UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2897

PETROLEUM NETWORKS, INC.,

Plaintiff-Appellant,

versus

CHEVRON PIPE LINE CO.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 92 415)

August 31, 1995

Before JONES, DUHÉ and STEWART, Circuit Judges.

EDITH H. JONES, Circuit Judge:[*]

Petroleum Networks, Inc. ("PNI") appeals from the district court's grant of summary judgment to Chevron Pipe Line, Inc. ("CPL" or "Chevron"). PNI sued CPL alleging discrimination claims pursuant to the Interstate Commerce Act, 49 App. U.S.C.A. §§ 1-27 ("the ICA"), various claims under Texas law, violations of federal antitrust statutes, and damage claims for lost profits. The district court granted CPL's motion for summary judgment

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

finding that the ICA claims were not proper, Texas law did not apply, the federal antitrust statutes had not been violated, and the lost profits claim should be denied. PNI appeals the district court's rulings as to the ICA claims, the Texas law claims, and the lost profits claim, apparently abandoning the antitrust claims. Finding no reversible error, we affirm.

I.

BACKGROUND

CPL, a Delaware corporation with its principal places of business in California and Louisiana, is a common carrier engaged in the interstate and intrastate pipeline transportation of crude petroleum along the Louisiana-Mississippi Gulf Coast. It operates a terminal facility at Empire, Louisiana known as the Empire Terminal System ("Empire"). Empire receives virgin whole sweet crude produced from various wells in Louisiana and on the adjacent Outer Continental Shelf. These wells are owned and operated by a wide variety of interests and produce a crude known in the industry as Heavy Louisiana Sweet or "HLS." The vast majority of crude petroleum received by Empire arrives via pipeline from offshore production platforms, but until May 1993, Empire also had a barge dock capable of on- and off-loading deliveries. From Empire's terminal, crude oil is transported in lines running to major refineries in Louisiana belonging to British Petroleum, Exxon, Shell and Mobil, and to a line feeding Chevron USA's Pascagoula, Mississippi refinery.

CPL operates a "common stream" pipeline, in that petroleum from the various sources is often commingled and delivery is made "from the common stream." The mix flowing from the Empire Terminal is referred to as "Empire Mix." CPL operates a "gravity bank" by which shippers and consignees are compensated or charged for the difference between the value, measured in terms of API gravity, of the crude they shipped or received and the average of that transported. In essence, shippers and consignees are paying each other to prevent anyone from taking advantage of or being penalized by the mixing of higher and lower value crudes in the common stream.

PNI, a corporation with its principal place of business in Texas, was set up as an independent crude petroleum marketing company to purchase, blend and transport mixtures of crude oil and natural gasoline for sale through CPL's Empire terminal. CPL argues that PNI's blend is a "dumbbell blend" designed to take advantage of the common stream and gravity bank. CPL observes that "by mixing the low gravity crude with high gravity natural gasoline, a mid-range composite gravity results. Thus, rather than paying a penalty to the gravity bank [as it would have if the crude and gasoline were shipped separately] PNI would receive a payment from the gravity bank as if it were shipping high value HLS." Further, CPL contends, PNI sought to profit by delivering to Empire its inexpensive blend, which CPL argues would be unattractive to refiners if not commingled with the common stream because it had little or no "distillate fraction", but marketing its product as

HLS from Empire's common stream and commanding Empire Mix premium prices.

On October 11-12, 1991, PNI made one such shipment of approximately 60,000 barrels by barge through the Empire Terminal to British Petroleum's refinery. As the district court stated,

> The record shows that on August 29, 1991, [PNI] purchased approximately 40,000 barrels of heavy sweet crude oil, and approximately 20,000 barrels of natural gasoline. The heavy sweet crude was purchased from Phibro Energy, Inc. at St. Rose, Louisiana and delivered to a [PNI] barge from the IMTT Storage Tank facility adjacent to Phibro's refinery in St. Rose, Louisiana. The crude was then transported down the Mississippi River to Harahan, Louisiana.
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> The natural gasoline was delivered to a [PNI] barge . . . at either Breaux Bridge, Louisiana or Butte La Rose, Louisiana. The natural gas was then transported down the Mississippi River to Harahan, Louisiana. These transports all occurred within the state of Louisiana. After blending, the blend produced was transported by barge directly to Empire Terminal.

(footnote omitted). On October 15, British Petroleum complained to CPL that it had experienced a significant disruption at its refinery resulting in reduced production and accompanied by a substantial increase in yields of "light straight run (i.e. natural gasoline) and heavy ends." BP attributed the irregularities to problems with the crude received from Empire. CPL reviewed samples of recent barge deliveries and determined (from samples of PNI's delivery) that PNI had delivered "dumbbell crude" that was

unacceptable and had damaged the common stream. CPL requested that PNI provide samples of the product before future shipments.[1]

PNI and CPL engaged in several discussions about what types of shipments would be acceptable. PNI asked CPL to provide standards or definitive requirements of HLS. The district court found from the summary judgment evidence that

> In truth, Chevron possessed no definitive distillation values for HLS because its system is based on virgin, whole South Louisiana crudes. . . . However, in an effort to accommodate [PNI], Chevron undertook to develop such criteria.
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> Chevron developed a standard distillation curve with a range of values from the results of the tests run, for the express purpose of describing typical South Louisiana crude. These results were expressed in a chart that was delivered to [PNI]. By the time that [PNI] received this chart, it had demanded that Chevron represent and warrant that the standard that was developed was being enforced against all shippers. Chevron sent a copy of its clarifying letter to all shippers, informing them that crude petroleum that did not meet these objective criteria would be rejected. This letter also informed the shippers that each was responsible for insuring that its shipments met the distillation curve.

District Court's Opinion, p. 6-7. On January 28, 1992, CPL subsequently notified all shippers by letter of new procedures

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[1] PNI alleges that it had contracted with Phibro for 80,000 barrels of crude and that 40,000 barrels were taken as part of the October 11, 1991 shipment. The record is unclear on this, but apparently PNI sought to ship the remaining 40,000 barrels as part of a blend destined for Empire in November or December 1991, but cancelled the shipment after CPL required samples before future shipments. PNI alleges in its lost profits claim that it paid a penalty to Phibro as a result of the cancellation.

requiring submission of advance samples for any shipment of crude "new to Empire Terminal."[2]

At some point in January 1992, PNI provided a test result for a sample of crude from Nederland, Texas that PNI proposed to blend with natural gasoline and deliver into Empire's common stream. PNI alleges that CPL rejected the crude on the basis that it did not comply with CPL's quality requirements. PNI alleges that CPL accepted shipments of Nederland-area crude from other shippers even though those did not meet the requirements.[3] CPL argues that PNI represented only that it might ship crude similar to that which had been tested. CPL denies that it rejected the Nederland crude. Rather, CPL argues that it informed PNI that the crude did not appear to be within the range of typical HLS, but it could go ahead and "blend up" what it intended to ship and CPL would look at that. PNI never did.[4] Instead, on February 10, 1992, PNI initiated this suit seeking relief pursuant to various theories rejected by the district court and discussed below.

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[2] CPL defined crude "new to the Empire Terminal" as "crude petroleum that has not been received in the last (6) months."

[3] The only summary judgment evidence involves shipments made between late March and August of 1992. Inst. No. 177, Exh. 44. PNI admits that CPL decided to stop enforcing the requirements by April of 1992. Inst. No. 177, ¶ 56. However, CPL informed none of the shippers of this decision. Id. There is no summary judgment evidence of discrimination in the application of the requirements between late March and August of 1992. PNI's case hinges on discriminatory treatment from November 1991 to January 1992. PNI has produced no evidence that CPL accepted blended product similar to its October 11 delivery from other shippers during that period. Neither has PNI produced any evidence that blends including "Nederland-area" crude were accepted during that period.

[4] PNI provides no evidence as to where the natural gasoline would be purchased or where the blending would take place.

II.

THE INTERSTATE COMMERCE ACT CLAIMS

On appeal, PNI first presses its claims to relief for alleged discriminatory application of quality requirements by CPL in violation of §§ 1(4), 2, 3 and 6 of the ICA. As a threshold matter, CPL argues that PNI cannot state a claim under the ICA because it fails to produce evidence that any of the alleged discriminatory acts involved or would have involved interstate commerce sufficient to bring the transactions within the jurisdiction of the Act. Section 1 of the Act, setting out the jurisdictional limits and definitions of the regulations contemplated, provides:

> **(1) Carriers subject to regulation**
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> The provisions of this chapter shall apply to common carriers engaged in --
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> (b) Transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water;
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> from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia. . . .
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> **(2) Transportation subject to regulation**
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> The provisions of this chapter shall also apply to such transportation of passengers and property, but only insofar as such transport-ation takes place within the United States, **but shall not apply --**
>
> (a) **To the transportation of passengers or property**, or to the receiving, delivering, storage, or handling of property, **wholly within one State** and not shipped to or from a foreign country . . . .

49 App. U.S.C.A. § 1 (Supp. 1995) (emphasis added). No one disputes that CPL is a common carrier for the purposes of § 1(1) as defined by § 1(3)(a). PNI purports to be a "person" as defined by § 1(3)(a).[5]

PNI would have this court read §§ 1(1) & 1(2) as creating independent bases for jurisdiction so that the Act would cover "common carriers" (§ 1(1)) and "such transportation of passengers or property" but not "transportation of passengers or property . . . wholly within one state" (§ 1(2)(a)). PNI argues that as a "person" under the ICA, it needed only show that a common carrier violated the Act's provisions and that it suffered damages, citing 49 App. U.S.C.A. § 8. CPL argues that the phrases are to be read in the conjunctive as part of a two step inquiry: first, the statute delineates which actors it seeks to regulate ("common carriers"), then the statute specifies what conduct is to be covered (transportation not "wholly within one State").

CPL's argument was plainly sustained by the Supreme Court in Pennsylvania R.R. Co. v. Public Util. Comm. of Ohio, 298 U.S. 170, 56 S.Ct. 687 (1936). Confronted with the need to determine the reach of the ICA, Justice Cardozo explained

> The question for us here is not whether the movement of coal is to be classified as commerce or even as commerce between states. The question is whether it is that particular form of interstate commerce which Congress has subjected to the regulation in respect of

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[5] "The term 'person' as used in this chapter includes an individual, firm, co-partnership, corporation, association, or joint-stock association; and includes a trustee, receiver, assignee or personal representative thereof." 49 App. U.S.C.A. § 1(3)(a) (Supp. 1995).

> rates by a federal commission. The Interstate Commerce Act is aimed at common carriers exclusively, and not even all of these. . . . There are limitations, moreover, in the respect to the conduct to be controlled in addition to the foregoing limitations in respect of the carriers to be regulated. **Even though the activities are those of common carriers by rail, the statute does not apply 'to the transportation of passengers or property * * * wholly within one State and not shipped to or from a foreign country from or to any place in the United States.**

298 U.S. at 174, 56 S.Ct. at 688-89 (emphasis added). Further, the Federal Energy Regulatory Commission (FERC), charged with administering the ICA with respect to oil pipelines, followed "well-established standards for determining jurisdiction under the ICA" in concluding that FERC did not have jurisdiction over intra-Alaska shipments through the Trans-Alaska Pipeline System, even though the oil shipped was commingled with oil which was to travel "interstate" and which was subject to ICA regulation. Trans Alaska Pipeline System, 23 F.E.R.C. ¶ 61,352, 1983 WL 39675, *1-*2. See also Hydrocarbon Trading and Trans. Co. v. Texas Eastern Transmission Corp., 26 F.E.R.C. ¶ 61,201, 1984 WL 55788, *4-*6 (deferring action on an ICA discrimination complaint for investigation of facts supporting jurisdiction). These authorities obviate the need to accept CPL's invitation to examine the legislative history of the ICA. While CPL's discussion of legislative history is persuasive, CPL's proffered interpretation is compelled a fortiori by the cited authorities.[6]

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[6] PNI's contrary, independent reading of §§ 1(1) & 1(2) would permit a claim by any "person" bringing suit against a "common carrier" engaging in interstate commerce, even if the offending conduct involved non-ICA transportation.

Accordingly, PNI was obliged to demonstrate that CPL's conduct related to interstate transportation within the jurisdiction of the ICA. "The burden of proof in a[n ICA] complaint proceeding is clearly on the complainant. [The complainant], therefore, is well advised to adduce all the facts necessary to support a finding of jurisdiction of the transportation service rendered by [the pipeline]." Hydrocarbon Trading and Trans. Co., 26 F.E.R.C. ¶ 61,201, 1984 WL 55788, at *6.

The district court granted summary judgment for CPL because PNI had failed to produce evidence of ICA jurisdiction. PNI challenges the district court's ruling, saying the district court improperly required PNI to prove "prior interstate movement of property." We disagree.

"The question of whether commerce is 'interstate' or 'intrastate' [for the purposes of the ICA] must be determined by 'the essential character of the commerce, and not by mere billing or form of contract . . . . In determining 'the essential character of the commerce' the factor most often relied on is the fixed and persisting transportation intent of the shipper at the time of shipment." Hydrocarbon Trading and Trans. Co., 26 F.E.R.C. ¶ 61,201, 1984 WL 55788, at *4. A crucial factor in this case is the location of the blending. Citing Pennsylvania R.R. Co., 298 U.S. 170, 175, 56 S.Ct. 687, 689, the district court noted that

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The cases PNI cites for this proposition are inapposite. For instance, Dearing v. United States, 167 F.2d 310 (10th Cir. 1948), deals with a carrier's obligation to keep records for purposes of ICC regulation; not with the application of the ICA to a shipper's wholly intrastate transportation.

"transportation begins after the merchandise has been placed in the possession of a carrier." In this case, the "merchandise" is placed in the possession of a carrier no earlier than at the time of blending. "When products are unloaded, stored, and mixed with other property in the state, interstate commerce is ended for all purposes." Atlantic Coast Line R.R. Co. v. Standard Oil of Kentucky, 275 U.S. 257, 260, ___ S.Ct. ___, ___ (1927). Thus, even if crude were acquired from Alaska and natural gasoline were acquired from Texas, if those components were blended in Louisiana and then given to a carrier for delivery within Louisiana, the transportation would be intrastate and beyond the jurisdiction of the ICA.

PNI's October 11, 1991 shipment involved crude oil acquired in St. Rose, Louisiana and natural gasoline acquired in Butte La Rose, Louisiana which had been loaded onto barges and transported to Harahan, Louisiana where the components were blended on a barge. The blend was delivered to Empire, Louisiana for redelivery to a refinery in Louisiana. This was not ICA transportation.

PNI argues that it is not the October 1991 transportation which forms the basis for ICA jurisdiction, but rather CPL's subsequent rejections and discriminatory application of quality requirements to PNI but no one else.[7]

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[7] However, PNI also makes the contradictory argument that proposed shipments should be viewed as "interstate" because CPL applied the FERC tariff to the October 1991 shipment. PNI provides no authority for the proposition that the mere application of the FERC tariff to past shipments creates ICA jurisdiction over future intrastate transportation.

However, PNI produces no evidence from which a reasonable finder of fact could find that the allegedly rejected transportation would have involved interstate commerce or that the purported discrimination affected anything but intrastate shipments. There is no evidence that the allegedly cancelled shipment which would have involved the remainder of 80,000 barrels of crude that PNI had under contract would have differed substantially from the October 11 shipment. That crude oil would have been received by PNI in Louisiana and moved to Empire, Louisiana for redelivery presumably to a refinery in Louisiana.[8] PNI offered no evidence of the putative source of the natural gasoline for blending nor the location for the blending, but indicated on the record that blending was typically accomplished on the barge that hauled the components to Empire's barge dock.

The only other possible transportation request by PNI that CPL could have refused or otherwise discriminated against involves PNI's proposal in January 1992 to ship Nederland crude.[9] Again, the record discloses no proposed source for the natural

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[8] The only potential non-Louisiana customer for PNI's blend would be Chevron, U.S.A.'s Pascagoula, Mississippi refinery. PNI produced no evidence of potential contracts with Chevron, U.S.A.

[9] We need not discuss CPL's contention that this shipment was too speculative, because even if it were adequately concrete, PNI has failed to provide evidence of the interstate nature of the shipment. But even in the case that PNI offers for the proposition that its requests were "as close to a formal tender as one can get without requiring the absurdity of trucking oil to the line while knowing full well that transportation would be refused," the shipper had a "crude purchase contract." Denver Petroleum Corp. v. Shell Oil Co., 306 F.Supp. 289, 302 (D.Col. 1969). PNI had no such contract for the Nederland crude. As CPL argues, PNI proposed to buy a future lot of oil from the Nederland source and blend it with natural gasoline. It could be argued that PNI has failed to produce evidence from which a reasonable trier of fact could find a sufficient "fixed and persistent transportation intent of the shipper" upon which to base ICA jurisdiction.

gasoline that PNI claims it would have blended with the crude. Nor did PNI produce any evidence of where the blending might have occurred.

Although there appear to be many disputed facts related to PNI's unsuccessful attempts to persuade CPL to accept a blended crude product, there is no dispute that the only material that PNI had under contract was the remainder of the 80,000 barrels of Phibro crude in Louisiana. There is no evidence from which a reasonable trier of fact could infer that blending or ultimate delivery would have occurred outside of Louisiana. CPL's conduct with respect to that transportation is not properly subjected to scrutiny by the ICA. PNI has failed to meet its burden of producing evidence raising genuine issues of contested fact relating to jurisdiction under the ICA. Because of this threshold deficiency, we need not address the merits of the ICA claims.

III.

THE STATE LAW CLAIMS

PNI appeals the trial court's ruling that Louisiana law should be applied to its state law claims instead of Texas law.[10] Apparently, PNI concedes that if Louisiana law applies, it has failed to state a claim against CPL. Further, PNI appeals only on its tort claims, abandoning its contract and statutory claims. We

[10] Having reached this conclusion, the district court stated that it would "abstain from supervising litigation that is based solely on state law, particularly from a foreign forum. Concerning the questions of Texas law, the Court is of the opinion that no cause of action has been asserted."

review the district court's choice of law analysis de novo. Bailey v. Dolphin Int'l Inc., 697 F.2d 1268, 1274 (5th Cir. 1983).

As a federal court sitting in diversity jurisdiction, the district court correctly applied the choice of law principles of Texas as to state law claims. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S.487, 496, ___ S.Ct. ___, ___ (1941). This issue is governed by the "most significant relationship" test as stated in the Restatement (Second) of Conflict of Laws § 6 (1971). Gutierrez v. Collins, 583 S.W.2d 312, 318 (Tex. 1979). Section 145 of the Restatement (Second) lists four factual matters to be considered when applying the principles of § 6 to a tort case such as that of PNI: 1) the place where the injury occurred, 2) the place where the conduct causing the injury occurred, 3) the domicile, residence, nationality, place of incorporation and the place of business of the parties, and 4) the place where the relationship, if any between the parties is centered. These contacts are to be evaluated according to their relative importance with respect to the particular claims for relief. After examining the § 145 factors and the § 6 considerations, the district court held that Louisiana law should be applied to PNI's claims.

PNI challenges the district court's weighing of contacts pertinent to the § 145 factors because many of the parties' communications were directed to Texas, officers from PNI and CPL met in Texas to discuss a potential shipment, and some of the crude "rejected" by CPL might have come from Nederland, Texas. These facts are not compelling. We agree with the district court that

all four § 145 inquiries supported application of Louisiana law, but the second and fourth factors are most persuasive. There is no real dispute that the conduct causing the injury occurred in Louisiana. Any restraint of trade, breach of duty of good faith and fair dealing, fraud, negligence, unfair competition, or defamation would have occurred at the Empire Terminal or at CPL's business offices in Algiers, Louisiana. The sum of conduct occurring in Texas pales in comparison to the amount of conduct by both parties in Louisiana. Further, the place where the relationship was "centered" was Louisiana. Not only are CPL's operations largely in Louisiana, but PNI's only consummated business involved the purchase of crude oil and natural gasoline from Louisiana, blending it in Louisiana, delivering it to CPL's terminal in Louisiana, and marketing it as HLS to refiners in Louisiana. Although PNI's Louisiana conduct involved supervision and management from Texas, and "hedges" in Texas, Oklahoma and elsewhere, the "center" of PNI's relationship with CPL was Louisiana. We also agree with the district court's analysis of the § 6 factors supporting application of Louisiana law.

Accordingly, the trial court did not err in applying Louisiana law to the relationship between CPL and PNI. Further, the district court did not err in finding that PNI failed to state a claim on its Texas state law claims, because Texas law does not govern. PNI did not preserve its potential causes of action

pursuant to Louisiana state law.[11] As PNI has either waived, abandoned or failed to properly plead its state law causes of action, summary judgment for CPL is proper.

IV.

THE LOST PROFITS CLAIMS

Having ruled for CPL on all claims relating to liability, the issue of PNI's claims for lost profits as a measure of damages is moot.

V.

CONCLUSION

PNI has failed to produce evidence from which a reasonable trier of fact could find that its proposed business dealings with CPL involved transportation in interstate commerce under the aegis of the ICA and has not asserted causes of action cognizable under the laws of Texas or Louisiana. The summary judgment entered by the district court is **AFFIRMED**.

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[11] PNI failed to amend timely its complaint to include Louisiana causes of action. The district court denied PNI's motion to amend, and PNI has not appealed. Certainly, the time for such endeavors has passed.