

**Not To Be Published:**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

IOWA, CHICAGO & EASTERN  
RAILROAD CORPORATION,

Plaintiffs,

vs.

PAY LOAD, INC. d/b/a DENNY  
WESSELS TRANSPORT, INC. and  
DENNY WESSELS TRANSPORT; and  
COREY R. WESSELS,

Defendants.

No. C03-3017-MWB

**MEMORANDUM OPINION AND  
ORDER REGARDING DEFENDANTS'  
MOTION TO DISMISS**

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## ***I. INTRODUCTION AND BACKGROUND***

### ***A. Procedural Background***

On February 25, 2003, plaintiff Iowa, Chicago & Eastern Railroad Corporation (“IC & E”) filed its complaint in this lawsuit against defendants Pay Load, Inc. d/b/a Denny Wessels Transport, Inc. and Denny Wessels Transport (“Pay Load”), and Corey R. Wessels. In the complaint, IC & E asserts an Iowa state common law claim for negligence against Pay Load and Wessels for damages that resulted from a collision at a railroad crossing between a train operated by IC & E and a semi-truck owned by Pay Load and being operated by Wessels. IC & E has also filed a claim for punitive damages and seeks a declaratory judgment regarding the parties obligations vis-a-vis a locomotive lease.

Defendants filed their Motion To Dismiss on March 18, 2003, contending that complete diversity does not exist between the adverse parties in this case because defendants are citizens of Iowa, and IC & E's principal place of business is in Iowa, making IC & E a citizen of Iowa under 28 U.S.C. § 1332(c)(1).<sup>1</sup> IC & E filed a timely resistance to defendants’ Motion to Dismiss in which it asserts that its principal place of business is in South Dakota, thereby making this court’s assertion of diversity jurisdiction proper.

While the court initially set telephonic oral arguments on defendants’ Motion to

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<sup>1</sup>Defendants also assert that Count III should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. Defendants further seek the dismissal of this case pursuant to Federal Rule of Civil Procedure 12(b)(7) for failure to join a necessary party pursuant to Federal Rule of Civil Procedure 19. Defendants, however, never briefed either of these two issues. Local Rule 7.1(d) requires that a moving party file a written brief containing a statement of the grounds for the motion and citations to those authorities upon which the moving party relies. Because defendants have failed to brief either their Rule 12(b)(6) argument or their Rule 12(b)(7) argument, those contentions are denied.

Dismiss, upon review of the parties' submissions and the record, the court concludes that oral argument would not be beneficial here. The court turns first to the factual background of this case. The court then turns to the legal analysis of defendants' Motion To Dismiss.

### ***B. Factual Background***

The parties have supplied affidavits and exhibits in support of their respective positions with regard to the motion to dismiss from which, in addition to the complaint and the answer, the court has extracted the following facts.

Defendant Pay Load, Inc. d/b/a Denny Wessels Transport, Inc. and Danny Wessels Transport, is an Iowa Corporation with its principal place of business in Buffalo Center, Iowa. Defendant Corey R. Wessels is an individual living in Winnebago County, Iowa. IC & E owns and operates a railroad line as a common carrier in interstate commerce. IC & E is a Delaware Corporation. IC & E is wholly owned by Cedar American Rail Holdings, Inc. ("CARH"), a Delaware Corporation which in turn is wholly owned by Dakota, Minnesota & Eastern Railroad Corporation ("DMERC"), a privately held Delaware Corporation with its principal place of business located in Sioux Falls, South Dakota.

IC & E's headquarters are located at 140 North Phillips Avenue, Sioux Falls, South Dakota.<sup>2</sup> Both CARH and DMERC also have their headquarters at the same address. On January 31, 2003, the Surface Transportation Board ("STB") approved of DMERC's joint control of CARH and IC & E. At the time that this lawsuit was commenced, the following executives worked out of IC & E's Sioux Falls, South Dakota, office: Kevin V. Schieffer, President and Chief Executive Officer; Robert B. Brownell, Executive Vice President of

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<sup>2</sup>The court notes that this is the address used by IC & E on its applications for certificate of authority to transact business filed with the states of Illinois, Iowa, Wisconsin and Missouri.

Operations; Kurt V. Feaster, Senior Vice President and Chief Financial Officer; Lynn A. Anderson, Vice President of Marketing; Steven O. Scharnweber, Vice President of Engineering and Chief Engineer; Richard D. Awe, Chief Transportation Officer; and Daniel L. Goodwin, Chief Mechanical Officer.

The Financial Department for IC & E is located in Sioux Falls, South Dakota. IC & E's Financial Department is comprised of the Information Technology Department, Revenue and Accounting Departments and the Human Resources Department. The employees who work in the Financial Department report to Kurt V. Feaster, Senior Vice President and Chief Financial Officer. The vast majority of Financial Department employees are located in Sioux Falls, South Dakota. The business records pertaining to the day-to-day financial operations of IC & E are prepared by and filed in IC & E's headquarters in Sioux Falls, South Dakota.

Employees located in Sioux Falls, South Dakota, are responsible for preparing the requisite financial and operating reports of IC & E for the Federal Railroad Administration, Railroad Retirement Board, Surface Transportation Board and other governmental agencies.

Twenty-three IC & E employees located at IC & E's headquarters in Sioux Falls, South Dakota, manage the day-to-day movements of trains and railcars for IC & E. Eight additional IC & E employees in Sioux Falls, South Dakota, handle the scheduling and contacts with train crews throughout the IC & E and DMERC systems. IC & E's consumer service representatives and operations supervisors are the employees responsible for the routine contact with IC & E's customers and the general public. These employees answer customer telephone inquiries regarding shipment orders and the status of shipments. All of these activities are controlled from Sioux Falls, South Dakota.

IC & E has employees scattered through the states in which it operates, including Iowa. IC & E has a satellite office in Bettendorf, Iowa, which employs sixteen individuals. Six executives in IC & E's marketing department, including General Manager John Brooks,

are located the Bettendorf facility. However, since STB's approval of joint control of IC & E and DMERC, the marketing operations for IC & E are being consolidated in Sioux Falls, South Dakota. No engineers or conductors report to IC & E's Bettendorf satellite office.

## **II. LEGAL ANALYSIS**

### **A. Rule 12(b)(1) Challenges to Jurisdiction**

For the court to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the complaint must be successfully challenged on its face or on the factual truthfulness of its averments. *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). The court in *Titus* distinguished between the two kinds of challenges:

In a facial challenge to jurisdiction, all of the factual allegations concerning jurisdiction are presumed to be true and the motion is successful if the plaintiff fails to allege an element necessary for subject matter jurisdiction. *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 731-32 (11th Cir. 1982). . . .

If the [defendant] wants to make a factual attack on the jurisdictional allegations of the complaint, the court may receive competent evidence such as affidavits, deposition testimony, and the like in order to determine the factual dispute. *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947) [footnote omitted]. The proper course is for the defendant to request an evidentiary hearing on the issue. *Osborn [v. United States]*, 918 F.2d [724,] 730 (citing *Crawford v. United States*, 796 F.2d 924, 928 (7th Cir. 1986)).

*Id.*

In *Osborn v. United States*, 918 F.2d 724 (8th Cir. 1990), the Eighth Circuit Court of Appeals provided an exhaustive discussion of the procedures and requirements for determination of a 12(b)(1) motion to dismiss.

The district court was correct in recognizing the critical

differences between Rule 12(b)(1), which governs challenges to subject matter jurisdiction, and Rule 56, which governs summary judgment. Rule 12 requires that Rule 56 standards be applied to motions to dismiss for failure to state a claim under Rule 12(b)(6) when the court considers matters outside the pleadings. [Citations omitted.] Rule 12 does not prescribe, however, summary judgment treatment for challenges under 12(b)(1) to subject matter jurisdiction where a factual record is developed. Nonetheless, some courts have held that Rule 56 governs a 12(b)(1) motion when the court looks beyond the complaint. We agree, however, with the majority of circuits that have held to the contrary. . . . [Citations omitted.]

The reason for treating a 12(b)(1) motion differently than a 12(b)(6) motion, which is governed by Rule 56 when matters outside the pleadings are considered, “is rooted in the unique nature of the jurisdictional question.” *Williamson [v. Tucker]*, 645 F.2d [404,] 413 [ (5th Cir.), *cert. denied*, 454 U.S. 897 (1981)]. It is “elementary,” the Fourth [sic] Circuit stated, that a district court has “broader power to decide its own right to hear the case than it has when the merits of the case are reached.” *Id.* Jurisdictional issues, whether they involve questions of law or of fact, are for the court to decide. *Id.* Moreover, because jurisdiction is a threshold question, judicial economy demands that the issue be decided at the outset rather than deferring it until trial, as would occur with denial of a summary judgment motion.

*Osborn*, 918 F.2d at 729.

The court in *Osborn* found the distinction between facial and factual attacks on the complaint under 12(b)(1) to be critical. *Id.* (citing *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir.), *cert. denied*, 449 U.S. 953 (1980), and *Mortensen v. First Fed. Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977)). The court stated that

[i]n the first instance, the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6). The general rule is that a complaint should not

be dismissed “‘unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards.

*Id.* at 729 n.6 (citations omitted); see *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 698 (8th Cir. 2003) (“A motion to dismiss for lack of jurisdiction under Rule 12(b)(1) which is limited to a facial attack on the pleadings is subject to the same standard as a motion brought under Rule 12(b)(6).”). A factual challenge to jurisdiction under 12(b)(1) is unique:

[H]ere the trial court may proceed as it never could under 12(b)(6) or FED. R. CIV. P.. 56. Because at issue in a factual motion is the trial court’s jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to the plaintiff’s allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.

*Osborn*, 918 F.2d at 730 (quoting *Mortensen*, 549 F.2d at 891); see *Faibisch v. University of Minn.*, 304 F.3d 797, 801 (8th Cir. 2002) (noting that “[w]hen a district court engages in a factual review, it inquires into and resolves factual disputes.”). The *Osborn* court stated that the proper course is for the defendant to request an evidentiary hearing on the issue, and, since no statute or rule prescribes the format of such a hearing, “‘any rational mode of inquiry will do.’” *Osborn*, 918 F.2d at 730 (quoting *Crawford*, 796 F.2d at 929).

Once the evidence is submitted, the district court must decide the jurisdictional issue, not simply rule that there is or is not enough evidence to have a trial on the issue. [*Crawford*, 796 F.2d at 929.] The only exception is in instances when the jurisdictional issue is “so bound up with the merits that a full trial on the merits may be necessary to resolve the issue.” *Id.*

*Id.* In the present case, the court concludes that defendants have made a factual challenge to subject matter pursuant to Federal Rule of Civil Procedure 12(b)(1). However, neither party has asked for an evidentiary hearing on the issue. Rather, the parties have submitted exhibits and affidavits to buttress their respective factual positions.

### ***B. Diversity Of Citizenship***

Defendants contend that although IC & E is incorporated Delaware, it has its principal place of business in Iowa. As a court of limited jurisdiction, a federal court has an obligation to assure itself that it has subject matter jurisdiction in every case. *Thomas v. St. Luke's Health Sys., Inc.*, 869 F. Supp. 1413, 1424 (N.D. Iowa 1994)(citing *Sanders v. Clemco Indus.*, 823 F.2d 214, 216 (8th Cir. 1987)). For the court to maintain subject matter jurisdiction over this case, complete diversity of citizenship must exist between the adverse parties. *Strawbridge v. Curtiss*, 3 Cranch 267, 2 L. Ed.435 (1806). Consequently, if IC & E is a citizen of the state of Iowa, this court would lack jurisdiction to hear this case because defendants are also from Iowa. Under 28 U.S.C. § 1332(c)(1) "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. . . ." 28 U.S.C. § 1332(c)(1); see *Midlantic Nat'l Bank v. Hansen*, 48 F.3d 693, 695 (3rd Cir.), *cert. dismissed*, 515 U.S. 1184 (1995). Therefore, if either the state of incorporation or IC & E's principal place of business is in Iowa, there will be no diversity.

Here, defendants have alleged that Iowa is the location of IC & E's principal place of business, rather than South Dakota as IC & E claims in its complaint, and accordingly, IC & E is a citizen of Iowa pursuant to § 1332(c)(1). The party who is attempting to establish federal jurisdiction bears the burden of proof if diversity of citizenship is challenged. *Blakemore v. Missouri Pacific R.R. Co.*, 789 F.2d 616, 618 (8th Cir. 1986); *Russell v. New Amsterdam Casualty Co.*, 325 F.2d 996, 998 (8th Cir. 1964); *Amoco*

*Rocmount Co. v. Anschutz Corp.*, 7 F.3d 909, 914 (10th Cir. 1993), *cert. denied*, 510 U.S. 1112 (1994); *Media Duplication Servs. v. HDG Software, Inc.*, 928 F.2d 1228, 1235 (1st Cir. 1991); *Industrial Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990); *Fenton v. Freedman*, 748 F.2d 1358, 1359 n.1 (9th Cir. 1984); *Bullock v. Wiebe Constr. Co.*, 241 F. Supp. 961, 962 (S.D. Iowa 1965)(citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936)). Therefore, even though defendants have moved to dismiss this case, IC & E still retains the burden of showing the existence of complete diversity between the adverse parties. *Bullock*, 241 F. Supp. at 962. Thus, in this case, IC & E has the burden of proving its principal place of business is not in Iowa. The determination of a corporation's principal place of business is a mixed question of law and fact, but mainly one of fact. *Blakemore*, 789 F.2d at 618; *Rogers v. Bates*, 431 F.2d 16, 18 (8th Cir. 1970); *North Star Hotels Corp.*, 696 F. Supp. at 1269.

Determining a corporation's principal place of business involves an investigation into the intricate details surrounding the nature or essence of a corporation's business and activities. This high level of scrutiny is embodied in the tests which other courts have developed or adopted to determine a corporation's principal place of business for purposes of ascertaining the existence or lack of federal diversity jurisdiction. The court has previously reviewed the various tests employed in the determination of a corporation's principal place of business:

There are two tests in particular that have been employed by the courts in determining where a corporation's principal place of business is located. First, the "nerve center" test, emphasizes the location of the managerial and policy making functions of the corporation. *See Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862, 865 (S.D.N.Y. 1959) (case which developed the "nerve center" test); *Breitman v. May Co. California*, 37 F.3d 562, 563 (9th Cir. 1994) (adopting nerve center test); *Krueger v. Cartwright*, 996 F.2d 928, 931 (7th Cir. 1993) (same); *Wheelabrator Frackville Energy Co. v.*

*Morea Culm Servs., Inc.*, 741 F. Supp. 536, 540 (E.D. Pa. 1990)(same). The second test is known as the "place of activity" test, which focuses on the service and production activities of a corporation and examines the places where the corporation has the greatest contact with the public, the largest number of employees, the greatest assets, and derives most of its income. See *Mahoney v. Northwestern Bell Tel. Co.*, 258 F. Supp. 500, 502 (D. Neb. 1966), *aff'd*, 377 F.2d 549 (8th Cir. 1967) (favoring the center of corporate activity test); *Tubbs v. Southwestern Bell Telephone Co.*, 846 F. Supp. 551, 554 (S.D. Tex. 1994)(using production test to find defendant's principal place of business and then remanding for lack of diversity); *AFA Enters., Inc. v. American States Ins. Co.*, 842 F. Supp. 902, 907-08 (S.D.W.Va. 1994) (rejecting the nerve center test for determining principal place of business); *Nerco Delamar Co. v. North American Silver Co.*, 702 F. Supp. 809, 811 (D. Idaho 1989); *Associated Petroleum Producers, Inc. v. Treco 3 Rivers Energy Corp.*, 692 F. Supp. 1070, 1075 (E.D. Mo. 1988). . . .

Most courts, however, regardless of which test they purport to endorse, consider all the facts and circumstances of a corporation's business activities and do not necessarily succumb to the temptation of placing labels on the process of analysis. . . .

. . .  
Thus, the court concludes that the principal place of business of a corporation can only be decided after a careful consideration of the facts, taking into account the character of the corporation, its purposes, the kind of business in which it is engaged, and the situs of its operations.

*Quality Refrigerated Servs., Inc. v. City of Spencer*, 908 F. Supp. 1471, 1481-82 (N.D. Iowa 1995).

Accordingly, the court now turns to an analysis of the facts and circumstances here.

### ***C. IC & E's Principal Place of Business***

Upon consideration of the character of IC & E, its purposes, the kind of business in which it is engaged, and the situs of its operations, the court concludes that its principal place of business is in the State of South Dakota. IC & E owns and operates a railroad line as a common carrier. IC & E operates in Iowa, Minnesota, Illinois, Wisconsin and Missouri. It, however, has its headquarters in Sioux Falls, South Dakota. At the time that this lawsuit was filed, the following executives worked out of IC & E's Sioux Falls, South Dakota, office: President and Chief Executive Officer; Executive Vice President of Operations; Senior Vice President and Chief Financial Officer; Vice President of Marketing; Vice President of Engineering and Chief Engineer; Chief Transportation Officer; and, Chief Mechanical Officer.<sup>3</sup>

Another fact here is that in addition to having many of its executives located in Sioux Falls, the Financial Department for IC & E is also located in Sioux Falls, South Dakota. IC & E's Financial Department is comprised of the Information Technology Department,

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<sup>3</sup>Defendants assert that the office of IC & E's President is located in Bettendorf, Iowa. The record before the court, however, does not substantiate that claim. Defendants' assertion is based on a freight tariff adoption notice, Defendants' Ex. #3, which identifies Robert Brownell as the President of IC & E and lists the address of IC & E's Bettendorf, Iowa, office. This document, however, is ambiguous as to the address of Brownell's office. This defect, however, is not shared with the applications for certificate of authority to transact business filed with the states of Illinois, Iowa, Wisconsin and Missouri. Each of those applications lists Brownell's name and identifies his address as being in Sioux Falls, South Dakota. Moreover, Brownell has submitted an affidavit in which he avers that:

4. I serve from IC & E corporate owned headquarters located at 140 North Phillips Avenue, Sioux Falls, South Dakota. I reside in Sioux Falls, South Dakota, and have resided in South Dakota at all times material herein.

Plaintiff's Ex. 2, Brownell Aff. at ¶ 4. Thus, the court concludes from the record before it that the office of IC & E's president is located in Sioux Falls, South Dakota.

Revenue and Accounting Departments and the Human Resources Department. The vast majority of Financial Department employees are located in Sioux Falls, South Dakota. The business records pertaining to the day-to-day financial operations of IC & E are prepared by and filed in IC & E's headquarters in Sioux Falls, South Dakota.

Moreover, IC & E employees located in Sioux Falls, South Dakota, are responsible for preparing the requisite financial and operating reports of IC & E for the Federal Railroad Administration, Railroad Retirement Board, Surface Transportation Board and other governmental agencies. Twenty-three IC& E employees located at IC & E's headquarters in Sioux Falls, South Dakota, also manage the day-to-day movements of trains and railcars for IC & E. In addition, eight other IC & E employees located in Sioux Falls, handle the scheduling and contacts with train crews throughout the IC & E and DMERC systems. Finally, the court notes that the activities of IC & E's consumer service representatives and operations supervisors, who are the employees responsible for the routine contact with IC & E's customers and the general public, are controlled from Sioux Falls, South Dakota.

Defendants' arguments center on the existence of IC & E's office in Bettendorf, Iowa. While IC & E does have a satellite office in Bettendorf, Iowa, only sixteen IC & E employees work from that office, including some six executives in IC & E's marketing department. However, since STB's approval of joint control of IC & E and DMERC, the marketing operations for IC & E are being consolidated in Sioux Falls, South Dakota. Moreover, the court notes that no engineers or conductors report to IC & E's Bettendorf satellite office.<sup>4</sup>

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<sup>4</sup>Defendants also contend that IC & E has more miles of track in Iowa than any other state as supporting its proposition that the state of Iowa is IC & E's principal place of business. The flaw in this argument is that from the limited record before it, the court  
(continued...)

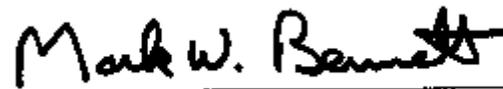
Thus, upon weighing these facts, the court concludes that IC & E has its principal place of business in South Dakota. Therefore, having found that IC & E's principal place of business is in South Dakota, complete diversity exists between defendants, citizens of Iowa, and IC & E, a citizen of South Dakota. Because diversity between the adverse parties does exist in this case, diversity jurisdiction is applicable here, and defendants' Motion To Dismiss is denied.

### **III. CONCLUSION**

Having found that IC & E's principal place of business is in South Dakota, complete diversity does exist between defendants, citizens of Iowa, and IC & E, a citizen of South Dakota. Therefore, because diversity between the adverse parties does exist in this case, the court denies defendants' Motion to Dismiss.

**IT IS SO ORDERED.**

**DATED** this 29th day of April, 2003.

  
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MARK W. BENNETT  
CHIEF JUDGE, U. S. DISTRICT COURT  
NORTHERN DISTRICT OF IOWA

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<sup>4</sup>(...continued)

cannot find what percentage of IC & E's assets these tracks constitute nor conclude what percentage of its income is derived from these tracks. Moreover, the IC & E employees operating on those tracks, the locomotive engineers and conductors, do not report to IC & E's Bettendorf office but, rather, to IC & E's headquarters in Sioux Falls.