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January 28, 2019

247016

VIA ELECTRONIC FILING

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W., Room 1034
Washington, DC 20423-0001

ENTERED
Office of Proceedings
January 28, 2019
Part of
Public Record

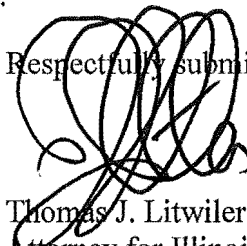
Re: **Docket No. NOR 42161**
Ameropan Oil Corporation v.
Canadian National Railway Company

Dear Ms. Brown:

Attached for filing in the above-captioned proceeding is a public, redacted version of the **Motion to Dismiss of Illinois Central Railroad Company and Canadian National Railway Company**, dated January 28, 2019.

Please feel free to contact me should any questions arise regarding this filing. Thank you for your assistance on this matter.

Respectfully submitted,



Thomas J. Litwiler
Attorney for Illinois Central Railroad Company
and Canadian National Railway Company

TJL:tl

Attachment

cc: Thomas F. McFarland, Esq.

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42161

AMEROPAN OIL CORPORATION

v.

CANADIAN NATIONAL RAILWAY COMPANY

**MOTION TO DISMISS OF
ILLINOIS CENTRAL RAILROAD COMPANY
AND CANADIAN NATIONAL RAILWAY COMPANY**

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**ATTORNEYS FOR ILLINOIS CENTRAL
RAILROAD COMPANY AND CANADIAN
NATIONAL RAILWAY COMPANY**

Dated: January 28, 2019

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. NOR 42161

AMEROPAN OIL CORPORATION
v.
CANADIAN NATIONAL RAILWAY COMPANY

**MOTION TO DISMISS OF
ILLINOIS CENTRAL RAILROAD COMPANY
AND CANADIAN NATIONAL RAILWAY COMPANY**

Illinois Central Railroad Company ("IC") and Canadian National Railway Company ("CNR") seek dismissal of the Complaint of Ameropan Oil Corporation ("Ameropan") in this proceeding because the Surface Transportation Board does not have jurisdiction over the matters alleged in the Complaint.¹ Ameropan asserts that, under 49 U.S.C. §§ 11101(a), 11101(c) and 10702(2), IC must offer rail service on-demand every weekday at Ameropan's facility in Chicago, Illinois. IC's service to Ameropan, however, is provided pursuant to a rail transportation contract entered into between the parties and governed by 49 U.S.C. § 10709. Because 49 U.S.C. § 10709(c)(1) deprives the Board of jurisdiction over the rail service provided by IC to Ameropan under contract, the Complaint must be dismissed.²

¹ CNR and IC use the trade name "CN". As discussed further below, Ameropan incorrectly names CNR, IC's ultimate corporate parent, rather than IC as the defendant in its Complaint. While Ameropan could be required to amend its Complaint to substitute IC as the defendant, IC sees no reason to delay filing this dispositive motion to dismiss given the lack of STB jurisdiction. CNR joins this motion and additionally argues that it should be dismissed as a party to this proceeding. IC is concurrently filing in this proceeding a request to toll the period for answering the Complaint while the Board considers and rules on this motion to dismiss.

² Ameropan's Complaint was filed on December 17, 2018, and responsive pleadings were due January 7, 2019. IC is filing this motion to dismiss immediately upon the Board's resumption of operations after the partial federal government shutdown that began December 22, 2018.

BACKGROUND

In March of 2017, Ameropan³ and CN entered into CN Confidential Transportation Master Agreement No. 543274-AA 0000 (the "Master Agreement"). The Master Agreement includes as an attachment CN Confidential Transportation Agreement No. CN 543274-AA-0001-AA, which provides such commercial terms as {

}, and a Schedule I that provides "Commodity and Transportation Particulars." The Master Agreement provides, *inter alia*, for the rail transportation of {

} to Ameropan's Chicago facility through the end of { }⁴

The Master Agreement is signed by the parties. It {

} Master Agreement, § 2(A). It further provides that {

} Master Agreement, § 2(G). The parties to the Master Agreement {

} Master Agreement, § 2(N).

³ Four entities affiliated with Ameropan were also parties to the rail transportation contract: Interstate Asphalt, American Materials LLC, Bell Oil Terminal Inc. and Peoria River Terminal Inc. Those entities are not at issue in this case.

⁴ A copy of the confidential Master Agreement, designated as Exhibit A to this motion, is submitted under seal, subject to a concurrently-file motion for protective order.

In April of 2018, IC and CNR initiated litigation in federal court against Ameropan and several affiliates for non-payment of transportation and demurrage charges and sought to terminate the Master Agreement.⁵ Ameropan responded by filing a Motion to Compel Mediation and Dismiss Complaint, attached hereto as Exhibit B. Ameropan argued that the Master Agreement governed the rail transportation at issue and included an alternative dispute resolution process that required mediation and, if unsuccessful, arbitration of disputes between the parties, thus precluding the judicial relief CN was seeking. *See* Exhibit B at 1 ("Plaintiffs and Defendants are parties to an agreement [the Master Agreement] that governs all aspects of this dispute.").

The case was dismissed on July 2, 2018 after the parties settled the litigation. { }, and CN reinstated the Master Agreement.⁶ Since that time, any rail traffic to the Ameropan facility in Chicago has continued to move pursuant to the Master Agreement. { }.⁷

The gravamen of Ameropan's Complaint to the Board is that IC has purportedly reduced service to Ameropan's Chicago facility from five days per week to two days per week. Yet Ameropan has acknowledged to IC, { }⁸ Instead, Ameropan appears to seek rail service that is "on call" to its Chicago facility every day of the

⁵ *Illinois Central Railroad Company v. Ameropan Oil Corporation*, No. 18-CV-02790 (N.D. Ill.).

⁶ Upon reinstatement, CN reissued the Master Agreement with a new contract number for administrative reasons (No. 552620-AA 0000). It is identical to the original Master Agreement except for the contract number.

⁷ The facts in this motion are verified by James Gunther, CN's Director, Supply Chain Sales Southern Region.

⁸ December 17, 2018 e-mail from Ameropan's Peter Wittich to CN's James Gunther, attached as Exhibit C and submitted under seal, subject to the concurrently-file motion for protective order.

work week, to be summoned on demand by Ameropan, regardless of actual traffic volumes at the facility. IC notes that in the entire year of 2018, IC handled { } railcars at Ameropan's Chicago facility and did not move any cars in { }

Ameropan makes no mention in its Complaint of the Master Agreement governing the movements to its Chicago facility. Rather, Ameropan claims that IC's actions violate the common carrier obligation and constitute an unreasonable practice under the Interstate Commerce Act. In so doing, Ameropan seeks to use the Board to supplant its rail transportation contract with IC.

DISCUSSION

I. The Board Does Not Have Jurisdiction to Consider Ameropan's Complaint for Transportation Governed By a Rail Transportation Contract

As Ameropan explicitly recognized and argued in federal court, the parties have entered into a rail transportation contract that governs the provision of rail service to Ameropan's Chicago facility -- the same service that is the subject of Ameropan's Complaint at the Board. In these circumstances, there is no remedy before the Board related to such transportation or service. 49 U.S.C. § 10709(a) provides that rail carriers "may enter into a contract with one or more purchases of rail services to provide specified services under specified rates and conditions." For contracts under Section 10709 between rail carriers and a customer, "transportation under such contract, shall not be subject to this part [i.e., the Interstate Commerce Act], 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." 49 U.S.C. § 10709(c)(1). Where a contract governs the transportation between rail carriers and a customer, the rail carriers "shall have no

duty in connection with services provided under such contract other than those duties specified by the terms of the contract." 49 U.S.C. § 10709(b).

The provisions of Section 10709 "remove transportation under a rail contract from any subsequent regulatory review." *H.B. Fuller Co. v. Southern Pac. Transp. Co.*, 2 S.T.B. 550, 553 (1997) (collecting cases). Rail service performed under a Section 10709 contract thus is not subject to challenge or review at the Board. This is true even as to tariff terms incorporated into the contract, because the tariff terms "become a contract term for purposes of transportation performed under the contract." *H.B. Fuller*, 2 S.T.B. at 553; *see also, e.g., Omaha Public Power District v. Union Pacific Railroad Company*, Docket No. NOR 42006 (STB served Oct. 17, 1997) 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]. Incorporation of tariff provisions into a contract does not alter this basic principle in any way.").

This lack of agency jurisdiction over rail transportation provided pursuant to a contract is conclusive and long-standing. *E.g., North American Freight Car Association v. Union Pacific Railroad Company*, Docket No. NOR 42144 (STB served Dec. 21, 2015) at 4 ("well settled" that the Board's authority does not extend to movements conducted pursuant to transportation contracts); *United States Rail Service Issues*, Docket No. EP 724 (STB served Dec. 30, 2014) at 7 (under Section 10709, "parties are not subject to statutory duties with respect to contract service"); *Albemarle Corporation v. The Louisiana & North West Railroad Company*, Docket No. NOR 42097 (STB served Aug. 1, 2006) at 1 ("The Board does not have jurisdiction over contract carriage."); *Parrish & Heimbecker, Inc. -- Petition for Declaratory Order*, 4 S.T.B. 866, 871 (2000) (Congress removed Section 10709 contracts "and the underlying contract service from the regulatory authority of [the agency and Interstate

Commerce Act]"); Conf. Rep. on Staggers Rail Act of 1980, H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. at 100, *reprinted in* 1980 U.S.C.C.A.N. at 4132 (transportation provided under contract is "exempt . . . from all regulation and all of the requirements of the [Interstate Commerce] Act.").⁹

Against this backdrop, and the transportation contract governing IC's rail service at Ameropan's Chicago facility, there is no basis for Board to exercise jurisdiction over Ameropan's Complaint. Ameropan alleges violations of the Interstate Commerce Act, including the common carrier obligation, and seeks damages and a cease and desist remedy from the Board. But such allegations and claims for relief are the very types of provisions of the Interstate Commerce Act that "transportation under a rail contract may not be challenged on." *Omaha Public Power* at 2. Ameropan inexplicably alleges that IC's actions supposedly "expos[e] [Ameropan] to penalties for failing to meet the minimum annual volume requirement in CN's *tariff*." Complaint at 4 (emphasis added). Yet that minimum annual volume commitment is contained in the Master Agreement between Ameropan and CN. IC is uncertain what reasonable basis Ameropan and its counsel could have believed they had to file the unverified Complaint before the Board and consume agency time and resources when Ameropan had already confirmed in federal court that the transportation and service at issue here is governed by a rail transportation contract.¹⁰ Whatever that explanation, the Board has no jurisdiction to consider Ameropan's Complaint or the relief sought therein.

⁹ Indeed, it was "settled law" as early as 1986 that "the ICC has no jurisdiction to resolve or intrude upon contract law disputes between the contracting parties." *Railroad Transportation Contracts*, 3 I.C.C.2d 219, 230 n.6 (1986) (citing *Cleveland Cliffs Iron Co. v. ICC*, 664 F.2d 568 (6th Cir. 1981) and *Burlington Nor. R. Co. v. ICC*, 679 F.2d 934 (D.C. Cir. 1981)).

¹⁰ Ameropan's counsel in this proceeding is also counsel of record in the federal court proceeding where Ameropan moved to dismiss based on the alternative dispute resolution process in the Master Agreement.

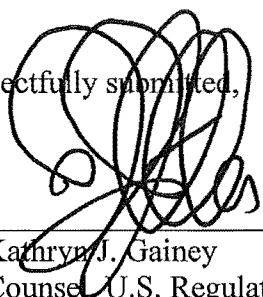
**II. CNR Is Not a Proper Party In This Case and
Should Be Dismissed As a Party Defendant**

Ameropan has named CNR as the sole defendant in its Complaint. CNR is a Canadian corporation that does not own or operate rail lines in Illinois and does not provide rail service to Ameropan in Chicago. IC, a wholly-owned, indirect subsidiary of CNR, is the serving rail carrier at Ameropan's facility. Even if dismissal of Ameropan's Complaint in its entirety was not required on the jurisdictional grounds outlined above, there would be no basis to proceed with CNR as the putative defendant in a matter involving rail service at an IC-served facility in Chicago. *See CSX Corporation and CSX Transportation, Inc. -- Adverse Abandonment -- Canadian National Railway Company and Grand Trunk Western Railroad, Inc.*, Docket No. AB-31 (Sub-No. 38) (STB served Feb. 1, 2002) at 3. Dismissal of the Complaint as against CNR is separately required on those grounds.

CONCLUSION

As Ameropan has represented in federal court, a rail transportation contract governs the provision of rail service to Ameropan's Chicago facility. The absence of any remedy before the Board related to such transportation or service could not be clearer. The Ameropan Complaint must be dismissed for lack of jurisdiction. In addition, CNR should be dismissed as a party to this proceeding.

Respectfully submitted,

By: 

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**ATTORNEYS FOR ILLINOIS CENTRAL
RAILROAD COMPANY AND CANADIAN
NATIONAL RAILWAY COMPANY**

Dated: January 28, 2019

**CN CONFIDENTIAL TRANSPORTATION MASTER AGREEMENT
NO. 543274-AA 0000**

[CONFIDENTIAL - REDACTED]

AMEROPAN MOTION TO COMPEL MEDIATION AND DISMISS COMPLAINT

Illinois Central Railroad Company v. Ameropan Oil Corporation, No. 18-CV-02790 (N.D. Ill.)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS CENTRAL RAILROAD	)	
COMPANY, an Illinois Company and	)	
CANADIAN NATIONAL RAILWAY	)	
COMPANY, a Canadian Corporation	)	
	)	
Plaintiffs,	)	Case No. 18-CV-02790
v.	)	
	)	
AMEROPAN OIL CORPORATION, a	)	
New York Corporation, INTERSTATE	)	
ASPHALT II LLC, a Delaware LLC, and	)	
PEORIA RIVER TERMINAL LLC, a	)	
Delaware LLC	)	
Defendants.	)	

MOTION TO COMPEL MEDIATION AND DISMISS COMPLAINT

Pursuant to FRCP 12(b)(3), Defendants Ameropan Oil Corporation (“Ameropan”), Interstate Asphalt II, LLC (“Interstate Asphalt”), and Peoria River Terminal LLC (“Peoria River”) hereby move to compel mediation and to dismiss the complaint. Plaintiffs and Defendants are parties to an agreement that governs all aspects of this dispute and includes a mandatory mediation provision precluding the Court from deciding the matters at issue. Accordingly, Defendants respectfully ask the Court to compel mediation and to dismiss the complaint.

In the alternative, Defendants move for dismissal of the following counts pursuant to Federal Rule of Civil Procedure 12(b)(1) because they involve only amounts that accrued wholly within Canada and are thus not within the Court’s subject-matter jurisdiction:

- (1) First Count - all charges;
- (2) Second Count - the last seven entries in Exhibit B to the Complaint; and
- (3) Third Count - all amounts on Exhibit C to the Complaint, pages 1 and 2.

I. FACTUAL BACKGROUND

Interstate Asphalt, Ameropan, and Peoria River—collectively, as “Customer”—entered into the CN Confidential Transportation Master Agreement No. 5434274-AA 0000 (“Master Agreement”) with Canadian National Railway Company on its own behalf and on the behalf of certain carriers (“CN”), effective March 1, 2017 (attached as Ex. 1¹). The Master Agreement provided the “terms and conditions applicable to the transportation by the Carriers of certain products of the Customer (‘the Commodity’) from each origin to each destination more particularly described in any Schedule I issued in accordance with this Contract.” (Master Agr. ¶ 2(A).) The Master Agreement specifically incorporated “all tariffs, rules and regulations that are applicable to the transportation of the Commodity as if fully set forth herein, and shall together form an integral and binding part of this Contract.” (*Id.* ¶ 3.) Attached to the Master

¹ Defendants’ attachment of the Master Agreement to their motion to dismiss does not convert it to a motion for summary judgment. Courts may consider documents attached to a motion to dismiss without converting the motion to one for summary judgment “where the documents, though not attached to or mentioned in the complaint, are necessary for the district court ‘to understand the nature of the dispute between the parties’ or to ‘throw[] light on the relationship’ between the parties.” *Colander v. Metro. Life Ins. Co.*, 2017 WL 3816100, at *3 (N.D. Ill. Aug. 31, 2017) (citing *188 LLC v. Trinity Indus., Inc.*, 300 F.3d 730, 735 (7th Cir. 2002) and *Hecker v. Deere & Co.*, 556 F.3d 575, 583 (7th Cir. 2009)). The purpose of allowing courts to consider certain documents attached to a motion to dismiss “is to prevent parties from surviving a motion to dismiss by artful pleading or by failing to attach relevant documents.” *188 LLC v. Trinity Indus., Inc.*, 300 F.3d 730, 735 (7th Cir. 2002). Although Plaintiffs failed to attach the Master Agreement to their complaint and referenced it only obliquely (Compl. ¶¶ 17, 22 (referring to “contracts”), the Master Agreement governs the relationship of the parties concerning the subject matter of the complaint. (See Master Agr. ¶ 2.A (“This Master Contract specifies the terms and conditions applicable to the transportation by the Carriers of certain products of the Customer (the Commodity) from each origin to each destination more particularly described in any Schedule I issued in accordance with this Contract.”).) See also *Blythe Holdings, Inc. v. Flawless Fin. Corp.*, 2009 WL 103196, at *8 (N.D. Ill. Jan. 15, 2009) (refusing to convert motion to dismiss or stay and compel mediation/arbitration into a motion to dismiss when defendant’s motion attached the agreements between the parties that were “central” to the plaintiffs’ claims).

Agreement were the CN Confidential Transportation Agreement No. CN 5430AA-00001-AA, which set such terms as volume commitment and schedules, and Schedule I, which set forth certain Commodity and Transportation Particulars.

The Master Agreement set forth a particular procedure for deciding disputes between the parties and required mediation before any party could seek arbitration or court intervention:

9. DISPUTE RESOLUTION

- A. In the event of any dispute between the Parties with respect to the interpretation or enforcement of this Contract that the Parties cannot resolve through independent negotiation and escalation through their respective representatives (a “Dispute”), the Parties agree to enter into mediation with the intention of reaching a consensual resolution of their Dispute. Each Party will be responsible for its own costs and both parties will share equally in the costs of, and the services provided by the mediator. The timeline for completion of the mediation will be fifteen (15) working days from the date of the appointment of the mediator unless otherwise agreed by the Parties.
- B. In the event that the Dispute is not fully resolved at the end of the mediation process, either Party may submit the matter to binding arbitration to the exclusion of any other court or tribunal. The arbitration shall be conducted before a single arbitrator in accordance with the arbitration act of the province or state where the Customer is situated.

(*Id.* ¶ 9(A)-(B).)

The Master Agreement empowers a party to terminate the Master Agreement if “any Party defaults in any material covenant, condition or obligation of this Contract, which is not excused in writing and continues for a period of ten (10) days following the giving of written notice to the defaulting Party.” (*Id.* ¶ 2(K)(a).)

On April 23, 2018, Illinois Central Railroad Company (“ICRC”) and its parent company CN filed a complaint in the Northern District of Illinois against Defendants alleging that Defendants had failed to pay “charges assessed under circulars and tariffs published by the

plaintiff for demurrage services performed by CN” for Ameropan in the United States and Canada (Count I), “freight services and miscellaneous tariff charges performed by CN” for Interstate Asphalt in the United States and Canada (Count II), and “demurrage services and miscellaneous tariff charges performed by CN” for Peoria River in Canada and by ICRC in the United States (Count III). (Compl. ¶¶ 10, 15, 20.)

On May 1, 2018, CN sent Defendants a letter with subject line “Master Agreement 543274-AA-0000” confirming that CN had “recently referred certain unpaid charges” and additional outstanding freight charges “to an outside counsel for collection.” (May 1, 2018 Letter from T. Healey to P. Wittich, attached as Ex. 2.) In the letter, CN threatened to terminate the Master Agreement “in accordance with Section 2(K) of the Master Agreement” for “charges unpaid as per CN tariffs and rates” unless Defendants paid within 30 days. (*Id.*) In a May 10, 2018 email (attached as Ex. 3), Defendants disputed the charges and requested dispute resolution under Clause 9 of the Master Agreement. On June 5, after some further discussion about the disputed charges with Defendants but without agreeing to comply with the Master Agreement’s dispute resolution procedures, CN terminated the Master Agreement effective June 5, 2018. (Jun. 5, 2018 Letter from T. Healey to P. Wittich, attached as Ex. 4.) In an email the same day, counsel for Plaintiffs acknowledged that this litigation may concern the Master Agreement. (See Jun. 5, 2018 email from T. Healey to P. Wittich, attached as Ex. 5 (note from Plaintiffs’ counsel to Defendants’ counsel: “While I’m aware that Mr. Wittich’s companies are represented by you in litigation that may concern this agreement, I’m sending this directly to Mr. Wittich to satisfy the notice requirements in the referenced transportation contract.”).)

II. ARGUMENT

Federal Rule of Civil Procedure 12(b)(3) permits a party to move to dismiss an action where the Court lacks subject-matter jurisdiction over the action. Fed. R. Civ. P. 12(b)(3); *Soucy v. Capital Mgmt. Services, L.P.*, 2015 WL 404632, at *3 (N.D. Ill. Jan. 29, 2015) (noting that motions to dismiss pursuant to an arbitration clause must be brought under this rule). Courts have the discretion to compel mediation/arbitration and to dismiss complaints when the parties have a valid and enforceable mediation or arbitration clause and “it is clear the entire controversy between the parties will be resolved by arbitration.” *Soucy v.*, 2015 WL 404632, at *6 (citation omitted).

Federal Rule of Civil Procedure 12(b)(1) permits a party to move to dismiss when a court lacks subject-matter jurisdiction over the controversy. Fed. R. Civ. P. 12(b)(1).

A. The Court should dismiss the complaint and compel mediation.

This action must be dismissed, and the Court must compel mediation, because the Master Agreement between the parties contains a mandatory mediation clause. The parties agreed to “enter into mediation” to resolve any dispute about “the interpretation or enforcement of this Contract that the Parties cannot resolve through independent negotiation and escalation through their respective representatives.” (Master Agr. ¶ 9.A.) Only after mediation fails may either party “submit the matter to binding arbitration to the exclusion of any other court or tribunal.” (*Id.* ¶ 9.B.) In other words, the parties mutually agreed that mediation was a prerequisite to bringing disputes under the Master Agreement to “any other court or tribunal.”

Both Illinois and federal courts construe mediation clauses broadly and “conclude that the parties are obligated to mediate any dispute that arguably arises under an agreement containing” such a provision. *Siddiqui v. Metro. Cardiovascular Assocs., LLC*, 2015 IL App (2d) 140870-U, ¶ 22 (granting motion to dismiss and compel mediation when the dispute “arose out of or related directly to the Agreement, and therefore it should be resolved by mediation as mandated by the mediation clause in the Agreement”); *Pennsylvania Chiropractic Ass’n v. Blue Cross Blue Shield Ass’n*, 713 F. Supp. 2d 734, 741 (N.D. Ill. 2010) (noting “the broad policy in favor of arbitrability and the Seventh Circuit’s instruction that all that is needed to trigger arbitration is a clause that ‘arguably cover[s]’ the disputes at hand”).

There is no question that the disputes in Plaintiffs’ complaint arise out of the Master Agreement between Canadian National Railway Company (“CN”) and Defendants. Charges for demurrage services performed by CN for Defendants are covered by the terms of the Master Agreement. (See Master Agr. ¶ 2.A (“This Master Contract specifies the terms and conditions applicable to the transportation by the Carriers of certain products of the Customer (the Commodity) from each origin to each destination more particularly described in any Schedule I issued in accordance with this Contract.”).) Plaintiffs admit that their grievances “stem[] from charges assessed under circulars and tariffs published by the plaintiff for demurrage services performed by CN for” the Defendants (Compl. ¶¶ 10, 15, 20) and from “contracts” (*id.* ¶¶ 17, 22). Plaintiffs have admitted in correspondence with Defendants that this dispute likely concerns the Master Agreement. (Ex. 2 (letter with RE line “Master Agreement 543274-AA-0000” threatening to terminate the Master Agreement “in accordance with Section 2(K) of the Master

Agreement” for “charges unpaid as per CN tariffs and rates”).) Moreover, the parties’ disagreement about whether the Master Agreement was properly terminated is a dispute arising from the Master Agreement that must be decided in mediation. *See Siddiqui*, 2015 IL App (2d) 140870-U, ¶ 25 (“As stated, whether the Agreement is no longer valid, pursuant to the requirements of section 2, or whether plaintiff became a member, pursuant to the requirements of section 4, clearly falls within the purview of the mediation clause as they are disputes, claims, or controversies arising out the Agreement . . .”).

The parties’ agreement to mediate these matters rather than litigate them in the first instance is akin to a forum selection clause that must be respected by the Courts. *See Soucy*, 2015 WL 404632, at *1. Because the parties agreed to mediate the issues involved in this action before bringing grievances to a court, the Court should dismiss the complaint and compel the parties to attend mediation.

B. In the alternative, the Court should dismiss this action because it lacks subject-matter jurisdiction over all charges incurred in Canada.

The charges set forth in the last seven entries of Exhibit B (Second Count) and in all of Exhibit C (Third Count) should be dismissed because they accrued wholly within Canada. In the absence of any indication in the Complaint that the statutes relied on by Plaintiff for subject matter jurisdiction have extraterritorial application to events in Canada, this Court does not have jurisdiction over such charges.

1. The charges sought to be dismissed accrued in Canada.

The freight charges in the last seven entries of Exhibit B (Second Count) are acknowledged by Plaintiff to have been assessed for transportation that originated at Fort Francis

and was destined to Lloydminster. Pursuant to FRE 201(b)(2), this Court can take judicial notice that both Fort Francis and Llyodminster are located in Canada. . .i.e., Fort Francis in Northwest Ontario Canada, and Llyodminster straddling the borders of Alberta and Saskatchewan, Canada.

Plaintiff has acknowledged that all of the Optional Service Charges in Exhibit C (Third Count) accrued at Llyodminster, which as has been shown, is located in Canada. Plaintiff has acknowledged that the Optional Service Charges in Exhibit C are demurrage charges (Complaint at 3). Demurrage charges are incurred when rail cars are detained beyond a specified free time for loading or unloading.

2. The statutes Plaintiffs rely on for subject-matter jurisdiction do not apply to transportation or demurrage charges incurred in Canada.

Plaintiff relies on 28 U.S.C. § 1337(a) and 49 U.S.C. § 10743(a) for subject matter jurisdiction. (Compl. at 1). Neither of those statutes provides for such jurisdiction over transportation or demurrage charges incurred in Canada.

Federal statutory law is presumed to apply only within the territorial jurisdiction of the United States unless Congress has clearly expressed a contrary intent. *Van Blaricom v. Burlington Northern R. Co.*, 17 F3d 1224, 1225 (9th Cir, 1994) (citing *Foley Bros. v. Filardo*, 336 US 281, 284-285 (1949)).

There is no evidence of any such congressional intent in 28 U.S.C. § 1337(a) or 49 U.S.C. § 10743(a).² That being the case, those statutes apply only within the territorial jurisdiction of the United States. Those statutes do not apply to transportation or demurrage

² 49 U.S.C. § 10743 does not apply to demurrage charges, so it cannot provide subject matter jurisdiction as to the demurrage charges in the First Count (Exhibit A) and the Third Count (Exhibit C) of the Complaint. See *Demurrage Liability*, 2014 WL 1399404 at *19 (STB Docket No. EP 707, decision served April 11, 2014).

charges incurred beyond that territorial limit, such as to charges incurred in Canada in the case at hand.

In the absence of any statute that provides subject matter jurisdiction over the charges incurred in Canada, FRCP 12(h)(3) requires that the Court dismiss the counts of the Complaint that allege a right to collect such charges, i.e., Second Count, Exhibit B, last seven entries, and all of Third Count, Exhibit C, pages 1 and 2.

3. The Court should dismiss portions of the complaint because it lacks jurisdiction over demurrage charges for which issuance of timely tariff notice was not alleged.

49 C.F.R. § 1333.3 provides that a person receiving rail cars from a rail carrier for loading or unloading who detains the cars beyond the period of free time set forth in the applicable tariff may be held liable for demurrage charges “if the carrier has provided that person with actual notice of the demurrage tariff providing for such liability prior to the placement of the rail cars.” The regulation states that such notice must be in written or electronic form.

Timely issuance of such a notice is thus a prerequisite to collection of demurrage charges.

The Complaint does not contain an allegation that such a notice was timely issued. In the absence of such an allegation, demurrage charges cannot be lawfully collected from Defendants. *See Demurrage Liability*, 2014 WL 1399404 at *19.

The absence of the essential allegation of timely notice provides a ground for dismissal of the First Count (Exhibit A), and provides an additional ground for dismissal of the charges in Exhibit C of the Third Count of the Complaint, both of which seek collection of demurrage charges.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated herein, the Court should dismiss or stay these entire proceedings and compel the parties to mediate. In the alternative, the Court should dismiss the First Count (Exhibit A), the portion of the Second Count consisting of the last seven entries in Exhibit B, and the portion of the Third Count in Exhibit C of the Complaint. A proposed order has been submitted pursuant to this Court's procedures.

DATED: June 12, 2018

Respectfully submitted,

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Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 12, 2018 a copy of the foregoing ***Motion to Compel Mediation and Dismiss Complaint*** was served via CM/ECF upon:

John K. Fiorilla, Esq.
Capehart & Scatchard, P.A.
8000 Midlantic Drive, Suite 300S, Box 5016
Mt. Laurel, NJ 08054
jfiorilla@capehart.com

Richard M. Kates, Esq.
111 West Washington Street, Suite 1900
Chicago, IL 60602-2713
kateslaw64@gmail.com

/s/ Nancy J. Rich

Nancy J. Rich

Exhibit 2



www.cn.ca

May 1, 2018

Peter Wittich
1041 S.E. 17th Street
Suite 300
Ft. Lauderdale, FL 33316

RE: Master Agreement 543274 – AA - 0000

Mr. Wittich:

I am writing today to follow up on previous communications that Interstate Asphalt, Lansing Asphalt Terminal Company, American Materials LLC, Ameropan Oil Corp, Bell Oil Terminal Inc. and Peoria River Terminal Inc. (collectively "Interstate") received from CN Credit Management, and to advise of changes coming to your credit facility with CN.

As you know, we recently referred certain unpaid charges to an outside counsel for collection. More recently, additional freight charges have been left outstanding, beyond their permitted payment terms. Without a prompt resolution, these will also be referred to legal counsel for collection.

Given the fact that Interstate's accounts are not maintained in good standing, with charges remaining unpaid as per CN tariffs and rates, CN is no longer in a position to extend credit to Interstate. Accounts for Interstate will be managed on a prepaid basis starting Monday May 7, 2018. Communication will follow from the CN Cash Traffic team with instructions to make the new process seamless.

Additionally, with respect to the existing unpaid invoices, in accordance with Section 2(K) of the Master Agreement, Interstate is in default. Please find this letter as an official notice of Interstate's obligation to correct these deficiencies within thirty (30) days. If the breaches are not remediated within that time, CN reserves the right to terminate the Master Agreement.

Please contact me if you have any questions.

Law

Thomas J. Healey
Counsel - Regulatory

17641 S. Ashland Avenue
Homewood, IL 60430-1339

T - 708-332-4381
F - 708-332-4361
tom.healey@cn.ca

17
1798

Very truly yours,

Thomas J. Healey

Exhibit 3

5/11/2018

Fwd: Master Agreement 543274

From: Peter Wittich <pwittich@interstateasphalt.com>
To: Tom McFarland <mcfarland@aol.com>
Subject: Fwd: Master Agreement 543274
Date: Thu, May 10, 2018 3:41 pm

Begin forwarded message:

From: pwittich@interstateasphalt.com
Date: May 10, 2018 at 4:38:08 PM EDT
To: Tom.Healey@cn.ca
Cc: Gary.Crowther@cn.ca, James Gunther
<James.Gunther@cn.ca>
Subject: Master Agreement 543274

Mr. Healey,

Responding to your letter dated May 1, 2018 specifically the last paragraph we are in no way in default of the Master Agreement as you propose. We deny there is any unpaid amount or monies due under the agreement.

All freight bills under this agreement have been paid in full and if you believe there are any bills not paid according to the agreement please direct them to my personal attention for prompt review.

We do in fact have a dispute and accordingly request dispute resolution under the clause 9 A and B.

Please confirm receipt of this notice according to the agreement.

Thank you

Exhibit 4



www.cn.ca

June 5, 2018

Peter Wittich
1041 S.E. 17th Street
Suite 300
Ft. Lauderdale, FL 33316

RE: Master Agreement 543274 – AA - 0000

Mr. Wittich:

On May 1, 2018, I wrote to you concerning certain deficiencies with payment of charges owed under the referenced agreement, advising that under Section 2(K) of the referenced agreement, those deficiencies needed to be rectified within thirty (30) days. Earlier today, I was advised that many of those deficiencies under the referenced agreement remain uncured.

Therefore, please be advised that the referenced agreement is terminated effective June 5, 2018.

Please contact me if you have any questions.

Law

Thomas J. Healey
Counsel - Regulatory

17641 S. Ashland Avenue
Homewood, IL 60430-1339

T - 708-332-4381
F - 708-332-4361
tom.healey@cn.ca

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Tom Healey', written over a light blue circular stamp.

Thomas J. Healey

cc: Tom McFarland, Esq.

DECEMBER 17, 2018 E-MAIL FROM PETER WITTICH TO JAMES GUNTHER

[CONFIDENTIAL - REDACTED]

VERIFICATION

I, James Gunther, Director, Supply Chain Sales Southern Region, for the U.S. rail operating affiliates of Canadian National Railway Company ("CN"), declare under penalty of perjury under the laws of the United States that I have read CN's Motion to Dismiss and that the facts asserted there are true as stated. I certify that I am qualified and authorized to file this Verification.

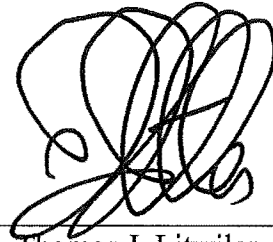
Executed on January 7, 2019.


James Gunther

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2019, a copy of the foregoing
**Motion to Dismiss of Illinois Central Railroad Company and Canadian National Railway
Company** was served by electronic delivery and U.S. first class mail, postage prepaid, upon:

Thomas F. McFarland, Esq.
Thomas F. McFarland, P.C.
208 South LaSalle Street
Suite 1666
Chicago, Illinois 60604-1228
mcfarland@aol.com

A handwritten signature in black ink, appearing to read 'T. Litwiler', is written over a horizontal line.

Thomas J. Litwiler