

Pennington Hill, LLP

The Fort Worth Club Tower
777 Taylor Street, Suite 890
Fort Worth, Texas 76102
Tel: 817-332-5055
Fax: 817-332-5054

H. Allen Pennington, Jr.

December 21, 2006

Via Electronic Filing

Surface Transportation Board
1925 K. Street, NW
Washington, DC 20006

Re: *PCI Transportation, Inc. v. Fort Worth & Western Railroad Company*; In
and Before the Surface Transportation Board

Dear Madam:

Enclosed please find a copy of our Response to Motion to Dismiss and Brief in Support.

We have filed this document electronically pursuant to STB rules and will retain the original.

A copy will also be forwarded to counsel of record as indicated below.

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, LLP

By: /s/ H. Allen Pennington, Jr. 12/21/2006
H. Allen Pennington, Jr.

HAP/skj

Enclosure

R:\10\PCI\SURFACE TRANSPORTATION Suit 2\Corres\STB Clerk.Ltr.12.21.06.doc

Surface Transportation Board
December 21, 2006
Page 2 of 2

cc: Mr. Richard DeBerry
MCDONALD SANDERS
777 Main Street, Suite 1300
Fort Worth, Texas 76102
Via Certified Mail 7004 1160 0007 3875 1741

Mr. Paul H. Lamboley
Bank of America Plaza, Suite 645
50 W. Liberty Street
Reno, NV 89501
Via Certified Mail 7004 1160 0007 3875 1758

UNITED STATES OF AMERICA

IN AND BEFORE THE SURFACE TRANSPORTATION BOARD

STB DOCKET NO. NOR 42094-SUB NO.1

PCI TRANSPORTATION, INC.

Complainant,

v.

FORT WORTH & WESTERN RAILROAD COMPANY

Respondent.

**RESPONSE TO MOTION TO DISMISS
AND BRIEF IN SUPPORT**

H. Allen Pennington, Jr.
Pennington Hill, LLP
777 Taylor Street, Suite 890
Fort Worth, Texas 76102
(817) 332-5055
(817) 332-5054 (Fax)
apennington@phblaw.com

December 21, 2006

ATTORNEYS FOR PCI
TRANSPORTATION, INC.

BRIEF OF PCI TRANSPORTATION, INC. IN RESPONSE TO THE MOTION TO DISMISS OF FORT WORTH & WESTERN RAIL COMPANY

PCI Transportation, Inc. ("PCI") submits this Brief in support of its Response to the Fort Worth & Western Rail Company's Motion to Dismiss PCI's complaint and would respectfully show the Board the following:

I. SUMMARY OF THE 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 admits that it uses a computer system that does not calculate proper demurrage charges. In July of 2003, a dispute arose concerning false demurrage charges billed to PCI, which PCI demonstrated was erroneous and FWWR confessed was in error. With the matter apparently settled, 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 FWWR. Shortly thereafter, knowing that PCI was now locked into a long term lease, FWWR resubmitted the same false demurrage bill as now past due and owing. PCI reminded FWWR of their prior discussions and FWWR acknowledged the bill was not owed, but then overnight insisted PCI pay the demurrage bill, correct or not, or FWWR would cancel the parties' Agreement. PCI refused to give in to FWWR's abusive and unreasonable rules and practices and filed its lawsuit with the State court in Tarrant County, Texas. For almost three 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 PCI's claims against FWWR. Now that the Fifth Circuit and federal district court have expressly confirmed that the STB does have the exclusive

jurisdiction over all of PCI's claims, FWWR now contends that the STB has no jurisdiction to hear any part of PCI's Complaint.

As a federal agency, the STB is charged with the duty to protect oppressed customers of rail carriers such as PCI. 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 FWWR. PCI's Complaint now 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. Further, the Board is charged to liberally construe its rules to secure just, speedy and inexpensive determination of the issues presented by PCI. Therefore, FWWR's motion to dismiss should be denied. The parties should be directed to discuss discovery and procedure matters in order to compile and propose a joint procedural schedule to the Board. In the alternative, if the Board determines that PCI should replead any particulars of its Complaint, PCI will honor any such order by the Board.

II. PROCEDURAL BACKGROUND

Complainant PCI Transportation, Inc. originally filed suit against Respondent Fort Worth & Western Railroad Company, Inc. ("FWWR") in the 141st District Court of Tarrant County, Texas. As stated above, 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 therein, in an ultimate show of bad faith, FWWR purported to give notice of termination of the parties' Agreement.

The state court case was removed to the federal district court by FWWR on March 19, 2004. FWWR 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.

On August 3, 2004, PCI filed its Second Amended Complaint in the federal court, asserting causes of action against FWWR for breach of the Confidential Demurrage Agreement (the "Agreement"), intentional interference with existing and prospective

contractual relations, injunctive relief and, in the alternative, wrongful termination of the Agreement.

On July 29, 2004, FWWR filed its Amended Answer and Counterclaim against PCI. FWWR 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, FWWR 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. FWWR 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. All such claims, as the Board will recognize, are proper only before the STB, as the Fifth Circuit and federal district court concluded. FWWR specifically and expressly sought a clarification of the federal court that:

"All of PCI's claims, causes of action and requested relief concerning FWWR's demurrage charges, practices and rail services and procedures fall within the exclusive jurisdiction of the Surface Transportation Board."

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 "B" to FWWR's Motion to Dismiss) 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.” (*Id.* 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 (*Id.* at p. 17), and (3) that all of PCI’s extra-contractual claims are also within the exclusive jurisdiction of the STB (*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 ruled that the federal district court had no original subject matter jurisdiction to adjudicate any of PCI’s claims in that lawsuit. In other words, the Fifth Circuit 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 were pending in the Federal lawsuit, before the STB in complete deference to the Fifth Circuit Court of Appeals Opinion. FWR received notice of PCI’s claims and failed to deny any factual averment in its complaint to the STB and, without reservation or general denial, chose to file a dilatory Motion to Dismiss PCI’s claims. At that time, FWR hired a new attorney, who appeared to be unaware of FWR’s prior pleaded and argued position regarding this Board’s jurisdiction, who filed the motion to dismiss PCI’s claims before the STB on the basis that PCI had failed to properly state claims before the STB, and that the STB had no jurisdiction to hear PCI’s claims.

The STB, however, did dismiss PCI's complaint without prejudice and expressed that it was doing so until the federal district court took some action indicating the STB had jurisdiction. (Exhibit "5" to PCI's Original Complaint of October 26, 2006). The federal court has now done so. Thus, FWWR's present contentions that the Board previously dismissed or otherwise found fault with PCI's pleadings before the STB is disingenuous at best; the STB obviously was deferring to the federal district court for prior action on the very same claims which were simultaneously before that Court and the STB.

On February 7, 2006, before the federal district court, FWWR filed an Amended Motion to Dismiss PCI's claims. Astoundingly, FWWR's position was based on its contention that PCI's claims were not properly before such court and the STB had exclusive jurisdiction over same. This continuous and systematic flip-flopping of positions is a transparent effort to avoid any decision on the merits of this case, a case in which FWWR is dead wrong on the facts. Remaining true to form, FWWR also filed an Amended Motion for Summary Judgment before the federal district court contending it was entitled to relief on its claims, which are the mirror image of PCI's claims, which FWWR simultaneously argued could not be ruled upon by the federal district court. Apparently, FWWR'S three year long procedural circus wore thin, and the federal district court denied FWWR's Motion for Summary Judgment and granted the Motion to Dismiss, holding that all parties and all claims were within the exclusive jurisdiction of the STB. (Exhibits "2" and "3" to PCI's Original Complaint of October 26, 2006). The FWWR has now filed notice of an appeal to the Fifth Circuit, complaining of a district court decision which was completely consistent with

FWWR's continuous argument that the STB has sole jurisdiction over the claims between the parties.

For almost three years, before the State court, the federal district court, Fifth Circuit Court of Appeals, and back before the federal district court, FWWR has steadfastly maintained that the Surface Transportation Board ("STB") has exclusive jurisdiction over all of PCI's claims against FWWR. The Fifth Circuit confirmed that in fact, the STB does have the exclusive jurisdiction over all of PCI's claims. After the appeal, FWWR re-urged the federal district court to dismiss PCI's claims because the STB has exclusive jurisdiction over all claims between these parties. The Federal district court granted the motion to dismiss and issued an order clearly indicating that all claims between all parties are within the exclusive jurisdiction of the STB. (Exhibit "C" to FWWR's Motion to Dismiss). Now, FWWR has completely changed its position against the very relief it received from the federal district court, and now contends to this Board that the STB has no jurisdiction to hear PCI's Complaint, and even asks the STB to dismiss with prejudice claims over which FWWR says it has no jurisdiction. (Obviously as any first year law student knows, a forum with no subject matter jurisdiction over a claim could not dismiss such claims on the merits, or with prejudice.)

FWWR'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, FWWR further misconstrues the appellate court opinion because there never was proper subject matter jurisdiction in the

federal district court between the parties, who are both Texas citizens. FWWR vehemently argued in the Fifth Circuit, and prevailed on a Motion to Dismiss before the federal district court, arguing 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 Opinion is now the law of this case (*See* Exhibit "B" to FWWR's Motion to Dismiss). The Opinion states that the STB indeed has exclusive jurisdiction to hear all of PCI's pending claims. 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. The federal district court endorsed this entire analysis, without reservation, in the order dismissing the claims before it. (*Id.*)

The complaint filed by PCI has been deemed proper before the STB by the Fifth Circuit and the federal district court. The STB is a federal agency charged with the duty to protect oppressed customers of rail carriers such as PCI, and, as such, the STB should not allow FWWR to continue 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 FWWR. 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 FWWR and for its improper, oppressive and discriminatory acts against PCI. FWWR asks this Board to scoff at the decisions of the Fifth Circuit Court of Appeals and the federal district court, and indeed to ignore them, and dismiss PCI's claims, which have been deemed not proper before the federal district court,

not proper before the state court, but proper only before the STB. It is FWWR's motion to dismiss which is not proper and without merit, and it should be denied, with an order requiring FWWR to answer the complaint. The STB is also requested to set a hearing on PCI's request for injunctive relief as soon as possible.

III. Arguments and Authority

A. The STB does have Exclusive Jurisdiction over All PCI's Claims

FWWR 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. FWWR apparently believes that PCI should have no forum for relief, and that the STB should simply protect FWWR and whatever abusive billing tactics they wish to impose. FWWR's present arguments are virtually identical to legal arguments that have been expressly rejected 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 and the ruling by the federal district court.

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. (Exhibit "B" to FWWR's Motion to Dismiss)
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, and their course of dealing thereunder, is not within the terms of the parties' express agreement, and thus is 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 rail yard, 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. (*Id.* at p. 18) The federal district court has followed the Fifth Circuit and in its order dismissing the lawsuit, held that it was doing so because the STB has exclusive jurisdiction over all parties and claims which were previously before it. (Exhibits “2” and “3” to PCI's Original Complaint of October 26, 2006). Therefore, respecting the Opinion of the Fifth Circuit Court of Appeals and the opinion of the federal district court, 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 and the federal district court, as discussed above.

B. PCI's Complaint is Proper Before the STB

The Fifth Circuit Court of Appeals has delivered its decision, judgment and mandate. The federal district court has now ruled consistently with the Fifth Circuit. 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 and the district court have 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 and the federal district court, all claims brought by PCI are ripe for adjudication before the proper forum, the STB.

Since PCI's complaint has now been filed before the STB, as directed by the Fifth Circuit and the federal district court, 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 was obviously being sought by FWWR in the federal district court so that it could argue some preclusive effect before the STB. This was 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 three 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. The Fifth Circuit and federal district court have held that the STB has jurisdiction over these claims, which could potentially affect FWWR's conduct in operating its business. Therefore, the STB has exclusive jurisdiction to hear such claims.

Nothing has prevented 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, in a form requested by FWWR, 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. As such, PCI's complaint before the STB is timely and ripe for consideration by the STB and FWWR's Motion to Dismiss should be, in all things, denied.

C. Statutory Authority for PCI's Claims

PCI's Complaint is more than sufficient to allow FWWR 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, FWWR 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, FWWR argues that the STB should recognize and require form over substance and apply some hyper-technical pleading requirement upon PCI. FWWR'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, FWWR ignores the express holdings of the Fifth Circuit and federal district court, 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 FWWR cannot discern the basis of PCI's claims, FWWR's motion to dismiss is improper in any event. The Fifth Circuit had no problem understanding the claims, and concluding PCI's claims were proper before the STB, and neither did the federal district court. 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 Gaston¹ provides a highly detailed factual background of 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

¹ The affidavit of Randy Gaston is attached as Exhibit "4" to PCI's Original Complaint of October 26, 2006, and is incorporated by reference herein.

especially offensive since it was allowed to engage in unlimited discovery of its choosing in the federal district court proceeding on the facts of PCI's case, while simultaneously objecting to basic requests for documents served upon it by PCI.

PCI's present 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, which according to the rules of the STB, is the proper due order of pleading before any dismissal should be entertained by the STB. 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 the facts of 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. Technical deficiencies, if any, could very easily be corrected if PCI were ordered to clarify its complaint, to the extent necessary.

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; 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 unwritten, but 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,

2004.² 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."

Furthermore, PCI's understanding of the established practices of FWWR is confirmed in

² The deposition of FWWR representative Charles Godsey is attached to PCI's Original Complaint as Exhibit "6" and incorporated by reference herein.

Gaston's Affidavit. (Exhibit "4," pp. 9-10, to PCI's Original Complaint of October 26, 2006). 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 states is in violation of 49 USC Sections 10702, 10704 and 10741. PCI also contends that FWWR'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 FWWR is responsible under 49 USC § 11907.

Additionally, under 49 USC § 10746, FWWR is responsible for computing and accurately accessing demurrage charges and establishing reasonable rules related to those charges. PCI contends that FWWR has violated this statute to PCI's detriment by implementing wholly unreasonable rules and practices related to its demurrage charges to customers, including PCI. FWWR has also committed several violations of its own customary rules and practices, as set forth above, in a discriminatory manner against PCI.

FWWR 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 FWWR's own mistakes in delivering rail cars and then attempts to make improper demurrage charges to PCI. When notified of such demonstrably erroneous charges and actions, FWWR simply informed PCI that regardless of whether the charges were a result of FWWR'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 FWWR has engaged in discriminatory acts against PCI in violation of the rules it employs regarding demurrage charges. Further PCI contends that FWWR was in violation of Section 10746 when it knowingly used a computer program to compute demurrage charges to its customers that FWWR 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 FWWR's customers, PCI believes that it should be entitled to discovery and a review of the demurrage bills sent to all of FWWR's customers, to determine if the errors of the system are acknowledged and fixed with its other customers, and whether FWWR's "stick it to 'em" attitude and practice involving PCI is widespread. PCI also believes that the Board has the authority to initiate an investigation itself or allow PCI to investigate and fully discover these matters under the authority granted to the Board under the laws of the United States of America, and believes such discovery would promote the purpose of the ICCTA and would be just under the circumstances.

If the STB is truly interested in investigating and insuring the proper and fair operations of companies like FWWR, these allegations are sufficient to qualify as cognizable

claims. Further, if FWWR is imposing these fraudulent practices and procedures through the use of a known faulty computer system, then all of FWWR's customers are being mistreated without any recourse. If the STB does not investigate FWWR's procedures, it may be likely that FWWR has oppressively and improperly billed its customers for several years and for a large amount of money.

There is no doubt that PCI's Complaint is adequately pled to allow FWWR 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 requisite discovery process under the STB rules. In this Response, PCI has also provided each of the specific statutes of which it contends FWWR 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 supplementation curing any deficiencies which allegedly formed the basis of FWWR's motion to dismiss, PCI respectfully requests that this Board deny FWWR's motion to dismiss and, after, almost three years of litigation, finally require FWWR 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 power and 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 FWR which alleges it is the exclusive provider of rail services on PCI's railroad spur in Fort Worth, Texas. FWR brazenly admits that its computer system used to compute demurrage charged to its customers is flawed and does not calculate the proper charges.³ A dispute arose concerning the false demurrage charges billed to PCI in July of 2003. PCI demonstrated that the bill was erroneous and FWR confessed its mistake. A few months later, FWR resurfaced, contending that the demurrage bill it had acknowledged was erroneous months before, was now past due and owing. PCI attempted to remind FWR of their prior discussions. FWR 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 FWR would cancel the parties' Agreement. PCI refused to give in to FWR's abusive and unreasonable rules and practices, so it filed its lawsuit with the State court in Tarrant County, Texas.

For almost three years, before the State court, the federal district court, and Fifth Circuit Court of Appeals, FWR has maintained that the STB has exclusive jurisdiction over all of the claims between these parties. Now that the Fifth Circuit and federal district court have confirmed that, in fact, the STB does have the exclusive jurisdiction over all of PCI's claim, FWR has completely switched gears and now contends that the STB has no jurisdiction to hear any part of PCI's Complaint. As a federal agency charged with the duty

³ The deposition of FWR representative, Charlie Paul Godsey, is attached as Exhibit "6" to PCI's Original Complaint of October 26, 2006, and is incorporated by reference herein. In his deposition Mr. Godsey provides a detailed account of FWR'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 FWR's actions with regard to the subject false demurrage bill and its attempted cancellation of the parties' demurrage agreement. For the Board's convenience, the pages to Godsey's deposition cited above are found at pp. 165-180, 191-207, 231-233, 235-238, and 265-272 of PCI's Original Complaint of October 26, 2006.

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. Further, the Board is charged to liberally construe its rules to secure just, speedy and inexpensive determination of the issues presented by PCI. Therefore, FWWR's motion to dismiss should be denied and the parties should be directed to discuss discovery and procedure matters to compile and propose a joint procedural schedule to the Board. In the alternative, if the Board determines in its power and sole discretion that it would aid in clarifying PCI's present claims under the ICAA, that PCI should replead its Complaint, FWWR should be made to identify any deficiencies with PCI's complaint and upon such an order from the Board, PCI would replead its Complaint and such order by the Board will be honored.

PRAYER

WHEREFORE, PREMISES CONSIDERED, PCI respectfully requests that Respondent FWWR's *Motion to Dismiss* be denied, that PCI be allowed an oral hearing as soon as possible regarding its requested temporary injunction and permanent injunction against FWWR, 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.

PENNINGTON HILL, LLP

By: /s/ H. Allen Pennington, Jr. 12/21/2006
H. Allen Pennington, Jr.
Texas State Bar No. 15758500

777 Taylor Street, Suite 890
Fort Worth, Texas 76102
Telephone: (817) 332-5055
Facsimile: (817) 332-5054
apennington@phblaw.com

ATTORNEYS FOR
PCI TRANSPORTATION, INC.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the *Response to Motion to Dismiss and Brief in Support* has been forwarded to counsel of record on this the 21st day of December, 2006, as indicated below:

Paul H. Lamboley
Bank of America Plaza, Suite 645
50 W. Liberty Street
Reno, NV 89501
Via CMRRR #7004 1160 0007 3875 1758

Mr. Richard DeBerry
MCDONALD SANDERS
777 Main Street, Suite 1300
Fort Worth, Texas 76102
Via CMRRR # 7004 1160 0007 3875 1741

/s/ H. Allen Pennington, Jr. 12/21/2006
H. Allen Pennington, Jr.