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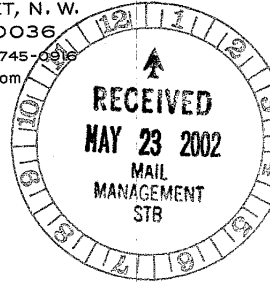
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May 23, 2002

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

* VA BAR ONLY
** MA BAR ONLY
*** MI AND IL BAR ONLY
+ IL BAR ONLY
++ LEGISLATIVE, NON-LAWYER

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

ENTERED
Office of the Secretary

MAY 24 2002

Part of
Public Record

Dear Mr. Williams:

Pursuant to the Rules of the Surface Transportation Board, please find enclosed herewith an original and 10 copies of the Reply Brief in Support of the Motion of United Parcel Service, Inc. (OH) and United Parcel Service, Inc. (NY) to Dismiss Levolor's Petition filed in the above-captioned matter. We thank you for your attention to this matter. Please do not hesitate to contact us if you have any questions or require further information.

Very truly yours,

James F. Moriarty

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD
DOCKET NO. 42073

205465



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

v.

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

ENTERED
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REPLY BRIEF IN SUPPORT OF MOTION OF
UNITED PARCEL SERVICE, INC. (OH) AND UNITED PARCEL
SERVICE, INC. (NY) TO DISMISS PETITION

Pursuant to the Rules of Practice and Procedure of the Surface Transportation Board ("STB" or "Board"), United Parcel Service, Inc. (OH) and United Parcel Service, Inc. (NY) (collectively referred to as "UPS") hereby file a short reply in further support of its Motion to Dismiss and in answer to the response filed by the Levolor Home Fashions Division of Newell Window Furnishings, Inc. and Newell Rubbermaid, Inc. ("Levolor").

I. INTRODUCTION

In Levolor's view, the Court's referral trumps the STB's right, as a federal administrative agency, to make an independent inquiry into whether it has statutory jurisdiction to consider this dispute and, if so, whether exercising that jurisdiction would be appropriate. Levolor is wrong. Upon referral, the STB makes an independent determination of whether its special expertise is necessary to aid the Court. Here, as in

NSL, the answer in no.¹ The STB has consistently declined to create a second record where the Court is well equipped to interpret the contract and determine the rate that should apply to each individual shipment.

Faced with UPS's Motion to Dismiss, Levolor has abandoned its earlier request that the Board determine whether UPS charged the correct contract rate for approximately 150,000 individual shipments at issue here. Levolor now asks the Board to do what it has never done before - - that is, issue an "abstract" opinion² on "general" issues,³ including matters outside the Board's special expertise, like the burden of proof in a breach of contract case.⁴ How this new ever-evolving approach could possibly help the Court address this complicated factual dispute is left unexplained.

II. FACTUAL BACKGROUND

Without a doubt, this is a breach of contract case. UPS provided approximately \$1 million in shipping services delivering Levolor's products to its customers. Levolor was required to report certain information electronically for each and every package it shipped, so that UPS could bill and collect the appropriate charges. It is undisputed that UPS never received the required information from Levolor, and it is undisputed that UPS

¹ NSL, Inc. v. Owen Eugene Whitlock, et al., STB Docket Nos. 41997 et al. (April 5, 2000) ("We do not believe it would ultimately be helpful to the Court - - which has the authority over, and undoubtedly, far more experience than we do, with contract-type issues - - if we sought to rule on individual [applicability] claims in this manner.")

² See, e.g., Levolor Response at 25 (Levolor asks STB ("[w]hether the Consignee Billing Brochure applies in the abstract[.]

³ Id. at 28 (Levolor asks "[w]hether the evidence generally demonstrates that Levolor is entitled to a refund for overcharges.")

⁴ Id. at 37 (Levolor asks the STB to declare whether "UPS has the burden of proving that its residential delivery surcharge applies to the movements at issue.")

was never paid for the shipping services it provided. Levolor now contends that some of the unreported shipments should have been consignee billed to J.C. Penney. However, despite UPS's repeated requests, Levolor has never provided the information required so that UPS could bill J.C. Penney.

Under the parties' contractual agreements, Levolor was therefore responsible for paying the charges. But Levolor flatly refused to pay any portion of the charges, and UPS was forced to file suit to recover the \$1 million. To delay paying this substantial debt, Levolor filed in court a Motion to Dismiss, which mischaracterized UPS's lawsuit as arising from rate applicability issues within the Board's primary jurisdiction.

It is unclear why Levolor contends that the Court "soundly rejected" UPS's showing that the Court, and not the Board, has exclusive jurisdiction over breach of contract matters. (Levolor's Resp. at 3). Quite the contrary, the Court's referral order expressly acknowledged that breach of contract claims, like UPS's claims here, fall within the exclusive jurisdiction of the Court. The Court cited to 49 U.S.C. § 14101(b), which provides in pertinent part as follows:

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

* * *

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

(Emphasis supplied).

The Court denied Levolor's motion to dismiss UPS's lawsuit. Instead, the Court entered a 90-day stay and referred to the Board the following limited issues: "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.'"

Instead of immediately requesting that the Board address these issues during the 90-day stay, Levolor waited more than 60 days before filing a comprehensive Petition that far exceeded the scope of the Court's referral.⁵ For the reasons detailed herein and in its original Brief, UPS respectfully requests that Levolor's Petition be dismissed.

III. ARGUMENT AND AUTHORITIES

A. Sections 13701 and 14101 Are Not in Conflict, but rather Reflect the Proper Balance of Power between the Board and the Courts.

In its Response, Levolor asks the Board to do what the Court refused to do — ignore the unambiguous language of 49 U.S.C. § 14101(b). Levolor insists that if "the exclusive remedy for any alleged breach of contract" is in the court system, as 49 U.S.C. § 14101(b) plainly states, then 49 U.S.C. § 13710 (which confers primary jurisdiction over rate applicability to the Board) is meaningless. Levolor's alarmist view is without merit. Section 13710 and Section 14101 are not in conflict, but rather reflect the proper comity between the judicial and administrative branches of government.

⁵ Levolor's contention that UPS delayed these proceedings by filing an untimely Motion to Dismiss is disingenuous at best. The sole reason UPS's Motion was not filed earlier is that Levolor failed to properly serve its Petition. Levolor filed the Petition with the Board by overnight courier, but served copies upon UPS's counsel by *regular mail*, in violation of 49 C.F.R. § 1104.12. Rather than delay these proceedings by objecting to Levolor's insufficient service of process, UPS filed its Motion to Dismiss just 18 days after receiving the Petition, even though, under 49 C.F.R. § 1104.13, UPS was allowed 20 days from actual receipt of the Petition to file its Motion to Dismiss.

1. The Board Should Make an Independent Determination Whether Its Special Expertise with Rate Applicability is Necessary Here.

Given the statutory balance of power between the Board and the Court, Judge Tidwell chose to err on the side of caution and refer to the STB all matters that could be related, however tangentially, to rate applicability. Judge Tidwell's referral order reflects the Court's respect for and deference to the STB should it possess special expertise in that area.

But the Court's act of deference was completely lost on Levolor. Indeed, Levolor interprets Judge Tidwell's referral Order as an absolute command to the Board to investigate and opine on the disputes between the parties. Levolor even accuses UPS of acting in "flagrant disregard" of the Court's referral by moving the Board to dismiss Levolor's Petition. To the contrary, UPS's Motion to Dismiss was entirely appropriate. The Court's referral gave a wide berth to the Board's primary jurisdiction, and the Board must now determine for itself whether the items referred in the Court's order are actually issues of rate applicability requiring the Board's assistance. As it has done in the past, the Board should refuse to "read the district court's [referral] as directing us to conduct such an inquiry if it would be inappropriate for us to do so, as it would be here." Wisconsin Central Ltd. – Petition for Declaratory Order, STB Docket No. 41995 (June 20, 2001). As shown in UPS's Motion to Dismiss, this case presents straightforward questions of contract interpretation, which do not implicate the Board's special expertise with rate applicability.

2. As a General Rule, The Board Does Not Advise the Court on Matters of Contract Interpretation.

Just as Judge Tidwell deferred to the Board's special expertise with rate applicability, the Board has repeatedly deferred to the court systems' more extensive familiarity with matters of contract interpretation. Indeed, the Board has established a "general rule [that] we do not become involved in disputes over motor carrier contracts." Associated Traffic Services, Inc. – STB Docket No. 41996 (May 8, 1998). The Board will occasionally become involved where a true question of rate applicability is presented, *i.e.*, where the question is *what rate applies*. For example, in Associated Traffic Services, the issue was whether exception class 70 or class ratings 85 and 100 of the National Motor Freight Classification were applicable to the shipments. The language of the contract of carriage was unclear, and the Board's special knowledge and extensive familiarity with shipping customs and practices could aid the Court in reaching a reasoned conclusion. The STB gave its advice while fully cognizant that "the Court hearing the contract case will not be bound to give deference to our ruling."

Associated Traffic establishes that the Board has the authority — but not the obligation — to assist where the Court may have difficulty in determining what rate applies to a shipment. But in this case, the applicable shipping rates are not in dispute. The question, rather, is which party should pay the applicable rate — J.C. Penney or Levolor?

Neither is there a dispute regarding the rate charged for additional handling. UPS and Levolor entered into a privately negotiated Letter Agreement governing the assessment of additional handling charges. The one-page Letter Agreement provides that Levolor will pay the "published additional handling rate at the time of shipping for 40%

of the **total** ground packages shipped each week." (Emphasis supplied). The dispute is not what rate applies, but rather, is Levolor required to pay an additional handling charge for the **total** ground packages shipped (as the plain language of the contract states) or only for the pre-paid packages?⁶ This is not a question of contract interpretation, not rate applicability.

The parties' Letter Agreement is not in the form of a tariff, so neither larger issues of national transportation policy nor the STB's familiarity with tariff rates would be implicated. This case is in stark contrast to Associated Traffic Services – STB Docket No. 41996 (May 8, 1998), where "the transportation agreement encompassed rates in tariff format," the STB broke its "general rule" against "becom[ing] involved in disputes over motor carrier contract rates" and agreed to opine regarding which rate should apply.

The cases Levolor cites do not support its position. Hall v. Aloha International Moving Services, Inc., STB Docket No. 42048 (November 2, 1999) is not applicable here, as it involved the transportation of household goods pursuant to filed tariffs. The Board has considerably greater regulatory oversight in those cases. See 49 U.S.C. § 13701(a)(1)(giving Board reasonableness jurisdiction over household goods carriers). NSL, Inc. v. Whitlock, STB Docket No. 41998 (Apr. 5, 2000) supports UPS's position, not Levolor's. There, the Board emphasized its "limited role in motor carrier billing cases" and stressed that "the Courts, rather than the Board, have the authority to require payment of charges[.]"

⁶ Contrary to Levolor's argument at pages 24 through 26, UPS does not contend, and never has contended, that the Consignee Billing Brochure has anything to do with the assessment of additional handling charges against Levolor. Until November 2001, when Levolor terminated the Letter Agreement, UPS assessed additional handling charges based solely on the Letter Agreement's unambiguous terms.

Levolor does not even attempt to meaningfully distinguish the rail carrier cases UPS cites. There is no way for Levolor to avoid the fact that the pertinent statutory language enacted with respect to rail carrier contracts is identical to 49 U.S.C. § 14101(b)(2). 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. There is no reasoned basis for giving a different construction to 49 U.S.C. § 14101(b) where no special expertise on rate applicability issues is required.

B. The Board Should Decline to Issue an "Abstract" Opinion on "General" Issues.

Levolor requests that the Board issue an "abstract" opinion on "general" issues, but such an opinion would do nothing to aid the Court in adjudicating the parties' disputes and would only delay further the Court's decision on the merits. The Board has never allowed its forum to be misused by those, like Levolor, whose objective is to postpone the entry of a judgment. UPS respectfully requests that the Board dismiss Levolor's Petition, so UPS's lawsuit may proceed.

1. Levolor's Refund Claim Belongs in the Court.

Levolor seeks a refund of additional handling charges that it paid over the course of the business relationship between UPS and Levolor. As discussed above, Levolor and UPS entered a private Letter Agreement, which provided that Levolor would pay the published additional handling charge rate for 40% of its *total* ground packages. For years, Levolor paid additional handling charges based on its total shipped packages, but now seeks a refund, contending that it should have only paid additional handling charges on those packages that were shipped pre-paid, and not those shipped via consignee or third-party billing.⁷

Levolor's refund claim is more properly considered as a counterclaim to UPS's lawsuit. The contractual term "total" holds no special meaning within the transportation industry, so the Court is fully able to interpret the parties' contract. In addition, the vast majority of Levolor's refund claim is barred by the "180-day" rule, and Levolor cannot resuscitate these time-barred claims by presenting them before the STB.

2. Levolor's Request for a General Investigation is Uncalled-for.

As expressly contemplated by Congress, the competitive market will ensure that UPS offers reasonable contract rates and services. There is no reason for the Board to investigate to determine whether UPS has "violated" the statute of limitations. The Board has previously confirmed that the courts are familiar with statutes of limitations and able to apply them in transportation cases. See NSL, Inc. v. Owen Eugene Whitlock, et al.,

⁷ For the sake of brevity, UPS has not responded to the myriad factual misstatements contained within Levolor's Response. But to avoid any potential confusion by the Board, UPS must clarify that Levolor did not ship packages to J.C. Penney on a "collect" basis, as Levolor states throughout its Response, but rather shipped packages to J.C. Penney via UPS's "consignee" or "third-party" billing options.

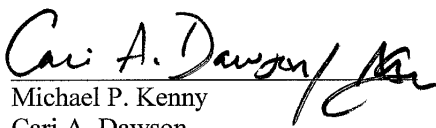
STB Docket Nos. 41997 et al. (April 5, 2000) ("[I]t is ultimately up to the courts to apply the 180-day rule in individual cases.").

Contrary to Levolor's allegation, UPS cannot wield market power to force payment, especially in today's competitive marketplace. The facts of this case are an apt example: When UPS refused to continue extending additional credit to Levolor, Levolor immediately diverted its shipments to other carriers, and, today, Levolor continues to use carriers other than UPS.

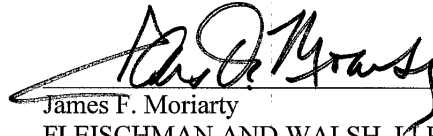
Finally, Levolor provides no support for its extraordinary request that the Board should review individual loss and damage claims or refer them to the Federal Motor Carrier Safety Administration ("FMCSA"). The Board has confirmed that it has no jurisdiction to consider loss and damage claims. See Clark Distrib. Sys., Inc., et. al. — Petition for Declaratory Order, STB No. 41074, 1996 WL 714568 (Dec. 9, 1996). If Levolor chooses to do so, it can pursue these claims directly before the FMCSA. But Levolor's request for a Board referral to the FMCSA should be denied, especially since the Court's referral order did not ask the STB to comment on Levolor's loss and damage claims in the first place.

III. CONCLUSION

For all the reasons stated herein, and in UPS's Motion to Dismiss, UPS respectfully requests that the Surface Transportation Board dismiss Levolor's Petition.



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May 23, 2002.

CERTIFICATE OF SERVICE

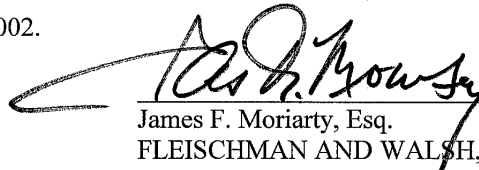
I hereby certify that I have served a true and correct copy of the within and foregoing **Motion to File Reply Brief in Support of UPS's Motion to Dismiss Levolor's Petition** upon opposing counsel by depositing same in the United States Mail in a properly addressed envelope with adequate postage thereon, as follows:

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This 23rd day of May, 2002.


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