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DID # 0101912001

March 27, 2002

Via Federal Express Delivery

Secretary
Surface Transportation Board
1925 K Street
Washington, DC 20423

NOM-42073



Re: Petition for Declaratory Order and Other Relief – Newell Window Furnishings, Inc. and Newell Rubbermaid, Inc. v. United Parcel Service, an Ohio corporation, and United Parcel Service, a New York Corporation

Dear Sir or Madam:

Enclosed please find an original and ten (10) copies of the Petition for Declaratory Order and Other Relief filed on behalf of our clients Newell Window Furnishings, Inc. and Newell Rubbermaid, Inc., including Appendices A through E thereto, for filing with the Surface Transportation Board. This filing follows the prior informal complaint filed by Newell Window Furnishings, through its division Levolor Home Fashions, and Newell Rubbermaid, Inc. against Respondents. With this letter, we are serving copies of the enclosed pleading on counsel for Respondents.

Enclosed also please find a check in the amount of \$1,000.00 representing the filing fee for the Petition for Declaratory Order and Other Relief.

If you have any questions regarding the enclosed Petition for Declaratory Order and Other Relief, please contact me at your convenience.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Henry M. Perlowski'.

Henry M. Perlowski

ENTERED
Office of the Secretary
MAR 28 2002
Part of
Public Record

Enclosure

cc: William J. Augello, Esq. (w/ encl.)
Barry S. Alberts, Esq. (w/ encl.)
Cari K. Dawson, Esq. (w/ encl.)
James F. Moriarity, Esq. (w/ encl.)
Robert L. Rothman, Esq. (w/ encl.)

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MAR 28 2002

SURFACE
TRANSPORTATION BOARD

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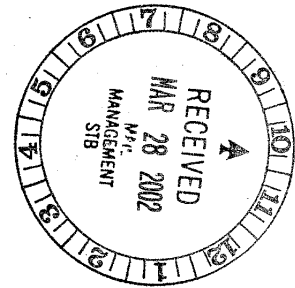
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BEFORE THE

SURFACE TRANSPORTATION BOARD

DID # 0101912001

NOM 42073



NEWELL WINDOW FURNISHINGS, INC. and NEWELL RUBBERMAID, INC.

v.

UNITED PARCEL SERVICE, INC., an Ohio Corporation, and UNITED

PARCEL SERVICE, INC. a New York Corporation

PETITION FOR DECLARATORY ORDER

AND OTHER RELIEF

ENTERED
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TRANSPORTATION BOARD

FILED

MAR 28 2002

SUB
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Dated: March 27, 2002

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

NEWELL WINDOW FURNISHINGS, INC. and NEWELL RUBBERMAID, INC.

v.

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

**PETITION FOR DECLARATORY ORDER
AND OTHER RELIEF**

Come now Petitioners, Newell Window Furnishings, Inc. and Newell Rubbermaid, Inc., including Levolor Home Fashions, a division of Newell Window Furnishings, Inc., and petition the Surface Transportation Board ("the Board") to issue a declaratory order in the above-captioned matter pursuant to the order of the United States District Court for the Northern District of Georgia, Atlanta Division, dated January 25, 2002, entered in Civil Action No. 1:01-cv-1788-GET, a copy of which is annexed hereto as **Appendix A**.

THE PARTIES

Petitioner Newell Rubbermaid, Inc. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the State of Illinois. Petitioner Newell Window Furnishings, Inc., is a corporation organized and existing under the laws of the State of Delaware with its principal

place of business in the State of North Carolina. Levolor Home Fashions is a division of Newell Window Furnishings, Inc., and manufactures and sells window blinds throughout the United States. Petitioners sometimes may collectively be referred to as "Levolor".

United Parcel Service, Inc., an Ohio corporation, is a corporation organized and existing under the laws of the State of Ohio with its principal place of business in Georgia. United Parcel Service, Inc., a New York corporation, is a corporation organized and existing under the laws of the State of New York with its principal place of business in Georgia. The foregoing corporate entities shall collectively be referred to as "UPS".

HISTORY OF THE BILLING DISPUTES

I. The Status of the Proceedings.

The billing disputes between Levolor and UPS, as described more particularly below, resulted in the filing of an informal complaint with the Board on June 8, 2001 under the provisions of 49 U.S.C. § 13710(a)(3)(B), a copy of which is annexed as **Appendix B** hereto. The complaint alleges that UPS: (a) unlawfully and wrongfully billed Levolor for transportation charges totaling approximately \$900,000; (b) violated its statutory obligation to serve the shipping public on reasonable request as required by 49 U.S.C. § 14101 when UPS discontinued its pickup service at Levolor's facilities on December 26, 2000; (c) violated the Federal Motor Carrier Safety Administration's (FMCSA) loss and damage claim regulations contained in 49 C.F.R. § 370 by withholding payment

of lawful claims in an effort to coerce Levolor into paying additional charges sought by UPS; and (d) has failed to investigate and resolve overcharges.

On the same day, UPS filed an action at law in the Superior Court of Fulton County, Georgia, Civil Action No. 2001-cv-38909 styled as United Parcel Service, Inc, et al v. Newell Window Furnishings, Inc. et al. Defendants removed the action to the United States District Court for the Northern District of Georgia, Atlanta Division, Civil Action No. 1:01-cv-1788-GET, pursuant to 28 U.S.C. §§ 1441 and 1446, where it was styled United Parcel Service, Inc., an Ohio Corporation; and United Parcel Service, Inc., a New York Corporation v. Newell Window Furnishings, Inc., a Delaware Corporation; and Newell Rubbermaid, Inc., a Delaware Corporation. Defendants answered the complaint and filed their counterclaims. **Appendix C.**

Defendants then moved to stay the lawsuit pending the Board's disposition of the informal complaint previously filed with the Board. On January 25, 2002, the Court granted Defendants' motion for a stay of the proceedings pending the Board's disposition of their informal complaint, recognizing that the Board has primary jurisdiction over the billing disputes among the parties. The Court granted the motion for a stay for a period of ninety (90) days from the date of the order, and directed the parties to report to the Court on the status of the action pending before the Board after the expiration of ninety (90) days. The Court also advised that its stay order was without prejudice to the parties' right to request additional time to stay the lawsuit at the conclusion of the ninety (90)-day period.

Subsequent to the filing of the Court's Order with the Board, Petitioners awaited receipt of a procedural order from the Board addressing their informal complaint. However, Petitioners were informed, on March 12, 2002, to file this Petition for a Declaratory Order (or a formal complaint) in lieu of proceeding with the informal complaint filed on June 8, 2001.

II. Summary of the Complaint Against UPS

A. The Billing Issues Presented by UPS' Conduct.

An explanation of the billing disputes between the parties is contained in the informal complaint filed with the STB on June 8, 2001, a copy of which is reproduced in Appendix B, and in the counterclaims filed in the lawsuit, a copy of which is reproduced in Appendix C. Briefly stated, the disputes involve the following issues within the particular province and expertise of the Board:

1. The applicability of charges sought by UPS on shipments which UPS claims that it never billed;
2. The applicability of charges on shipments that were billed "collect" by Levolor, and were accepted by UPS on those terms;
3. The applicability of an "additional handling charge" of \$5.00 per shipment that applied on shipments that exceeded sixty (60) inches in length, but were subject to a special agreement between the parties;
4. The applicability of residential delivery surcharges that were erroneously applied to shipments delivered to commercial establishments;

5. The applicability of charges double-billed by UPS for additional handling charges on shipments delivered between November 6, 2000 and June 16, 2001; and
6. The applicability of charges billed by UPS beyond the governing statutes of limitations.

Although Petitioners attempted to address these billing issues with UPS informally, UPS instead suspended service at all Levolor facilities and continued to attempt to impose incorrect and unlawful charges against Levolor, culminating with UPS' filing of a lawsuit against Levolor.

From these billing dispute issues that involve the applicability of rates and charges billed by UPS, it is clear that UPS violated a number of governing federal statutes and regulations as stated in detail below. Accordingly, Petitioners request an award of damages, pursuant to 49 U.S.C. § 14704(a)(2), including prejudgment interest and attorneys' fees as provided in 49 U.S.C. § 14704(a)(e), following a recommendation from the Board. See **Appendix D** for a summary of the damages sustained by Petitioners as a result of UPS' unlawful conduct. Petitioners also request that the Board initiate a general investigation into UPS' unlawful billing practices.

B. The Facts of the Billing Disputes.

1. The Agreements Among the Parties.

From March 1997 through December 26, 2000, Levolor utilized the services of UPS for delivery of its products to commercial and residential customers. The shipment of Levolor's products by UPS was governed by a

written agreement between the parties for the period from March 3, 1997 through October 26, 1998. Thereafter, the shipments were governed by UPS' tariff and the Guide to UPS Services, except for an agreement to charge additional handling charges on forty percent (40%) of Levolor's prepaid shipments. The forty percent (40%) agreement was reached as an estimate, based on a study of Levolor's shipments, of the percentage of packages that exceeded sixty (60) inches in length, and which would incur an "additional handling charge" of \$5.00 per package. A similar agreement was entered into between UPS and Levolor regarding its shipments consisting of product under its Kirsch brand, whereby Levolor would be billed for additional handling charges on thirty-seven percent (37%) of Kirsch brand shipments.

In accordance with the agreement between the parties, all shipments made by Levolor from its facilities in New Jersey, Illinois, Texas, North Carolina, Georgia, Arizona, Utah, Pennsylvania and California were listed on a manifest by Levolor and transmitted to UPS utilizing an electronic reporting system commissioned by UPS. Levolor accurately reported each and every package tendered to UPS and electronically transmitted its reports twice daily. UPS then was supposed to invoice Levolor for charges applying to the shipments reported on each manifest, except for shipments sent on a "collect" basis to J.C. Penney Company, Inc. ("J.C. Penney"). UPS specifically agreed to bill J.C. Penney directly, as the consignee of shipments from Levolor, and collect all charges related to such shipments from J.C. Penney, rather than from Levolor.

Levolor accordingly sent two manifests via electronic transmission to UPS each day. The first transmission would be made by Levolor's first shift when UPS' truck made its pick-up (the "First Manifest"). A second transmission was made by Levolor's second shift at the end of each day for all shipments made before midnight of each calendar day (the "Second Manifest"). The Second Manifest thus included all shipments listed on the same day's First Manifest, as well as all shipments made thereafter and before midnight.

2. The UPS Manifest Problem.

In April 2000, Levolor realized that it was not receiving invoices from UPS for every package listed on its manifests and notified UPS of the discrepancy. UPS later informed Levolor that the reason for the discrepancies was that UPS' electronic billing system was rejecting the Second Manifest as a duplicate of the First Manifest, even though the Second Manifest contained additional shipments made on the same calendar date as the shipments listed on the First Manifest. As a result, UPS had not been sending Levolor invoices for shipments made after transmission of the First Manifest.

Levolor agreed to pay for any packages that were not billed by UPS for prepaid shipments, but required documentary evidence of those shipments for verification. UPS refused, as it claimed to be unable to provide such documentation, and demanded that Levolor provide that information from its records. Levolor attempted to provide those records but was unable to do so.

3. The Collect Shipment "Additional Handling Charge" Overcharges.

UPS billed Levolor for all "collect" shipments made by Levolor to J.C. Penney on the ground that Levolor failed to make proper transmissions and, therefore, allegedly violated UPS' "Consignee Billing Brochure". Levolor refused to acknowledge liability for "collect" shipments, and denied having any knowledge of, or agreement to, any "brochure" that was not published in UPS' tariff.

In addition to being billed erroneously on the alleged improperly transmitted collect shipments to J.C. Penney, Levolor discovered, in the weekly UPS billing under the category of "Adjustments", that UPS was including the "collect" J.C. Penney shipments in the "Additional Handling Charge" assessment as well. The "Additional Handling Charge" assessment applied a \$5.00 per shipment charge on forty percent (40%) of Levolor's prepaid packages and on thirty-seven percent (37%) of Petitioners' prepaid Kirsch branded packages. Petitioners, however, unwittingly paid these "adjustments" on the "collect" J.C. Penney shipments until this billing dispute incepted, which charges were calculated by applying percentages representative of J.C. Penney traffic, to all packages shipped by Levolor within specific time periods. For the time period at issue, the charges were calculated as follows:

<u>Date Range</u>	<u>Packages Shipped</u>	<u>(J.C. Penney)</u>	<u>%</u>	<u>Over Billing</u>
7/99 to 1/00	530,173	174,957	33	\$279,931.00
2/00 to 4/00	171,550	77,198	45	\$154,395.00
5/00 to 8/00	150,289	97,688	65	\$195,375.00
9/00 to 11/4/00	66,487	43,216	65	\$216,080.00
Total				\$845,781.00

Furthermore, these erroneous billings were not detected until a detailed audit of UPS' billings was performed. Upon information and belief, UPS is continuing to attempt to impose these charges on Levolor because UPS entered into an agreement with J.C. Penney to waive these charges by providing a \$5.00 credit to J.C. Penney whenever the charges appeared on a J.C. Penney bill.

The sum of these overcharges incurred during the period from July 1999 through November 4, 2000 amounts to \$845,781.00 for the Levolor shipments only.

4. Double-billed "Additional Handling Charge" Overcharges.

Furthermore, UPS continued to levy these charges even after Levolor informed UPS that it was terminating the 40% and 37% agreements, and would indicate on its manifests when a package exceeded sixty (60) inches in length. This decision was relayed to UPS in an e-mail issued on November 15, 2000, which provided as follows: "As of Nov. 6th all Levolor facilities are assessing the additional handling function for all UPS shipments. We will no longer pay the 40% and 37% additional handling charges assessed to the Levolor and Kirsch facilities". Nevertheless, UPS continued to assess these surcharges of \$5.00 per shipment on 40% and 37% of the packages shipped by Levolor and Kirsch. In addition Levolor and Kirsch paid the \$5.00 surcharge whenever a package exceeded sixty (60) inches in length. These charges were erroneously billed to, and paid by, Petitioners against account numbers 453542 and 88649W between the dates of November 20, 2000 and June 16, 2001, and resulted in overcharges totaling \$369,129.00.

5. The Commercial v. Residential Overcharges.

Originally, Levolor attempted to identify residential customers at the time of shipping, but due to internal problems in making those determinations at the time of shipping, many shipments were incorrectly shipped as commercial shipments. These errors resulted in UPS back-billing Levolor for approximately \$800,000.00 in 1998 and \$350,000.00 in 1999. To stop these end-of-year adjustments, Levolor changed its bar coding system to default to the "residential" charge for all packages unless the shipping clerk had evidence that it was going to a commercial address. As a result, Levolor overpaid UPS on shipments that were delivered to commercial addresses, but which were incorrectly marked as residential.

Thereafter, UPS conducted an audit of Levolor's shipments from Ogden and Salt Lake City, Utah to determine those shipments that were billed as residential but which were actually consigned to commercial addresses for the time period from January 1998 through October 1998. As a result of this partial audit, the Ogden and Salt Lake City facilities received approximately \$17,000.00 in refunds.

The study, however, was never completed for the remainder of the Levolor facilities. When Levolor requested a complete audit, a representative of UPS claimed that the study was performed, and it "washed". Based on the limited UPS study results and the fact that all Levolor facilities used the same procedures to address parcels (designating them as residential unless there was evidence of a commercial address), it is obvious that the audit was not complete

as claimed. It is estimated that a complete audit of all facilities would result in a refund totaling approximately \$40,000.00.

As a result of these deficiencies and errors in UPS' electronic billing system described hereinabove, and as a result of UPS' refusal to acknowledge other errors in its billings to Levolor, UPS has created a billing dispute with Levolor by: (i) demanding payment for shipments made on a "collect" basis to J.C. Penney; (ii) billing duplicate additional handling charges to Levolor on "collect" shipments; (iii) failing to correct billing on shipments marked "residential" when delivered to a commercial establishment; (iv) refusing to credit Levolor for errors on invoices submitted by UPS; and (v) billing Levolor for shipments alleged to have been delivered, but not billed, due to missing transmissions.

Moreover, beginning on or about December 26, 2000, UPS refused to ship packages from Levolor due to a dispute over UPS' claim that Levolor owed an additional \$900,000.00 in freight charges to UPS. As a result, Levolor was forced to use another package express carrier to serve its customers, which charged higher rates. The additional costs of shipping packages between December 26, 2000 and March 25, 2001, the date on which UPS agreed to resume service, total \$122,000.00.

As a result of the foregoing conduct, Levolor has been damaged by inappropriate and wrongful billings and invoices from UPS in an amount in excess of **\$1,673,828.23**, as summarized in **Appendix D**.

UPS' STATUTORY VIOLATIONS

I. The Common Carrier Duty to Serve the Public.

UPS is a motor common carrier subject to the Interstate Commerce Act, 49 U.S.C. § 13501 *et seq.* As such, it is subject to 49 U.S.C. § 14101(a), which provides that “[a] carrier providing transportation or service subject to jurisdiction under chapter 135 *shall* provide the transportation or service on reasonable request. In addition, a motor carrier *shall* provide safe and adequate service, equipment and facilities.” (All emphasis added).

On or about December 26, 2000, UPS discontinued pick-up service at all of Levolor’s facilities without just cause. Indeed, UPS’ discontinuance of service followed its previous threats to suspend service unless Levolor paid the \$900,000 in additional charges demanded by UPS, even though such charges were not fully documented or substantiated, or timely demanded. The suspension of service by a common motor carrier for the purpose of coercing a customer into paying additional charges, most of which are time-barred, and all of which are not substantiated with appropriate documentation, is not “reasonable”, and therefore, is a violation of 49 U.S.C. § 14101.

The unreasonableness of UPS’ decision to suspend service is demonstrated by the fact that Levolor was not delinquent on any undisputed charges. At all times during the negotiations over the additional billings, Levolor agreed to pay any charges that UPS could substantiate as being packages that Levolor shipped on a prepaid basis that were not billed by UPS. Levolor also, at all times, had an excellent credit rating. UPS never stated to Levolor that its

credit rating warranted that it be placed on a "cash" basis. UPS' actions therefore constituted a clear violation of its common carrier obligation to serve the public.

Levolor has been damaged by this unwarranted and unlawful suspension of service in that it was required to ship to its customers, via alternate transportation services, at higher rates and charges. For the period from December 27, 2000 through March 25, 2001, Levolor incurred charges in excess of the cost of using UPS' services totaling at least \$122,000.

49 U.S.C. § 17404(a)(2) provides that "[a] carrier or broker providing transportation or service subject to jurisdiction under chapter 135 is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part." 49 U.S.C. § 14704(e) further provides that "[t]he district court shall award a reasonable attorney's fee under this section. The district court shall tax and collect that fee as part of the costs of the action." Consequently, UPS is liable to Levolor for all damages, prejudgment interest, attorneys' fees and costs incurred in this action (and in the lawsuit) as a result of UPS' unlawful suspension of service.

II. Loss and Damage Claim Regulations.

49 C. F. R. § 370 (formerly § 1005) governs motor carriers' loss and damage claim practices and procedures. This regulation requires claims to be acknowledged within thirty (30) days of receipt, requires claims to be "promptly and thoroughly investigated", and requires carriers to "pay, decline, or make a firm compromise settlement offer" within 120 days. If a claim cannot be disposed of within 120 days, the carrier must at that time, and every sixty (60) days

thereafter, advise the claimant, in writing, of the status of the claim and the reason for the delay in disposition.

UPS systematically ignored these regulations with respect to Levolor by failing to provide required acknowledgements in a timely fashion, by failing to dispose of Levolor's loss and damage claims within the required time frame, by failing to provide status reports with respect to delayed claims, and by suspending the processing of Levolor's claims in an effort to coerce Levolor into paying disputed charges. At the time of this writing, UPS has accumulated 2,306 unpaid claims totaling \$188,249.19 for the period from December 20, 1999 through March 18, 2002. UPS duly acknowledged only 191 of these claims, but failed to acknowledge the remainder of the claims within thirty (30) days as required by 49 C.F.R. § 370. UPS also failed to present Levolor with periodic status reports within every sixty (60) days as required by law.

Levolor has been damaged in an amount of \$188,249.19, exclusive of interest, by UPS' repeated violations of FMCSA loss and damage claim regulations in that it has been deprived of the use of these claim funds, which are being improperly detained by UPS in an effort to coerce Levolor into paying other sums wrongfully demanded by UPS as set forth herein. Levolor therefore is entitled to payment for all outstanding loss and damage claims, prejudgment interest from the dates of delivery, and all attorneys' fees and costs incurred in this action and in the lawsuit.

III. Statutes of Limitations.

49 U.S.C. § 14705(a) provides that “[a] carrier providing transportation or service subject to jurisdiction under chapter 135 must begin a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues.” 49 U.S.C. § 14705(g) states that “[a] claim related to a shipment of property accrues under this section on delivery or tender of delivery by the carrier.” Despite the clarity of these provisions, UPS has repeatedly made demands upon Levolor for the payment of charges that are time barred by 49 U.S.C. § 14705(a). Indeed, approximately half of the charges demanded by UPS were and remain time-barred by the governing statutes of limitations.

In addition, 49 U.S.C. § 13710(a)(3)(A) provides that “[a] carrier must issue any bill for charges in addition to those originally billed within 180 days of the receipt of the original bill in order to have the right to collect such charges.” (Emphasis added). UPS has continually violated 49 U.S.C. § 13710(a)(3)(A) by demanding payment from Levolor of charges that are in addition to the charges originally billed on the same shipments (e.g., residential surcharges and additional handling charges for packages in excess of sixty (60) inches in length) later than 180 days after Levolor’s receipt of the original bills.

Upon information and belief, UPS has included time-barred shipments in its claims for the purpose of inflating the amounts demanded in an effort to coerce Levolor into paying or settling said claims. UPS’ conduct in ignoring the applicable federal statutes of limitation as set forth herein has damaged Levolor

by causing Levolor to incur expenses, including attorneys' fees, to defend itself against UPS' claims for time-barred charges. Thus, UPS is liable to Levolor for damages pursuant to 49 U.S.C. § 14704(a)(2).

RELIEF SOUGHT BY PETITIONERS

I. Request for a Declaratory Order.

Petitioners hereby request that the Board conduct an investigation into the billing disputes among the parties and issue an order declaring as follows:

1. That UPS' flawed rejection of Levolor's Second Manifest reports as duplicates cannot invalidate Levolor's transmission of "collect" shipping instructions and/or support any alleged obligation to pay said charges;
2. That UPS owes Petitioners the sum of \$845,781.00 for per shipment charges incorrectly imposed on "collect" shipments made to J.C. Penney;
3. That UPS owes Petitioners the sum of \$369,129.00 for duplicate additional handling charges imposed during the period from November 20, 2000 and June 16, 2001;
4. That UPS is required to conduct an audit of all Levolor shipping locations to determine the amount of overcharges for shipments erroneously billed as residential and, immediately thereafter, account for all such overcharges;
5. That UPS systematically back-billed and overcharged customers by improperly assessing residential delivery surcharges, additional

handling charges, oversized shipment surcharges, erroneous correction of address surcharges and the like;

6. That UPS has unlawfully held \$188,249.19 of funds owed to Petitioners by failing to properly dispose of loss and damage claims submitted by Levolor;
7. That UPS violated FMCSA Loss and Damage Claim Regulations set forth in 49 C.F.R. § 370 by automatically denying claims for damage on the ground that the package was "inadequate" or "insufficient", without conducting an investigation into the facts relating to the shipment;
8. That UPS has ignored, and is continuing to ignore, applicable statutes of limitations when billing customers for original charges that it failed to bill within 18 months (pursuant to 49 U.S.C. § 14705) and when issuing bills for additional charges that it failed to bill within 180 days (pursuant to 49 U.S.C. § 13710 (a)(3)(A));
9. That UPS violated 49 U.S.C. § 14101 by using the threat of discontinuing service to coerce shippers into paying unsubstantiated additional bills for charges alleged to be due UPS; and
10. That UPS owes Petitioners the sum of \$122,000.00 in additional charges incurred by Levolor, which sum represents the difference between UPS and Fed Ex Ground charges on J.C. Penney shipments.

Petitioners reserve the right to amend and add to the relief requested herein as this matter proceeds and as facts develop during discovery.

II. Damages, Attorneys' Fees and Expenses.

Common carriers are liable for damages caused by their violation of federal statutes pursuant to 49 U.S.C. § 14704(a)(2). In addition, a court may award reasonable attorneys' fees as part of the costs of the action pursuant to 49 U.S.C. § 14704(e). Accordingly, Levolor respectfully requests that the Board recommend, as part of its decision, that the Court award damages, prejudgment interest and reasonable attorneys' fees and costs to Levolor as compensation for UPS' repeated violations of law. Annexed hereto, as **Appendix D**, is a summary of Levolor's damages incurred to date, which totals no less than **\$1,673,828.33** as of this filing.

III. General Investigation into UPS' Billing Practices.

UPS' practices displayed in this proceeding and in other instances¹ clearly reveal a corporate policy of ignoring applicable federal statutes and regulations governing common motor carriers, particularly with respect to UPS' duty to serve the public, duty to dispose of loss and damage claims in a timely fashion, duty to submit claims that fall only within governing statutes of limitations, and duty to address and dispose of overcharge claims. Based on the actions reported herein and elsewhere, it is apparent that UPS is taking advantage of the shipping public by submitting unsupported billings, many of which are time-barred, long after the

¹ See, e.g., *Beer Nuts, Ltd. d/b/a/ Hogs Head Beer Cellars v. United Parcel Service, Inc.*, Civil Action File No. 1:00CV00531, United States District Court for the Middle District of North Carolina, Greensboro Division wherein the plaintiff alleged that UPS cut-off its service due to plaintiff's refusal to pay a bill for additional charges totaling \$191,283. The amount sought was alleged to be for residential deliveries, and for packages delivered, but not billed. However, UPS reportedly was unable to identify those packages that were not billed. See also the complaint filed with Connecticut Attorney General Richard Blumenthal in October 2000 alleging that UPS systematically and fraudulently overbilled customers for residential deliveries and threatened to cut-off service if its bills for these charges were not paid.

fact, and is coercing payment by threatening to discontinue service. On information and belief, these improper tactics have been successful due to UPS' dominant position in the package express industry and shippers' corresponding fear of having their nationwide package distribution systems disrupted. These tactics particularly are effective when used by UPS against shippers of unequal economic stature and commercial awareness.

Levolor thus requested in its informal complaint (Appendix B) that the Board institute a general investigation into these allegations. Levolor renews this request herein, and respectfully submits that such an investigation should be initiated, pursuant to 49 U.S.C. § 14701(a), for the purpose of determining whether:

1. UPS is violating 49 U.S.C. § 14101 by using the threat of discontinuing service to coerce shippers into paying unsubstantiated additional bills for charges alleged to be due UPS;
2. UPS is systematically violating FMCSA Loss and Damage Claim Regulations set forth in 49 C.F.R. § 370 by automatically denying claims for damage on the ground that the package was "inadequate" or "insufficient", without conducting an investigation into the facts relating to the shipment²;

² The following UPS tariff rule illustrates UPS' unreasonable attempt at justifying its declinations for damaged packages: Item 535 "UPS will not be responsible for the loss of or damage to . . . improper, inadequate, or unsafe packaging or wrapping that fails to meet UPS' published standards related thereto set forth this UPS Tariff or elsewhere." (Emphasis added). Item 537 contains the same provision on shipments for which the customer purchases a "shipper's interest insurance policy", but UPS processes all claims under the insurance policy.

3. UPS is systematically back-billing and overcharging customers by improperly assessing residential delivery surcharges, additional handling charges, oversized shipment surcharges, erroneous correction of address surcharges and the like; and
4. UPS has ignored, and is continuing to ignore, applicable statutes of limitations when billing customers for original charges that it failed to bill within 18 months (pursuant to 49 U.S.C. § 14705) and when issuing bills for additional charges that it failed to bill within 180 days (pursuant to 49 U.S.C. § 13710 (a)(3)(A)).

Accordingly, Levolor respectfully requests that the Board's Office of Compliance and Enforcement intervene as a party in this proceeding and conduct an independent investigation into UPS' practices complained of herein.

IV. Suggested Procedural Schedule Going Forward.

Levolor respectfully suggests that the Board issue a procedural order that allows: (a) the parties to conduct and complete discovery during the 120 day period commencing with the issuance of its procedural order, subject to the parties' need for additional time, if any, within which to complete discovery; (b) directs Petitioners to file their opening statement within 30 days of the completion of discovery; (c) directs Respondents to file their reply within 30 days of the filing of Petitioners' opening statement; and (d) allows Petitioners to file their rebuttal statement within 15 days of Respondents' filing of their reply. Annexed hereto as **Appendix E** is Petitioners' initial discovery requests issued to Respondents.

This the 27th day of March, 2002.

Respectfully Submitted,

William J. Augello / HMP
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OF COUNSEL:

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Attorneys for Petitioners Newell Window
Furnishings, Inc. and Newell
Rubbermaid, Inc.

A

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

FILED
JAN 25 2002

JAN 25 2002

LUTHER D. THOMAS, CLERK
By: MD
Deputy Clerk

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.

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).

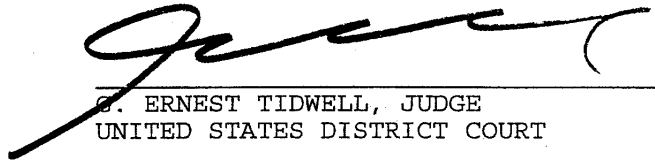
Moreover, the parties' Joint Preliminary Planning Report and Scheduling Order states that the factual issues in this case are "exceptionally complex" and that this case contains "highly technical issues and proof." Therefore, the Board's "special competence" in determining issues of rate applicability 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

B

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OF COUNSEL TO
AUGELLO, PEZOLD
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June 8, 2001

Mr. Lawrence C. Herzig, Chief
Section of Tariffs, Rates and Informal Cases
Surface Transportation Board
1925 K Street N.W.
Washington, D.C. 20423

Re: Levolor Home Fashions vs. United Parcel Services

Dear Mr. Herzig:

This is a request that the Board determine the applicability of charges originally billed and additional charges subsequently billed to Levolor by United Parcel Service, Inc. (UPS) under the provisions of 49 U.S.C. § 13710(a)(3)(B). In addition, this complaint relates violations of 49 U.S.C. § 14101 (obligation to serve the public), the Board's loss and damage claim regulations in 49 C.F.R. § 1005 and the Board's regulations in 49 C.F.R. § 378 relating to overcharges.

Enclosed is payment of the filing fee of \$150.

INTRODUCTION

Levolor Home Fashions is a division of The Newell Company with plants in New Jersey, Illinois, Texas, North Carolina, Georgia, Arizona, Utah, Pennsylvania and California. In 1999, Levolor shipped approximately 1.4 million packages via UPS at a cost of approximately \$9.3 million. One half of the shipments were to commercial addresses, and the other half were delivered to residential addresses for which UPS charged an extra fee of \$1 per shipment. All UPS shipments were manifested on an electronic reporting system due to the large number of daily shipments, and were electronically transmitted to UPS at the end of each day. When shipments arrived damaged or were not delivered, loss and damage claims were filed for up to \$100 per package which is UPS' tariff limitation of liability.

Beginning in June 1998, UPS began billing Levolor for residential surcharges on shipments it believed to be residential addresses, which were disputed by Levolor. In May 1999, UPS began to bill Levolor for shipments that it alleged were not previously billed. Levolor demanded that each of the bills be substantiated by UPS, as required by the Board's regulations, but UPS failed to provide documentary or electronic proof of these alleged shipments until February 17, 2000. The total

amount demanded by UPS for shipments up to and including June 2000 is \$891,299.62. A substantial amount of these additional billings, (totaling \$558,745) are for shipments that moved more than 180 days after the original billings were presented, or more than 18 months after shipment, and, therefore, are time-barred.

UPS demanded payment of the aforesaid amount despite Levolor's repeated position that many of the charges were owed by JC Penney, to whom Levolor shipped "collect". Levolor also informed UPS that the documentation presented by UPS was incomplete in that many of the shipments lacked tracking numbers, and, therefore, it was unable to verify the charges sought. UPS responded by demanding that Levolor produce evidence of its shipments through the electronic manifesting system used by Levolor named "Powership System", which is provided by Federal Express. UPS wanted Levolor to obtain a file containing only UPS shipments between February, March and April, 2000 for the sole purpose of determining which shipments it delivered to JC Penney to facilitate its billing that company. Levolor requested Federal Express to produce such a record for UPS. Federal Express produced a file that was capable of being transmitted electronically for the three-month period of February-March-April, 2000 at its great expense. UPS then demanded that Levolor produce the same file for the balance of year 2000, but Federal Express was extremely reluctant to devote any additional resources to produce this information due to the substantial expense of producing reports in that form. UPS demanded a report in electronic form for the balance of year 2000, but Levolor was unable to compel Federal Express to generate reports in the form requested by UPS.

In view of Levolor's refusal to pay UPS the amount demanded, UPS suspended its services at all Levolor locations effective December 27, 2000.

In an attempt to resolve the differences between the two parties held a meeting in Chicago on March 20, 2001. UPS presented a chart listing the amounts alleged to be due for the period October 1999 through December 2000. UPS claimed to have deleted all shipments that were time-barred by 49 U.S.C. § 13710 and 49 U.S.C. § 14705. UPS also provided its analysis of the 2391 pending loss and damage claims. Levolor provided supporting documentation for these 2391 claims to U.P.S. on Feb. 26, 2001. The two parties also discussed the reasons for the alleged balance due bills and UPS' suspension of service on December 26, 2000.

No decision was reached on UPS's financial demands as Levolor representatives immediately recognized discrepancies in the data provided by U.P.S. U.P.S. also required additional claims data in order to conclusively determine its claims liability.

At the conclusion of the meeting, Levolor agreed to voluntarily toll the statutes of limitations until June 7, 2001 in return for the resumption of U.P.S. service to Levolor for J.C. Penney's collect shipments. Levolor also agreed to install the U.P.S. Worldship manifest system in all facilities. In addition, Levolor agreed to insist that Federal Express reconstruct all of the available shipment data residing on its systems that was formally requested by U.P.S. Federal Express was able to recreate all requested shipment data except for the Ogden, Utah and South Holland Illinois facilities. That information was not available due to an upgrading of the computer in Ogden and the closure of the South Holland facility.

During the year 1999, Levolor made numerous corrections to UPS invoices due to a variety of errors, such as double billing, duplicate billing of additional handling charges, and consignee billing errors. UPS made manual corrections to invoices prior to sending to Levolor. Several months later UPS discontinued making these corrections stating that it required too much management time and resources to do so. UPS then resumed its incorrect billing practices and refused to make any further corrections requested by Levolor.

Subsequent to the March 20th meeting, U.P.S. requested Levolor to provide line-by-line detail of the deductions taken by Levolor from the amounts listed on the statement or "Time Line" prepared by U.P.S. Levolor detailed the deductions taken despite repeated prior requests to U.P.S. to correct the billing. The "Time Line" then provided the detailed information necessary for both parties to verify the validity of the amounts demanded by U.P.S. U.P.S. reviewed the data and then informed Levolor that it had previously credited Levolor for these deductions on invoices other than those specified on the "Time Line". U.P.S. explained that it applied the credits to other invoices to make its receivables report look better.

As a result of this action, Levolor is unable to verify the credits that are alleged to have been applied for its account or to determine if they had been applied to time-barred shipments.

ALLEGED VIOLATIONS OF FEDERAL LAW

1. By billing Levolor for shipments alleged to be made more than 18 months after the date of tender to UPS, it has intentionally ignored the 18-month statutory limitation of liability provided in 49 U.S.C. §14705. By billing Levolor for additional charges more than 180 days after the original charges were billed, UPS has intentionally violated the time limit specified in 49 U.S.C. § 13710. Thus, UPS was billing and demanded payment of charges totaling \$558,745 that was not lawfully due it from Levolor. Nevertheless, UPS attempted to coerce Levolor into paying the sums demanded by threatening to discontinue serving Levolor's shipping locations. When Levolor refused to pay the sums demanded without substantiating records, UPS discontinued serving Levolor on December 27, 2000.

Billing shippers for charges beyond the statutory time limits appears to be UPS' corporate policy. In view of the fact that most of its customers are small, unsophisticated shippers, UPS apparently believes that most shippers will not be aware of these time constraints, and will pay these charges to avoid its threats to discontinue service.

2. As of March 20, 2001, UPS had accumulated an outstanding balance of loss and damage claims totaling \$197,558.51, in violation of the Board's regulation, which appears to have been a further attempt to coerce Levolor into paying the sums demanded by UPS. Of this total, claims totaling \$157,347.54 had not been issued an LDI number by UPS despite the Board's regulation requiring claims to be acknowledged within 30 days of their receipt. 49 C.F.R. § 1005. Nor is UPS disposing of Levolor's claims within 120 days, or giving it a status report every 60 days as required by these regulations.

In an attempt to expedite the resolution of outstanding claims, Levolor, on February 26, 2001, copied and sent documentation to U.P.S. in support of 2391 claims. On March 23, 2001 at the request of U.P.S., Levolor re-copied and sent documents in support of 2319 claims. On June 1, 2001 U.P.S. responded to our claims disposition request by indicated that it had analyzed 257 claims and that would not provide any further disposition of claims as it desired to include the outstanding claims in settlement negotiations.

UPS' practice of holding outstanding loss and damage claims hostage to coerce shippers into paying disputed charges is clearly a violation of the governing claim regulations:

APPLICABILITY OF TARIFF CHARGE ISSUES

The issues in dispute fall into several categories:

1. Liability for "Collect" shipments.
2. Applicability of "additional handling charges" for oversized shipments.
3. Applicability of residential delivery surcharges.
4. Offsetting the amounts owed on pending loss and damage claims.

Levolor's position on each of these issues follows:

1. Liability for "Collect" shipments.

Levolor manufactures a substantial amount of product for J.C. Penney, the terms of which are "freight collect". UPS contends that Levolor failed to comply with its tariff conditions for accepting collect shipments in that it did not properly transmit "package level detail" (PLD) information for many of its shipments. When UPS determined that a shipment was delivered but not billed, it billed Levolor for these shipments even though many were shipped "collect", for which the consignee is liable. However, UPS has refused to seek these charges from JC Penney, contending that its "collect" billing tariff rule is not applicable to Levolor's shipments if PLD information is improperly transmitted.

Levolor's rebuttal is that it properly transmitted all shipment information to UPS in package level detail as required. UPS' failure to receive that PLD information was due to its internal system's rejection of PLD transmissions after 5 PM. These rejections occurred after Levolor began sending two PLD files to U.P.S. in the course of one day. One would be sent at approximately 5:00 P.M. when the local U.P.S. driver arrived to pickup the day shift's shipments, and the second one just before midnight when Levolor ended its second shift. This practice was initiated to accommodate UPS' operations because it was unwilling to pick up Levolor's packages at the end of Levolor's second shift which ended at midnight. To assure that all packages shipped on a calendar day were billed as shipped that day, Levolor was forced to transmit two reports daily to UPS listing all of the shipments tendered for UPS' pickup on that date.

U.P.S. concurred with this practice for several months but was not aware of the fact that its system was rejecting the midnight transmission as a duplicate. U.P.S.' system read the midnight report as a duplicate of the 5:00 PM transmission due to the fact that the UPS module in the system automatically assigns the same pickup record number to all

shipments picked-up on the same calendar day. In April, 2000, Levolor voluntarily brought this malfunction to the attention of U.P.S. As a result, UPS began to issue bills for the shipments it improperly rejected as duplicates.

Levolor agreed to pay these bills until it noted that they contained numerous "collect" shipments to JC Penney, for which it was not liable. Levolor refused to pay for any "collect" shipments. UPS then requested of Levolor a "disc" file of all UPS shipments from which it could extract JC Penney shipments. According to an E-mail message from UPS to Levolor dated December 6, 2000, the purpose of this request was to bill JC Penney for these shipments.

Levolor estimates that approximately 1/3 of these bills are for JC Penney shipments, but UPS claims that it can not determine from its records the identity of consignees, despite the fact that it delivered shipments to these consignees. Levolor has reconstructed its available PLD information requested by UPS. After analysis, UPS has advised that it can identify only \$55,000 in charges that it can bill JC Penney, and therefore, demands that Levolor pay the balance. However, to this date, UPS has never presented Levolor with an itemized statement of account alleged to be due in a form that can be verified.

Levolor submits that under the circumstances, it did not violate the terms' of UPS' tariff governing "collect" shipments, and, therefore, the charges billed on J C Penney shipments are not Levolor's responsibility.

2. Applicability of "additional handling charges" for shipments over 60".

UPS and Levolor entered into an agreement whereby a surcharge of \$5.00 for handling packages in excess of 60 inches in length would be assessed on 40% of Levolor's shipments rather than requiring Levolor to identify each oversized package. This percentage figure was determined by studying shipment records during normal shipping patterns. Pursuant to this agreement to pay \$5.00 per shipment on 40% of all shipments, Levolor has been billed for, and has paid a total of \$629,701 on JC Penney's shipments, for which Levolor was not liable because they were shipped "collect".

Levolor contends that the compelling reason for UPS' seeking payment of the \$5.00 additional handling charges from Levolor rather than JC Penney is that UPS offsets the additional handling charges for J C Penney shipments over 60" with an "Incentive Credit" of \$5.00.¹ Since UPS can not collect this \$5.00 charge from JC Penney, it is attempting to coerce Levolor into paying it by claiming a violation of its tariff terms for "collect" shipments. Levolor has not violated the tariff terms for "collect" shipments to JC Penney, and therefore, UPS is indebted to Levolor in the amount of \$629,701 for the period beginning July 1999 to August 2000, and \$248,752 for the period September 1, 2000 to November 4, 2000, a total of \$878,453.

3. Applicability of residential delivery surcharges.

U.P.S. billed Levolor for commercial shipments billed as residential shipments, which Levolor subsequently paid in 1998. The shipments occurred between the time periods of January, 1998 through approximately October, 1998. But the UPS' local representative in Ogden later conducted an audit that resulted in a \$17,000 refund to Levolor for

¹ UPS also gives J C Penney an "Incentive Credit" of \$1.50 to offset its "Delivery Area Surcharge".

commercial shipments originating from Ogden and Salt Lake City, UT that were erroneously charged a residential surcharge. Levolor then requested that a similar audit be conducted of all of its other shipping locations.² UPS' National Account Representative informed Levolor that his findings indicated that his audit of these facilities "washed", without further explanation or documentation. An audit of Levolor's other shipping locations was obviously not conducted by UPS despite the representation that such an audit was performed.

Based on the Ogden study's results, Levolor estimates that if UPS were to conduct an audit of all of Levolor's other shipping locations, UPS would owe Levolor approximately \$40,000. Levolor insists that its method of distinguishing residential from commercial shipments was identical in all Levolor facilities, and, therefore, if overcharges in residential charges were found at Ogden and Salt Lake City, they will undoubtedly be found at its other facilities.

UPS' failure to conduct an audit of all of Levolor's shipping locations after having discovered overcharges at the Ogden and Salt Lake City facilities as required by 49 C.F.R. § 378 is unlawful. That section requires carriers to "promptly initiate an investigation" when it discovers an overcharge that has not been the subject of a claim. In this case, UPS only conducted a partial audit (two out of eleven of Levolor's shipping locations) and deliberately misinformed Levolor that it had audited all of its other shipping locations.

4. Offsetting the amounts owed on pending loss and damage claims.

Levolor has timely filed loss and damage claims with UPS' local field offices. UPS paid Levolor for properly documented claim until the billing dispute escalated. Thereafter, UPS drastically reduced the processing and payment of Levolor's claims and accumulated a total of \$246,000 of unprocessed claims through September 24, 2000. On that date, UPS' representative in Chicago released the processing of Levolor's claims function to the local UPS field offices in anticipation of a meeting the next day between officials of UPS and Levolor.

The Salt Lake City UPS office was experiencing difficulty processing Levolor's large volume of requests for LDI numbers, which UPS assigns to each claim determined by them to be valid. Levolor was approached by UPS at a meeting in Ogden and asked to hold up the filing of damage notification forms until it resolved a problem being experienced with duplicate LDI numbers. Levolor was also requested to refer all future requests for LDI numbers to the UPS office in Chicago. UPS explained that it believed that Levolor's Ogden office was submitting claims information to UPS simultaneously with claims from customer service centers or customers on the same shipments. Therefore, Levolor withheld filing requests for LDI numbers for a period of 2-3 weeks.

Levolor later informed UPS that it was not receiving UPS' claims acknowledgement forms containing an LDI number. UPS responded that it was not receiving claims information from any other source, only from Levolor's Ogden office, and that that information was generating acknowledgement forms with an LDI number. UPS then instructed Levolor to begin re-sending damage notification forms to UPS to obtain an LDI number. When those forms were sent, UPS contended that the salvage was not available for pickup by UPS. However, upon Levolor's inquiry to

² Athens, GA; Bisbee, AZ; High Point, NC; Houston, TX; Rockaway, NJ; Shamokin, PA; South Holland, IL; Waco, TX; Westminster, CA.

10 consignees selected at random, it was revealed that UPS has not made one attempt to pick up salvage, as required by the Board's regulations. Therefore, UPS did not process the claims, nor did they disallow them in writing as required by the Board's regulations at 49 C.F.R. §1005 and by 49 U.S.C. §14706(e)(2)(A).

As a result of following UPS' instructions to send all claims information to its Chicago office, that office became overwhelmed with Levolor claims. When Levolor inquired as to the reason for the delay in processing its claims, UPS' representative responded to the effect that the processing of LDI numbers was not her priority and that she would process only those LDI numbers for which she had time. Levolor was also told by a UPS national account representative that UPS was collecting data and that they would not instruct their business managers to pickup salvage as the salvage would not be available because the claims were "too old".

Levolor assumes from the foregoing facts that UPS is making no effort to investigate or pay these claims.

To date, UPS has outstanding claims from Levolor totaling \$186,773.41. No LDI number has been issued on claims totaling \$162,307.02. UPS is, therefore, in violation of the Board's regulations in 49 U.S.C. §1005 requiring acknowledgement of all claims within 30 days and payment, settlement or declination, in writing or electronically, within 120 days of receipt. Nor has UPS given Levolor its reason for failing to conclude these claims at the end of each 60-day period as required by these regulations.

UPS's loss and damage claims policy and practice in this case has a direct bearing on the instant complaint regarding the applicability of rates and charges as UPS is using its outstanding claims balance to coerce Levolor into paying invalid charges, much of which have been time-barred.

REQUEST FOR FINDINGS

After investigation of the matters complained of herein, the Board is respectfully requested to find that:

1. UPS' internal system's rejection of Levolor's midnight PLD reports as duplicates does not invalidate Levolor's transmission of "collect" shipping instructions, and, therefore, Levolor is not liable for "collect" shipment charges.
2. UPS owes Levolor \$878,453 for the \$5.00 per shipment additional handling charges billed to and paid by Levolor on "collect" shipments to JC Penney.
3. UPS is legally required to conduct an audit of all of Levolor's shipping locations to determine the amount of overcharges owed to Levolor on shipments erroneously billed as "residential", pursuant to 49 C.F.R. § 378.
4. UPS has unlawfully held \$186,773.41 in loss and damage claims hostage in an attempt to coerce Levolor into paying undocumented charges and alleged undercharges, much of which have been time-barred, in violation of 49 U.S.C. § 14706 and 49 C.F.R. § 1005.
5. UPS unlawfully suspended service to Levolor's facilities in an attempt to coerce Levolor into paying undocumented charges and alleged undercharges, much of which were time-barred, in violation of 49 U.S.C. §14101.

6. Levolor is not liable for charges that are time-barred by 49 U.S.C. § 13710 or § 14705.

Furthermore, it is respectfully requested that the evidence submitted herein be referred to the Office of Compliance and Enforcement for an investigation into UPS' policies and practices with regard to assessing additional charges, overcharging, overbilling and erroneous billing, improper loss and damage claims administration and threatening to suspend service to coerce customers into paying time-barred, improper, undocumented and inapplicable charges. Recent trade press articles report similar charges have been made against UPS by other shippers, and, therefore, there is reason to believe that these practices are not confined to Levolor's account.

Expeditious Handling of this complaint is requested for the reason that Levolor is incurring financial injury daily as a result of UPS' unlawful practices.

Respectfully Submitted,

William J. Augello,
Attorney for Levolor
11520 North Palmetto Dunes
Tucson, AZ 85737
(520) 531-0203

Cc: Office of Compliance and Enforcement

C

DUPLICATE

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

FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta

JUL 13 2001

UNITED PARCEL SERVICE, INC.,)
an Ohio corporation, and)
UNITED PARCEL SERVICE, INC.,)
a New York corporation,)

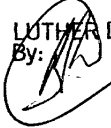
Plaintiffs,)

v.)

NEWELL WINDOW FURNISHINGS, INC.,)
a Delaware corporation; and)
and NEWELL RUBBERMAID, INC.,)
a Delaware corporation,)

Defendants.)

Civil Action File No.
1:01-CV-1788

LUTHER D. THOMAS, Clerk
By:  Deputy Clerk

DEFENDANTS' ANSWER AND AFFIRMATIVE DEFENSES
TO COMPLAINT AND COUNTERCLAIM

Defendants Newell Window Furnishings, Inc., and Newell Rubbermaid, Inc., by and through their undersigned attorneys, answering the allegations of the Complaint, state as follows:

1.

Defendants admit the allegations contained in Paragraph 1.

2.

Defendants admit the allegations contained in Paragraph 2.

3.

Defendants admit the allegations contained in Paragraph 3.

4.

Defendants admit the allegations contained in Paragraph 4.

5.

Defendants admit the allegations contained in Paragraph 5.

6.

Defendants admit the allegations contained in Paragraph 6.

7.

Defendants admit that UPS provided such services, admit that the parties had entered into a written contract entitled "Newell Company/UPS Ground Incentive Program Contract Carrier Agreement" (hereinafter the "Agreement"), a true and correct copy of which is attached to the Complaint as Exhibit A, defendants allege that the provisions of the Agreement speak for themselves, and defendants deny the remaining allegations contained in Paragraph 7.

8.

Defendants admit the Agreement contains the language that is quoted in Paragraph 8.

9.

Defendants admit the Agreement contains the language that is quoted in Paragraph 9.

10.

Defendants are without knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 10 regarding what UPS may or may not do "routinely." Further answering, defendants admit that UPS has a Guide that contains the language "Additional Handling Charge, as stated on the current rate chart, will be assessed for the transportation of . . . [a]ny package that exceeds 60 inches in length," and that an excerpt from a Guide to UPS Services is attached to the Complaint as Exhibit B.

10.

(Duplicate)

Defendants admit that Newell wanted to avoid the time-consuming and labor-intensive process of measuring every shipped package, and deny the remaining allegations contained in (duplicate) Paragraph 10.

11.

Defendants admit that the Agreement contains the language quoted in Paragraph 11, allege that the provisions of the Agreement speak for themselves, and defendants deny the remaining allegations contained in Paragraph 11.

12.

Defendants admit that the parties entered into an Addendum to the Agreement, a true and correct copy of which is attached to the Complaint as Exhibit C, allege that the Addendum speaks for itself, defendants deny the remaining allegations contained in Paragraph 12.

13.

Defendants allege that the Addendum speaks for itself, and deny the remaining allegations contained in Paragraph 13.

14.

Defendants admit the allegations contained in Paragraph 14.

15.

Defendants deny the allegations contained in Paragraph 15, and allege that the Termination Letter speaks for itself.

16.

Defendants admit that Exhibits E and F to the Complaint are what they purport to be. The remaining allegations contained in Paragraph 16 purport to state conclusions of law as to which no answer is required, except that to the extent an answer is required, Defendants deny that the Consignee Billing Brochure governed the rights and obligations of the parties.

17.

Defendants admit that Exhibit E contains the language quoted in Paragraph 17, allege that Exhibit E speaks for itself, and defendants deny the remaining allegations contained in Paragraph 17.

18.

Defendants admit that Exhibit E contains the language quoted in Paragraph 18, allege that Exhibit E speaks for itself,

and defendants deny the remaining allegations contained in Paragraph 18.

19.

Defendants admit that Exhibit B contains the language quoted in Paragraph 19, allege that Exhibit B speaks for itself, and defendants deny the remaining allegations contained in Paragraph 19.

20.

Defendants admit that Exhibit F contains the language quoted in Paragraph 20, allege that the Tariff speaks for itself, and defendants deny the remaining allegations contained in Paragraph 20.

21.

Defendants deny the allegations contained in Paragraph 21.

22.

Defendants admit the allegations contained in Paragraph 22.

23.

Defendants admit that Exhibit G contains the language quoted in Paragraph 23, allege that Exhibit G speaks for itself, and defendants deny the remaining allegations contained in Paragraph 23.

24.

Defendants admit that Exhibit G contains the language quoted in Paragraph 24, allege that Exhibit G speaks for itself,

and defendants deny the remaining allegations contained in Paragraph 24.

25.

Defendants are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in Paragraph 25, as the purported "applicable UPS Rate Chart" is not attached to or quoted in the Complaint.

26.

Defendants admit that UPS invoiced Levolor Home Fashions ("Levolor"), a division of Newell Window Furnishings, Inc., for shipping services, and defendants deny the remaining allegations contained in Paragraph 26.

27.

Defendants admit that Levolor prepared its own daily shipping manifests. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 27.

28.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 28.

29.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 29.

30.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 30.

31.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 31.

32.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 32.

33.

Defendants deny the allegations contained in Paragraph 33.

34.

Defendants deny the allegations contained in Paragraph 34.

COUNT I - BREACH OF CONTRACT

35.

Defendants incorporate their answers to the allegations contained in paragraphs 1 through 34 of this Answer as if set forth verbatim herein.

36.

The allegations contained in Paragraph 36 purport to state conclusions of law as to which no answer is required; to the extent that Paragraph 36 includes allegations of fact as to which the Federal Rules of Civil Procedure require an answer, defendants deny such allegations.

37.

Defendants deny the allegations contained in Paragraph 37 for the reasons set forth more fully in defendants accompanying Counterclaim, the allegations of which are incorporated herein by reference.

38.

Defendants deny the allegations contained in Paragraph 38.

COUNT II - BREACH OF IMPLIED CONTRACT

39.

Defendants incorporate their answers to the allegations contained in paragraphs 1 through 34 of this Answer as if set forth verbatim herein.

40.

The allegations contained in Paragraph 40 purport to state a conclusion of law as to which no answer is required; to the extent that Paragraph 40 includes allegations of fact as to which the Federal Rules of Civil Procedure require an answer, defendants deny such allegations.

41.

The allegations contained in Paragraph 41 purport to state conclusions of law as to which no answer is required; to the extent that Paragraph 41 includes allegations of fact as to which the Federal Rules of Civil Procedure require an answer, defendants deny such allegations.

42.

Defendants deny the allegations contained in Paragraph 42 for the reasons set forth more fully in defendants' accompanying Counterclaim, the allegations of which are incorporated herein by reference.

43.

Defendants deny the allegations contained in Paragraph 43.

COUNT III - QUANTUM MERUIT AND UNJUST ENRICHMENT

44.

Defendants incorporate their answers to the allegations contained in paragraphs 1 through 34 of this Answer as if set forth verbatim herein.

45.

Defendants admit that they have benefitted from certain shipping services rendered by UPS, and that they have accepted certain shipping services rendered by UPS; defendants deny that they have benefitted from and accepted all shipping services rendered by UPS.

46.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 46.

47.

Defendants deny the allegations contained in Paragraph 47.

48.

Defendants deny the allegations contained in Paragraph 48.

49.

Defendants deny the allegations contained in Paragraph 49.

50.

Defendants deny the allegations contained in Paragraph 50.

AFFIRMATIVE DEFENSES

1.

Some or all of the Counts of Plaintiffs' Complaint failed to state a claim upon which relief may be granted.

2.

The Plaintiffs' claims should be stayed or dismissed in light of a prior pending action filed by Defendants on June 8, 2001 with the federal Service Transportation Board.

3.

The Plaintiffs' claims should be stayed or dismissed because the federal Service Transportation Board has primary jurisdiction over the claims and counterclaims asserted herein.

4.

Some or all of Plaintiffs' claims are barred by the doctrine of laches.

5.

Some or all of Plaintiffs' claims are time-barred by the applicable statute of limitations.

6.

Some or all of Plaintiffs' claims are barred by the doctrines of estoppel and/or waiver

7.

Defendants are entitled to set-offs in excess of any amounts found to be properly due to Plaintiffs.

WHEREFORE, defendants pray that judgment be entered in their favor and against plaintiffs on each count of the Complaint, dismissing the Complaint with prejudice, and that defendants be awarded their costs incurred herein and such other and further relief as the Court deems just and proper.

JURY DEMAND

Defendants demands a jury trial on all claims and matters as to which they are entitled to a jury trial.

COUNTERCLAIM

For their counterclaim against United Parcel Service, Inc., an Ohio corporation, and United Parcel Service, Inc., a New York

corporation, Newell Window Furnishings, Inc., and Newell Rubbermaid, Inc. (subject to and without waiving their right to pursue these claims as previously filed with the Surface Transportation Board, which has primary jurisdiction of the counterclaims set forth herein), state as follows:

1.

Counterclaim plaintiff Newell Rubbermaid, Inc. is a corporation organized and existing under the laws of the state of Delaware with its principal place of business in the state of Illinois. Counterclaim plaintiff Newell Window Furnishings, Inc., is a corporation organized and existing under the laws of the state of Delaware with its principal place of business in the state of North Carolina. Levolor Home Fashions is a division of Newell Window Furnishings, Inc. (the Counterclaim Plaintiffs herein shall be referred to collectively as "Levolor"). Levolor manufactures and sells window blinds throughout the United States.

2.

United Parcel Service, Inc., an Ohio corporation, is a corporation organized and existing under the laws of the State of Ohio with its principal place of business in Georgia. United Parcel Service, Inc., a New York corporation, is a corporation organized and existing under the laws of the State of New York with its principal place of business in Georgia. (The foregoing

corporate entities are hereinafter referred to collectively as "UPS").

3.

From March 1997 through December 26, 2000, Levolor utilized the services of UPS with the delivery of its products to commercial and residential customers. The shipment of Levolor's products by UPS was governed by a written agreement between the parties for the period from March 3, 1997 through October 26, 1998. Thereafter, the shipments were governed by UPS' tariff and the Guide to UPS Services, except for an agreement to charge additional handling charges on forty percent (40%) of the shipments for which Levolor is liable.

4.

Beginning on or about December 26, 2000, UPS refused to ship packages from Levolor due to a dispute over UPS' claims that Levolor owed an additional \$900,000.00 in freight charges to UPS.

5.

In accordance with the agreement between the parties, all shipments made by Levolor from its facilities in New Jersey, Illinois, Texas, North Carolina, Georgia, Arizona, Utah, Pennsylvania and California were listed on a manifest by Levolor and transmitted to UPS utilizing an electronic reporting system commissioned by UPS. Levolor accurately reported each and every

package tendered to UPS and electronically transmitted its reports twice daily to UPS.

6.

UPS then was supposed to invoice Levolor for charges applying to the shipments reported on each manifest, except for shipments sent on a "collect" basis to J.C. Penney Company, Inc. UPS had agreed to bill J.C. Penney Company, Inc. as the consignee of shipments from Levolor and to collect all charges related to such shipments from J.C. Penney Company, Inc. rather than from Levolor.

7.

Levolor sent two manifests via electronic transmission to UPS each day. The first transmission would be made by Levolor's first shift when UPS' truck made its pick-up (the "First Manifest"). A second transmission was made by Levolor's second shift at the end of each day for all shipments made before midnight of each calendar day (the "Second Manifest"). The second manifest thus included all shipments listed on the same day's First Manifest as well as all shipments made thereafter but before midnight.

8.

In April 2000, Levolor realized that it was not receiving invoices from UPS for each package listed on the Second Manifest and notified UPS of the discrepancy. UPS later informed Levolor

that UPS' electronic billing system was rejecting the Second Manifest as duplicates of the First Manifest, even though the Second Manifest contained additional shipments made on the same calendar date as the shipments listed on the First Manifest. As a result, UPS had not been sending Levolor invoices for shipments made after transmission of the First Manifest.

COUNT I -- BREACH OF CONTRACT

9.

Levolor incorporates paragraphs 1 through 8 of its counterclaim as if set forth verbatim herein.

10.

As a result of the error in UPS' electronic billing system described in paragraph 8 hereof, and as a result of UPS's refusal to acknowledge other errors in its billings to Levolor, UPS has breached its contract with Levolor by: (i) demanding payment from Levolor for shipments made on a "collect" basis; (ii) billing duplicate additional handling charges to Levolor on "collect" shipments; (iii) failing to correct billing on shipments marked "residential" when delivered to a commercial establishment; (iv) refusing to credit Levolor for errors on invoices submitted by UPS; and (v) billing Levolor for shipments alleged to have been delivered but not billed due to missing transmissions.

11.

As a result of UPS's breaches of its contract with Levolor as described herein, Levolor has been damaged by inappropriate and wrongful billings and invoices from UPS in an amount believed to be in excess of \$575,000.

COUNT II -- BREACH OF COMMON CARRIER DUTY TO
SERVICE THE PUBLIC ON REASONABLE DEMAND

12.

Levolor incorporates paragraphs 1 through 11 as if set forth verbatim herein.

13.

UPS is a motor common carrier subject to the Interstate Commerce Act, 49 U.S.C. § 13501 et seq. As such, it is subject to § 14101(a) that provides: "A carrier providing transportation or service subject to jurisdiction under chapter 135 shall provide the transportation or service on reasonable request. In addition, a motor carrier shall provide safe and adequate service, equipment and facilities."

14.

On or about December 26, 2000, UPS discontinued pick-up service at all of Levolor's facilities without just cause. On information and belief, UPS' discontinuance of service was ordered to carry-out its previous threats to suspend service unless Levolor paid the \$900,000 in additional charges demanded by UPS, but not fully documented or substantiated, or timely demanded. The suspension of service by a common motor carrier

for the sole purpose of coercing a customer into paying additional charges, most of which are time-barred, and all of which are not substantiated with appropriate documentation, is not "reasonable", and therefore, is a violation of 49 U.S.C. § 14101.

15.

Levolor has been damaged by said suspension of service in that it was required to ship to its customers via alternate transportation services at higher rates and charges. For the period of December 27, 2000 to March 25, 2001, Levolor's has incurred charges in excess of the cost of using UPS' services totaling at least \$122,000. As a result of negotiations, UPS resumed limited service for J.C.Penney shipments on March 26, 2001.

16.

49 U.S.C. § 17404(a)(2), provides that "A carrier or broker providing transportation or service subject to jurisdiction under chapter 135 is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part." Accordingly, UPS is liable to Levolor for all damages suffered as a result of its unlawful suspension of service.

17.

49 U.S.C. § 14704(e) provides that "The district court shall award a reasonable attorney's fee under this section. The district court shall tax and collect that fee as part of the costs of the action."

COUNT III -- BREACH OF LOSS & DAMAGE CLAIM REGULATIONS

18.

Levolor incorporates paragraphs 1 through 17 as if set forth verbatim herein.

19.

Levolor has duly and timely filed with UPS a total of 2,268 loss and damage claims totaling \$ 187,601.11 for the period of December 20, 1999 to June 18, 2001. UPS duly acknowledged only 139 of those claims, but has failed to acknowledge the remainder of the claims within 30 days as required by 49 C.F.R. § 1005.

20.

UPS has failed to dispose of 2,034 of Levolor's claims within 120 days as required by 49 C.F.R. § 1005. The total amount of outstanding claims is \$ 187,601.11 as of June 18, 2001.

21.

UPS has failed to present Levolor with a status report every 60 days as required by 49 U.S.C. § 1005.

22.

Levolor has been damaged in the amount of \$187,601.11 by UPS' violation of the Federal Motor Carrier Safety Administration's loss and damage claim regulations in that it has been deprived of the use of the funds paid by Levolor and being improperly detained by UPS in an effort to coerce Levolor into paying other sums wrongfully demanded by UPS as set forth herein.

23.

Levolor demands payment for all outstanding loss and damage claims, plus pre-judgment interest from the dates of delivery.

COUNT IV - - BREACH OF STATUTES OF LIMITATION

24.

Levolor incorporates paragraphs 1 through 23 as if set forth verbatim herein.

25.

49 U.S.C. § 14705(a) provides that, "A carrier providing transportation or service subject to jurisdiction under chapter 135 must begin a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues." Subsection (g) states that "A claim related to a shipment of property accrues under this section on delivery or tender of delivery by the carrier."

26.

UPS has repeatedly made demands upon Levolor for the payment of charges that are time barred by 49 U.S.C. § 14705(a).

27.

On information and belief, UPS has included time-barred shipments in its claims for the purpose of inflating the amounts demanded in an effort to coerce Levolor into paying or settling said claims. In doing so, UPS is liable to Levolor pursuant to 49 U.S.C. § 14704(a)(2), which provides:

"A carrier providing transportation or service subject to jurisdiction under chapter 135 is liable to a person as a result of an act or omission of that carrier or broker in violation of this part."

28.

49 U.S.C. § 13710(a)(3)(A) provides: " . . . A carrier must issue any bill for charges in addition to those originally billed within 180 days of the receipt of the original bill in order to have the right to collect such charges." UPS has continually violated § 13710(a)(3)(A) by demanding payment from Levolor of charges that are in addition to the charges originally billed on the same shipments (such as, for example, residential surcharges and additional handling charges for packages in excess of 60 inches in length) later than 180 days after Levolor's receipt of the original bills.

29.

UPS' conduct in ignoring the applicable federal statutes of limitation as set forth herein has damaged Levolor by causing Levolor to incur expenses, including attorneys' fees, to defend itself against UPS' claims for time-barred charges.

WHEREFORE, Counterclaim-plaintiffs pray for Judgment in its favor on each count of their Counterclaim and that they be awarded the following relief:

- (a) Compensatory damages on each count in such amounts as proved at trial;
- (b) Pre- and post-judgment interest;
- (c) Attorneys' fees as provided by law;

(d) Costs of this action; and

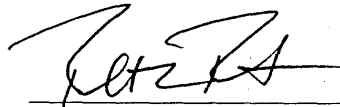
(e) such other and further relief as the Court deems just and proper.

JURY DEMAND ON COUNTERCLAIM

Levolor demands a jury trial on all claims and matters as to which it is entitled to a jury trial.

Dated: July 13, 2001

Respectfully submitted



Robert L. Rothman
Georgia Bar No. 615850

Attorney for Defendants-
Counterclaims

ARNALL GOLDEN GREGORY LLP
1201 West Peachtree Street, N.E.
2800 One Atlantic Center
Atlanta, GA 30309-3450
(404) 873-8500

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

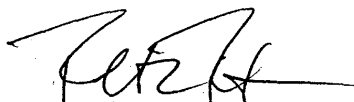
UNITED PARCEL SERVICE, INC.,	)	
an Ohio corporation, and	)	
UNITED PARCEL SERVICE, INC.,	)	
a New York corporation,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action File No.
	)	1:01-CV-1788
	)	
NEWELL WINDOW FURNISHINGS, INC.,	)	
a Delaware corporation; and	)	
and NEWELL RUBBERMAID, INC.,	)	
a Delaware corporation,	)	
	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I do hereby certify that the foregoing Defendant's Answer to Complaint and Counterclaim was served by United States mail, first-class, with sufficient postage attached to:

Michael P. Kenny, Esq.
Cari K. Dawson, Esq.
Heather R. Peoples, Esq.
Alston & Bird LLP
1201 West Peachtree Street
Atlanta, GA 30309-3424

This 13th day of July, 2001.


Robert L. Rothman

D

APPENDIX D

SUMMARY OF DAMAGES INCURRED BY PETITIONERS

I. Outstanding freight claims:

Outstanding freight claims incurred to date total **\$188,249.19**, which represent lost use of these funds which are improperly being withheld by UPS.

II. "Additional Handling Charges" billed to, and paid by, Levolor for J.C. Penney shipments:

Levolor was billed for, and subsequently paid, additional handling charges for J.C. Penney shipments for which it was not responsible in the amount of **\$845,781.00**.

III. Double-billed additional handling charges paid by Levolor:

Petitioners are entitled to recover **\$369,129.00** in overcharges based on UPS' practice of continuing to assess \$5.00 per shipment surcharges on 37% of the packages shipped by Kirsch, and for packages that exceeded sixty (60) inches in length.

IV. Commercial shipments erroneously billed as residential:

Based on the expected results of a complete audit of all Levolor facilities, Petitioners are entitled to a refund of approximately **\$40,000.00** for shipments delivered to commercial addresses that were incorrectly marked as residential.

V. Damages from unjustified suspension of service:

Petitioners incurred **\$122,000.00** in additional charges after UPS suspended service to Levolor, which sum represents the difference between UPS and Fed Ex Ground charges on J.C. Penney shipments.

VI. Attorney's fees and expenses:

Petitioners have incurred attorneys' fees and expenses in excess of
\$108,669.04 to date.

TOTAL DAMAGES TO DATE: In excess of **\$1,673,828.23**, exclusive of
prejudgment interest and other sums that continue to accrue

E

APPENDIX E

Petitioners' Initial Discovery Requests to UPS

Come now Petitioners Newell Window Furnishings, Inc. and Newell Rubbermaid, Inc., including Levolor Home Fashions, a division of Newell Window Furnishings, Inc. (collectively "Petitioners" or "Levolor") and hereby serve the following discovery requests, including requests for production of documents and interrogatories, on Respondents United Parcel Service, Inc., an Ohio Corporation, and United Parcel Service, Inc., a New York corporation (collectively "UPS"), pursuant to the procedural order issued by the Surface Transportation Board ("the Board"), showing as follows:

Definitions

1. The terms "document" and "documents" shall mean the original and all drafts of a writing, as that term is defined by Rule 1001 of the Federal Rules of Evidence, including, without limitation, all written, recorded, graphic or photographic matter, however produced or reproduced, of every kind and description in your actual or constructive possession, custody, care or control pertaining in any manner to the subject matter indicated and includes, without limiting the generality of the foregoing, originals (or copies where originals are not available) and drafts of all papers, letters, notes, memoranda, correspondence, e-mail, telegrams, cables, photographs, microfilm, prints, records, transcriptions, drawings, paper, books, accounts, objects, notes or sound records of any type of personal or telephone conversations or meetings or conferences, minutes of director(s) or committee

meetings, other minutes, interoffice and interagency communications or correspondence, reports, studies, written forecasts, projects, analyses, contracts, agreements, journals, vouchers, working papers, drafts, instructions, guidelines, manuals, insurance policies, reports of examinations, findings of investigations, canceled checks, statements of witnesses, claim forms, claim reports, statistical records, stenographer's notebooks, calendars, appointment books, telephone slips, diaries, time sheets or logs, job or transaction files, computer printouts or paper similar to any of the foregoing however denominated by you. A draft or non-identical copy is a separate document within the meaning of this term. As used herein, the terms "document" and "documents" shall refer to all tangible means by which human communication is transmitted or stored, including all types of written, typed, graphic, recorded, printed or computerized materials in its entirety, with any addenda, supplements, amendments, revisions, exhibits and appendices thereto, and in its original form (copies to include the front and back of the document when there is written, typed, graphic, recorded or printed material on the back), together with any copies thereof bearing notations, memoranda or other written, typed, graphic, recorded or printed information not on the original.

2. "All" shall mean "any and all."
3. The term "any" as used herein means "each and every" as well as "any one."
4. The terms "and" and "or" shall be interpreted and construed as "and/or," and shall not be interpreted to exclude any information otherwise within the scope of the request.

5. "Communication" shall mean the transmittal of information, or a request for information, document or otherwise, and includes, without limitation, any conversation in person, by telephone, or by any other means (including e-mail), as well as any utterance heard by another person, whether in person, by telephone, or otherwise.

6. The terms "possession, custody and control" shall mean in your physical possession and/or if you have the right to secure or compel production of the document or a copy thereof from another person or entity having physical possession thereof.

7. The term "support" means substantiate, corroborate, advance and/or assist.

8. "Records" shall mean computer records (including e-mails) or printouts, minute books, minutes of meetings of the agencies, resolutions, and the like.

9. The terms "evidence," "evidencing," "mentioning," "reflect," "reflecting," "refer," "referring to," "relating to," "relate to," and "relate" as used below, shall include within their meaning the concepts of containing, alluding to, pertaining to, responding to, concerning, regarding, about, commenting upon, discussing, showing, describing, disclosing, explaining, mentioning, analyzing, constituting, evidencing, summarizing or characterizing, either directly or indirectly, in whole or in part, or having any relationship to the subject matter that follows the term.

10. The term "person" means any individual, corporation, partnership, proprietorship, professional corporation, association, group, governmental agency

or agent, municipal corporation, state government, local government, political subdivision, or any other legal entity of any kind including parents, subsidiaries, affiliates, predecessors, successors, assignors, assignees, officers, directors, agents, and controlling person.

11. The term "identify" when used with respect to an individual, corporation, partnership, or other entity, means that you must state the person's or entity's full name, present occupation and principal line of business, present home address and business address, and present home and business telephone number.

The term "identify" when used in connection with any oral communications means that you must state the date of such communication, the place or places where such communication occurred, the time of day of such communication, the identities of all persons taking part in such communication (such persons should be identified in accordance with the requirements of the preceding paragraph), a summary of the contents of such communication, and whether any written or other type of transcriptions or notes were produced as a result of such communication by either you or any witnesses with knowledge of said communications.

The term "identify" when used in connection with any written or other type of communication means that you must state by whom the document, tape, or other medium was prepared, to whom it was directed and sent, the date of preparation, the names of persons signing the document (if any), the type of medium (memo, letter, contract, etc.), and the general contents of the document. If any such document was, but no longer is, in your possession, or subject to your control, or in

existence, "identify" further requires you to state whether it is missing, lost, destroyed, transmitted or transferred, voluntarily or involuntarily, to others, and to identify such others by name, address and title, or otherwise deposed of.

12. The terms "you," "your" and/or "UPS" shall mean United Parcel Service, Inc., an Ohio Corporation, and United Parcel Service, Inc., a New York corporation, and its or their agents, representatives, officers, directors, shareholders, employees, subsidiaries, predecessors and successors in interest, successors and/or assigns or any other person or entity affiliated therewith.

13. The term "Levolor" shall mean Petitioners Newell Rubbermaid, Inc. and Newell Window Furnishings, Inc., including the division Levolor Home Fashions, and its or their agents, representatives, officers, directors, shareholders, employees, subsidiaries, predecessors and successors in interest, successors and/or assigns or any other person or entity affiliated therewith.

14. The term "J.C. Penney" shall mean J.C. Penney Company, Inc. and its agents, representatives, officers, directors, shareholders, employees, subsidiaries, predecessors and successors in interest, successors and/or assigns or any other person or entity affiliated therewith.

Instructions

1. These discovery requests are continuing in nature. Any documents which are secured or discovered after initial production and which would have been included therein had such documents been previously known or available shall be supplied by supplemental production. Likewise, any additional facts secured or

discovered after the submission of responses by UPS shall be supplied in supplemental interrogatory responses.

2. You are requested to produce original documents. If you are producing copies of the requested documents in lieu of the originals thereof, please submit a statement, under oath, whether the copies are true and correct copies of the originals thereof, and the reasons for your failure to produce original documents.

3. File folders with tabs or labels identifying documents called for by the documents requested must be produced with all documents. Selection of documents from the files and other sources and the numbering of such documents shall be performed in such a manner as to ensure that the source of each document may be determined. Documents attached to each other shall not be separated.

4. Electronic records and computerized information shall be produced in an intelligible format or together with a description of the system and/or program from which each was derived sufficient to permit rendering the material intelligible.

5. In the event that you object to the production of any document responsive to any request on the grounds of privilege, list all such documents and state:

(a) the name of each author, writer, sender or initiator of such document, if any;

(b) the name of each recipient, addressee, or party for whom such document was intended or received, if any;

(c) the date of such document, if any, or an estimate thereof, and so indicated as an estimate, if no date appears on such document;

(d) a description of the general nature of the document and a description of the general subject matter as described in such document, or if no such description appears, then such other description sufficient to identify said document;

(e) the grounds which you believe establish the privilege as to the document; and

(f) if any portion of the document is not covered by your claim of privilege, such portion must be produced.

6. Likewise, If you claim as privileged, or otherwise cloaked from discovery, any communication responsive to any interrogatory, you are to give:

(a) the date of the communication;

(b) the identity of the persons who were parties to the communication;

(c) the subject matter with which the communication is concerned;

(d) each interrogatory to which the communication is responsive;

and

(e) the grounds upon which you rely in claiming that the communication is privileged or otherwise cloaked from discovery.

7. If any documents or portions of documents requested herein were in your possession, custody, or control, but have been lost, discarded, destroyed or otherwise transferred outside your possession, custody, or control, each such

document or portion of document shall be identified as completely as possible by stating the following information:

(a) the name of each author, writer, sender or initiator of such document, if any;

(b) the name of each recipient, addressee, or party for whom such document was intended or received, if any;

(c) the date of such document, if any, or an estimate thereof, and so indicated as an estimate, if no date appears on such document;

(d) a description of the general nature of the document and a description of the general subject matter as described in such document, or if no such description appears, then such other description sufficient to identify said document;

(e) a description of the reason(s) why such responsive document is or was lost, discarded, destroyed or is otherwise outside your possession, custody, or control;

(f) a description of the manner through which such responsive document is or was lost, discarded, destroyed or is otherwise outside your possession, custody or control; and

(g) the identify of the person(s) authorizing such responsive document to be lost, discarded, destroyed or otherwise place outside your possession, custody, or control.

8. If you object to, or otherwise decline to answer any portion of an interrogatory, provide all information called for by that portion of the interrogatory to

which you do not object or to which you do not decline to answer. For those portions of any interrogatory to which you object or otherwise decline to answer, state in detail the reason for such objection or declination.

9. If the response to any interrogatory consists in whole or in part of any objection relating to or including burdensomeness, then, with respect to such response:

- (a) Provide such information as can be ascertained without undue burden;
- (b) State with particularity the basis for such objection including:
 - (1) a description of the process or method required to obtain any fact responsive to the interrogatory; and
 - (2) the estimated cost and time required to obtain any fact responsive to the interrogatory;
- (c) Describe the nature and extent of the documents or other source(s), if any, from which any fact responsive to the interrogatory can be obtained; and
- (d) State whether documents or other sources will be made available for inspection and copying.

10. For each separate interrogatory, identify all individuals consulted in order to provide your response.

Document Requests

Subject to the foregoing Definitions and Instructions, each of which is incorporated by reference into each request below as if fully set forth therein,

Petitioners request that UPS responds to the following requests and produce all responsive documents to counsel for Petitioners, by no later than 30 days after the date of service or at such earlier time as determined by the Board:

1. All contracts and agreements between Levolor and UPS during the period from March 1997 to the present, including, but not limited to, all additional handling charge agreements.

2. All tariff documents that UPS alleges are applicable to shipments made by UPS on behalf of Levolor during the period from March 1997 to the present.

3. All documents that in any way relate or refer to the discontinuance or suspension of service (or any alteration in the manner of service) at Levolor's facilities incepting on or about December 26, 2000.

4. All documents that in any way relate or refer to the discontinuance or suspension of service at the facility or facilities of any other shipper by UPS within the past five (5) years.

5. All documents that in any way relate or refer to UPS' administration of Levolor's loss and damage claims, including, but not limited to:

- (a) all acknowledgement documents issued by UPS to Levolor;
- (b) all documents relating to any investigation conducted by UPS into the claims submitted by Levolor (either with respect to the claims individually or collectively);

(c) all documents relating to any decision by UPS to pay, decline or attempt to compromise the claims submitted by Levolor (either with respect to the claims individually or collectively); and

(d) all status reports issued by UPS to Levolor with respect to claims not disposed of within 120 days.

6. All policies, procedures, manuals and like documents maintained by UPS during the period from March 1997 to the present that in any way relate or refer to:

- (a) the administration of loss and damage claims;
- (b) the grounds for denying loss and damage claims;
- (c) the administration of claims governed by a "shipper's interest insurance policy";
- (d) the addition of the reference to packaging specifications in UPS' tariff "and elsewhere";
- (e) the grounds for suspending or discontinuing customer service;
- (f) conducting customer audits;
- (g) the imposition of charges for commercial versus residential shipping;
- (h) the process(es) by which UPS' representatives determine whether a package is classified as "commercial" or "residential";
- (i) the applicability of additional handling charges for shipments, including those in excess of sixty (60) inches in length;

(j) the handling of claims beyond the applicable statute of limitations; and

(k) the review, analysis and processing of customer manifest reports.

7. All documents that in any way relate or refer to UPS' investigation, if any, into the facts relating to Levolor's daily transmission of shipment information after its "first manifest" transmission.

8. All documents that in any way relate or refer to any problems experienced by UPS in receiving shipment information provided by Levolor after its "first manifest" transmission, including, but not limited to, any problems with UPS' internal electronic reporting system.

9. All documents that in any way relate or refer to UPS' alleged entitlement to payment from Levolor for "collect" shipments made to J.C. Penney.

10. All documents that in any way relate or refer to UPS' investigation of the costs to Levolor associated with shipments incorrectly billed as commercial instead of residential.

11. All documents that in any way relate or refer to any audit or review conducted by or on behalf of UPS of Levolor's account or any Levolor shipments.

12. All documents that in any way relate or refer to any per shipment additional handling charges imposed by UPS on Levolor shipments (including, but not limited to, the Kirsch brand of products shipped by Petitioners), including, but not limited to, UPS' investigation of these additional handling charges, during the period from July 1999 through November 4, 2000.

13. All documents that in any way relate or refer to any per shipment additional handling charges imposed by UPS on Levolor for packages (whether Levolor or Kirsch) shipped during the period from November 6, 2000 through June 16, 2001.

14. All documents that in any way relate or refer to the amounts allegedly owed by Levolor to UPS, including, but not limited to, all invoice and manifest records for each shipment that forms the basis of any amount allegedly owed.

15. All documents exchanged between and among UPS and J.C. Penney regarding outstanding amounts owed on shipments of Levolor products to J.C. Penney.

16. All contracts and agreements between and among UPS and J.C. Penney that in any way relate or apply to shipments of Levolor products, either generally or that specifically mention Levolor shipments.

17. All documents that in any way relate or refer to UPS' decision to stop making manual corrections on invoices submitted to Levolor.

18. All documents identified in, or that in any way relate or refer to the facts set forth in, UPS' Complaint filed against Levolor on June 8, 2001 in the lawsuit styled as *United Parcel Service et al. v. Newell Window Furnishings, Inc. et al.*, Civil Action File No. 2001-cv-38909 in the Superior Court of Fulton County, Georgia ("the Complaint").

19. All documents identified in, or that in any way relate or refer to the facts set forth in, the Joint Preliminary Planning Report and Scheduling Order

filed in the lawsuit styled as *United Parcel Service et al. v. Newell Window Furnishings, Inc. et al.*, Civil Action File No. 1:01-cv-1788 in the United States District Court for the Northern District of Georgia.

20. All documents that support UPS' contention in paragraph 32 of the Complaint that "Levolor had not properly reported to UPS the number of packages Levolor shipped, the destination of the packages (i.e., commercial versus residential), consignee billing information, tracking numbers, and consignee addresses of its daily shipments of packages".

21. All documents that support UPS' contention in paragraph 33 of the Complaint that "Levolor is significantly in arrears in its payments to UPS for Additional Handling Charges for oversized packages, which it agreed to pay as provided in the Letter Agreement".

22. All documents that support UPS' contention in paragraph 34 of the Complaint that "Levolor currently owes UPS in excess of \$900,000 for unpaid shipping charges and related assessorial and Additional Handling Charges".

23. All corporate minutes or memoranda (whether for shareholder meetings, Board of Director meetings, committee meetings, sales meetings etc.) that in any way relate or refer to Levolor.

Interrogatories

Subject to the foregoing Definitions and Instructions, each of which is incorporated by reference into each interrogatory below as if fully set forth therein, Petitioners request that UPS responds to the following interrogatories, under oath,

by no later than 30 days after the date of service or at such earlier time as determined by the Board:

1. Identify all documents and/or things that are responsive to the foregoing document requests (or any subsequent request), but which you are withholding from production because of an assertion of privilege. For each such document and thing, state the factual basis for any asserted privilege or objection that you contend relieves you of the obligation to produce such document and/or thing. This interrogatory seeks what is commonly referred to as a "privilege log".

2. Identify all persons whom you expect to call or who may be called to testify as an expert witness at any hearing or trial (whether administrative or otherwise) or to render an opinion regarding any of the facts relating to this dispute. With respect to each such person, state the following:

(a) His or her educational background giving the names of the educational institutions attended, the date of attendance, the degrees earned with the dates thereof;

(b) His or her experience within the field, giving the dates, names, addresses of employers, if any; dates, names and addresses of institutions associated with, if any; and any other experience, indicating dates and places;

(c) All professional associations of which he or she is a member and associates with whom he or she is related, stating his or her status with each and the inclusive dates of such status;

(d) The title, name of publication, name of publisher, and date of publication of published articles, books, etc., authored by each such person;

(e) Whether each such expert has ever been a witness in any other lawsuit and, if so, for each lawsuit, give the name of the suit, the kind of suit involved, the name of the court, the date of the testimony, the name and addresses of the parties or attorneys for whom he or she testified; and

(f) The subject matter on which the expert witness is expected to testify.

3. Identify each person or persons at UPS responsible for the procurement of the Levolor account; the contracts, agreements and tariffs applicable to the Levolor account; and/or the management of the Levolor account (including any audits or reviews thereof) during the period from March 1997 to the present. For each such person, state the following information, in addition to the information sought by the term "identify" as used herein and as defined above:

(a) title of each such person;

(b) the name and title of the person to whom each such person reported; and

(c) the time period(s) when each such person was responsible for the Levolor account.

4. Identify each person or persons that was involved in, or was consulted, regarding the decision by UPS to suspend, discontinue or alter the manner of service provided to Levolor on or about December 26, 2000.

5. Identify each person or persons responsible for, or involved in, the billing of the Levolor account during the period from March 1997 to the present.

6. Identify each person or persons responsible for, or involved in, UPS' administration of Levolor's loss and damage claims, including but not limited to, the following components of the administration of any such loss and damage claim(s):

- (a) the acknowledgement of said claims;
- (b) any investigation conducted into said claims;
- (c) any decision by UPS to pay, decline or attempt to compromise said claims; and/or
- (d) the issuance of status reports to Levolor with respect to any claims not disposed of within 120 days.

7. In addition to the persons identified in response to interrogatories 4, 5 and 6, identify each person whom you know or believe may have personal knowledge of any facts supporting any of the allegations pleaded in Levolor's Petition for Declaratory Order and Other Relief filed with the Board or in the Complaint. For each such person, state the facts of which you contend each such person has knowledge.

8. Identify each UPS policy and procedure implemented, or in effect, during the period from March 1997 to the present that in any way relates to:

- (a) the administration of loss and damage claims;
- (b) the grounds for denying loss and damage claims;

(c) the administration of claims governed by a "shipper's interest insurance policy";

(d) the addition of the reference to packaging specifications in UPS' tariff "and elsewhere";

(e) the grounds for suspending or discontinuing customer service;

(f) conducting customer audits;

(g) the imposition of charges for commercial versus residential shipping;

(h) the process(es) by which UPS' representatives determine whether a package is classified as "commercial" or "residential";

(i) the applicability of additional handling charges for shipments, including those in excess of sixty (60) inches in length;

(j) the handling of claims beyond the applicable statute of limitations; and

(k) the review, analysis and processing of customer manifest reports.

9. For each policy or procedure identified in response to interrogatory 8, identify the persons responsible for, or involved in, the writing and implementation of the policy or procedure.

10. Identify all communications between you and any other person (other than your attorneys), including, but not limited to, the Surface Transportation Board or J.C. Penney, regarding the disputes between UPS and Levolor.

11. Identify all customers for whom UPS has discontinued or suspended service within the past five (5) years. For each such customer, identify the name, address and telephone number for the customer's primary representative as identified in UPS' files.
12. Identify all facts relating to UPS' failure to dispose of all loss and damage claims submitted by Levolor within 120 days of receipt of such claims.
13. Identify all facts relating to UPS' failure to receive shipment information provided by Levolor after the daily first manifest transmission.
14. Identify all facts supporting UPS' contention that Levolor is responsible for "collect" shipments made to J.C. Penney.
15. Identify all facts relating to UPS' investigation of the costs to Levolor associated with shipments billed as commercial instead of residential, including, but not limited to, all facts relating to the partial audit conducted by UPS of Levolor's shipments from its Ogden and Salt Lake City facilities.
16. Identify all facts relating to UPS' imposition of additional handling charges of \$5.00 per shipment imposed on shipments during the period from July 1999 through June 16, 2001.
17. Identify all facts supporting UPS' contention in paragraph 32 of the Complaint that "Levolor had not properly reported to UPS the number of packages Levolor shipped, the destination of the packages (i.e., commercial versus residential), consignee billing information, tracking numbers, and consignee addresses of its daily shipments of packages".

18. Identify all facts supporting UPS' contention in paragraph 33 of the Complaint that "Levolor is significantly in arrears in its payments to UPS for Additional Handling Charges for oversized packages, which it agreed to pay as provided in the Letter Agreement".

19. Identify all facts supporting UPS' contention in paragraph 34 of the Complaint that "Levolor currently owes UPS in excess of \$900,000 for unpaid shipping charges and related assessorial and Additional Handling Charges".

This the 27th day of March, 2002.

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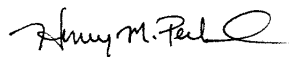
CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing
PETITION FOR DECLARATORY ORDER AND OTHER RELIEF by depositing a
copy of same in the United States mail with sufficient postage affixed thereon,
addressed as follows:

Cari K. Dawson, Esq.
Alston & Bird LLP
1201 West Peachtree Street
Atlanta, GA 30309-3424

James F. Moriarity, Esq.
Fleischman and Walsh, LLP
1400 Sixteenth Street
Washington, DC 20036

This the 27th day of March, 2002.



Henry M. Perlowski

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