

219 465

PAUL H LAMBOLEY  
BANK OF AMERICA PLAZA  
SUITE 645  
50 W LIBERTY STREET  
RENO, NV 89501

TEL 775 786 8333  
FAX 775 786 8334

E-MAIL  
[phlamboley@aol.com](mailto:phlamboley@aol.com)

Via E-filing

May 29, 2007

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

Re: *PCI Transportation, Inc v. Fort Worth & Western Railroad Company*  
STB Docket No NOR 42094 Sub-No. 1

Dear Secretary Williams:

Enclosed for filing on behalf of Respondent Fort Worth & Western Railroad Company in the above-captioned docket is the Respondent's Request for Decision on Motion to Dismiss presented in both original and PDF version in WORD format done on an iMac

By agreement, counsel for PCI has been served both by E-Mail and U.S. Mail this date.

Please acknowledge receipt.

Thank you.

Yours truly,

Paul H. Lamboley

PHL/nd  
Enc

**UNITED STATES OF AMERICA**  

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**BEFORE THE SURFACE TRANSPORTATION BOARD**  

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**STB DOCKET NO. NOR 42094 Sub-No.1**  

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**PCI TRANSPORTATION, INC.**

**Complainant,**

**v.**

**FORT WORTH & WESTERN RAILROAD COMPANY**

**Respondent.**

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**RESPONDENT FORT WORTH & WESTERN RAILROAD COMPANY'S  
REQUEST FOR DECISION ON MOTION TO DISMISS**

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**Paul H. Lamboley  
Bank of America Plaza, Suite 645  
50 W. Liberty Street  
Reno, NV 89501  
Tel. 775.786.8333  
Fax 775.786.8334  
E-mail: [phlamboley@aol.com](mailto:phlamboley@aol.com)**

**Richard C. DeBerry  
Russell A. Devenport  
MCDONALD SANDERS, P.C.  
777 Main Street, Suite 1300  
Fort Worth, TX 76102  
Tel. 817.336.8651  
Fax 817.334.0271**

**May 29, 2007**

**Attorneys for Respondent  
Fort Worth & Western Railroad Company**

## REQUEST FOR DECISION ON MOTION TO DISMISS

Respondent FORT WORTH & WESTERN RAILROAD COMPANY ("FWWR") respectfully requests decision on Respondent's pending Motion to Dismiss, dated November 21, 2006, raising jurisdictional issues under 49 U.S.C. §10709 concerning the complaint filed by Complainant PCI TRANSPORTATION, INC ("PCI").

All replies and responses thereto having been timely filed in December 2006, the Motion to Dismiss is at issue and ripe for decision.

### REASONS SUPPORTING REQUEST FOR DECISION

FWWR submits the following reasons for the Board to now consider decision on the Motion to Dismiss:

1. FWWR's Motion to Dismiss raises significant threshold jurisdictional issue under 49 U.S.C. 10709, i.e. whether PCI's complaint alleges causes of action and claims cognizable by the Board for which relief can be granted in light of contractual issues statutorily excluded from Board jurisdiction by 49 U.S.C. 10709. FWWR argues that PCI's complaint essentially repeats the contract-based claims alleged in prior proceedings, Case No. NOR 42094, dismissed without prejudice.

If, as FWWR contends it should, the Board concludes that PCI complaint realleges contract-based and tort claims beyond Board jurisdiction, the complaint should be dismissed, obviating the need for further proceedings on PCI's complaint.

2. On May 11, 2007 the Board issued a Procedural Schedule Order authorizing discovery. As is evident from pleadings to date, PCI and FWWR disagree on the contract premises of PCI complaint, as well as the need for and scope of discovery.

Given the nature of demurrage dispute between the parties and the threshold question whether PCI's claims are contract-based outside of Board jurisdiction by reason of Section 10709, decision on the Motion to Dismiss will doubtlessly help define the scope of discovery, if any, authorized.

3. FWWR has timely appealed the remand decision of the United States District Court dismissing all parties' claims and counterclaims as being within exclusive Board jurisdiction to the United States Court of Appeals for the 5<sup>th</sup> Circuit ("5th Circuit"), Case No 06-11301. FWWR contends the District Court's decision is contrary to law and the prior decision of the 5<sup>th</sup> Circuit which concluded that "at the very least, a portion of PCI's claims", those seeking injunctive relief, are preempted by the ICA, and implied that other PCI contract-based claims issues may be excluded from Board jurisdiction under 49 U.S.C. 10709.

The 5<sup>th</sup> Circuit has extended the time for FWWR's Opening Brief to allow having the benefit of the Board's action on FWWR's Motion to Dismiss

4 In Ex Parte No. 669, the proposed rule and discussion set out in Notice served March 29, 2007 interpreting the term "contract" as used in 49 U.S.C. §10709, may aptly apply to the *hybrid* nature of a contract between PCI and FWWR which involves the contractual modification and potential incorporation of a referenced common carrier demurrage tariff, and the subsequent termination of that contract by FWWR.

The circumstances in this case suggest the absence of "unilateral contract" as that term was used in Ex Parte No 669, in favor of bilateral arrangement that existed until terminated. In this case, PCI appears to assert claims essentially grounded on a "mutuality of obligation between the carrier and shipper that appear to have the

hallmarks of a contractual relationship. These bilateral agreements mutually bind both the shipper and the carrier for a given period of time. In exchange for some sort of consideration from the shipper, the carrier commits to a specific rate or service for a specific term." See Ex Parte No. 669, Notice of Proposed Rulemaking ("NPRM"), p. 4.

Notwithstanding the NPRM's prospective application to contracts entered into post-FR publication of decision, Ex Parte No. 669 offers analytical guidance for disposition of FWWR's motion to dismiss based on Section 10709 and the hybrid arrangement at issue.

#### CONCLUSION

For the foregoing reasons, FWWR believes the Board should now address the disposition of FWWR's Motion to Dismiss, and respectfully requests that the Board do so.

Dated and submitted this 29<sup>th</sup> day of May, 2007 by \_\_\_\_\_/s/\_\_\_\_\_ for  
Paul H. Lamboley

Paul H. Lamboley  
Nevada State Bar No. 2149NV  
Law Offices of Paul H. Lamboley  
Bank of America Plaza, 645  
50 W. Liberty  
Reno, Nevada 89501  
Tel. 775.786.8333  
Fax 775.786.8334

and

Richard C. DeBerry  
State Bar No. 24007109  
Russell a. Devenport  
State Bar No. 24007109  
McDONALD SANDERS PC  
777 Main Street, Suite 1300  
Fort Worth, Texas 76102  
Telephone: (817) 336-8651  
Metro. (817) 429-1150  
Facsimile: (817) 334-0271

**Attorneys for Fort Worth & Western Railroad Company**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that by agreement a true and correct copy of the foregoing document was served on Council of Record identified below (1) by e-mail and (2) by first class U S mail, postage prepaid, this 29<sup>th</sup> day of May, 2007

H. Allen Pennington, Jr.  
Pennington Hill LLP  
777 Taylor Street, Suite 890  
Fort Worth, Texas 76102  
Tel. 817 332 5055  
Fax 817.332.5054  
E-mail: apennington@phblaw.com

Dated 29<sup>th</sup> of May, 2007.

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/s/  
Paul H. Lamboley