

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.

---

**REPORT AND PROPOSED PROCEDURAL SCHEDULE**

---

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

March 16, 2007

ATTORNEYS FOR PCI  
TRANSPORTATION, INC.

Pursuant to the order of the Surface Transportation Board (“STB”) issued on February 2, 2007, Complainant PCI Transportation, Inc. (“PCI”) files this its Report and Proposed Procedural Schedule with the STB, and will show the Honorable Board the following:

### **Discussion**

Complainant PCI reports that PCI and Respondent Fort Worth & Western Railroad Company (“FWWR”) began discussing discovery and procedural matters on or about March 6, 2007, in compliance with the order of the STB. After several days of exchanging proposed discovery and procedural schedules and numerous telephone conferences, the parties agreed to submit competing proposed discovery and procedural schedules for the Board’s consideration.

PCI is the Complainant and, as such, is in the best position to estimate and determine the amount of discovery it will need to prepare its claims against FWWR. FWWR, as a respondent, has every motivation to stifle all efforts by PCI to conduct discovery and develop its case against FWWR. Since this matter was originally initiated by PCI over two years ago, FWWR has engaged in repeated and continuous dilatory procedural tactics to avoid allowing any meaningful discovery to take place between the parties. One of the bases for PCI’s claims is that FWWR has employed the use of a faulty customer billing system which FWWR’s representative Mr. Charles Godsey has testified does not correctly compute proper demurrage charges for FWWR’s many customers, including PCI. (See Deposition of Mr. Godsey at Exhibit “6” to Claimant’s Original Complaint.) As such, PCI estimates that the investigation through the discovery process will require extensive written discovery, several depositions of FWWR personnel, as well as a limited number of third parties who may also have been abused by FWWR’s faulty demurrage calculation and billing practices.

Given the seriousness of the allegations in this matter, and what is at risk for FWWR with its manner of doing business, FWWR naturally takes the position that very little, if any, discovery is needed between these parties. FWWR has proposed a completely unrealistic discovery and procedural schedule that serves its interests, attempts to use the STB as a shield to protect its abusive practices and inaccurate billing system, and continues its efforts to avoid allowing the facts of this controversy between these parties from coming to light before the Board. FWWR's proposed schedule limits to almost nothing the amount of discovery that will be allowed between the parties and also provides for no time whatsoever to resolve any anticipated discovery resistance PCI will inevitably face in this proceeding from FWWR.

For example, FWWR suggests in its proposed schedule that the parties should be forced to conduct all oral depositions within a time span of only two days, in fact two days that PCI's counsel will be trying a jury case. This suggestion by FWWR is completely impractical, doesn't take into consideration the inevitable scheduling conflicts that always arise between parties in a dispute such as this, and fails to make any concession to the fact that potential third party deponents, who can only be revealed through initial written discovery, would inevitably not be available during a window of two calendar days during Memorial Day week. This ludicrous proposal does, however, reveal FWWR's unabashed and continued efforts to thwart justice and hide the facts in this matter. FWWR has a very real and self-serving concern to side-step and short-circuit discovery in this matter, which PCI is confident will demonstrate not only the abuse PCI has suffered at the hands of FWWR, but also will bring to the Board's attention improper conduct by FWWR on a much wider scale. FWWR has asked this Board to employ a discovery and procedural schedule that is so limited and compact that PCI would have no realistic opportunity to gather the necessary evidence it needs to prove its claims. If the Board is

interested in allowing justice to prevail, it must allow the parties a realistic opportunity to conduct discovery, especially given the obvious procedural history of delay and misdirection exercised by FWWR in this matter. FWWR's proposed procedural and discovery plan is only the most recent step in its continuing efforts to deny PCI the opportunity to demonstrate FWWR's improper railroad practices.

In good faith and in the interest of ensuring both parties a reasonable and realistic opportunity to conduct discovery, PCI has prepared a proposed discovery and procedural schedule for the Board's consideration. PCI respectfully requests that the Board approve the discovery and procedural schedule below.

### **PROCEDURAL SCHEDULE**

1. April 5, 2007 PCI Shall file its Answer to FWWR's Counter-Claim
2. Discovery Period April 21, 2007 – August 10, 2007
  - a) April 21, 2007 PCI and FWWR shall serve their First Written Requests for Discovery during the week of April 21, 2007 (Interrogatories, Production, and/or Admissions)
  - b) May 21, 2007 PCI's and FWWR's Responses to Written Requests for Discovery shall be due thirty (30) days from the date of service of such discovery plus 3 days if such discovery is served by mail or facsimile.
  - c) Depositions shall be taken during the discovery period upon written agreement by the parties or good cause shown to and approval by the Board.
  - d) Nothing precludes the parties from propounding additional discovery to the parties in this proceeding or to any third parties beyond April 21, 2007, but such written discovery must be served 30 days before the end of the discovery period of August 10, 2007
3. Aug. 27, 2007 PCI's Opening Statement in Support of Complaint and FWWR's Opening Statement in Support of Counter-Claim

4. Sept. 27, 2007 FWW's Reply Statement in Opposition to PCI's Complaint and PCI's Reply Statement in Opposition to FWWR's Counter-Claim
5. Oct. 26, 2007 PCI's Rebuttal Statement in Support of Complaint FWWR's Rebuttal Statement in Support of its Counter-Claim
6. Nov. 29-30, 2007 Oral Hearing on Merits
7. This scheduling plan may be modified in any way by written agreement by the parties and notification to the Board. Further, in the event of any unforeseen circumstances which render any of the dates listed above impossible or unduly burdensome, any party may seek a modification of or extension of time with respect to this plan upon written motion to the Board and a showing good cause.

### **PRAYER**

WHEREFORE, PREMISES CONSIDERED, PCI respectfully requests that the Board approve the proposed procedural and discovery schedule set forth herein in its entirety or those portions the Board deems appropriate and acceptable, that PCI be granted declaratory relief as requested in its Complaint, 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. 3/16/2007  
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 *Report and Proposed Procedural Schedule* has been forwarded to counsel of record on this the 16<sup>th</sup> day of March, 2007, as indicated below:

Paul H. Lamboley  
Bank of America Plaza, Suite 645  
50 W. Liberty Street  
Reno, NV 89501  
**Via CMRRR**

Mr. Richard DeBerry  
MCDONALD SANDERS  
777 Main Street, Suite 1300  
Fort Worth, Texas 76102  
**Via CMRRR**

Mr. Albert S. Tabor  
Vinson & Elkins, LLP  
2300 First City Tower 1001 Fannin  
Houston, Texas 77002-6760  
**Via CMRRR**

/s/ H. Allen Pennington, Jr. 3/16/2007  
H. Allen Pennington, Jr.