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SERVICE DATE – MAY 30, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34920

SAVANNAH PORT TERMINAL RAILROAD, INC.–  
PETITION FOR DECLARATORY ORDER–  
CERTAIN RATES AND PRACTICES AS APPLIED TO CAPITAL CARGO, INC.

Decided: May 29, 2008

The Savannah Port Terminal Railroad, Inc. (SPTR) has filed a petition for declaratory order asking the Board to consider issues referred by the Superior Court of Chatham County, Eastern Judicial Circuit of the State of Georgia (the court), in Capital Cargo, Inc. v. Rail Link, Inc., Savannah Port Terminal Railroad, Inc. and Georgia Ports Authority, Civil Action No. CV05-0755-AB. At issue in the court proceeding is whether Capital Cargo, Inc. (Capital) is obligated to pay \$149,648 in demurrage charges<sup>1</sup> that accrued from April 2003 through May 2005. SPTR obtained a stay of the court case and referral to the Board with respect to the reasonableness of the rail services provided to Capital and the appropriateness of the demurrage charges.

In its petition, filed on October 6, 2006, SPTR asks the Board to determine that, because Capital failed to provide a timely written objection to the demurrage charges as required by the governing tariffs, Capital is now precluded from raising any defenses for nonpayment of those charges. Alternatively, SPTR asks the Board to determine that the demurrage charges were appropriately applied here.

On November 30, 2006, Capital filed a motion to dismiss, arguing that the dispute is beyond the Board's jurisdiction because the transportation was governed by contract, rather than by the tariffs cited by SPTR. Capital contends that the disputed demurrage charges arose out of SPTR's failure to meet a contractual obligation to provide Capital with 3 switches (of 3 cars each) per day.<sup>2</sup> Capital also filed an answer and cross-complaint asserting the same contractual argument and contending (1) that SPTR's failure to provide 3 switches per day violated the

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<sup>1</sup> "Demurrage" is a daily rate charged by a railroad to a consignee for each railroad car that the consignee is either unable to accept or fails to unload within a certain time. Illinois Cent. R.R. Co. v. Ready-Mix Concrete, Inc., 323 F. Supp. 609, 610 (E.D. La. 1971).

<sup>2</sup> As used in this decision, the term "switch" refers to the moving of cars from SPTR's yard onto the track at Capital's facility for unloading.

carrier's responsibilities under 49 U.S.C. 10702, 10746, and 11101, and (2) that application of the demurrage charges was unreasonable under 49 U.S.C. 10702 and 10746.<sup>3</sup>

On February 1, 2007, SPTR filed a motion to dismiss Capital's cross-complaint, a reply to Capital's motion to dismiss, and an answer to Capital's cross-complaint. On February 21, 2007, Capital filed a reply to SPTR's motion to dismiss the cross-complaint and a rebuttal to SPTR's response. On March 16, 2007, SPTR filed a motion to strike Capital's February 21, 2007 filing, on the ground that a reply to a reply is not permitted, citing 49 CFR 1104.13. On March 30, 2007, Capital filed replies to SPTR's March 16, 2007 filing. We deny SPTR's motion to strike, and we accept these supplemental filings in the interest of a more complete record.

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The parties have submitted sufficient information with their filings to enable us to address the service and demurrage issues that have been raised. As discussed below, we conclude that: (1) we have authority to address these matters because there was no rail transportation contract under 49 U.S.C. 10709 here, and the record does not show that SPTR otherwise committed to provide Capital with 3 switches per day; (2) Capital has not shown that SPTR was required to provide it with 3 switches per day to meet the carrier's service obligations under the Interstate Commerce Act; and (3) SPTR has properly applied demurrage charges in this case.

## BACKGROUND

Capital receives loaded boxcars at a warehouse facility in the Garden City Terminal in Savannah, GA, where it reloads the commodities onto trucks for eventual transport to export markets. Capital leased the facility, located at 250 Brampton Road, from the Georgia Ports Authority (GPA) pursuant to a written agreement (the "Lease Agreement") to which it became a party on December 10, 1995.<sup>4</sup> That facility includes a delivery track with a capacity of 3 rail cars. GPA's subsidiary, the Savannah State Docks Railroad (SSDR), initially provided rail service to this facility, as contemplated by the Lease Agreement between Capital and GPA.

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<sup>3</sup> Demurrage charges are subject to Board regulation under section 10702, which requires railroads to establish reasonable rates and transportation-related rules and practices. In addition, section 10746 directs rail carriers to compute demurrage charges and establish rules related to those charges in a way that will facilitate freight car use and distribution and promote an adequate car supply. And section 11101 requires common carriers to carry out their common carrier obligations to provide reasonable service on reasonable request.

<sup>4</sup> Capital acquired the rights under the Lease Agreement through a bankruptcy proceeding involving a third party that had originally executed the Lease Agreement with GPA. See Capital's motion to dismiss at 3 and Meyer deposition at 29.

SPTR took over SSSDR's service obligations on June 1, 1998, pursuant to an Easement Agreement with GPA,<sup>5</sup> and provided rail service to Capital until May 2005.

Capital states that, when it initially leased the facility from GPA, it calculated that it would need to unload 9 cars per day in order to operate the facility profitably. Given the limited capacity of the track at the facility, that would require 3 switches per day (i.e., 3 deliveries and pickups of 3 cars each). According to Capital, representatives of GPA and SSSDR assured Capital that it would receive at least 3 switches per day. The record indicates that, after taking over rail operations from SSSDR in 1998, SPTR continued to regularly provide Capital with 3 switches per day until the summer of 2004, when congestion developed in the terminal and SPTR reduced service to Capital.

In August 2004, representatives of Capital, GPA, SPTR and SPTR's parent company (Rail Link) met to discuss the service that SPTR was providing to Capital. After the meeting, SPTR resumed regularly providing 3 switches per day and continued to provide that level of service until January 2005, when service to Capital was again reduced due to congestion at the terminal. Moreover, switches to Capital were substantially delayed in February 2005 after 30 to 35 cars unexpectedly arrived simultaneously at the terminal for delivery to Capital. The record indicates that traffic at the Port continued to be heavy and that delays continued through May 2005. During this period, some cars were delayed for up to 26 days between the time of constructive placement<sup>6</sup> and actual placement at Capital's delivery track.

SPTR claims that under the applicable tariffs Capital owes demurrage charges for April 2003 through May 2005 totaling \$149,648.<sup>7</sup> Invoices for demurrage between April 2003 and

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<sup>5</sup> SPTR was authorized to acquire exclusive easements over and to operate the trackage in the Garden City Terminal in Savannah Port Terminal Railroad, Inc.—Acquisition and Operation Exemption—Georgia Ports Authority and Savannah State Docks Railroad, STB Finance Docket No. 33613 (STB served July 1, 1998). In a related transaction, Genesee & Wyoming, Inc., was authorized to control SPTR through its ownership of Rail Link, Inc. (Rail Link). See Genesee & Wyoming, Inc.—Continuance in Control Exemption—Savannah Port Terminal Railroad, Inc. and Golden Isles Terminal Railroad, Inc., STB Finance Docket No. 33615 (STB served July 1, 1998).

<sup>6</sup> Constructive placement occurs when a rail car is available for delivery but cannot actually be placed at the shipper's facility because of a condition attributable to the shipper (such as lack of room on the tracks in the shipper's facility). The railroad holds the car and sends notice of the hold to the shipper. See Capitol Materials Incorporated—Petition for Declaratory Order—Certain Rates and Practices of Norfolk Southern Railway Company, STB Docket No. 42068 (STB served Apr. 12, 2004) (Capitol Materials).

<sup>7</sup> Invoices for April and May 2003, June through September 2004, and November 2004 through May 2005 were submitted as Exhibit P to SPTR's petition for declaratory order.

January 2005 ranged from \$400 to \$3,540 per month. Demurrage charges increased substantially for the months of February through May 2005. The February 2005 invoice totaled \$50,400; the March 2005 invoice totaled \$41,880; and the April 2005 invoice totaled \$33,760. The May 2005 invoice was adjusted to \$8,560.<sup>8</sup>

Capital contends that it is not obligated to pay those demurrage charges because it did not receive the 3 switches per day that Capital says was provided for in an arrangement with GPA that it claims SPTR assumed when SPTR contracted with GPA to serve the Garden City Terminal. Capital recomputed the demurrage bill for February 2005, and concluded that, if it had received 3 switches per day (of 3 cars each), it would have owed only \$4,000 in demurrage.<sup>9</sup> However, Capital has not explained why it has not paid demurrage even for those months in which it apparently received 3 switches per day (April and May 2003, and November and December 2004).

On May 5, 2005, SPTR placed Capital on a cash-only basis because of the unpaid demurrage. On May 10, 2005, Capital filed suit challenging the demurrage charges. The court granted SPTR's request to refer the matter to the Board.

On May 19, 2005, SPTR and Capital entered into a settlement agreement in which SPTR agreed to provide 3 deliveries per day (of up to 3 cars each) provided that Capital met certain terms.<sup>10</sup> But the agreement did not address the demurrage claims that are at issue here.<sup>11</sup> According to the record, Capital has since opened a new warehouse facility, at 175 Brampton Road, which has a track capacity of 13 cars and is served by Norfolk Southern Railway Company.

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<sup>8</sup> SPTR consistently claims that Capital owes it a total of \$149,648 in demurrage charges. However, the invoices submitted by SPTR appear to show a total of \$152,138 in demurrage charges (\$109,818 for the months of April 2003 through March 2005 and \$42,320 for the months of April and May 2005, which are the same as the amounts shown at page 12 of the petition for declaratory order).

<sup>9</sup> The record does not indicate whether Capital has paid that \$4,000 amount to SPTR.

<sup>10</sup> The Settlement Agreement was submitted as Exhibit B to SPTR's petition for declaratory order.

<sup>11</sup> The Settlement Agreement did obligate Capital to pay \$8,120 in outstanding demurrage charges for 3 cars that were on the delivery track and for 4 cars that were due to be delivered to Capital's warehouse. Capital's payment of these charges is reflected in the adjusted invoice for demurrage due for May 2005. See Exhibit P at 74.

## DISCUSSION AND CONCLUSIONS

### Capital's Contract Arguments

Capital has moved to dismiss the petition on the ground that it had a rail transportation contract under 49 U.S.C. 10709 with SPTR addressing demurrage, and that the demurrage dispute is therefore outside the Board's jurisdiction. However, we find that its claim of a rail transportation contract lacks merit.

To support its claim, Capital points to its Lease Agreement with GPA, which obligates GPA to provide rail service to Capital as long as Capital maintains rail access to its facility.<sup>12</sup> Capital also relies on verbal commitments allegedly made by representatives of GPA and SSSR to induce Capital to enter into the Lease Agreement with GPA.<sup>13</sup> According to Capital, when SPTR took over operations at the terminal under the Easement Agreement,<sup>14</sup> SPTR agreed to continue the same level of service that had been provided by SSSR, and SPTR therefore assumed GPA's obligation to provide 3 switches per day. Capital points to a provision in the Easement Agreement providing that SPTR has full common carrier responsibility to provide rail transportation service within the terminal in accordance with applicable tariffs, contracts, and laws.<sup>15</sup> Capital also cites a provision in the Easement Agreement obligating SPTR initially to perform rail service in accordance with GPA's existing tariff and contracts and other agreements with users and other carriers, which SPTR agreed to adopt and/or assume.<sup>16</sup> Finally, Capital cites to a provision in the Easement Agreement to the effect that SPTR shall provide efficient and economical rail transportation services commensurate with the reasonable needs and requests of GPA and its customers and that SPTR agrees to cooperate with GPA to ensure that adequate rail service is furnished at competitive costs to users.<sup>17</sup>

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<sup>12</sup> Exhibit I to SPTR's petition is a copy of the Lease Agreement between GPA and a prior lessee; Exhibit J is a First Amendment to the Lease Agreement renewing the term of the prior lessee. Exhibit K is a copy of a Second Amendment to the Lease Agreement that substitutes Capital as lessee.

<sup>13</sup> Capital motion to dismiss at 4.

<sup>14</sup> The Easement Agreement between GPA and SPTR was submitted as Exhibit L to SPTR's petition.

<sup>15</sup> Exhibit L at 119.

<sup>16</sup> Id.

<sup>17</sup> Id. at 120.

Under the Interstate Commerce Act, a rail carrier may “enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions.” 49 U.S.C. 10709(a). Transportation services under such a rail transportation contract are not subject to the Board’s jurisdiction. 49 U.S.C. 10709(c). See, e.g., Parrish & Heimbecker, Inc.–Petition for Declaratory Order, STB Docket No. 42031 (STB served May 26, 2000, and May 25, 2001) (Parrish); Cross Oil Refining & Marketing, Inc. v. Union Pacific Railroad Company, STB Finance Docket No. 33582 (STB served Oct. 27, 1998) (Cross Oil); Omaha Public Power District v. Union Pacific Railroad Company, STB Docket No. 42006 (STB served Oct. 17, 1997) (Omaha); H.B. Fuller Company v. Southern Pacific Transportation Company, Docket No. 41510 (STB served Aug. 22, 1997) (Fuller).

But unlike the contracts discussed in Parrish, Cross Oil, Omaha and Fuller, there is no convincing evidence in the record here demonstrating the existence a rail transportation contract within the meaning of 49 U.S.C. 10709. As noted, section 10709(a) addresses a contract “to provide specified services under specified rates and conditions.” The Lease Agreement between GPA and Capital, which governs Capital’s use of the warehouse facility at 250 Brampton Road, does not contain any provision that details the service Capital would receive, nor does it specify any rates or conditions for that service, other than that it be by regular common carriage. Similarly, the Easement Agreement between GPA and SPTR describes SPTR’s general obligation to provide service to shippers in the terminal, including Capital, but does not specify any rates<sup>18</sup> or require SPTR to commit to specific service levels. Finally, the Lease Agreement and the Easement Agreement do not specify the transportation service that SPTR would perform and do not specify rates and conditions for the transportation service. Nor do they contain any provisions relating to demurrage. Accordingly, we find no rail transportation contract under section 10709 governing the transportation service that SPTR provided to Capital. Rather, we conclude that the service to Capital was common carriage. The Board therefore has jurisdiction to consider the issues referred by the court as presented in SPTR’s petition.

Capital argues more generally that SPTR made a commitment to provide Capital with 3 switches per day and that Capital should not be held responsible for demurrage resulting from SPTR’s failure to honor that commitment. Capital claims that it had negotiated an arrangement with GPA to receive 3 switches per day and for demurrage not to accrue unless there was an unusual backup resulting from an unexpected influx of cars or a failure by Capital to unload cars within the (48-hour) free time allotted under the tariff. Capital argues that this arrangement constituted an obligation that SPTR was required to adopt pursuant to the Easement Agreement, and that SPTR in fact continued the arrangement for years (until the summer of 2004).

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<sup>18</sup> The record indicates that Capital does not pay freight charges for inbound shipments to its facility. Freight charges are paid by the lumber mills sending cargo to Capital. See Meyer deposition at 12, 13.

SPTR denies that it agreed to assume such an arrangement. SPTR maintains that, as a common carrier, it was not obligated to provide more than 1 switch per day, even though it provided 3 switches per day when it was able to do so. When the terminal became congested, SPTR states, good business practices required it to prioritize its resources. By concentrating its efforts on providing switches to customers with larger facilities and larger tracks that could accommodate a greater number of cars, it was able to clear the terminal of congestion and enhance the flow of rail cars throughout the terminal to the benefit of all customers.

The record fails to support Capital's claim that SPTR assumed a specific commitment to provide 3 switches per day to Capital. Any understanding that Capital may have had with GPA is not reflected in the Lease Agreement, which, according to Article 26, is the entire agreement of the parties and the final expression of their agreement. Moreover, the Lease Agreement expressly states that it can only be modified by written agreement. Neither amendment modifying the Lease Agreement addressed the number of switches to be provided to Capital. Likewise, there is no evidence that SPTR separately committed to provide 3 switches per day when it took over operations at the terminal. In any event, it does not appear to us that SPTR's practice of providing 3 switches during times when the Port was not too busy was intended to constitute an agreement to provide 3 switches when the Port was busy.

#### Capital's Exemption Argument

Capital further asserts that the Board cannot address this dispute because the movements have been exempted from Board regulation pursuant to 49 U.S.C. 10502. All of these shipments moved in boxcars; and as Capital points out, the agency has exempted movements transported in boxcars from most regulation. See 49 CFR 1039.14. Moreover, most of the cars delivered to Capital contained pulpboard or woodpulp, commodities that are included within the exemption for "pulp, paper or allied products," contained in Standard Transportation Commodity Code (STCC) number 26. See 49 CFR 1039.11. Several cars contained scrap paper and waste paper that are included within the exemptions for wood scrap or waste under STCC number 40231 and paper waste or scrap under STCC number 40241. Id.<sup>19</sup>

These exemptions, however, are not total. By their terms, the commodity exemptions contained in 49 C.F.R. 1039.11 do not affect regulation regarding the use of equipment, 49 CFR 1039.11(a), and the boxcar exemption does not extend to matters regarding car hire, car service, or car supply, 49 CFR 1039.14(b)(1) and (b)(4). Demurrage is a matter regarding use of equipment and is related to car service. Thus, neither of these exemptions extends to controversies over assessment of demurrage. Delaware & Hudson Ry. Co. v. Offset Paperback Mfrs., 126 F.3d 426, 428-29 (2d Cir. 1997); Exemption from Regulation—Boxcar Traffic, 367 I.C.C. 424, 455 (1983), aff'd in part, Brae Corporation v. ICC, 740 F.2d 1023 (D.C. Cir.

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<sup>19</sup> The monthly invoices submitted by SPTR show the contents of each car delivered to Capital. See Exhibit P.

1984), cert. denied, 471 U.S. 1069 (1985); and Rail Exemption–Misc. Manufactured Commodities, 6 I.C.C.2d 186 (1989). Indeed, the Board has expressly declined to exempt demurrage matters from regulation. Exemption of Demurrage from Regulation, Ex Parte No. 462 (STB served Mar. 29, 1996). Thus, there is no impediment to the Board addressing the matters that have been brought before us here.

### SPTR’s Obligation Under the Interstate Commerce Act

Under 49 U.S.C. 11101, a rail carrier has an obligation to provide transportation or service upon reasonable request. That obligation includes dropping off loaded cars and picking up unloaded cars. The issue here is whether that obligation required SPTR to provide 3 switches per day to Capital.

There is no set rule establishing the number of switches a rail carrier is required to provide. Rather, the Board looks to what is reasonable under the circumstances. However, in various cases, the Board and its predecessor, the Interstate Commerce Commission, have found that more than one switch per day is generally not required. See, e.g., Detroit Harbor Terminals, Incorporated, Terminal Allowance – Practices of Carriers Affecting Operating Revenues or Expenses, 332 I.C.C. 635, 636-37 (1968) (the term “ordinary operating convenience,” referring to how carriers typically switch, “contemplates only one switch” in most cases); id. at 640 (suggesting that railroad set up operations “premised on a one switch per day basis”); Capitol Materials, at 9 (although “it might be unreasonable in certain circumstances for a railroad not to provide more frequent switches, . . . many railroads provide shippers of [Capitol Material’s] size with just one switch per weekday”). Indeed, for the most part, carriers do not generally provide more than one switch per day.

As the Board recognized in Capitol Materials, there may be situations where it would be appropriate to require a carrier to provide more than 1 switch per day. But Capital has not shown that this is such a case.<sup>20</sup> Indeed, Capital has not shown that any other business at the Port (or

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<sup>20</sup> Under the Interstate Commerce Act, Capital, as the party challenging demurrage charges on the basis of its alleged 3-switch entitlement, has the burden of establishing by competent evidence that collection of the assailed charges is unlawful. See North American Freight Car Association v. BNSF Railway Company, STB Docket No. 42060 (Sub-No. 1) (STB served Jan. 26, 2007), at 5 (NAFCA). See also Ametek, Inc. – Petition for Declaratory Order – Panther Valley Railroad Corporation, et al., ICC Docket No. 40663, et al. (ICC served Mar. 26, 1992) (Ametek), and cases cited therein (in demurrage cases, unless otherwise specified in the statute, the burden of proof generally rests with the complainant). The fact that SPTR, pursuant to a court order, has instituted this declaratory order proceeding does not relieve Capital of meeting its burden of proof as to the merits of its claim. See Ametek; Communications Supply Service Association – Petition for Declaratory Order – Certain Rates and Practices of Jones Truck Lines, Inc., ICC Docket No. 41141 (ICC served Dec. 27, 1994).

elsewhere) receives 3 switches per day at any time, particularly during peak-volume periods at the Port.

We understand why Capital wanted to continue receiving 3 switches per day regardless of the levels of overall traffic at the Port: Capital's profitability hinged on its ability to unload 9 cars per day. But common carriers serve the public generally, and the common carrier obligation does not require a carrier to maintain service levels for one shipper that will degrade service overall. See De Bruce Grain Co., Inc. v. Union Pacific Railroad Company, STB Docket No. 42023 (STB served Dec. 22, 1997), and cases cited therein.

Here, the obvious source of Capital's problem was not inadequate service by the railroad, but rather the inadequacy of Capital's track to meet the volumes that Capital's business generated, a problem that Capital was aware of from the start. The fact that the railroads serving Capital worked with Capital when they were able to do so does not mean that SPTR was required to do so when the Port became congested, or that it had to subordinate the needs of shippers generally—including those that had adequate facilities—to the desires of Capital.<sup>21</sup> A ruling here that SPTR was obligated to provide 3 switches per day just because it had done so when it could would discourage railroads from providing additional service to customers, lest they be required to continue such service levels even when they are not reasonably able to do so.

#### Review of the Demurrage Charges Assessed Here

The tariffs pursuant to which the charges were assessed are typical demurrage tariffs that are common throughout the rail industry.<sup>22</sup> When Capital first located at the Garden City Terminal in 1995, SDR assessed demurrage charges under Freight Tariff ASLG 6004, issued by the American Short Line Railroad Association. SPTR adopted Freight Tariff ASLG 6004 on June 9, 1998, when it took over operations at the terminal and began serving Capital and other customers. Tariff ASLG 6004 provides for demurrage under an "average demurrage" plan. Under an average demurrage plan, the shipper earns "credits" when a car is held for less than the allowable free time; these credits are used to offset demurrage charges that would otherwise accrue on cars held beyond the free time. SPTR continued to assess average demurrage pursuant to this tariff until February 2005, when it issued its own Demurrage Tariff, SAPT 6001, which became effective on March 1, 2005. Under Demurrage Tariff SAPT 6001, the charges assessed

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<sup>21</sup> SPTR's petition notes that Capital has also argued to the court that SPTR's providing service to new customers resulted in SPTR's failing to provide it with the necessary 3 switches per day, causing demurrage to accrue. But SPTR persuasively explains that, not only had it not served new customers when the majority of the demurrage accrued, but that it had even lost two customers by November 2004. See SPTR's petition at 16 and Bulone affidavit at 78. Regardless, pursuant to its common carrier obligation, SPTR must provide service on reasonable request to all shippers on the line, not only to Capital.

<sup>22</sup> Copies of the relevant tariffs were submitted in Exhibit M to SPTR's petition.

were “straight” demurrage. Under a straight demurrage plan, charges are assessed strictly on a per-car basis, with no credit for early release of cars.

Under both tariffs, the demurrage clock began to run from the time cars were placed at the shipper’s facility. If a rail car could not actually be placed at the shipper’s facility because of a condition attributable to the shipper (such as no room on the track at the shipper’s facility), the car was deemed constructively placed, beginning the demurrage clock.<sup>23</sup>

Both tariffs – the average agreement tariff and the straight tariff – contain provisions enabling a shipper to seek relief because of railroad error. Each, however, requires shippers to submit a timely, written claim for any disputed demurrage, stating the conditions for which relief is sought.<sup>24</sup> SPTR claims, however, that, because Capital failed to submit written claims for any disputed demurrage, it therefore is now precluded from raising any defenses for the non-payment of demurrage.

Capital points to a provision in the Lease Agreement stating that “[f]ailure of Lessor or Lessee to complain of any act or omission on the part of the other party no matter how long the same may continue, shall not be deemed to be a waiver by said party of any of its rights hereunder.” This provision, however, is not a contractual waiver of the notice requirement in the tariffs, as the Lease Agreement does not constitute a section 10709 contract establishing the rates and conditions for the transportation service SPTR provided to Capital. Rather, the rates and conditions for demurrage are set forth in the applicable tariffs, while the waiver provision in the lease relates only to the lease and is not relevant to the tariff requirements.

Even where a carrier’s tariff limits shipper defenses, the Board has discretion to grant relief beyond that provided in the tariff. See NAFCA, at 13 & n.46; Cleveland Elec. Illuminating v. ICC, 685 F.2d 170, 172 (6th Cir. 1982). Under the facts of this case, however, we find no basis to grant such relief.

To address Capital’s claim that it should not be subject to the assessed charges, we look at the purpose of demurrage. Demurrage charges serve two functions. First, demurrage serves as a penalty for undue car detention, encouraging the efficient use of rail cars in the rail network. See Capitol Materials, at 2, citing Chrysler Corp. v. New York Central R. Co., 234 I.C.C. 755, 759 (1939). Second, demurrage compensates rail carriers for the expenses incurred when rail

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<sup>23</sup> See Freight Tariff, ASLG 6004, Item 545; Demurrage Tariff SAPT 6001, Item 801.

<sup>24</sup> See Freight Tariff ASLG 6004, Item 1435; Demurrage Tariff SAPT 6001, Item 809.

cars are detained by shippers beyond a period of “free time.”<sup>25</sup> Here, we find that assessment of the charges is consistent with both purposes of demurrage. Id.

Assessment of charges in this case meets the first demurrage objective—penalizing undue car detention and encouraging efficient car utilization—at least over the long term. At bottom, the reason Capital’s cars were not switched more quickly is that Capital’s track was not adequate for Capital’s traffic volume. It was able to get around this problem when traffic at the Port was light by having SPTR pay extra attention to Capital and provide it 3 switches per day. But when traffic became heavy at the Port, that kind of attention was not feasible. Indeed, as SPTR points out, giving Capital 3 switches per day when traffic was heavy would have undercut SPTR’s ability to help clear out the Port by preventing SPTR from focusing more attention on shippers with larger facilities that accommodated more cars. Ultimately, curtailing the 3-switches-per-day practice during busy periods advanced the first purpose of demurrage by penalizing Capital for poor utilization and encouraging Capital to move to a facility with sufficient track capacity to meet its business needs.

Capital argues that, even if it was not feasible for SPTR to continue to give it 3 switches per day during the busy times, SPTR should not have assessed demurrage for the cars that were waiting to go to its facility. We recognize that SPTR’s predecessor did hold cars without charging demurrage.<sup>26</sup> But SPTR was not required to do so, and during periods when space is at a premium in the port facility, it would not make business sense to delay the accrual of demurrage.<sup>27</sup>

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<sup>25</sup> In Capitol Materials, at 2, we explained this second principle as follows:

When a shipper utilizes a rail car, that shipper is taking up a railroad asset—the use of that rail car. As a result, a railroad has a right to set a reasonable time for a shipper to finish using that asset and return it to the railroad. If a shipper keeps the asset for too long, then [unless the railroad causes the delay, the shipper] should compensate the railroad for the extended use of its rail car by paying demurrage charges.

<sup>26</sup> In its court complaint, Capital has alleged that, when service was provided by GPA’s subsidiary, SDDR, if more than 3 cars arrived at the terminal for delivery, cars would be held off-site and then would be delivered to Capital within 2 hours after Capital notified GPA that it was ready for the cars. Capital has asserted that GPA did not begin the demurrage clock until cars were actually delivered to Capital’s facility. See Exhibit A at 26.

<sup>27</sup> We note that Capital’s own description of its understanding with GPA indicates that demurrage was to accrue when car detention resulted from unreasonable backups of Capital’s own cars. See Capital’s motion to dismiss at 5, citing Meyer deposition at 26.

In any event, Capital's argument that SPTR should have waived the charges overlooks the second purpose of demurrage: compensating the carrier when its cars are kept from being used to serve other shippers. Again, if Capital had a facility with track capacity more suited to its volume—which, apparently, it has now obtained—the cars used to serve it would be moved through the system more quickly. Because the cars did not move through the system more quickly, the carrier incurred additional costs, and it should be compensated. Thus, assessment of the charges advances the second objective of demurrage.

Conclusion. Capital knew when it leased its original facility at 250 Brampton Road that it would need to process 9 cars per day. But it also knew that its track could accommodate only 3 cars at a time and that it therefore would not be able to timely process deliveries of more than 3 cars at a time. The initial carrier (and even SPTR) was willing to accommodate Capital by spacing deliveries and providing 3 switches a day when that was feasible. But 3-car switches 3 times each day is a high level of attention, and there was no written agreement requiring SPTR to provide that level of service. Nor was there anything inappropriate in the carrier's assessment of demurrage charges, as provided for in the governing tariff. In sum, assessment of the charges under the circumstances here advanced the purposes of demurrage and was not unlawful.

It is ordered:

1. Capital's motion to dismiss is denied.
2. This proceeding is discontinued.
3. All filed pleadings are accepted into the record.
4. This decision is effective on its service date.

5. A copy of this decision will be mailed to:

The Honorable Louisa Abbot  
Chatham County Superior Court  
Eastern Judicial Circuit  
State of Georgia  
133 Montgomery Street  
Savannah, GA 31401

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner  
Buttrey.

Anne K. Quinlan  
Acting Secretary