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UNITED STATES OF AMERICA

BEFORE THE SURFACE TRANSPORTATION BOARD

STB DOCKET NO. NOR 42094

PCI TRANSPORTATION, INC.

Complainant,

v.

FORT WORTH & WESTERN RAIL COMPANY

Respondent.



BRIEF OF FORT WORTH & WESTERN RAIL COMPANY
IN SUPPORT OF MOTION TO DISMISS OR, IN THE
ALTERNATIVE, TO HOLD THE MATTER IN ABEYANCE

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BRIEF OF FORT WORTH & WESTERN RAIL COMPANY
IN SUPPORT OF MOTION TO DISMISS OR, IN THE
ALTERNATIVE, TO HOLD THE MATTER IN ABEYANCE

FWWR submits this Brief in support of its motion to dismiss PCI's complaint on the grounds that it fails to state claims cognizable by the Board upon which relief can be granted under the Interstate Commerce Act (ICA) as amended by the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. §§10101 *et seq.*, or alternatively, to hold the matter in abeyance pending further action, that may include referral of questions, by the United States District Court for the Northern District of Texas, Fort Worth Division, in Civil Action No. 4:04-cv-211 Y, reopened August 22, 2005 following Decision, Judgment and Mandate of the United States Court of Appeals for the 5th Circuit entered July 26, 2005 in Case No. 04-10965, involving the parties named and issues raised in the Complaint now before the Board.

I

SUMMARY OF RELEVANT FACTS AND PROCEEDINGS

A. Parties.

FWWR, a Texas corporation with principle offices in Fort Worth, TX, is a Class III short line carrier providing interstate rail transportation to the public in the Fort Worth, TX area.

PCI, a Texas company with principle offices in Fort Worth, TX, is a member of the public to whom FWWR has provided rail transportation services in the Fort Worth, TX area.

B. Dispute between the Parties.

Sometime during 2001 a dispute arose between the parties regarding switching services and demurrage charges, as well as the purported agreements between the parties dating back to 1998 concerning those services and charges.

Unable to resolve the dispute, PCI filed action in the 141st District Court of Tarrant County, Texas, on March 5, 2004.

C. Proceedings in Texas State Court.

Following the filing of PCI's complaint and request for injunctive relief, the state court issued a Temporary Restraining Order (TRO) and set PCI's application for a temporary injunction for hearing on March 22, 2004.

On March 19, 2004, FWWR removed the matter to the United States District Court for the Northern District of Texas, Fort Worth Division, there assigned Civil Action No. 4:04cv211 Y

D. Proceedings in Federal Forums.

1. US District Court (Civil Action No. 4:04-cv-211 Y).

On March 19, 2005, accompanying its Notice of Removal, FWWR filed its initial Answer to PCI's complaint, and later, its First Amended Answer and Counterclaim in the District Court.

On March 23, 2004, PCI filed an emergency motion for remand. FWWR responded in opposition. The District Court denied PCI's motion on April 8, 2005

On April 29, 2004, PCI filed a motion for preliminary injunction. FWWR filed opposition. The District Court denied PCI's motion on July 6, 2004.

On August 4, 2004 PCI filed an Interlocutory Notice of Appeal over the District Court's denial of PCI's motions to remand and for injunctive relief. That same date, the District Court entered its order rendering moot reconsideration of those denials requested by PCI.

On August 30, 2004 PCI filed a motion for stay pending appeal. The same day, FWWR filed a motion for partial summary judgment and motion to dismiss claims for injunctive relief. FWWR's motions remain pending.

On November 4, 2004 the District Court granted PCI's motion for stay until the 5th Circuit issues mandate and administratively closed the civil action proceedings.

2. US Court of Appeals – 5th Circuit (Case No. 04-10965).

On October 8th and 19th the USCA denied PCI's motion for stay pending appeal.

Following appellate mediation efforts and briefing, on July 26, 2005, the USCA issued its Decision affirming the District Court's denial of remand and injunctive relief, and its Judgment and Mandate thereon.

3. US District Court (Civil Action No. 4:04-cv-211 Y)(cont'd).

On August 18, 2005, PCI filed notice of filing its complaint with the STB on August 8, and also filed a motion to dismiss or stay the civil action pending STB action.

On August 19, 2005, the USCA's Opinion, Judgment and Mandate were filed in the District Court.

On August 22, 2005, the District Court reopened the civil action and ordered FWWR to respond to PCI's August 18 Motion to Dismiss on or before September 7, 2005.

The Declaration of Counsel supporting this motion includes the docket history of proceedings in civil action no. 4:04cv211 Y (Exhibit A) and Order Reopening Case (Exhibit B).

4. US Surface Transportation Board (STB).

On August 8, 2005, PCI filed complaint against FWR.

On August 29, 2005, FWR filed stipulated motion for extension of time until September 9, 2005 to respond, which motion was granted by the Board on August 29, 2005.

Accordingly, FWR files its responsive motion to dismiss, or alternatively, to stay.

II

ARGUMENT/DISCUSSION

FWR argues that PCI's complaint should be dismissed because, on its face, the complaint fails to state claims cognizable by this Board upon which relief can be granted under provisions of ICA, as amended. In the alternative, FWR argues the matter should be held in abeyance pending further action, that may include referral of questions, by the U.S. District Court for the Northern District of Texas, Fort Worth Division in case no 4:04-cv-211 Y entitled *PCI Transportation, Inc. v. Fort Worth & Western Railroad Company*, reopened August 22, 2005 following decision the U.S. Court of Appeals for the 5th Circuit affirming the District Court's denial of PCI's motions for remand and for injunctive relief on July 26, 2005.

A. Dismissal for Failure to Allege Claims Cognizable by the Board Under the ICA.

At its core, FWWR's contention that PCI's complaint should be dismissed for failure to state claims cognizable by the Board upon which relief can be granted under the ICA as amended, raises the threshold question of subject matter jurisdiction.

1. Subject Matter Jurisdiction.

a. Statutory Framework.

The Board's subject matter jurisdiction under the ICA, as amended, is set out in Section 10501, augmented by the statutory definitions in Section 10102. That jurisdiction is restricted by the contract-related provisions in Section 10709 and the statutory exclusions in Section 10906. See 49 U.S.C. §§10102, 10501, 10709, and 10906. Administrative exemptions authorized under Section 10502 remain subject to Board jurisdiction.

The Board may exercise jurisdiction over rail transportation services either as a matter of "exclusive" or "primary" jurisdiction: "exclusive" jurisdiction arises from the express Congressional grant in the statutory language of Section 10501(b); and "primary" jurisdiction flows from judicial recognition of Board expertise and the need for uniformity in Federal regulation over interstate rail transportation under the ICA. The former gives rise to "complete" Federal pre-emption and original Federal subject matter jurisdiction. The latter gives rise to "ordinary" pre-emption.

Emphasizing deregulation of rail transportation in passage of the ICCTA, Congress continued both the authorization of market-based, commercial contracts between rail carriers and customers for transportation services and the limitation that

contracted-for rail services were removed from coverage of the Act, and consequently, Board jurisdiction. See Section 10709; cf. former Sections 10713(i)(1) and (2).

Authorizing contracts in Section 10709(a) and limiting duties of parties to those “specified by the terms of the contract” in Section 10709(b), Congress in Sections 10709(c)(1) and (2) expressly provided: (1) *“transportation under such contract shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part”* and (2) *“the exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree”*. (Italics added.)

Significantly, and for purposes of this case, Section 10709(f) provides: *“A rail carrier that enters into a contract as authorized by this section remains subject to the common carrier obligation set forth in section 11101, with respect to rail transportation not provided under such a contract”*.

b. Relevant Precedent.

(1) Board Decisions.

As did the ICC under former Section 10713, the Board has repeatedly recognized the limitations on its jurisdiction imposed by Section 10709(c).¹ Consistent with Section

¹ See *H.B. Fuller Co. v. Southern Pacific Transportation Co.*, No. 41510, STB served August 22, 1997 (decided under former Sections 10713(i)(1) and (2) with notation that similar provisions exist in Sections 10709(c)(1) and (2)); *Omaha Public Power District v. Union Pacific Railroad Company*, STB Docket No. 42006, dismissal decision served October 17, 1997, reconsideration denied by decision served November 15, 2000; *Cross Oil Refining & Marketing, Inc. v. Union Pacific Railroad Co.*, STB Finance Docket No. 33582, served October 27, 1998; *South-Tec Development Warehouse, Inc. et al - Petition for Declaratory Order – Illinois Central Railroad Co.*, STB Docket No. 42050, served November 15, 2000; *Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Railway Co.*, STB Docket No. STB Docket No. 42038, served March 6, 2000; and *Parrish & Heimbecker, Inc. – Petition for Declaratory Order*, STB Docket No. 42031,

10709(f), the Board has also made clear that, for purposes of jurisdiction, duties of contract carriage under Section 10709 are distinct and exist separate from obligations of common carriage under Sections 11101 and 10702. Consequently, while the Board may not exercise jurisdiction over contract carriage claims, it may do so over cognizable common carriage and reasonableness claims under the ICA in the rail transportation transaction(s) at issue.²

The Board has also found that, to the extent common carrier service may conflict with contract service, the rights and obligations of common carriage must yield to those contracted-for in transportation transaction(s) at issue.³

(2) Court Decisions.

Notwithstanding the fact that alleged claims for relief in PCI's complaint were based solely on state law, the U.S. District Court in case no. 4:04-cv-211 Y assumed original Federal subject matter jurisdiction over transportation service claims at issue, and denied remand to state court. The District Court's decision rested on doctrine of "complete Federal pre-emption", the judicially recognized exception to the "well-pleaded complaint" rule, as well as the exclusive jurisdiction provisions of the ICA, Section

served May 26, 2000, reconsideration denied by decision served May 24, 2001; cf. *Boston and Maine Corp. et al. v. New England Central Railroad, Inc.*, STB Docket No. 34612, served February 24, 2005.

² See *Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Railway Co.*, STB Docket No. 42038, served March 6, 2000; and *Parrish & Heimbecker, Inc. – Petition for Declaratory Order*, STB Docket No. 42031, served May 26, 2000, reconsideration denied by decision served May 24, 2001.

³ *Parrish & Heimbecker, Inc. – Petition for Declaratory Order*, STB Docket No. 42031, served May 26, 2000, reconsideration denied by decision served May 24, 2001; cf. *R. Franklin Unger, Trustee – Petition for Declaratory Order – Assessment and Collection of Demurrage and Switching Charges*, STB Docket No. 42030, served June 14, 2000 and *South-Tec Development Warehouse, Inc. et al. - Petition for Declaratory Order – Illinois Central Railroad Co.*, STB Docket No. 42050, served November 15, 2000.

10501(b). Exercising jurisdiction the District Court denied PCI's request for injunctive relief.

The 5th Circuit affirmed the District Court's denial of remand as well as the denial of injunctive relief.

Characterizing the PCI/FWR contract as "very limited in scope", the 5th Circuit rejected PCI's overly broad Section 10709 arguments, holding that (1) the STB is not precluded from exercising jurisdiction over claims that may be "even related to" an agreement, and (2) the injunctive relief PCI seeks exceeded contract coverage since "at the very least, a portion of [PCI's] claims are governed by the ICCTA". *Decision*, p. 14.⁴

For purposes of Federal subject matter jurisdiction, the 5th Circuit found that Section 10501 requires the application of the "complete" pre-emption doctrine to claims alleged in PCI's complaint, and concluded that "as the ICCTA provides the exclusive cause of action for PCI's non-contractual relief, we hold that those claims 'only arise'[]under federal law". *Decision*, p. 18.

2. Lack of Subject Matter Jurisdiction Requires Dismissal of Complaint.

As discussed above, both the Board and the 5th Circuit have concluded that the Board may exercise jurisdiction over claims for relief that do not arise from contracted-for duties, i.e. non-contractual claims for relief under the ICA.

In this case, PCI's complaint headings, normally discounted for interpretive purposes, prove to be literally descriptive of the content of the contract claims and state law relief alleged therein. See for example PCI's Complaint, Count I (Breach of

⁴ FWR believes the 5th Circuit's decision contains a clerical error mis-describing "PCI claims" as "FWR claims", to find otherwise would be inconsistent with its holding and the applicable precedent. FWR has brought the matter to the 5th Circuit's attention but subsequent damage in New Orleans by hurricane Katrina will delay any corrective action.

Contract/Attorneys' Fees) p. 7, Count II (Intentional Interference with Existing and Prospective Contractual Relations) p. 8, and Count IV (Violations of Chapter 17 of the Texas Business and Commerce Code) (DTPA) p. 11.

Even the more generally denominated claims in Count III (Application for Injunctive Relief) p. 9, and Count V (Declaratory Judgment) p. 18 are predicated on the same facts supporting contract and relief theories under Texas state law alleged in the other Counts.

FWWR contends a fair reading of PCI's complaint leads to the conclusion it is nothing more than a reiteration of its initial state court complaint alleging causes of action for breach of contract and other relief under Texas state law, and is the same complaint filed in the District Court. See Declaration of Counsel, Exhibit C, Plaintiff's Second Amended Complaint. In its complaint before the Board PCI continues to allege claims for relief based on contract and state law violations. Such claims are not cognizable by the Board under the ICA, and are otherwise pre-empted.

On its face, PCI's complaint is utterly devoid of claims cognizable by the Board under the ICA, as amended by ICCTA. Mere mention of demurrage as a topical issue does state a claim cognizable under the ICA where, as here, the context and predicate for relief remain a contracted-for arrangement and state law. In short, as a matter of law, PCI's complaint before the Board fails for want of subject matter jurisdiction and dismissal is required.

PCI relies on the 5th Circuit decision for its complaint against FWWR before the Board, but in jurisdictional allegations, PCI misconstrues and misstates the 5th Circuit's holdings. PCI alleges that *all* of its claims fall within the exclusive jurisdiction of the

Board. See PCI's Complaint, pp. 1-2. On the contrary, the 5th Circuit held that claims based on state law are completely pre-empted, and that *only some* of PCI's claims are governed by the ICCTA. Thus, *only* non-contractual claims based on ICA, as amended, are cognizable by Board. See *Decision*, pp. 14 and 18.

Thus, PCI may not merely re-allege its prior state law claims but must allege claims in terms cognizable by the Board under the ICA. PCI has failed to do so.

In this case, PCI asserted contract-based claims for relief under state law in a state court of Texas. PCI re-alleged those very same claims upon removal to the US District Court, and does so again before the Board. The allegations are insufficient to invoke the subject matter jurisdiction of the Board and PCI's complaint should be dismissed.

3. Dismissal Without Prejudice Is Appropriate.

At this juncture, FWWR believes the Board should dismiss PCI's complaint without prejudice. By so doing, PCI is not denied the opportunity to amend its complaint to properly invoke, if it can, the jurisdiction of the Board. To date however, PCI has ignored the judicial instruction in decisions of the District Court and the 5th Circuit, ignored applicable Board precedent, and ignored the distinction between "exclusive" and "primary" jurisdiction.

Significantly, PCI's complaint now before the Board is little more than an attempt to pre-empt and cut-off further action by the District Court in the reopened case, action that well may include referral of specific questions to the Board and retention of jurisdiction by the Court. Referral has been the practice in matters of concurrent jurisdiction between the Courts and the Board.⁵ The Board has recognized that in passing

⁵ See e.g. *Parrish & Heimbecker, Inc. – Petition for Declaratory Order*, STB Docket No. 42031, served May 26, 2000, reconsideration denied by decision served May 24, 2001; *South-Tec*

the ICCTA “Congress intended only to pre-empt state law and remedies, but did not intend to oust concurrent Federal district court jurisdiction over common carrier obligation claims under the ICA.”⁶

The Courts have respected the Board’s expertise and “primary” jurisdiction by use of the referral mechanism.⁷ Likewise, the Board has respected the Court’s jurisdiction.⁸

Dismissal without prejudice is fair to PCI and accommodates the concurrent jurisdiction of two Federal forums over a case involving the same parties and basic issues.

B. Alternatively, This Matter Should Be Held In Abeyance Pending District Court Action Following the 5th Circuit Decision, Judgment and Mandate.

If the Board does not agree that dismissal without prejudice is appropriate, FWRW urges the Board to hold this matter in abeyance pending further action by the District Court in case no. 4:04-cv-211 Y reopened August 22, 2005 following issuance of Decision, Judgment and Mandate by the 5th Circuit.

Development Warehouse, Inc. et al - Petition for Declaratory Order – Illinois Central Railroad Co., STB Docket No. 42050, served November 15, 2000; Martin Gas Sales, Inc. – Petition for Declaratory Order – Certain Rates and Practices of Union Pacific Railroad Co., STB Docket No. 42082, served June 15, 2004; Capitol Materials Inc. – Petition for Declaratory Order – Certain Rates and Practices of Norfolk Southern Railway Co., STB Docket No. 42068, served April 12, 2004;

⁶ *Greenville County Economic Development Corp. – Petition for Declaratory Order, STB Docket No. 34487, served July 27, 2005 and Groome & Associates, Inc et al. v. Greenville County Economic Development Corp., STB Docket No. 42087, served July 27, 2005.*

⁷ See e.g. *Consolidated Rail Corp. – Declaratory Order Proceeding, STB Finance Docket No. 34319, served October 10, 2003.*

⁸ See *Boston and Maine Corp. et al. v. New England Central Railroad, Inc., STB Docket No. 34612, served February 24, 2005.*

As discussed in Paragraph 3 above, the August 22 reopening by the District Court may result in further definition and referral of issues appropriate for the Board as well as disposition of issues not subject to Board jurisdiction raised by PCI's complaint.

Accommodation between Federal forums is particularly appropriate in this case given its substantial history of prior, and on-going, litigation and significant rulings concerning PCI's complaint against FWWR.

The District Court has ordered FWWR to respond to PCI's motions to dismiss by September 7, 2005. See Declaration of Counsel, Exhibit B, Order Reopening Case. FWWR's motions for summary judgment and dismissal of PCI's request for injunctive relief also remain pending before the Court. District Court action on the respective parties' motions may prove to be material, if not determinative, of issues between PCI and FWWR appropriate for the Board.

III

CONCLUSIONS

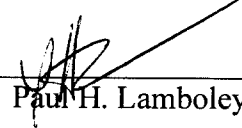
For reasons argued and discussed above, FWWR submits the Board should dismiss PCI's complaint without prejudice. Failing that, FWWR submits the Board should hold this matter in abeyance.

Without dismissal and/or appropriate amendment, FWWR cannot adequately identify and defend against PCI's claims properly within Board jurisdiction, all to FWWR's prejudice.

Alternatively, without holding this matter in abeyance pending District Court action, which action may result in further definition, clarification and/or referral of issues

appropriate for the Board, may give rise to inconsistent rulings in parallel Federal proceedings.

Respectfully submitted September 8, 2005 by _____ for


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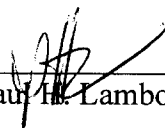
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served on Counsel of Record identified below via first class U.S. mail, postage prepaid, this 6th day of September, 2005:

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