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April 18, 2002

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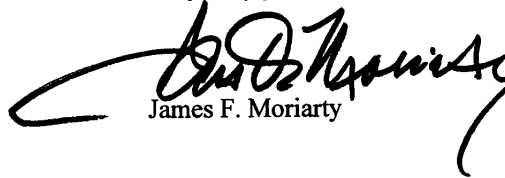
Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20453

Re: Docket No. 42073, Newell Window Furnishings, Inc. and
Newell Rubbermaid, Inc. v. United Parcel Service, Inc. (OH)
and United Parcel Service, Inc. (NY)

Dear Mr. Williams:

Pursuant to the Rules of the Surface Transportation Board, please find enclosed herewith an original and 10 copies of the Motion of United Parcel Service, Inc. (OH) and United Parcel Service, Inc. (NY) to Dismiss the Petition for Declaratory Relief filed in the above-captioned matter. We have also enclosed the Affidavit of R. Curt Brown and exhibits in support thereof. We thank you for your attention to this matter. Please do not hesitate to contact us if you have any questions or require further information.

Very truly yours,


James F. Moriarty

Enclosures

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**BEFORE THE
SURFACE TRANSPORTATION BOARD
DOCKET NO. 42073**



**NEWELL WINDOW FURNISHINGS, INC. AND
NEWELL RUBBERMAID, INC.**

v.

**UNITED PARCEL SERVICE, INC. (OH) AND
UNITED PARCEL SERVICE, INC. (NY)**

**MOTION OF
UNITED PARCEL SERVICE, INC. (OH)
AND UNITED PARCEL SERVICE, INC. (NY)
TO DISMISS PETITION**

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Dated: April 18, 2002

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Public Record**

**BEFORE THE
SURFACE TRANSPORTATION BOARD
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**NEWELL WINDOW FURNISHINGS, INC. AND
NEWELL RUBBERMAID, INC.**

v.

**UNITED PARCEL SERVICE, INC. (OH) AND
UNITED PARCEL SERVICE, INC. (NY)**

UPS's MOTION TO DISMISS PETITION

Pursuant to 49 U.S.C. § 11701(b) and 49 C.F.R. §§ 1111.5, 1117.1 and 1104.13, United Parcel Service, Inc. ("UPS") hereby moves the Surface Transportation Board ("STB" or "Board") to dismiss the Petition for Declaratory Relief ("Petition") filed on behalf of the Levolor Home Fashions Division of Newell Window Furnishings, Inc. and Newell Rubbermaid, Inc. ("Levolor") in the above-captioned proceeding.

I. INTRODUCTION

Despite Levolor's best efforts to characterize this case as a rate applicability matter, it is transparently a breach of contract case. UPS provided more than \$1 million of services delivering Levolor's products to consumers around the country. Levolor does not deny tendering shipments to UPS that were delivered to its customers. But Levolor nevertheless refuses to pay UPS for the services provided, based on dubious arguments and far-fetched interpretations of its contract with UPS.¹ UPS filed a straightforward

¹ Ironically, Levolor continues to prefer UPS's services and, today, tenders packages daily for transportation subject to the UPS procedures described herein.

breach of contract lawsuit to collect the unpaid shipping charges. In an apparent attempt to delay the Court's ruling, Levolor mischaracterized this action as involving rate applicability matters that are in the primary jurisdiction of the STB, and moved to dismiss UPS's lawsuit on that basis.

But the Court did not dismiss the lawsuit. The Court retained jurisdiction of this matter, ruling that the exclusive remedy for alleged breaches of contract is in the court system. The Court seeks guidance from the Board on only one narrow issue: What rates are applicable to Levolor's shipped packages?

The answer to this question is simple and undisputed. The rates applicable to Levolor's shipments are described in the parties' private contracts. Levolor's Petition concedes that the Letter Agreement, the Tariff and the Service Guides are binding contracts that govern the rights and obligations of the parties. (See Petition, at 7). 49 U.S.C. § 14101(b)(2) declares that the Court has exclusive jurisdiction over this breach of contract suit, and UPS therefore respectfully requests that its Motion to Dismiss be granted.

II. FACTUAL BACKGROUND

A. UPS Billed Levolor on the "Honor System."

This dispute arises out of the business relationship between UPS and Levolor, a relationship that continues to this day. UPS billed Levolor (and most other customers with corporate shipping accounts) on the "honor system," whereby Levolor, in effect, created its own bills for its shipments of packages. (Affidavit of R. Curt Brown, ¶ 24). Levolor was required to create a daily "shipping manifest," on which Levolor was to list detailed information regarding each package shipped, including without limitation the

package's tracking number, destination address, consignee billing information (if applicable), and a calculation of the total shipping charge. (Id., ¶ 26). (This information is known as "package level detail," or "PLD.") Levolor agreed to electronically transmit the shipping manifests using computer software created by any of approximately 20 different UPS-approved vendors. (Id., ¶ 32). Each week, UPS billed Levolor for all the shipments reported on Levolor's manifests. (Id., ¶ 26).

B. UPS and Newell Entered the Additional Handling Charges Agreement.

UPS requires its customers to report on their manifests the number of packages that are over 60 inches in length, and UPS charges an additional handling charge for these packages. (Id., ¶ 7). Levolor and other divisions of Newell wanted to avoid the time consuming and labor intensive process of measuring each package, so, on or about September 29, 1998, UPS and Newell entered into a Letter Agreement. (See id., ¶ 19; Letter Agreement, Exhibit "I" to Brown Aff.). Under the Letter Agreement, various divisions of Newell were not required to measure each package to assess additional handling charges. Instead, each division would pay the published additional handling rate at the time of shipment for a certain percentage of the total packages shipped. The Letter Agreement stated, in pertinent part:

UPS will bill the following Levolor, Louver Drape, and Del Mar Fashions' UPS shipper numbers the published additional handling rate at the time of shipping for 40% of the **total** ground packages shipped each week.

(See Letter Agreement)(emphasis supplied).

The plain language of the Letter Agreement contradicts Levolor's argument that it only agreed to pay an additional handling charge based on its pre-paid shipments, rather than its total shipments.

C. Levolor Altered Pre-Approved Shipping Software, Which Resulted in Levolor Under-Reporting Its Shipped Packages.

By utilizing its "DIAD" technology, UPS learned that Levolor had not properly reported all packages it had shipped. (*Id.*, ¶ 30). UPS's package car drivers create a computer record of every delivered package using a hand-held computer known as a DIAD (short for "delivery information acquisition device"). At delivery, the UPS driver records in the DIAD, among other things, (1) the shipper's identification number, and (2) whether the delivery was made to a commercial or residential address. (*Id.*, ¶ 29). UPS assesses a surcharge for deliveries to private residences. (*Id.*, ¶ 23).

In early 2000,² UPS reviewed the DIAD reports of the delivered packages containing Levolor's shipper numbers, and discovered over \$1 million in unpaid shipping and related additional handling and residential delivery charges. (*Id.*, ¶ 31). UPS met and negotiated with Levolor for many months in an attempt to resolve the outstanding debt. During the negotiations, UPS learned that Levolor had modified the UPS-approved shipping software, so that Levolor could re-open a previously transmitted manifest. (*Id.*, ¶ 32). Levolor had been transmitting its shipping manifest to UPS in the afternoon, and then, without notice and contrary to UPS's requirements, adding additional packages to that manifest. (Levolor's Petition, at 8). Levolor alleges that it attempted to retransmit the modified manifests around midnight, but UPS never received any second manifests, and thus never sent bills for any packages recorded there. (Brown Aff., ¶ 32).

² UPS held meetings with Levolor even before 2000 to discuss the fact that Levolor was not properly recording information on its manifests and was not properly transmitting those manifests to UPS. (Brown Aff., ¶¶ 31, 36).

D. Levolor is Responsible for Payment of the Unreported Shipping Charges.

Throughout UPS's and Levolor's negotiations, Levolor contended that J.C. Penney should pay for much of the unpaid shipping charges. (Brown Aff., ¶ 34). J.C. Penney had agreed to be third-party and consignee billed for shipments from Levolor. (Id., ¶ 34). But in order to benefit from J.C. Penney's agreement to pay shipping charges, Levolor was required to properly record the consignee billing information on its manifests, and properly transmit those manifests to UPS. (Id., ¶ 34). Levolor did not live up to those responsibilities.

When the unreported packages came to light, UPS negotiated with J.C. Penney on Levolor's behalf, and J.C. Penney agreed to pay the shipping charges if provided with documentation. (Id., ¶ 35). All Levolor had to do was extract from its computer back-up tapes the information it had allegedly recorded on its manifests for the unreported packages, so UPS could show J.C. Penney that it should pay the charges. (Id., ¶ 35). But Levolor either could not or would not provide the required consignee and third-party billing information. (Id., ¶ 35).

Under the terms of UPS's Tariff, Service Guides, and Consignee Billing Brochure, Levolor was therefore responsible for the remainder of the charges. (Id., ¶ 35). But Levolor refused to pay the unreported charges, either in whole or in part. Levolor also informed UPS that, in the future, it would not pay for any consignee or third-party billed packages, even if Levolor failed to provide the package level detail information necessary for UPS to bill the consignee. (Id., ¶ 37). Levolor's ultimatums left UPS no choice but to discontinue extending even more credit to Levolor. UPS discontinued Levolor's access to additional credit on December 26, 2000, but UPS *never* refused to

provide shipping services to Levolor. (Id., ¶ 37). Levolor was free to ship with UPS by paying the charges at the time of shipment, as would any UPS customer that did not have a credit account. (Id., ¶ 37).

E. The Negotiations and Litigation Between the Parties.

By January 2001, the parties had engaged counsel to help settle the dispute. As part of that process, UPS re-extended shipping credit to Levolor on March 26, 2001. The parties continued to negotiate, but were ultimately unable to reach settlement. On June 8, 2001, UPS filed its Complaint in the Superior Court of Fulton County, Georgia, and Levolor timely removed the lawsuit to the United States District Court for the Northern District of Georgia. Levolor also delivered an informal letter request to the Board on June 8, 2001.

On July 26, 2001, Levolor filed a Motion to Dismiss or Stay UPS's lawsuit. On January 25, 2002, the Court denied Levolor's Motion to Dismiss, and entered an Order referring to the Board certain applicability issues. Specifically, the Court's Referral Order asks the Board to determine "the applicability of (1) rates contained in a document entitled 'Consignee Billing Brochure'; (2) residential delivery surcharges; (3) third-party 'collect' charges; and (4) 'additional handling charges.'" (See Jan. 25, 2002 Order, attached hereto as Exhibit "1").

Three months later, on March 27, 2002, Levolor filed a Petition for Declaratory Order. UPS now moves to dismiss that Petition. Levolor's Petition far exceeds the scope of the Court's referral. Moreover, two of the four issues identified in the referral order — the Consignee Billing Brochure and third-party charges — are not actually issues of rate applicability, but rather issues of contract interpretation. The Court, rather than the STB,

has jurisdiction over these matters. The STB's specialized expertise is not needed to determine the other two issues in the Court's referral, the applicability of additional handling charges to more than 50,000 unreported shipments, and the applicability of residential surcharges to over 150,000 shipments.

III. ARGUMENT AND CITATION OF AUTHORITY

A. The STB Lacks Jurisdiction To Rule On Breach of Contract Issues.

The primary dispute in this case is whether, under the terms of the contracts between the parties, Levolor is responsible for paying the shipping, additional handling and residential delivery charges for unreported shipments. The STB has repeatedly recognized that in cases such as this, where the rates are a matter of contract rather than filed tariff, and rate reasonableness is not an issue, the parties should pursue their breach of contract claims through the courts. See e.g., NSL, Inc. v. Owen Eugene Whitlock, et al., STB Docket Nos. 41997 et al. (April 5, 2000).

The STB's position is fully consistent with statutory mandates, which direct that actions for breach of private contract between shipper and carrier *must* be heard in a court, absent agreement by the parties. 49 U.S.C. § 14101(b)(1) and (2) provide in pertinent part:

A carrier providing transportation or service subject to jurisdiction under Chapter 135 may enter into a contract with a shipper . . . to provide specified services under specified rates and conditions.

* * *

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

(Emphasis supplied).

In construing a statutory provision that parallels 49 U.S.C. § 14101(b)(2), the Board declined, on jurisdictional grounds, to consider the private contracts entered between carrier and shipper. In H.B. Fuller Co v. Southern Pacific Transp. Co., 1997 WL 476350 (I.C.C., August 20, 1997), the STB found it did not have jurisdiction over a dispute between rail carrier and shipper where the transportation moved under private contract, even though that contract merely incorporated the terms of the carrier's filed tariff. This Board dismissed the shipper's complaint, stating as follows:

The fact that the parties may have chosen to incorporate tariff terms into their contract does not make the transportation under the contract subject to regulation [by the STB]. Rather, the referenced tariff terms became contract terms for purposes of transportation performed under contract. As such, issues regarding the breach or precise construction of those terms will have to be resolved in an appropriate court of law.

Id. at *2. Accord Wisconsin Central Ltd. – Petition for Declaratory Order, 2001 WL 688877, STB Docket No. 41995 (June 15, 2001)(holding STB lacks jurisdiction over breach of contract claims); Cross Oil Refining & Marketing, Inc. v. Union Pac. R., 1998 WL 744366, STB Finance Docket No. 33582 (Oct. 19, 1998)(same).

Here, Levolor concedes that the Letter Agreement, the Tariff and the Service Guides are binding contracts that govern the rights and obligations of the parties. (Petition, at 7). UPS filed suit so that the Court could consider the terms of those contracts and determine whether Levolor is required to pay approximately \$1 million in shipping charges for packages that Levolor shipped, but for which UPS never received payment. 49 USC § 14101(b)(2) declares that the Court has exclusive jurisdiction over this breach of contract suit. This dispute does not present a question of rate applicability — Levolor only couched its pleadings in those terms in hopes that the Court would transfer the case to the STB, thereby delaying the Court's decision on the merits.

**B. The Board Should Decline The Court's Invitation
To Determine The Applicable Rates.**

The Court's Referral Order is quite narrow. It asks the Board to consider "the applicability of (1) rates contained in a document entitled 'Consignee Billing Brochure'; (2) residential delivery surcharges; (3) third-party 'collect' charges; and (4) 'additional handling charges.'" The STB's special expertise is not required to resolve any of these four issues. In cases such as this, where rate reasonableness is not an issue, the STB recently confirmed that "we do not believe it would ultimately be helpful to the Court — which has the authority over, and undoubtedly far more experience than we do, with contract-type issues — if we sought to rule on individual [applicability] claims in this manner." See e.g., NSL, Inc. v. Owen Eugene Whitlock, et al., STB Docket Nos. 41997 et al. (April 5, 2000). Moreover, two of the issues in the Court's referral — the "Consignee Billing Brochure" and "third-party 'collect' charges" — are issues of contract interpretation that fall outside the Board's jurisdiction.

1. The "Consignee Billing Brochure" and "Third-Party
'Collect' Charges"

Levolor contends that it is not responsible for shipping charges that it intended to consignee bill to J.C. Penney. This is an issue of contract interpretation, not rate applicability. The question is not *what rate applies*, but rather, is Levolor responsible for paying the shipping charges? This question must be answered by construing the language of the contracts between Levolor and UPS, which, as the STB has repeatedly recognized, should be left for the courts.

The parties' contracts are clear: if Levolor does not properly record consignee billing information on its manifests, and properly transmit those manifests to UPS, then

Levolor is responsible for the charges. The Guide to UPS Services, which is incorporated by reference into the Tariff, provides: "Unless otherwise indicated on the shipping record provided to UPS, shipping charges will be billed to the shipper. UPS accepts shipments for collect billing and third party billing provided the receiver or third party has a valid UPS account number and has agreed to accept the charges. . . . In the event of nonpayment by the receiver or third party, the charges will be reversed and billed back to the shipper" (Guide to UPS Services, as Exhibit "B" to Brown Aff., at 84). The UPS Tariff provides: "All charges must be paid by the shipper." (See Item 450 of Tariff, Exhibit "F" to Brown Aff.).

The Consignee Billing Brochure specifies the qualifying conditions with which the shipper must comply in order to utilize consignee billing privileges. It provides: "Each package [must be] recorded and identified according to the carrier's instructions for preparing UPS Consignee Billing packages. . . . The shipper will prepare and retain a business record showing the Consignee Billing Tracking Number, the date of shipment and the consignee address for each Consignee Billing package. . . ." (See Consignee Billing Brochure, at 3). It also provides: "In the event that a package is shipped using UPS Consignee Billing and the qualifying conditions or restrictions are not complied with, the package will be delivered and the package transportation charges on the then current UPS Rate Chart ("Rate Chart") will be billed to the shipper. . . ." (Id., at 3.)

The question of whether Levolor is responsible for paying charges that were allegedly intended to be consignee billed to J.C. Penney is not an issue of rate applicability. Rather, it is a simple matter of contract interpretation, which is properly left for the Court. See 49 U.S.C. § 14101(b)(2).

2. "Residential delivery surcharges"

In 1999 and 2000, UPS charged an additional \$1.00 charge for residential deliveries. During an audit of Levolor account's, UPS discovered over \$150,000 in unreported residential charges. The Court's referral would thus require the STB to evaluate proof as to whether over 150,000 deliveries were to residential or commercial locations, and, based on that determination, whether the right rate was charged.

The STB should decline the Court's invitation to determine the applicable rate because, as the STB has already held, no special administrative expertise is required to distinguish a residential from a commercial location. Chadwick's of Boston, Ltd. v. United Parcel Service, Inc., Docket No. NOM-41531 (June 21, 1995), at 3 ("[W]e do not believe that the Commission's unique expertise is required to apply or interpret the distinction between 'residential' and 'commercial' delivery service. Nor do we believe that the involved terms create any ambiguity that needs to be clarified in order to resolve this billing dispute [in Court].").

3. "Additional Handling Charges"

Neither do the additional handling charges present an issue of rate applicability requiring the STB's specialized expertise. The assessment of Levolor's additional handling charges for packages over 60 inches in length was governed by a Letter Agreement entered between the parties as of September 29, 1998. Levolor agreed to pay "the published additional handling rate at the time of shipping for 40% of the *total* ground packages shipped each week." (Letter Agreement, Exhibit "A")(emphasis supplied).

The issue is not what rate applies — Levolor has never disputed that the applicable rate is the "published additional handling rate at the time of shipping." (See

id.). The issue, instead, is whether Levolor must pay additional handling charges based on the *total* ground packages shipped, or based on only the pre-paid packages. As in Chadwick's of Boston, Ltd. v. United Parcel Service, Inc., *supra*, the STB should find that the contractual term "*total*" does not "create any ambiguity that needs to be clarified in order to resolve this billing dispute [in Court]."

C. The Board Should Dismiss Levolor's Statutory Claims.

Levolor's Petition includes three alleged violations of statutes or regulations by UPS, none of which were referred to the STB in the Court's referral order. These claims are summarized in the following chart and discussed in greater detail below.

<u>Levolor's Claims</u>	<u>Legal Precedent</u>
<u>1. Alleged Breach of Duty to Provide Service on Reasonable Request</u> Levolor claims that UPS acted unreasonably by agreeing to provide service upon Levolor's prepayment of shipping charges.	"[T]he rates involved here are not subject to our rate reasonableness jurisdiction because, being individually set rates for ground transportation of general freight, they are not subject to section 13701." <u>Associated Traffic Serv., Inc.</u>, <i>infra</i>.
<u>2. Alleged Breach of Loss and Damage Claims Regulations</u> Levolor claims that UPS failed to comply with loss and damage claims regulations at 49 C.F.R. § 370.	"[The STB] does not have jurisdiction to determine the merits or the measure of damages of particular loss and damage claims, those being cognizable only in the courts." <u>Clark Distrib. Sys., Inc.</u>, <i>infra</i>.
<u>3. Alleged "Breach" of the Statute of Limitations</u> Levolor claims that UPS seeks time-barred charges.	"It is ultimately up to the courts to apply the 180-day rule[.]" <u>NSL, Inc.</u>, <i>infra</i>.

1. UPS Has Always Provided Service Upon Reasonable Request.

Levolor (which continues to be a UPS customer) cannot seriously claim that UPS refused to provide it service upon reasonable request. Rather, Levolor's argument is that, after Levolor refused to pay for any portion of the unreported shipping services that UPS provided to Levolor, UPS's rates and terms for continued service to Levolor were somehow unreasonable. This argument fails for several reasons: First, the STB is without jurisdiction to consider the reasonableness of contract carrier rates and related provisions. See Associated Traffic Serv., Inc., - Petition for Declaratory Order, STB Docket No. 41996, 1998 W.L. 231214 (May 1, 1998)("[T]he rates involved here are not subject to our rate reasonableness jurisdiction because, being individually set rates for ground transportation of general freight, they are not subject to section 13701.").

Second, as Levolor acknowledges, UPS was always willing to ship Levolor's packages, provided Levolor paid the shipping charges at the time of shipment. Levolor has cited absolutely no statutory or case authority that would require a carrier to extend even more credit to a shipper under any set of circumstances, much less where, as here, the shipper refused to pay for \$1 million dollars in shipping services the carrier had already provided on its behalf. Levolor argues that it had an excellent credit rating, but Levolor's credit rating is immaterial if UPS must sue Levolor to collect on a debt.

Third, even if UPS had completely denied Levolor service, which it did not do, such action would have been justified. Levolor owed UPS approximately \$1 million in back charges, which it flatly refused to pay, either in whole or in part. In addition, on a going forward basis, Levolor refused to pay for any consignee or third party billed packages, even if Levolor did not provide the required package level detail information

so UPS could bill the consignee. UPS is under no statutory obligation to provide a service that is operationally or economically impracticable to perform. B.J. Alan Co. v. United Parcel Service, 5 I.C.C. 2d 700, 701-04 (1989), aff'd, B.J. Alan Co. v. ICC, 897 F.2d 561 (D.C. Cir. 1990), cert. denied 503 U.S. 1004 (1992).

2. The STB Lacks Jurisdiction to Consider Levolor's Damaged Package Claims.

UPS respectfully requests that the Board dismiss Levolor's damaged package claims on three separate and independent grounds. First, the Court's referral order does not request that the STB adjudicate Levolor's damage claims. Clearly, the Court plans to determine the merits of Levolor's damage claims, and UPS respectfully requests that the Board dismiss those claims and allow the Court to proceed.

Second, the STB lacks jurisdiction to consider such claims. This Board and the ICC before it have long held that *only* the courts have jurisdiction to hear loss and damage claims. The ICC "consistently held that it does not have jurisdiction to determine the merits or the measure of damages of particular loss and damage claims, those being cognizable only in the courts." Clark Distrib. Sys., Inc., et. al. — Petition for Declaratory Order, STB No. 41074, 1996 WL 714568 (Dec. 9, 1996) (citing Loss Damage Claims, 340 I.C.C. 515, 549 (1972)).

Third, as of October 2001, the claims handling regulations in 49 C.F.R. Part 370 are administered by the Federal Motor Carrier Safety Administration (the "FMCSA"), rather than the STB. See Motor Carrier Safety Improvement Act of 1999, P.L. 106-159, (Dec. 9, 1999); see also 49 C.F.R. § 386.1 et. seq. (providing the Assistant Administrator of the FMCSA may determine a carrier's compliance with claims processing regulations).

3. The Board Should Dismiss Levolor's Claims Regarding the Alleged "Breach" of the Statute of Limitations and the 180-Day Rule.

The Board need not issue an advisory opinion to the Court regarding the statute of limitations and the 180-day rule. See, e.g., NSL, Inc. v. Owen Eugene Whitlock, et al., STB Docket Nos 41997 et al. (April 5, 2000) ("[I]t is ultimately up to the courts to apply the 180-day rule in individual cases."). As the STB has consistently recognized, the Court here is well equipped to apply these straightforward statutes and determine whether any of the charges are time barred.

Levolor accuses UPS of ignoring the statute of limitations and 180-day rule in order to inflate its damages and coerce Levolor to pay a higher settlement.³ The Board should ignore this emotionally charged but legally weak argument. UPS, of course, is only seeking to recover amounts that are not time barred. But even assuming *arguendo* that some of the unreported charges were already past the statute of limitations by the time UPS discovered them, UPS would not have acted improperly if it had asked Levolor to pay those charges. As the STB has recognized, "there is no legal prohibition against correcting a billing error, or settling a claim, that was not timely raised . . . There may well be instances, particularly where there is an ongoing business relationship between the carrier and shipper, where a carrier or shipper may wish to pay a claim that was not

³ The Board should summarily dismiss Levolor's request for a general investigation of UPS's billing practices. Obviously, the complaints of two other shippers do not evidence a "corporate policy" of "taking advantage" of shippers, as Levolor's Petition claims. In Beer Nuts, Ltd. d/b/a Hogs Head Beer Cellars v. UPS, 1:00CV00531, MDNC, Greensboro Division, the Court granted summary judgment for UPS on the vast majority of the shipper's claims. The parties settled the suit on favorable terms to UPS soon thereafter. To UPS's knowledge, the Connecticut Attorney General has taken no action on the complaint referenced in Levolor's Petition, which has been pending since October 2000. See Petition, at 19 n.1.

[timely] asserted" Carolina Traffic Servs. of Gastonia, Inc. — Petition for Declaratory Order, STB No 4169, 1996 STB Lexis 189 (May 31, 1996). Here, there is such an ongoing business relationship where Levolor continues to tender packages to UPS for delivery.

C. The Board Lacks Authority to Award Damages or Attorney Fees.

Levolor's Petition also requests damages and attorney fees. Even Levolor recognizes, however, that the Board does not have authority to enter an award of damages or attorney fees against UPS, and Levolor therefore asks the Board to recommend to the Court that it award damages and attorney fees. (Petition, at 19.)

The STB should deny Levolor's request. First of all, the Court did not ask the Board for any such recommendation. The Court has not abandoned its role as adjudicator of the claims made by both parties. The Court refused Levolor's request to transfer this entire matter to the STB, and instead referred *only* those matters that Levolor framed as rate applicability issues within the Board's primary jurisdiction. As shown above, some of those referred matters do not present questions of rate applicability at all.

More importantly, Levolor's request for damages and attorney fees is without foundation. Levolor is the only party at fault here. It is beyond dispute that UPS provided Levolor with over \$1 million in shipping services for which UPS was never paid. Levolor has unfairly profited at UPS's expense. UPS has done nothing but attempt to collect a debt that it is rightly owed. UPS has not "breached" the statute of limitations (which, of course, does not state a claim upon which relief may be granted). Neither has UPS refused to provide service to Levolor. Levolor was always free to ship with UPS by paying the charges at the time of shipment. Today, Levolor continues to ship packages

with UPS. (Brown Aff., ¶ 37). For these reasons, UPS respectfully requests that the Board deny Levolor's request for damages and attorney fees.

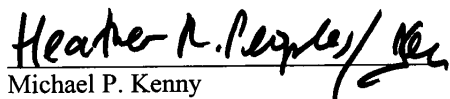
D. The Board Should Stay All Discovery

The Petition filed in this proceeding is procedurally and substantively defective. At a minimum, the Board should determine preliminarily whether or not any legitimate claims survive before discovery of the magnitude Levolor seeks can be properly considered. See e.g., Ashley Creek Phosphate Company v. Chevron Pipeline Company, et al., served March 5, 1991 (not printed) ("After weighing all the arguments of the parties. . . the better solution is to await a decision by the [now Board] on the [critical issue of] ratemaking methodology to be employed here and to hold discovery in abeyance."); Potomac Electric Power Company v. The Baltimore and Ohio Railroad Company, et al., No. 378725, issued December 12, 1984 (available on LEXIS, ICC MCC file) ("Consistent with our decision to hold this proceeding in abeyance we will defer all action on [Complainant's] discovery motions."). Before appropriate action can be taken by the Board on any discovery request, the reasonableness and relevance of Levolor's request must be evaluated in light of UPS's response. Thus, to preserve the resources of the Board and the parties, all discovery should be stayed pending the Board's consideration and disposition of the instant Motion.

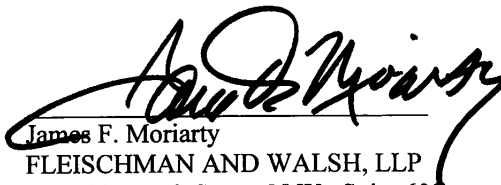
IV. CONCLUSION

For all the foregoing reasons, and on the authorities cited, UPS respectfully requests that the Board (i) dismiss the Petition and (ii) stay all discovery pending disposition of this Motion.

Respectfully submitted,



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Attorneys for Respondents
UNITED PARCEL SERVICE, INC. (OH) AND
UNITED PARCEL SERVICE, INC. (NY)

Dated: April 18, 2002.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED
JAN 25 2002

UNITED PARCEL SERVICE, INC.,
an Ohio Corporation; UNITED
PARCEL SERVICE, INC., a New
York Corporation,

Plaintiffs,

v.

NEWELL WINDOW FURNISHINGS,
INC., a Delaware Corporation;
NEWELL RUBBERMAID, INC., a
Delaware Corporation,

Defendants.

NEWELL WINDOW FURNISHINGS,
INC., a Delaware Corporation;
NEWELL RUBBERMAID, INC., a
Delaware Corporation,

Counter-claimants,

v.

UNITED PARCEL SERVICE, INC.,
an Ohio Corporation; UNITED
PARCEL SERVICE, INC., a New
York Corporation,

Counter-defendants.

LUTHER D. THOMAS, CLERK
By: [Signature]
Deputy Clerk

CIVIL ACTION
NO. 1:01-cv-1788-GET

O R D E R

The above-styled matter is presently before the court on
defendants Newell Window Furnishings, Inc. and Newell Rubbermaid,
Inc.'s motion to dismiss without prejudice or to stay [docket no.
3].

On June 8, 2001, plaintiff United Parcel Service, Inc. filed the instant action in the Superior Court of Fulton County, Georgia, alleging that defendants Newell Window Furnishings, Inc. and Newell Rubbermaid, Inc. owe plaintiff approximately \$900,000 for shipping defendants' products. On that same day, defendants filed a complaint with the United States Surface Transportation Board ("the Board") pursuant to 49 U.S.C. § 13710(a)(3)(B), requesting, *inter alia*, that the Board determine whether certain disputed charges billed by plaintiff are proper. On July 6, 2001, defendants removed this action to federal court pursuant to 28 U.S.C. §§ 1441 and 1446. On July 13, 2001, defendants filed their answer and asserted counterclaims, alleging, *inter alia*, that plaintiff has overcharged defendants by approximately \$575,000. Defendants now move to dismiss this action without prejudice or, in the alternative, to stay this action pending the Board's disposition of defendants' complaint.

Defendants argue that the Board has primary jurisdiction to determine which rates apply to the transactions between plaintiff and defendants. Under the doctrine of primary jurisdiction, a court "may dismiss or stay an action pending a resolution of some portion of the action by an administrative agency." Smith v. GTE Corp., 236 F.3d 1292, 1298 n.3 (11th Cir. 2001). "The primary jurisdiction doctrine comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an

administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." Id.

Pursuant to 49 U.S.C. § 13710(a)(2), "[w]hen the applicability or reasonableness of the rates and related provisions billed by a motor carrier is challenged by the person paying the freight charges, the Board shall determine whether such rates and provisions are reasonable under section 13701 or applicable based on the record before it." Under 49 U.S.C. § 13710(a)(3)(B), "[i]f a shipper seeks to contest the charges originally billed or additional charges subsequently billed, the shipper may request that the Board determine whether the charges billed must be paid." However, "[t]he exclusive remedy for any alleged breach of a contract entered into under this subsection shall be an action in an appropriate State court or United States district court..." 49 U.S.C. § 14101(b)(2).

Plaintiff argues that it would be inappropriate to refer this case to the Board because this is primarily an action for breach of contract. See 49 U.S.C. § 14101(b)(2). However, defendants' complaint with the Board, as well as defendants' answer and counterclaims, raise the following issues concerning "the applicability of...the rates...billed by" plaintiff: the applicability of (1) rates contained in a document entitled "Consignee Billing Brochure"; (2) residential delivery surcharges; (3) third-party "collect" charges; and (4) "additional handling charges." See 49 U.S.C. § 13710(a)(2). Therefore, the Board has

jurisdiction to "determine whether the charges billed must be paid" by defendants. See 49 U.S.C. § 13710(a) (3) (B) .

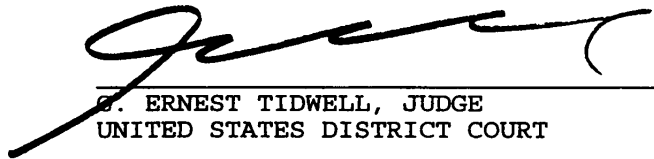
Moreover, the parties' Joint Preliminary Planning Report and Scheduling Order states that the factual issues in this case are "exceptionally complex" and that this case contains "highly technical issues and proof." Therefore, the Board's "special competence" in determining issues of rate applicability would assist the court in the resolution of this action. See Smith, 236 F.3d at 1298 n.3. Accordingly, defendants' motion to stay this action [docket no. 3-2] is GRANTED for ninety (90) days from the date of this Order. After the expiration of the ninety (90)-day period, the parties are DIRECTED to report to the court the status of the action pending before the Board. In addition, this order is without prejudice to the parties' right to request additional time to stay this action at the conclusion of the ninety (90)-day period. Defendants' motion to dismiss without prejudice [docket no. 3-1] is DENIED.

Summary

Defendants Newell Window Furnishings, Inc. and Newell Rubbermaid, Inc.'s motion to stay this action [docket no. 3-2] is GRANTED for ninety (90) days from the date of this Order. After the expiration of the ninety (90)-day period, the parties are DIRECTED to report to the court the status of the action pending before the United States Surface Transportation Board. In addition, this order is without prejudice to the parties' right to

request additional time to stay this action at the conclusion of the ninety (90)-day period. Defendants' motion to dismiss without prejudice [docket no. 3-1] is DENIED.

SO ORDERED, this 25 day of January, 2002.


G. ERNEST TIDWELL, JUDGE
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

JAN 28 2002

BY L.D.T., CLERK
DEPUTY CLERK

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CERTIFICATE OF SERVICE

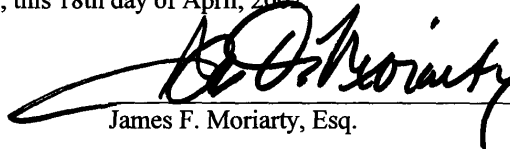
This is to certify that I have this day served the foregoing Motion to Dismiss by placing a copy of same in the United States mail with sufficient postage affixed thereon, addressed as follows:

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Dated at Washington, D.C., this 18th day of April, 2002


James F. Moriarty, Esq.