

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.

**MOTION FOR LEAVE TO FILE ANSWER TO COUNTERCLAIM
BY PCI TRANSPORTATION, INC.**

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March 29, 2007

ATTORNEYS FOR PCI
TRANSPORTATION, INC.

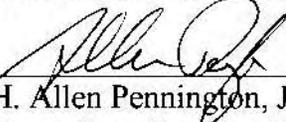
**MOTION FOR LEAVE TO FILE LATE ANSWER
BY PCI TRANSPORTATION, INC.**

Complainant, Transportation Inc. Inc. ("PCI") or "Complainant", hereby moves the Board to grant PCI leave to file its original answer to the Counterclaims filed by Fort Worth and Western Railroad Company ("FWWR") filed on February 26, 2007. No scheduling order has been entered, so that the filing of this answer will not delay the proceedings before the Board. Counsel was not familiar with the requirement to file an answer to a counterclaim, which is not required in Texas practice.

In order that the Board will be able to see the issues which are disputed, and those which are undisputed, by seeing the specific admissions and denials of the allegations of the Counterclaim, and in the interest of justice, PCI requests leave to file the attached Answer to FWWR's Counterclaim.

Respectively submitted,

PENNINGTON HILL, LLP

By: 
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on counsel of record identified below via First Class U.S. Mail, postage paid, on this the 29th day of March, 2007. In addition, this document was forwarded to opposing counsel via email.

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H. Allen Pennington, Jr. - Lead counsel
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CERTIFICATE OF CONFERENCE

I attempted to confer with Mr. Richard DeBerry regarding this motion, but was unable to reach him. No opposition is anticipated given that PCI did not object to FWWR's late filing of an answer to the original complaint in this matter.



H. Allen Pennington, Jr. - Lead counsel
State Bar No. 15758500

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STB DOCKET NO. NOR 42094-SUB NO.1

PCI TRANSPORTATION, INC.

Complainant,

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**ORIGINAL ANSWER BY PCI TRANSPORTATION, INC.
TO COUNTERCLAIMS OF FORT WORTH AND
WESTERN RAILROAD COMPANY**

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ATTORNEYS FOR PCI
TRANSPORTATION, INC.

**ORIGINAL ANSWER BY PCI TRANSPORTATION, INC.
TO COUNTERCLAIMS OF FORT WORTH AND
WESTERN RAILROAD COMPANY**

COMES NOW Complainant, PCI Transportation, Inc. filing this its original answer to the counterclaim filed by Fort Worth and Western Railroad ("FWWR") and hereby admits, denies, avers, and asserts its affirmative defenses as follows:

I. PARTIES

1. Answering paragraph 1 of the Counterclaims, PCI admits the allegations contained therein.

2. Answering paragraph 2 of the Counterclaims, PCI admits the allegations contained therein.

II. JURISDICTION

3. Answering paragraph 3 of the Counterclaims, PCI admits the STB has jurisdiction of at least some of the claims between the parties herein. PCI reserves the right to seek a severance of FWWR's claims from this proceeding.

III. BACKGROUND FACTS

4. In answering paragraph number 4 of the Counterclaims, PCI admits the allegations contained therein on information and belief.

5. In answering paragraph number 5 of the Counterclaims, PCI denies the allegations therein, save and accept as follows: PCI admits that it is a rail service customer of Burlington Northern Santa Fe ("BNSF") and Union Pacific ("UP"). PCI denies the other allegations contained in this paragraph. Despite numerous requests and opportunities, FWWR has not provided the documentation to support these factual allegations.

6. Answering paragraph 6 of the Counterclaims, PCI denies the allegations therein, save and accept as follows: PCI cannot admit or deny the demurrage arrangements under which FWWR provides railcar switching services for customers of BNSF and UP other than PCI. PCI admits that demurrage arrangements and charges may be established pursuant to confidential agreements between the parties, under federal law.

7. In answering paragraph 7 of the Counterclaims, PCI admits that FWWR first began rail services to PCI in the spring of 1998 on information and belief. PCI admits that it entered into a confidential demurrage agreement (the "Confidential Demurrage Agreement") or ("CDA"), on or about August 23, 2001 with FWWR. PCI denies that the CDA was effectively terminated by FWWR as to PCI on April 20, 2004, for any default of payment of demurrage charges or any repudiation, and contends the agreement is still in effect. PCI admits that FWWR attempted to cancel or terminate this CDA and put PCI on a cash basis and notified PCI that demurrage would be charged pursuant to tariff 8001-G. In this respect, PCI's contention is that it denies the tariff 8001-G applies to its arrangement with FWWR to the extent that it deviates from the CDA, which PCI contends was improperly terminated and thus, is still in effect between the parties.

8. Answering paragraph 8 of the Counterclaims, PCI denies the allegations contained therein except as stated hereafter. PCI does admit that FWWR continued to provide services to PCI, but denies that such services were under the control or auspices of tariff 8001-G. PCI further denies that demurrage charges accrued and were invoiced to PCI from March 30, 2004 to June 29, 2006 in the total amount of \$61,040.00 exclusive as interest as it is PCI's contention that FWWR's charge of demurrage under tariff 8001-G (which

allows only two days of free time, as opposed to the four days under the CDA) is improper and therefore any such demurrage charges are calculated improperly as well. Further, PCI denies the total amount of alleged demurrage charges as FWWR has computed those damages under an inapplicable tariff and with a faulty computer system which it admits does not properly compute demurrage charges in the first place. PCI denies that demurrage charges for continuing rail service to PCI have continued to accrue.

9. In answering paragraph 9 of the Counterclaims, PCI denies the allegations contained therein. PCI denies that it has failed or refused to pay proper demurrage charges (pursuant to the tariff or otherwise) since it believes the CDA is still in effect, and the tariff does not apply to the relationship between these parties. PCI denies that it has indicated, unequivocally or otherwise, that it will continue to refuse to pay any and all demurrage charges accruing to FWWR in the future, because PCI has indicated that it will pay demurrage charges properly accruing pursuant to the CDA.

10. In answering paragraph 10 of the Counterclaims, PCI incorporates its preceding paragraph 1 through 9 responses herein.

11. In answering paragraph 11 of the Counterclaims, PCI admits to the allegations contained in the first and second sentence of such paragraph. PCI denies that FWWR is authorized to impose charges on PCI pursuant to its tariff, as opposed to the parties' terms contained in the CDA.

12. In answering paragraph 12 of the Counterclaims, PCI denies all allegations contained therein. PCI contends that the tariff does not control the relationship between

these parties. PCI contends that the CDA has not been terminated, and should therefore still be in effect and applicable to these parties and their relationship.

13. In answering paragraph 13 of the Counterclaims, PCI denies all allegations therein. PCI asserts that its complaint only seeks to avoid payments shown to be beyond the scope of the CDA, improperly charged under any alleged tariff and incorrectly computed by FWWR's faulty computer system. In response to paragraph 13a of the Counterclaims, PCI denies that FWWR is entitled to any declaration that tariff 8001-F and successor FWWR tariff 8001-G are fair, just, reasonable and nondiscriminatory as to PCI, because it is PCI's contention that the tariffs do not apply to the relationship between the parties to the extent that they deviate from the terms contained in the CDA, which is applicable to the parties. In responding to paragraph 13b of the Counterclaims, PCI admits that a letter was sent on March 2, 2004, purporting to cancel and/or terminate PCI if it failed to pay then accrued demurrage by March 8, 2004. However, PCI denies that such letter was justified, lawful or well founded on any valid ground. Further, PCI contends that FWWR was attempting to impose demurrage charges that were patently false and inaccurate. In answering paragraph 13c of the Counterclaims, PCI denies all the allegations contained therein. PCI further asserts that the letter of April 20, 2004, did not cancel the CDA. In responding to paragraph 13d of the Counterclaims, PCI denies all allegations contained therein. Further, PCI asserts that FWWR cannot impose nor collect demurrage pursuant to tariff 8001-G, as such tariff does not include the terms in the CDA, which has not been properly terminated, and must control the parties' relationship. Further, FWWR would not be charging demurrage under tariff 8001-G unless such tariff allows the imposition of random and arbitrary demurrage

charges through the use of the faulty computer program such as the one used by FWWR. In answering paragraph 13e of the Counterclaims, PCI denies all allegations contained therein. PCI asserts that it has contested improper charges attempted to be imposed upon it by FWWR's faulty computer programming system, which improperly computes demurrage charges and under the alleged tariff.

14. In answering paragraph 14 of the Counterclaims, PCI incorporates the proceeding responses to paragraphs 1 through 13 above.

15. In answering paragraph 15 of the Counterclaims, PCI denies all allegations contained therein. PCI contends that FWWR should not be entitled to any demurrage charges which were improperly calculated, or calculated pursuant to any inapplicable tariff, as the demurrage charges by FWWR to PCI should be controlled by the CDA, which was improperly terminated by FWWR.

16. In answering paragraph 16 of the Counterclaims, PCI denies all allegations.

17. To the extent the prayer in FWWR's Counterclaim requires any response, PCI denies FWWR is entitled to any of the relief requested against PCI.

As and for affirmative defenses to the Counterclaims, PCI incorporates each and every admission and denial of allegation made in paragraphs 1 through 17 above, as if fully set forth herein. PCI alleges, separately and/or alternatively, even if inconsistent, the following affirmative defenses to claims made by the respondent, FWWR, in its Counterclaims:

1. To the extent any claims alleged in the Counterclaims, are ultimately deemed cognizable by the Board under the ICA, such claims are barred by the statute of limitations and/or the doctrine of mitigation, waiver, estoppel and/or laches.

2. Such claims are barred by the claims and facts set forth in PCI's complaint, which are incorporated herein by reference.

PRAYER

WHEREFORE, PREMISES CONSIDERED, PCI requests that upon hearing of this matter, FWWR take nothing by its Counterclaims and its Counterclaims be dismissed with prejudice, and that PCI be awarded all relief sought by way of its original complaint or amendment thereto, and its attorneys fees and costs, and that the Board grant PCI such other and further relief to which it may show itself justly entitled.

PENNINGTON HILL, LLP

By: /s/ H. Allen Pennington, Jr. 03/29/2007

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ATTORNEYS FOR

PCI TRANSPORTATION, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on counsel of record identified below by First Class U.S. Mail, postage pre-paid, on this 29th day of March, 2007: In addition, this document was forwarded to opposing counsel via email.

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