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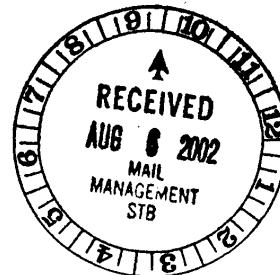
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August 5, 2002

Via Federal Express Delivery

Secretary
Surface Transportation Board
1925 K Street
Washington, DC 20423

205989



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 Petitioners' Response to Motion to Lodge Recent Federal Court Order for filing with the Surface Transportation Board. A copy of this document is 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 filing, please contact me at your convenience.

Sincerely,

Henry M. Perlowski

Enclosure

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

ENTERED
Office of Proceedings

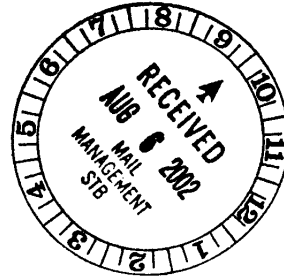
AUG 06 2002

Part of
Public Record

BEFORE THE
SURFACE TRANSPORTATION BOARD

DOCKET NO. 42073

205989



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 TO MOTION TO LODGE
RECENT FEDERAL COURT ORDER

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ENTERED
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Part of
Public Record

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Dated: August 5, 2002

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. 42073

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

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**UNITED PARCEL SERVICE, INC., an Ohio Corporation, and UNITED
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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 their Response to Motion to Lodge Recent Federal Court Order showing this tribunal as follows:

Status of the Proceeding

On March 27, 2002, Levolor filed its Petition for Declaratory Order and Other Relief ("the Petition") following its prior letter complaint submitted to the United States Surface Transportation Board ("the Board") and the referral order issued by the Honorable G. Ernest Tidwell ("Judge Tidwell") of the United States District Court for the Northern District of Georgia in 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"). Respondents United Parcel Service, Inc., an Ohio corporation, and United Parcel Service, Inc., a New York corporation (collectively "UPS" or "Respondents") have moved to dismiss the Petition arguing that the Board should not exercise jurisdiction over *any* matter presented by Levolor. Petitioners since have opposed this motion to dismiss showing that the Board clearly has jurisdiction over the numerous rate applicability and billing dispute issues in controversy pursuant to the applicable provisions of the Interstate Commerce Act.

On June 28, 2002, even with the filing of UPS' motion to dismiss, the Board issued an order instituting Levolor's declaratory order proceeding. In so doing, the Board specifically concluded that "[t]his matter appears to be within the Board's primary jurisdiction and has been referred by a federal court." (See Order, June 28, 2002 at p. 2.) The Board moreover described the proceeding as including the following issues, among others:

[W]hether UPS violated 49 U.S.C. 14101 by threatening to discontinue service; whether UPS violated loss and damage claim regulations at 49 CFR 370; whether UPS improperly assessed residential delivery surcharges, additional handling charges, and other charges; and whether UPS has violated 49 U.S.C. 13710(a)(3)(A) by billing customers beyond the 180-day time limit.

(Id. at pp. 1-2.) The Board also clearly acknowledged its jurisdiction over "the applicability of residential delivery surcharges; the applicability of third-party 'collect' charges; and the applicability of 'additional handling charges.'" (Id. at p. 2.)

On July 17, 2002, Judge Tidwell lifted the stay of the Lawsuit and directed the parties to proceed with discovery and resolve all issues presented in the Lawsuit. (See Exhibit A to Resp'ts.' Mtn. Lodge Federal Ct. Order, p. 3.) The Court issued this Order

after determining that "the issues pending before the Board will not be resolved expeditiously." (*Id.* at pp. 2-3.) Judge Tidwell, however, did not revoke his referral order or in any way state that he was no longer interested in receiving guidance from the Board on the issues that fall within its primary jurisdiction. Instead, Judge Tidwell only directed the parties to proceed with the Lawsuit while this proceeding also moves forward.

Argument and Citation of Authorities

While UPS desperately seeks to avoid Board scrutiny of its illegal and coercive billing practices, the lodging of Judge Tidwell's order cannot supply the means to its desired (and improper) end. As explained in detail in Levolor's response to UPS' pending motion to dismiss, Congress specifically and deliberately bestowed the Board with jurisdiction over "billing disputes" pursuant to 49 U.S.C. § 13710. The Board moreover has exclusive authority to review other issues raised in the Petition, such as Levolor's request for a general investigation of UPS' billing practices, which clearly fall well outside of the province of the courts. Thus, the Board has jurisdiction over the matters set forth in the Petition regardless of what happens in the Lawsuit.

By ordering the institution of the Petition, the Board clearly exercised its "... discretionary authority under 5 U.S.C. § 554(e) to issue a declaratory order to terminate a controversy or remove uncertainty." (Order, June 28, 2002 at p. 2.) This order confirmed that a number of controversies and uncertainties exist with respect to UPS' billing practices, each of which fall within the Board's permissible and primary jurisdiction. The Board thus reached the same conclusion previously reached by Judge

Tidwell in his referral order of January 25, 2002 – that the Board has a role in this matter and other like disputes within the framework of the Interstate Commerce Act.

Having correctly observed that a number of controversies and uncertainties exist with respect to UPS' billing practices, a simple question remains – have these controversies or uncertainties been resolved by the lifting of the stay in the Lawsuit? Of course, the answer to this question is "No." The Board therefore may exercise jurisdiction over all matters presented in Levolor's Petition and issue rulings that may serve as guidance for Judge Tidwell as he continues to address the more limited subset of matters presented in the Lawsuit. Moreover, if anything, the order lifting the stay should encourage the Board to expedite its consideration of the issues presented in the Petition. By reaching these issues in the near future, the Board may provide guidance within a time frame capable of benefiting Judge Tidwell, as contemplated and requested by his original referral order, which remains in full force and effect.

Furthermore, a number of issues presented in the Petition clearly impact the public interest and warrant a general investigation of UPS' illegal and coercive billing practices, a remedy that certainly cannot be ordered by Judge Tidwell or by any court for that matter. These issues include:

1. UPS' violation of its common carrier duty to serve the public under 49 U.S.C. § 14101(a) by suspending service to Levolor in an effort to coerce Levolor into paying approximately \$900,000 in unsubstantiated bills;
2. UPS' violation of loss and damage claim regulations in an attempt to coerce Levolor into paying approximately \$900,000 in unsubstantiated bills; and
3. UPS' submission of over \$500,000 in time-barred charges in violation of 49 U.S.C. § 14705(a) and 49 U.S.C. § 14710(a)(3)(B).

UPS obviously does not want to be exposed to a general investigation of its billing and claim practices, but cannot reasonably cite to an order lifting the stay of the Lawsuit as grounds to divest the Board of its general investigatory powers.

Conclusion

For all of the foregoing reasons and the reasons stated in their opposition to UPS' pending motion to dismiss, Petitioners urge the Board to follow its jurisdictional mandate and review all of the issues presented by Levolor in the Petition. Petitioners respectfully request that this review be expedited so that the Board's rulings may provide guidance to Judge Tidwell given that the Lawsuit will proceed simultaneously with this action. Otherwise, UPS effectively will have succeeded in its attempt to avoid Board review of its illegal and coercive billing practices and, accordingly, eviscerate the jurisdiction expressly provided to the Board by Congress via the Interstate Commerce Act.

This the 5th day of August, 2002.

Respectfully Submitted,

William J. Augello by Henry M. Perlowski
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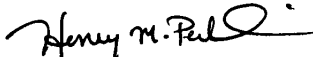
CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing
**PETITIONERS' RESPONSE TO MOTION TO LODGE RECENT FEDERAL COURT
ORDER** by overnight mail, via Federal Express delivery, with sufficient postage affixed
thereon, addressed as follows:

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This the 5th day of August, 2002.


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