18 owing.

19 If we do get to that point, this might be a good
20 case to appoint a master. I do not have much desire to
21 count rail cars, and I might get some help in handling that
22 aspect of the case.

23 So let me wait until I see the amended complaint
24 and see what you have to say in response to it, and then I
25 will decide what I can decide.

1 **MR. ZICCARDI:** Excuse me, your Honor. May I
2 ask one point of clarification?
3 You're giving the defendants 14 days from today to
4 supplement?

5 **THE COURT:** No, from the date after the
6 amended complaint is filed, because I think you may want to
7 refocus some of your arguments, depending on how the
8 pleadings are structured.

9 **MR. ZICCARDI:** Thank you.

10 **THE COURT:** All right.
11 With that in mind, we will be in recess on this
12 matter.

13 (Proceedings adjourned.)
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C E R T I F I C A T E

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



JAMES P. GIBBONS, CSR, RPR, RMR
Official Court Reporter
1 Courthouse Way, Suite 7205
Boston, Massachusetts 02210
(617) 428-0402

ATTACHMENT C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NUMBER 01-10829-RGS

ENGELHARD CORPORATION, A
DELAWARE CORPORATION

v.

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

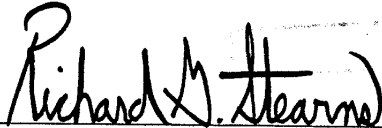
MEMORANDUM AND ORDER ON THE PARTIES'
PROPOSED ORDERS OF REFERENCE TO
THE SURFACE TRANSPORTATION BOARD

May 22, 2002

STEARNS, D.J.

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

SO ORDERED.



UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

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

ORDER

It is hereby **ORDERED** as follows:

1. Pursuant to the Memorandum and Order of this Court dated April 2, 2002, and this Court's April 19, 2002 Order, the following questions are referred to the Surface Transportation Board:

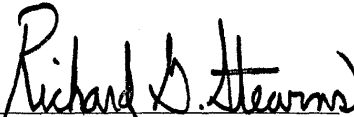
(a) Does a cause of action involving a disputed failure to pay car mileage allowances under Tariff 6007 arise one month and ten days after the end of the month in which the obligation is incurred, or four months after the date on which a railroad refuses to pay or act on a claim, or on the occurrence of some other date or event?

(b) Is a railroad obligated to pay compensation under Tariff 6007 only to the owner of a car's reporting mark, or does Item 180 of such tariff permit the owner of the mark to assign the right to payment to a lessee of a car?

2. The plaintiff shall take such action as is necessary to institute the declaratory order proceeding before the Surface Transportation Board.

3. All proceedings in this action are stayed pending the action of the Surface Transportation Board on such referral.

4. The Clerk is directed to transmit a certified copy of this order to the Secretary of the Surface Transportation Board, with copies to counsel for the parties.


RICHARD G. STEARNS
United States District Judge

Dated at Boston, Massachusetts this 22d day of May, 2002

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was served on August 15, 2003, by overnight mail, postage prepaid upon Vincent C. Szeligo, 1450 Two Chatham Center, Pittsburgh, PA 15219, and David C. Ziccardi, Consolidated Rail Corporation, Two Commercial Square, 2001 Market Street, 16-A, Philadelphia, PA 19101, attorneys for the Engelhard Corporation and the Consolidated Rail Corporation, respectively.

Dated: August 15, 2003


Robert B. Culliford