

#150.00

BWK

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

AT&T COMMUNICATIONS, INC.,
900 Route 202/206 North
Bedminster, NJ 07921

Plaintiff,

v.

CONSOLIDATED RAIL CORPORATION,
Serve: Corporation Service Company
2704 Commerce Drive
Harrisburg, PA 17110

Defendant.

FILED

MICHAEL E. KUNZ, Clerk
By TU Dep. Clerk

Civil Action No. 03-00147
JURY TRIAL DEMANDED

COMPLAINT

Plaintiff AT&T Communications, Inc. ("AT&T"), for its complaint for damages, declaratory judgment, an accounting and other relief against Defendant Consolidated Rail Corporation ("Conrail"), states as follows:

NATURE OF ACTION

1. AT&T brings this action to enforce Conrail's contractual obligation to comply with the "most favored nation" covenant (the "MFN Covenant") in a license agreement between AT&T and Conrail dated January 1, 1984 (the "License Agreement") relating to AT&T's use of Conrail's right of way for a fiber optic cable ("FOC") system.

2. AT&T has paid Conrail over \$200 million in license fees in connection with the License Agreement and currently is paying Conrail more than \$17 million per year in license fees.

8

3. The MFN Covenant requires that if a third party is given the right to use any right of way between any two points on or parallel to the AT&T Licensed Premises for installation of a FOC system, either (i) the third party shall be charged a per mile fee at least equal to the average per mile fee paid by AT&T, or (ii) AT&T's per mile fee shall be reduced to the average per mile fee charged to the third party. Conrail has breached this obligation to AT&T's detriment by entering into agreements with third parties that charge a per mile fee that is effectively less than the average per mile fee paid by AT&T without reducing AT&T's average per mile fee to the amount charged the third party licensees.

4. Conrail also has breached the MFN Covenant, and repudiated the License Agreement, by transferring to its wholly-owned subsidiaries its interests in some or all of the right of way that is subject to AT&T's license and then disclaiming any further obligation to AT&T with respect to the transferred right of way and disabling itself of the ability to perform its obligations under the MFN Covenant.

5. AT&T seeks monetary damages for Conrail's breaches of the MFN Covenant and, at AT&T's election, the right to terminate the License Agreement without further obligation to Conrail. AT&T also seeks a judgment declaring that (i) the MFN Covenant is applicable to agreements permitting third parties to use FOC on the right of way that is subject to the License Agreement, even if Conrail is not a party to the agreements, and (ii) that Conrail is liable to AT&T to the extent such agreements charge the licensees an average per mile fee that is less than the average per mile fee paid by AT&T for the same right of way. AT&T also seeks a judgment declaring that, by virtue of Conrail's breaches and repudiation, AT&T, at its election, (i) is discharged from any further obligation under the License Agreement, or alternatively (ii) is entitled to a reduction of its future license fees by the amount that those fees exceed the average per mile fee charged to any other

licensee for the right to use the same right of way covered by the MFN Covenant. Finally, AT&T seeks a judgment declaring that, in the event AT&T elects to reduce its future license fees (rather than terminating the License Agreement), Conrail is required to disclose to AT&T all future agreements allowing the installation of FOC on the right of way covered by the MFN Covenant and to submit to an accounting of the average per mile fees paid by each licensee under each agreement that it is required to disclose.

PARTIES

6. AT&T is a corporation organized and existing under the laws of Delaware, with its principal place of business at Bedminster, New Jersey. AT&T owns and operates telecommunications equipment and provides telecommunications and related services throughout the United States.

7. Defendant Conrail is a corporation organized and existing under the laws of Pennsylvania with its principal place of business at Philadelphia, Pennsylvania. Conrail owns and operates railroads and railroad properties.

JURISDICTION AND VENUE

8. This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1332(a)(1) because the matter in controversy exceeds the sum of \$75,000, exclusive of interest and costs, and the parties are citizens of different states.

9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because Conrail is a resident of Philadelphia, Pennsylvania and a substantial part of the events giving rise to this complaint occurred in Philadelphia.

MATERIAL BACKGROUND FACTS

A. The License Agreement

10. In the 1980s, to improve its telecommunications services offered to the public, AT&T began creating a network of fiber optic telecommunications cable throughout the United States.

11. In 1984, AT&T and Conrail entered into a License Agreement which permitted AT&T to install a FOC system on selected portions of Conrail's railroad right of way. This License Agreement was the first agreement that AT&T entered into with any railroad in connection with the development of AT&T's new fiber optic network.

12. Upon information and belief, the License Agreement was also the first agreement that Conrail entered into with any major telecommunications company relating to the development of a new fiber optic network.

13. The License Agreement permitted AT&T to use specified right of way (initially, approximately 750 miles between Harrisburg, Pennsylvania and Chicago, Illinois) owned or controlled by Conrail for the purpose of constructing, installing, maintaining, operating and repairing a FOC system.

14. The License Agreement also granted AT&T the option to license up to 2,250 miles of additional Conrail right of way for its FOC system.

15. The License Agreement required AT&T to pay Conrail a monthly per mile fee for the original right of way it licensed for its FOC system. Those fees are periodically adjusted for changes in the Consumer Price Index ("CPI"), with a stated minimum increase of no less than twelve percent (12%) over various three-year time periods. The License Agreement also sets forth a per mile fee structure for the additional right of way that AT&T licensed, with attendant CPI increases.

16. The License Agreement expressly limits AT&T's FOC system to a single fiber optic cable containing not more than 24 fibers, along with the associated electronics. AT&T was given the right to install cable consisting of 36 fibers provided that the additional fibers did not create "fiber miles in excess of the product of 10% of the right of way comprising the Licensed Premises, multiplied by 12." (The term "Licensed Premises" as used in the License Agreement covers all of the right of way licensed by AT&T.)

17. AT&T subsequently licensed additional miles and has installed a total of approximately 2,700 miles of fiber optic cable on Conrail's right of way. AT&T continues to operate its FOC system on this right of way.

18. The original term of the License Agreement, which commenced on January 1, 1984, was for 15 years ending on January 1, 1999. The License Agreement gave AT&T the option of extending the License Agreement for two additional 15-year terms. AT&T exercised the first of those options and the License Agreement is now effective until January 1, 2014.

19. AT&T has paid Conrail over \$200 million in license fees in connection with the License Agreement. AT&T is currently paying Conrail more than \$17 million per year in license fees and, unless the License Agreement is terminated, AT&T will continue to pay Conrail license fees through January 1, 2014.

20. In 1986, when AT&T wanted to install FOC containing more than 24 fibers, such that the additional fibers created "fiber miles in excess of the product of 10% of the right of way comprising the Licensed Premises, multiplied by 12," Conrail advised AT&T that the additional fibers would result in "the creation of a theoretical segment, for pricing purposes of 17.3 miles." Conrail required that AT&T pay license fees for these additional 17.3 miles at the highest per mile in service rate required in the License

Agreement. AT&T has been paying Conrail the highest in service license fee rate in effect on these miles since January 1986.

B. The MFN Covenant

21. Because the License Agreement was Conrail's first agreement for the use of its right of way by a major telecommunications firm for the installation of a FOC system, and it was expected that Conrail would enter into similar agreements with other firms for the right to use its right of way, AT&T bargained for a "most favored nation" obligation. Paragraph 11.2 of the License Agreement contains the MFN Covenant in which Conrail agreed that, in the event agreements were entered with third parties providing for the use of any right of way between any two points on or parallel to the AT&T Licensed Premises, the third parties would be charged a per mile fee that was at least equal to the average per mile fee paid by AT&T, or AT&T's average per mile fee would be reduced to the average per mile fee paid by the third party. Specifically, the MFN Covenant states:

CONRAIL covenants and agrees that, in the event it enters into any agreement with a party other than [AT&T] providing for the use by such party of right of way owned or controlled by CONRAIL for the installation of a FOC system between any two points on the Licensed Premises, whether such system is to be installed on the Licensed Premises or parallel to the Licensed Premises, CONRAIL will, at its option, either (i) charge such other party a per mile fee at least equal to the average per mile fee (including adjustments thereto referred to in Paragraphs 3 and 4 hereof), between such two points which [AT&T] is obligated to pay CONRAIL pursuant to this License, or, in the alternative, (ii) reduce its average per mile fee between such two points to [AT&T] to the average per mile fee charged to such other party.

22. The purpose of the MFN Covenant was to protect AT&T against a possible competitive disadvantage in the event that the MFN ROW was licensed to others. (As used in this Complaint, the term "MFN ROW" will refer to the right of way that is covered by

the MFN Covenant, specifically, any right of way that is between any two points on the AT&T Licensed Premises, whether on or parallel to the Licensed Premises.)

23. The MFN Covenant gives AT&T “most favored” status on the MFN ROW for the full term of the License Agreement.

C. Conrail’s Breaches of the MFN Covenant

24. Since the inception of the License Agreement in 1984, Conrail and its successors have entered into numerous license agreements with third parties for the installation by those parties of FOC systems on Conrail right of way. Some of those license agreements cover the MFN ROW. In connection with those agreements that cover the MFN ROW, Conrail has a duty to AT&T under the MFN Covenant to ensure that those licensees are charged a per mile fee that is at least equal to the average per mile fee AT&T pays Conrail in connection with that right of way, or to reduce AT&T’s average per mile fee so that it does not exceed the average per mile fee paid by any of those licensees.

25. Conrail has entered into a number of license agreements providing for the use of the MFN ROW in which it charges licensees an average per mile license fee that is less than the average per mile fee paid by AT&T.

26. Conrail has failed or refused to reduce the fees AT&T pays under the License Agreement so that AT&T’s fees do not exceed the average per mile fee paid by those licensees. As a result, AT&T has paid, and is paying, Conrail license fees that are greater than the average per mile fees paid by other licensees for the right to use the MFN ROW.

27. In 1999, as part of a corporate reorganization, Conrail formed two wholly-owned subsidiaries, New York Central Lines LLC (“NYC”) and Pennsylvania Lines LLC.

Upon information and belief, Conrail has conveyed to NYC and Pennsylvania Lines all, or a substantial portion, of the right of way that is subject to the AT&T License Agreement.

28. AT&T has paid and continues to pay Conrail monthly license fees under the License Agreement for the right to use the right of way property that Conrail transferred to its wholly owned subsidiaries, NYC and Pennsylvania Lines.

29. In consideration for large annual payments based upon the value of the transferred property, NYC and Pennsylvania Lines have entered into operating agreements with third-party operating companies and assigned the right of way for the use and enjoyment of those operating companies. The operating agreements require those operating companies to obtain the written consent of NYC or Pennsylvania Lines in connection with any agreement granting a third party the right to use the assigned property, including the right of way subject to the AT&T License Agreement.

30. Upon information and belief, in its property conveyances to NYC and Pennsylvania Lines, Conrail specifically recognized that the conveyances are subject to the License Agreement.

31. Paragraph 16.5 of the License Agreement provides that the obligations under the License Agreement are binding on Conrail and its successors and assigns.

32. Upon information and belief, one or more of the third-party operating companies has entered into one or more agreements with a third party pursuant to which the third party is permitted to use the MFN ROW.

33. Conrail has asserted to AT&T that it has no control over the transferred right of way and the third-party operating companies and it does not have any authority over the terms of their license agreements.

34. AT&T has requested that Conrail provide AT&T with information about the agreements that the third-party operating companies have made with third parties pursuant to which the third parties are permitted to use the MFN ROW. AT&T made this request to allow it to determine whether these agreements also implicate the MFN Covenant. Conrail has refused to produce any information, claiming that it has no liability to AT&T for any license agreement entered into by any of the third-party operating companies and approved by one of its wholly-owned subsidiaries, NYC or Pennsylvania Lines, even if such agreements license some of the MFN ROW and even if such agreements charge the third party a per mile fee that is effectively less than the average per mile fee AT&T is charged.

COUNT I

BREACH OF CONTRACT

35. AT&T adopts and incorporates by reference as though fully set forth herein the allegations of paragraphs 1 through 34 as stated above.

36. The License Agreement constitutes a valid and binding contract under which Conrail has a continuing duty to charge AT&T an average per mile fee for its licensed right of way that is no greater than average per mile fee charged to any third party for the right to use the MFN ROW.

37. AT&T has at all times performed, and continues to perform, its obligations under the License Agreement.

38. In addition to its express duties under the MFN Covenant, Conrail has an obligation, implied by law into the License Agreement, to refrain from taking any actions that have the effect of destroying or injuring AT&T's right to receive the bargained-for

fruits of the License Agreement, including its “most favored” status under the MFN Covenant.

39. Conrail has breached its express and implied duties under the License Agreement by:

a. entering into agreements with third parties allowing the use of the MFN ROW, and charging those third parties an effective per mile license fee that is lower than the average per mile fee paid by AT&T under the License Agreement;

b. failing to disclose to AT&T that it had entered into agreements providing for the use of the MFN ROW in which it charged others an effective per mile license fee that is lower than the average per mile fee paid by AT&T under the License Agreement;

c. transferring portions of the MFN ROW to its wholly-owned subsidiaries (NYC and Pennsylvania Lines) and then disclaiming any responsibility for subsequent agreements providing for the use of the MFN ROW that may violate the MFN Covenant;

d. transferring portions of the MFN ROW to its wholly-owned subsidiaries (NYC and Pennsylvania Lines) and then divesting itself of the ability to perform its obligations under the MFN Covenant; and

e. refusing to disclose to AT&T whether agreements providing for the use of the MFN ROW (that were made after Conrail transferred the MFN ROW to its wholly-owned subsidiaries) charge third parties an effective per mile license fee that is lower than the average per mile fee paid by AT&T under the License Agreement.

40. As a result of Conrail’s breaches of the License Agreement identified in Paragraphs 39(a) and (b) above, AT&T has suffered monetary damages in an as yet

unknown amount. AT&T continues and will continue to suffer harm throughout the remaining term of the License Agreement to the extent that the monthly fees it pays Conrail exceed the average per mile fees paid for the use of the MFN ROW by any other licensee.

41. Conrail's breaches of the License Agreement identified in Paragraphs 39(c) and (d) above constitute a repudiation of the License Agreement. As a result of Conrail's repudiation, AT&T is discharged from any further obligation to render performance under the License Agreement.

42. As a result of Conrail's breaches of the License Agreement identified in Paragraphs 39(c), (d) and (e) above, AT&T may have been damaged and may continue to suffer damages to the extent that one or more of the third-party operating companies may have entered into one or more agreements providing for the use of the MFN ROW in return for an average per mile license fee that is less than the average per mile fee paid by AT&T for the MFN ROW. AT&T is entitled to an accounting of the terms of the contracts involving the MFN ROW and the fees charged and paid under all such contracts in order to determine the full extent of its damages.

WHEREFORE, AT&T prays that the Court enter judgment for AT&T and against Conrail:

A. Awarding AT&T compensatory damages for Conrail's past breaches of the MFN Covenant in an amount to be proved at trial, including damages for any breaches that are identified from the accounting that is sought in Paragraph B(2)(b) below;

B. Declaring either

(1) that AT&T is discharged from any further performance of its duties and obligations under the License Agreement, or, alternatively, at AT&T's election,

(2) that (a) the amount of AT&T's monthly license fees owed Conrail on an ongoing basis through the current term of the License Agreement be reduced by the amounts that AT&T's average per mile fees exceed the average per mile fees charged to any third party for the right to use the MFN ROW; (b) Conrail must submit to an annual accounting of the terms of its contracts providing for the use of the MFN ROW and the fees charged and paid under all such contracts, (c) Conrail must disclose and provide to AT&T any future agreements in its possession, custody or control providing for the use of some of the MFN ROW, including, but not limited to, agreements entered into between third-party operating companies and others with the consent of Conrail's subsidiaries; and (d) Conrail must submit to an annual accounting of the average per mile fees charged to and paid by each of the licensees under all agreements that it is ordered to disclose pursuant to subparagraph (c) above; and

C. Granting such other and further relief as the Court deems just and proper.

COUNT II

DECLARATORY JUDGMENT UNDER 28 U.S.C. § 2201

43. AT&T adopts and incorporates by reference as though fully set forth herein the allegations of paragraphs 1 through 42 as stated above.

44. An actual controversy exists between AT&T and Conrail as to whether the MFN Covenant is applicable to, and Conrail has liability to AT&T for, agreements entered

into by the third-party operating companies that allow the use of some or all of the MFN ROW, if under such agreements the right of way user is charged an average per mile fee that is effectively less than the average per mile fee AT&T is charged under the License Agreement for the same right of way.

45. AT&T is entitled to a declaratory judgment against Conrail declaring that the MFN Covenant is applicable to any agreements providing for the use of the MFN ROW for a FOC system, even if Conrail is not a party to the agreements.

46. AT&T is entitled to a declaratory judgment against Conrail declaring that Conrail has repudiated the License Agreement as a result of Conrail's disabling itself of the ability to perform its obligations under the MFN Covenant, thereby discharging AT&T's remaining duties to render performance and permitting AT&T to elect to terminate the License Agreement.

47. In the alternative, AT&T is entitled to a declaratory judgment against Conrail declaring that

a. where any license agreement provides for the use of the MFN ROW for a FOC system in return for an average per mile license fee that is less than the average per mile fee paid by AT&T for the MFN ROW Conrail must reduce AT&T's average per mile fee to the amount charged the third party licensee;

b. Conrail is required to disclose and provide to AT&T for the remaining term of the License Agreement any future agreements in its possession, custody or control that provide for the use of the MFN ROW for a FOC system, even if Conrail is not a party to the agreements; and

c. Conrail must submit to an annual accounting of the average per mile fees charged to and paid by each of the licensees under all agreements that it is ordered to disclose.

WHEREFORE, AT&T prays that the Court enter judgment for AT&T and against Conrail:

A. Declaring that the MFN Covenant is applicable to any agreements providing for the use of the MFN ROW for a FOC system, even if Conrail is not a party to the agreement;

B. Declaring that Conrail has repudiated the License Agreement as a result of Conrail's disabling itself of the ability to perform its obligations under the MFN Covenant, thereby discharging AT&T's remaining duties to render performance and permitting AT&T to elect to terminate the License Agreement;

C. Alternatively, declaring that

(1) under the terms of the License Agreement, any license agreement that provides for the use of the MFN ROW for a FOC system in return for an average per mile license fee that is less than the average per mile fee paid by AT&T for the MFN ROW requires a reduction of AT&T's average per mile fee to the amount charged the third party licensee;

(2) under the terms of the License Agreement, Conrail must disclose and provide to AT&T for the remaining term of the License Agreement any agreements in its possession, custody or control that provide for the use of the MFN ROW for a FOC system, even if Conrail is not a party to the agreement; and

(3) Conrail must submit to an annual accounting of the average per mile fees charged to and paid by each of the licensees under all agreements that it is ordered to disclose pursuant to subparagraph (2) above; and

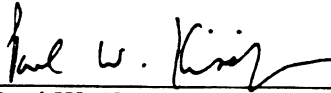
D. Granting such other and further relief that the Court deems just and proper.

JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38(b), AT&T hereby demands a trial by jury.

Dated: January 10, 2003

Respectfully Submitted,

By 

Paul W. Kisslinger (Pa. I.D. No. 68668)
Robert J. Higgins
Howard N. Feldman
Laura H. Calaluca
DICKSTEIN SHAPIRO MORIN &
OSHINSKY LLP
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 785-9700

Of Counsel:

B. Haven Walling, Jr.
AT&T CORPORATE CENTER
2022 Chain Bridge Road, Room 3-D
Oakton, VA 22185

Lois Lipton
AT&T LAW DIVISION
222 W. Adams Street, Suite 1500
Chicago, IL 60606

Attorneys for Plaintiff AT&T Communications, Inc.