

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
August 31, 2017
Part of
Public Record

**FORESIGHT COAL SALES, LLC,
SUGAR CAMP ENERGY, LLC,
WILLIAMSON ENERGY, LLC**

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No. NOR 42155

CONSOLIDATION COAL COMPANY

Complainant,

v.

CSX TRANSPORTATION, INC.

Defendant.

Docket No. NOR 42156

MOTION TO DISMISS COMPLAINTS

Pursuant to 49 U.S.C. § 11701(b) and 49 C.F.R. § 1111.5, CSX Transportation, Inc. (“CSXT”) moves to dismiss the Complaints filed in the above captioned proceedings by Foresight Coal Sales, LLC, Sugar Camp Energy, LLC, and Williamson Energy, LLC (“Foresight Complaint”) and by Consolidation Coal Company (“Consolidation Complaint”) (collectively, “Complaints”). The Foresight Complaint and Consolidation Complaint were each filed by entities affiliated with Murray Energy Corp., and each makes nearly identical allegations about CSXT’s

service from certain Murray mines. Most importantly for purposes of this Motion, each Complaint exclusively makes claims about rail transportation CSXT performed pursuant to rail transportation contracts. Indeed, the Complainants have filed separate state court actions asserting claims under those contracts, in which Complainants admit that their claims of inadequate service all relate to transportation that was conducted pursuant to contract. Because all of the transportation movements that are the subject of the Complaints were conducted under rail transportation contracts, under 49 U.S.C. § 10709 the Board has no jurisdiction over Complainants' claims, and they must be dismissed.

I. THE COMPLAINTS ONLY ADDRESS CONTRACT TRAFFIC.

The Complaints exclusively concern CSXT's service for transportation movements that are governed by contracts. Tellingly, neither Complaint contains an allegation that the movements in question are subject to the Board's jurisdiction. But the Board does not need to make an inference from this silence, for Complainants have admitted in their separate state court actions that all movements from the mines in question are subject to transportation contracts. Complainants' state court allegations that these movements were conducted pursuant to transportation contract are not contested by CSXT, and thus constitute definitive evidence that the movements in question are contract movements outside the Board's jurisdiction. CSXT also is submitting a Verified Statement from Russ Epting, CSXT's Vice President of Coal Sales and Marketing, which confirms that all movements from the mines in question have been subject to transportation contracts for the time period covered by the Complaints.

The Consolidation Complaint makes allegations about CSXT's service for transportation originating at certain Consolidation mines in West Virginia. But Consolidation filed a parallel action in West Virginia state court alleging that all CSXT's service from Consolidation mines was conducted pursuant to transportation contract.¹ Specifically, Consolidation alleged that "Consolidation's customers have contracts with Defendant [CSXT] to provide rail services that Consolidation uses to ship its coal to the customers."² Consolidation went on to specifically allege that each of the customers for which CSXT's service was allegedly deficient "had agreements with CSX for shipping" from Consolidation's mines.³

Similarly, the Foresight Complaint alleges that CSXT provided unsatisfactory service from the MC#1 Mine and the Viking Mine in southern Illinois. But in the state court complaint that Foresight filed,⁴ every customer that it identified as having received allegedly problematic service from CSXT was a customer that had "an agreement with CSX" for transportation service.⁵

The enclosed Verified Statement of Russ Epting confirms that all of CSXT's rail transportation service from the five mines named in the Complaints—the

¹ Complaint, *Consolidation Coal Co. v. CSX Transp., Inc.*, Case No. 17c158 (Circuit Court of Marshall County, WV) (filed July 31, 2017) (attached as Exhibit 1).

² *Id.* at ¶ 6.

³ *Id.* at ¶¶ 11, 14, 17, 20, 23, 26, 29.

⁴ Petition, *Foresight Coal Sales, LLC, et al v. CSX Transp., Inc.*, Case No. 1722-CC10895 (22nd Judicial Circuit Court of St. Louis, MO) (filed July 31, 2017) (attached as Exhibit 2).

⁵ *Id.* at ¶¶ 15, 17, 21, 25, 28.

Monongalia County Mine, the Marion County Mine, the Marshall County Mine, the Ohio County Mine, the Harrison County Mine, the MC#1 Mine, and the Viking Mine—is currently subject to rail transportation contracts and has been subject to rail transportation contracts for the entire time period covered by the Complaints (*i.e.*, 2015 to the present). *See* Epting Verified Statement at 2.

In short, both parties agree that all of the service at issue in the Complaints has been and is being performed subject to transportation contracts.

II. THE BOARD LACKS JURISDICTION OVER TRAFFIC MOVED PURSUANT TO A CONTRACT.

The Board does not have any jurisdiction over transportation movements conducted pursuant to a contract. 49 U.S.C. § 10709(c)(1) provides that “A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.” The Board has explained repeatedly that with that language, “Congress expressly removed all matters and disputes arising from rail transportation contracts from the Board’s jurisdiction.”⁶ The Board’s lack of jurisdiction over contract traffic is

⁶ *Rail Transp. Contracts Under 49 U.S.C. 10709*, STB Ex Parte No. 676, at 2 (STB served Jan. 6, 2009).

“well established”⁷ and “well settled.”⁸ A long line of cases have reasserted this same basic and broad principle.⁹

Moreover, the Board has made clear that it is not merely contract *rates* that are beyond its jurisdiction, but also any *service* governed by contract.¹⁰ Simply put,

⁷ *Omaha Pub. Power Dist. v. Union Pac. R.R. Co.*, STB Docket No. 42006, at 2 (STB served Oct. 17, 1997) (“*Omaha Power*”).

⁸ *N. Am. Freight Car Ass’n v. Union Pac. R.R. Co.*, STB Docket No. 42144, at 4 (STB served Dec. 21, 2015).

⁹ See, e.g., *PCI Transp., Inc. v. Fort Worth & W. R.R. Co.*, STB Docket No. 42094 (Sub-No. 1), at 3-4 (served Apr. 25, 2008) (“The Act limits the jurisdiction of the Board so as to exclude shipments moving under rail transportation contracts. See 49 U.S.C. 10709. Indeed, section 10709(c)(1) expressly provides that transportation provided under a contract is not subject to the Act and may not be challenged before the Board or the courts on the grounds that the contract violates the Act.”); *Cent. Power & Light Co. v. S. Pac. Transp. Co.*, 1 S.T.B. 1059, 1074 (1996) (“Plainly, we are without rate reasonableness jurisdiction over the rates of any rail transportation provided by contract.”); *Albemarle Corp. v. The Louisiana & N. W. R.R. Co.*, STB Docket No. 42097, at 1 (STB served Aug. 1, 2006) (“the Board does not have jurisdiction over contract carriage”); *Arizona Elec. Power Coop., Inc. v. BNSF Ry. Co. & Union Pac. R.R. Co.*, STB Docket No. 42113, at 3 (served Apr. 23, 2009) (“If a contract exists for rail services between one or more rail carriers and one or more shippers under 49 U.S.C. 10709(c), a party to the contract may seek redress related to that contract only in an appropriate state or federal court, unless the parties otherwise agree.”); *United States Rail Service Issues*, STB Ex Parte No. 724, at 7 (served Dec. 30, 2014) (“Section 10709 states that transportation provided under private contract is not subject to the Board’s governing statute; parties are not subject to statutory duties with respect to contract service; and the ‘exclusive remedy’ for breach of contract is in a court of competent jurisdiction.”); *Xcel Energy v. Union Pac. R.R. Co.*, STB Docket No. 42059, at 1 n.1 (STB served May 24, 2002) (“[T]he Board has no jurisdiction over the contract portion of the movement, 49 U.S.C. 10709(c).”).

¹⁰ See, e.g., *Union Pac. R.R. Co.—Petition for Declaratory Order*, STB Docket No. 35021, at 2 (STB served May 16, 2007) (“However, that holding does not apply to any traffic handled under rail transportation contracts, because under 49 U.S.C. 10709 we have no authority to regulate rail rates and *services* that are governed by a contract.”) (emphasis added); *Rail Fuel Surcharges*, STB Ex Parte No. 661, at 13

when transportation is conducted pursuant to a rail transportation contract, the reasonableness of service provided by a carrier for that transportation is governed by the applicable contract, and not by the background statutory duties that the Board might enforce for common carriage movements.¹¹ This is true even where a contract explicitly incorporates a tariff that otherwise would be within the Board's jurisdiction to consider.¹²

Here, there is no question that the Complaints exclusively concern transportation that was and is under contract. As such, the Board has no jurisdiction over that traffic or any claims that CSXT's service for that traffic failed to comply with provisions of the Interstate Commerce Act. The applicable contracts govern what level of service CSXT is required to provide, and the statute expressly removes any dispute about the service under those contracts from the Board's jurisdiction.

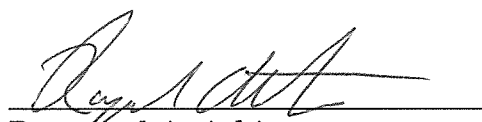
(STB served Jan. 26, 2007) ("Under 49 U.S.C. 10709, we have no authority to regulate rates and *services* that are governed by a contract.") (emphasis added).

¹¹ See *H.B. Fuller Co. v. S. Pac. Transp. Co.*, STB Docket No. 41510 (STB served Aug. 22, 1997) ("*H.B. Fuller*") (complainant brought an unreasonable practice claim and the Board dismissed it "because the record indicates that all shipments in issue moved under the contract or its predecessors").

¹² See *Omaha Power* at 2 ("It is well established that, under 49 U.S.C. 10709(c)(1), transportation under a rail contract may not be challenged on the ground that it violates the Interstate Commerce Act, as amended by the ICC Termination Act of 1995. Incorporation of tariff provisions into a contract does not alter this basic principle in any way."); *H.B. Fuller* at 3 ("In this case, the transportation was performed under contract, even though the terms of the contract refer to the carrier's tariff.").

As CSXT explains in the Answers filed today, it disputes many of the claims in the Complaints, which misstate facts and mischaracterize both CSXT's performance and its commitment to provide good service to all its customers. CSXT will continue to work with the Complainants to address any legitimate service concerns they raise. But the statute makes clear that the Board has no jurisdiction to act on complaints about service provided pursuant to rail transportation contracts. Because the parties agree that the traffic at issue moves pursuant to transportation contracts outside of the Board's jurisdiction, the Complaints should be dismissed.

Respectfully submitted,



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Counsel to CSX Transportation, Inc.

Dated: August 31, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August 2017, I served a copy of the foregoing upon the following counsel for complainants Consolidation Coal Company; Foresight Coal Sales, LLC; Sugar Camp Energy, LLC and Williamson Energy, LLC via U.S. first-class mail or more expeditious means of delivery:

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Marc A. Korman

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**FORESIGHT COAL SALES, LLC,
SUGAR CAMP ENERGY, LLC,
WILLIAMSON ENERGY, LLC**

Complainant,

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CSX TRANSPORTATION, INC.

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**VERIFIED STATEMENT OF RUSS A. EPTING
CSX TRANSPORTATION, INC.**

1. My name is Russ A. Epting, and I am Vice President, Coal Sales and Marketing at CSX Transportation, Inc. ("CSXT"). I have held that position for six months. In this capacity, my responsibilities include all sales and marketing of rail transportation to the domestic and export coal markets. As part of these responsibilities, I am aware of, and responsible for managing, whether coal traffic is moved pursuant to a tariff or rail transportation contract.

2. CSXT provides rail transportation to numerous coal load origins along its network.

3. CSXT provides rail transportation to the five mines referenced in Consolidation Coal Company's STB complaint filed August 11, 2017 in Docket No. NOR 42156: the Monongalia County Mine, the Marion County Mine, the Marshall County Mine, the Ohio County Mine, and the Harrison County Mine.

4. All of the rail transportation that CSXT has provided originating from these mines since 2015 was conducted pursuant to transportation contracts with CSXT's customers for delivery to the customers' plants and to export piers.

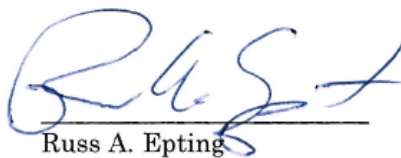
5. CSXT also provides rail transportation to the two mines referenced in the STB complaint filed by Foresight Coal Sales, LLC, Sugar Camp Energy, LLC, and Williamson Energy, LLC, on August 11, 2017 in Docket No. NOR 42155: the MC#1 Mine and the Viking Mine.

6. All of the rail transportation that CSXT has provided originating from these mines since 2015 was conducted pursuant to transportation contracts with CSXT's customers for delivery to the customers' plants.

VERIFICATION

I declare under penalty of perjury that the foregoing statement is true and correct to the best of my knowledge, belief, and information. Further, I certify that I am qualified and authorized to file this statement.

Executed this 31 day of August, 2017.



Russ A. Epting

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. NOR 42155

DOCKET NO. NOR 42156

**FORESIGHT COAL SALES, LLC, SUGAR CAMP ENERGY,
LLC AND WILLIAMSON ENERGY, LLC v. CSX
TRANSPORTATION, INC.**

**CONSOLIDATION COAL COMPANY v. CSX
TRANSPORTATION, INC.**

MOTION TO DISMISS

EXHIBIT 1

FILED

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

2017 JUL 31 PM 3:42

Consolidation Coal Co.,

: Case No.

Plaintiff,

:
: Judge:

v.

CSX Transportation, Inc.,

:
: **JURY DEMAND**

Defendant.

:
:
:

COMPLAINT

Plaintiff Consolidation Coal Company ("Consolidation") for its complaint for relief against the Defendant, CSX Transportation, Inc. ("CSX"), states as follows:

PARTIES

1. Consolidation is a Delaware corporation with its principal place of business in St. Clairsville, Ohio. Plaintiff Consolidation operates several coal mines in Marshall County, West Virginia.

2. CSX Transportation, Inc., is a Virginia Corporation with a principal place of business located in Jacksonville, Florida.

JURISDICTION

3. This Court has personal jurisdiction over Defendant because Defendant entered into contracts with Consolidation for the delivery of coal from Consolidation's mines in Marshall County, West Virginia to Consolidation's customers, and/or because the actions of Defendant caused harm in Marshall County, West Virginia, and/or because Defendant maintains a general presence and is authorized to transact business in West Virginia.

4. Venue is proper in the Circuit Court of Marshall County, under West Virginia Code §56-1-1.

FACTS

5. Consolidation supplies coal to multiple purchasers located in several different States, including Ohio, Illinois, South Carolina, and North Carolina.

6. Consolidation's customers have contracts with Defendant to provide rail services that Consolidation uses to ship its coal to the customers.

7. Both Consolidation and Consolidation's customers are entirely dependent on Defendant to transport the coal. Defendant is aware of the vital position it holds and all of the contractual relationships among Consolidation, Consolidation's customers, and Defendant.

8. Since 2015, Defendant has missed numerous obligations under its agreements with Consolidation's customers to provide train transportation of coal.

Customer 1

9. Under a January 11, 2012 contract, Consolidation is required to supply coal to a subsidiary of Customer 1.

10. Consolidation and Customer 1 agreed that the coal would be delivered to Customer 1 free-on-board ("FOB") barge at Consolidation's barge fleeting facility located on the West Virginia side of the Ohio River at mile 93.7.

11. Upon information and belief, Customer 1 has an agreement with CSX for shipping from the mine.

Customer 2

12. Consolidation entered into contracts in December 2014 to supply coal to Customer 2.

13. Under those various agreements, Consolidation was required to deliver the coal FOB at Consolidation's mines.

14. Upon information and belief, Customer 2 had agreements with CSX for shipping from the mine.

Customer 3

15. Consolidation entered into numerous contracts with Customer 3 between October 2013 and September 2016 to supply coal to Customer 3.

16. Under those contracts, Consolidation was usually required to deliver the coal FOB at CSX's Curtis Bay facility.

17. Consolidation had agreements with CSX for shipping from Consolidation's mines to Curtis Bay.

Customer 4

18. Consolidation entered into a contract with Customer 4 in August 2006 to supply coal to Customer 4.

19. Under those contracts, Consolidation loaded the coal onto CSX trains as Consolidation's mines.

20. Upon information and belief, Customer 4 had agreements with CSX for shipping from the mines.

Customer 5

21. Consolidation entered into a contract with Customer 5 in January 2015 to supply coal to Customer 5.

22. Under that contract, Consolidation delivered the coal FOB railcar at Consolidation's loadout points located near Consolidation's mines.

23. Upon information and belief, Customer 5 had agreements with CSX for shipping from Consolidation's mines.

Customer 6

24. Consolidation entered into contracts with Customer 6 in June 2014, December 2014 and October 2016 to supply coal to Customer 6.

25. Under those contracts, Consolidation delivered the coal FOB railcar at Consolidation's loadout points located near Consolidation's mines.

26. Upon information and belief, Customer 6 had agreements with CSX for shipping from the mines.

Customer 7

27. Consolidation entered into a contract with Customer 7 in June 2016 to supply coal to Customer 7.

28. Under that contract, Consolidation delivered the coal FOB railcar at Consolidation's mines.

29. Upon information and belief, Customer 7 had agreements with CSX for shipping from Consolidation's mines.

Delivery Delays Caused by CSX

30. Consolidation's contracts with Customers 1 through 7 (collectively, the "Purchasers") are hereinafter referred to collectively as the "Agreements."

31. In each instance as referenced above, Customers 1 through 2 and 4 through 7 reached an agreement with CSX to provide rail transportation services for the coal purchased under their respective coal supply contracts with Consolidation. With respect to Customer 3, Consolidation had a direct contract with CSX for transportation of coal. CSX's timely performance was an essential component for delivery of the purchased coal.

32. CSX provided access to its web-based reservation system for use related to all of the Agreements.

33. Specifically, for each order placed under any of the Agreements, CSX would obtain from Consolidation an estimation of the total amount and number of deliveries to occur during the upcoming month. This estimate typically occurred one month before the shipments were to begin.

34. Thereafter, the Purchasers would access CSX's web-based reservation system and identify the specific number of train cars and coal requested for that month under each of the Agreements. Consolidation would then confirm that they could produce the amount of coal requested. This typically occurred fifteen (15) days before the shipments were to begin.

35. The Purchasers could adjust the total number of projected shipments after Consolidation confirmed they could produce the coal requested if they discovered they needed additional amounts and/or to make up shortfall from the prior month.

36. At no time during the relevant time period did CSX reject the proposals from the Purchasers that were accepted by Consolidation.

37. In every instance, CSX had access to and knowledge of the confirmation and acceptance because this information was provided to CSX through its web-based reservation system.

38. CSX repeatedly failed to take appropriate actions to ensure approved and/or agreed on deliveries were met. On information and belief, CSX's failures included, but are not limited to:

- a. failing, intentionally and/or negligently, to provide adequate crews and engines;

- b. intentionally and/or negligently delaying in-transit shipments, which caused CSX to be unable to return and retrieve additional trains for transit;
- c. failing, intentionally and/or negligently, to anticipate and take necessary actions for scheduled trains; and
- d. intentionally and/or negligently prioritizing other shipments without valid cause.

39. Due to CSX's failure to take the required steps to ensure it met the approved deliveries, Consolidation was forced to delay and/or cancel at least 38 trains from 2015 to the present:

- a. In 2015, CSX caused, in whole or in part, seven trains scheduled on behalf of Customer 1 to be delayed and/or canceled.
- b. In 2015, CSX caused, in whole or in part, three trains scheduled on behalf of Customer 2 to be delayed and/or canceled.
- c. In 2015, CSX caused, in whole or in part, seven trains scheduled on behalf of Customer 5 to be delayed and/or canceled.
- d. In 2016, CSX caused, in whole or in part, ten trains scheduled on behalf of Customer 3 to be delayed and/or canceled.
- e. In 2016, CSX caused, in whole or in part, one train scheduled on behalf of Customer 4 to be delayed and/or canceled.
- f. In 2016, CSX caused, in whole or in part, one train scheduled on behalf of Customer 6 to be delayed and/or canceled.
- g. In 2016, CSX caused, in whole or in part, one train scheduled on behalf of Customer 7 to be delayed and/or canceled.

h. In 2017, CSX caused, in whole or in part, one train scheduled on behalf of Customer 3 to be delayed and/or canceled.

i. In 2017, CSX caused, in whole or in part, one train scheduled on behalf of Customer 6 to be delayed and/or canceled.

40. Thus, due to the foregoing, CSX caused, intentionally or negligently, in whole or in part, thirty-eight trains scheduled by Consolidation through CSX's web-based reservation system to be delayed and/or cancelled.

41. CSX's failures caused Consolidation to incur significant costs in managing, restocking, and storing coal reserves to meet the requirements under the Agreements. Consolidation was also forced to forego acquiring additional contracts and earning additional profits due to the delay in shipment of coal from their holding facilities. CSX's actions caused additional harm by forcing delays to Consolidation's production schedule, which in turn caused tonnage costs to increase.

COUNT I:
BREACH OF CONTRACT

42. Consolidation incorporates all of the above paragraphs as if fully rewritten herein.

43. CSX agreed to provide the necessary crew, engines, and other requirements for delivering the loaded railcars by accepting the requests and confirmations processed on the CSX web-based reservation system, and/or took other actions intended to cause Consolidation and the Purchasers to conclude that CSX agreed to provide the necessary crew, engines, and other requirements for delivering the loaded railcars.

44. The demands by the individual Purchasers, the acceptance by Consolidation, and the agreement/acceptance by CSX constitute accepted, enforceable agreements.

45. CSX failed to provide the necessary crew, engines, and other requirements for delivering the loaded railcars.

46. CSX's failure to provide the necessary crew, engines and other requirements for delivering the loaded railcars caused Consolidation to suffer damages, including but not limited to missed sales opportunities, increased storage and maintenance costs, and increased production costs.

COUNT II:
PROMISSORY ESTOPPEL

47. Consolidation incorporates all of the above paragraphs as if fully rewritten herein.

48. CSX made a clear and unambiguous promise to Consolidation through its web-based reservation system to provide the necessary crew, engines, and other requirements for delivering the loaded railcars, and led Consolidation to conclude that CSX agreed to provide the necessary crew, engines and other requirements for delivering the loaded railcars.

49. Consolidation reasonably relied on CSX's promise to provide the necessary crew, engines, and other requirements for delivering the loaded railcars because CSX never rejected or otherwise indicated that it would not fulfill Consolidation's requests.

50. CSX's failure to provide the necessary crew, engines, and other requirements for delivering the loaded railcars caused Consolidation to suffer damages, including but not limited to missed sales opportunities, increased storage and maintenance costs, and increased production costs.

COUNT III:
INTENTIONAL INTERFERENCE WITH CONTRACT

51. Consolidation incorporates all of the above paragraphs as if fully rewritten herein.

52. Consolidation has valid, enforceable contracts with Purchasers.

53. Consolidation has ongoing business relationships with Purchasers.

54. CSX knew about the contracts and the ongoing business relationships between Consolidation and Purchasers because CSX was an active participant in those relationships.

55. CSX intentionally procured the breach of the contracts between Consolidation and Purchasers by refusing to provide the necessary crew, engines, and other requirements, which caused Consolidation to be unable to comply with its contracts with Purchasers.

56. CSX had no justification for its intentional actions.

57. Consolidation has suffered damages as a result of CSX's failure to provide the necessary crew, engines, and other requirements for delivering the loaded railcars, including but not limited to, missed sales opportunities, increased storage and maintenance costs, and increased production costs.

COUNT IV:
BREACH OF CONTRACT (THIRD PARTY BENEFICIARY)

58. Consolidation incorporates all of the above paragraphs as if fully rewritten herein.

59. Upon information and belief, CSX entered into agreements with Purchasers to provide shipping services related to the coal Purchasers bought from Consolidation.

60. Consolidation was an intended beneficiary of those contracts because CSX knew it was transporting coal for the benefit of Consolidation. CSX knew that it had to supply the necessary crew, engines, and other equipment for Consolidation to be able to fulfill its obligations to Purchasers to deliver coal.

61. CSX breached its contracts with Purchasers by failing to provide the necessary crew, engines, and other requirements for delivering the loaded railcars.

62. CSX's failure to provide the necessary crew, engines, and other requirements for delivering the loaded railcars caused Consolidation to suffer damages, including but not limited

to, missed sales opportunities, increased storage and maintenance costs, and increased production costs.

COUNT V:
PROMISSORY ESTOPPEL (THIRD PARTY BENEFICIARY)

63. Consolidation incorporates all of the above paragraphs as if fully rewritten herein.

64. CSX's actions or lack thereof regarding the request to provide railcars sent on the CSX web-based reservation system created a promise to Purchasers to provide the necessary crew, engines, and other requirements for delivering the coal, and led Consolidation to conclude that CSX agreed to provide the necessary crew, engines, and other requirements for delivering the loaded railcars.

65. Consolidation reasonably relied upon CSX's promise to provide the necessary crew, engines, and other requirements for delivering the loaded railcars.

66. By either affirming that CSX would provide the necessary crew engines and other requirements for delivering the loaded railcars or by failing to acknowledge their inability or refusal to do the same, CSX expected or should have expected Consolidation to rely on CSX's promise.

67. CSX failed to provide the necessary crew, engines, and other requirements for delivering the loaded railcars in violation of its agreements with Purchasers.

68. CSX's failure to provide the necessary crew, engines, and other requirements for delivering the loaded railcars caused Consolidation to suffer damages, including but not limited to, missed sales opportunities, increased storage and maintenance costs, and increased production costs.

69. Enforcement of CSX's promise is required because it would otherwise result in an injustice that only enforcement of the promise can cure.

WHEREFORE, Consolidation respectfully demands judgment as follows:

1. Trial by jury;
2. Judgment in favor of Consolidation on all claims in an amount in excess of \$25,000;
3. Costs and attorneys' fees, if and where applicable; and
4. All other relief to which Consolidation is entitled.

PLAINTIFF DEMANDS TRIAL BY JURY ON ALL ISSUES

Respectfully submitted,



COUNSEL FOR PLAINTIFF

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MOTION TO DISMISS

EXHIBIT 2

1674964

4. CSX Transportation, Inc., is a Virginia Corporation with a principal place of business located in Jacksonville, Florida.

JURISDICTION

5. This Court has subject matter jurisdiction over the claims alleged in this Complaint pursuant to Mo. Const. Art. V, Section 14.

6. This Court has personal jurisdiction over Defendant because the Defendant entered into contracts with companies whose principal place of business was and is in St. Louis, Missouri, and/or because the actions of the Defendant caused harm in St. Louis, Missouri, and/or because the Defendant maintains a general presence and is authorized to transact business in Missouri.

7. Venue is proper in this Court pursuant to Mo. Rev. Stat. 508.010(2)(4) and/or 508.010(4).

FACTS

8. Foresight acts as contracting agent for certain affiliated entities for the purpose of selling coal from specific mines.

9. In pertinent part, Foresight acts as agent for Williamson and Sugar Camp.

10. Foresight is responsible for entering into coal supply contracts on behalf of the Williamson and Sugar Camp, and collecting revenues resulting from the supply of coal by Williamson and Sugar Camp to the coal purchasers under the coal supply contracts.

11. Under that authority, Foresight has entered into contracts with multiple purchasers located in several different States, including South Carolina, Florida, Georgia and Alabama.

Customer #1

12. Foresight agreed on behalf of Williamson and Sugar Camp to provide certain amounts of coal to Customer #1.

13. Plaintiffs and Customer #1 agreed that the coal would be delivered to Customer #1 free-on-board (“FOB”) railcars at the mine, with, upon information and belief, the railcars to be provided by CSX, pursuant to an agreement with Customer #1.

14. The price for the coal was to be determined at the time of loading. Invoices are sent from Foresight to Customer #1 after shipment, and payment is made by Customer #1 to Foresight.

15. Upon information and belief, Customer #1 has an agreement with CSX for shipping from the mine.

Customer #2

16. Foresight agreed on behalf of Sugar Camp to provide certain amounts of coal to the Customer #2.

17. Foresight and Sugar Camp were required to load and ship coal sold and purchased in accordance with certain requirements referenced from a separate agreement between CSX and Customer #2, including an obligation that CSX coordinate placement of empty cars with Foresight and Sugar Camp by providing, *inter alia*, advance notice of arrival for loading and unloading. Foresight and Sugar Camp were also required to coordinate timely scheduling of unit shipments and trains with CSX.

18. Foresight, Sugar Camp and Customer #2 agreed the coal would be provided FOB railcar at the CSX Interchange in Evansville, Indiana (the “CSX Interchange”) for coal delivered from Sugar Camp. Payments are made by Customer #2 to Foresight for the shipped coal pursuant to invoice.

Customer #3

19. Foresight agreed on behalf of Sugar Camp to provide certain amounts of coal to Customer #3.

20. Foresight, Sugar Camp and Customer #3 agreed that the coal was to be provided FOB at the CSX Interchange. Payments are to be made by Customer #3 to Foresight for shipped coal pursuant to invoice.

21. Foresight and Sugar Camp were also required to load and ship coal sold and purchased in accordance with certain requirements referenced from a separate agreement between CSX and Customer #3, including an obligation that CSX coordinate placement of empty cars with Foresight and Sugar Camp by providing, *inter alia*, advance notice of arrival for loading and unloading. Foresight and Sugar Camp were also required to coordinate timely scheduling of unit shipments and trains with CSX.

Customer #4

22. Foresight agreed on behalf of Sugar Camp to provide certain amounts of coal to Customer #4.

23. Foresight, Sugar Camp and Customer #4 agreed that the coal was to be provided FOB railcar at the Evansville Western/CSX Interchange in Evansville, Indiana. Payments are made by Customer #4 to Foresight for shipped coal pursuant to invoice.

24. Foresight could not charge Customer #4 for any coal until after the coal was loaded onto the railcars for delivery.

25. Upon information and belief, Customer #4 has an agreement with CSX whereby CSX was to provide empty railcars for the shipment of coal from the Evansville Western / CSX Interchange to Customer #4.

Customer #5

26. Foresight agreed on behalf of Sugar Camp to provide certain amounts of coal to the Customer #5.

27. Foresight, Sugar Camp and Customer #5 agreed that the coal was to be provided FOB at the CSX Interchange. Payments are to be made by Customer #5 to Foresight for shipped coal pursuant to invoice.

28. Foresight and Sugar Camp were also required to load and ship coal sold and purchased in accordance with certain requirements referenced from a separate agreement between CSX and Customer #5, including an obligation that CSX coordinate placement of empty cars with Foresight and Sugar Camp by providing, *inter alia*, advance notice of arrival for loading and unloading. Foresight and Sugar Camp were also required to coordinate timely scheduling of unit shipments and trains with CSX.

Delivery Delays Caused by CSX

29. In each instance as referenced above, Customers #1-5 (collectively, the “Purchasers”) reached an agreement with CSX to provide rail transportation services for the coal purchased under their respective coal supply contracts with Foresight. CSX’s timely performance was an essential component for delivery of the purchased coal.

30. CSX provided access to its web-based reservation system for use in scheduling all deliveries to the Purchasers.

31. Specifically, for each order placed under any of the Agreements, CSX would obtain from Foresight an estimation of the total amount and number of deliveries to occur during the upcoming month. This estimate typically occurred one month before the shipments were to begin.

32. Thereafter, the Purchasers would access CSX's web-based reservation system and identify the specific number of train cars and coal requested for that month under each of the Agreements. Foresight would then confirm that they could produce the amount of coal requested. This typically occurred fifteen (15) days before the shipments were to begin.

33. The Purchasers could adjust the total number of projected shipments after Foresight confirmed they could produce the coal requested if they discovered they needed additional amounts and/or to make up shortfall from the prior month.

34. At no time during the relevant time period did CSX reject the proposals from the Purchasers that were accepted by Foresight.

35. In every instance, CSX had access and knowledge of the confirmation and acceptance because they were provided through CSX's web-based reservation system.

36. CSX repeatedly failed to take appropriate actions to ensure approved and/or agreed upon deliveries were met. Upon information and belief, CSX's failures included, but are not limited to:

- a. failing, intentionally and/or negligently, to provide adequate crews and engines;
- b. intentionally and/or negligently delaying in-transit shipments, which caused CSX to be unable to return and retrieve additional trains for transit;
- c. failing, intentionally and/or negligently, to anticipate and take necessary actions for scheduled trains; and
- d. intentionally and/or negligently prioritizing shipments for unrelated third parties without valid cause.

37. Due to CSX's failure to take the required steps to ensure it met the approved deliveries, Plaintiffs were forced to delay and/or cancel at least 160 trains from 2015 to the date of filing of this Petition:

- a. In 2015, CSX caused, in whole or in part, seventeen trains scheduled on behalf of Customer #1 to be delayed and/or canceled.
- b. In 2015, CSX caused, in whole or in part, thirty-six trains scheduled on behalf of Customer #5 to be delayed and/or canceled.
- c. In 2015, CSX caused, in whole or in part, four trains scheduled on behalf of Customer #2 to be delayed and/or canceled.
- d. In 2016, CSX caused, in whole or in part, twenty-eight trains scheduled on behalf of Customer #1 to be delayed and/or canceled.
- e. In 2016, CSX caused, in whole or in part, fifteen trains scheduled on behalf of Customer #5 to be delayed and/or canceled.
- f. In 2016, CSX caused, in whole or in part, five trains scheduled on behalf of Customer #2 to be delayed and/or canceled.
- g. In 2017, CSX caused, in whole or in part, five trains scheduled on behalf of Customer #1 to be delayed and/or canceled.
- h. In 2017, CSX caused, in whole or in part, thirty-two trains scheduled on behalf of Customer #5 to be delayed and/or canceled.
- i. In 2017, CSX caused, in whole or in part, three trains scheduled on behalf of Customer #2 to be delayed and/or canceled.
- j. In 2017, CSX caused, in whole or in part, nine trains scheduled on behalf of Customer #3 to be delayed and/or canceled.

k. In 2017, CSX caused, in whole or in part, six trains scheduled on behalf of Customer #4 to be delayed and/or canceled.

38. Thus, due to the foregoing, CSX caused, intentionally or negligently, in whole or in part, one hundred sixty trains scheduled by Plaintiffs through CSX's web-based reservation system to be delayed and/or cancelled.

39. CSX's failures caused Plaintiffs to incur significant costs in managing, restocking and storing coal reserves to meet the requirements under their agreements with the Purchasers. Plaintiffs were also forced to forego acquiring additional contracts and earning additional profits due to the delay in shipment of coal from their holding facilities. CSX's actions caused additional harm by forcing delays to Plaintiffs' production schedule, which in turn caused tonnage costs to increase.

40. The damages caused by CSX's failures are continuing and ongoing.

COUNT I:
BREACH OF CONTRACT

41. Plaintiffs incorporate by reference paragraphs 1 - 40 of this Complaint.

42. CSX agreed to provide the necessary crew, engines and other requirements for delivering the loaded railcars by failing to refuse any of the requests and confirmations processed on the CSX web-based reservation system, and/or took other actions intended to cause Plaintiffs and the respective Purchasers to conclude that CSX agreed to provide the necessary crew, engines and other requirements for delivering the loaded railcars.

43. The demands by the individual Purchasers, the acceptance by Plaintiffs, and the agreement/acceptance by CSX constitute accepted, enforceable agreements.

44. CSX failed to provide the necessary crew, engines and other requirements for delivering the loaded railcars in violation of its agreement with Plaintiffs.

45. CSX's failure to provide the necessary crew, engines and other requirements for delivering the loaded railcars caused Plaintiffs to suffer damages, including but not limited to missed sales opportunities, lost revenue and profits, increased storage and maintenance costs, and increased production costs.

COUNT II:
PROMISSORY ESTOPPEL

46. Plaintiffs incorporate by reference paragraphs 1 - 45 of this Complaint.

47. CSX's actions or lack thereof regarding the request to provide railcars sent on the CSX web-based reservation system created a promise to Plaintiffs to provide the necessary crew, engines and other requirements for delivering the loaded railcars, and led Plaintiffs to conclude that CSX agreed to provide the necessary crew, engines and other requirements for delivering the loaded railcars.

48. Plaintiffs relied upon CSX's promise to provide the necessary crew, engines and other requirements for delivering the loaded railcars.

49. By either affirming that CSX would provide the necessary crew engines and other requirements for delivering the loaded railcars or by failing to acknowledge their inability or refusal to do the same, CSX expected or should have expected Plaintiffs to rely upon CSX's promise.

50. CSX failed to provide the necessary crew, engines and other requirements for delivering the loaded railcars in violation of its agreement with Plaintiffs.

51. CSX's failure to provide the necessary crew, engines and other requirements for delivering the loaded railcars caused Plaintiffs to suffer damages, including but not limited to missed sales opportunities, lost revenue and profits, increased storage and maintenance costs, and increased production costs.

52. Enforcement of CSX's promise is required because it would otherwise result in an injustice that only enforcement of the promise can cure.

COUNT III:
INTENTIONAL INTERFERENCE WITH CONTRACT

53. Plaintiffs incorporate by reference paragraphs 1 – 52 of this Complaint.

54. Plaintiffs have valid, enforceable and ongoing business relationships with the Purchasers.

55. CSX was aware of the valid, enforceable and ongoing business relationships, in part because it was an active participant in those relationships.

56. CSX intentionally interfered in those relationships by refusing to provide the necessary crew, engines and other requirements, which caused Plaintiffs to be unable to comply with the requests by the Purchasers and their respective agreements with Plaintiffs.

57. CSX has failed to provide any reasonable justification for its intentional actions.

58. CSX's failure to provide the necessary crew, engines and other requirements for delivering the loaded railcars caused Plaintiffs to suffer damages, including but not limited to missed sales opportunities, lost revenue and profits, increased storage and maintenance costs, and increased production costs.

COUNT IV:
BREACH OF CONTRACT (THIRD PARTY BENEFICIARY)

59. Plaintiffs incorporate by reference paragraphs 1 - 58 of this Complaint.

60. Upon information and belief, CSX entered into agreements with the Purchasers to provide shipping services from the mines operated by Sugar Camp and/or Williamson and/or the CSX Interchange to the Purchasers.

61. Plaintiffs were intended beneficiaries of those agreements in that CSX and the Purchasers were not only aware that Plaintiffs were selling the coal and would benefit financially

from the transactions, but also because Plaintiffs were the identified provider of the coal that CSX was transporting.

62. CSX breached the agreements with the Purchasers by failing to provide the necessary crew, engines and other requirements for delivering the loaded railcars.

63. CSX's failure to provide the necessary crew, engines and other requirements for delivering the loaded railcars caused Plaintiffs to suffer damages, including but not limited to missed sales opportunities, lost revenue and profits, increased storage and maintenance costs, and increased production costs.

COUNT V:
PROMISSORY ESTOPPEL (THIRD PARTY BENEFICIARY)

64. Plaintiffs incorporate by reference paragraphs 1 - 63 of this Complaint.

65. CSX's actions or lack thereof regarding the request to provide railcars sent on the CSX web-based reservation system created a promise or promises to the Purchasers to provide the necessary crew, engines and other requirements for delivering the coal, and led Plaintiffs to conclude that CSX agreed to provide the necessary crew, engines and other requirements for delivering the loaded railcars.

66. Plaintiffs relied upon CSX's promise to provide the necessary crew, engines and other requirements for delivering the loaded railcars.

67. By either affirming that CSX would provide the necessary crew engines and other requirements for delivering the loaded railcars or by failing to acknowledge their inability or refusal to do the same, CSX expected or should have expected Plaintiffs to rely upon CSX's promise.

68. CSX failed to provide the necessary crew, engines and other requirements for delivering the loaded railcars in violation of its agreement with the Purchasers.

69. CSX's failure to provide the necessary crew, engines and other requirements for delivering the loaded railcars caused Plaintiffs to suffer damages, including but not limited to missed sales opportunities, lost revenue and profits, increased storage and maintenance costs, and increased production costs.

70. Enforcement of CSX's promise is required because it would otherwise result in an injustice that only enforcement of the promise can cure.

WHEREFORE, Plaintiffs respectfully demand judgment on the Complaint herein as follows:

1. Judgment in favor of Plaintiffs on all claims in the amount to be determined at trial;
2. Costs and attorneys' fees, if and where applicable; and
3. All other relief to which Plaintiffs are entitled.

PLAINTIFFS DEMAND TRIAL BY JURY.

Respectfully submitted,

/s/ Juliane M. Rodriguez

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