

ANGENEND & AUGUSTINE, A PROFESSIONAL CORPORATION

464
FILED

Paul D. Angenend

Office of Proceedings

ATTORNEYS AND COUNSELORS AT LAW
7800 N. Mopac, Suite 210 Austin, Texas 78759
P.O. Box 29717 Austin, Texas 78755-6717
(512) 794-8989 Facsimile (512) 794-9898

JUL 7 2003

JUL 07 2003

Part of
Public Record

SURFACE
TRANSPORTATION BOARD

July 2, 2003

FEE RECEIVED



JUL 7 2003

208289
DID # 010220600/

VIA FEDERAL EXPRESS

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

FD-34379

Re: Martin Gas Sales, Inc.—Petition for Declaratory Order – Certain Rates
and Practices of Union Pacific Railroad Company

Dear Secretary Williams:

Enclosed for filing are the original and ten copies of the Petition for Declaratory Order of Martin Gas Sales, Inc. pursuant to a referral order issued by William M. Steger, United States District Judge, Eastern District of Texas, Tyler Division, in Case No. 6:02-CV-00180

Any order issued by the Surface Transportation Board with respect to this matter should be served upon the referral judge and the Clerk of the United States District Court for the Eastern District of Texas, Tyler Division, as follows:

Honorable William M. Steger
and
David J. Maland, Clerk of Court
United States District Court
100 East Houston Street
Marshall, TX 75670

Enclosed is our check in the amount of \$1,000.00 payable to the Surface Transportation Board for the filing fee.

An extra copy of this letter and the petition are enclosed for your file-stamp and return in the enclosed self-addressed, stamped envelope.

The Honorable Vernon A. Williams
Page 2
July 2, 2003

Thank you for your cooperation in this matter. If you have any questions, please do not hesitate to contact me.

Sincerely yours,



Paul D. Angenend

PDA/mdm

Enclosures
c: All Parties of Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD 34379



**MARTIN GAS SALES, INC. – PETITION FOR DECLARATORY ORDER
– CERTAIN RATES AND PRACTICES OF UNION PACIFIC RAILROAD COMPANY**

Martin Gas Sales, Inc. ("Martin" or "Petitioner") submits this Petition for Declaratory Order to the Surface Transportation Board ("STB" or "Board") in order that the Board may consider the matters referred to it by the United States District Court for the Eastern District of Texas, Tyler Division, ("District Court") in Civil Action No. 6:02-CV-00180 (WS), *Union Pacific Railroad Company v. Martin Gas Sales, Inc.*

BACKGROUND

1. Petitioner Martin is a Texas corporation domiciled in Kilgore, Texas.
2. Respondent is Union Pacific Railroad Company ("UP" or "Respondent"), a Delaware corporation, domiciled in Omaha, Nebraska.
3. This dispute involves the alleged non-payment of demurrage charges on rail cars accruing between December 2000 and February 2002.
4. As here pertinent, Petitioner is a wholesaler of asphalt with a bulk facility located in the Neches Industrial Park near Beaumont, Texas. This facility receives rail car shipments of asphalt delivered by UP.
5. On April 24, 2002 UP filed its complaint in the District Court seeking to collect demurrage charges of \$737,150.00. Martin filed its Answer on May 8, 2002 denying liability, and filed its First Amended Answer and Counterclaim on November 22, 2002. In its Counterclaim, Martin seeks damages resulting from the alleged unreasonable rates and unreasonable practices of UP. Martin also filed a Motion

Suggesting Referral to the STB. UP's Complaint is attached as Exhibit 1. Martin's First Amended Answer is attached as Exhibit 2 and its Counterclaim is attached as Exhibit 3.

6. On May 6, 2003 the District Court entered its Order referring the instant case to the STB. On May 27, 2003 the Court, *sua sponte*, entered its Order making it clear that both the issue of unreasonable tariff charges by UP, and the issue of unreasonable practices by UP, are referred to the STB, and that Martin is to file the instant petition with the STB on or before July 7, 2003. The Court's Order of May 6, 2003 is attached as Exhibit 4 and its Order of May 27, 2003 is attached as Exhibit 5.

REQUEST FOR DECLARATORY ORDER

7. 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. Both the Board, and its predecessor, the Interstate Commerce Commission, routinely have accepted and treated a petition for declaratory order based on a referral from a court in the same manner as a complaint.

8. The sole basis of UP's Complaint is to collect demurrage charges from Martin which allegedly accrued between December 2000 and February 2002. Martin challenges the reasonableness of UP's charges by asserting: (a) UP's demurrage charges as contained in UP's Rail Car Demurrage Tariff are unreasonable; (b) UP's method of calculating the demurrage charges is unreasonable; and (c) UP's practice of assessing the demurrage charges is an unreasonable practice.

9. The District Court did not rule on the issues of unreasonable tariff charges and unreasonable practices raised by Martin, but rather referred both issues to the Board.

PROCEDURAL ISSUE

10. On March 4, 2003 Martin filed its Motion to Compel with the District Court, a copy of which is attached as Exhibit 6. While UP did provide some of the information requested in the Motion, it steadfastly has refused to produce the rail car records showing the movement of all rail cars from origin to destination on which demurrage is asserted. Martin's Motion to Compel has not been ruled upon and was pending before the District Court when the Court issued its Order to refer these matters to the STB.

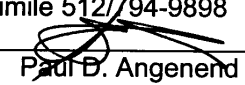
11. Martin does not have copies of, or access to, the rail car records relating to actual movement of the rail cars from origin to point of constructive placement. The information contained in the rail car records is critical in determining whether UP was engaged in holding rail cars at the yard before providing constructive notice to Martin, and thus was engaged in bunching rail cars destined to Martin. In the event the Board institutes a proceeding in this matter, Martin intends to pursue discovery of the rail car records under the Board's applicable rules.

WHEREFORE, Martin requests that the Board institute a declaratory order proceeding and establish a procedural schedule, that provides a reasonable period for discovery, in accord with its rules.

Respectfully submitted,

ANGENEND & AUGUSTINE, P.C.
7800 N. Mopac, Suite 210
P. O. Box 29717
Austin, TX 78755-6717
Telephone 512/794-8989
Facsimile 512/794-9898

By: _____

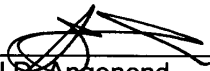

Paul B. Angenend
State Bar No. 01260000

Charles H. Clark
State Bar No. 04274000
CLARK, LEA & AINSWORTH
P. O. Box 98
Tyler, TX 75710
Telephone 903/593-2514
Facsimile 903/595-1294

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify this 2nd day of July 2003 that a copy of the foregoing Petition for Declaratory Order has been served via Certified Mail, Return Receipt Requested, on the attorney of record as listed below.



Paul D. Angenend

Charles E. Lauffer, Jr.
Ritcheson, Dollahite & Lauffer
3301 Golden Road
Suite 400
Tyler, TX 75701
Telephone 903/535-2900
Facsimile 903/533-8646

In Association with:

Janssen & Keenan
One Commerce Square
Suite 2050
2005 Market Street
Philadelphia, PA 19103

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

TYLER DIVISION

FILED
02 APR 24 PM 3:46
TYLER, TEXAS
CLERK

UNION PACIFIC RAILROAD COMPANY :
 :
Plaintiff, :
 :
v. :
 :
MARTIN GAS SALES, INC. :
 :
Defendant. :

Case No.

6:02CV180

COMPLAINT

COMES NOW, Plaintiff, UNION PACIFIC RAILROAD COMPANY (hereinafter
"Union Pacific"), which complains of defendant, and alleges as follows:

1. Jurisdiction in this matter is based upon 28 U.S.C. § 1337 as a cause of action arising under the Interstate Commerce Act, 49 U.S.C. § 10101 et seq., as well as upon 28 U.S.C. § 1332 as the matter in controversy exceeds \$75,000.00 and is between citizens of different states.
2. Venue lies in this judicial district by virtue of 28 U.S.C. § 1391(b) in that the defendant resides in this judicial district and a substantial part of the events or omissions giving rise to the claim occurred in this judicial district.
3. Plaintiff, Union Pacific is a Delaware corporation with its principal place of business in Nebraska, and operates as an interstate rail carrier subject to the jurisdiction of the U.S. Surface Transportation Board, and governed by the provisions of the Interstate Commerce Act, 49 U.S.C. § 10101, et seq.

EXHIBIT " 7 "

4. Defendant Martin Gas Sales, Inc. (hereinafter "Martin") is upon information and belief, a Texas corporation with its principal place of business located at 4200 Stone Road, Kilgore, Texas.

5. The subject matter of this action stems from rail car demurrage charges, which are assessed pursuant to the provisions of Union Pacific's Rail Car Demurrage Tariff and rules promulgated thereunder relating to freight car use and distribution.

6. Between December 2000 and February 2002, Martin received delivery of rail cars but failed to timely return the rail cars to Union Pacific within the permitted "free time", and thereby incurred \$737,150.00 in demurrage charges, all of said charges due and owing to plaintiff Union Pacific.

7. A full compilation of all such charges has been prepared by invoice and submitted to Martin.

8. Although repeated demand has been made for payment of the aforementioned charges, Martin has refused payment.

WHEREFORE, plaintiff Union Pacific Railroad Company prays judgment on its complaint against defendant Martin Gas Sales, Inc. as follows:

1. For judgment against defendant Martin Gas Sales, Inc. in the amount of \$737,150.00, together with interest;
2. For judgment against defendant Martin Gas Sales, Inc. for its attorneys' fees, expenses, court costs, investigation costs and other costs of suit incurred in the litigation of this matter; and
3. For such other and further relief as the court deems just and proper.

RITCHESON, DOLLAHITE & LAUFFER
3301 GOLDEN ROAD
SUITE 400
TYLER, TX 75701
TEL - (903) 535-2900
FAX - (903) 533-8646

In Association with:

JANSSEN & KEENAN
ONE COMMERCE SQUARE
SUITE 2050
2005 MARKET STREET
PHILADELPHIA, PA 19103

By:



CHARLES E. LAUFFER, JR.
State Bar no. 11989400
Attorney for Plaintiff
Union Pacific Railroad Company

UNITED STATES DISTRICT COURT

Eastern

District of

Texas

Union Pacific Railroad Company

SUMMONS IN A CIVIL CASE

V.

Martin Gas Sales, Inc.

CASE NUMBER: 6:02CV180

TO: (Name and address of Defendant)

Martin Gas Sales, Inc.
4200 Stone Road
Kilgore, Texas 75662

YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

Paul Keenan
Janssen & Keenan, P.C.
One Commerce Square
Suite 2050
2005 Market Street
Philadelphia, PA 19103

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

DAVID J. MALAND

CLERK

Revels

DATE

4/24/02

(By) DEPUTY CLERK

RETURN OF SERVICE

Service of the Summons and complaint was made by me ⁽¹⁾	DATE <u>4-26-2002</u> <u>8:50 AM</u>
NAME OF SERVER (PRINT)	TITLE

Check one box below to indicate appropriate method of service

- ☐ Served personally upon the defendant. Place where served: _____
- ☐ Left copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
Name of person with whom the summons and complaint were left: _____
- ☐ Returned unexecuted: _____
- ☐ Other (specify): _____

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL
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DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____ Date _____ Signature of Server _____

Address of Server _____

(1) As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

the JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Union Pacific Railroad Company

DEFENDANTS

Martin Gas Sales, Inc.

(b) County of Residence of First Listed Plaintiff Douglas, Nebraska
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Plaintiff

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)
Ritcheson, Dollahite & Lauffer, P.C.
3301 Golden Road, Suite 400
Tyler, TX 75701
903-535-2900
Janssen & Keenan
One Commerce Square, Suite 2050
2005 Market Street
Philadelphia, PA 19103
(215) 665-8408

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
☒ 2 U.S. Government Defendant
☒ 3 Federal Question (U.S. Government Not a Party)
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State ☐ 1 ☐ 1 Incorporated or Principal Place of Business in This State ☐ 4
Citizen of Another State ☐ 2 ☐ 2 Incorporated and Principal Place of Business in Another State ☒ 5
Citizen or Subject of a Foreign Country ☐ 3 ☐ 3 Foreign Nation ☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of ☐ 151 Recovery of Defaulted Student Loans (Excl. Veterans) ☐ 152 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholders' Suits ☐ 190 Other Contract ☐ 195 Contract Product Liability	PERSONAL INJURY ☐ 310 Airplane ☐ 315 Airplane Product Liability ☐ 320 Assault, Libel & Slander ☐ 330 Federal Employers' Liability ☐ 340 Marine ☐ 345 Marine Product Liability ☐ 350 Motor Vehicle ☐ 355 Motor Vehicle Product Liability ☐ 360 Other Personal Injury	PERSONAL INJURY ☐ 362 Personal Injury—Med. Malpractice ☐ 365 Personal Injury—Product Liability ☐ 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY ☐ 370 Other Fraud ☐ 371 Truth in Lending ☐ 380 Other Personal Property Damage ☐ 385 Property Damage Product Liability	☐ 610 Agriculture ☐ 620 Other Food & Drug ☐ 625 Drug Related Seizure of Property 21 USC ☐ 630 Liquor Laws ☐ 640 R.R. & Truck ☐ 650 Airline Regs. ☐ 660 Occupational Safety/Health ☐ 690 Other LABOR ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 730 Labor/Mgmt. Reporting & Disclosure Act ☐ 740 Railway Labor Act ☐ 790 Other Labor Litigation ☐ 791 Empl. Ret. Inc. Security Act	☐ 422 Appeal 28 USC 158 ☐ 423 Withdrawal 28 USC 157 PROPERTY RIGHTS ☐ 820 Copyrights ☐ 830 Patent ☐ 840 Trademark SOCIAL SECURITY ☐ 861 HRA (1395ff) ☐ 862 Black Lung (923) ☐ 863 DIWC/DIWW (405(g)) ☐ 864 SSID Title XVI ☐ 865 RSI (405(g)) FEDERAL TAX SUITS ☐ 870 Taxes (U.S. Plaintiff or Defendant) ☐ 871 IRS—Third Party 26 USC 7609	☐ 400 State Reapportionment ☐ 410 Antitrust ☐ 430 Banks and Banking ☒ 450 Commerce/ICC Rates ☐ 460 Deportation ☐ 470 Racketeer Influenced Corrupt Organizations ☐ 810 Selective Service ☐ 850 Securities/Commodities Exchange ☐ 875 Customer Challenge 12 USC 3410 ☐ 891 Agricultural Acts ☐ 892 Economic Stabilization ☐ 893 Environmental Matter ☐ 894 Emergency Allocation Act ☐ 895 Freedom of Information Act ☐ 900 Appeal of Determination Equal Access Justice ☐ 950 Constitutionality of State Statutes ☐ 890 Other Statutory Act.
REAL PROPERTY ☐ 210 Land Condemnation ☐ 220 Foreclosure ☐ 230 Rent Lease & Ejectment ☐ 240 Torts to Land ☐ 245 Tort Product Liability ☐ 290 All Other Real Property	CIVIL RIGHTS ☐ 441 Voting ☐ 442 Employment ☐ 443 Housing/Accommodations ☐ 444 Welfare ☐ 440 Other Civil Rights	PRISONER PETITIONS ☐ 510 Petitions to Vacate Sentence ☐ 530 General ☐ 535 Death Penalty ☐ 540 Mandamus & Other ☐ 550 Civil Rights ☐ 555 Prison Condition			

V. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify)
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write brief statement of cause. Do not cite jurisdictional statutes unless diversity.)
Interstate Commerce Act 49 U.S.C. §10101 et seq., action for demurrage tariff

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ CHECK YES only if demanded in complaint JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY (See instructions):

JUDGE

DOCKET NUMBER

DATE

4/27/02
FOR OFFICE USE ONLY

SIGNATURE OF ATTORNEY OF RECORD

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNION PACIFIC RAILROAD COMPANY, §
Plaintiff, §

vs. §

MARTIN GAS SALES, INC., §
Defendant. §

Case No. 6:02-CV-00180

DEFENDANT'S FIRST AMENDED ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Martin Gas Sales, Inc., hereinafter called "Defendant" and, as provided in Paragraph 7 of the Court's Docket Control order and in accordance with Rule 15(a) of the Federal Rules of Procedure, FRCP 15(a), in response to the Complaint filed herein by Union Pacific Railroad Company, hereinafter called "Plaintiff", shows the Court as follows:

FIRST DEFENSE

Defendant will respond to each paragraph with the numbers of Defendant's response corresponding to the paragraph numbers as contained in Plaintiff's Complaint.

1. Defendant admits the allegations contained in Paragraph 1 of Plaintiff's Complaint.

2. Defendant admits the allegations contained in Paragraph 2 of Plaintiff's Complaint.

3. Defendant admits the allegations contained in Paragraph 3 of Plaintiff's Complaint.

EXHIBIT " 2 "

4. Defendant admits the allegations contained in Paragraph 4 of Plaintiff's Complaint.

5. Defendant denies that it owes Plaintiff demurrage charges as Plaintiff contends; therefore, the allegations set forth in Paragraph 5 are denied.

6. Defendant denies the allegations as set forth in Paragraph 6 in Plaintiff's Complaint.

7. Defendant admits that a compilation of charges have been submitted to Defendant; however, Defendant denies that it owes such charges.

8. Defendant admits that demand has been made and that it has refused payment.

9. Defendant denies that Plaintiff is entitled to attorney's fees as sought in the prayer paragraph of the Complaint.

10. Defendant denies any other allegations of the Complaint not expressly admitted above.

SECOND DEFENSE

11. Alternatively, Plaintiff's assessment of demurrage charges is unlawful because such assessment constitutes an unreasonable practice in violation of 49 USC §§ 10702(2) and 10704(a)(1), for which Defendant seeks recoupment or setoff pursuant to 49 USC § 11704(b).

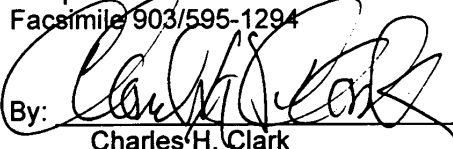
THIRD DEFENSE

12. Alternatively, Plaintiff's demurrage charges are unlawful because they are unreasonably high pursuant to 49 USC §§ 70101, 10702(1) and 10704(c)(1), for which Defendant seeks recoupment or setoff pursuant to 49 USC § 11704(b).

WHEREFORE, Defendant prays that upon final hearing that all relief requested by Plaintiff be denied, including the amount sued for, attorney's fees, expenses, court costs, investigation costs, and any other costs incurred by Plaintiff and that judgment be rendered for Defendant and against Plaintiff and that Plaintiff take nothing and that Defendant recover its costs.

Respectfully submitted,

CLARK, LEA & AINSWORTH
P. O. Box 98
Tyler, TX 75710
Telephone 903/593-2514
Facsimile 903/595-1294

By: 

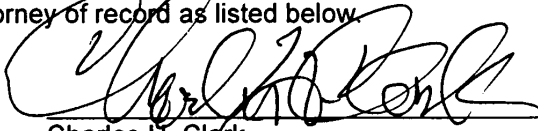
Charles H. Clark
State Bar No. 04274000

Paul D. Angenend
State Bar No. 01260000
ANGENEND & AUGUSTINE, P.C.
7800 N. Mopac, Suite 210
P. O. Box 29717
Austin, TX 78755-6717
Telephone 512/474-8989
Facsimile 512/474-9898

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify this 22nd day of November 2002, that a copy of the foregoing Defendant's First Amended Original Answer has been served via Certified Mail, Return Receipt Requested, on Plaintiffs' attorney of record as listed below.



Charles H. Clark

Charles E. Lauffer, Jr.
Ritcheson, Dollahite & Lauffer
3301 Golden Road
Suite 400
Tyler, TX 75701
Telephone 903/535-2900
Facsimile 903/533-8646

In Association with:

Janssen & Keenan
One Commerce Square
Suite 2050
2005 Market Street
Philadelphia, PA 19103

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNION PACIFIC RAILROAD COMPANY, §
Plaintiff §

vs. §

Case No. 6:02-CV-00180

MARTIN GAS SALES, INC., §
Defendant. §

ORIGINAL COUNTERCLAIM

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Martin Gas Sales, Inc., hereinafter "Martin" or "Counter-Plaintiff," and files this Original Counterclaim pursuant to Fed. R. Civ. P.13 against Plaintiff Union Pacific Railroad Company, hereinafter "Union Pacific" or "Counter-Defendant" and as grounds therefore would show the Court as follows:

PARTIES

1. Counter-Plaintiff is a Texas corporation with its principal place of business in Kilgore, Texas.
2. Counter-Defendant is a Delaware corporation with its principal place of business in Nebraska. Union Pacific already has appeared herein and is being served by mail upon its counsel of record.

VENUE AND JURISDICTION

3. This court has jurisdiction over the subject matter of this counterclaim pursuant to 28 U.S.C. § 1331 (federal question), Section 1332 (diversity jurisdiction), and Section 1337 (interstate commerce). The amount in controversy exceeds \$75,000 exclusive of interests and costs.

EXHIBIT " 3 "

4. Venue is proper in the Tyler division of the Eastern District of Texas because the claims arose in part in this district.

FACTUAL BACKGROUND

5. On various dates between December 2000 and February 2002, Union Pacific allegedly constructively placed certain rail cars consigned to Martin, which rail cars Union Pacific knew were incapable of being delivered to Martin's facilities solely due to the actions and inactions of Union Pacific.

6. During this period Union Pacific: (1) engaged in aggregating, or bunching, rail cars consigned to Martin; (2) refused to deliver rail cars to Martin as requested; (3) failed to maintain its rail structure so as to allow delivery of rail cars to Martin; (4) failed properly to operate its trains resulting in derailments on its tracks and (5) failed to repair promptly the damages caused by the derailments. All of these actions, and inactions, resulted in rail cars consigned to Martin not being delivered to Martin timely and as requested by Martin.

7. Although Union Pacific was aware that its actions and inactions were precluding the timely delivery of rail cars to Martin, and had been advised by Martin of these problems and Union Pacific's failure to deliver timely rail cars consigned to Martin, nevertheless Union Pacific issued invoices to Martin asserting demurrage charges due and owing under Union Pacific Rail Car Demurrage Tariff.

COUNT ONE - UNREASONABLE PRACTICE

8. Martin incorporates herein by reference and realleges Paragraphs I through 7 of the Counterclaim.

9. Union Pacific's assessment and attempt to collect the demurrage charge of

\$75.00 per day per car, and the hazardous charge of \$50.00 per day per car reflected in Union Pacific Tariff 6004 is an unreasonable practice in violation of 49 U.S.C. §§ 10702(2) and 10704(a)(1). As a result, Union Pacific is not entitled to collect such charges from Martin, and to the extent Union Pacific's tariff assesses such charges, Martin is entitled to recover such amounts as reparations or by way of recoupment or offset.

COUNT TWO - UNREASONABLE TARIFF CHARGE

10. Martin incorporates herein by reference and realleges Paragraphs 1 through 7 of the Counterclaim.

11. The demurrage charge of \$75.00 per day per car and the hazardous charge of \$50.00 per car per day reflected in Union Pacific Tariff 6004 were and are unreasonable. The demurrage and hazardous charges are unreasonable charges in violation of 49 U.S.C. §§ 10701, 10702(1), and 10704(a)(1). Martin is entitled to recover as reparations or by way of recoupment or offset the difference between the tariff charge and the charge determined to be reasonable under the Interstate commerce Act.

PRAYER

WHEREFORE, Counter-Plaintiff Martin requests that Counter-Defendant Union Pacific answer this Counterclaim, and that upon final hearing, Martin have judgment as follows:

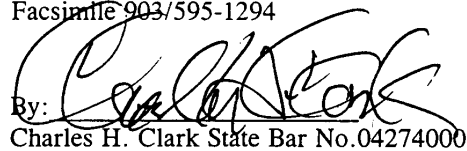
(a) An order that the assessments of demurrage and hazardous charges in Union Pacific's Tariff 6004 are unreasonable practices and therefore unlawful, and that Union Pacific is precluded from recovering such charges from Martin, or that Martin is entitled to recover any such charges as reparations or by way of recoupment or offset;

(b) An order that the demurrage and hazardous charges in Union Pacific's Tariff 6004 are unreasonable and therefore unlawful, and that Martin is entitled to recover as reparations or by way of recoupment or offset the difference between the tariff rate and the rate determined to be reasonable under the Interstate Commerce Act;

- (c) For reasonable and necessary attorney's fees;
- (d) For the costs of suit; and
- (e) For such other and further relief to which Martin may be justly entitled.

Respectfully submitted,

CLARK, LEA & AINSWORTH
P.O. Box 98
Tyler, TX 75710
Telephone 903/593-2514
Facsimile 903/595-1294

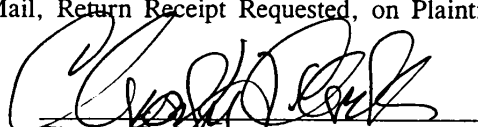
By: 
Charles H. Clark State Bar No.04274000

Paul D. Angenend
State Bar No.01260000
ANGENEND & AUGUSTINE, P.C.
7800 N. Mopac, Suite 210
P.O. Box 29717
Austin, TX 78755-6717
Telephone 512/474-8989
Facsimile 512/474-9898

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify this 22nd day of November 2002, that a copy of the foregoing Original Counterclaim has been served via Certified Mail, Return Receipt Requested, on Plaintiffs' attorney of record as listed below.


Charles H. Clark

Charles E. Lauffer, Jr.
Ritcheson, Dollahite & Lauffer
3301 Golden Road
Suite 400
Tyler, TX 75701
Telephone 903/535-2900
Facsimile 903/533-8646

In Association with:

Janssen & Keenan
One Commerce Square
Suite 2050
2005 Market Street
Philadelphia, PA 19103

EOD MAY 06 '03

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

UNION PACIFIC RAILROAD
COMPANY

Plaintiff,

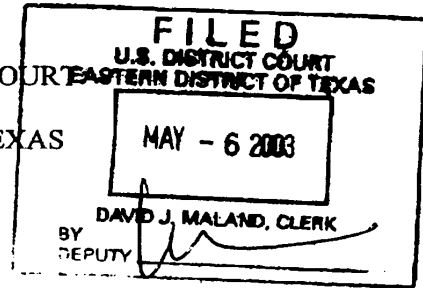
v.

MARTIN GAS SALES, INC.

Defendant.

§
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§
§
§
§

6:02cv180

**ORDER**

Came on this day for consideration the *Motion of Defendant and Cross-Plaintiff Suggesting Referral to the Surface Transportation Board* (Docket No. 19). After careful consideration the Court is of the opinion that the following order should issue.

The Plaintiff Union Pacific Railroad Company ("Union Pacific") operates as an interstate rail carrier subject to the jurisdiction of the United States Surface Transportation Board ("STB") and governed by the provisions of the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* Union Pacific filed the instant action alleging violations of the Interstate Commerce Act by the Defendant Martin Gas Sales, Inc. ("Martin"). The subject matter of this action stems from rail car demurrage charges, which are assessed pursuant to the provisions of Union Pacific's Rail Car Demurrage Tariff and rules promulgated thereunder relating to freight car use and distribution. In the Complaint, Union Pacific alleges that between December 2000 and February 2002, Martin received delivery of rail cars but failed to timely return the rail cars to Union Pacific within the permitted "free time" and as a result

EXHIBIT " 4 "

incurred demurrage charges.

In the Defendant's First Amended Original Answer and its Original Counterclaim, Martin asserts that Union Pacific engaged in aggregating, or bunching, rail cars consigned to Martin; refused to deliver rail cars to Martin as requested; failed to maintain its rail structure so as to allow delivery of rail cars to Martin; failed to properly operate its trains resulting in derailments on its tracks; and failed to promptly repair the damages caused by the derailments. Through these assertions, Martin alleges that the Plaintiff assessed an unreasonable tariff charge in violation of 49 U.S.C. §§ 10701, 10702(1), and 10704(a)(1). Martin further alleges that when Union Pacific attempted to assess and collect the demurrage charges, the Plaintiff engaged in an unreasonable practice in violation of 49 U.S.C. §§ 10702(2) and 10704(a)(1).

The Defendant filed its First Amended Original Answer and its Original Counterclaim on November 22, 2002, followed immediately on the same date by the motion to refer the instant case to the Interstate Commerce Commission's Surface Transportation Board. The Defendant argues that the Interstate Commerce Commission ("ICC") is the proper forum for determination of these issues. The general division of initial jurisdiction between the courts and the ICC is defined by the "primary jurisdiction doctrine," which requires that

"issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by the act" be submitted initially to the Commission for determination. Therefore, a district court trying a case under the Interstate Commerce Act *must*, if presented with such an issue, stay its proceedings and refer the case to the Commission.

City of New Orleans v. Southern Scrap Material, 704 F.2d 755, 758 (5th Cir. 1983) (emphasis

added) *quoting ICC v. Atlantic Coast R.*, 383 U.S. 576, 579, 86 S.Ct. 1000, 1003, 16 L.Ed.2d 109 (1966).

The Plaintiff denies that it engaged in unreasonable practices and further denies that it assessed unreasonable tariff charges. The Plaintiff submits that the district court is the proper forum because the doctrine of primary jurisdiction does not apply since Martin has not raised any defense that falls within the primary jurisdiction of the ICC. Alternatively, the Plaintiff submits that even if the Defendant has raised a defense subject to the jurisdiction of the ICC, none of these questions present issues of national importance, issues requiring uniformity for railroad operations nationwide, nor issues requiring either the specialized knowledge or particular expertise of the ICC.

This Court does recognize the defenses raised in the Defendant's First Amended Original Answer and its Original Counterclaim as defenses that fall within the jurisdiction of the ICC. Therefore, the determining factor is whether the issues are of such a nature that require the ICC's expertise. Where the reasonableness of a tariff rate is at issue, as it is here, the primary jurisdiction doctrine compels that "there *must* be preliminary resort to the Commission." *Southern Pacific Transport Co. v. City of San Antonio, Texas*, 748 F.2d 266, 272 (5th Cir. 1984) (emphasis added) *quoting Great Northern Ry. v. Merchants Elevator*, 259 U.S. 285, 291, 42 S.Ct. 477, 479, 66 L.Ed. 943 (1922).

"Clearly, the primary jurisdiction doctrine mandates that the defense of unreasonableness initially be committed, according to the usual procedures under 28 U.S.C. § 1336(b), to the ICC for its review and decision. Upon return of the referred issues from the ICC, the district court should then accord appropriate review." *Advance United*

Expressways v. Eastman Kodak, 965 F.2d 1347, 1353 (5th Cir. 1992).¹

In this case, the Defendant has raised the issue of reasonableness of the applicable tariff. Since this Court has found that the issue is within the primary jurisdiction of the ICC, the issue must be referred to the Commission.

It is therefore

ORDERED that the *Motion of Defendant and Cross-Plaintiff Suggesting Referral to the Surface Transportation Board* (Docket No. 19) is hereby **GRANTED**.

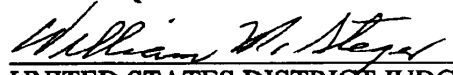
It is further

ORDERED that the instant case is **REFERRED** to the Interstate Commerce Commission's Surface Transportation Board.

It is further

ORDERED that the proceedings of the instant case are **STAYED** until an order is issued from the Surface Transportation Board.

SIGNED this 5th day of May, 2003.

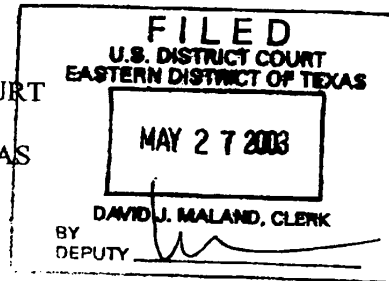

UNITED STATES DISTRICT JUDGE

¹ When a district court ... refers a question or issue to the Surface Transportation Board for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Surface Transportation Board arising out of such referral. 28 U.S.C. § 1336(b).

EOD MAY 27 '03

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION



UNION PACIFIC RAILROAD
COMPANY

Plaintiff,

v.

MARTIN GAS SALES, INC.

Defendant.

§
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§
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§

6:02cv180

ORDER

After careful consideration the Court issues the following order *sua sponte*.

On May 6, 2003, the Court entered its Order referring the instant case to the Surface Transportation Board ("STB") and staying all further proceedings in the case until an order is issued by the STB. The parties have expressed a lack of understanding as to which issue or issues were transferred to the STB as well as when the parties must file a petition with the STB. The Court issues this Order in response to those concerns.

The Defendant alleges that the Plaintiff assessed an unreasonable tariff charge in violation of 49 U.S.C. §§ 10701, 10702(1), and 10704(a)(1). The Defendant further alleges that when the Plaintiff attempted to assess and collect the demurrage charges, the Plaintiff engaged in an unreasonable practice in violation of 49 U.S.C. §§ 10702(2) and 10704(a)(1). The Court has already determined that the Defendant's defenses fall within the primary jurisdiction of the STB and that the STB's expertise is required. As stated in the Court's previous Order, "clearly, the primary jurisdiction doctrine mandates that the defense of

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EXHIBIT " 5 "

unreasonableness initially be committed, according to the usual procedures under 28 U.S.C. § 1336(b), to the ICC for its review and decision. Upon return of the referred issues from the ICC, the district court should then accord appropriate review." *Advance United Expressways v. Eastman Kodak*, 965 F.2d 1347, 1353 (5th Cir. 1992). The Defendant has alleged two types of unreasonableness - (1) unreasonable tariff charges, and (2) an unreasonable practice by the Plaintiff in attempting to collect the demurrage charges. Both types of unreasonableness must be referred to the STB.

It is therefore

ORDERED that both the issue of unreasonable tariff charges by the Plaintiff and the issue of Plaintiff engaging in an unreasonable practice are referred to the Surface Transportation Board.

It is further

ORDERED that the Defendant file a petition with the Surface Transportation Board for determination of these issues on or before **July 7, 2003**.

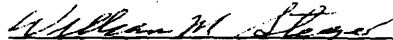
It is further

ORDERED that the Court shall retain jurisdiction, and the case be restored to the trial docket when the action is in a status so that it may proceed to final disposition.

It is further

ORDERED that this case is **ADMINISTRATIVELY CLOSED**.

SIGNED this 27 day of May, 2003.


UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNION PACIFIC RAILROAD COMPANY, §
Plaintiff, §

vs. §

Case No. 6:02-CV-00180

MARTIN GAS SALES, INC., §
Defendant. §

DEFENDANT'S MOTION TO COMPEL

TO THE HONORABLE JUDGE OF SAID COURT:

Pursuant to Rule 37 (a)(2)(A), Fed. R. Civ. P. 37(a)(2)(A) and Local Court Rule CV-26, Martin Gas Sales, Inc., hereinafter "Martin" or "Defendant", submits its Motion to Compel, and in support thereof respectfully shows:

1. Union Pacific Railroad Company, hereinafter "UPRR" or "Plaintiff", seeks recovery of asserted demurrage charges from Defendant.

2. Defendant's First Amended Original Answer asserts defensive matters, the existence of which have been known to Plaintiff since their occurrence, and more specifically provided to Plaintiff by Defendant's witnesses during their depositions and supplemented by Defendant's computer spreadsheet provided Plaintiff shortly following depositions.

3. On July 25, 2002, Plaintiff filed its initial disclosures. No further disclosures have been filed by Plaintiff.

4. By letter dated January 31, 2003, counsel for Defendant requested Plaintiff to supplement its disclosures, and identified specific items that were to be included in

EXHIBIT " 6 "

Plaintiff's supplemented disclosure. A copy of the January 31, 2003 letter is attached as Exhibit 1.

5. On March 3, 2003 counsel for Defendant contacted counsel for Plaintiff to determine if supplemental disclosure had been filed. Plaintiff's counsel advised that it had not yet determined that it would supplement its disclosure, that Plaintiff felt some requested information was not relevant and that it was still investigating whether or not the remaining information was, in its opinion, relevant.

6. Rule 26(e), Fed. R. Civ. P. 26(e), requires a party to supplement its disclosure once a party learns its initial disclosure is incomplete or incorrect, and the additional information has not otherwise been made available or known to the other party during discovery.

7. Local Court Rule CV-26, and in particular subsection (d), provides guidance as to the nature of information that is required to be disclosed.

8. As particularly specified in the attached Exhibit 1, Defendant requested Plaintiff to disclose information relating to:

- (a) the rail transportation contract that governs the movement of the railcars on which demurrage is asserted;
- (b) rail car records showing the movement of all rail cars from origin to destination on which demurrage is asserted;
- (c) all derailments on Plaintiff's tracks from point of constructive placement to destination during the period Plaintiff seeks demurrage; and
- (d) all information relating to Plaintiff's inability to operate trans from point of constructive placement to destination during the period Plaintiff seeks demurrage.

9. The information Defendant requested to disclose clearly includes information:

- (a) that would not support Plaintiff's contentions;
- (b) that is likely to have an influence on or affect the outcome of Plaintiff's claim;
- (c) that deserves to be considered by Defendant in the preparation, evaluation or trial of its defense; and
- (d) that reasonable and competent counsel would consider reasonably necessary to prepare, evaluate or try a claim or defense.

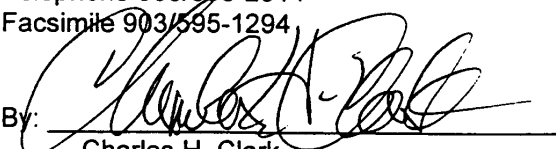
10. Plaintiff's refusal to disclose information required by Rule 26(a), is a proper basis for a motion to compel and for sanctions. *See, Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.2d 1221, 1229 (10th Cir. 1999).

Based on the foregoing, Defendant respectfully requests that the Court set this motion for hearing and, after hearing, enter an order:

- (a) compelling Plaintiff to disclose all information requested by Defendant;
- (b) sanctioning Plaintiff for its failure to disclose; and
- (c) awarding Defendant its reasonable attorney fees and costs incurred in filing this motion.

Respectfully submitted,

CLARK, LEA & AINSWORTH
P. O. Box 98
Tyler, TX 75710
Telephone 903/593-2514
Facsimile 903/595-1294

By: 

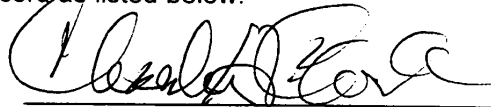
Charles H. Clark
State Bar No. 04274000

Paul D. Angenend
State Bar No. 01260000
ANGENEND & AUGUSTINE, P.C.
7800 N. Mopac, Suite 210
P. O. Box 29717
Austin, TX 78755-6717
Telephone 512/794-8989
Facsimile 512/794-9898

Attorneys for Defendant and Counter-Plaintiff

CERTIFICATE OF SERVICE

I hereby certify this 4th day of March 2003 that a copy of the foregoing Defendant's Motion to Compel has been served via Certified Mail, Return Receipt Requested, on Plaintiff's attorney of record as listed below.



Charles H. Clark

Charles E. Lauffer, Jr.
Ritcheson, Dollahite & Lauffer
3301 Golden Road
Suite 400
Tyler, TX 75701
Telephone 903/535-2900
Facsimile 903/533-8646

In Association with:

Janssen & Keenan
One Commerce Square
Suite 2050
2005 Market Street
Philadelphia, PA 19103

ANGENEND & AUGUSTINE A PROFESSIONAL CORPORATION

Paul D. Angenend

ATTORNEYS AND COUNSELORS AT LAW
7800 N. Mopac, Suite 210 Austin, Texas 78759
P.O. Box 29717 Austin, Texas 78755-6717
(512)794-8989 Facsimile (512)794-9898

January 31, 2003

Jonathan F. Ball
Janssen & Keenan, P.C.
One Commerce Square
2005 Market Street, Ste. 2050
Philadelphia, PA 19103

Re: Case No. 6:02-CF-00180; *Union Pacific Railroad Company v. Martin Gas Sales, Inc.*, in the United States District Court, Eastern District of Texas, Tyler Division

Dear Jon:

As you will recall, on January 8, 2003, I contacted you to request a copy of the rail contract between Union Pacific and Fina/Alon USA. I also asked if it would be necessary for me to make a formal discovery request or if this could be done informally. At that time, you indicated that I did not need to make a formal request, that you preferred that this be handled informally and you would contact your client concerning production of the document(s).

On January 28, 2003, I again called and asked if the contract was forthcoming. You indicated that you would again contact your client and stated that you would advise me no later than January 30, 2003 whether the contract would be produced. As of this date, I have not heard from you. Accordingly, I must assume that it will be necessary that a formal request be made to produce the contract.

Pursuant to Rule 26(e) of the Federal Rules of Civil Procedure and Local Rule CV-26 of the U.S. District Court for the Eastern District of Texas, there is a continuing duty to disclose by either supplementing or correcting previously provided disclosure. Plaintiff's Initial Disclosure does not provide any documents or other data relating to the movement of rail cars from origin to destination. Plaintiff's disclosure also does not contain documents or other data relating to derailments or other conditions precluding Plaintiff from delivering rail cars from point of constructive placement to Defendant. Accordingly, in addition to the contract between Fina and Plaintiff, Defendant also requests disclosure of the following items:



Jonathan F. Ball
January 31, 2003
Page 2 of 2

1. Car records showing the movement of all rail cars from origin (Big Spring, TX) to destination (Chaison, TX) during the period Plaintiff seeks recovery of demurrage charges from Defendant.

2. All documents relating to derailments on Plaintiff's tracks from point of constructive placement to destination during the period Plaintiff seeks recovery of demurrage charges from Defendant.

3. All documents relating to the inability of Plaintiff to operate trains from point of constructive placement to destination during the period Plaintiff seeks recovery of demurrage charges from Defendant.

If you have any questions, please do not hesitate to contact me.

Sincerely yours,



Paul D. Angenend

PDA/mdm

c: Charles H. Clark