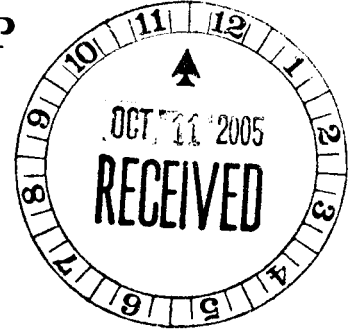


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H. Allen Pennington, Jr.

October 10, 2005

Via FedEx Overnight Delivery

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K. Street, NW
Washington, DC 20006

ENTERED
Office of Proceedings

OCT 11 2005

Part of
Public Record

Re: *PCI Transportation, Inc. v. Fort Worth & Western Railroad Company*; In and
Before the Surface Transportation Board, Claim No. NOR42094

Dear Secretary Williams:

Enclosed please find an original and twelve copies of PCI's Response to Motion to Dismiss or, in the Alternative to Hold the Matter in Abeyance and Brief in Support and PCI's Declaration of Counsel in Support of Response to Motion to Dismiss or, in the Alternative to Hold the Matter in Abeyance, for filing in the above-referenced matter. Also find two compact discs containing the foregoing documents.

Please return the excess file-stamped copies of the above document to the undersigned in the enclosed envelope I have provided for your convenience.

Thank you for your assistance in this regard and should you have any questions please do not hesitate to call me.

Sincerely yours,

PENNINGTON, HILL & BAKER, LLP

By: _____

H. Allen Pennington, Jr.

HAP/mr

Enclosure

R:\10\PCI\SURFACE TRANSPORTATION BOARD Suit\Correspondence\STB Clerk.Ltr.3.doc

cc: Mr. Richard DeBerry
MCDONALD SANDERS
777 Main Street, Suite 1300
Fort Worth, Texas 76102
Via FedEx Overnight Delivery

Paul H. Lambole
Bank of America Plaza, Suite 645
50 W. Liberty Street
Reno, NV 89501
Via FedEx Overnight Delivery

ORIGINAL

UNITED STATES OF AMERICA

IN AND BEFORE THE SURFACE TRANSPORTATION BOARD



STB DOCKET NO. NOR 42094

PCI TRANSPORTATION, INC.

214866

Complainant,

ENTERED
Office of Proceedings

V.

OCT 11 2005

FORT WORTH & WESTERN RAILROAD COMPANY

Part of
Public Record

Respondent.

**RESPONSE TO MOTION TO DISMISS OR, IN THE
ALTERNATIVE TO HOLD THE MATTER IN ABEYANCE
AND BREIF IN SUPPORT**

H. Allen Pennington, Jr.
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Fort Worth, Texas 76102
(817) 332-5055
(817) 332-5054 (Fax)

October 11, 2005

ATTORNEYS FOR PCI
TRANSPORTATION, INC.

**BRIEF OF PCI TRANSPORTATION, INC. IN RESPONSE TO
FORT WORTH & WESTERN RAIL COMPANY'S MOTION TO DISMISS,
OR IN THE ALTERNATIVE TO HOLD THE MATTER IN ABEYANCE**

PCI Transportation, Inc. ("PCI") submits this Brief in support of its Response to Fort Worth & Western Rail Company's motion to dismiss PCI's complaint, or in the alternative to hold this matter in abeyance, and would respectfully show the Board the following:

I. SUMMARY OF RESPONSE

PCI is a captive customer of FWWR which alleges it is the exclusive provider of rail services on PCI's railroad spur in Fort Worth, Texas. FWWR readily admits that it uses a computer system to compute demurrage charged to its customers which is flawed and which apparently never calculates the proper charges. In July of 2003, a dispute arose concerning false demurrage charges billed to PCI. PCI was able to demonstrate, at that time, that the bill was completely erroneous and FWWR confessed its mistake. It seemed the issue was resolved. Just a few months later, PCI entered into a long term lease of its warehouse in Fort Worth where FWWR provides its services to PCI. PCI's decision to re-up the lease was based on its ability to operate profitably with the written Agreement it had with FWWR, which provided for four free days of PCI cars. FWWR was aware PCI entered into a long term renewal of its lease. Shortly thereafter, knowing that PCI was now locked into a long term lease, FWWR resurfaced with its false bill. At that time, FWWR contended that the demurrage bill, which it had acknowledged was erroneous months before, was now past due and owing. PCI attempted to remind FWWR of their prior discussions.

FWWR at first acknowledged the bill was not owed in a face-to-face meeting, but then literally overnight refused to consider the possibility that it was in error and insisted PCI pay the demurrage bill, correct or not, fair or not, or FWWR would cancel the parties' Agreement and destroy PCI's ability to continue operating its business. Faced with this Hobson's choice, PCI refused to give in to FWWR's abusive, oppressive and unreasonable rules and practices, and decided to file a lawsuit in the State court in Tarrant County, Texas to enjoin cancellation of the Agreement. The state court judge readily found the merit of a temporary restraining order against FWWR. FWWR removed the case to the federal district court and, while an injunctive request was pending, purportedly to give notice of termination of the parties' Agreement.

For almost two years, before the State court, the federal district court, and Fifth Circuit Court of Appeals, FWWR has steadfastly maintained that the STB has exclusive jurisdiction over all of the claims between these parties. The Fifth Circuit has confirmed that in fact, the STB does have the exclusive jurisdiction over PCI's claims. Now, FWWR has completely changed its position against the very relief it now seeks from the federal district court, and now contends to this Board that the STB has no jurisdiction to hear PCI's Complaint. Typically, in the course of litigation, a party would attempt to defend a claim before the STB by taking advantage of the opportunity to challenge a complainant's pleading. This is not, however, the typical situation. This is not a "brand new claim" PCI is making against FWWR for the first time before the STB. The complaint filed by PCI has been

deemed proper at the STB by the Fifth Circuit. The claims brought by PCI have traveled a long and arduous journey through the federal court system and via a holding by the Fifth Circuit Court of Appeals. The STB is a federal agency charged with the duty to protect oppressed customers of rail carriers such as FWR, and, as such, the STB should not allow FWR to mire this proceeding with dilatory tactics and continue to manipulate the legal system to block PCI's right to find justice for the wrongful and abusive treatment it has endured at the hands of FWR. PCI's complaint before this Board sets forth ample facts upon which PCI brings its claims under the ICCA for the unreasonable rules, practices and procedures employed by FWR in its improper, oppressive and discriminatory acts against PCI. FWR's motion to dismiss or in the alternative to hold this matter in abeyance, is not proper, is without merit and should be denied.

FWR's Motion to Dismiss PCI's complaint before the STB for lack of subject matter jurisdiction is wholly based on the incorrect assumption that the Fifth Circuit Court of Appeals has held that the federal district court and the STB have "concurrent jurisdiction". Not only is this statement not made by the Fifth Circuit, FWR further misconstrues the opinion because there can be no proper subject matter jurisdiction in the federal district court between the parties who are both Texas citizens. Before now, FWR has consistently taken the position before the Texas state court, the federal district court and the Fifth Circuit Court of Appeals that the Surface Transportation Board ("STB") has exclusive jurisdiction of all of PCI's claims in the federal lawsuit: contractual, extra-contractual and injunctive. FWR's

live pleadings before the federal district court in fact pray that the court declare that the STB has exclusive jurisdiction to hear all of PCI's claims.¹ FWWR vehemently argued in the Fifth Circuit that the STB had exclusive jurisdiction to hear all of PCI's claims and argued directly counter to the very position it is now taking in its Motion to Dismiss before the STB. The Fifth Circuit's Opinion states that the STB indeed has exclusive jurisdiction to hear all of PCI's pending claims, the very relief sought by FWWR in the Court of Appeals.

Therefore, on August 8, 2005, PCI filed all its claims, basically verbatim, which were then pending in the federal lawsuit, before the STB. FWWR then hired a new attorney, who has filed the subject Motion to Dismiss PCI's claims in the STB on the basis that PCI has failed to properly state claims before the STB, and that the STB has no jurisdiction to hear PCI's claims. In its Motion to Dismiss, FWWR shamelessly uses most of the same arguments previously advanced by PCI in its motion to remand and in its appellate brief in the Fifth Circuit to support FWWR's new position, and PCI's previously held but overruled opinion, that the STB should not exercise jurisdiction over PCI's claims. FWWR now continues its abusive tactics and urges the STB to dismiss those claims for lack of jurisdiction. Meanwhile, FWWR's oppressive practices and use of a faulty computer billing system with PCI and its other customers continues unabated. Apparently, FWWR believes no tribunal should sit in judgment of its operations and its unreasonable practices and conduct.

¹ See FWWR's Second Amended Answer and Counter Claim filed in the federal district court lawsuit, attached hereto as Exhibit "4".

Now, in an obvious attempt to avoid being made to answer for its abuses and to avoid an imminent and indefensible attack on its billing system before the STB, FWWR attempts to switch its position yet again and claim the STB has no jurisdiction to hear PCI's claims. The question is whether the STB is going to allow this deprivation of a forum for PCI's grievances to continue.

The Fifth Circuit Opinion is now the law of this case, until changed by subsequent Supreme Court judgment.² Given that fact, there is no basis for subject matter jurisdiction of the federal district court over any claim in that lawsuit, and this Board has exclusive jurisdiction to hear all the parties' claims and counter-claims. First, the Opinion says all of PCI's claims must go to the STB. Second, the basis for removal found by the Opinion was complete pre-emption. This was the only finding of proper removal of PCI's state court case to federal court. The Fifth Circuit certainly made no finding that the federal district court had jurisdiction to adjudicate any claim in this suit, nor could it; it simply said removal was proper, because a federal agency, the STB, had exclusive jurisdiction to hear the claims, and that made removal to the federal system proper. To the extent the case sought to enforce an express agreement, the Appellate Court said that would be a basis for a state law action pursuant to 49 U.S.C. § 10709 (there being no diversity between the parties). To the extent the terms of the express agreement were not at issue, the Opinion says that the STB has exclusive jurisdiction of all PCI's claims under 49 U.S.C. § 10501. There is no in-between which gives the federal court jurisdiction to hear and

² The Opinion of the Fifth Circuit Court of Appeals is attached hereto as Exhibit "1", and incorporated by reference herein.

adjudicate any of the claims in this action. There is not a “primary jurisdiction” issue in the case. The Fifth Circuit did not say the federal court should retain jurisdiction and send PCI’s claims to the STB for partial adjudication. The Opinion says the STB has exclusive jurisdiction of all of PCI’s claims, period.

To illustrate the great lengths FWWR will go in order to deny PCI any forum for its claims, and a hearing on its request for injunctive relief, FWWR is presently arguing before the federal court, in defiance of the logic of the Fifth Circuit’s opinion, that the federal court has jurisdiction to hear its counterclaims under 28 U.S.C. § 1337. This statute establishes federal jurisdiction only for an amount in controversy in excess of \$10,000 per bill. PCI had received no bill of this amount prior to June, 2005³. FWWR sending bills lately based upon the alleged “new agreement” of only two days free demurrage, rather than the four day demurrage agreement used by FWWR to entice PCI to put down and establish roots in Fort Worth and sign a long-term lease. Removal jurisdiction was not properly placed on Section 1337, since no \$10,000 bill existed at the time of the removal. Therefore, this statute provides no basis for jurisdiction over any claims in this action before the federal court. FWWR also does not mention that after its attempted termination of the parties’ agreement, PCI tried to pay those portions of FWWR’s demurrage bills, which were based on cars held by FWWR more than four days. FWWR refused these portions of the bills, even under reservation, apparently so it could complain to the federal district court

³ See the Declaration of Randy Gaston attached hereto as Exhibit “3”, and incorporated by reference herein.

about “tens of thousands of dollars” of unpaid demurrage bills since this \$2,500 lawsuit was initiated in the Tarrant County Court. Amazingly, FWWR fails to inform the STB of the fact that the counterclaims it now contends are proper before the federal district court are for declaratory judgment of its alleged reasonable and proper practices and procedures, which also fall within the exclusive jurisdiction of the STB under Section 10501.

The other basis for alleged jurisdiction of the federal court over FWWR’s counterclaims is “supplemental jurisdiction.” But there must be some basis for this Court to adjudicate one or more of PCI’s affirmative claims, before the question of supplemental jurisdiction of other affirmative claims or counterclaims arise. If, as the Fifth Circuit says, all of PCI’s claims should have been filed in the STB in the first place, and a removal to the federal district court was proper because of federal pre-emption by law to be applied by a federal agency, the federal district court acquired no jurisdiction to adjudicate any counterclaims while PCI’s lawsuit simply passed through the federal district court on the way to the STB. FWWR’s argument pre-supposes that removal jurisdiction can be based on counterclaims (which were not even on file at the time of the removal), a concept contrary to established federal law, procedure and practice.

PCI’s complaint before the STB adequately sets forth the necessary facts to allow the Board to determine “cognizable” claims under the ICCA and to provide FWWR notice of claims that have been pending against it for almost two years. FWWR can file any of its compulsory counterclaims against PCI before the STB.

Despite FWR's baseless arguments urging the Board to dismiss PCI's complaint, if the Board determines that PCI should plead its Complaint with more specificity in any regard, PCI remains ready willing and able to do so upon direction by this Honorable Board. Dismissal of PCI's Complaint for lack of "cognizable" claims under the ICCA, would be improper. The Board is charged with the authority and duty to see that the actions of FWR are reasonable, dismissing PCI's Complaint without first directing PCI to replead its Complaint against FWR, if necessary, would do very little in promoting justice in this regard, but would promote FWR's agenda of preventing an adjudication of the facts of PCI's claims against FWR.

II. INTRODUCTION

Plaintiff PCI Transportation, Inc. originally filed suit against Respondent Fort Worth & Western Railroad Company, Inc. ("FWR") in the 141st District Court of Tarrant County, Texas.

This case was removed to the federal district court by FWR on March 19, 2004. FWR argued that removal was proper under 28 U.S.C. 1441, claiming that PCI's claims for injunctive relief were completely pre-empted by federal law and could only be adjudicated by the STB. (As discussed below, the Fifth Circuit Court of Appeals has recently ruled that all PCI's claims, including those claims for injunctive relief, are actually subject to the exclusive jurisdiction of the Surface Transportation Board.)

On July 30, 2004, PCI filed its Second Amended Complaint in the federal court, asserting causes of action against FWR for breach of the Confidential

Demurrage Agreement (the “Agreement”), intentional interference with existing and perspective contractual relations, injunctive relief and, in the alternative, wrongful termination of the Agreement.

On July 29, 2004, FWR filed its Amended Answer and Counterclaim against PCI. FWR brought claims for declaratory relief against PCI, in large part, tracking the injunctive relief sought by PCI, but stating the requested declarations in the negative, contrary to the language used in the injunction requested by PCI. Specifically, FWR sought declaratory relief regarding its rights to charge demurrage in contravention of PCI’s contentions, which would, of course, be a compulsory counterclaim as to PCI’s original claims. FWR also brought claims for anticipatory repudiation of the Confidential Demurrage Agreement, breach of such Agreement and an alleged tariff which it claims governs the parties’ relationship, and sought payment of certain alleged demurrage charges and attorneys fees under the Agreement and tariff. FWR specifically and expressly seeks a declaration of the federal court that:

“All of PCI’s claims, causes of action and requested relief concerning FWR’s demurrage charges, practices and rail services and procedures fall within the exclusive jurisdiction of the Surface Transportation Board.”

See Exhibit 4.

PCI filed its Notice of Appeal on August 4, 2004, with respect to a Motion to Remand which was denied by the federal court.

On July 26, 2005, the Fifth Circuit Court of Appeals published its Opinion (the “Court of Appeals Opinion”) affirming the federal court’s denial of PCI’s Motion to

Remand. *See* Exhibit 1. The Court of Appeals Opinion holds that all of PCI's injunctive relief is completely pre-empted by federal law and falls squarely under 49 U.S.C. §10501 of the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") since it "would regulate the operation of FWR's switching yard." *See* Exhibit 1 at pp. 4-8. The Appellate Opinion further states 1) that the injunctive claims upon which FWR based removal are subject to the exclusive jurisdiction of the STB, 2) that any "contractual" relief requested by PCI is outside the express scope of the contract, is not governed by 49 U.S.C. § 10709, and thus is subject to the exclusive jurisdiction of the STB (*See Id.* at p. 17), and 3) that all of PCI's extra-contractual claims are also within the exclusive jurisdiction of the STB (*See Id.* at p. 18). In effect, though removal to the Federal court by FWR was found proper under the complete pre-emption doctrine, the Fifth Circuit has ruled that the federal district court has no original subject matter jurisdiction to adjudicate any of PCI's claims in that lawsuit. In other words, the Fifth Circuit has held that removal was proper, but that the federal agency, the STB, has exclusive jurisdiction to the exclusion of federal and state courts to hear all of PCI's claims.

On August 8, 2005, PCI filed all its claims, basically verbatim, which are pending in the Federal lawsuit, before the STB in its present form, in complete deference to the Fifth Circuit Court of Appeals Opinion. PCI's complaint sets forth the facts upon which it relies to assert its claims against FWR's unreasonable demurrage charges, rail services, practices and procedures relating to its oppressive monopolistic conduct with PCI (upon information and belief, FWR's conduct

would also affect customers other than PCI since the same billing system is being used for all FWR's customers). FWR has notice of PCI's claims and has failed to deny any factual averment in its complaint to the STB and, without reservation or general denial, has chosen to file its dilatory Motion to Dismiss PCI's claims.

FWR has hired a new attorney, who appears to be unaware of FWR's prior pleaded and argued position regarding this Board's jurisdiction, who has filed the subject motion to dismiss PCI's claims before the STB on the basis that PCI has failed to properly state claims before the STB, and that the STB has no jurisdiction to hear PCI's claims. FWR's motion to dismiss is without merit, improper and should be denied. FWR's request, in the alternative, to hold these proceedings in abeyance, is without merit and also should be denied so the Board can approve this matter for adjudication, allow PCI to have an emergency oral hearing for Injunction against FWR and allow the parties to begin necessary discovery.

III. Arguments and Authority

A. The STB does have Exclusive Jurisdiction over All Claims

FWR attempts to walk the Board through "statutory framework", "board decisions" and "court decisions" to essentially argue that the STB lacks subject matter jurisdiction to hear PCI's claims, in direct contravention of, what is at the present time, the law of the case contained in the Fifth Circuit Court Opinion. Many of FWR's present arguments are virtually identical to legal arguments that have been expressly denied by the Fifth Circuit. PCI knows this to be true because it argued many of the identical positions and even used the identical authority which now is cited by

FWWR and which was overruled by the Fifth Circuit. Despite FWWR's attempt to "educate" the Board in its present motion to dismiss, its opinion of the interpretation of the law is overly generalized with no relation to the claims brought by PCI and, more importantly, is trumped by the Fifth Circuit Court's Opinion.

It is clear that the Court of Appeals ruled on July 26, 2005 that the STB has exclusive jurisdiction of all claims in this proceeding. *See* Exhibit 1. The court specifically ruled that all the requests by PCI are outside the scope of the express terms of the confidential demurrage agreement between the parties. The appellate court reasoned that all requested relief therefore falls outside the provisions of 49 U.S.C. § 10709, and therefore within the exclusive jurisdiction of the STB. The Court of Appeals has ruled, in effect, then, that all contractual relief sought by PCI, which PCI maintains is, in fact, based upon the parties' contract, and their course of dealing thereunder, is not within the terms of the parties' express agreement and thus within the exclusive jurisdiction of the STB. The Fifth Circuit's opinion states that PCI's requests for injunctive relief seek to control FWWR's ability to impose demurrage, regulate FWWR's railyard, and that any attempt to do so would be a claim that is exclusively within the jurisdiction of the STB. Next, on page 18 of the Appellate Opinion, the Fifth Circuit ruled that all "non-contractual" relief sought by PCI is also within the exclusive jurisdiction of the STB. *See Id.* at p. 18. Therefore, respecting the Opinion of the Fifth Circuit Court of Appeals, PCI filed its complaint, in substantially the same form as previously pleaded, before the STB. FWWR's analysis of the interaction between Section 10501 and Section 10709, and its subparts,

lends nothing to its argument that the STB does not have jurisdiction over PCI's claims in this matter because those issues have already been addressed and resolved by the Fifth Circuit, as discussed above.

B. There is no need to hold this Matter in Abeyance

The Fifth Circuit Court of Appeals has delivered its decision, judgment and mandate. The Court of Appeals Opinion holds that all of PCI's injunctive relief is completely pre-empted by federal law and falls squarely under 49 U.S.C. §10501 of the ICCTA, since it would "regulate" the operation of FWR's switching yard. The Appellate Opinion further states 1) that the injunctive claims upon which FWR based removal are subject to the exclusive jurisdiction of the STB, 2) that any "contractual" relief requested by PCI is outside the express scope of the contract, is not governed by 49 U.S.C. § 10709, and thus is subject to the exclusive jurisdiction of the STB and that all of PCI's extra-contractual claims are also within the exclusive jurisdiction of the STB. In effect, though removal to the federal district court by FWR was found proper under the complete pre-emption doctrine, the Fifth Circuit has ruled that the federal district court has no original subject matter jurisdiction to adjudicate any of PCI's claims in this lawsuit. In other words, the Fifth Circuit has held that removal was proper, but that the federal agency, the STB, has exclusive jurisdiction to the exclusion of federal and state courts to hear or adjudicate all of PCI's claims. Therefore, according to the Fifth Circuit Court of Appeals, all claims brought by PCI are ripe for adjudication before the proper forum, the STB.

Nothing has prevented FWR from filing a timely answer to PCI's complaint before the STB. If it chooses, FWR may file any claims it has against PCI in the same forum. Instead, FWR has filed its baseless motion to dismiss as a dilatory tactic in an attempt to manipulate the judicial system and forestall further discovery on its faulty demurrage billing system, which it has done successfully thus far, in an attempt to obtain rulings on motions it has pending before the federal district court that would directly conflict with issues the Fifth Circuit Court of Appeals has deemed within the exclusive jurisdiction of the STB.

FWR also argues that it has independent claims concerning demurrage charges to PCI under its purported tariff. FWR's prior counsel, however, in briefing to the Fifth Circuit Court of Appeals, cited *Illinois Cent. R.R., v. South Tec Development Warehouse*, 1999 U.S. Dist. LEXIS 11222 (N.D. Ill. 1999) for the proposition that the STB has exclusive jurisdiction over PCI's claims. The *Illinois Cent.* court held that demurrage charges and practices under (an alleged) tariff are subject to STB jurisdiction. So even FWR has, at one time in this litigation, contended that the very claims between these parties it now wants the STB to stay, are actually subject to the STB jurisdiction.

FWR's compulsory counterclaims against PCI for breach of the Confidential Demurrage Agreement, anticipatory repudiation of the Confidential Demurrage Agreement and attorneys' fees cannot confer original subject matter jurisdiction in the federal district court. As a result, under the Fifth Circuit's analysis, all claims between these non-diverse parties are appropriately within the exclusive

jurisdiction of the STB. These claims are obviously compulsory counterclaims to PCI's complaint filed before the STB.

FWWR's claims before the federal district court are for declaratory relief which merely seek the opposite relief sought by PCI. It is therefore obvious that those claims would also be subject to STB jurisdiction and could not be independently maintained before the federal district court. The Fifth Circuit did not, and could not, rule that any contrary relief sought by FWWR regarding "FWWR's demurrage charges, practices and rail services and procedures" are subject to the adjudicatory jurisdiction of the federal district court, while ruling that PCI's claims regarding the same matters, issues and transactions are not. Likewise, FWWR's claims for anticipatory breach of the Confidential Demurrage Agreement and for attorney's fees would necessarily follow the non-contractual claims which the Fifth Circuit has determined may only be heard before the STB. Certainly none of FWWR's claims could ever be sufficient to establish original subject matter jurisdiction in the federal district court, since both FWWR and PCI are Texas citizens. In fact, when counsel suggested at oral argument in the Fifth Circuit that none of the claims in the federal district court lawsuit could have originally been brought in the district court, at least two of the justices visibly and/or orally agreed with that statement. As a result, the Fifth Circuit Court of Appeals Opinion implicitly, if not expressly, holds that FWWR's claims are also subject to the exclusive jurisdiction of the STB.

In *San Luis Central Railroad Co. v. Springfield Terminal Railway Co.*, 369 F.Supp.2d 172 (D. Mass. 2005), the court conducted similar analysis as that of the Fifth Circuit of the interaction between 49 U.S.C. § 10709 and 49 U.S.C. § 10501 in relation to the Plaintiff's contractual claims and remedies to recover charges for car service. The Court cited Section 10709 (b), and stated that the statute does not confer original jurisdiction of the district courts of the United States based on Sections 1331 or 1337 of Title 28, United States Code. 369 F. Supp. 2d at 176. The court concluded, as the Fifth Circuit does in the federal district court case, that any such claims are completely pre-empted and subject to the exclusive jurisdiction of the STB. The *San Luis* court found that since jurisdiction could be proper only before the STB, the challenged claims therein should be dismissed without prejudice by the federal district court. The Court of Appeals has ruled that all claims and requests for relief between PCI and FWWR fall squarely within 49 U.S.C. §10501, and thereby are subject to the exclusive jurisdiction of the STB. The federal district court has no jurisdiction over FWWR's counterclaims that are properly before the STB.

Generally, federal courts may, under limited circumstances, exercise jurisdiction over state law claims. Indeed, 28 U.S.C. §1367 (a) provides:

in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

However, while under Section 1367(a), a district court properly exercises supplemental jurisdiction over state law claims that are part of the same case or

controversy over which the district court has original jurisdiction, Section 1367(c)(3) provides that a district court "may decline to exercise supplemental jurisdiction over a claim under subsection (a) "if ... the district court had dismissed all claims over which it has original jurisdiction." District courts enjoy some discretion in determining whether to retain supplemental jurisdiction over a state claim once all federal claims are dismissed. The Commentary to § 1367 (c)(3) explains:

the idea here is that once the crutch is removed- the claim that supports the supplemental jurisdiction of the other claims- the other should not remain for adjudication ... Judicial discretion here is a particularly important element. Here the "may' in "may decline" has a major role to play. 28 U.S.C. § 1367 Practice Commentary (West Supp.1993).

However, the United States Supreme Court has stated that "a court must have jurisdiction over a case or controversy before it may assert jurisdiction over ancillary claims." Ancillary jurisdiction, therefore, cannot provide the original jurisdiction. See *Syngent Crop Prot., Inc. v. Henson*, 537 U.S. 28 (2002). As a result, since the Fifth Circuit has ruled that none of the claims of PCI which FWWR used as a basis for removal to the federal district court conferred original jurisdiction on the district court (that is, jurisdiction to actually adjudicate such claims), then there is not now and never has been any basis for retaining any of FWWR's counterclaims on an ancillary basis by the federal district court. Such counterclaims would be characterized only as pendant or ancillary claims, which are also subject to the exclusive jurisdiction of the STB in any event. Therefore, PCI has argued before the federal district court that FWWR's claims should be dismissed without prejudice to the proper filing before the STB on this independent basis.

PCI believes that if FWR believes it has any legitimate claims against PCI, FWR's claims should be filed before the STB and considered at the same time as PCI's. Dismissal of FWR counterclaims in the federal district court is required to avoid any conflicting rulings between the STB and the federal district court, since such claims all arise from the same operative facts and the relief sought by FWR is the mere opposite of that sought by PCI, which the Fifth Circuit has already determined must be brought before the STB. The risk of conflicting rulings between the federal district court and the STB on the merits of such claims would be legion. As just one example, PCI seeks a ruling in the STB that the parties' Confidential Demurrage Agreement is still in force and effect, the alleged cancellation of the Confidential Demurrage Agreement being based upon a demonstrably false demurrage bill which are based on FWR's unreasonable rules, procedures and practices under the ICCTA. Yet, FWR seeks a declaration in the federal court that the parties' agreement was validly terminated based, in part, upon its contention that it properly cancelled the agreement based upon non-payment of that same false demurrage bill. The STB must rule in the first instance whether the Agreement is still in effect. By asking the federal district court to retain jurisdiction over its counterclaims and make rulings on dispositive motions, FWR is asking the federal district court to usurp the STB's jurisdiction over the claims in this suit. PCI is confident that FWR's pending dispositive motions should not be considered by the federal district court, in light of the Fifth Circuit Court's implicit holding that all

claims between these parties are within the jurisdiction of the STB. The STB must assert its jurisdiction is unequivocally stated by the Fifth Circuit.

Since PCI's complaint has now been filed before the STB, as directed by the Fifth Circuit, any motion to dismiss any of PCI's specific claims would be within the exclusive province of the STB. If the STB has exclusive jurisdiction of these claims, as the Fifth Circuit has expressly ruled, then the STB may determine whether PCI's claims for injunctive relief (which are the very subject matter of FWWR's Motion to Dismiss) should be granted. A dismissal of those claims is obviously being sought by FWWR in the federal district court so that it can argue some preclusive effect before the STB. This is yet another transparent attempt by FWWR to simultaneously maintain inconsistent positions that would result in PCI ultimately being denied any forum whatsoever in which to have its claims considered. This has been PCI's expressed concern for almost two years, that FWWR is simply trying to use the system to deny PCI any relief and any forum for FWWR's improper, abusive, coercive and discriminatory conduct in violation of the provisions of the ICCA.

FWWR also seeks summary judgment in federal court on PCI's claims for intentional interference with existing contractual relations, intentional interference with prospective contractual relations and wrongful termination of contract. FWWR argues that the Opinion holds that these claims are completely preempted by the ICCTA under 49 U.S.C. § 10501. But FWWR's argument proves too much, because the Opinion states that these issues also belong before the STB. It is up to the STB to determine whether FWWR can abuse an involuntary rail customer with unreasonable

rules, practices, procedures and discriminatory conduct, holding out one set of practices and policies to customers, but using another to extract demurrage charges. It becomes painfully obvious that FWR's argument is self defeating. FWR on the one hand asserts properly that only the STB can provide PCI relief but on the other hand claims that the federal district court should do the STB's job and grant FWR's summary judgment before the STB has a chance to make any determination of whether PCI's claims are proper before the STB.

FWR also urges the federal district court to rule on FWR's request for declaratory relief in connection with the alleged termination of the parties' Agreement. This argument marks the height of FWR's obfuscation of the Fifth Circuit Court's Opinion. FWR's declaratory relief is the exact opposite of the declaratory relief originally and continually sought by PCI. Of course, the main tenet of PCI's declaratory judgment relief is a finding that the parties' written agreement has not been terminated. A monopoly, such as FWR (PCI's only access to the two main line railroads) cannot simply cancel a contract at its whim for purported reasons it bases on its rules, practices and procedures which are completely disingenuous and which are used as a mere artifice to discriminate against PCI and coercively extract money which it is clearly not due. Despite the unequivocal ruling of the Fifth Circuit Court's Opinion on PCI's declaratory relief, FWR attempts to urge the federal district court to dismiss the declaratory relief sought by its motion for summary judgment, which would negate all the declaratory relief sought by PCI before the STB, but principally the finding that the parties' written agreement has not been

terminated. Again, PCI's claims for declaratory relief, as determined by the Fifth Circuit, cannot be ruled on by the federal court, so it must follow that the direct opposite declarations sought by FWWR are equally disqualified from consideration. Again, the STB must exercise jurisdiction declared by the Fifth Circuit, and require FWWR to state its counterclaims before the STB.

Only the STB can make the determinations called for in ruling on the FWWR's motions before the federal court, if appropriately brought before the STB, and therefore the federal district court cannot make any ruling on FWWR's Motions to Dismiss and for Summary Judgment. This is the STB's job according to the Fifth Circuit.

Nothing prevents FWWR from filing its answer to PCI's complaint before the STB. Indeed, the STB should order FWWR to do so. The Fifth Circuit Court of Appeals has handed down its Opinion which has expressly held that PCI's claims are subject to the exclusive jurisdiction of the STB and, impliedly, that the mere opposite claims by FWWR are also subject to the exclusive jurisdiction of the STB. FWWR's pending motions before the federal district court cannot be ruled upon without undercutting the holding of the Fifth Circuit and the exclusive jurisdiction of the STB. As such, PCI's complaint before the STB is timely and ripe for consideration by the STB and FWWR's motion to dismiss or hold the matter in abeyance should be, in all things, denied.

C. Statutory Authority for PCI's Claims

PCI's Complaint is more than sufficient to allow FWR an opportunity to prepare its answer. The STB is a regulatory agency charged with the duty to oversee the operations of the rail industry and enacted to provide the expeditious handling and resolution of all proceedings required or permitted to be brought under 49 U.S.C.S. §§ 10101 et. seq. *See* 49 U.S.C. § 10101(15). First, FWR has urged this Board to dismiss PCI's complaint on the ground that PCI's complaint fails to state a claim "cognizable" under the ICCA. Next, FWR argues that the STB should recognize and require form over substance and apply some hyper-technical pleading requirement upon PCI. FWR's motion to dismiss simply seeks too much, and less drastic measures than dismissal are available if, however unlikely, this Board determines PCI's Complaint requires additional clarification.

First, FWR ignores the express holding of the Fifth Circuit and refuses to recognize that PCI's Complaint has been deemed appropriate and indeed adequately pled by the Fifth Circuit for submission to the STB. Assuming FWR cannot discern the basis of PCI's claims, FWR's motion to dismiss is improper in any event. The Fifth Circuit had no problem concluding PCI's claims were proper before the STB. Respecting the Fifth Circuit's opinion, PCI filed its claims before the STB in their present form. PCI's Complaint, fully supported by the affidavit of PCI's representative Randy Gaston⁴, provides a highly detailed factual background of

⁴ The Affidavit of Randy Gaston is attached hereto as Exhibit "3", and incorporated by reference herein.

FWWR's refusal to follow its own rules and practices, yet FWWR would rather engage in dilatory tactics to continue to drive up PCI's attorneys fees in a war of attrition, for which it is obviously much better equipped. However, if FWWR were at all interested in allowing the STB to provide a resolution to this proceeding by expeditious means, it could begin by following reasonable pleading procedure and answer PCI's Complaint. FWWR's argument that it is not able to answer PCI's Complaint is especially offensive since it was allowed to engage in unlimited discovery of its choosing in the federal district court proceeding, while simultaneously objecting to basic requests for documents served upon it by PCI.

PCI's Complaint is more than adequate to provide FWWR with notice of the claims against it. Next, if the Complaint is lacking for some technical requirement, FWWR had the option to request the Board to order PCI to clarify its Complaint. However, a motion to clarify under the STB would require FWWR to clearly point out which, if any, deficiencies are present in PCI's Complaint, which FWWR has not and cannot do. Again, FWWR was given unlimited discovery on this controversy under the Federal Rules of Civil Procedure in the federal court action. FWWR's motion to dismiss PCI's Complaint based on a failure to identify "cognizable" claims under the ICAA is completely inappropriate at this stage of these proceedings. Dismissal of PCI's complaint would result in unnecessarily prolonging resolution of this matter and just further delay PCI to a right to have its injunctive claims heard. Any technical deficiencies could very easily be corrected if PCI were ordered to clarify its complaint.

FWWR's chief complaint with PCI's Complaint seems to be that it fails to spoon-feed the statutory provisions upon which PCI relies in bringing its claims before the STB, pursuant to 49 U.S.C. § 10101. To aid FWWR in identifying "cognizable" claims under the ICCTA, PCI will provide the following supplementation to its complaint incorporating such Complaint by reference in its entirety herein.

PCI complains that FWWR has engaged in predatory practices involving its relationship with its customer PCI. 49 U.S.C.S. § 10101 (12). FWWR has committed several fraudulent acts concerning the implementation of rules and practices in providing switching services for which it has also improperly imposed erroneous demurrage charges to PCI. During the relationship between the parties, a course of dealing developed whereby FWWR would spot or deliver to PCI's spur the oldest cars first, that is, the cars which had been in the possession of FWWR the longest. Eventually, the parties entered into an August 23, 2000, Confidential Demurrage Agreement. The two bases for the injunctive relief sought by PCI, and held by the Fifth Circuit Court of Appeals as exclusively before the STB, are the continued oppression with, and improper billing of, demurrage fees in violation of the express contract between the parties; and FWWR's tortious interference with PCI's long term lease of the spur and contracts with its customers. The relevant provisions of the August 23, 2001, Agreement required FWWR to provide PCI with at least one "switch" per day to PCI's spur. The Agreement provides for four free days for which demurrage is not charged; this is two more days than is granted under the alleged

tariff. As the Fifth Circuit Court ruled, the Agreement is, however, silent as to any definition of the term “switch” supplied by FWWR in the Agreement, or as to any criteria to determine if a “switch” is properly performed. PCI alleges that this term is defined by the consistently recognized customs, practices and rules of FWWR. The customs, practices and rules between the parties alleged by PCI were confirmed by Charles Godsey, the operations manager for FWWR in his deposition testimony taken May 26, 2004. *See* Exhibit 2. Mr. Godsey testified that it has always been the practice of FWWR with all its customers, including PCI, not to charge demurrage under the following circumstances:

- a. where FWWR has not spotted the oldest cars first, absent instructions from the customer to the contrary;
- b. where FWWR fails to provide a daily switch of cars;
- c. where FWWR fails to deliver a full spot of cars;
- d. in the event of certain service failures, including:
 - (i) when FWWR turns a box car on the customer’s spur the wrong way (resulting in an inability of the customer to unload the car);
 - (ii) when FWWR delivers cars to the customer’s spur in a manner which results in an inability to unload the cars for other reasons;
 - (iii) derailment;
 - (iv) engine breakdown; and

- (v) flood, fire or rain;
- e. when a customer's cars get "stuck" behind other customer's cars on an interchange, resulting in cars not being delivered to the customer on an oldest car basis; and
- f. when any of the above issues causes a "domino effect" on future days, FWWR doesn't charge demurrage on those affected cars.

Mr. Godsey's deposition clearly illustrates what FWWR meant in the term daily "switch" which FWWR supplied in the parties' Agreement. Furthermore, PCI's understanding of the established practices of FWWR is confirmed in Gaston's Affidavit attached as Exhibit 3 (see pp. 9-10 thereof). In reliance upon the Agreement, FWWR's express commitment to the four day demurrage component thereof, and the oldest-car-first delivery of cars under the Agreement, in January, 2004, PCI entered into a five year renewal of its lease with the Sylvania Industrial Park, which consists of 320,000 square feet of warehouse space and a railroad spur at a cost of approximately \$60,000 per month. PCI alleges that through its abusive billing practices, improper application of unreasonable rules regarding demurrage, predatory practices, and unlawful discrimination against PCI, FWWR has injured PCI and caused it to incur damages as a result thereof.

FWWR's fraudulent acts concern the demurrage rules, practices and procedures it provides to PCI and such acts taken by FWWR are completely unreasonable, which PCI complains FWWR is in violation of 49 USC Sections

10702, 10704 and 10741. PCI also contends that FWR's employees or representatives, while in the scope of their employment, engaged in acts and/or omissions that would constitute unreasonable practices, resulting in improper demurrage charges to PCI, such acts for which FWR is responsible under 49 USC § 11907.

Additionally, under 49 USC § 10746, FWR is responsible for computing and accurately assessing demurrage charges and establishing reasonable rules related to those charges. PCI contends that FWR has violated this statute to PCI's detriment by implementing wholly unreasonable rules and practices related to its demurrage charges to customers. FWR has also, committed several violations of its own customary rules and practices, as set forth above, in a discriminatory manner against PCI. FWR has implemented fraudulent and deceptive tactics as a part of its common practices, wherein it purposely, intentionally and knowingly, with conscious disregard, penalizes PCI for FWR's own mistakes in delivering rail cars and then attempts to make improper demurrage charges to PCI. When notified of such demonstratively erroneous charges and actions, FWR simply informed PCI that regardless of whether the charges were a result of FWR's own mistakes, and regardless of the accuracy of the bill, PCI could pay the demurrage charges or face the cancellation of its confidential demurrage agreement.

Further PCI contends that FWR has engaged in discriminatory acts against PCI in violation of the rules it employs regarding demurrage charges. Further PCI contends that FWR was in violation of Section 10746 when it knowingly used a

computer program to compute demurrage charges to its customers that FWRW readily admits performs erroneous basic mathematical calculations and makes other errors. In relation to this allegation by PCI, and considering the potential harm to all of FWRW's customers, PCI believes that it should be entitled to discovery and a review of the demurrage bills sent to all of FWRW's customers, to determine if the errors of the system are acknowledged and fixed with its other customers, and whether FWRW's "stick it to 'em" attitude and practice involving PCI is widespread. PCI believes that the Board has the authority to allow PCI to investigate and fully discover these matters under the authority granted to it under the laws of the United States of America, and believes such discovery would promote the purpose of the ICCTA and promote justice.

There is no doubt that PCI's Complaint is adequately pled to allow FWRW reasonable notice of the claims being brought against it before the Board. PCI has provided detailed allegations to allow the Board to approve this proceeding and allow these parties to begin engaging in the discovery process under the STB rules. In this Response, PCI has also provided each of the specific statutes of which it contends FWRW is in violation at this time. PCI reserves the right to further supplement or fully amend its complaint to comply with the facts of this case as they are developed through discovery. By providing the supplementation curing any deficiencies which allegedly formed the basis of FWRW motion to dismiss, PCI respectfully requests that this Board deny FWRW's motion to dismiss and, after 19 months of litigation, finally require FWRW to justify their unlawful, abusive and oppressive conduct

against PCI. However, in the unlikely event the Board concludes that any additional clarification to PCI's Complaint is necessary; PCI requests that the Board, in its sole discretion, merely require PCI to replead its Complaint within a reasonable time so that this proceeding experiences no further unnecessary delays.

IV. CONCLUSION

PCI is a captive customer of FWRW which alleges it is the exclusive provider of rail services on PCI's railroad spur in Fort Worth, Texas. FWRW brazenly admits that its computer system used to compute demurrage charged to its customers is flawed and does not calculate the proper charges.⁵ A dispute arose concerning the false demurrage charges billed to PCI in July of 2003. PCI demonstrated that the bill was erroneous and FWRW confessed its mistake. A few months later, PCI entered into a long term lease of its warehouse in Fort Worth based on its ability to operate profitably with the Agreement with FWRW. FWRW was aware PCI entered into a long term renewal of its lease. Shortly thereafter, knowing that PCI was now locked into a long term lease, FWRW resurfaced, contending that the demurrage bill it had acknowledged was erroneous months before, was now past due and owing. PCI attempted to remind FWRW of their prior discussions. FWRW at first acknowledged the bill was not owed, but then overnight refused to consider the possibility that it was in error and insisted PCI pay the demurrage bill, correct or not, or FWRW would

⁵ The deposition of FWRW representative, Charlie Paul Godsey, is attached hereto as Exhibit "2". In his deposition Mr. Godsey provides a detailed account of FWRW's rules, practices and procedures regarding demurrage charges at pp. 20-35, 46-62, 86-88, 90-93, 120-127, which were wholly ignored in FWRW's actions with regard to the subject false demurrage bill and its attempted cancellation of the parties' demurrage agreement.

cancel the Agreement. PCI refused to give in to FWWR's abusive and unreasonable rules and practices, so it filed its lawsuit with the State court in Tarrant County, Texas.

For almost two years, before the State court, the federal district court, and Fifth Circuit Court of Appeals, FWWR has maintained that the STB has exclusive jurisdiction over all of the claims between these parties. Now that the Fifth Circuit has confirmed that, in fact, the STB does have the exclusive jurisdiction over PCI's claim; FWWR has completely switched gears and now contends that the STB has no jurisdiction to hear PCI's Complaint. FWWR neglects to mention that the very Complaint filed by PCI has been deemed proper at the STB through a long and arduous journey through the federal court system and by a holding of the Fifth Circuit. As a federal agency charged with the duty to protect oppressed customers of rail carriers such as FWWR, the STB should not allow FWWR to continue to manipulate the legal system to block PCI's only chance to find any justice for the wrongful treatment it has endured at the hands of the monopolistic, abusive and coercive FWWR. PCI's complaint before this Board sets forth the facts upon which PCI brings its claims under the ICCA for the unreasonable rules, practices and procedures employed by FWWR in its improper, oppressive and discriminatory acts regarding PCI. Therefore, FWWR's motion to dismiss or in the alternative to hold this matter in abeyance, should be denied. In the alternative, if the Board determines in its discretion that it would aid in clarifying PCI's present claims under the ICAA, that PCI should replead its Complaint, such an order from the Board will be honored.

PRAYER

WHEREFORE, PREMISES CONSIDERED, PCI respectfully requests that Respondent FWWR's *Motion to Dismiss, or in the Alternative to Hold this Matter in Abeyance*, be denied, that PCI be allowed an emergency oral hearing regarding its requested temporary injunction and permanent injunction requiring respondent FWWR to act in accordance with the terms of the parties' Agreement and refrain from the acts described in its Complaint, that PCI be granted declaratory relief as requested in its Complaint, that PCI be allowed to commence discovery in this action, and for such other and further legal and equitable relief to which it shows itself justly entitled.

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CERTIFICATE OF SERVICE

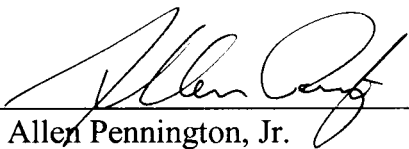
This is to certify that a true and correct copy of the *Response to Motion to Dismiss or in the Alternative to Hold the Matter in Abeyance, and Brief in Support* has been forwarded to counsel of record on this the 11th day of October, 2005, as indicated below:

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