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ENTERED
Office of Proceedings

SEP 26 2002

Part of
Public Record

September 25, 2002

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The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street NW
Washington, DC 20423-0001

Re: Engelhard Corporation -- Petition for Declaratory
Order -- Springfield Terminal Railway Co., Inc. and
Consolidated Rail Corporation

STB Docket No. 42075

UPS NEXT DAY

Dear Secretary Williams:

Please find enclosed an original and ten (10) copies of the
Petition for Declaratory Order filed by Engelhard Corporation
pursuant to a referral order issued by Richard G. Stearns, United
States District Court Judge, District of Massachusetts in
Engelhard Corporation v. Springfield Terminal Railway Co., Inc
and Consolidated Rail Corporation, 193 F.Supp. 2d 385 (D. Mass.
2002). Copies of the pleading has been served upon counsel for
both defendants in this civil action.

Defendant Conrail is represented by:

David C. Ziccardi, Esq.
Consolidated Rail Corporation
Two Commerce Square
2001 Market Street, 16-A
Philadelphia, PA 19103-1416

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**SURFACE
TRANSPORTATION BOARD**

Defendant Springfield Terminal is represented by:

Robert B. Culliford, Esq.
Guilford Transportation Industries, Inc.
Iron Horse Park
North Billerica, MA 01862

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**SURFACE
TRANSPORTATION BOARD**

WICK, STREIFF, MEYER, O'BOYLE & SZELIGO, P.C.

The Honorable Vernon A. Williams
September 25, 2002
Page -2-

Any order issued by the Board with respect to this matter should be served upon the referring judge and the Clerk of the United States District Court for the District of Massachusetts, as follows:

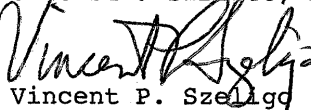
Honorable Richard G. Stearns
and
Clerk of the Court
United States District Court
for the District of Massachusetts
Suite 2300
One Courthouse Way
Boston, MA 02110

A check for the applicable filing fee is enclosed. Also enclosed is a 3.5 inch disk, containing the text of the Petition for Declaratory Judgment in Word Perfect format. If you have any questions, do not hesitate to call.

I would appreciate it if you would date-stamp the enclosed extra copy of the Petition and return same in the self-addressed, stamped envelope.

Very truly yours,

WICK, STREIFF, MEYER,
O'BOYLE & SZELIGO, P.C.


Vincent P. Szelligo

Enclosures

cc: David C. Ziccardi, Esq. (w/enc.)
Robert B. Culliford, Esq. (w/enc.)
Engelhard Corporation (w/enc.)

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**SURFACE
TRANSPORTATION BOARD**

206270
**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB DOCKET No. 42025



**ENGELHARD CORPORATION -- PETITION FOR DECLARATORY ORDER --
ENTERED SPRINGFIELD TERMINAL RAILWAY CO., INC AND CONSOLIDATED RAIL
Office of Proceedings CORPORATION**

SEP 26 2002

PETITION FOR DECLARATORY ORDER

Part of
Public Record

AND NOW COMES, Engelhard Corporation ("Engelhard" or "Petitioner"), to seek a

declaratory order to address issues referred to the Board by the United States District Court for the District of Massachusetts in Engelhard Corporation v. Springfield Terminal and Consolidated Rail Corporation, Civil Action No. 01-10829 RGS, a more complete statement of which is set forth below:

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SEP 26 2002

BACKGROUND

**SURFACE
TRANSPORTATION BOARD**

1. Petitioner is Engelhard Corporation, a Delaware corporation with a principal office in Iselin, New Jersey.
2. Respondents are Springfield Terminal Railway Co., Inc. ("Springfield Terminal") and Consolidated Rail Corporation ("Conrail").
3. This dispute involves the alleged non-payment of car mileage allowances generated by the movement of privately-owned tank cars over a 155 mile stretch of railway track between Selkirk, New York, and Barber, Massachusetts, by Conrail and/or Springfield Terminal. The track is owned by Conrail and operations over the segment are governed by an "Agreement Dated as of March 31, 1990 between Consolidated Rail Corporation and the Boston and Maine Corporation and The Springfield Terminal Railway Company".

4. As relevant to this dispute, Engelhard supplied kaolin clay mined in Georgia to various customers engaged in paper manufacturing at facilities located in the Northeast. Engelhard's customers arranged for and paid the shipping charges, but Engelhard provided the railroads with private equipment which it either owned or leased. Typically, railroads would compensate Engelhard through private car mileage allowances published in Freight Tariff 6007. However, mileage auditors retained by Engelhard found that complete mileage allowances had not been paid because of a dispute between Springfield Terminal and Conrail over the terms of the aforementioned Agreement Dated March 31, 1990 concerning which railroad was responsible for payment of mileage earned over the 155 mile segment.

5. On May 15, 2001, Engelhard filed its original complaint at Civil Action No. 01-10829 RGS, for the collection of outstanding mileage allowances owed by either Springfield Terminal or Conrail.

6. On November 14, 2001, Engelhard filed an Amended Complaint, setting forth alternative legal theories for relief against either Conrail or Springfield Terminal under state contract law and the Interstate Commerce Act. (A copy of the Amended Complaint is attached to this Petition as Exhibit No. 1).

7. Conrail and Springfield Terminals have not answered the allegations of the Amended Complaint, but rather filed for dismissal of those mileage claims which they viewed as being barred by the applicable statute of limitations. The railroads also sought dismissal of state law based claims which they viewed as being preempted by the Interstate Commerce Act.

8. By decision issued April 2, 2002, in Engelhard v. Springfield Terminal and Conrail, 193 F.Supp. 2d 385 (D. Mass.), United States District Judge Richard G. Stearns, dismissed the state law based claims in Counts II, III IV and V of the Amended Complaint as preempted by the Interstate Commerce Act, and held that the two-year statute of limitations of 49 U.S.C. § 11705 applied to Count I. However, the Court identified two issues concerning the application of the two year statute of limitations which it wished to refer to the Board. (A copy of the Court's April 2, 2002 Decision and Order is attached as Exhibit No. 2.)(The Court's discovery order dated April 19, 2002 is attached as Exhibit No. 3.)

9. The Court issued a referral order dated May 22, 2002. (Exhibit No. 4.)

REQUEST FOR DECLARATORY ORDER

10. Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty and petitions for issuance of a declaratory order premised on referral from a federal court are routinely accepted and treated in the same manner as a complaint.

11. Here, the Court was asked to rule on motions to dismiss in which Defendant railroads argued that the statute of limitation for bringing an action for non-payment of required mileage allowances commenced one month and ten days after the end of the month in which the obligation was incurred. In response, Engelhard argued that the established procedure for handling mileage allowances provided for submission of audit claims to the railroads, that the railroads failed to properly handle such audit claims, and that the statute of limitation for bringing a legal action should be measured from four months after the railroad refused to pay or

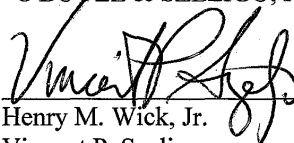
act on a mileage audit claim. The Court did not rule on this issue, but rather referred the issue to the Board. (See Exhibit No 4.)

12. Another issue raised by Springfield Terminals, but not joined in by Conrail, is the question of whether Engelhard, as a assignee, is entitled to bring an action for recovery of mileage allowances in circumstances where Engelhard has leased private cars which retain the reporting marks of the lessor. Engelhard argued to the Court that it holds assignments from its lessors, that its course of dealing in collecting mileage allowances has been to retain a mileage auditor who submits claims in Engelhard's name, and that railroads routinely accept such claims for review without insisting that such claims be presented by the lessor. The Court did not rule on this issue, but rather referred it to the Board. (See Exhibit No 4.)

WHEREFORE, Engelhard requests that the Board institute a declaratory order proceeding and establish a procedural schedule in accord with its rules.

September 25, 2002

Respectfully submitted,
WICK, STREIFF, MEYER,
O'BOYLE & SZELIGO, P.C.



Henry M. Wick, Jr.
Vincent P. Szeligo
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Pittsburgh, PA 15219
412-765-1600
vszeligo@wsmoslaw.com

Attorneys for Engelhard Corporation

EXHIBIT NO. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ENGELHARD CORPORATION, a
Delaware Corporation,

Plaintiff,

vs.

SPRINGFIELD TERMINAL
RAILWAY CO., INC., a
Vermont Corporation and
CONSOLIDATED RAIL
CORPORATION, a
Pennsylvania Corporation

Defendants.

Civil Action No. 01-10829 RGS

AMENDED COMPLAINT

Engelhard Corporation (hereinafter, "Plaintiff" or "Engelhard"), by and through its undersigned counsel, hereby files this Amended Complaint against Defendants, Consolidated Rail Corporation ("Conrail") and Springfield Terminal Railway Co., Inc. ("Springfield Terminal") and in support thereof states as follows:

Introductory Statement.

The Original Complaint filed on May 15, 2001 sets forth the basic factual background of Plaintiff's efforts to secure mileage allowance payments for private rail cars it furnished to Defendants for their use in for-hire transportation services. Defendants responded by filing Motions to Dismiss wherein it was argued that the Original Complaint did not clearly reveal the legal theory

upon which Plaintiff sought recovery. In its brief in opposition and in oral argument, Plaintiff set forth a clarification of the facts underlying its claims. This Court allowed Plaintiff to file an Amended Complaint to more precisely set forth the facts and to identify the legal theories (or alternative theories) upon which Plaintiff seeks relief.

Through this Amended Complaint, Plaintiff completely restates the averments upon which this action is based, as well as its prayer for relief. However, to avoid unnecessary duplication of pleadings, Plaintiff has not resubmitted its 87 page listing of each shipment over the 155 mile Selkirk to Barber line segment entitled "Appendices to Complaint - Springfield Terminal and Conrail", but instead incorporates the Appendices A through E filed May 15, 2001 with the Original Complaint by reference as if they were attached to this Amended Complaint.

Here, Plaintiff sets forth alternative causes of actions for: (1) various state law contract claims in which it is alleged that Defendants breached a private Haulage Agreement; and alternatively, (2) a federal question claim in which it is alleged that Defendants are in violation of obligations set forth in the Interstate Commerce Act regarding private car compensation.

Jurisdiction and Venue.

1. This Court has diversity jurisdiction over the state law claims set forth in this Amended Complaint pursuant to 28 U.S.C. §1332(a)(1) and §1367(a) in that the amount in controversy exceeds \$75,000.00, and there is complete diversity between Plaintiff and Defendants.

2. Alternatively, this Court has federal question jurisdiction pursuant to 28 U.S.C. § 1337 because Plaintiff alleges injury arising from Defendants' acts or omissions in violation the Interstate Commerce Act, specifically 49 U.S.C. §§ 11121 and 11122. See 49 U.S.C. § 11704(b).

3. This Court has venue over Defendants in that both are railroad common carriers who operated rail lines within the Commonwealth of Massachusetts during the period relevant to this action. Moreover, since this dispute concerns operations over a 155 mile segment of rail line running from Selkirk, New York to Barber Station, Massachusetts, the subject matter involves obligations incurred from operations conducted almost entirely within Massachusetts.

Factual Allegations.

4. Plaintiff is a corporation organized and existing under the laws of the State of Delaware with its principal office located in Iselin, New Jersey. Plaintiff is a specialty chemical company engaged in a number of businesses, including the mining and sale of high quality kaolin clay at origins in Georgia, which clay is transported in bulk, in dry and slurry form, in rail tank cars, and to a much lesser extent in hopper and sparger cars from Georgia origins to numerous customers of Plaintiff in the Northeastern United States and Canada. Although Plaintiff's product is transported by Defendant rail carriers, Plaintiff is not a "shipper", as defined by the Interstate Commerce Act. Rather, Plaintiff's customers are the "shippers".

5. Defendant Springfield Terminal is a corporation organized and existing under the laws of the State of Vermont with a principal place of business located at Iron Horse Park, North Billerica, Massachusetts. Defendant Springfield Terminal is a railroad common carrier engaged with its

connecting rail lines in the business of providing railroad freight service. As relevant here, Springfield Terminal has provided freight service for shippers who are Plaintiff's customers with facilities in various points in the Northeastern United States, through Massachusetts.

6. Defendant Conrail is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal corporate office located in Philadelphia, Pennsylvania. Defendant Conrail was, at all times relevant to this Amended Complaint, a railroad common carrier engaged with its connecting rail lines in the business of providing railroad freight service. As relevant here, Conrail has provided freight service for shippers who are Plaintiff's customers with facilities in various points in the Northeastern United States, through Massachusetts.

7. Defendant s have not furnished equipment suitable for the transportation of Plaintiff's product despite the fact that all rail common carriers are required to do so under Section 11121 of the Interstate Commerce Act. 49 U.S.C. § 10101, et seq.

8. Over a period of many years, Plaintiff has made substantial capital investments in the acquisition, by purchase or long term lease, of rail equipment suitable for the transportation of clay by Defendants' for shippers who purchase Plaintiff's product. Plaintiff has made such investment because of the failure and refusal of Defendants, and other railroads, to provide specialized equipment. Since Plaintiff provides private cars and other specialized equipment utilized by rail common carriers, it is entitled to receive and, in most cases, does receive fair compensation for the railroads' use of its private equipment pursuant to 49 U.S.C. § 11121. Said compensation is known as "mileage allowances". Both Conrail and Springfield Terminal have historically paid mileage

allowances, except for the isolated instances identified in this Complaint involving movements over a 155 mile segment of line running from Selkirk, NY to Barber Station, MA.

9. Plaintiff has purchased tank cars which it owns and has leased other tank, hopper and sparger cars from the following lessors: ACF Industries, Incorporated; General American Tank Corporation; General Electric Capital Rail Car Corporation; and Union Tank Car Company. For both owned and leased cars, Engelhard is the ultimate recipient of mileage allowance payments. With the consent and/or acquiescence of lessors and railroads, including Defendants Conrail and Springfield Terminals, for many years Engelhard has pursued claims for unpaid mileage allowances in its own right on the basis of oral and/or written assignments from said private car lessors. For the cars involved in this action, Engelhard is authorized to pursue collection of mileage allowances from Defendants.

10. For the shipments transported over a 155 mile segment of line running from Selkirk, NY to Barber Station, MA, as listed in Appendix A through Appendix E, Plaintiff furnished private rail cars which Defendants used in transportation service, but for which Defendants have failed to pay compensation. The amount of unpaid compensation is \$568,155.13.

11. Conrail has paid, or approved for payment, all required mileage allowances on these same shipments for transportation over all other segments of its rail line; i.e., up to but not beyond Selkirk, NY. It has refused all payment for mileage allowances on the 155 mile segment from Selkirk, NY to Barber Station, MA.

12. Springfield Terminal has paid, or approved for payment, all required mileage allowances on these same shipments for transportation over all segments of its rail lines from Barber Station, MA to destinations in New England.

13. Although the Selkirk, NY to Barber Station, MA line does not belong to Springfield Terminal, and it is not authorized to perform rail carrier service over its length, in some instances, it has accepted responsibility for and paid mileage allowances pursuant to a March 31, 1990 Haulage Agreement.

14. The amount of compensation required for each private car is based on a per mile charge listed for specific age and value categories, updated over time, and set forth in periodic supplements to Freight Tariff 6007, "Mileage Allowances and Rules Governing the Handling of and the Payment of Mileage also Charges on Cars of Private Ownership" (Hereinafter referred to as "Mileage Tariff"). (Appendix F is a true and correct copy of relevant portions of the most recent Mileage Tariff; Freight Tariff 6007-L, effective April 1, 2001. The appended version does not materially differ from prior versions, except for the cents-per-mile rates updated semi-annually in Item 195. Items 180 and 182, which set forth procedures for reporting, payment and auditing of mileage allowances, have not been changed during the period involved in this action.)

15. The mileage allowances for which Plaintiff seeks recovery all pertain to the same 155 mile segment of line from Selkirk, NY to Barber Station, MA. In all instances, a loaded private car originating in Georgia was transported to New England. Conrail has paid mileage allowances for

transportation over each mile of its track up to Selkirk, NY, but has refused to pay mileage allowances for transportation over the 155 mile segment of line from Selkirk, NY to Barber Station, MA.

16. Conrail owns the 155 mile segment of line from Selkirk, NY to Barber Station, MA.

17. Conrail holds a certificate of public convenience issued by the Interstate Commerce Commission authorizing it to perform for-hire transportation service for the public as a railroad common carrier over the 155 mile segment of line from Selkirk, NY to Barber Station, MA. This ICC authorization is exclusive; no other carrier is certificated to provide common carrier service over this segment.

18. Springfield Terminal does not hold a certificate of public to perform for-hire transportation service for the public as a railroad common carrier over the 155 mile segment of line from Selkirk, NY to Barber Station, MA. Any physical operation performed by Springfield Terminal over this segment is performed as an agent for, and in the name of the authorized railroad carrier, which in this case is Conrail.

19. Springfield Terminal holds a certificate of public convenience issued by the ICC authorizing it to perform for-hire transportation service over numerous other rail lines in the New England Region, including a line which connects to Conrail's Selkirk to Barber line at a junction near Worcester, MA

20. For the shipments involved in this action, Barber Station, MA is an interchange point between Conrail and Springfield Terminal, marking the point where Conrail's status as the rail common carrier for a shipment ends and Springfield Terminal's rail common carrier status begins.

21. Conrail and Springfield Terminal are parties to an Agreement dated March 31, 1990 "Relating to Interchange of Loaded and Empty Freight Cars on B&M/ST's track ... at Barber, Massachusetts" (hereinafter "the Haulage Agreement"). Portions of a copy of said Haulage Agreement, as provided to Plaintiff's auditors, Larry Burkes of Freight Rate Services and Patrick Kelley of Rail Transportation Management Services, by Conrail are attached as Appendix G. (A complete copy of the actual Haulage Agreement is not available to Plaintiff and Defendants have denied Plaintiff's requests to produce a full and complete copy.)

22. By information and belief, Plaintiff alleges that pursuant to the Haulage Agreement, on some occasions, Springfield Terminal has physically run trains over the 155 mile segment and moved Plaintiff's private cars from Selkirk, NY to Barber Station, MA and beyond. But in other cases, Conrail has physically run trains over the 155 mile segment, delivering Plaintiff's cars to Springfield Terminal at Barber Station, MA.

23 Said Haulage Agreement is a private operating agreement which was consummated without prior approval of the Interstate Commerce Commission, now the Surface Transportation Board.

24. Said Haulage Agreement has not altered Conrail's rail common carrier status for transportation over the 155 mile segment. Although Conrail reached a private agreement with a subcontractor to assist it with operations over this segment, it ultimately retains liability for movements handled on its behalf pursuant to the Haulage Agreement.

25. Although Springfield Terminal may have performed operations over the 155 mile segment, the Haulage Agreement has not elevated Springfield Terminal's status with respect to that segment to that of a rail common carrier. Only the ICC/STB can bestow common carrier status.

26. In March, 1997, Larry Burks of Freight Rate Service Co. ("FRSC"), a mileage auditor retained by Plaintiff to submit mileage allowance claims for collection of unpaid, accrued mileage allowances, made telephone and written inquiries to both Conrail and Springfield Terminal to determine why mileage allowances were being paid for some but not all movements over the 155 mile segment.

27. In response to said inquiries, Thomas J. Tremblay, Manager of Car Accounting for Springfield Terminal, spoke with Mr. Burkes and also by letter dated March 13, 1997 (a copy of which is attached as Appendix H) and stated that some shipments over the 155 mile segment were moved by Conrail and others were moved by Springfield Terminal, but that Springfield Terminal was only responsible for mileage payments on its moves and was not obligated to pay on Conrail's moves.

28. Plaintiff's auditor spoke with John DiGiovanni, Manager of Car Accounting for Conrail and in a letter dated March 13, 1997 (a copy of which is attached as Appendix I), advised Conrail of Springfield Terminal's non-payment of mileage allowances over the 155 mile segment, as well as Springfield Terminal's position that Conrail was responsible for payment on select moves.

29. In a response to Mr. Burke, a copy of which is attached as Appendix J, Mr. DiGiovanni of Conrail sent Plaintiff a copy of portions of the Haulage Agreement and took the position that the Haulage Agreement absolved Conrail of responsibility for all mileage payments over the 155 mile

segment from Selkirk, NY to Barber Station, MA and that the Haulage Agreement placed responsibility for all such moves on Springfield Terminal, regardless of which railroad actually moved the car or received a division of freight rates on the segment. Specifically, Conrail's correspondence states:

To: LARRY BURKS

Subject: S.T. HAULAGE AGREEMENT

PLEASE SEE THE ATTACHED AGREEMENT.

WE DON'T AND WE DON'T PAY PAST SELKIRK. CAR ACCOUNTING HANDLES CAR HIRE AND MILEAGE ANDS IT'S APPLICATION. PERSONALLY I DON'T CARE WHAT S.T. WANTS TO DO WITH THE BILLING OR MISBILLINGS BY THE FREIGHT SIDE AND THEIR BILLS OF LADING. THE CAR HIRE RESPONSIBILITY IS SPELLED OUT IN SECTION #4 AND SPECIFICALLY MENTIONS HOW TO HANDLE BARBER STATION. (TREATED AS IF INTERCHANGED AT SELKIRK)

YES IS SPOKE TO S.T. AND FURNISHING THEM THE AGREEMENT. IF S.T. DOESN'T WANT TO ABIDE BY THIS AGREEMENT THEY'LL HAVE TO MOVE TO GET IT CHANGED.

JOHN T. DIGIOVANNI

C.R. PHILA.

30. The non-payment for some, but not all, movements over the 155 mile segment continued despite the March, 1997 efforts to resolve responsibility. Continuing telephone discussions were undertaken by Patrick Kelley, of Rail Transportation Management Services ("RTMS"), the new mileage auditor for Plaintiff, who pursued payment through claims submitted to both Conrail and Springfield Terminal.

31. In telephone discussions, both Conrail and Springfield Terminal confirmed to Mr. Kelley that the 155 mile track was owned by Conrail, but that responsibility for mileage payments was to be determined pursuant to the Haulage Agreement.

32. RTMS submitted 18 mileage claims to Springfield Terminal between October 19, 1996 and May 5, 2000 covering 6,055 shipments over the 155 mile segment. In response to the audit filings, Springfield Terminal paid mileage on the 155 mile segment on 2,518 of the shipments, but did not pay on 3,537 of the shipments. On these 3,537 shipments for which payment was not made, Springfield Terminal denied payment for 2,260 on the grounds that Conrail handled the move up to the point of interchange at Barber Station, MA, but did not answer with respect to 1,277 shipments, most of which were included in a claim submitted shortly before this lawsuit was filed. RTMS's summary of mileage claims is attached as Appendix K.

33. By letter of April 17, 1998, Mr. Kelley wrote to Conrail and Springfield Terminal to summarize positions taken by the parties over the question of which railroad was responsible for payment and also to demand payment. A copy of this letter is attached as Appendix L.

34. In response, Jeffrey Miller of Springfield Terminal, in a letter dated April 27, 1998, took the position that the Haulage Agreement did not impose responsibility on Springfield Terminal for payment of mileage allowances on all movements over the 155 mile segment, insisting instead that the Haulage Agreement only obligated it to pay on those movement for which the 155 miles had been included in Springfield Terminal's account for the inter-railroad division of freight revenue. A copy of this letter is attached as Appendix M.

35. In response, Conrail told Mr. Kelley that Plaintiff should look to Springfield Terminal for payment under the Haulage Agreement because that agreement obligated Springfield Terminal to pay on all movements over the segment, regardless of other agreements between Conrail and Springfield Terminal concerning the division of revenues.

36. On the basis of its interpretation of the Haulage Agreement as being applicable only when it receives a division of revenues on the segment, Springfield Terminal has paid, or approved for payment, mileage allowances on some movements over the 155 mile Selkirk, NY to Barber Station, MA segment, and denied payment on other shipments for which it contends Conrail earned revenues on the segment.

37. Conrail relied on the terms of the Haulage Agreement as the rationale for denying Plaintiff's demand for payment, citing its interpretation of the Haulage Agreement as obligating Springfield Terminal to pay mileage allowances for all movements over segment, regardless of which railroad received divisions for the segment.

38. Neither Conrail nor Springfield Terminal have denied payment to Plaintiff on the basis of an interpretation of their obligations under Sections 11121 and 11122 of the Interstate Commerce Act, but rather each has asserted that the other railroad is the party responsible for payment to Engelhard pursuant to the Haulage Agreement.

**COUNT I - VIOLATION OF THE INTERSTATE COMMERCE ACT
(Alternative Theory)**

39. The averments of Paragraphs 1 through 38 are incorporated herein by reference.

40. Plaintiff sets forth this claim for damages under the Interstate Commerce Act as an alternative theory of recovery. It is the theory of liability which Plaintiff believes would apply but for the state law rights and obligations arising out of the private Haulage Agreement. Neither Conrail nor Springfield Terminal provided rail transportation service for Plaintiff - - rail transportation service was in all instances provided to Plaintiff's customers who were the "shippers" as that term is defined in the Interstate Commerce Act.

41. Defendant Conrail used private cars provided by Plaintiff Engelhard for each shipment detailed in Appendices A - E, but failed to pay the required mileage allowances as determined under the then current version of Freight Tariff 6007 for transportation of said cars over the 155 mile segment.

42. Conrail is the only railroad carrier which has been certified by the Interstate Commerce Commission, now the Surface Transportation Board, to provide rail common carrier service over the 155 mile line segment from Selkirk, NY to Barber Station, MA. Therefore, rail transportation service over this segment, as that term is defined in the Interstate Commerce Act, could only have been performed by Conrail, or by Springfield Terminal as an agent acting on Conrail's behalf.

43. The failure of Conrail, or its agent, Springfield Terminal, to make payment of mileage allowances on said shipments is an act or omission committed in violation of common carrier obligations to pay for use of private equipment under Section 11122 of the Interstate Commerce Act.

44. As the identified railroad common carrier, Conrail was obligated to report and then pay the mileage of Plaintiff's private cars taking place over the 155 mile segment of its line within

one month and ten days after shipment pursuant to the terms of Item 180 of the Mileage Tariff; however, it failed to do so. Conrail's agent, Springfield Terminal also failed to report mileage; however, in some instances, it did pay or approve payment of mileage allowances after audit claims were presented to it.

45. Item 182-A, part 2 of the Mileage Allowance Tariff permits private car owners to submit claims for mileage payment discrepancies up to two years after a railroad's inaccurate report and/or payment of mileage allowances.

46. Each of Plaintiff's claims for unpaid mileage as listed in Appendices A - E were submitted to Conrail's agent, Springfield Terminal, within the two years period provided in the Mileage Tariff; however, said claims remain unpaid.

47. Conrail and its agent, Springfield Terminal, in violation of provisions of the Interstate Commerce Act requiring rail common carriers to pay compensation for use of private rail cars, have caused damage to Plaintiff by failing to pay the mileage allowances which are due and owing as listed in Appendices A - E in the amount of \$568,155.13.

48. A party who successfully recovers damages from a rail carrier found liable under 49 U.S.C. § 11704(d)(3) is entitled to the award of attorney's fees.

WHEREFORE, Plaintiff respectfully requests that judgment be entered against Conrail in the amount of \$568,155.13, plus attorney's fees. Alternatively, Plaintiff respectfully requests that judgment be entered against Springfield Terminal in the amount of \$568,155.13, plus attorney's fees.

Alternative, Plaintiff requests that this Court find both Conrail and Springfield Terminal to be jointly and severally liable for violation of the Interstate Commerce Act and award judgment against each in the amount of \$568,155.13, plus attorney's fees.

**COUNT II - BREACH OF IMPLIED-IN-FACT CONTRACT
ARISING FROM COURSE OF DEALINGS
(Alternative Theory)**

49. The averments of Paragraph 1 through 38 are incorporated by reference.

50. Under normal circumstance, in accordance with the Mileage Tariff (Appendix F, Items 25 and 185), rail common carriers are obligated to pay mileage allowances to private car providers when such cars are moved over their lines in revenue service (as opposed to empty movements).

51. Plaintiff furnished private cars to Defendants with the reasonable expectation of receiving compensation because Defendants used these cars to earn freight revenue; however, all unpaid mileage relates to movements over Conrail's 155 mile Selkirk, NY to Barber Station, MA

52. An implied contract between Plaintiff, Conrail and Springfield Terminal to handle payment for mileage allowances under the Haulage Agreement, in lieu of the normal line ownership procedure, developed through a course of dealing between Plaintiff, Conrail and Springfield Terminal.

53. In reliance upon Conrail's representations that Plaintiff's right to receive mileage allowance payments for movements over the 155 mile segment were governed by the Haulage

Agreement, Plaintiff submitted claims for unpaid mileage allowances to Springfield Terminal, notwithstanding the fact that Springfield Terminal did not own the line and was not the ICC certificated rail carrier authorized to provide transportation service over the segment.

54. Springfield Terminals tendered payment of mileage allowances for some movements over the segment pursuant to its interpretation of the Haulage Agreement.

55. In response to instances where Springfield Terminal refused payment under the Haulage Agreement, Plaintiff advised Conrail of rationale for Springfield Terminal's denials and demanded that Conrail make payment.

56. The ordinary course of dealings between Plaintiff and Defendants manifests an intent by all parties to be bound by the Haulage Agreement and such intent was commonly understood by Plaintiff and Defendants.

57. Springfield Terminal did not include the 155 mile segment on the type of reports spelled out in Item 180 of the Mileage Tariff, but relied on Plaintiff to submit claims identifying the movements which it then paid or denied in accord with its interpretation of the Haulage Agreement.

58. Defendants instructed Plaintiff to submit claims for mileage allowances in accordance with the Haulage Agreement and Plaintiff relied on Defendants' instructions.

59. The course of dealing reveals that Defendants urged Plaintiff to forebear on efforts to pursue payment based upon the ownership of the 155 mile segment, but rather look to the Haulage Agreement for payment.

60. At all relevant times, Plaintiff acted in accordance with the Haulage Agreement and Defendants acted in accordance with their respective interpretation of the Haulage Agreement.

61. The dispute over the unpaid mileage allowance is a result of differing interpretations of the Haulage Agreement by the Defendants; that is, Conrail maintains that Springfield Terminal is responsible for all mileage allowances pursuant to the Haulage Agreement, whereas Springfield Terminal maintains that the Haulage Agreement should only impose mileage liability upon it in circumstances where its division of freight revenue paid by the shipper includes the segment.

WHEREFORE, Plaintiff respectfully requests that judgment be entered jointly and severally against Conrail and Springfield Terminal in the amount of \$568,155.13, plus interest at the rate of 12%, as provided under Massachusetts statute.

**COUNT III - BREACH OF IMPLIED-IN-FACT CONTRACT
ARISING FROM PROMISSORY ESTOPPEL
(Alternative Theory)**

62. The averments of Paragraph 1 through 38 and Paragraphs 49 through 61 are incorporated by reference.

63. Conrail expressly represented to Plaintiff that the Haulage Agreement relieved it of liability for payment of mileage allowances on the 155 mile segment.

64. Conrail expressly urged Plaintiff to pursue Springfield Terminal for payment for mileage allowances on the 155 mile segment in accord with the Haulage Agreement.

65. In reasonable reliance upon Conrail's representations, Plaintiff's auditors submitted mileage claims to Springfield Terminal.

66. In response to mileage claims submitted to it by Plaintiff pursuant to the Haulage Agreement, Springfield Terminals paid mileage allowances on a significant portion of the shipments moving over the 155 mile segment which absent the obligations arising under the Haulage Agreement it was not otherwise obligated to pay.

67. Plaintiff understood that pursuant to the Haulage Agreement, either Conrail or Springfield Terminal would pay mileage allowances over the 155 mile segment and was therefore reasonable in relying on the Haulage Agreement in urging the railroads to jointly resolve their differences in interpretation so that payment in full would be made.

68. In light of the fact that Plaintiff followed Conrail's suggestion to rely on the Haulage Agreement as the basis for pursuing mileage claims against Springfield Terminal, Conrail should be estopped from denying that Plaintiff has a right to enforce the Haulage Agreement.

69. In light of the fact that Springfield Terminal paid some mileage claims pursuant to the Haulage Agreement, it should be estopped from denying that Plaintiff has a right to enforce the Haulage Agreement.

WHEREFORE, Plaintiff respectfully requests that judgment be entered jointly and severally against Conrail and Springfield Terminal in the amount of \$568,155.13, plus interest at the rate of 12%, as provided under Massachusetts statute.

COUNT IV - QUANTUM MERUIT (UNJUST ENRICHMENT)

70. The averments of Paragraph 1 through 38 and Paragraphs 49 through 69 are incorporated by reference.

71. Plaintiff furnished private cars to Defendants with the reasonable expectation of receiving compensation because Defendants used these cars to earn freight revenue.

72. The private cars were furnished in a manner consistent with the trade custom and under normal circumstances, rail common carriers are obligated to pay mileage allowances for use of private cars. Therefore, Conrail and Springfield Terminal were on notice that Plaintiff expected to be fully paid for mileage allowances.

73. Although Conrail was obligated under the Interstate Commerce Act to pay all relevant mileage allowances, Conrail denied payment of claims by Plaintiff for mileage allowances on the basis that Springfield Terminal was liable for such payment under the terms of the private Haulage Agreement.

74. Although Springfield Terminal might not have been obligated under the Interstate Commerce Act to pay the relevant mileage allowances directly to Plaintiff, Springfield Terminal actually paid certain claims by Plaintiff for mileage allowances but not others pursuant to its interpretation of the Haulage Agreement.

75. Plaintiff furnished the private cars in good-faith and acted under the Haulage Agreement in good-faith as instructed by Defendants.

76. Conrail and Springfield Terminal derived a benefit from Plaintiff's furnishing of the private car in that Defendants used these cars to earn freight revenue; Defendants divided their rights and obligations to such freight revenue in the private Haulage Agreement; and both Defendants denied payment based on their respective interpretation of the Haulage Agreement.

77. Plaintiff is entitled to compensation for furnishing tank cars which were transported over the 155 mile segment, the only question is which of the two Defendants is liable for the benefit so derived.

WHEREFORE, Plaintiff respectfully requests that judgment be entered jointly and severally against Conrail and Springfield Terminal in the amount of \$568,155.13, plus interest at the rate of 12%, as provided under Massachusetts statute.

**COUNT V - BREACH OF CONTRACT FOR BENEFIT OF
THIRD PARTY BENEFICIARY**

78. The averments of Paragraph 1 through 38 and Paragraphs 49 through 77 are incorporated by reference.

79. Conrail and Springfield Terminal entered into a private Haulage Agreement which defined and divided the rights and obligations each would have with regard to transportation conducted over the specific 155 mile segment of line involve herein.

80. Said Haulage Agreement did not require the prior approval of the Interstate Commerce Commission, now the Surface Transportation Board. It created rights and obligations which are not subject to ICC/STB jurisdiction under the Interstate Commerce Act.

81. On information and belief, this Haulage Agreement defined and divided, among other things, obligations to pay mileage allowances directly to the third party who furnished the private cars.

82. In providing for such a treatment of mileage allowances under the Haulage Agreement, Defendants intended to process and pay mileage allowances outside the scope of the Interstate Commerce Act.

83. In March, 1990, when the Haulage Agreement was signed by Conrail and Springfield Terminal, both Defendants were aware that loaded private cars would be moved over the 155 mile Selkirk to Barber Station segment and that the car provider would be entitled to compensation.

84. The Haulage Agreement provides in relevant part:

SECTION 4. MILEAGE AND CAR HIRE

Except as otherwise be provided in October 27, 1989 agreement, for the purpose of determining per diem, car hire, and car mileage payments, and for no other purpose, cars interchanged at Barber, Massachusetts shall be treated as if interchanged at Conrail's Selkirk Yard, in the vicinity of Albany, New York....

85. Both Conrail and Springfield Terminal understood that the terms of this Haulage Agreement concerning "car mileage payments" referred to mileage allowances owed on cars provided by Plaintiff.

86. Defendants intended to benefit Plaintiff by providing for car mileage payments outside the scope of the Interstate Commerce Act.

87. Both Conrail and Springfield Terminal reaffirmed their intent to grant Plaintiff enforceable rights under the Haulage Agreement in the course of dealing between 1997 - 1998

wherein Plaintiff was urged to pursue its demands for payment in accord with the terms of the Haulage Agreement.

WHEREFORE, Plaintiff respectfully requests that judgment be entered jointly and severally against Conrail and Springfield Terminal in the amount of \$568,155.13, plus interest at the rate of 12%, as provided under Massachusetts statute.

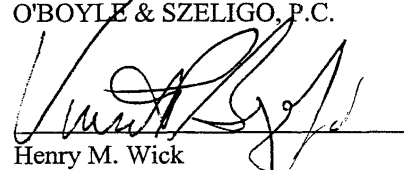
Respectfully submitted,
FEINBERG, CAMPBELL & ZACK, P.C.

Dated: November 14, 2001

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APPENDICES "A" to "E"*

*Previously filed with Plaintiff's original Complaint on May 15, 2001.
Appendices "A" to "E" are not attached and are incorporated by reference.

For the convenience of the Court Appendices "A" to "E" are identified below:

<u>Appendix</u>	<u>Description</u>
A.	SUMMARY of disputed claims
B.	SELKIRK - Disputed claims for owned cars (FRSC) \$ 50,229.81
C.	SELKIRK - Disputed claims for owned cars (RTMS) \$ 61,025.48
D.	SELKIRK - Disputed claims for leased cars (FRSC) \$140,385.43
E.	SELKIRK - Disputed claims for leased cars (RTMS) \$316,514.41

APPENDIX "F"

RAILINC, AGENT

FREIGHT TARIFF RIC 6007-L

(Cancels Freight Tariff RPS 6007-K)

**MILEAGE ALLOWANCES AND RULES
GOVERNING**

THE HANDLING OF AND THE PAYMENT OF MILEAGE

ALSO CHARGES

**ON
CARS OF PRIVATE OWNERSHIP
AS DEFINED IN ITEMS 25 AND 400**

**BY
RAILROADS PARTIES TO THIS TARIFF**

For List of Participating Carriers, see Item 2.10.

This tariff is also applicable on intrastate traffic except where expressly provided to the contrary in connection with particular items.

ISSUED MARCH 15, 2001

EFFECTIVE APRIL 1, 2001

**ISSUED BY
RAILINC, AGENT
7001 WESTON PARKWAY, SUITE 200
CARY, NC 27513**

Copyright 2001 (Pending)
By RAILINC, Agent

ALL-STATE LEGAL*

F

TARIFF 6007-L

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LIST OF PARTICIPATING CARRIERS ALPHABETIZED BY STANDARD CARRIER ABBREVIATION (See Note 1)

CARR ABBR	AAR CODE	NAME OF CARRIER	ITEM (S) (Note 2)
ASRY	576	Ashland Railway, Inc.....	
BAR	56	Bangor and Aroostook Railroad Company	
BDRV	59	Belvidere & Delaware River Railway	
BLE	61	Bessemer and Lake Erie Railroad Company.....	61, 412, 414
BNSF	777	Burlington Northern and Santa Fe Railway Company, The	50,70,73,416,420,422,424, 426,428,430,432,434, 436, 438, 440, 442, 443, 444, 446,448 22
BOCT	64	Baltimore and Ohio Chicago Terminal Railroad Company, The.....	
CKKY	116	Chattanooga & Chickamauga Railway Co.....	
CN	103	Canadian National Railway	79,115,185,450,452,454,456, 512 to 518
CPRS	105	Canadian Pacific Railway	458,460,462,464,466,468,470, 472,474,476,478,482
CSKR	904	C&S Railroad Corporation	
CSXT	712	CSX Transportation, Inc., comprised of the following carriers: Carrollton Railroad, The. CSX Transportation, Inc. Gainesville Midland Railroad Company. Richmond, Fredericksburg and Potomac Railway Company. Three Rivers Railway Company. Western Railway of Alabama, The	106, 484, 486
DKS	210	Doniphan, Kensett & Searcy Railway	
EJE	238	Elgin, Joliet and Eastern Railway Company	112, 488, 490
EPTC	62	East Portland Traction Company.....	
FEC	263	Florida East Coast Railway Company	35,492,494,496
FVW	264	Fox Valley & Western Ltd.....	498, 500
GWWE	293	Gateway Eastern Railway Company	
GWWR	362	Gateway Western Railway Company	505, 506

TARIFF 6007-L

LIST OF PARTICIPATING CARRIERS ALPHABETIZED BY STANDARD CARRIER ABBREVIATION (See Note 1)

CARR ABBR	AAR CODE	NAME OF CARRIER	ITEM (S) (Note 2)
HPTD	366	High Point, Thomasville & Denton Railroad Company.....	511
IANR	341	Iowa Northern Railway	522
IMRL	379	I & M Rail Link, LLC	
KCS	400	Kansas City Southern Railway Company.....	124,185,524,526,527,528,529, 530
MAA	453	Magma Arizona Railroad Company.....	
NAUG	541	Naugatuck Railroad Company, Inc.....	
NS	555	Norfolk Southern Railway Company, comprised of the following carriers: Norfolk and Western Railway Company. Norfolk Southern Railway Company. Alabama Great Southern Railroad Company. Atlantic and East Carolina Railway Company. Camp Lejeune Railroad Company. Central of Georgia Railroad Company. Chesapeake Western Railway. Cincinnati, New Orleans and Texas Pacific Railway Company. Georgia Southern and Florida Railway Company. Tennessee Railway Company.....	135,540,542,544,545,546,547, 548
PIR	632	Pittsburgh Industrial Railroad	
SRN	678	Sabine River & Northern Railroad Company	
SSAM	670	Sault Ste. Marie Bridge Company	
ST	746	ST Rail System	555, 560, 565
SUN	734	Sunset Railway Company	
TPW	769	Toledo, Peoria & Western Railway Corporation.....	160, 570
UP	802	Union Pacific Railroad Company.....	50,185,416,575,576,577,578, 579,581,583,585,591, 592,593
WC	250	Wisconsin Central LTD	597
WSS	854	Winston-Salem Southbound Railway Company	595

EXPLANATION OF NOTES

1. The code numbers shown opposite the abbreviations of the participating rail carriers are the Association of American Railroads Mandatory Accounting Rules, Rule 260 code numbers, and have no bearing on the rate application in this tariff.
2. Item of general application affecting the participation of all or large groups or numbers of carriers are not listed in this column.

TARIFF 6007-L

RULES AND OTHER GOVERNING PROVISIONS GENERAL RULES AND REGULATIONS

ITEM 5

REFERENCE TO TARIFFS, ITEMS, NOTES, RULES, ETC

1. Where reference is made in this tariff to tariffs, items, notes, rules, etc., such references are continuous and include supplements to and successive issues of such tariffs and reissues of such items, notes, rules, etc.
 2. Where reference is made in this tariff to another tariff by number, such reference applies also to such tariff to the extent it may be applicable on intrastate traffic or traffic to or from Canada.
-

ITEM 10

CONSECUTIVE NUMBERS

1. Where consecutive numbers are represented in this tariff by the first and last numbers connected by the word "to" of a hyphen they will be understood to include both of the numbers shown.
 2. If the first number only bears a reference mark such reference mark also applies to the last number shown and to all numbers between the first and last numbers.
-

ITEM 15

METHOD OF CANCELLING ITEMS

1. Except as provided in Paragraph 2, as this Tariff is supplemented, numbered items with letter suffixes cancel correspondingly numbered items in the original tariff, or in a prior supplement. Letter suffixes will be used in alphabetical sequence starting with A. Example: Item 100-A cancels Item 100, Item 100-AA cancels Item 100-Z, Item 100-AB cancels Item 100-AA, Item 100-BA cancels Item 100-AZ, or Item 105-B cancels Item 105-A, in a prior supplement which in turn cancelled Item 105.
-

ITEM 20

METHOD OF DENOTING REISSUED MATTER IN SUPPLEMENTS

1. Matter brought forward without change from one supplement to another will be designated as "Reissued" by a reference mark in the form of a square enclosing a number, the number being that of the supplement in which the reissued matter first appeared in its currently effective form. To determine its original effective date, consult the supplement in which the reissued matter first became effective.
-

ITEM 22

BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY (SEE EXCEPTION 1)

1. Provisions of this tariff for the movement of empty cars without charge to or from shop facilities for cleaning, lining, relining, maintenance or repair, will not apply to such cars moving from or to shop facilities served by BOCT, to the extent charges are published in Tariff BOCT 8100-Series.

EXCEPTION

1. These provisions do not apply to tank cars.
-

TARIFF 6007-L

SECTION 1 APPLIES ONLY ON TANK CARS

ITEM 25

APPLICATION OF SECTION 1

1. The term "Cars of Private Ownership", when used in this tariff, is defined as cars bearing other than Railroad Reporting marks that are owned by individuals, firms, corporations, or car companies, including cars owned and/or operated by railroad controlled car lines.
2. Except as otherwise provided herein, these rules govern the handling of tank cars including the payment of mileage allowances, when used by railroads parties to this tariff individually or jointly, where specifically provided herein, for transportation over their lines as follows:
 - A. Between points in the United States (interstate and intrastate) including movements where part of the through route is through the Dominion of Canada.
 - B. Internationally, i.e., between points in the United States and points in the Dominion of Canada. (Applicable only on that portion of the haul within the United States).
 - C. For that portion of the haul in the United States in connection with movements between points in the Dominion of Canada where part of the through route is through the United States.

EXCEPTIONS TO APPLICATION AND RULES APPLIES ONLY ON TANK CARS

ITEM 30

GENERAL EXCEPTION

1. The rules and mileage allowances published herein will not apply to:
 - A. Cars that are not properly registered in the Official Railway Equipment Register, RER 6413-Series, showing the marked capacities and assigned reporting marks and the gallonage capacities of which are not published in Tank Car Capacities Tariff WTL 6300-Series, except that the gallonage capacities of cars designed and used exclusively for handling commodities on which weights and charges are arrived at by weight and not by gallonage capacities of cars not to be published in Tank Car Capacities Tariff WTL 6300-Series.
 - B. Mileage allowances named in Item 195-Series of this tariff will not apply to cars handled under the provisions of Item 190.

ITEM 35

APPLIES ONLY FOR CARRIERS NAMED IN THIS ITEM

1. The provisions of Item 187-Series "Equalization of Mileage on Tank Cars of Private Ownership", will not apply in connection with carriers named below:

Florida East Coast Railway Company

Kansas City Southern Railway Company (Stations 31011 to 31315 only)

ITEM 50

APPLIES ONLY FOR CARRIERS NAMED IN THIS ITEM

1. Empty privately-owned or leased tank cars used or to be used in Intra-Mexican service will be subject to the following provisions:
 - A. Owner or lessee shall secure an entry permit from the involved Mexican carrier prior to empty movement to the border crossing and permit number must be shown in the writing instructions accompanying such car.
 - B. Subsequent to Intra-Mexican service, written instructions for each car entering the U.S. must clearly indicate the exact consignee or facility for disposition of the car prior to movement beyond the border gateways.
 - C. Upon failure to comply with paragraphs A or B, a holding charge of \$10.00 per day will be assessed for each 24 hours or fraction thereof beginning at 7:00 AM of the day following arrival of such empty privately owned or leased car at the border crossing, (excluding Saturdays, Sundays and holidays), until provisions of paragraphs A and B as applicable are fulfilled.

Burlington Northern and Santa Fe Railway Company
Union Pacific Railroad Company

ITEM 61

BESSEMER AND LAKE ERIE RAILROAD COMPANY

1. The provisions of Item 190 Series or other provisions (or the movement of empty tank cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification or repair, will not apply to such cars moving to or from facilities located at stations served by this railroad unless the empty movement is immediately preceded by or followed by a loaded revenue movement via the Bessemer and Lake Erie Railroad Company. In all other circumstances, the published tariff charges in Tariff BLE 3500 or 8425 Series for movement of empty cars on their own wheels shall apply.

TARIFF 6007-L

SECTION 1 EXCEPTIONS TO APPLICATION AND RULES APPLIES ONLY ON TANK CARS

ITEM 70

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY (LINES IN CANADA)

-
1. This tariff also applies on all traffic moving over the lines of the BNSF in Canada.
-

ITEM 73

BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY (SEE NOTE 1, THIS ITEM) (EXCEPTION TO ITEM 190)

1. When a tank car is released from load on BNSF, the empty will be returned via the reverse of the loaded route to the origin station of the last loaded movement. If the owner or lessee of the car desires movement via a different route or to a station other than the origin of the last loaded movement, empty billing instructions must be given to:
- Burlington Northern & Santa Fe Railway Co.
12th Floor - Carload Billing
176 E. 5th Street
St. Paul, MN 55101
Telephone: (888) 312-2673
FAX: (800) 786-2455
- prior to release of the empty car. If the owner or lessee of the car requests movement via a different route, or to a station other than the origin of the last movement, after release of the empty car, diversion provisions and charges, as named in BNSF Diversion Tariff 6200 Series, are applicable.

EXPLANATION OF NOTES

1. If subject car is a tank car last containing Hazardous Materials, shipping paper must be furnished at the point of origin of the empty car for all moves whether they are reverse route or not.
-

ITEM 79

CANADIAN NATIONAL RAILWAYS

1. The participation of the Canadian National Railways (Lines Armstrong, Thunder Bay, ON, and West thereof), and Canadian National Railways (Lines Thunder Bay, ON, Armstrong, ON and East thereof) is restricted to:
- Movements over its lines in Canada, when both point of origin and destination are in the United States.
-

ITEM 106

CSX TRANSPORTATION INC.

1. The participation of this carrier is restricted to movements over its lines, as follows:
- A. Between points in the United States, including movements where part of the through route is through the Dominion of Canada.
- B. For that portion of the haul in the United States on international movements, i.e., between points in the United States and points in the Dominion of Canada.
-

ITEM 112

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

1. The provisions of Item 190 Series or other provisions for the movement of empty tank cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification, repair or storage, will not apply to such cars moving to or from facilities acting as agent for the cars' owners and located at stations served by this railroad unless the empty movement is immediately preceded by or followed by a loaded revenue movement via the EJE. In all other circumstances, the published tariff charges in Tariff EJE 4193 or 6024 Series for movement of empty cars on their own wheels to and from repair or storage facilities acting as agent for the car owner shall apply.
-

ITEM 115

ILLINOIS CENTRAL RAILROAD COMPANY

1. No tank car mileage allowance will be paid on shipments moving under the provisions of Section 7, Rule 35, Tariff UFC 6000 Series for account of IC.
-

TARIFF 6007-L

SECTION 1 EXCEPTIONS TO APPLICATION AND RULES APPLIES ONLY ON TANK CARS

ITEM 124

KANSAS CITY SOUTHERN RAILWAY COMPANY, THE

1. Provisions of Item 190 Series, or any other provision allowing for free switching service of an empty freight car (or cars) to or from shop facilities for cleaning, lining, relining, maintenance, modification or repair, will not apply to and from shop facilities served by KCS. Matter of switch charge will be handled by contractual agreement between KCS and repair shop owner(s).
-

ITEM 131

NORFOLK SOUTHERN RAILWAY COMPANY

1. When it is necessary to move a loaded private car to/from shop or repair facilities located on NS, NS will pay mileage payments not to exceed the amount that would have been earned had the car not required additional rail movements to/from shop or repair facilities, provided that the mileage allowances for the loaded movement are not elsewhere restricted.
-

ITEM 135

NORFOLK SOUTHERN RAILWAY COMPANY (EXCEPTION TO ITEM 190) (See NOTE 1)

When a car is released from load on NS, the empty will be returned via the reverse of the loaded route to the origin station of the last loaded movement. If the owner or lessee of the car desires movement via a different route or to a station other than the origin of the last loaded movement, empty billing instructions must be sent prior to release of the empty car via FAX to:

FAX: 404-580-6092
Norfolk Southern Railway Company
Agency Operation Center
125 Spring Street South West
Atlanta, GA 30303

If the owner or lessee requests movement via a different route, or to a station other than the origin of the last loaded movement, after release of the empty car, diversion provisions and charges, as named in Norfolk Southern Tariff 8002 Series, are applicable. (See Exception 1.)

EXPLANATION OF NOTE

1. If subject tank car has last contained Hazardous Materials, shipping paper must be furnished at the point of origin of the empty car for all moves whether they are reverse or not.

EXCEPTION

1. The empty tank car will be allowed one diversion on Norfolk Southern without charge. All subsequent diversions on Norfolk Southern will be charged at the applicable diversion charge and be subject to rules governing diversions in NS 8002 series. Instructions to divert car should be sent on company letterhead and faxed to the following:

FAX: 404-589-6233
Norfolk Southern Railway Company
National Customer Service Center
125 Spring Street South West
Atlanta, GA 30303

ITEM 160

TOLEDO, PEORIA AND WESTERN RAILWAY CORPORATION

1. The provisions of Item 190 Series, or other provisions for the movement of empty tank cars without charge to or from facilities for cleaning, lining, relining, maintenance, modification, repair, or storage and also cars moving for scrapping, dismantling, or retiring purposes, will not apply to such cars moving to or from facilities served by the Toledo, Peoria and Western Railway Corporation.
-

TARIFF 6007-L

SECTION 1 RULES AND REGULATIONS APPLIES ONLY ON TANK CARS

ITEM 180

PAYMENT OF MILEAGE

1. Upon written application reporting marks will be assigned to car owner or lessee by the Secretary, Business Services, Association of American Railroads, provided applicants are subscribers to the AAR Mechanical Interchange Agreement. Applications for reporting marks shall state the name and address of the owner and lessee for cars under lease.
2. Mileage allowance must be reported to the car owner (person or company at a single address, to whom the reporting marks are assigned) within one (1) month and ten (10) days from the last day of the month in which it is earned including payment for cars on hand at the end of that month.
3. Mileage allowance for the use of tank cars will be paid only to the person or company at a single address, to whom the reporting marks are assigned provided cars are properly equipped and marked with the assigned reporting marks and car number, and providing further that:
 - A. The marked capacities and assigned reporting marks are properly submitted, not later than the date of the installations of cars in service, to The Official Railway Equipment Register for publication in the next succeeding issue.
 - B. Gallonage capacities are published in Tank Car Capacities Tariff WTL 6300 Series EXCEPT when cars are designed and used exclusively for handling commodities on which weights and charges are arrived at by weight and not by gallonage capacity of cars.
 - C. A description of each car is furnished to the Secretary, Customer Service Division, AAR, as required in the Universal Machine Language Equipment Register for the assignment of applicable mileage allowances. Such information received by the Secretary by the last working day of the month except, data transfers requiring data entry by AAR staff must be received by the 25th day of the month, will be effective the first day of the subsequent month. Cars registered with transportation code S, X, or Y are not eligible for mileage allowances and will be assigned a zero rate.
4. Reporting marks assigned to private car owners shall consist of four letters including the final letter 'X'.
5. Assigned reporting marks must be painted or stenciled on the body of the car. When reporting mileage allowances, the carding, placarding, or boarding of cars will not be recognized.

ITEM 182

DEDUCTIONS AND MILEAGE CLAIM HANDLING PROCEDURES

1. Deductions By Railroads To Private Car Owners
 - A. Mileage allowed in error, by a railroad, including, but not limited to mileage allowed at incorrect rates for any reason, may be deducted from the car owner's account within twenty-four (24) months from the last day of the month for which the mileage was reported as earned, but not later. A railroad may tender an invoice for mileage allowed in error at any time within twenty-four (24) months from the last day of the month for which the mileage was reported as earned. Except as provided in paragraph 3, an owner-lessor of a private car must remit within eight (8) months after the invoice is presented the entire amount of any invoice issued to it.
 - B. Deductions for amounts of \$25.00 or less shall not be taken after the expiration of two (2) months and ten (10) days from the last day of the month the mileage was earned.
2. Claims Issued By Private Car Owners To Railroads.
 - A. A private car owner must, within twenty-four (24) months from the last day of the month the completed cycle was reported, present any claim for mileage allowance discrepancies, including incorrect rates or omissions, to the applicable rail carrier in the prescribed AAR format, as published in AAR Circular No. OT-3 Series in The Official Railway Equipment Register. Claims not presented in the required format will not be processed. The railroad receiving the claim must within the four (4) months from the date on which the claim was presented allow it in whole or in part, or decline it. The private car owner may reissue its claim, if applicable within four (4) months from the last day of the four (4) months' period allowed the railroad which handled the claim prior to reissuance. The railroad receiving the reissue claim must within four (4) months from the date of which the reissued claim was presented allow it in whole or in part or decline it. If the railroad fails to handle the original or reissued claim within the prescribed time limits, it will constitute a valid claim as last presented and must be honored by the railroad to which presented. Claim for amounts of \$25.00 per car per cycle or less shall not be issued. The \$25.00 limit is not applicable where no miles were reported for the railroad cycle.

TARIFF 6007-L

SECTION 1 RULES AND REGULATIONS APPLIES ONLY ON TANK CARS

ITEM 182 CONT'D

DEDUCTIONS AND MILEAGE CLAIM HANDLING PROCEDURES

3. Claims by Owners-Lessors

- A. If a railroad takes a deduction against or issues an invoice to an owner-lessor for mileage allowed in error, including, but not limited to, mileage allowed at incorrect rates for any reason, but the erroneous allowance payment is not recoverable by the owner-lessor as defined below, the owner-lessor may present a claim for the recovery of the amounts deducted by the railroad or the cancellation of an unpaid invoice within two (2) years of receiving notice of the railroad's deduction or invoice. For application of this tariff provision, an owner-lessor may claim that an erroneous mileage payment is "not recoverable" only when (a) the erroneous mileage payment was actually paid or credited by the owner-lessor to a lessee (except those lessees whose primary business is the leasing of cars to entities other than those within a lessee's corporate family and who ship only incidentally) irrespective of whether the lessee subsequently paid or credited the mileage allowance payment to a sublessee; (b) the erroneous allowance payment cannot be recovered from the lessee because the lessee has declared bankruptcy or sought reorganization or is no longer a lessee of the owner-lessor; (c) the owner-lessor exercised timely efforts to recover the erroneous allowance payment beginning within ninety (90) days of receiving notice of the railroad's deduction or invoice; and (d) the owner-lessor undertook diligent collection efforts to recover the erroneous allowance payments until eight (8) months from the date of such notice or invoice (or until the earlier date of initiation of bankruptcy/reorganization proceedings), including making demands for payment and taking deductions against lessees' accounts. Such a claim must be accompanied by a certificate assigned by an officer or other person specifically authorized to sign the certificate of the owner-lessor stating how the claim satisfied each of the requirements set forth above, together with documents reflecting the owner-lessor's collection efforts. If, using reasonable efforts, the railroad is unable to determine whether the lessee's primary business is the leasing of cars to entities other than those in the lessee's corporate family, it shall consult with the owner-lessor, which shall provide the railroad with any evidence of the lessee's shipping activities which may be available to the owner-lessor using reasonable efforts. The owner-lessor shall provide the railroad with an assignment of the owner-lessor's claims and rights to collect the amount not recovered upon payment of the claim of cancellation of the invoice by the railroad.
- B. If the railroad had deducted the amount of an erroneous allowance payment from an owner-lessor, the railroad must remit to the owner-lessor the amount deducted within four (4) months of its receipt of a properly presented, valid claim from the owner-lessor.

ITEM 185

COMPUTATION OF MILEAGE (See Exceptions 1 through 6)

1. Mileage will be computed on the basis of actual distance based on freight mileage tables of the individual lines parties to this tariff, lawfully on file, via the route of movement from station of origin or station at which received from connecting line to destination station or to stations at which delivered to connecting line without deduction of mileage through switching districts (see Note 1).
2. When the transportation begins and ends, i.e., when a car is both loaded and unloaded, within a switching district, no mileage will be allowed. Mileage between an industry or public track and freight station at station of origin or destination will not be allowed.

EXPLANATION OF NOTES

1. The intent of the clause "without deduction of mileage through switching districts" is to insure mileage being allowed for the full distance the car moves, via route of movement from freight station of origin to freight station to which destined. When there are two or more freight stations on a road within a switching district, mileage will be paid to or from the station within such district at which the car is actually loaded or unloaded or at which it is received from or delivered to connecting line.

EXCEPTIONS

1. In computing distances between stations on the UP on the one hand and stations on the KCS on the other hand, via the New Orleans Gateway, deduct 11.5 miles from the actual distance to and from New Orleans via the UP and 5.4 miles from the actual distance to and from New Orleans via the KCS.
2. Mileage will be allowed on movements having origin and destinations at stations or districts within the Chicago Switching District, provided the movements originate at or are destined to industries having private sidings.
3. In computing distances between stations on the UP on the one hand and stations on the IC on the other hand via the New Orleans Gateway, deduct 11.5 miles from the actual distance to and from New Orleans, LA via the UP and 5.1 miles from the actual distance to and from New Orleans via the IC.
4. In computing distances from, to or via KCS on traffic routed via New Orleans, LA, interchanged at Shrewsbury, LA, deduct 5.4 miles from the actual distance to and from New Orleans, LA on the KCS.
5. When for account of the KCS, mileages will be computed on basis of the shortest distance over the route of these lines determined by freight mileage tables lawfully on file, in lieu of actual distance as provided in Paragraph 1 of this item.
6. All traffic between West Lake, LA on KCS and interchange with UP will be made at De Quincy, LA, in lieu of Lake Charles, LA for carriers convenience and to facilitate industries located at West Lake, LA. KCS will not pay mileage allowance between West Lake, LA and De Quincy, LA, when cars are moving under provisions of UP reroute orders.

TARIFF 6007-L

SECTION 1 RULES AND REGULATIONS APPLIES ONLY ON TANK CARS

ITEM 187

EQUALIZATION OF MILEAGE ON TANK CARS OF PRIVATE OWNERSHIP

PART A AGGREGATE EMPTY MILEAGE VERSUS LOADED MILEAGE (SEE NOTE 1)

1. Should the aggregate empty mileage accumulated by tank cars carrying any of the reported marks assigned to any one person or company during a calendar year exceed the aggregate loaded mileage during the same calendar year by more than six (6) percent, such excess mileage must be paid for by the person or company to whom the reporting marks are assigned at the rate of forty-two (42) cents per mile, without minimum, subject to the procedures outlined in Part D (See Note 2, this item).
 2. Mileage on empty cars moving on revenue billing will not be included in the equalization account.
 3. Empty mileage accumulated on cars moving to and from repair facilities for modification under DOT mandated retrofit programs or for inspection and/or repair under FRA Emergency Order Nos. 16 and 17, O & M Circular No. 4, or AAR Circular Letter 7697 will not be included in the equalization account. Similar relief will be allowed only for AAR mandated bottom discontinuity programs for 1984 and subsequent equalization years through July 1, 1994; if a special movement to the repair facility is required.
 4. Except as outlined in Item 190 Series, paragraph 2 (c), no adjustments to loaded or empty mileage will be made in the equalization account for mileage caused by error in handling of the reporting railroad or of another railroad, or for mileage accumulated on cars moving on their own wheels to and from repair facilities due to railroad damage or for mileage accumulated due to longer routes for railroad convenience, detours and Surface Transportation Board Service Orders. Rail carriers will make equalization adjustments to the owners of excess reported on-line empty mileage on cars, they lease and operate under private marks, or cars of other lessees and/or owners operating on their line for company material, weed killer and similar service.
 5. Adjustments to loaded or empty mileage will be made in the AAR equalization account for apparent accounting errors in the total mileage reported for participating rail carriers under the following procedures. In the absence of appropriate adjustments being made by the AAR or a participating carrier for such accounting errors, a private car company or owner may request an appropriate adjustment for mileage summaries reported in error, from the involved rail carrier in the format prescribed by the AAR, provided such request is made within thirty (30) days of the forwarding of the monthly AAR "Year to Date Equalization Register", containing the alleged error, furnishing a duplicate of such request to the Secretary, Business Services, AAR. The rail carriers will have thirty (30) days from the date of such request in which to decline or make all or a portion of the requested adjustment, advising the Secretary of the handling accorded. If the rail carrier fails to act upon a request for adjustments in the AAR summary totals within the specified time frame, the AAR is authorized to make the adjustment to the equalization account of the private car company or owner for the amount of mileage originally requested. Exceptions to the annual national equalization statement will be handled in accordance with the provisions of Part D (2).
- ALL requests for adjustments to the equalization account must be presented by the private car company or owner to the involved rail carrier(s) or presented by the rail carrier(s) to the private car company or owner within three (3) years from the last day of the reporting month in question. However, such request for adjustments will not be accepted by the AAR if the involved rail carrier or car owner is no longer an operating entity, except as provided for in Part C.
6. Aggregate loaded and empty mileage will be computed on the basis of actual distance, as defined in Item 185-Series. Adjustments made subsequent to the deadline specified in Part D will be computed in the subsequent equalization account year.

PART B REPORTING OF ACTUAL LOADED AND EMPTY MILEAGE

Each participating carrier will submit a monthly mileage report in the format prescribed by the AAR to the assignee of each reporting mark forty (40) days after the close of the movement month reporting by individual car number the actual loaded and empty miles moved as computed in accordance with Item 185-Series. In addition, total actual monthly loaded and empty mileage accumulated by all cars bearing each reporting mark will be reported to the assignee of such mark in the format prescribed by the AAR, furnishing a duplicate of this summary report to the Secretary, Business Services, AAR. Adjustments for prior months will be indicated on this monthly summary report.

PART C CHANGE OF OWNERSHIP

When a private tank car company or owner discontinues business or disposes of all tank car equipment, any excess empty mileage balance which has accrued to the date of such action, on the tank cars bearing the reporting marks of such company or owner, shall be subject to bill as of that date, in accordance with the provisions of Parts A and D of Item 187-Series, subject to any applicable adjustments.

TARIFF 6007-L

SECTION 1 RULES AND REGULATIONS APPLIES ONLY ON TANK CARS

ITEM 187 CONT'D

EQUALIZATION OF MILEAGE ON TANK CARS OF PRIVATE OWNERSHIP

PART D ANNUAL NATIONAL EQUALIZATION ACCOUNTING

1. After May 20 of each year, the Secretary, Business Services, AAR will summarize all empty and loaded mileage by reporting mark assigned to any person or company, reporting for the proceeding calendar year, by all participating carriers to this tariff. Should the aggregate empty mileage exceed the aggregate loaded mileage of all participating carriers by more than (6) percent for any such group of reporting marks, the person or company to whom the reporting marks are assigned will be billed at the rate of forty-two (42) cents per mile without minimum and must pay the AAR on behalf of each participating carrier for such excess for such empty mileage. The charges collected for this excess empty mileage will be distributed to the participating carriers by the AAR in direct proportion to such carriers portion of excess empty mileage to the total accumulated excess empty mileage. Only that mileage and any related adjustments reported to the Secretary prior to May 20 will be considered in determining and excess empty mileage, as outlined herein (See Notes 1, 2 and 3).
2. An annual national equalization statement detailing the excess empty mileage accumulated and any applicable charges will be tendered by the Secretary to the person or company assigned the reporting mark(s) for such cars for verification no later than July 1 of the year succeeding the equalization accounting year. Exceptions to this statement must be received by the Secretary within 30 days of the date tendered, and payment for all excess empty mileage is due immediately thereafter. Any adjustments made by the participating carriers up to and including the March account applicable to the prior year(s) will be incorporated in the equalization accounts for the prior equalization accounting year. Any railroad or AAR adjustments made subsequent to the March account will be carried over to the following equalization accounting year (see Note 3).
3. A private car company or owner failing to render complete payment for all excess empty mileage within thirty (30) days of the date its equalization statement is tendered by the AAR will be subject to a penalty of one and a half percent (1.5%) interest per month (i.e., annual rate of 18%) for each calendar month or fraction thereof on any outstanding balance due from the date of the AAR's invoice statement. If any portion of a private car company's or owner's equalization statement remains unpaid in excess of 3 months from the date initially tendered, all mileage allowances accrued by the tank cars registered in the UMLER file bearing its reporting marks will be withheld by the carriers participating in this item until such time as complete payment including applicable penalty interest is made. Once complete payment is made, the participating carriers will be notified by the AAR and claims for any applicable mileage allowances withheld will be honored, less a 15% penalty charge for the carriers' administrative expense.

EXPLANATION OF NOTES

1. The forty-two (42) cents per mile charges for excess empty mileage under the provisions of this item is subject to revision September 1 of each year under Ex Parte No. 328 agreed annual update procedures, and will be retroactively applied to cover the entire calendar year involved.
 2. Close out dates specified in Part D may be extended by the AAR for a maximum of 60 days for special national accounting problem conditions, affecting substantially all carriers and all owners.
 3. Invoices that have been issued which, after investigation, are determined to have been erroneous due to rail carriers or AAR accounting and/or system errors may be cancelled by the Secretary.
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ITEM 190

HANDLING OF EMPTY TANK CARS (SEE NOTE 2)

1. When a tank car is released from load, the owner or lessee must issue instructions for the disposition of the empty car to the agent at point of unloading either direct or through consignee or via EDI. Empty instructions may also be included with the original loaded shipping instructions if transmitted via EDI. If the owner or lessee fails to have instructions in the hands of the railroad agent having jurisdiction at point of unloading prior to the time the car is released from load to forward the car or written instructions to hold it, the agent is authorized to forward the empty car to the origin point of the last load via reverse of the loaded route. No tank car which last contained hazardous material may be moved without having shipping instructions furnished as per Title 49 Code of Federal Regulations.
 2. Empty tank cars will be handled as follows:
 - A. Except as otherwise provided in this tariff, cars covered by this section will be moved empty without charge between stations or junction points upon receipt of instructions from the car owner or lessee confirmed in writing. Such instructions must include the specific facility to which such empty car is consigned or the name and address of the person or company which controls the car. No allowance will be made for mileage of such cars during empty movement.
 - B. A new car, a car that is restenciled with private reporting marks or a newly acquired car moving prior to its first loaded move in commercial service and a newly acquired car moving prior to its first loaded move in commercial service and a car moving for sale or scrap will be moved upon surrender of a bill of lading and will be subject to applicable rates named in Consolidated Freight Classification and/or in Uniform Freight Classification or in state classification tariffs where state rates apply, or other applicable tariffs (see Note 1).
 - C. If the owner or lessee or party issued instructions to forward the empty tank car to the origin point of the last load by specific routing different than the reverse routing of the loaded movement, the total miles of such return movement will be billed at the excess empty mileage rate specified in Item 187-Series without minimum and such empty mileage so billed will be excluded from the equalization account of the owner. This billing will be made to, and collectable from, the person so requesting such variance in the return routing. If the carriers depart from the destinations, junctions or carriers of the reverse route of the load, any resulting excess empty miles will be excluded from the car owner's equalization account by erring carrier.
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TARIFF 6007-L

SECTION 1 RULES AND REGULATIONS APPLIES ONLY ON TANK CARS

ITEM 190 CONT'D

EXPLANATION OF NOTES

1. A car loaded with railroad company material moving on non-revenue billing will be considered as having been loaded in commercial service on which the railroads derived line-haul revenue.
 2. The provisions of this item apply except as otherwise provided in Item 192-Series of this tariff.
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ITEM 192

HANDLING AND HOLDING OF EMPTY TANK CARS BY RAILROADS ON RAILROAD TRACKS (SEE NOTE 1)

1. The rules and charges in this item apply only to empty private tank cars consigned to non-railroad repair facilities; i.e., facilities for cleaning, lining, relining, maintenance, modification or repair.
2. The rules and charges do not apply to:
 - A. Empty private tank cars moving as revenue freight under the provisions of Item 190-Series, Paragraph B 2.
 - B. Empty private tank cars handled or held for carrier operating convenience.
 - C. Empty private tank cars en route to facilities for cleaning, lining, relining or repair for heavy repairs following railroad damage.
 - D. Empty private tank cars en route to repair facilities located on the premises of a shipping facility, provided that the empty car, after repair, is subsequently shipped from the facility in revenue freight service.
3. No allowance will be made by carriers for mileage accrued during supplemental empty movement of tank cars that are assessed charges as provided in Paragraph 5.
4. Charges applicable under these provisions will apply to empty private tank cars which the consignee has not ordered to his cleaning, lining, relining, maintenance, modification or repair facility (or his owned or leased tracks in the vicinity thereof) before the expiration of 48 hours free time (not counting Saturdays, Sundays or holidays) after placement. The time calculation will start the first 7 A.M. subsequent to carrier notification to the consignee that the empty private car is ready for placement and the time calculation will stop when the carrier places or forwards the car pursuant to instructions or should have placed or forwarded the car pursuant to instructions.
5. After expiration of free time as provided in Paragraph 4, charges will be as follows: (See Note 2)
 - A. Supplementary handling charge of \$46.00 per car.
 - B. Holding charge of \$1 per car per calendar day or fraction thereof including Saturdays, Sundays and holidays while held by carrier on non-leased tracks awaiting disposition.
6. In the event the consignee orders the car to tracks owned or leased by the consignee in the vicinity of the facility for cleaning, lining, relining, maintenance, modification or repair within the forty-eight hour period described under Paragraph 4, this item, there will be no supplementary handling charge for the movement; however, such cars will be subject to the supplementary handling charge of \$46.00 per car (See Note 2) at such time that the empty tank car is subsequently ordered and moved onto the facility for cleaning, lining, relining, maintenance, modification or repair or ordered moved from that facility to the tracks or leased by the consignee in the vicinity of the facility.
7. Applicable billing will be monthly to the facility involved.

EXPLANATION OF NOTES

1. The rules and charges in this item do not in any way supersede or duplicate existing, or new written contractual operating, side track, track lease, property lease, etc., agreements or tariffs that contain empty private tank car handling and holding provisions as part of the overall agreement.
 2. Per ExParte No. 328, the supplemental handling charge will be revised annually at the same time as the tank car mileage allowance update, utilizing the same method as that prescribed for updating the excess mileage equalization charge.
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TARIFF 6007-L

ITEM 195

MILEAGE RATE ALLOWANCE ON TANK "T" AND HOUSE CAR "XT" (SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOLS) (SEE NOTE 1)

1. Mileage rate allowance for cars of foregoing mechanical designations shall be in cents per loaded mile (See Notes 2 and 7) as follows:

COLUMN 1 - Original cost or fair market value in dollars (see Notes 3, 4, 5 and 6, this item).

COLUMN 2 - Cars in service years 1 through 30.

COLUMN 3 - Cars in service years 31 and over.

COLUMN 1	COLUMN 2	COLUMN 3
\$ 0 - 1000	29.9	29.4
1001 - 2000	31.0	29.5
2001 - 3000	32.0	29.6
3001 - 4000	33.1	29.7
4001 - 5000	34.1	29.8
5001 - 6000	35.1	29.9
6001 - 7000	36.2	30.0
7001 - 8000	37.2	30.1
8001 - 9000	38.3	30.2
9001 - 10000	39.3	30.3
10001 - 11000	40.4	30.4
11001 - 12000	41.4	30.5
12001 - 13000	42.4	30.6
13001 - 14000	43.5	30.7
14001 - 15000	44.5	30.8
15001 - 16000	45.6	30.9
16001 - 17000	46.6	31.0
17001 - 18000	47.7	31.1
18001 - 19000	48.7	31.2
19001 - 20000	49.8	31.2
20001 - 21000	50.8	31.3
21001 - 22000	51.8	31.4
22001 - 23000	52.9	31.5
23001 - 24000	53.9	31.6
24001 - 25000	55.0	31.7
25001 - 26000	56.0	31.8
26001 - 27000	57.1	31.9
27001 - 28000	58.1	32.0
28001 - 29000	59.2	32.1
29001 - 30000	60.2	32.2
30001 - 31000	61.2	32.3
31001 - 32000	62.1	32.3
32001 - 33000	62.9	32.3
33001 - 34000	63.8	32.3
34001 - 35000	64.6	32.3

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SECTION 1 RULES AND REGULATIONS (APPLIES ONLY ON TANK CARS)

ITEM 195 CONT'D

MILEAGE RATE ALLOWANCE ON TANK "T" AND HOUSE CAR "XT"
(SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOLS)
(SEE NOTE 1)

COLUMN 1	COLUMN 2	COLUMN 3
35001 - 36000	65.4	32.3
36001 - 37000	66.2	32.2
37001 - 38000	67.1	32.2
38001 - 39000	67.9	32.2
39001 - 40000	68.7	32.2
40001 - 41000	69.5	32.2
41001 - 42000	70.3	32.2
42001 - 43000	71.0	32.2
43001 - 44000	71.8	32.2
44001 - 45000	72.6	32.2
45001 - 46000	73.4	32.2
46001 - 47000	74.1	32.2
47001 - 48000	74.9	32.2
48001 - 49000	75.7	32.2
49001 - 50000	76.4	32.1
50001 - 51000	77.2	32.1
51001 - 52000	77.9	32.1
52001 - 53000	78.7	32.1
53001 - 54000	79.4	32.1
54001 - 55000	80.1	32.1
55001 - 56000	80.9	32.1
56001 - 57000	81.6	32.1
57001 - 58000	82.3	32.1
58001 - 59000	83.0	32.1
59001 - 60000	83.7	32.1
60001 - 61000	84.5	32.1
61001 - 62000	85.2	32.1
62001 - 63000	85.9	32.0
63001 - 64000	86.6	32.0
64001 - 65000	87.2	32.0
65001 - 66000	87.9	32.0
66001 - 67000	88.6	32.0
67001 - 68000	89.3	32.0
68001 - 69000	90.0	32.0
69001 - 70000	90.6	32.0
70001 - 71000	91.3	32.0
71001 - 72000	92.0	32.0
72001 - 73000	92.6	32.0
73001 - 74000	93.3	32.0
74001 - 75000	94.0	32.0
75001 - 76000	94.6	32.0
76001 - 77000	95.3	32.0
77001 - 78000	95.9	32.0
78001 - 79000	96.5	31.9
79001 - 80000	97.2	31.9

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SECTION 1 RULES AND REGULATIONS (APPLIES ONLY ON TANK CARS)

ITEM 195 CONT'D

MILEAGE RATE ALLOWANCE ON TANK "T" AND HOUSE CAR "XT" (SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOLS) (SEE NOTE 1)

COLUMN 1	COLUMN 2	COLUMN 3
80001 - 81000	97.8	31.9
81001 - 82000	98.4	31.9
82001 - 83000	99.1	31.9
83001 - 84000	99.7	31.9
84001 - 85000	100.3	31.9
85001 - 86000	100.9	31.9
86001 - 87000	101.5	31.9
87001 - 88000	102.1	31.9
88001 - 89000	102.7	31.9
89001 - 90000	103.3	31.9
90001 - 91000	103.9	31.9
91001 - 92000	104.5	31.9
92001 - 93000	105.1	31.9
93001 - 94000	105.7	31.9
OVER 94000	106.3	31.9

EXPLANATION OF NOTES

- Designating symbols (mechanical designation) will be assigned to car owner or lessee by the Secretary, Technical Services, Association of American Railroads, upon written application.
- For mileage allowance purposes, the service year of a car is calculated based upon year of construction of underframe. A car's first service year is the year built. Its second service year begins on January 1 of the year following the year built, with succeeding service years starting on January 1 of each following year. If the tank's service year exceeds 30, the car's service year is considered to be in excess of 30 regardless of year of construction of underframe. For those cars constructed without an underframe, the car's service year is calculated based upon year of construction of tank. Service year is determined by subtracting the year of construction (built/rebuilt) from the current calendar year, plus 1, e.g., (2000 - 1970) + 1 = 31, or Service Years 31 and over allowance bracket.
- For cars built prior to January 1, 1968 assignment of owned or leased cars to value groups will be determined by the undepreciated base classification value. In addition, capitalized additions and betterments shall be added to the value if not already included in the BCV system.
- Applies as follows:
 - For cars built between January 1, 1968 and July 1, 1991, assignment of owned or leased cars to value groups will be determined by the original cost as represented to the original buyer by the manufacturer's invoice price at the time of original installation into service. In the case of a manufacturer-lessor, the fair market value or the value which was certified, or would have been certified, for investment tax credit purposes shall be substituted therefore.
 - Assignment to value groups of cars placed into service after July 1, 1991 will be determined by the original cost of the car to the original buyer as stated in the manufacturer's invoice. In only two circumstances, owners may certify as alternative "true value" in lieu of invoice price: (a) manufacturers who retain cars for their own leasing service and (b) purchasers who can demonstrate that they contributed physical assets of significant value that were used by the manufacturer in fabricating a car, resulting in a reduction of the invoice price by more than \$1,000 per car below the price that otherwise would have been charged. For manufacturers "true value" is the price for which a car or group of cars manufactured as a group would have been sold in an arm's length transaction. For purchasers who have made a qualifying contribution to fabrication, "true value" is the invoice price plus the depreciated value of the contributed assets distributed over the cars for which the assets were used, subject to the same limitations on "true value" which would apply to a manufacturer. "True value" shall not exceed the average price of similar cars registered in UMLER at invoice price within the most recent 12 months for which registration information is available in UMLER, adjusted for changes in the market values of new tank cars as reflected in average car prices. If the AAR determines by audit that a certified "true value" exceeds this value limit by an amount that causes a car to be placed in a higher allowance value bracket, the value of the car will be reduced to the appropriate value bracket. In addition, if the AAR determines by audit that a certified, "true value" exceeds this value limit by an amount that causes a car to be placed in allowance value bracket more than one bracket above the otherwise applicable bracket, excess allowances paid as a result of the over valuation shall be reimbursed to the paying railroads. Those owners who certify a "true value" in lieu of invoice price during the calendar year must provide to the AAR an officer's certificate at the end of the year stating that, based on all information available to the owner, the owner has complied with the terms of this item. Car owners must supply for entry into UMLER all information required for tank cars in the UMLER Specification Manual. Notwithstanding any other provision of this tariff item, "true value" will be subject to audit directly by the AAR.

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SECTION 1 RULES AND REGULATIONS (APPLIES ONLY ON TANK CARS)

ITEM 195 CONT'D

MILEAGE RATE ALLOWANCE ON TANK "T" AND HOUSE CAR "XT" (SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOLS) (SEE NOTE 1)

EXPLANATION OF NOTES

4. C. If applicable, initial into service transportation costs, capitalized original lining costs, capitalized additions and capitalized betterments shall be added to car values determined pursuant to paragraphs 4 (A) and 4 (B), above, if not already included in the value of the car. For cars built after January 1, 1988, capitalized inspection costs shall be added to the value, if applicable and if not already included in the value, if applicable and if not already included in the value of the car. Values other than invoice price shall be identified in accordance with the current AAR UMLER format at the time cars are submitted to the Secretary, Business Services, AAR, for registration in the UMLER file (see Note 6, this item).
- D. The rebuilt year and rebuilt valuation of a private car will be utilized for the purpose of computing applicable mileage allowances subject to the following conditions:
1. The car must be rebuilt in accordance with the current requirements of Rule 88, Section C of the Office Manual and Sections A & B of the Field Manual, AAR Interchange Rules. Application for official rebuilt status must be filed with the AAR Technical Services and written formal approval received prior to registering such car in the UMLER file with rebuilt age and valuation data.
 2. Assignment of owned or leased rebuilt cars to value groups will be determined as outlined in Notes 4. (A), 4. (B) and 4. (C) herein, except that the maximum valuation of a rebuilt private car shall not exceed the lesser of:
 - a. 75 percent of the original cost of a comparable new car.
 - b. 75 percent of the calculated replacement cost of the rebuilt car prior to rebuilding, as computed per AAR Interchange Rule 107.
- E. All car ages and values submitted are subject to verification by the AAR, and audit by the AAR or the owners independent public accountant upon reasonable request by the AAR. If the car owner elects to have the audit performed by its independent public accountant, such audit must be performed in a timely fashion in the manner prescribed by the AAR, will be performed at the car owner's expense and must be duly certified by the car owner's auditor as representing the true value of all cars included in such audit. Failure of the car owner to furnish the required car valuation data to the AAR UMLER file, to arrange for the requested audit, or to correct errors determined as a result of such audit, will result in such car(s) being assigned to the lowest applicable mileage allowance rate group.
- F. Maximum original cost of fair market value will be as follows:
- | | |
|---|----------|
| 1. For cars built in 1981 and prior | \$64,001 |
| 2. For cars built in 1982 | \$58,001 |
| 3. For cars built in 1983 | \$56,001 |
| 4. For cars built in 1984 | \$51,001 |
| 5. For cars built in 1985 | \$54,001 |
| 6. For cars built in 1986 | \$66,001 |
| 7. For cars built in 1987 | \$62,001 |
| 8. For cars built in 1988 | \$63,001 |
| 9. For cars built in 1989 | \$64,001 |
| 10. For cars built in 1990 | \$67,001 |
| 11. For cars built in 1991 | \$71,001 |
| 12. For cars built in 1992 | \$70,001 |
| 13. For cars built in 1993 | \$76,001 |
| 14. For cars built in 1994 | \$74,001 |
| 15. For cars built in 1995 | \$80,001 |
| 16. For cars built in 1996 | \$83,001 |
| 17. For cars built in 1997 | \$84,001 |
| 18. For cars built in 1998 | \$89,001 |
| 19. For cars built in 1999 | \$94,001 |
| 20. For cars built in 2000 and subsequent | \$92,001 |
- NOTE: Age is determined by subtracting the year of construction (built/rebuilt) from the calendar year plus 1, e.g. (2000-1988) + 1 = 13.
5. For cars built or rebuilt subsequent to December 31, 1977, all values reported to the AAR UMLER file must be stated in equivalent US dollars based on the applicable exchange rate at the time such cars were built or rebuilt. Subsequent capitalized additions and betterments reported to UMLER must also be stated in equivalent US dollars at the time such improvements were made.
6. Applies as follows:
- A. Into service transportation costs are those freight charges associated with the movement of a car that is ready for its first load to the locations of the car's original installation into service. Other transportation charges incurred during construction (e.g., to a facility which installs the original lining, etc) may be included in ledger value provided that the cost is capitalized.
 - B. A capital expenditure is an expenditure intended to benefit future periods in contrast to revenue expenditure/current expense which benefits a current period. It is an addition to a capital asset and is initially reflected on the balance sheet. A capital expenditure normally is subject to depreciation in future years.

CONCLUDED ON FOLLOWING PAGE

TARIFF 6007-L

SECTION 1 RULES AND REGULATIONS (APPLIES ONLY ON TANK CARS)

ITEM 195 CONT'D

MILEAGE RATE ALLOWANCE ON TANK "T" AND HOUSE CAR "XT" (SEE ITEM 196 FOR EXPLANATION OF DESIGNATING SYMBOLS) (SEE NOTE 1)

EXPLANATION OF NOTES

6. C. Applies as follows:
1. An addition or betterment has the effect of:
 - a. Extending the useful life of a car beyond the life projected when the car was entered into service; or
 - b. Increasing a car's normal use beyond that which was in effect when the car was entered into service; or
 - c. Lowering the operating costs beyond that which was in effect at the time the car was entered into service; or
 - d. Otherwise adding to the worth of the benefits a car can yield beyond that in effect when the car was entered into service (e.g., enhance safety, etc).
 - e. Any repair that maintains a car in its customary state of operating efficiency is NOT an addition or betterment.
 2. An addition is the installation of a new component of a car (not a replacement) which meets the above tests. The value registered in UMLER shall be the cost of the component added, including labor.
 3. A betterment is the replacement of a component of the car with a superior component. The value registered in UMLER for a betterment should not exceed the cost of the superior component, including labor minus (1) the original value of the component that was replaced (i.e., retired) and (2) the cost (i.e., expense) incurred in removing the old component.
 4. When a unit of property is removed from a car (i.e., partial retirement), the ledger value registered in UMLER shall be reduced by the original value of the unit removed.
 5. Any cost recovered under AAR Defect Car Billing, if applicable, must be deducted from the cost of an addition or betterment.
7. Applies as follows:
- A. When an owner: (1) makes a valuation correction to the UMLER file; or (2) changes the mechanical designation of cars registered in the UMLER file; and such changes result in an increase or decrease in the mileage allowance rates, the Secretary, Business Services, AAR, will be so notified and the increase or decrease will be applied retroactively. Once cars have been reported to the UMLER file, any of the foregoing corrections or changes that result in a retroactive increase or decrease in the mileage allowance rates will be identified by the Secretary. The car owner is required to furnish the Secretary documented proof of the basis of the correction or change and advise as to any applicable mileage allowance adjustments which are required.
 - B. Retroactive Mileage Allowance Decrease: Within five (5) months from the date of a change to the UMLER file resulting in a retroactive mileage allowance rate decrease, the owner will notify all using carriers of such decrease with either supporting details or a summary of the over-collections, with a copy to the Secretary. After receiving such notification, the using carrier shall deduct such amount(s), in the next open mileage reports to the car owner, plus fifteen (15) percent to reimburse the handling road for audit and associated administrative expenses. If the owner fails to send notification to the users within five (5) months, the Secretary shall notify carriers of the car initial(s) and number(s) involved and the user(s) shall make an adjustment, as described above.
 - C. Retroactive Mileage Allowance Increase: Within five (5) months from the date of a change to the UMLER file resulting in a retroactive mileage allowance rate increase, the owner will notify all using carriers of such increase with either supporting details or a summary of the under-collections, with a copy to the Secretary. After receiving such notification, the using carriers shall add such amount(s) in their next open mileage reports to the car owner, less fifteen (15) percent to reimburse the handling roads for audit and associated administrative expense. No retroactive mileage allowance rate increase will be applicable if the owner fails to notify the using carriers of such increase within five (5) months from the date of a change to the UMLER file.

SECTION 1 RULES AND REGULATIONS APPLIES ONLY ON TANK CARS

ITEM 196

EXPLANATION OF SYMBOLS USED IN ITEM 195

SYMBOL	EXPLANATION
"T"	Tank Car. Tank car means any car which is used only for the transportation of liquids, liquefied gases, compressed gases, or solids that are liquefied prior to unloading. Car may be without underframe if container serving as superstructure is designed to serve as underframe. If car has underframe, it must be designed only for the carriage of one or more enclosed containers (with or without compartments) that form the superstructure and are integral parts of the car. All such containers must be securely attached to underframe when offered for transportation but may have demountable features.
"XT"	A house car with or without doors either metal lined or enclosing one or more tanks.

APPENDIX "G"

033090

298 866

AGREEMENT

Dated as of March 31, 1990

between

CONSOLIDATED RAIL CORPORATION ("Conrail")

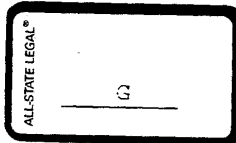
and

THE BOSTON AND MAINE CORPORATION ("B&M")

and

THE SPRINGFIELD TERMINAL RAILWAY COMPANY ("ST")

Relating to Interchange of Loaded and
empty freight cars on B&M/ST's track
between Mile Posts 3.0± and 4.6± (including necessary
head and tail room) at Barber, Massachusetts.



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- (ii) If Conrail is the party receiving the cars in interchange, Conrail will make the mechanical inspection at its Selkirk Yard, in the vicinity of Albany, New York.

In the event the receiving party fails to make the aforementioned mechanical inspection, the cars shall be considered interchanged as provided above and the responsibility for the mechanical condition of the cars shall be transferred to the receiving party.

(e) In the event the parties agree to operate extra freight service via the Barber Interchange Point, all provisions of this Agreement shall apply equally to such extra freight service.

(f) B&M/ST shall maintain, repair, and renew the Interchange Track(s) in reasonably good condition, for the use herein contemplated, at its sole cost and expense, with its own supervision and labor. B&M/ST does not guarantee the condition of the Interchange Track(s) or that operation thereover will not be interrupted.

+ SECTION 4. MILEAGE AND CAR HIRE

Except as otherwise be provided in October 27, 1989 agreement, for the purpose of determining per diem, car hire, and car mileage payments, and for no other purpose, cars interchanged at Barber, Massachusetts shall be treated as if interchanged at Conrail's Selkirk Yard, in the vicinity of Albany, New York. Conrail shall use its best efforts to handle cars between Selkirk Yard and Barber

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In accordance with the Schedule of Arranged Freight Service, as summarized in Exhibit "I". The time of interchange shall be as follows:

+ (a) The time of interchange in the case of cars interchanged by Conrail to B&M/ST shall be when the eastbound train handling such interchange cars departs Selkirk Yard (CP-SK).

+ (b) The time of interchange in the case of cars interchanged by B&M/ST to Conrail shall be when the westbound train handling such interchange cars arrives at Selkirk Yard (CP-SK).

(c) The aforementioned arrangements shall be subject to reclaim and other applicable Interchange Car Service and Car Hire Rules and any supplements or amendments thereto promulgated from time to time by the Association of American Railroads.

SECTION 5. MANAGEMENT AND OPERATION

(a) Conrail shall comply with the provisions of the Federal Locomotive Inspection Act and the Federal Safety Appliance Acts, as amended, and all other federal and state laws, regulations, and rules respecting the operation, condition, inspection, and safety of its trains, locomotives, cars and equipment while such trains, locomotives, cars and equipment are being operated over the Interchange Track(s). Conrail shall indemnify, protect, defend, and save harmless B&M/ST and its directors, officers, agents, and employees from and against all fines, penalties, and liabilities imposed upon B&M/ST or its

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(c) Either party may provide changes in the above addresses to the other party by personal service or certified mail.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be as a sealed instrument executed as of the date first set forth above by their duly authorized representatives.

WITNESS:

CONSOLIDATED RAIL CORPORATION

John J. Connors

BY: L. L. Rutledge
Title: General Superintendent - Contracts

WITNESS:

BOSTON AND MAINE CORPORATION

Richard E. Fuller

BY: Samuel B. Cullen
Title: VICE PRES. TRAWS

WITNESS:

SPRINGFIELD TERMINAL RAILWAY COMPANY

Richard E. Fuller

BY: Samuel B. Cullen
Title: VICE PRES TRAWS

APPENDIX "H"



BOSTON & MAINE CORPORATION
MAINE CENTRAL RAILROAD COMPANY
SPRINGFIELD TERMINAL RAILWAY COMPANY

IRON HORSE PARK
NO. BILLERICA, MASS. 01862

March 13, 1997

Mr. Larry Burks, Manager
Freight Rate Service Co.
1644 North Corrington Ave.
Kansas City, MO 64120

Dear Mr. Burks:

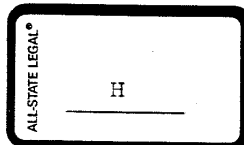
This letter is in response to your telephone conversation of March 10, 1997 with my colleague, Mr. Steve Magyar. Apparently, there is some misunderstanding about Conrail vs. Springfield Terminal liability for mileage earned through Rotterdam Junction and Selkirk, New York and Barbers Station, Massachusetts.

Responsibility is determined by means of the routing of the cars. This information is provided on individual waybills. If the car is waybilled Rotterdam Junction or Selkirk, NY, Springfield Terminal is responsible for the additional 155 miles between Selkirk and Barbers Station. If the waybill indicates Barbers Station, it is entirely a Conrail move. Conrail is receiving freight revenue on the entire move, and is responsible for car hire on the entire move. The 155 miles of track between Selkirk and Barbers Station belong to Conrail.

If you have access to such waybill information, you can save much time and effort for both of us by pre-screening your claims to ensure that only those waybilled Rotterdam Junction or Selkirk are filed against Springfield Terminal for the additional mileage due. If not, my colleagues and I will continue to screen all claims that you send. All claims that we return to you which are Barbers Station waybilled must be re-issued to Conrail so that you can collect from them.

This letter should clear up any misunderstandings between us. If you still have questions, please feel free to contact me at (508) 663-1064 or Mr. Magyar at (508) 663-1269.

Very truly yours,



*Div Rates
+ Rates*

[Signature]
Thomas J. Tremblay

Manager, Car Accounting

APPENDIX "I"

March 13, 1997

Mr. John DeGiovanni
Manager Car Accounting
Consolidated Rail Corporation
PO Box 41420
Philadelphia, PA 19101-1420

RE: Mileage Adjustment Claims

Dear John:

We have had phone conversations and previous letters to Joe Galasso concerning the attached claims.

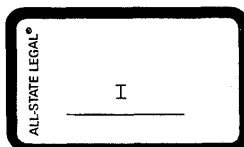
Steve Magyar states he has been in contact with you concerning these moves. The BM shows mileage due by CR because bills of lading show junction as Barbstation not Rotterdam Jct.

Please advise when adjustment will be made.

Yours very truly,

Larry J. Burks

LJB:hl



APPENDIX "J"

To: LARRY BURKS
Subject: S.T. HAULAGE AGREEMENT

PLEASE SEE THE ATTACHED AGREEMENT.

WE DON'T AND WE WON'T PAY PAST SELKIRK. CAR ACCOUNTING HANDLES CAR HIRE AND MILEAGE AND ITS APPLICATION. PERSONALLY I DON'T CARE WHAT S.T. WANTS TO DO WITH THE BILLING OR MISBILLINGS BY THE FREIGHT SIDE AND THEIR BILLS OF LADING. THE CAR HIRE RESPONSIBILITY IS SPELLED OUT IN SECTION #4 AND SPECIFICALLY MENTIONS HOW TO HANDLE BARBER STATION. (TREATED AS IF INTERCHANGED AT SELKIRK)

YES I SPOKE TO S.T. AND FURNISHING THEM THE AGREEMENT. IF S.T. DOESN'T WANT TO ABIDE BY THIS AGREEMENT THEY'LL HAVE TO MOVE TO GET IT CHANGED.

JOHN T. DIGIOVANNI
C.R. PHILA.

(e) In the event the parties agree to operate extra freight service via the Barber Interchange Point, all provisions of this Agreement shall apply equally to such extra freight service.

(f) B&M/ST shall maintain, repair, and renew the Interchange Track(s) in reasonably good condition, for the use herein contemplated, at its sole cost and expense, with its own supervision and labor. B&M/ST does not guarantee the condition of the Interchange Track(s) or that operation thereover will not be interrupted.

SECTION 4. MILEAGE AND CAR HIRE

Except as otherwise be provided in October 27, 1989 agreement, for the purpose of determining per diem, car hire, and car mileage payments, and for no other purpose, cars interchanged at Barber, Massachusetts shall be treated as if interchanged at Conrail's Selkirk Yard, in the vicinity of Albany, New York. ~~Conrail shall use its best efforts to handle cars between Selkirk Yard and Barber~~

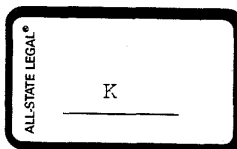
See letter
of 6-12-1991



APPENDIX "K"

**Rail Transportation Management Services
Client: Engelhard Corporation
Claim Status Report**

Claim Group	Date Filed	Latest Activity	Claim Status	Total Lines	Open Lines	Unanswered Lines	Amount Filed	Amount Outstanding	Amount Paid	Amount Cancelled	
EC ST	610	5	19961009	19980522	SEND REFILE	100	18	11,229.28	1,972.85	8,858.97	397.46
EC ST	611	5	19961101	19980220	SEND REFILE	105	30	10,617.05	3,190.06	7,426.70	.29
EC ST	612	5	19961202	19980429	SEND REFILE	219	65	23,017.17	6,800.15	13,745.94	2,471.08
EC ST	613	5	19961231	19980724	SEND REFILE	62	21	6,643.77	1,932.37	4,711.01	.39
EC ST	670	5	19960827	19980724	SEND REFILE	1145	348	121,103.17	36,780.92	82,581.55	1,740.70
EC ST	702	5	19970228	19980721	SEND REFILE	415	161	38,988.79	12,220.59	26,663.28	104.92
EC ST	705	5	19970530	19990127	SEND REFILE	547	136	58,109.10	14,629.66	42,038.59	1,440.85
EC ST	709	5	19970926	19980724	SEND REFILE	482	133	51,860.33	14,739.36	36,508.72	612.25
EC ST	712	5	19971229	19981102	SEND REFILE	164	137	17,838.18	15,187.23	2,700.79	-49.84
EC ST	777	1	19970923	19970923	SEND REFILE	23	23	5,668.55	5,668.55		
EC ST	779	5	19971125	19990127	SEND REFILE	288	119	84,917.49	18,340.26	66,503.25	73.98
EC ST	803	5	19980331	19980930	SEND REFILE	519	391	80,921.64	44,831.42	20,074.15	16,016.07
EC ST	807	5	19980730	20000701	OPEN	57	49	6,118.00	5,367.27	750.71	.02
EC ST	808	4	19980826	20000701	OPEN	25	9	5,304.67	781.24	4,520.32	3.11
EC ST	808	5	19980826	19980910	SEND REFILE	450	449	48,472.80	48,325.93	146.87	
EC ST	902	5	19990226	20000303	SEND REFILE	178	173	18,648.71	18,128.88	86.45	433.38
EC ST	A05	5	20000510	20000630	OPEN	1254	1253	140,008.23	139,640.87		367.42
EC ST	A71	5	20000510	20000620	OPEN	22	22	6,883.56	6,883.56		



APPENDIX "L"



Rail Transportation Management Services

April 17, 1998

Mr. Kevin C. Brown
Manager Car Accounting
Consolidated Rail Corporation
2001 Market St., Room 20E
Philadelphia, PA 19101-1420

Mr. Jeff Miller,
Manager - Revenue Systems
Springfield Terminal Railway Co.
Iron Horse Park
North Billerica, MA 01862

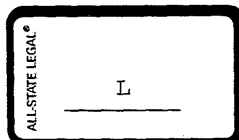
Re: Engelhard Corporation Mileage Credits

Gentlemen:

I am writing on behalf of Engelhard Corporation concerning an issue that has, over the last several years, escalated to major proportions, costing Engelhard hundreds of thousands of dollars in lost mileage credits. The issue concerns ST's use of Conrail's tracks between Selkirk and Barber Station.

As I understand it, the track is owned by Conrail and an operating agreement exists with ST to use the track. ST is responsible for mileage credits when operating under the agreement, however, it is ST's contention that on a large percentage of the moves Conrail is retaining the freight revenue and is therefore responsible for the mileage credits. On the other hand, Conrail claims that ST is always responsible for the mileage credits. The net effect of this disagreement is that Engelhard has not been paid at all for the 155 miles in contention over thousands of moves.

I think all parties will agree that Engelhard is due payment. Engelhard is determined to pursue a prompt resolution of this problem before the absorption of Conrail by, in the case of this section of track, CSXT. As a first step in resolving this issue, Engelhard has asked me to request that both Conrail and ST reply to this letter with a statement of its position concerning this issue. Please reply as soon as possible.



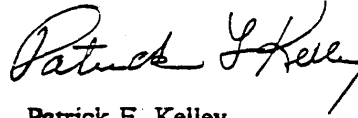
17453 Village Green Drive • Houston, TX 77040 • (713) 983-8864 • Fax (713) 856-8068

Mr. Kevin C. Brown
Mr. Jeff Miller
April 17, 1998
Page 2 of 2

In order to facilitate any research you may feel is required, I am including copies of several recent claims which have been rejected by ST as Conrail's responsibility, but which Conrail has also not paid.

Thank you for your prompt attention to this matter. Please call with any questions or comments.

Yours very truly,



Patrick F. Kelley

PFK/gs
Enclosure
L-041698.2

cc: Mr. Bob Tunstall,
Manager Car Accounting
Speed Code J690
CSX Transportation Company
6735 Southpoint Drive S.
Jacksonville, Florida 32216-6177

Mr. Thomas Flaherty
Manager Transportation
Engelhard Corporation
McIntyre, Georgia 31054

APPENDIX "M"



CON & MAINE CORPORATION
MAINE CENTRAL RAILROAD COMPANY
SPRINGFIELD TERMINAL RAILWAY COMPANY

IRON HORSE PARK
NO. BILLERICA, MASS. 01862

April 27, 1998

Mr. Patrick F. Kelley
RTMS
Rail Transportation Management Services
17453 Village Green Drive
Houston, TX 77040

Mr. Thomas Flaherty
Manager Transportation
Engelhard Corporation
McIntyre, Georgia 31054

RE: Engelhard Corporation Mileage Credits

Gentlemen:

In response to your letter asking us to state our position on payment of mileage for the 155 mile segment from Selkirk, NY. to Barber's Station, Ma. Liability is determined from the Bill of Lading route of movement the same way divisions of revenue are determined. There is a haulage agreement between Conrail and Springfield Terminal for operational convenience but it does not change the carhire liability.

I have given you the two possible scenarios for traffic moving eastward from CR to ST. If the route states CR-ROTTJ ST, then ST divisions of revenue and liability for carhire mileage begins at Selkirk, NY. ST pays mileage between Selkirk and Barber's Station. Conrail is hauling the cars but the cars remain in ST's account for both revenue and carhire as per the haulage agreement.

If the route states CR-BRBER ST, then ST divisions of revenue and liability for carhire mileage begins at Barber's Station, Ma. The carhire from Selkirk to Barber's Station remains in the account of Conrail. This is not a haulage move and the haulage agreement does not apply. Traffic moving westward from ST to CR works the same way.

If I can be of any additional assistance please let me know.

Yours very truly,

H. Jeffrey Miller
Mgr. Revenue Systems

HJM/cs
cc: Kevin C. Brown - Consolidated Rail Corp.

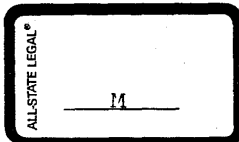


EXHIBIT NO. 2

**ENGELHARD CORPORATION v. SPRINGFIELD TERMINAL RAILWAY
COMPANY AND CONSOLIDATED RAIL CORPORATION**

CIVIL ACTION NUMBER 01-10829-RGS

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
MASSACHUSETTS**

193 F. Supp. 2d 385; 2002 U.S. Dist. LEXIS 5762

April 2, 2002, Decided

DISPOSITION:

[**1] Counts II, III, IV and V of the Amended Complaint were dismissed.

COUNSEL:

For ENGELHARD CORPORATION, Plaintiff:
Catherine M. Campbell, Feinberg, Campbell & Zack,
P.C., Boston, MA.

For ENGELHARD CORPORATION, Plaintiff: Henry
M. Wick, Vincent P. Szeligo, Wick, Streiff, Meyer,
O'Boyle & Szeligo, P.C., Pittsburgh, PA.

For CONSOLIDATED RAIL CORPORATION,
Defendant: Jonathan M. Broder, David C. Ziccardi,
Philadelphia, PA.

For CONSOLIDATED RAIL CORPORATION,
Defendant: Michael B. Flynn, Flynn & Associates, P.C.,
Boston, MA.

For SPRINGFIELD TERMINAL RAILWAY CO., INC.,
Defendant: Eric L. Hirschhorn, Winston & Strawn,
Washington, DC.

For SPRINGFIELD TERMINAL RAILWAY CO., INC.,
Defendant: Robert B. Culliford, N Billica, MA.

JUDGES:

Richard G. Stearns, UNITED STATES DISTRICT
JUDGE.

OPINIONBY:

Richard G. Stearns

OPINION:

[*385] MEMORANDUM AND ORDER ON
DEFENDANTS' MOTIONS TO DISMISS

April 2, 2002

STEARNS, D.J.

This case involves the alleged non-payment of "car mileage allowances" generated by the movement of privately-owned tank cars over a 155 mile stretch of railway track between Selkirk, New York and Barber, Massachusetts, by two railroads, defendant Consolidated Rail Corporation [*386] (Conrail), and [**2] defendant Springfield Terminal Railway Corporation (Springfield Terminal). The track is owned by Conrail and shared with Springfield Terminal under an Interchange Agreement. n1

n1 Railroads are required by law to provide "through routes" for competitors' cars over their proprietary tracks in the interest of promoting an integrated national freight system. 49 U.S.C. §§ 10703 and 10742. This obligation is typically discharged by voluntary agreements among railroads. See *Southern Ry. Co. v. Louisville & Nashville Railroad Co.*, 185 F. Supp. 645, 651-652 (W.D. Ky. 1960), aff'd, 289 F.2d 934 (6th Cir. 1961).

Plaintiff Engelhard Corporation supplies kaolin, a fine white clay commonly used in the manufacture of porcelain. The clay is mined in Georgia and delivered to

various destinations in the northeastern United States in specially built tank cars. Contrary to what might be expected, railroads do not typically supply specialized cars. Rather, as one court has [**3] explained:

Railroads, pursuant to their common-carrier obligations under the Interstate Commerce Act, must provide railcars suitable for the transportation of a broad range of property, including agricultural products, flammable liquids, as well as crated freight. In part because of these diverse requirements, it has proved impracticable for rail common-carriers to invest the capital necessary for the acquisition of general-use and specialty rolling stock. Carriers, therefore, commonly lease railcars both from firms in the business of supplying railcars and, occasionally, from shippers themselves. Under these leasing arrangements, railroads fulfill their common-carrier obligation to make available suitable railcars by paying car providers their costs of owning the rolling stock through a variety of means, including direct "mileage allowances" and offsets on line-haul freight tariffs.

General American Transp. Corp. v. ICC, 277 U.S. App. D.C. 78, 872 F.2d 1048, 1050 (D.C. Cir. 1989).

Engelhard supplies its customers not only with kaolin, but also provides the specialty tank cars required for its transport. All of this is a matter subject to intricate [**4] regulation. Railroads historically were second only to the nuclear power industry in the pervasiveness of their regulation by the State, an enduring if diminished legacy. At the apex of the regulatory system is the Surface Transportation Board (STB), the successor agency to the venerable Interstate Commerce Commission (ICC). The STB implements the directives of the Interstate Commerce Commission Termination Act of 1995 (ICCTA), 49 U.S.C. § 10101-11908, n2 which as its Title implies, was intended to eliminate government oversight over many, but by no means all, aspects of railway freight service. One such aspect is the "car mileage allowance." The STB remains responsible for setting allowance rates based on the features of a particular rail car. 49 U.S.C. § 11122. n3

n2 The ICCTA substantially amended Subtitle IV of Title 49 of the United States Code as it appeared prior to 1995. Subtitle IV, Part A of which governs rail commerce, is often referred to as the Interstate Commerce Act.

n3 Section 11122(b) states in relevant part:

The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor. In determining the rate of compensation, the Board shall consider the transportation use of each type of freight car, the national level of ownership of each type of freight car, and other factors that affect the adequacy of the national freight car supply.

[**5]

Before the court are motions to dismiss an Amended Complaint brought by Engelhard [**387] seeking to collect unpaid mileage allowances from the defendant railroads. The standards to be applied in reviewing a motion to dismiss are familiar. "We must accept the allegations of the complaint as true, and if, under any theory, the allegations are sufficient to state a cause of action in accordance with the law, we must deny the motion to dismiss." *Vartanian v. Monsanto Co.*, 14 F.3d 697, 700 (1st Cir. 1994). A court must, of course, be satisfied that a complaint contains "factual allegations, either direct or inferential, respecting each material element necessary to sustain a recovery under some actionable legal theory," *Glassman v. Computervision Corp.*, 90 F.3d 617, 628 (1st Cir. 1996), and need not consider unsupported assertions and mere legal conclusions. See *Shaw v. Digital Equipment Corp.*, 82 F.3d 1194, 1216 (1st Cir. 1996). Ordinarily, in making its assessment, the court is to confine itself within the four corners of the complaint. There is, however, an exception. Where factual allegations in the complaint are based on documents whose [**6] authenticity is not questioned, the court may look to these documents as well. *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33-34 (1st Cir. 2001). n4

n4 The Amended Complaint contains a number of documents appended as exhibits. The defendants have also submitted a copy of the full text of the Interchange Agreement between Conrail and Springfield Terminal. The parties do not dispute the authenticity of these documents, although they do differ about their meaning.

According to the Amended Complaint, Engelhard amassed a fleet of specially built tank cars for use in transporting its clay. Some of these cars were owned by Engelhard outright, while many were leased from other

car owners who authorized Engelhard to collect the accrued mileage allowances. Beginning in 1990, Springfield Terminal and Conrail hauled kaolin over the disputed 155 mile segment of track to customers in New England in tank cars supplied by Engelhard. While Conrail consistently credited Engelhard [**7] with mileage allowances for tank cars transited to Selkirk, New York, and while Springfield Terminal did the same for tank cars taken beyond Barber, Massachusetts, in a number of instances, neither railroad paid the allowance for cars hauled between the two stations. When questioned by Engelhard, Conrail claimed that Springfield Terminal was responsible for the payments, while predictably, Springfield Terminal put the onus for the payments on Conrail.

Engelhard filed this action on May 15, 2001, seeking \$ 568,155.13 in unpaid mileage allowances. Engelhard maintains that while Springfield Terminal "is not authorized to perform rail carrier service over its length [the disputed 155 mile segment], in some instances [Springfield Terminal] has accepted responsibility for and paid mileage allowances pursuant to a March 31, 1990 Haulage Agreement." Amended Complaint P 13. Despite Springfield Terminal's intermittent payments, the Amended Complaint asserts that Conrail remains primarily responsible for payment of the overdue car mileage allowances.

Said Haulage Agreement has not altered Conrail's rail common carrier status for transportation over the 155 mile segment. Although [**8] Conrail reached a private agreement with a subcontractor [Springfield Terminal] to assist it with operations over this segment, it ultimately retains liability for movements handled on its behalf pursuant to the Haulage Agreement.

Amended Complaint P 24.

The "Haulage Agreement" referenced in the Amended Complaint is an Interchange Agreement entered into between Conrail [*388] and Springfield Terminal on March 31, 1990, permitting Springfield Terminal to transit cars, either made up in Conrail trains or in trains of its own, over Conrail's Selkirk to Barber line. The Agreement provides, inter alia, for the division of the revenues earned and the expenses incurred in the joint hauling of cars. It is also apparent that a disagreement between Conrail and Springfield Terminal over the interpretation of this aspect of the Agreement is the reason for the erratic payment of mileage allowances to Engelhard. H. Jeffrey Miller, Springfield Terminal's Revenue Manager, responded to Engelhard's inquiries about the erratic payments with the explanation that

I have given you the two possible scenarios for traffic moving eastward from CR to ST. If the route states CR-ROTTJ ST, then ST divisions [**9] of revenue and liability for carhire mileage begins at Selkirk, NY. ST pays mileage between Selkirk and Barber's Station. Conrail is hauling the cars but the cars remain in ST's account for both revenue and carhire as per the haulage agreement.

If the route states CR-BRBER ST, then ST divisions of revenue and liability for carhire mileage begins at Barber's Station, Ma. The carhire from Selkirk to Barber's Station remains in the account of Conrail. This is not a haulage move and the haulage agreement does not apply. Traffic moving westward from ST to CR works the same way.

Amended Complaint, Ex. M.

Conrail, on the other hand, told Engelhard that the Interchange Agreement "placed responsibility for all such moves [between Selkirk and Barber] on Springfield Terminal, regardless of which railroad actually moved the car or received a division of freight rates on the segment." Amended Complaint, P29. n5

n5 As previously noted, Engelhard's position is that Conrail is responsible for payment of the allowances. Amended Complaint PP 17, 18 and 24.

[**10]

The court heard argument on defendants' motions to dismiss the original Complaint on October 24, 2001. As the parties refined their positions during the course of the hearing, it became apparent that two issues of law were ripe for adjudication: (1) Are Engelhard's state-law claims preempted by section 10501(b) of the ICCTA?; (2) If so, which of the ICCTA's statutes of limitations applies to Engelhard's claims of non-payment? At the conclusion of the hearing, the court gave Engelhard twenty-one days to file an Amended Complaint sharpening the focus of its state-law claims. Engelhard did so on November 14, 2001. n6 Thereafter, defendants renewed their motions to dismiss and the parties filed supplemental memoranda directed to the two issues ripe for adjudication.

n6 The Amended Complaint contains five counts: Count I - Violation of the Interstate

Commerce Act (Alternative theory); Count II - Breach of Implied-In-Fact Contract Arising From Course of Dealings (Alternative Theory); Count III - Breach of Implied-In-Fact Contract Arising From Promissory Estoppel (Alternative Theory); Count IV - Quantum Meruit (Unjust Enrichment); and Count V - Breach of Contract for Benefit of Third Party Beneficiary.

[**11]

DISCUSSION

Preemption

"Congress's intent is the touchstone of preemption analysis." *Mendes v. Medtronic Inc.*, 18 F.3d 13, 16 (1st Cir. 1994). "Such intent may be expressed either explicitly, in the language of a statute, or implicitly, through passage of a statutory scheme that extensively occupies the field or where the purpose and objectives of federal law would be frustrated by state [*389] law." *Talbott v. C.R. Bard, Inc.*, 63 F.3d 25, 27 (1st Cir. 1995). Section 10501(b) of the ICCTA states:

the jurisdiction of the [Surface Transportation] Board over (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services and facilities of such carriers; ... is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

The concluding sentence of section 10501(b) is an unmistakable statement of Congress's intent to preempt state [*12] laws touching on the substantive aspects of rail transportation.

In 1995, Congress eliminated what little remained of state and local regulatory authority over railroad operations through enactment of the Interstate Commerce Commission Termination Act ("ICCTA" or "the Act"), codified at 49 U.S.C. § 701 *et seq.* As one federal district court has stated with respect to the ICCTA, "It is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations." *CSX Transp., Inc. v. Georgia Public Service Comm'n*, 944 F. Supp. 1573, 1581 (N.D.Ga. 1996). Indeed, the Act's legislative history makes plain Congress's intent to shield railroads from state regulation while at the same time lessening federal regulation of the

railroad industry.

Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass *all* such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the [*13] Federal scheme of minimal regulation for this intrinsically interstate form of transportation.

H.R.Rep. No. 104-311, at 96 (1995), U.S.Code Cong. & Admin.News 1996, P. 793 (emphasis in original).

Florida East Coast Ry. Co. v. City of West Palm Beach, 110 F. Supp. 2d 1367, 1373-1374 (S.D. Fla. 2000), *aff'd*, 266 F.3d 1324 (11th Cir. 2001). See also *Pejepscot Industrial Park, Inc. v. Maine Central Railroad Co.*, 215 F.3d 195, 202 (1st Cir. 2000). n7

n7 The First Circuit in *Pejepscot*, while acknowledging the powerful preemptive effect of the concluding sentence of section 10501(b), was addressing a different issue, whether the first sentence of section 10501(b), by vesting "exclusive" jurisdiction over the remedies provided by Part A in the STB, thereby divested the district court of concurrent jurisdiction. The Court held that it did not, at least with respect to the claim at issue in that case. The Court did not, as Engelhard suggests, hold that the state law claims in *Pejepscot* survived preemption. Rather, it remanded the state law claims for a ruling by the district court, which had declined to exercise supplemental jurisdiction in the mistaken belief that it lacked federal subject matter jurisdiction.

[**14]

As broad as is preemption under the ICCTA, there are limits to its reach. Preemption, absent clear evidence of a contrary intent on the part of Congress, will not encroach on areas traditionally subject to the historic police powers of the States. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996). See *Florida East Coast Ry. Co.*, *supra*, 110 F. Supp. 2d at 1376 (while the preemptive reach of the ICCTA is broad, it does not oust a city's powers to enforce non-discriminatory occupational licenses and zoning ordinances). The issue presented here is whether Congress has chosen to occupy the transportation field insofar as car mileage [*390] allowances are concerned

by creating an exclusive federal remedy for their non-payment. I conclude that a study of the interplay of those sections of the ICCTA that touch directly or indirectly on the mileage allowance issue indicates that Congress clearly has.

Section 10501(b) of the ICCTA refers in the first instance to the exclusivity of the remedies provided by this "part," that is, by Part A of Subtitle IV of Title 49. As a general matter, section 11704(b) authorizes the imposition of [**15] liability on a rail carrier whose acts or omissions in violation of Part A result in damages to a "person." Section 11704(c)(1) in turn authorizes an injured "person" to bring an action for damages either before the STB or in the district court. See *Pejepscot*, 215 F.3d at 199-200. With respect to car mileage allowances, section 11122(a) directs the STB to establish rates of compensation for the use by a rail carrier of third-party freight cars. Similar authority is found in section 10745, n8 which authorizes the STB to "establish a charge or allowance for transportation or service for property when the owner of the property, directly or indirectly, furnishes a service related to or an instrumentality used in the transportation or service." The predecessor ICC exercised this authority in promulgating Freight Tariff 6007, which establishes compensation rates for the use of tank cars, as well as rules for the filing, processing and protest of mileage allowances. This interplay of remedial statutes and regulation leads inescapably to the conclusion that Congress has occupied the field of car mileage allowances so completely as to preempt any potentially parallel state-law [**16] remedy. I therefore rule that Counts II-V of the Amended Complaint are preempted by the ICCTA and must therefore be dismissed. n9

n8 Section 10745 is modeled on section 10747 of the pre-amendment Interstate Commerce Act. See *Bud Antle, Inc. v. United States*, 593 F.2d 865, 869 (9th Cir. 1979).

n9 Engelhard's principal argument against preemption is that Conrail and Springfield Terminal, by entering into the Interchange Agreement, contracted themselves out of the regulatory framework imposed by the ICCTA. While this is an extremely doubtful proposition on many levels, even were it correct, Engelhard is neither a party to the Interchange Agreement nor its intended beneficiary. Moreover, Engelhard is able to plead a contractual or quasi-contractual measure of damages only by reference to the compensation schedule set out by the STB in Freight Tariff 6007. Engelhard's secondary

contention that the Interchange Agreement falls within section 10709 of the ICCTA, which preserves state-law remedies for breaches of agreements between railroads and purchasers of rail services, is even more puzzling. Engelhard is neither a railroad nor a purchaser of shipping services, as it admits. See Amended Complaint P 40. At most, the Interchange Agreement may make state-law remedies available to the contracting railroads in disputes over matters of contribution and the like that may be related to the railroads' mileage allowance obligations. It does nothing of the sort for Engelhard.

[**17]

Statute of Limitations

Since Springfield Terminal's viable federal claim is brought under ICCTA § 11704(b), the two-year statute of limitations of 49 U.S.C. § 11705(c) applies to its non-payment count. Section 11705(c) requires a "person" seeking damages under section 11704(b) to file a complaint with the STB "within 2 years after the claim accrues." While section 11705(c) refers only to the filing of complaints before the STB, its statute of limitations applies to section 11704(b) actions before the district court as well. See *Aluminum Ass'n, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 746 F. Supp. 207, 213 n.18 (D.D.C. 1990). n10 It is worth noting that the STB [**391] has incorporated the two year statute of limitations of section 11705(c) into Freight Tariff 6007. Item 182 of the Tariff states that

[a] private car owner must, within twenty-four (24) months from the last day of the month the completed cycle was reported, present any claim for mileage allowance discrepancies, including incorrect rates or omissions, to the applicable rail carrier in the prescribed AAR format. ... The railroad receiving the claim must within [**18] the four (4) months from the date on which the claim was presented allow it in whole or in part, or decline it. The private car owner may reissue its claim, if applicable within four (4) months from the last day of the four (4) months' period allowed the railroad which handled the claim prior to reissuance. The railroad receiving the reissue claim must within four (4) months from the date of which the reissued claim was presented allow it in whole or in part or decline it. If the railroad fails to handle the original or reissued claim within the prescribed time limits, it will constitute a valid claim as last presented and must be honored by the railroad to which presented. Claims for amounts of \$ 25.00 per car per cycle or less shall not be issued. The \$ 25.00 limit is

not applicable where no miles were reported for the railroad cycle.

n10 While the First Circuit in *Pejepscot* suggested that the four-year general limitations period of 28 U.S.C. § 1658 might apply to section 11704(b) claims, *id.*, 215 F.3d at 202 n.5, as Springfield Terminal points out, that statute applies only to statutes enacted after December 1, 1990, and not to preexisting statutes amended subsequent to that date. See *Zubi v. AT&T Corp.*, 219 F.3d 220, 222, 225 (3d Cir. 2000). The section 11705(a) three-year statute of limitations applies only to actions brought by rail carriers seeking to recover charges for transportation services. *Pejepscot*, 215 F.3d at 199; *Atchison, Topeka and Santa Fe Railway Co. v. Benchcraft, Inc.*, 381 F. Supp. 603 (W.D. Mo. 1974). Engelhard is not a "rail carrier." A "rail carrier" is "a person providing common carrier railroad transportation for compensation. ..." 49 U.S.C. § 10102.

[**19]

Primary Jurisdiction

The remaining question is whether this court should invoke the primary jurisdiction doctrine to refer certain aspects of this case to the STB for guidance. As explained by the First Circuit in *Pejepscot*:

The primary jurisdiction doctrine is intended to "serve[] as a means of coordinating administrative and judicial machinery" and to "promote uniformity and take advantage of agencies' special expertise." *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 580 (1st Cir. 1979). This court relies on three factors to guide the decision on whether to refer an issue to an agency under the primary jurisdiction doctrine:

1) whether the agency determination lies at the heart of the task assigned the agency by Congress; (2) whether agency expertise is required to unravel intricate, technical facts; and (3) whether, though perhaps not determinative, the agency determination would materially aid the court.

Massachusetts v. Blackstone Valley Elec. Co., 67 F.3d 981, 992 (quoting *Mashpee Tribe*, 592 F.2d at 580-81) (alterations in original).

Id., 215 F.3d at 205.

Here, the first and third of [**20] the Mashpee Tribe criteria counsel referral. I will, therefore, subject to a caveat, stay this action and refer two questions to the STB for preliminary determination: (1) Does a cause of action involving a disputed failure to pay Tariff 6007 car mileage allowances arise one month and ten days after the payment comes due, or four months from the date on which a railroad refuses to pay or act on a claim, or some other date? (2) Is a railroad obligated to pay compensation [**392] only to the owner of a car's reporting mark, or does Item 180 of Tariff 6007 permit the owner of the mark to assign the right to payment to a lessor like Engelhard?

The caveat is this. The parties represent to the court that opportunities for discovery and factual elucidation are limited under the rules of the STB. If it will aid the parties' presentation to the STB and the ultimate resolution of this dispute, I will enter a discovery schedule of up to 120 days duration at the parties' request before making the referral and staying the district court case.

ORDER

For the foregoing reasons, Counts II, III, IV and V of the Amended Complaint are DISMISSED as preempted by the ICCTA. It is further ADJUDGED [**21] and DECLARED that the two-year statute of limitations of 49 U.S.C. § 11705(c) applies to Count I of the Amended Complaint. The parties will have fourteen (14) days from the date of this Order to submit a joint request for specified discovery to be conducted before any referral to the STB, and any suggestions for refinement or supplementation of the issues identified in this opinion as being appropriate for referral.

SO ORDERED.

Richard G. Stearns

UNITED STATES DISTRICT JUDGE

EXHIBIT NO. 3

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NUMBER 01-10829-RGS

ENGELHARD CORPORATION, A
DELAWARE CORPORATION

v.

SPRINGFIELD TERMINAL RAILWAY CO., INC., A
VERMONT CORPORATION AND CONSOLIDATED RAIL
CORPORATION, A PENNSYLVANIA CORPORATION

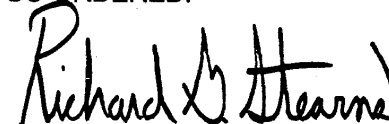
ORDER ON PARTIES' SUBMISSION
REGARDING PRE-REFERRAL SCHEDULE

April 19, 2002

STEARNS, D.J.

I am persuaded by defendants' argument that no discovery need be taken before the referral to the Surface Transportation Board of the two legal issues identified by the court in its April 2, 2002 opinion. The parties will have until May 17, 2002, to submit a proposed order of referral limited to these issues.¹

SO ORDERED.

A handwritten signature in black ink, appearing to read "Richard D. Stearns", is written over a horizontal line.

UNITED STATES DISTRICT JUDGE

¹The parties are correct that the word "lessor" as it appears in the court's formulation of the second issue should read "lessee."

EXHIBIT NO. 4

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NUMBER 01-10829-RGS

ENGELHARD CORPORATION, A
DELAWARE CORPORATION

v.

SPRINGFIELD TERMINAL RAILWAY CO., INC., A
VERMONT CORPORATION AND CONSOLIDATED RAIL
CORPORATION, A PENNSYLVANIA CORPORATION

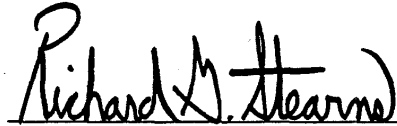
MEMORANDUM AND ORDER ON THE PARTIES'
PROPOSED ORDERS OF REFERENCE TO
THE SURFACE TRANSPORTATION BOARD

May 22, 2002

STEARNS, D.J.

Upon review of the parties' submissions, the court will ADOPT the Order proposed by defendants Springfield Terminal and Consolidated Rail Corp. as a faithful reflection of the issues identified in the court's April 2, 2002 opinion. Plaintiff Engelhard's proposed order in essence asks the Surface Transportation Board to redetermine matters already decided adversely to Engelhard by this court, or to opine on issues outside of its competence.

SO ORDERED.



UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ENGELHARD CORPORATION, a)
Delaware Corporation,)
)
Plaintiff)
)
vs.)
)
SPRINGFIELD TERMINAL)
RAILWAY CO., INC., a)
Vermont Corporation and)
CONSOLIDATED RAIL)
CORPORATION, a)
Pennsylvania Corporation)
)
Defendants.)

Civil Action No. C.A. 01-10829-RGS

ORDER

It is hereby **ORDERED** as follows:

1. Pursuant to the Memorandum and Order of this Court dated April 2, 2002, and this Court's April 19, 2002 Order, the following questions are referred to the Surface Transportation Board:

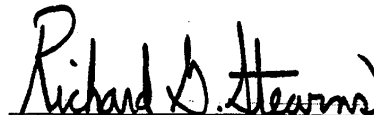
(a) Does a cause of action involving a disputed failure to pay car mileage allowances under Tariff 6007 arise one month and ten days after the end of the month in which the obligation is incurred, or four months after the date on which a railroad refuses to pay or act on a claim, or on the occurrence of some other date or event?

(b) Is a railroad obligated to pay compensation under Tariff 6007 only to the owner of a car's reporting mark, or does Item 180 of such tariff permit the owner of the mark to assign the right to payment to a lessee of a car?

2. The plaintiff shall take such action as is necessary to institute the declaratory order proceeding before the Surface Transportation Board.

3. All proceedings in this action are stayed pending the action of the Surface Transportation Board on such referral.

4. The Clerk is directed to transmit a certified copy of this order to the Secretary of the Surface Transportation Board, with copies to counsel for the parties.


RICHARD G. STEARNS
United States District Judge

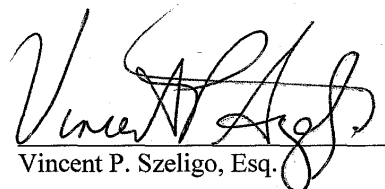
Dated at Boston, Massachusetts this 22d day of May, 2002

CERTIFICATE OF SERVICE

I, Vincent P. Szeligo, Esquire, certify that a true and correct copy of Engelhard's Petition for Declaratory Order was served upon counsel identified below by overnight delivery, this 25th day of September, 2002.

David C. Ziccardi, Esq.
Consolidated Rail Corporation
Two Commerce Square
2001 Market Street, 16-A
Philadelphia, PA 19103-1416

Robert B. Culliford, Esq.
Guilford Transportation Industries, Inc.
Iron Horse Park
North Billerica, MA 01862


Vincent P. Szeligo, Esq.