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May 7, 2002

Via Federal Express Delivery

Secretary
Surface Transportation Board
1925 K Street
Washington, DC 20423

205343



Re: *Newell Window Furnishings, Inc. and Newell Rubbermaid, Inc. v. United Parcel Service, an Ohio corporation, and United Parcel Service, a New York Corporation, STB Docket No. 42073*

Dear Sir or Madam:

Enclosed please find an original and ten (10) copies of the following documents for filing with the Surface Transportation Board:

1. Petitioners' Response in Opposition to Respondents' Motion to Dismiss Petition, including Exhibits A through E thereto; and
2. Affidavit of Henry F. Huchel, including Exhibits A through E thereto.

Copies of these documents are being served on opposing counsel, via overnight Federal Express delivery, as contemplated by the regulations governing practice before the Board.

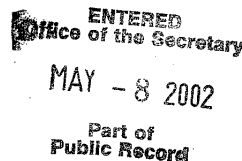
If you have any questions regarding the enclosed filings, please contact me at your convenience.

Sincerely,

Henry M. Perlowski

Enclosures

cc: William J. Augello, Esq. (w/ encl.)
Barry S. Alberts, Esq. (w/ encl.)
Cari K. Dawson, Esq. (w/ encl.) (via Federal Express)
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Secretary, Surface Transportation Board
May 7, 2002
Page 2 of 2

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(w/ encl.)

Federal Motor Carrier Safety Administration
of the United States Department of Transportation
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ORIGINAL

205343

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. 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

PETITIONERS' RESPONSE IN OPPOSITION
TO RESPONDENTS' MOTION TO DISMISS PETITION

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Dated: May 7, 2002

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. 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**

**PETITIONERS' RESPONSE IN OPPOSITION
TO RESPONDENTS' MOTION TO DISMISS PETITION**

Come Now Petitioners, Newell Window Furnishings, Inc. and Newell Rubbermaid, Inc., including Levolor Home Fashions, a division of Newell Window Furnishings, Inc. (collectively "Levolor" or "Petitioners"), and file this Response in Opposition to the Motion to Dismiss Petition filed by Respondents United Parcel Service, Inc., an Ohio corporation, and United Parcel Service, Inc., a New York corporation (collectively "UPS" or "Respondents"), showing this tribunal as follows:

Introduction

As the Surface Transportation Board ("the Board") undoubtedly is aware, the current billing disputes between Levolor and UPS are before the Board for two specific reasons. First, Levolor filed an informal complaint with the Board seeking review of UPS' coercive and unlawful billing practices on June 8, 2001 and, upon direction from

the Board, thereafter filed a formal Petition for Declaratory Order and Other Relief ("the Petition") on or about March 28, 2002. Second, the Honorable G. Ernest Tidwell ("Judge Tidwell") of the United States District Court for the Northern District of Georgia ("the Court"), following UPS' filing of the lawsuit styled as 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, Civil Action No. 1:01-cv-1788-GET ("the Lawsuit"), issued an order granting Levolor's motion to stay the Lawsuit so that the Board could exercise its primary jurisdiction over UPS' billing practices. (See Exhibit A annexed hereto for a true and correct copy of Judge Tidwell's referral order dated January 25, 2002.) With his order, Judge Tidwell plainly recognized the Board's statutory jurisdiction over motor carrier billing disputes provided in 49 U.S.C. § 13710(a) and "special competence" over the rate applicability and billing dispute issues raised by Levolor. (See Exhibit A, pp. 3-4.)

In apparent denial of these facts, and particularly the plain language of Judge Tidwell's order, UPS now has moved to dismiss the Petition in a desperate attempt to avoid Board scrutiny of its billing practices. However, UPS offers no new arguments in support of its motion to dismiss and has done nothing more than recycle the same position – the Board's alleged lack of jurisdiction over the rate applicability and billing dispute issues presented by Levolor – that Judge Tidwell soundly rejected. Moreover, if UPS' position were accepted, the Board would not have *any* role with respect to rate applicability and billing issues, leaving UPS (and other motor carriers) free to engage in coercive and illegal billing practices without regulatory oversight. This result simply

cannot be reconciled with the jurisdiction granted to the Board by Congress or with the applicable decisions issued by the Board, including many of those cited by UPS in its motion to dismiss.

Accordingly, Levolor respectfully requests that the Board deny UPS' motion to dismiss, which, in reality, is a hollow tactic designed to divert the Board's attention away from the merits of Levolor's Petition. In addition to denying the motion, Levolor requests that the Board issue a procedural order governing its review of the Petition and establish the record necessary to decide the rate applicability and billing dispute issues in controversy, including those cited by Judge Tidwell in his order. To facilitate this end, Levolor herewith presents the Affidavit of Henry F. Huchel ("the Huchel Affidavit") and the exhibits thereto for the Board's consideration and in response to the alleged facts contained in UPS' motion to dismiss. Based on Mr. Huchel's testimony alone, Levolor respectfully submits that the Board may issue the relief requested in the Petition and as set forth below, including initiating a general investigation into UPS' unlawful billing practices and responding to matters referred to the Board by Judge Tidwell.

Facts

I. The Status of the Proceedings.

For the reasons set forth in Section II *infra*, Levolor submitted a comprehensive letter complaint to the Board on June 8, 2001, a true and correct copy of which is annexed hereto as Exhibit B. With this complaint, Levolor sought Board review of rate applicability and billing issues, including: (a) "collect" shipment overcharges imposed on Levolor by UPS; (b) additional handling charges on "collect" shipments wrongly imposed on Levolor by UPS; and (c) residential delivery surcharges wrongly imposed on Levolor

by UPS. (See Exhibit B, pp. 4-6.) Levolor also raised a number of statutory and regulatory violations committed by UPS during its carriage of Levolor shipments and requested that the Board issue findings and refer the matter to its Office of Compliance and Enforcement for a general investigation into UPS' billing practices. (Id. at pp. 3-4, 7-8.)

After UPS filed the Lawsuit, Levolor filed a motion to dismiss or stay the Lawsuit on the ground that the Board had primary jurisdiction over the disputes among the parties. UPS opposed this motion, in an attempt to avoid Board review of its conduct, including the conduct described with particularity in Levolor's letter complaint. With its brief opposing Levolor's motion to dismiss or stay, UPS argued that the Board did not have jurisdiction over the claims between the parties following the enactment of the Interstate Commerce Commission Termination Act ("ICCTA"). (See Exhibit C annexed hereto for a true and correct copy of UPS' Response in Opposition to Defendants' Motion to Dismiss or Stay.)

After considering the arguments presented by Levolor in support of the Board's continuing jurisdiction over billing disputes, Judge Tidwell granted Levolor's motion and stayed the Lawsuit for an initial period of ninety (90) days. (Exhibit A, p. 4.) Judge Tidwell furthermore granted this stay without prejudice to the parties' right to request additional time to stay the Lawsuit at the conclusion of the initial ninety (90) stay period so that the Board's review of the issues in dispute could be completed. (Id. at pp. 4-5.) Judge Tidwell also directed the parties to report on the status of the proceedings before the Board at the conclusion of the initial ninety (90) day stay period. (Id. at p. 4.)

Following the entry of Judge Tidwell's order, UPS did not file a motion for reconsideration or seek interlocutory appeal.

Levolor then waited for the Board to issue a procedural order with respect to its letter complaint. Upon direction from Ms. Nancy Beiter of the Board received orally on March 12, 2002, Levolor then filed the Petition on March 28, 2002. The Petition presents the same substantive rate applicability, billing dispute and statutory violation issues (with additional factual support) and requests the same forms of relief previously sought by Levolor in its letter complaint.

More than twenty (20) days after Levolor's filing of the Petition and thus in express contravention of the time limitations contained in 49 C.F.R. § 1104.13(a),¹ UPS filed its motion to dismiss.

On April 25, 2002, both Levolor and UPS filed status reports with the Court, copies of which respectively are annexed hereto as Exhibits D and E. With the delay prompted by UPS' motion to dismiss, which has caused the Board not to issue a procedural order governing its review of the Petition, Levolor asked Judge Tidwell to stay the Lawsuit for an additional period of one hundred eighty (180) days or such longer period as deemed appropriate, so that the Board may consider the matters referred by the Court pursuant to Judge Tidwell's order. (See Exhibit D, p. 4.) In what amounts to nothing more than an untimely motion to reconsider Judge Tidwell's referral order, UPS has moved the Court to proceed with the Lawsuit without *any* form of Board

¹ 49 C.F.R. § 1104.13(a) provides that "[a] party may file a reply or motion addressed to any pleading within 20 days after the pleading is filed with the Board, unless otherwise provided." UPS therefore had to file its motion to dismiss by March 17, 2002, twenty (20) days after the Petition was filed, excluding the day of filing. The Board accordingly may dismiss UPS' motion without further consideration as "documents must be received for filing at the Board's offices in Washington, DC within the time limits set for filing." 49 C.F.R. § 1104.6 (regulation entitled "**Timely filing required.**") (emphasis in original.)

consideration of the billing disputes raised by Levolor. (See, e.g., Exhibit E.) Levolor, of course, will respond to UPS' position before the Court so that the Board's review of the rate applicability and billing issues presented in the Petition and referred by the Court may proceed without further interruption or delay.

II. The Rate Applicability and Billing Issues Presented in the Petition.

With its motion to dismiss, UPS again attempts to describe its disputes with Levolor as "transparently a breach of contract case" over Levolor's purported refusal to pay "more than \$1 million of services" allegedly provided by UPS on Levolor's behalf. (See UPS' Mtn. Dismiss, p. 1.) UPS' use of the word "transparent" is appropriate, as it made this flawed argument before Judge Tidwell in its first (and failed) attempt to avoid Board review of its unlawful and coercive billing practices. (See Exhibit C, pp. 1, 6 (wherein UPS categorized the matters before the Court as "straightforward" and "garden variety" breach of contract claims that did not warrant referral to the Board.)) The true and complete facts, however, amply demonstrate that the breach of contract claims offered by UPS are nothing more than a thinly veiled attempt to hide the improper charges that UPS has imposed on Levolor since 1998. Moreover, because the true and complete facts present real rate applicability and billing contest issues, UPS' conduct must be scrutinized by the "special competence" of the Board pursuant to both Judge Tidwell's referral order and the filing of Levolor's informal complaint and Petition.

A. The Agreements Governing These Disputes.

From March 1997 through December 26, 2000, Levolor utilized the services of UPS for delivery of its products to commercial and residential customers. (Huchel Affidavit, ¶ 5.) 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 25, 1998. (Id. See Exhibits A and C to Affidavit of R. Curt Brown ("Brown Affidavit") submitted with UPS' motion to dismiss.) This agreement included an addendum between the parties that allowed UPS to impose a discounted additional handling charge of \$2.00 per shipment on forty percent (40%) of Levolor brand prepaid shipments, which saved Levolor from having to account for the size of each individual shipment. (See Exhibit A to Brown Affidavit.) A similar agreement was entered into between UPS and Levolor regarding shipments of Petitioners' Kirsch brand prepaid products, whereby Levolor would be billed for additional handling charges on thirty-seven percent (37%) of Kirsch brand prepaid shipments. (Huchel Affidavit, ¶ 5.)

On September 25, 1998, UPS notified Levolor that it was terminating the letter agreements. The sole purpose of terminating these agreements was to increase the \$2.00 additional handling charge rate in the contract so that the tariff charge of \$3.00 would thereafter apply. (Id. at ¶ 7.) By this time, UPS had improperly back billed Levolor for approximately \$150,000.00 in increased additional handling charges that UPS claimed were due as a result of a reduction in Levolor's weekly package volume. (Id.) UPS, however, was not entitled to these charges because the discounted \$2.00 additional handling charge rate was *not* tied to a specific volume commitment and was subject to modification *only* by mutual agreement of the parties. (Id. See Exhibit C to Brown Affidavit.)

After UPS' unilaterally decided to cancel the letter agreements because Levolor refused to pay the increased additional handling charge rates that UPS sought to impose, UPS' General Tariff and the Guide to UPS Services governed all shipments

made after October 25, 1998. (See Exhibit D to Brown Affidavit.) Additional handling charges also were governed by a separate letter agreement entered into by the parties on September 29, 1998, which allowed UPS to impose such charges on forty percent (40%) of Levolor's prepaid shipments, *i.e.*, shipments on which Levolor received a bill from and paid UPS. (Huchel Affidavit, ¶ 8. See Exhibit I to Brown Affidavit.) With the letter agreement, the parties clearly understood that Levolor would be charged the published additional handling charge rate on forty percent (40%) of its prepaid shipments (which encompassed all Levolor shipments at this time), as reflected "on each weekly UPS bill" issued to Levolor. (Huchel Affidavit, ¶ 8.) It simply would not have made sense for Levolor to pay a \$5.00 charge (or any additional handling charge) on shipments for which it owed *no* charges.

With its motion to dismiss, UPS argues that its Consignee Billing Brochure also governs certain issues in dispute. (See UPS' Mtn. Dismiss, p. 5.) Levolor, however, never received a copy of any Consignee Billing Brochure until the negotiations over these billing disputes began. (Huchel Affidavit, ¶ 9.) Moreover, neither the General Tariff nor the Guide to UPS Services in any way references or incorporates the terms of the Consignee Billing Brochure. (See generally Exhibits F and H to Brown Affidavit.) This brochure therefore cannot support UPS' attempted imposition of rates on Levolor, as explained below.

B. The "Collect" Shipment Additional Handling Charges.

On or about June 1999, Levolor began to deliver all J.C. Penney shipments, via UPS, on a "collect" basis and J.C. Penney agreed to assume responsibility for all associated freight charges. (Huchel Affidavit, ¶ 10.) UPS acknowledged this

arrangement and accepted “collect” consignee billing of shipments delivered from Levolor’s facilities to J.C. Penney. (Id.) Contrary to UPS’ suggestion throughout its motion to dismiss, Levolor owed no charges on these “collect” shipments and did not receive regular bills for them, as the parties understood that J.C. Penney would be responsible for all “collect” charges pursuant to its agreements with UPS. (Id.) This consignment relationship furthermore satisfied all “Qualifying Conditions” within UPS’ Consignee Billing Brochure, even assuming that this brochure has any relevance to the disputes before the Board. (Id. at ¶ 11.)

Unbeknownst to Levolor at the time, UPS made a business decision not to bill J.C. Penney for additional handling charges, such as those imposed on Levolor and Kirsch brand prepaid shipments. (Id. at ¶ 14.) Instead, UPS agreed to apply a dollar-for-dollar *credit* on behalf of J.C. Penney against the additional handling charges, thus affirmatively negating the charge. (See, e.g., Exhibit A to Huchel Affidavit (showing four occasions on which UPS listed the \$5.00 additional handling charge, but then applied a \$5.00 credit on behalf of J.C. Penney in the “Incentive Credit” column.)) Having chosen not to bill J.C. Penney for these additional handling charges, which was a precondition for reversal of these charges back to Levolor, UPS was not entitled to collect them from Levolor. (See Exhibit B to Brown Affidavit, p. 84 (“*In the event of nonpayment by the receiver or third party, the charges will be reversed and billed back to the shipper . . .*” (emphasis added.)))

Once the billing disputes among the parties came into light, Levolor determined that it unwittingly paid “collect” shipment additional handling charges improperly imposed by UPS under the general category of “Adjustments” and without any further

explanation. (Huchel Affidavit, ¶ 15.) For example, a typical bill provided by UPS sought to recover significant amounts (i.e., \$49,304.26) based on the following "information" only:

BILLING ADJUSTMENT FOR W/E 07/10/99
INCORRECT CHARGES BILLED
CHARGES FOR PACKAGES PREVIOUSLY UNBILLED

(See Exhibit B to Huchel Affidavit.) Based on an analysis of representative traffic, Levolor paid approximately \$845,781.00 in overcharges during the period from July 1999 through November 2000. (Huchel Affidavit, ¶ 15.) Levolor stopped paying these overcharges after it conducted a detailed audit of UPS' billings. (*Id.*) To date, UPS has refused to refund these overcharges in contravention of the General Tariff, the Guide to UPS Services and applicable law.

C. Double-Billed "Additional Handling Charge" Overcharges.

Effective November 6, 2000, Levolor terminated the forty percent (40%) and thirty-seven percent (37%) additional handling charges agreement applicable to Levolor and Kirsch brand prepaid shipments. (*Id.* at ¶ 16.) Levolor then internally determined when its packages exceeded sixty inches (60") in length and paid a \$5.00 additional handling charge, per the General Tariff and UPS' published rates, for each such shipment. (*Id.*) Nevertheless, UPS continued to bill Levolor for *another* \$5.00 on forty percent (40%) of Levolor brand shipments and thirty-seven percent (37%) of Kirsch brand shipments. (*Id.*) These duplicate surcharges were improperly billed to Petitioners between the dates of November 20, 2000 and June 16, 2001, and resulted in overcharges totaling \$369,129.00. (*Id.*) UPS, of course, cannot cite to any provision within the General Tariff or any other applicable document allowing for the imposition

and retention of duplicate rate charges, and continues to refuse to refund these charges on demand.

D. The Commercial v. Residential Overcharges.

Without any factual support whatsoever, UPS intimates that Levolor failed to account for residential delivery surcharges when listing packages on the "honor system." (See UPS' Mtn. Dismiss, p. 4; Brown Affidavit, ¶¶ 23, 27, 29-30.) First and foremost, UPS does not, and cannot, point to a single provision contained in the General Tariff or any other applicable document showing that Levolor assumed the obligation to classify packages to be delivered by UPS' drivers as either residential or commercial.² Second, UPS does not disclose to the Board the fact that it performed an audit of Levolor's shipments from its Ogden and Salt Lake City, Utah facilities for the period from January 1998 through October 1998 for the specific purpose of evaluating the residential delivery surcharge issue. (Huchel Affidavit, ¶ 19.) This audit uncovered approximately \$17,000.00 in erroneous applications of the residential delivery surcharge, which UPS paid. (*Id.*) After Levolor requested an audit of its other facilities, UPS refused to provide Levolor with the results of the audit, assuming that one even was conducted, only saying that the audit "washed." (*Id.*) Extrapolating from the results of the Utah facilities audit, Levolor determined that UPS likely owes Levolor at least \$40,000.00 in overpayments of the residential delivery surcharge on its other facilities, but UPS has refused to pay or provide a copy of its alleged audit. (*Id.* at ¶ 20.)

² One would think that UPS' drivers would be in the best position to determine whether a package was delivered to a residence or a commercial place of business.

E. The UPS Manifest Problem.

As the primary thrust of its transparent breach of contract claims asserted against Levolor in the Lawsuit, UPS cryptically alleges that Levolor “modified the UPS-approved shipping software” and did not provide “package level detail” for all packages shipped by UPS. (See UPS’ Mtn. Dismiss, pp. 2-4.) UPS thus blames its failure to bill for certain packages and, therefore, collect appropriate freight charges on some affirmative act of Levolor. UPS, however, does not identify how Levolor supposedly modified its shipping software, an allegation that is not true, and otherwise fails to disclose critical facts demonstrating that this billing dispute is the product of UPS’ own system failures, as well as UPS’ ensuing failure to provide basic details regarding the charges allegedly owed by Levolor.

In April 2000, Levolor discovered that, between February and April 2000, UPS was not billing Levolor for all of the packages it had shipped on behalf of Levolor. (Huchel Affidavit, ¶ 24.) Levolor then reported this fact to UPS so that it could investigate the source of the problem. (Id.) After conducting research, UPS discovered that the second daily electronic manifest transmission issued by Levolor at the end of its second shift was being rejected by UPS’ systems as a duplicate of the first manifest transmission issued earlier in the day. (Id.)

The need for a second manifest was driven by the fact that UPS required its drivers to receive a Pick-Up Record listing a summary of packages each time products were picked up from Levolor’s facilities. (Id. at ¶ 25.) While Levolor’s facilities operated on a two-shift schedule, with the first shift ending at 5:00 p.m. and the second shift ending near midnight, UPS only made pick-ups between 3:00 p.m. and 5:00 p.m., and

refused to make another pick-up at the end of Levolor's second shift. (Id.) Regardless, Levolor continued to follow customary practice in the venetian blind manufacturing industry requiring that its customers be invoiced on the same day that goods are manufactured. (Id.) In an attempt to accommodate its business needs and UPS' package detail requirements, Levolor: (1) transmitted two electronic transmissions each day to UPS -- the first at approximately 5:00 p.m., when UPS' driver arrived, and the second at the end of the second shift; *and* (2) delivered hard copy Pick Up Records of all packages manufactured on the first shift (given to UPS' drivers at the 5:00 p.m. daily pick-up) and on the second shift (given to UPS' drivers at the next day's pick-up). (Id.) In other words, despite UPS' protest that it was not receiving the second electronic transmission at the 5:00 p.m. daily pick-up, its driver would receive hard copies of the Pick-Up Record covering that day's first shift *and* the prior day's second shift.

Unknown to Levolor at the time, UPS' internal system rejected the second electronic manifest transmission as a duplicate of the first manifest transmission received earlier in the day. (Id. at ¶ 27.) While UPS also had the daily hard copy records provided to its drivers, it apparently failed to use these records to verify the accuracy of its invoices. Thus, UPS prepared invoices based on the first electronic manifest transmission only, at least for the period between February and April 2000, and did not capture or bill for the products manufactured during Levolor's second shift. (See id.)

Contrary to the after-the-fact statements offered by UPS in support of its largely untimely claims for payment,³ Levolor did nothing to modify any form of hardware or

³ Please refer to pages 16 and 17 of the Petition for a discussion of UPS' failure to abide by the statutes of limitations periods applicable to its claims for payment.

software provided by UPS, including the “Clipper Ship” electronic shipping and manifesting system supplied by Federal Express for use by UPS’ non-exclusive customers. (*Id.* at ¶ 28.) Notably, UPS has never questioned the sufficiency of the “package level detail” information provided by Levolor on its first daily electronic manifest transmission. Yet, it is now complaining about the sufficiency of the *same* kinds of “package level detail” information provided by Levolor for its second shift packages *using the same software*. UPS also does not, and cannot, point to a single provision in the General Tariff or any other applicable document that prohibits the sending of a second daily electronic manifest. In any event, Levolor provided UPS with accurate information – both electronically and in hard copy -- for all packages that it shipped. Apparently, UPS was not able to process the information because of its internal system problems and general inattention to detail. (*Id.* at ¶ 29.)

For the foregoing reasons, the real issues presented by UPS’ transparent breach of contract claims are whether it has provided sufficient detail to Levolor to support these charges, pursuant to the contracts of carriage between the parties, and whether UPS has violated applicable statutes of limitations set forth in 49 U.S.C. § 13710(a)(3)(A) and 49 U.S.C. § 14705. (*See* Petition, pp. 16-17.)

F. The Negotiations Among the Parties and UPS’ Repeated Failure to Provide Appropriate Detail for the Charges Allegedly Owed.

Having completely mischaracterized the source of the manifest problem discussed in Section II.E. *supra*, UPS proceeds to allege that “all Levolor had to do was extract from its computer back-up tapes the information it had allegedly recorded on its manifest for the unreported packages, so UPS could show J.C. Penney that it should pay the charges.” (UPS’ Mtn. Dismiss, p. 5.) Other than recognizing that J.C. Penney,

and not Levolor, is responsible for "collect" shipment freight charges, this statement is devoid of truth. Indeed, after discovering the manifest problem and reporting it to UPS in April 2000, Levolor repeatedly attempted to present even more information to,⁴ and extract information from, UPS, to no avail.

Illustrative of the negotiations between the parties that ensued after April 2000, Levolor met with UPS' approved software designer, Kewill E Commerce ("Kewill"), in July 2000 regarding the outstanding billing disputes among the parties. (Huchel Affidavit, ¶ 30.) Levolor then received an e-mail from Kewill stating: "This E-mail is to confirm that the format of the PLD file being produced by PowerShip mc adheres to the PLD specifications supplied by UPS. All reference data is appropriately represented." (Exhibit D to Huchel Affidavit.) In clear contradiction of the opinion of its software designer, UPS nevertheless was not satisfied with the files resubmitted by Levolor.

Evidencing its continued willingness to pay for all charges for which UPS could provide adequate documentary support, Levolor continued to meet with representatives of UPS and Federal Express on multiple occasions throughout 2000 and the first half of 2001. (See Huchel Affidavit, ¶¶ 32-37.) At each step of the way, UPS came up with some purported reason as to why it could not accept the information provided by Levolor or extract the requested information from its own records and systems. (See id.) Instead, UPS repeatedly attempted to pass the costs associated with its invoicing problems to Levolor (or, amazingly, to Federal Express, a competitor of UPS) or simply

⁴ Again, it must be remembered that Levolor submitted two daily electronic manifest transmissions and back-up hard copy Pick-Up Records containing all information needed by UPS to invoice Levolor for all packages manufactured during Levolor's first and second shifts.

demanded that Levolor pay the sum of \$900,000.00 without providing reliable documentation verifying the charges at issue. (Id. at ¶¶ 34, 37.)

G. UPS' Decision to Suspend Service and Loss and Damage Claim Processing.

Compounding its failure to provide Levolor with any form of support for its request for payment, UPS, on December 22, 2000, advised Levolor that it was going to stop picking up shipments at all of Levolor's facilities. (Huchel Affidavit, ¶ 39.) More than just a refusal to "discontinue extending even more credit to Levolor" (see UPS' Mtn. Dismiss, p. 5), UPS instructed its drivers to stop making all scheduled pick-ups at all of Levolor's facilities. (Huchel Affidavit, ¶ 39.) Accordingly, when Levolor opened for business on December 27, 2000, following the Christmas holidays, it was left without any form of regular ground delivery service. (Id.) This interruption of service, in express violation of 49 U.S.C. § 14101, continued until late March 2001 and caused Levolor considerable hardship, including having to pay increased delivery costs of \$122,000.00 during the period between December 27, 2000 and March 25, 2001. (Id. at ¶ 41.) UPS also never categorized its discontinuance of pick-up service as a suspension of credit, as it now alleges, until Levolor told UPS that it was violating the law. (Id. at ¶ 40.)

In addition to discontinuing regular service at Levolor's facilities, UPS also suspended the processing of the majority of Levolor's loss and damage claims without any valid excuse in violation of 49 C.F.R. § 370. (Id. at ¶ 42.) At last count, UPS failed to acknowledge 2,115 of the 2,306 loss and damage claims duly filed by Levolor, which claims represent \$173,057.57 of the total amount of \$188,249.00 owed to Levolor on this aspect of the dispute between the parties. (Id.) Consistent with its behavior

throughout this matter, UPS has not offered any reasonable explanation for its failure to process Levolor's claims, let alone its failure to do so within the time frame required by law.

As a result of UPS' overcharges and other forms of unlawful conduct, Levolor has been damaged in an amount in excess of \$1,673,828.23, exclusive of interest, as of the filing of the Petition.

Argument and Citation of Authorities

I. The Board's Jurisdiction Over Motor Carrier Billing Disputes Generally.

Following its categorization of this matter as a "breach of contract" contract case, the primary thrust of UPS' position in support of its motion to dismiss is that the Board does not have jurisdiction over "whether Levolor is responsible for paying the shipping, additional handling and residential delivery charges for unreported shipments." (UPS' Mtn. Dismiss, pp. 7-8.) Perhaps recognizing the inherent flaws within its jurisdictional argument, which was soundly rejected by Judge Tidwell, UPS, in a display of considerable hubris, alternatively contends that the Board should ignore the Court's request for assistance set forth in Judge Tidwell's referral order. (*Id.* at pp. 9-12.) While it is unfortunate that the Board even has to consider these recycled arguments instead of proceeding immediately to the merits of Levolor's Petition, UPS simply cannot avoid Board scrutiny of its improper and coercive conduct. Indeed, based on the plain language of ICCTA and subsequent decisions issued by the Board, the matters presented in the Petition fall squarely within the Board's primary jurisdiction.

A The Plain Language of 49 U.S.C. § 13710(a)(3) Supports the Board's Continuing Jurisdiction Over Rate Applicability Billing Disputes.

Even with Congress' decision to deregulate the motor carrier industry, see 49 U.S.C. § 14101(b)(2), ICCTA provided the Board with specific jurisdiction to consider "billing disputes" at the election of the shipper or motor carrier. 49 U.S.C. §§ 13710(a)(3). When a shipper challenges the applicability of a rate or related provision, ICCTA provides that:

If 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. A shipper must contest the original bill or subsequent bill within 180 days of receipt of the bill in order to have the right to contest such charges.

49 U.S.C. § 13710(a)(3)(B).

Thus, the process contemplated by Congress is clear. If a shipper wishes to seek Board review of "charges originally billed or additional charges subsequently billed," the shipper need only file a request with the Board, like the letter request or the Petition filed by Levolor. The Board then is charged with developing a full record, determining which rates and charges are applicable, and evaluating whether any statutory provisions and regulations are implicated by the dispute. In so doing, the Board may facilitate resolution among the parties and/or give guidance to the district courts if litigation is unavoidable or, as in this case, has been filed.

Without even acknowledging the existence of 49 U.S.C. § 13710(a)(3), UPS again argues that all contract disputes "*must* be heard in a court, absent agreement by the parties." (UPS' Mtn. Dismiss, p. 7) (emphasis in original.) Such a reading of ICCTA, however, would eviscerate the review process expressly delegated to the Board by Congress. Indeed, as all tariffs are "contracts," the section 13710(a)(3) review

process would be trumped every time a party filed a lawsuit if UPS' construction of 49 U.S.C. § 14101(b)(2) and accompanying disregard of 49 U.S.C. § 13710(a)(3) were followed. The Board also would be left without any authority to assist the district courts, on referral, to review matters within its special expertise simply because a party, like UPS, filed self-styled "breach of contract" claims.⁵

The plain intent of Congress to involve the expertise of the Board in rate applicability and other billing contests cannot be discarded so callously, especially considering that Congress deliberately created the Board review process in legislation otherwise designed to deregulate the industry. When deciding among possible constructions of ICCTA, meaning *must* be given to the review process set forth in 49 U.S.C. § 13710(a)(3). Contrary to the implication offered by UPS, Board referral in no way defeats the ultimate role of the courts in deciding legitimate breach of contract claims and awarding relief thereon. With the referral option like that exercised by Judge Tidwell, the district courts may make reasoned decisions benefited, in whole or in part, by the record and findings of the Board.

B. The Post-ICCTA Decisions of the District Courts and the Board Support the Board's Continued Jurisdiction Over Billing Disputes.

Confirming its proper role in reviewing rate applicability and billing contests, the Board repeatedly has accepted referrals from the district courts following the enactment of 49 U.S.C. § 13710(a)(3). See NSL, Inc. v. Whitlock, 2000 WL 351354 at *2, STB Docket No. 41998 (Apr. 5, 2000) (after issuing two earlier decisions upon referral from

⁵ Indeed, imagine the practical result if UPS' interpretation of ICCTA was correct. Every time a motor carrier wanted to avoid Board review of its billing practices, it would file a lawsuit in district court alleging breach of contract. The lawsuit then would be used to defeat Board jurisdiction over all issues simply by virtue of its filing. Consumers, including those without the resources of Levolor, then would be left with the prospect of having to defend lawsuits instead of seeking Board guidance.

the United States District Court for the Southern District of Illinois, the Board determined whether the carrier generally complied with the same 180-day statute of limitations period cited by Levolor in the Petition); Hall v. Aloha Int'l Moving Serv., Inc., 1999 WL 989311 at *1, STB Docket No. 42048 (Nov. 2, 1999) (citing to the United States District Court for the District of Minnesota's referral order "to resolve issues concerning tariff applicability" and "rates"); Associated Traffic Serv., Inc. – Pet. for Decl. Order, 1998 WL 231214 at *1 and *5, STB Docket No. 41996 (May 8, 1998) (following referral from the United States District Court for the Northern District of Georgia, the Board interpreted tariff provisions to consider the propriety of alleged overcharges contested by the shipper); NSL, Inc. v. Whitlock, 1997 WL 542656 at *1-*2 and n.4, STB Docket No. 41998 (Sept. 5, 1997) (following referral, the Board was tasked with determining whether the claims involved rate applicability issues over which the Board has jurisdiction).

The Board likewise has acknowledged jurisdiction over billing disputes when complaints, like the one filed by Levolor, have been challenged for alleged lack of jurisdiction. Despite the limitations that ICCTA may have placed on rate reasonableness jurisdiction, the Board explained:

[W]e believe we do have jurisdiction to determine the applicability of motor carrier rates, whether or not they are subject to section 13701. . . . [W]e clearly do have authority to interpret tariffs for the benefit of a court with jurisdiction, and to express our view as to which movements are governed by which tariff rates. . . . [W]e believe we do have jurisdiction to express our view as to the applicability of the tariff rates to this transportation.

Associated Traffic Serv., Inc., 1998 WL 231214 at *2; NSL, Inc. v. Whitlock, 1999 WL 1044910 at *3, STB Docket No. 41998 (Nov. 18, 1999) ("[W]e believe that we can best assist the court by explaining why the . . . regulatory defenses are not valid, and by then

addressing . . . the tariff/contract questions about particular claims that have been submitted to us[.]”). Accord Carolina Traffic Serv. of Gastonia, Inc. – Pet. For Decl. Order, 1996 WL 303722 at *3, STB Docket No. 41996 (June 7, 1996) (stating that “if a Board determination has not already been obtained, the court will need to afford an opportunity for the Board to exercise its primary jurisdiction over rate applicability matters . . . pursuant to section 13710(a)[3]”). When rejecting the same flawed statutory construction argument offered by UPS, the Board commented that:

[T]he plain language of section 13710(a)(3) continues to provide a means for carriers to seek additional charges and for shippers to contest charges, regardless of whether the charges were tariff-based. There is no basis on which to limit the application of the plain statutory language

National Assoc. of Freight Transp. Consultants, Inc., 1997 WL 189658 at *5.

Ignoring this ample precedent supporting the Board’s statutory jurisdiction and important role in assisting the district courts, UPS primarily cites to cases that are not even peripherally related to *motor carrier* billing disputes. See Wisconsin Cent. Ltd. – Pet. for Decl. Order, 2001 WL 688877 at *3, STB Docket No. 41995 (June 20, 2001) (no jurisdiction over an inter-carrier rail dispute pursuant to 49 U.S.C. § 10709); Cross Oil Ref. & Mktg., Inc. v. Union Pacific R.R. Co., 1998 WL 744366 at *2, STB Docket No. 33582 (Oct. 27, 1998) (no jurisdiction over a rail contract dispute pursuant to 49 U.S.C. § 10709); H.B. Fuller Co. v. Southern Pac. Transp. Co., 1997 WL 476350 at *1, STB Docket No. 41510 (Aug. 22, 1997) (no jurisdiction over a freight storage charge dispute pursuant to 49 U.S.C. § 10713). Alternatively, UPS cites to a single aspect within a series of Board decisions, see NSL, Inc. v. Whitlock, 2000 WL 351354, STB Docket No. 41998 (Apr. 5, 2000), that, in their entirety, clearly support the Board’s role in this matter. While the Board in NSL, Inc. v. Whitlock, STB Docket No. 41998 (Apr. 5, 2000)

ultimately refused to rule on individual movements unless requested by the district court, UPS cannot avoid the fact that the Board issued no less than three decisions on the merits following referrals from the district court.

For the foregoing reasons, UPS' attempted restrictive construction of ICCTA based solely on the exclusive remedy language contained within 49 U.S.C. § 14101(b) cannot withstand scrutiny. Casting aside the rail carriage cases that have no applicability in this matter, the myriad motor carrier cases set forth above, *including* those cited by UPS in its motion to dismiss,⁶ demonstrate that the Board has jurisdiction over rate applicability and other billing contest matters. Thus, there is no basis for the Board to dismiss the Petition or otherwise refuse Judge Tidwell's express request for assistance from the "special competence" of the Board. (See Exhibit A, p. 4.)

II. The Board Clearly has Primary Jurisdiction Over the Specific Issues Presented by Levolor in the Petition.

A. As Confirmed by Judge Tidwell's Referral Order, the Board has Jurisdiction Over the Billing Dispute Issues Presented in the Petition.

When rejecting UPS' jurisdictional argument presented in response to Levolor's motion to dismiss or stay the Lawsuit, Judge Tidwell held that Levolor's informal complaint filed with the Board and Levolor's response to the Lawsuit raised issues concerning the applicability of rates charged by UPS. (See Exhibit A, p. 3.) Judge Tidwell then specifically requested the Board's guidance with respect to 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

⁶ For example, UPS cited to NSL, Inc. v. Whitlock, STB Docket No. 41998 (Apr. 5, 2000) and Associated Traffic Serv., Inc. – Pet. for Decl. Order, STB Docket No. 41996 (May 8, 1998), while apparently ignoring the jurisdiction exercised by the Board in these matters.

handling charges.” (Id.). More than just identifying these rate applicability and billing issues, Judge Tidwell reinforced that the Board has jurisdiction to “determine whether the charges billed must be paid,” citing to 49 U.S.C. § 13710(a)(3)(B). (Id. at pp. 3-4.)

Instead of questioning Judge Tidwell’s order before the source itself, UPS remained silent for nearly three months. Once Levolor filed the Petition, however, UPS embarked on an “at all costs” strategy designed to delay the Board’s consideration of the merits of the issues presented in the Petition. In flagrant disregard of Judge Tidwell’s order requesting Board assistance, UPS now has come before the Board stating that the Board’s “special expertise is not required to resolve any of these four issues.” (See UPS’ Mtn. Dismiss, p. 9.) UPS further contends that “two of the issues in the Court’s referral – the ‘Consignee Billing Brochure’ and ‘third-party ‘collect’ charges’ – are issues of contract interpretation that fall outside of the Board’s jurisdiction.” (Id.) While this last statement begs the question of whether UPS finally has admitted that the other two issues (the residential delivery surcharge and additional handling charge issues) fall *within* the Board’s jurisdiction, UPS’ argument that the Board should decline the Court’s referral is specious.

1. The Applicability *vel non* of the Consignee Billing Brochure and the Third-Party “Collect” Charges Imposed on Levolor.

With the Petition, Levolor has brought an overcharges claim based on UPS’ retention of \$845,781.00 of improper additional handling charges billed on “collect” shipments consigned to J.C. Penney. Based on the “Qualifying Conditions” contained in its Consignee Billing Brochure, UPS defends these charges on the sole ground that Levolor failed to satisfy all conditions precedent for consignment. (See id. at p. 10; Brown Affidavit, ¶¶ 15-16.) Because of Levolor’s alleged failure to comply with the

terms of the Consignee Billing Brochure, UPS argues it was entitled to collect the additional handling charge rate contained in the then current UPS Rate Chart from Levolor on all of the consigned J.C. Penney shipments at issue. (UPS' Mtn. Dismiss, p. 10.) Turning logic on its head, UPS then states that "[t]he question of whether Levolor is responsible for paying charges that were allegedly intended to be consignee billed to J.C. Penney is not an issue of rate applicability." (See *id.*)

Consistent with 49 U.S.C. § 13710(a)(3)(B), both the Court and Levolor have asked the Board to review the applicability of the Consignee Billing Brochure and the "collect" shipment additional handling "charges originally billed" to Levolor, instead of to J.C. Penney, purportedly because of the brochure. Regardless of how UPS disingenuously describes the Consignee Billing Brochure as a "contract"⁷ in an attempt to avoid regulatory review of its "billing and collection practices,"⁸ the Consignee Billing Brochure is at the crux of the "collect" additional handling charges imposed on Levolor. Indeed, the following questions, among others, are fundamental to whether Levolor is entitled to a refund of these overcharges that it unwittingly paid during the period from July 1999 through November 2000:

- (a) Whether the Consignee Billing Brochure applies in the abstract;
- (b) If the answer to (a) is "Yes," whether Levolor failed to satisfy all of the qualifying conditions for the shipments consigned to J.C. Penney; and

⁷ Of course, Levolor never received the Consignee Billing Brochure at any time prior to the inception of these disputes and UPS has never explained how it is part of the Tariff or the other documents that govern the relationship between the parties. (See Huchel Affidavit, ¶ 9.) Assuming that it does somehow apply, UPS also has not explained, and cannot explain, how Levolor violated the "Qualifying Conditions" set forth in the Consignee Billing Brochure, as each such condition in the brochure was met. (*Id.* at ¶ 11.)

⁸ 49 U.S.C. § 13710, the jurisdictional statute in question, tellingly is titled "**Additional billing and collection practices.**"

(c) Even if the answers to questions (a) and (b) are "yes," whether UPS nevertheless is entitled to retain the additional handling charges unwittingly paid by Levolor, given that UPS affirmatively decided not to bill J.C. Penney for these charges in contravention of the terms of the Guide to UPS Services.

These questions, of course, have to be answered based on the record and cannot be dismissed based on the bald statements contained in UPS' motion to dismiss.

Per Judge Tidwell's ruling, the Board has jurisdiction to consider and opine on both the "Consignee Billing Brochure" and "collect" shipment issues cited in the Court's referral order pursuant to 49 U.S.C. § 13710(a)(3)(B). See, e.g., NSL, Inc., 1999 WL 1044910 at *3; Hall, 1999 WL 989311 at *1; Associated Traffic Serv., Inc., 1998 WL 231214 at *1 and *5; National Assoc. of Freight Transp. Consultants, Inc., 1997 WL 189658 at *5. This jurisdiction moreover includes the ability to "determine whether the charges billed must be paid" or, in this case, refunded to Levolor. Any other result would frustrate the plain language and regulatory purpose of ICCTA to the exclusive benefit of UPS, a motor carrier with superior bargaining power in comparison to the overwhelming majority of the shippers with which it does business.

2. The Duplicate Additional Handling Charges.

Levolor also has brought an overcharge claim based on duplicate additional handling charges imposed by UPS in express violation of the terms of its General Tariff. As stated with more particularity in the Petition and above, Levolor terminated the separate additional handling charges agreement applicable to Levolor and Kirsch brand prepaid shipments, effective November 6, 2000, and took over responsibility for

determining which of its packages exceeded sixty inches (60") in length. (Huchel Affidavit, ¶ 16.) Levolor then paid a \$5.00 additional handling charge for each such shipment, pursuant to the General Tariff and UPS' published rates. (Id.) UPS, however, continued to bill Levolor for *another* \$5.00 on forty percent (40%) of Levolor brand shipments and thirty-seven percent (37%) of Kirsch brand shipments during the period between November 20, 2000 and June 16, 2001, resulting in \$369,129.00 in overcharges. (Id.)

Even with these facts, UPS has come before the Board arguing that this additional handling charges question does not involve rate applicability or an interpretation of its General Tariff. (See UPS' Mtn. Dismiss, pp. 11-12.) While UPS understandably may want to avoid having to explain why it has retained duplicate charges for as much as eighteen (18) months without any reasonable explanation, this overcharge claim plainly requires an analysis of UPS' attempt to circumvent the terms of its Tariff. The claim also is a "contest" of "charges originally billed" and, thus, falls squarely within the Board's purview pursuant to 49 U.S.C. § 13710(a)(3)(B). The Board therefore should consider these charges based on its interpretation of the Tariff and consideration of the record, and advise the Court that all duplicate additional handling charges retained by UPS are improper, as Levolor contends.

3. The Residential Delivery Surcharges.

The last issue mentioned in the Court's referral order is the matter of the residential delivery surcharges imposed by UPS. This issue cuts both ways, as UPS claims that Levolor failed to detail shipments to residential customers and Levolor contends that UPS has retained overcharges in the form of residential delivery

surcharges based on the limited audit that UPS performed of Levolor's two facilities in Utah. Ignoring the big picture billing practice questions presented by its retention of residential delivery surcharges and unwillingness to audit Levolor's other facilities, UPS now argues that "no special administrative expertise is required to distinguish a residential from a commercial address" and that the Board should not evaluate proof "as to whether over 150,000 deliveries were to residential or commercial locations." (See UPS' Mtn. Dismiss, p. 11.)

Simply stated, UPS misses the point entirely, as Levolor has not asked, and does not ask, the Board to rule on whether a \$1.00 surcharge was appropriate on each shipment at issue. Instead, the Board may review:

- (a) Whether the Tariff and other applicable documents are ambiguous as to what locations qualify as residential versus commercial;
- (b) Whether UPS has the burden of establishing that the surcharge applies given that its Tariff does not index or define the term "residential deliveries"⁹ (See Exhibit F to Brown Affidavit.);
- (c) Whether UPS must conduct an audit of Levolor's facilities given that the limited audit of the two Utah facilities demonstrated that Levolor was entitled to a refund for overcharges; and
- (d) Whether the evidence generally demonstrates that Levolor is entitled to a refund for overcharges.

⁹ For example, is the surcharge applied based exclusively on the appearance of the building to which the shipment was delivered (*i.e.*, is a surcharge applied to a commercial consignee located in any residential building or area)? UPS' former tariff (the 1991 Tariff) defined "commercial location" as a consignee's place of business or employment, and a "residence" to be the location where the consignee lives. *Chadwick's of Boston, Ltd. – Pet. for Decl. Order*, ICC No 41531, 1995 WL 366724 (June 21, 1995). When reviewing this issue, the Interstate Commerce Commission held that UPS has the burden of proving how it determined which shipments should be charged with the residential surcharge.

Again, Levolor is not requesting that the Board determine the applicability of each surcharge and only asks that the Board give guidance to the Court in a manner consistent with Judge Tidwell's referral order and the parameters of 49 U.S.C. § 13710(a)(3)(B).

B. The Board has Jurisdiction Over the Statutory Violation Issues Presented in the Petition.

Turning to the statutory claims brought by Levolor in the Petition, UPS ironically suggests that the Board should not exercise jurisdiction over *any* matter outside of the scope of Judge Tidwell's order *after* repeatedly arguing that the Board should otherwise ignore the referral directives issued by Judge Tidwell. (See UPS' Mtn. Dismiss, pp. 6, 12; Exhibit E, pp. 2, 5.) Although UPS naturally seeks to divert the Board's attention away from the merits, its attempt to limit the Board's review to the four issues cited in Judge Tidwell's referral order is baseless. On the contrary, the Board has authority to hear any matter within the scope of the jurisdiction conferred by Congress and even may initiate a *sua sponte* investigation into unlawful motor carrier billing practices such as those demonstrated by UPS throughout the events at issue. See 49 U.S.C. § 14701; 49 C.F.R. § 1111.7.

Based on UPS' repeated violations of the statutes and regulations governing motor carrier billing and collection practices, Levolor respectfully contends that the Board should give guidance to the Court on these issues *and* initiate a general investigation into UPS' conduct pursuant to 49 U.S.C. § 14701. Absent such Board action, UPS effectively will have free reign to exert its market power on shippers in an attempt to collect and retain improper charges, subject only to having to defend or prosecute an occasional lawsuit in court. If anything, UPS' continued recalcitrance

during the events at issue amplifies the need for a firm regulatory response through guidance to the Court and a thorough general investigation of UPS' billing and collection practices.

1. UPS' Repeated Violations of the Statutes of Limitations Periods Applicable to its Claims for Original and Additional Charges.

As alleged in the Petition, UPS systematically has violated the statute of limitations period set forth in 49 U.S.C. § 14705(a) by seeking to recover original charges more than eighteen (18) months after the accrual of service. UPS likewise has violated the statute of limitations period set forth in 49 U.S.C. § 13710(a)(3)(A) by suing to recover additional charges more than one hundred eighty (180) days after the receipt of original bills. (See Petition, pp. 16-17.) Accordingly, Levolor has asked the Board to review the record to determine whether UPS generally has ignored these statutes of limitations periods, as part of its overall coercive billing and collection tactics. (Id. at p. 18.) Levolor notably has not asked the Board to rule on the timeliness of *each* individual collection effort that is the subject of UPS' claims brought in the Lawsuit. (See id. at pp. 16-18.)

In response to this statutory violation issue, UPS first engages a form of legal slight of hand. Specifically, UPS first quotes the Board's opinion in NSL, Inc. v. Whitlock, 2000 WL 351354, STB Docket No. 41998 (Apr. 5, 2000) for the proposition that "[i]t is ultimately up to the courts to apply the 180-day rule in individual cases." (UPS' Mtn. Dismiss, p. 15.) UPS, however, does not disclose that this conclusion, with which Levolor does not disagree, was reached only *after* the Board established a factual record and provided guidance to the referring district court as to whether the 180-day limitations period generally applied to the movements at issue. NSL, Inc., 2000 WL

351354 at *2. Accord Carolina Traffic Serv. of Gastonia, Inc., 1996 WL 303722 at *3-*4 (analyzing the 180-day limitations period issue only). As the Board held in Carolina Traffic Service of Gastonia, Inc., "if a Board determination has not already been obtained, the court will then need to afford an opportunity for the Board to exercise its primary jurisdiction over rate applicability matters." 1996 WL 303722 at *4.

Tellingly, UPS then asserts that it may be appropriate for a carrier to attempt to collect otherwise time barred charges as part of an ongoing business relationship with a shipper, such as Levolor. (See UPS' Mtn. Dismiss, pp. 15-16.) Of course, UPS cannot attach any legal significance to this tacit admission that it sought to recover many time barred charges from Levolor and continues to do so via the Lawsuit. UPS simply is seeking to avoid Board review of the fact that it repeatedly demanded that Levolor pay the flat sum of \$900,000.00 without any supporting documentation for its charges, including time barred charges, in an attempt to inflate the face value of its claims. While UPS now may claim that it "is only seeking to recover amounts that are not time barred," (UPS' Mtn. Dismiss, p. 15,) the history among the parties proves otherwise. Just as the Board held in the NSL and Carolina Traffic Service decisions, it clearly has a role in establishing and reviewing the record to determine whether UPS has ignored applicable statutes of limitations periods as part of its overall billing practices.

2. UPS' Unlawful Suspension of Service.

Levolor also has asked that the Board review UPS' decision to discontinue service at all of Levolor's facilities from December 27, 2000 through March 25, 2001 in violation of 49 U.S.C. § 14101(a). (See Petition, pp. 13-14.) In response, UPS requests that the Board summarily refuse to consider this issue. (See UPS' Mtn. Dismiss, pp. 13-

14.) Ignoring that this issue is before the Board on a motion to dismiss and without the benefit of a full record, UPS exclusively bases its argument for summary dismissal on its alleged version of the facts.

First and foremost, UPS has not, and cannot, cite to any legal reason as to why the Board should not review whether UPS violated its obligation to provide service on reasonable request as part of its overall attempt to collect sums allegedly owed by Levolor. On the contrary, this issue is within the particular province of the Board, which has much more experience evaluating core refusal to serve issues than the district courts. See, e.g., B.J. Alan Co., Inc. v. United Parcel Service, Inc., 5 I.C.C.2d 700, 709 (1989) (while finding for the carrier, the Interstate Commerce Commission, the predecessor agency to the Board, clearly confirmed its role “in assessing refusal-to-serve” cases). Although the Board may not be able to issue an award of damages resulting from UPS’ patent refusal to provide regular service at Levolor’s facilities, it may consider the facts, advise the Court and initiate a general investigation into UPS’ billing and collection practices.

Second, Levolor clearly disagrees with UPS’ version of the facts presented in support of its motion to dismiss. As of December 2000, the continued negotiations over sums allegedly due by Levolor again stalled as a result of UPS’ failure to provide sufficient documentation and accompanying refusal to accept the documentation and data files provided by Levolor. (See, e.g., Huchel Affidavit, ¶¶ 33-37.) On December 22, 2000, UPS flatly advised Levolor that it was discontinuing service at all of Levolor’s facilities, without any further explanation, including any explanation relating to the alleged refusal to extend credit only. (Id. at ¶¶ 39-40.) UPS then discontinued service

for Levolor on December 27, 2000 and for the next three months, as its drivers stopped making the scheduled pick-ups that previously took place on a daily basis for nearly three years. (Id. at ¶ 39.)

Based on the true and complete facts, Levolor respectfully contends that there is no basis in the General Tariff or in law for UPS' refusal to provide service for almost three months. Instead, UPS' decision to interrupt Levolor's business was nothing more than an exercise of market power designed to extract payment of an otherwise unsupported debt allegedly owed by Levolor. This type of flagrant conduct designed to further imbalance the equities between UPS and its customers is precisely what the Board should investigate and comment upon for the benefit of the district courts, which then may award damages against UPS pursuant to 49 U.S.C. § 17404(a)(2) and 49 U.S.C. § 17404(e).

3. UPS' Unlawful Suspension of the Processing of Levolor's Loss and Damage Claims in Violation of 49 C.F.R. § 370.

Following the inception of these disputes, UPS also suspended the processing of Levolor's loss and damage claims in a further attempt to collect sums that UPS could not support, but repeatedly claimed were due from Levolor. Indeed, UPS failed to process the overwhelming majority of loss and damage claims duly filed by Levolor and continues to withhold \$188,249.00 owed to Levolor on this aspect of the dispute alone. (Huchel Affidavit, ¶ 42.) Within this larger problem, UPS has failed to timely acknowledge at least seventy-five percent (75%) of Levolor's claims within thirty (30) days of receipt or give status reports every sixty (60) days as required by 49 C.F.R. § 370. UPS also has developed a pattern of denying claims out of Levolor's locations in Athens, Georgia, High Point, North Carolina and South Holland, Illinois. (Id., ¶ 44.)

Given UPS' sophistication and certain ability to comply with the law, considering its ample resources, it is clear that UPS has delayed processing of Levolor's loss and damage claims to force Levolor to pay the disputed sums that UPS contends are owed on the second-shift shipments at issue.

With its motion to dismiss and throughout the Brown Affidavit, UPS ignores the facts relating to its failure to process Levolor's loss and damage claims in the manner required by 49 C.F.R. § 370, perhaps recognizing that it has no reasonable explanation for its illegal and coercive conduct. UPS instead argues that the Board does not have jurisdiction to consider "the merits or the measure of damages of particular loss and damage claims" (UPS' Mtn. Dismiss, p. 14 (citing to Clark Distrib. Sys., Inc. et al. – Pet. Decl. Order, 1996 WL 714568, STB Docket No. 41074 (Dec. 9, 1996).) Yet, Levolor does not ask the Board to review and issue rulings with respect to each loss and damage claim presented to UPS. Levolor merely requests that the Board consider this conduct – particularly, UPS' undisputed violations of claims regulations and wholesale suspension of loss and damage claim processing – within the context of the overall billing disputes among the parties. Thus, the Board may consider UPS' retention of claim payments without justification as part of the Board's overall investigation of UPS' coercive billing and collection practices, which are clearly within the scope of the Board's jurisdiction.

Alternatively, to the extent that the any matter relating to the enforcement of loss and damage claims regulations is within the exclusive province of the Federal Motor Carrier Safety Administration ("FMCSA"), the Board may: (1) refer this issue to the FMCSA for its review and consideration, either as an intervenor herein or as part of an

independent investigation; or (2) direct Levolor to file a separate complaint with the FMCSA, if necessary.

Relief Requested by Levolor

I. The Procedural Relief Requested by Levolor.

For all of the foregoing reasons, Levolor respectfully requests that the Board take the following actions in furtherance of its consideration of the Petition:

- (a) Issue an order denying UPS' motion to dismiss in its entirety;
- (b) Issue a procedural order, as expeditiously as possible, that will allow discovery to proceed and allow the Board to develop a full record on the claims presented in the Petition;
- (c) Initiate a general investigation into UPS' unlawful and coercive billing practices, through the Board's Office of Compliance and Enforcement, pursuant to 49 U.S.C. § 14701. This general investigation may include consideration of whether:
 - 1. UPS is systematically back-billing and overcharging customers by improperly assessing residential delivery surcharges, duplicate additional handling charges, improper "collect" shipment charges, and the like;
 - 2. UPS is systematically back-billing for time barred charges and, accordingly, is ignoring applicable statutes of limitations set forth in 49 U.S.C. § 14705 and 49 U.S.C. § 13710(a)(3)(A) in an attempt to inflate the value of its claims presented to shippers;

3. UPS is violating 49 U.S.C. § 14101 by using the potential and realized threat of refusal of service to coerce shippers into paying unsubstantiated charges alleged to be due to UPS; and
 4. UPS is systematically violating the Loss and Damage Claim Regulations set forth in 49 C.F.R. § 370¹⁰; and
- (d) If necessary to facilitate its general investigation of UPS' practices, request that the Board's Office of Compliance and Enforcement intervene in this proceeding.

II. The Substantive Relief Requested by Levolor.

Following the Board's investigation and consideration of the claims presented in the Petition and any accompanying general investigation of UPS' practices, Levolor requests that the Board issue an order, for the benefit of the Court, declaring that:

- (a) UPS' flawed rejection of Levolor's second daily electronic manifest transmission, as a duplicate of the first daily manifest transmission, cannot invalidate Levolor's transmission of shipping instructions and/or support any alleged obligation to pay the charges claimed due by UPS;
- (b) UPS has not supported its claims for payment with sufficient shipment detail so as to warrant payment from Levolor;
- (c) UPS is not entitled to payment from Levolor for any third-party "collect" shipment charges pursuant to the terms of the General Tariff;
- (d) The Consignee Billing Brochure does not apply to the movements at issue or, alternatively, if the Board concludes that the Consignee Billing Brochure does

¹⁰ Alternatively, the Board may refer this issue to the FMCSA's Office of Enforcement and Compliance.

apply to the movements at issue, that Levolor has complied with all "Qualifying Conditions" set forth in the Consignee Billing Brochure;

- (e) UPS has improperly retained overcharges in the form of additional handling charges billed and paid on "collect" shipments where UPS did not attempt to bill or collect these charges from the consignee (J.C. Penney);
- (f) UPS has improperly retained overcharges in the form of duplicate additional handling charges imposed on Levolor in violation of the terms of the General Tariff and Guide to UPS Services;
- (g) The General Tariff is ambiguous as to what locations qualify as "residential" for the purpose of imposing the residential delivery surcharge;
- (h) UPS has the burden of proving that its residential delivery surcharge applies to the movements at issue;
- (i) UPS must provide an audit of all of Levolor's shipping locations to determine the amount, if any, of overcharges for shipments erroneously billed as residential;
- (j) UPS has engaged in illegal and coercive billing and collection practices by seeking to impose charges after the expiration of the statutes of limitations periods set forth in 49 U.S.C. § 14705(a) and 49 U.S.C. § 13710(a)(3)(B);
- (k) UPS has engaged in illegal and coercive billing and collection practices by discontinuing service at Levolor's facilities during the period from December 27, 2000 through March 25, 2001;
- (l) UPS has engaged in illegal and coercive billing and collection practices by suspending the processing of, or wrongfully rejecting, Levolor's loss and

damage claims, failing to acknowledge claims within thirty (30) days of receipt and failing to provide status reports every sixty (60) days, all in violation of 49 C.F.R. § 370; and

(m) Levolor is entitled to damages, including attorney's fees and expenses, in an amount to be determined by the Court pursuant to 49 U.S.C. § 14704(a)(2) and 49 U.S.C. § 14704(e).

This the 7th day of May, 2002.

Respectfully Submitted,

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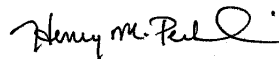
CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing
**PETITIONERS' RESPONSE IN OPPOSITION TO RESPONDENTS' MOTION TO
DISMISS PETITION** by overnight mail, via Federal Express delivery, with sufficient
postage affixed thereon, addressed as follows:

Cari K. Dawson, Esq.
Alston & Bird LLP
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James F. Moriarity, Esq.
Fleischman and Walsh, LLP
1400 Sixteenth Street
Washington, DC 20036

This the 7th day of May, 2002.



Henry M. Perlowski

Arnall Golden Gregory LLP
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1201 West Peachtree Street, N.E.
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Attorney 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 IN CLERK'S OFFICE
JAN 25 2002

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

Plaintiffs,

v.

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

Defendants.

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

Counter-claimants,

v.

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

Counter-defendants.

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

CIVIL ACTION

NO. 1:01-cv-1788-GET

O R D E R

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

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

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

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

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

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

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

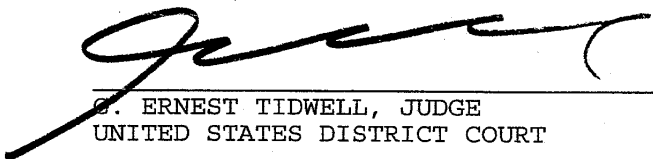
Moreover, the parties' Joint Preliminary Planning Report and Scheduling Order states that the factual issues in this case are "exceptionally complex" and that this case contains "highly technical issues and proof." Therefore, the Board's "special competence" in determining issues of rate applicability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

Summary

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

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

SO ORDERED, this 25 day of January, 2002.



G. ERNEST TIDWELL, JUDGE
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

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BY L.D.T., CLERK
DEPUTY CLERK

Page 5

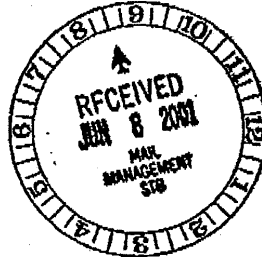


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June 8, 2001

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 pick up 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.

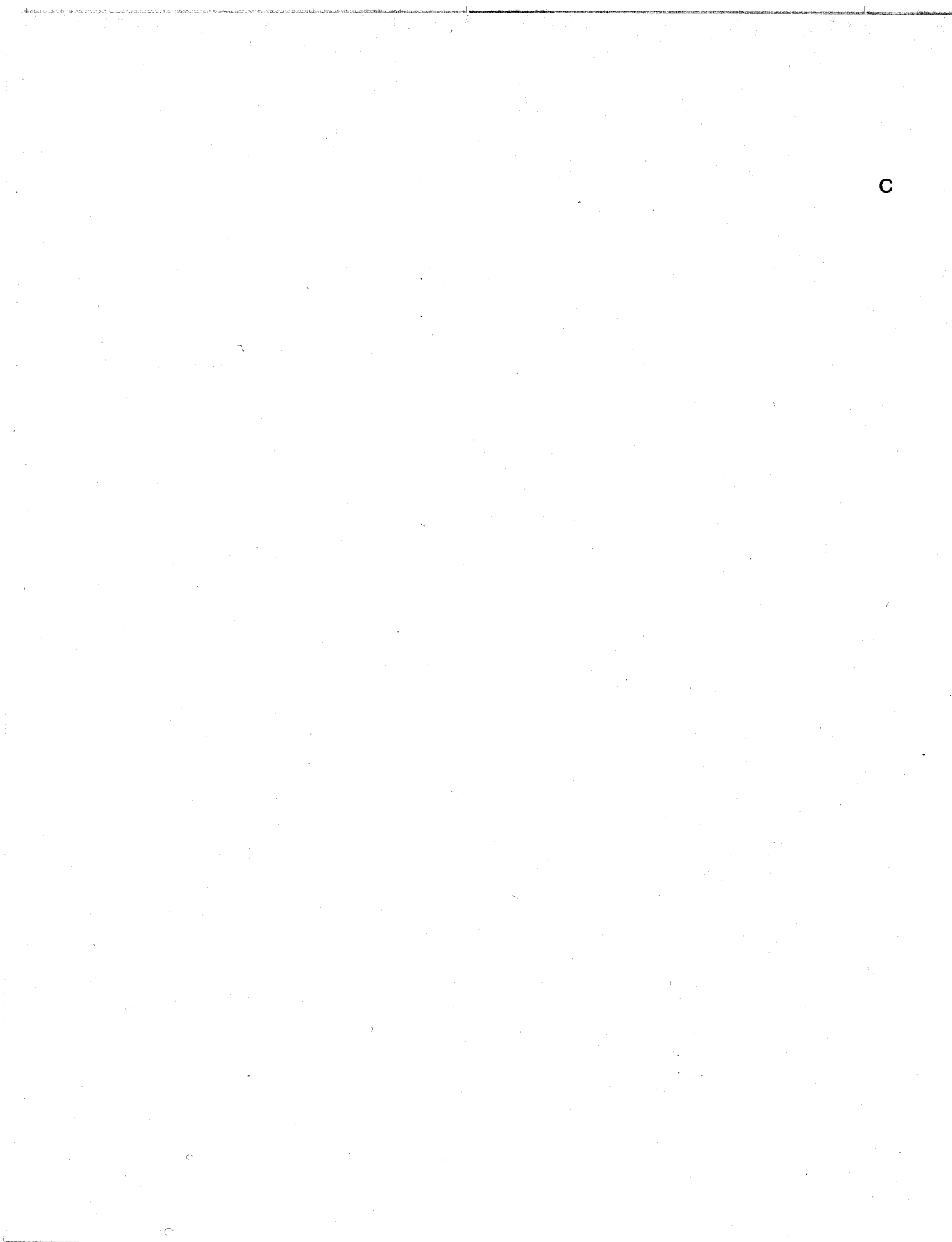
Furthermore, it is respectfully requested that the evidence submitted herein be referred to the Office of Compliance and Enforcement for an investigation into UPS' policies and practices with regard to assessing additional charges, overcharging, overbilling and erroneous billing, improper loss and damage 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,

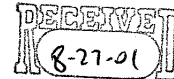
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Cc: Office of Compliance and Enforcement



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

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



Plaintiffs,)

CIVIL ACTION

v.)

FILE NO. 1:01-CV-1788

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

Defendants.)

**UPS'S RESPONSE IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS OR STAY**

Plaintiffs United Parcel Service, Inc., an Ohio corporation, and United Parcel Service, Inc., a New York corporation (collectively "UPS"), strongly oppose Defendants' Motion to Dismiss or Stay this action. UPS has asked this Court to resolve straightforward breach of contract claims: UPS seeks to be paid for the services performed. This Court routinely determines such contractual disputes and can do so here without deferral to any specialized expertise of the Surface Transportation Board ("STB").

By federal statute, the remedy sought by UPS and Levolor is exclusively available through the Courts. See

49 U.S.C. § 14101(b)(2) ("The exclusive remedy . . . shall be an action in an appropriate State court or a United States district court."). For its part, the STB has recently determined that in cases such as this, where the rates charged are no longer filed, and rate reasonableness is not an issue, referral would serve no useful purpose, a conclusion reached 14 years ago by this Court. See Delta Traffic Services, Inc. v. Commercial Cold Storage, 1987 WL 60209 (N.D. Ga. 1989) (Tidwell, J.). It would only delay resolution of the case and waste the resources of the Court, the STB and the parties.

FACTUAL BACKGROUND

This lawsuit is UPS's attempt to collect a \$900,000 debt from Levolor. Since 1997, Levolor has shipped packages pursuant to a contract with UPS. UPS billed Levolor (and all other customers with shipping accounts) on the "honor system," whereby Levolor, in effect, billed itself for its shipments of packages. (UPS's Complaint, ¶ 27.) Levolor was required to create a daily "shipping manifest," on which Levolor was to list detailed information regarding each package shipped, including without limitation the package's tracking number, destination address, consignee billing information (if applicable), and a calculation of the total shipping

charge. (Id., ¶ 28.) Levolor was then required to electronically transmit the shipping manifests using computer software created by any of approximately 20 different UPS-approved vendors. UPS based its weekly invoices on the manifests it received from Levolor. (Id., ¶ 29.)

By utilizing its "DIAD" technology, UPS learned that Levolor had not properly reported all packages it had shipped. UPS's package car drivers create a computer record of every delivered package using a hand-held computer known as a DIAD (short for "delivery information acquisition device"). (Id., ¶ 31.) At delivery, the driver scans the package label with the DIAD, which records, among other information, the shipper's identification number. In early 2000, UPS reviewed the DIAD reports of the delivered packages containing Levolor's shipper number, and discovered a large discrepancy in the delivered versus billed packages, amounting to over \$1 million in unpaid shipping and related additional handling charges. (Id., ¶¶ 32-34.)

UPS met and negotiated with Levolor for many months in an attempt to resolve the outstanding debt. During the negotiations, UPS learned that Levolor had modified the UPS-approved shipping software so that Levolor could reopen

a previously transmitted manifest. Levolor had been transmitting its shipping manifest to UPS in the afternoon, and then, without notice and contrary to UPS's requirements, adding additional packages and attempting to retransmit the modified manifest around midnight.

(Levolor's Counterclaim, ¶ 7.) UPS never received these second transmissions; UPS's computer system is programmed to reject any second transmission of the same manifest so as to ensure that UPS does not inadvertently bill a customer twice for delivery of the same package.

Throughout UPS's and Levolor's negotiations, Levolor contended that J.C. Penney should pay for much of the unpaid shipping charges. (Levolor's Counterclaim, ¶ 6.) J.C. Penney, which is Levolor's main customer, had agreed to be third-party billed for Levolor's shipments. However, Levolor was required to properly record and transmit to UPS its manifests containing the required information for billing J.C. Penney. (UPS's Complaint, ¶ 29.) Due to Levolor's altering its computer software, UPS never received Levolor's second daily transmissions of the same manifests, and thus could not bill J.C. Penney for the charges. Under the terms of the contract, Levolor was therefore responsible for paying those charges. (Id., ¶¶ 17-20.)

After Levolor refused to pay the unreported charges, either in whole or in part, UPS discontinued extending credit to Levolor on December 26, 2000. But contrary to Levolor's contention, UPS never refused to provide shipping services to Levolor. Levolor was free to ship with UPS by paying the charges at the time of shipment, as would any UPS customer that did not have a credit account.

PROCEDURAL HISTORY

By January 2001, the parties had engaged counsel to help settle the dispute. UPS re-extended shipping credit to Levolor on March 26, 2001. The parties entered an agreement on March 31, 2001 that neither party would file a complaint with any court or administrative body until May 7, 2001. The agreement was later extended through June 7, 2001. The parties ultimately were unable to reach a compromise, however, and at approximately 8:38 a.m. on June 8, 2001, UPS filed its Complaint in the Superior Court of Fulton County, State of Georgia. (Affidavit of Heather Peoples, ¶ 4, attached hereto as Exhibit A.) Thereafter, Levolor delivered an informal letter request to the STB regarding the same matters pending in Fulton County Superior Court.¹

¹ In various letters and pleadings filed with the STB and the Court, Levolor has referred to its informal letter

Levolor removed the state court action to this Court on July 6, 2001; filed an Answer and Counterclaim on July 13, 2001; and moved this Court on July 26, 2001 to dismiss or stay the pending action. For the reasons stated herein, UPS respectfully requests that the Court deny Levolor's motion.

ARGUMENT AND CITATION OF AUTHORITIES

This Court, In Its Sound Discretion, Should Deny Levolor's Motion To Refer This Matter To The Surface Transportation Board.

The primary dispute in this case is whether Levolor is responsible for paying the shipping and additional handling charges as agreed in the contract of carriage. The Court should exercise its discretion to deny Levolor's motion to refer this matter to the STB. As the STB itself recently found, the Court is better qualified than the STB to determine the garden variety breach of contract claims

request as a "first-filed action." UPS actually filed its lawsuit a few minutes earlier than Levolor delivered its letter to the STB, making UPS's Complaint the "first-filed." And Levolor's letter to the STB cannot be considered an "action," since the STB has no power to enforce any decision it makes. See Carolina Traffic Svcs. of Gastonia, Inc. - Petition for Declaratory Order, STB Docket No. 41689 (June 7, 1996) ("A favorable determination by the Board . . . will not obviate the need for the moving party to bring a court action. . . . A court action is needed to enforce the Board's determination should the other party not acquiesce in the Board's conclusion.").

presented here. See NSL, Inc. v. Owen Eugene Whitlock et al., STB Docket Nos. 41997 et al. (April 5, 2000).² In fact, Congress has directed that only the courts, and not the STB, have jurisdiction to grant remedies regarding private contracts entered between a shipper and carrier. See 49 U.S.C. § 14101(b) (2).

A. Recent Legislative Changes

Effective January 1, 1996, Congress enacted the Interstate Commerce Commission Termination Act ("ICCTA"), which eliminated the prior distinction between "common carriers" and "contract carriers," disbanded the Interstate Commerce Commission ("ICC"), and established within the Department of Transportation a new agency, the Surface Transportation Board, with more limited powers and duties. See In re Olympia Holding Corp., 88 F.3d 952, 955 nn. 2-4 (11th Cir. 1996) (noting that ICCTA eliminated most tariff filing requirements; carrier and shipper will now enter privately ordered agreements).

Before the enactment of the ICCTA, the ICC resolved disputes between carriers and shippers regarding loss and damage claims, duplicate payments and overcharges. But the House Transportation and Infrastructure Committee

² A copy of this decision is attached hereto in Composite Exhibit B.

specifically intended that the STB no longer continue the ICC's active role in dispute resolution:

The Committee does not believe that the DOT³ should allocate scarce resources to resolving these essentially private disputes and specifically directs that DOT should not continue the dispute resolution functions in these areas. The bill provides that private parties may bring actions in court to enforce the provisions of the Motor Carrier Act. This change will permit these private, commercial disputes to be resolved the way that all other commercial disputes are resolved - by the parties.

H.R.Rep. No. 104-311, at 87-88 (1995) *reprinted in* 1995-2 U.S.C.C.A.N. 793, 799-800.

Congress contemplated that competition among the carriers, not carrier rate and tariff filings and hands-on regulation by an administrative agency, would dictate transportation rates, services and billing structures. To facilitate competition, Congress expressly allowed all carriers to enter into private contracts with shippers. 49 U.S.C. § 14101(b)(1) provides in pertinent part:

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

³ The Surface Transportation Board is established within the Department of Transportation, and the Secretary of the Department of Transportation determines the budget of the Surface Transportation Board. See 49 U.S.C. §§ 701, 703(f).

That same Section further provides that any action for breach of such a contract *must* be heard in a court, absent agreement by the parties:

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

49 U.S.C. § 14101(b)(2) (emphasis supplied).

B. The Contract Between the Parties Controls

In the case at bar, it is beyond dispute that Levolor's and UPS's business relationship is governed by a contract.⁴ The assessment of additional handling charges for shipment of oversized packages was governed at all times material hereto by a Letter Agreement entered between the parties as of September 29, 1998. The terms, conditions and pricing structure for UPS's shipping services were set out in the General Tariff and Service Guides. UPS is not required to file these contracts with the STB, and the STB has no power to determine whether the contractual terms are reasonable. See 49 U.S.C. §§ 13701,

⁴Deerskin Trading Co. v. United Parcel Service, Inc., 972 F. Supp. 665, 666-67 (N.D.Ga. 1997) (Hull, J.) (finding rate schedule published by UPS is a contract between UPS and its customer); Kemper Ins. Co. v. Federal Express Corp., 115 F. Supp. 2d 116, 119 (D. Mass. 2000) ("FedEx's contract of carriage consists of the Master Powership Agreement . . . and Service Conditions contained in the applicable FedEx

13702. Because the rights and obligations of the parties are governed by private contract rather than filed tariff, Section 14101(b) (2) vests the court system (not the STB) with exclusive jurisdiction to resolve the dispute between UPS and Levolor. Absent filed tariffs and federal agency jurisdiction to determine the reasonableness of the rates, this Court should deny referral. See, e.g., Delta Traffic Services, Inc. v. Commercial Cold Storage, 1987 WL 60209 (N.D.Ga. 1987) (Tidwell, J.).⁵

The doctrine of primary jurisdiction does not change this result and, in fact, militates against referring this matter to the STB. The primary jurisdiction doctrine "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." United States v. Western Pac. R. Co., 352 U.S. 59, 63 (1956). Trial courts must exercise their discretion to determine whether "the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." Columbia Gas Transmission Corp. v. Allied Chem. Corp., 652 F.2d 503, 519 n.14 (5th Cir. Aug. 4,

Service Guide. . . , incorporated by reference into the Agreement.").

⁵ A copy of this decision is attached hereto in Composite Exhibit B.

1981).⁶ Here, based on 49 U.S.C. § 14101 and other significant statutory changes since 1996, the Court should adopt the STB's recent determination that a court, rather than the STB, is the proper forum for a carrier's action to collect a debt. NSL, Inc. v. Owen Eugene Whitlock, et al., STB Docket No. 41997 et. al (April 5, 2000).

Of particular note, the STB has construed statutory language enacted with respect to rail carrier contracts that is parallel to 49 U.S.C. § 14101. 49 U.S.C. § 10709 provides in pertinent part as follows:

One or more rail carriers . . . may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions.

* * *

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

(Emphasis supplied.)

On the basis of 49 U.S.C. § 10709, the STB has repeatedly recognized that it has no jurisdiction to consider the contracts entered between rail carrier and shipper, absent an agreement to the contrary. In H.B. Fuller Co v. Southern Pacific Transp. Co., 1997 WL 476350

⁶ Decisions of the former Fifth Circuit filed before October 1, 1981, constitute binding precedent in the

(I.C.C., August 20, 1997),⁷ the STB found it did not have jurisdiction over a dispute between rail carrier and shipper where the transportation moved under private contract, even though that contract merely incorporated the terms of the carrier's filed tariff. The STB dismissed the shipper's complaint, stating as follows:

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

Id. at *2. Accord Wisconsin Central Ltd. - Petition for Declaratory Order, 2001 WL 688877, STB Docket No. 41995 (June 15, 2001);⁸ Cross Oil Refining & Marketing, Inc. v. Union Pac. R., 1998 WL 744366, STB Finance Docket No. 33582 (October 19, 1998);⁹ Entergy Services, Inc. v. Union Pac. R., 99 F.Supp.2d 1080, 1085 (D. Neb. 2000) (holding that contracts between rail carrier and shipper are excluded from the STB's jurisdiction); cf. American Airlines, Inc.

Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981).

⁷ A copy of this decision is attached hereto in Composite Exhibit B.

⁸ A copy of this decision is attached hereto in Composite Exhibit B.

⁹ A copy of this decision is attached hereto in Composite Exhibit B.

v. Wolens, 513 U.S. 219, 232 (1995) ("The United States maintains that the DOT has neither the authority nor the apparatus required to superintend a contract dispute resolution regime[for the airline industry].").

C. The Factual and Legal Issues Presented Are Well Within The Court's Competence to Decide

Referral is especially inappropriate here since no special STB expertise is required to resolve the factual and contractual disputes identified by Levolor. For example, Levolor presents the following issues:

1. Did Levolor self-bill lower commercial charges for what were in fact higher rate residential deliveries?¹⁰

This would require the Court to evaluate proof as to whether a delivery was to a residential or commercial location and, based on that determination, whether the right rate was charged. As the STB has already held, no special expertise is required (and Levolor has cited none) to distinguish a residential from a commercial location.¹¹

¹⁰ Memorandum In Support of Defendants' Motion to Dismiss or Stay ("Defendants' Memorandum") at 4.

¹¹ Chadwick's of Boston, Ltd. v. United Parcel Service, Inc., Docket No. NOM-41531 (June 21, 1995) at 3 ("[O]n the matter of tariff applicability, we do not believe that the Commission's unique expertise is required to apply or interpret the distinction between 'residential' and 'commercial' delivery service. Nor do we believe that the involved terms create any ambiguity that needs to be clarified in order to resolve this billing dispute [in court].")

2. Did Levolor file 2,268 loss and damage claims with UPS for the period December 20, 1999 to June 18, 2001?¹²

This would require the Court to evaluate proof as to the number of such loss and damage claims. No special STB expertise is required (and Levolor has cited none) to count the number of claims.

3. Did UPS respond properly and timely to each of Levolor's claims?

This would require the Court to evaluate proof as to UPS's handling of Levolor's claims within certain time limits. No special STB expertise is required (and Levolor has cited none) to review UPS's responses and to count the days or months from a Levolor claim to a UPS response.

4. Is Levolor, or some third party, contractually obligated to pay UPS's charges?¹³

This would require the Court to apply unambiguous contract language to the facts of this case. No special STB expertise is required (and Levolor has cited none) to interpret the contract.

¹² Defendants' Memorandum at 4.

¹³ Id. at 4.

5. Are any of UPS's claims against Levolor time-barred by a federal statute?¹⁴

This would require the Court to apply a federal statute to the underlying claims. No special STB expertise is required (and Levolor has cited none) for the Court to apply the 180-day rule.¹⁵

As much as Levolor may wish otherwise, the STB has already rejected the very remedy and delay Levolor seeks here. Specifically, in cases such as these, where rate reasonableness is not an issue, the STB recently confirmed that "we do not believe it would ultimately be helpful to the Court – which has the authority over, and undoubtedly far more experience than we do, with contract-type issues – if we sought to rule on individual claims in this manner."¹⁶ For all these reasons, the Court should deny Levolor's referral motion.

¹⁴ Id. at 4-5.

¹⁵ See, e.g., NSL, Inc. v. Owen Eugene Whitlock, et al., STB Docket Nos 41997 et al. (April 5, 2000) ("[I]t is ultimately up to the courts to apply the 180-day rule in individual cases.").

¹⁶ Id.

**D. Levolor's Misuse of Terminology Does Not Divest
This Court of its Exclusive Jurisdiction**

Contrary to Levolor's argument, the dispute before the Court does not present a question of "rate applicability" within the meaning of 49 U.S.C. § 13710. The issue is not *what rate* applies; the issue is *who pays* the charges. Levolor is not claiming that UPS charged rates different than those specified in the UPS Rate & Service Guide and the September 29, 1998 Letter Agreement. Compare TJX Companies, Inc. - Petition for Declaratory Order, STB Docket No. 41192 (Service Date January 6, 1998) (finding STB has jurisdiction to determine, for pre-ICCTA shipments, whether "class rate" specified in filed tariff or privately-agreed rate should apply). Instead, the dispute centers on whether Levolor or J.C. Penney is responsible for paying certain charges. This is not a question of "rate applicability," but rather a matter of construing the unambiguous language of Levolor's contract with UPS.

Even assuming arguendo that rate applicability is at issue, the Court should nevertheless exercise its discretion to deny Levolor's motion to stay. In Miller v. WD-40 Company, 29 F. Supp. 2d 1040 (D. Minn. 1998), the issue was which rate would apply to a particular group of shipments: the rate specified in an expired contract, or

the class rate on file with the STB. Although Miller clearly presented a question of rate applicability, the court declined to refer the matter to the STB. As in this case, "by referring this dispute to the Surface Transportation Board, the court would turn this breach of contract action into a more complex dispute than necessitated by the facts." Miller, 29 F.Supp.2d at 1045. The STB reached an identical result in NSL, Inc., supra.

The cases Levolor cites in support of its argument actually bolster UPS's position. In Southwestern Sugar and Molasses Co. v. River Terminals Corp., 360 U.S. 411 (1959), the Supreme Court held that the Interstate Commerce Commission should have an opportunity to determine whether a particular clause in a filed tariff was enforceable. The Court distinguished cases of private contractual relations, where "the ICC, the body primarily charged by Congress with the regulation of the terms and conditions upon which . . . carriers subject to its jurisdiction shall offer their services, ha[s] no control" over the terms. Id. at 417. In Danna v. Air France, 463 F.2d 407, 413 (2d Cir. 1972), the court held that only the Civil Aeronautics Board may determine whether an airline's rates published in a filed tariff are unreasonable or unduly discriminatory. Both Southwestern Sugar and Molasses Co. and Danna are wholly

distinguishable from the case at bar, where only the competitive market, and not filed tariffs and an administrative agency, will ensure that UPS offers reasonable rates, and where the STB has no power to determine whether UPS's rates are reasonable.

CONCLUSION

This is a breach of contract case. No larger issues of transportation policy that would require guidance from the STB are involved here. For the reasons described herein, UPS respectfully requests that the Court **DENY** Levolor's motion to dismiss or stay.


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

APR 25 2002

IN THE UNITED STATES DISTRICT COURT LUTHER L. ... Clerk
FOR THE NORTHERN DISTRICT OF GEORGIA By: *CA*
ATLANTA DIVISION Deputy Clerk

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-GET

DEFENDANTS' STATUS REPORT ON THE PROCEEDINGS
BEFORE THE SURFACE TRANSPORTATION BOARD

COME NOW, Defendants Newell Window Furnishings, Inc., a Delaware corporation and Newell Rubbermaid, Inc., a Delaware corporation (collectively "Defendants" or "Newell"), and pursuant to this Court's Order of January 25, 2002, hereby report on the status of the proceedings before the United States Surface Transportation Board ("the Board"), showing the Court as follows:

1. On June 8, 2001, Defendants filed a letter complaint against United Parcel Service, Inc. with the Board pursuant to 49 U.S.C. § 13710(a)(3)(B) requesting that the Board resolve certain rate applicability billing disputes.

2. On the same day, Plaintiffs United Parcel Service, Inc., an Ohio corporation, and United Parcel Service, Inc., a New York corporation (collectively "Plaintiffs" or "UPS"), filed a lawsuit against Defendants sounding in breach of contract, which then was removed to this Court by Defendants.

3. Defendants thereafter filed a motion to dismiss or stay this lawsuit on the grounds that this Court should defer to the primary jurisdiction of the Board over the rate applicability billing disputes among the parties. UPS opposed this motion, arguing that the Board did not have jurisdiction over the claims between the parties.

4. On January 25, 2002, this Court entered an Order granting Defendants' motion to stay this lawsuit for a period of ninety (90) days, finding that "the Board's 'special competence' in determining issues of rate applicability would assist the court in the resolution of this action." The Court furthermore granted this stay without prejudice to the parties' right to request additional time to stay the lawsuit at the conclusion of the initial ninety (90) stay period. The Court also directed the parties to report on the status of the proceedings before the Board at the conclusion of the initial ninety (90) day stay period.

5. Following the entry of this Order, Defendants waited for the Board to issue a procedural order with respect to their letter complaint filed on June 8, 2001. Upon direction from the Board received orally on March 12, 2002, Defendants submitted a formal Petition for Declaratory Order and Other Relief ("the Petition") to the Board on or about March 27, 2002. Therein, Defendants asked the Board to issue a procedural order that would establish a schedule for the proceedings before the Board, in part, so that Defendants could keep the Court apprised of these proceedings.

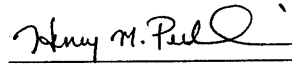
6. On April 18, 2002, UPS filed a motion to dismiss the Petition, which largely is based on the same jurisdictional arguments rejected by this Court. For example, UPS, in a clear attempt to avoid Board review of its rate applicability and billing practices, again argues that the Board does not have jurisdiction over what they describe as "transparently a breach of contract case." See Pls.' Mtn. Dismiss Pet., pp. 1, 7-8 (filed with the Board on April 18, 2002). UPS alternatively argues that the Board should decline the Court's invitation to consider the rate applicability issues presented by the disputes among the parties. *Id.* at pp. 9-12. While Defendants are in the process of responding to these recycled arguments, UPS

necessarily has delayed the Board's ability to reach the merits, as the Board first must address the motion to dismiss before issuing a procedural order governing its review of the merits presented by the Petition.

7. Based on the foregoing facts, Defendants hereby request that this Court stay the instant lawsuit for an additional period of one hundred eighty (180) days, or such longer period as the Court deems appropriate, given the delay caused by UPS' motion to dismiss. This additional period will allow the Board to consider UPS' motion to dismiss and then issue a procedural order governing its review and investigation of the merits of the Petition. Defendants further request that this stay be granted without prejudice to their right to request additional time to stay this action at the conclusion of the amended stay period.

{Signature of counsel appears on next page}

This the 25th day of April, 2002.



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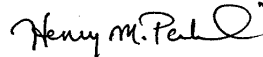
CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing DEFENDANTS' STATUS REPORT ON THE PROCEEDINGS BEFORE THE SURFACE TRANSPORTATION BOARD by depositing a copy of same in the United States mail with sufficient postage affixed thereon, addressed as follows:

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This the 25th day of April, 2002.



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

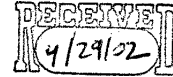
UNITED PARCEL SERVICE, INC.,
an Ohio corporation; and
UNITED PARCEL SERVICE, INC.,
a New York corporation,

Plaintiffs,

v.

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

Defendants.



CIVIL ACTION

FILE NO. 1:01-CV-1788

PLAINTIFF UPS's STATUS REPORT and
MOTION TO PROCEED WITH COURT ACTION

In its January 25, 2002 Order, the Court stayed the above-styled action for 90 days to allow Defendants to refer certain issues allegedly involving rate applicability to the Surface Transportation Board ("STB" or "Board"). The Court directed the parties to report the status of the STB action after the expiration of the 90-day period. Plaintiff United Parcel Service, Inc. ("UPS") hereby files this Status Report pursuant to the Court's directive. In addition, UPS respectfully moves the Court to allow UPS's lawsuit to proceed at this time.

I. Current Status of STB Action

On March 27, 2002, more than 60 days after the Court's January 25, 2002 Order entering a 90-day stay, Defendants Newell Window Furnishings, Inc. and Newell Rubbermaid, Inc., on behalf of their Levolor Home Fashions Division (hereinafter "Levolor"), filed a Petition for Declaratory Order with the Surface Transportation Board. A copy of Levolor's Petition is attached hereto as Exhibit "A."

Levolor's Petition far exceeded the scope of the Court's January 25, 2002 Referral Order. The Court's Order had requested that the Board determine "the applicability of (1) rates contained in a document entitled 'Consignee Billing Brochure'; (2) residential delivery surcharges; (3) third-party 'collect' charges; and (4) 'additional handling charges.'" Levolor did not limit its Petition to these issues, but rather asked the Board to rule upon every allegation contained in Levolor's Counterclaim, which is presently pending before this Court. Levolor requested that the STB decide, without limitation, (1) whether UPS acted reasonably by requiring prepayment for shipping services; (2) whether UPS violated loss and damage claims regulations; and (3) whether UPS "breached" the statute of limitations. Levolor further requested that the Board enter a scheduling order permitting the parties to

undertake discovery; requested a general investigation of UPS's billing practices; and requested damages and fees.

On April 18, 2002, UPS timely filed with the STB a Motion to Dismiss Levolor's Petition, a copy of which is attached hereto as Exhibit "B." Based on the prior STB precedent detailed in the following chart, UPS anticipates that its Motion will be granted:

<u>Levolor's Claims</u>	<u>STB Prior Precedent</u>
Levolor claims that UPS acted unreasonably by agreeing to provide service upon Levolor's prepayment of shipping charges.	"[T]he rates involved here are not subject to our rate reasonableness jurisdiction because, being individually set rates for ground transportation of general freight, they are not subject to section 13701." <u>Associated Traffic Serv., Inc.</u> , STB No. 41996 (May 1, 1998).
Levolor claims that UPS failed to comply with loss and damage claims regulations at 49 C.F.R. § 370.	"[The STB] does not have jurisdiction to determine the merits or the measure of damages of particular loss and damage claims, those being cognizable only in the courts." <u>Clark Distrib. Sys., Inc.</u> , STB No. 41074 (Dec. 6, 1996).
Levolor claims that UPS "breached" the statute of limitations by seeking time-barred charges.	"It is ultimately up to the courts to apply the 180-day rule[.]" <u>NSL, Inc.</u> , STB No. 41997 (April 5, 2000).

The rights and obligations of UPS and Levolor are governed by private contract, and the STB has consistently

held that only the courts have jurisdiction to determine breach of contract issues. See Wisconsin Central, Ltd., STB. No. 41995 (June 15, 2001); Cross Oil Refining & Marketing v. Union Pac. R., STB Finance Docket No. 33582 (Oct. 19, 1998). UPS's Motion to Dismiss is currently pending before the Board.

II. UPS's Motion to Proceed with Court Action

UPS respectfully requests that the Court enter an Order permitting this case, which UPS filed to recover \$1 million in unpaid shipping services, to proceed at this time. It would be unfair to extend the stay and allow Levolor to further prolong the time that UPS must wait to collect this substantial debt.

Levolor has employed a number of tactics to delay this Court from reaching the merits of UPS's claim. First, Levolor filed a Motion to Dismiss, seeking to transfer UPS's entire case to the STB. The Court denied Levolor's Motion, on the grounds that UPS's claim is outside the STB's jurisdiction and must be heard in the courts. See Jan. 25, 2002 Order, at 3 (citing 49 U.S.C. § 14101(b)(2)). The Court stayed the lawsuit for 90 days for the limited purpose of allowing Levolor to seek the STB's guidance on those few issues that allegedly involve rate applicability, which is within the STB's primary jurisdiction.

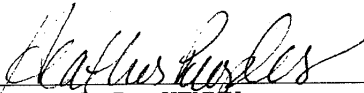
Next, Levolor waited more than 60 days after the Court's Order to file anything with the Board. And even then, Levolor did not limit its filing to the matters specified in the Court's Order. Instead, Levolor filed a broad Petition, asking the STB to decide, among other things, breach of contract issues, loss and damage claims, the reasonableness of UPS's contract carrier rates and related provisions, and damages and attorney fees. In effect, Levolor attempted to make an end run around the Court's Order, which held that only the Court has jurisdiction over breach of contract issues, and further attempted to trump UPS's right, as plaintiff in this action, to litigate in its chosen forum.

The STB must now sort through the myriad issues presented in Levolor's Petition and dismiss all those outside its jurisdiction. Levolor's gamesmanship will obviously postpone any decision by the STB on the narrow issue of rate applicability.

To avoid further delay, UPS respectfully requests that this Court permit the parties to proceed with discovery while UPS's Motion to Dismiss Levolor's Petition is pending before the STB. Alternatively, in the event the Court extends the stay, UPS respectfully requests that the stay last only through the date of the STB's ruling on UPS's

Motion to Dismiss Levolor's Petition, and further requests
that the Court direct the parties to provide a second
Status Report within five days thereafter.

This 25th day of April, 2001.



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