

**Before the  
SURFACE TRANSPORTATION BOARD**

ENTERED  
Office of Proceedings  
June 29, 2016  
Part of  
Public Record

**C. L. Consulting and Management Corp. – Petition  
for Declaratory Order – Reasonableness of  
Demurrage Charges**

DOCKET NO: 36042

**REPLY TO PETITION FOR DECLARATORY ORDER**

Norfolk Southern Railway Company (“Norfolk Southern”) urges the Board to deny the June 10, 2016 Petition for Declaratory Order (“Petition”) filed by C.L. Consulting and Management Corp. (“CLC”). Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, whether to issue a declaratory order to terminate a controversy or remove uncertainty is a matter left to the discretion of the Board. Although the Board often issues declaratory orders when courts refer issues, the federal district court before which this dispute has been pending since April 2015 was specifically asked by CLC to refer this dispute to the Board, and the court declined to do so. Accordingly, it is appropriate for the Board to decline the present request for a declaratory order. *See Nat’l Solid Wastes Mgmt. Ass’n, et al.--Petition for Declaratory Order* FIN 34776, 2006 WL 581152 (S.T.B. Mar. 8, 2006). Declining CLC’S request is particularly appropriate here where the law is clear that the commodities discussed in the Petition are hazardous materials and remain so while in Norfolk Southern’s possession. So the underlying case is simply a routine demurrage dispute the United States District Court for the District of New Jersey is well-equipped to resolve.

**SUMMARY OF THE ARGUMENT**

This is a demurrage dispute that has already been pending in the United States District Court for the District of New Jersey for nearly 15 months. In July of 2015, CLC

filed a motion with the District Court seeking to transfer this matter to the Board due to allegedly unreasonable practices by Norfolk Southern in connection with the assessment of demurrage. In its January 2016 Opinion, the U.S. District Court specifically **denied** CLC's motion, concluding that this matter is a "routine demurrage fee case . . . [and] the courts of the Third Circuit are well-experienced in resolving such demurrage disputes." *See Norfolk Southern v. C. L. Consulting and Management Corp.*, No. 15-cv-02548, at 8-9 (D. N.J. Jan. 11, 2016) (attached hereto as Exhibit A). The instant Petition is nothing more than a transparent "end run" around this unfavorable ruling by the U.S. District Court.

CLC's precise rationale for why the Board should consider this dispute remains unclear. As the District Court observed, CLC initially argued that transfer to the Board was appropriate because this is an ideal "test case" for the notice requirements appearing in the Board's recently-enacted demurrage regulations (49 C.F.R. § 1333, *et. seq.*). *Id.* at 4, 8. Upon belatedly realizing that all of the demurrage at issue accrued *before* these regulations took effect, CLC shifted gears and "asserted for the first time [in a reply brief] that the decision is not the main reason it seeks to refer this case to the STB". *Id.* at 8. Its new reply argument was that Norfolk Southern's unreasonable demurrage practices "renders STB jurisdiction of this case appropriate and warranted." *Id.* at 7. Even though this argument proved unsuccessful, CLC has now raised it again in the instant Petition to the Board. In a June 20 letter to the Board, CLC again modified its legal theory and stated that its primary focus is now whether being assessed demurrage at the higher rate applicable to hazardous materials was reasonable.

Declaratory petitions before this Board are not vehicles to re-litigate arguments that have already proven unsuccessful in District Court. And even if the Board were to consider the merits of CLC's latest reasonableness arguments, CLC would not be entitled to the relief it desires. The gravamen of CLC's latest reasonableness argument is that asphalt is only hazardous above certain temperatures, so shipments that are appropriately labeled hazardous at origin may cease to be hazardous if they cool during transportation. This latest argument is illogical and legally irrelevant because freight that the shipper has identified to the railroad as hazardous at origin remains hazardous, as a matter of law, throughout the entire rail journey. Rail carriers cannot change placards on cars while the cars are in transit.

Any quarrel over whether the shipments should have been identified as hazardous in the first place is with the supplier/shipper. It is well established as a matter of law that the *shipper*, not the railroad, is responsible for determining whether a particular shipment contains hazardous material. The shipper is also legally obligated to notify the railroad of the hazardous nature of the shipment, and is obligated to appropriately label, placard, and mark railcars prior to their transportation. So, the issue of whether asphalt may cool sufficiently during rail travel to become non-hazardous at some point during the journey is legally irrelevant, because Norfolk Southern simply assessed demurrage pursuant to the terms of its tariff and applicable law.

Put simply, the Board should decline to institute a declaratory order proceeding in this case because this is simply a routine demurrage collection case that the U.S. District Court in New Jersey has clearly and unambiguously expressed its intention to resolve.

## RELEVANT FACTS AND PROCEDURAL HISTORY

Pursuant to the Congressional mandate of 49 U.S.C. § 10746, Norfolk Southern has promulgated rules with respect to the computation and accrual of railcar demurrage, which are found in Norfolk Southern's Demurrage Tariff NS 6004-C ("Tariff") - a public tariff posted on Norfolk Southern's website.<sup>1</sup> Between October of 2013 and May of 2014, CLC directed Norfolk Southern to deliver a number of railcars consigned to CLC via its terminal operator: New York Terminals, LLC ("NYT").<sup>2</sup> See Petition at 7. NYT and CLC's failure to timely unload the cars in accordance with the terms of Norfolk Southern's tariff and federal law, resulted in \$284,960 in demurrage charges being assessed to CLC pursuant to the terms of the Tariff. After CLC refused to pay, Norfolk Southern was forced to initiate a legal action in the United States District Court for the District of New Jersey to recover the charges in April 2015.

In response to Norfolk Southern's Complaint, CLC filed a motion in July 2015 seeking to refer Norfolk Southern's demurrage claim to the Board because it was purportedly a "test case" for the Board's new demurrage regulations. Based upon this faulty premise, CLC argued that referral to the Board was appropriate due to a substantial danger of inconsistent rulings relative to the application of the Board's new demurrage regulations and, "in the context of the rule changes", whether Norfolk Southern engaged in an unreasonable practice by attempting to collect demurrage from CLC. Further, CLC represented to the Court that it had no prior notice of the demurrage charges or the Tariff.

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<sup>1</sup> See <http://www.nscorp.com/content/nscorp/en/transportation-terms/otherrequirements/demurrage-rules-and-charges.html>. Last visited June 23, 2016.

<sup>2</sup> Sometimes referred to as New York Terminals, LLC II.

In response, Norfolk Southern pointed out that the charges at issue in this case accrued between October of 2013 and May of 2014, which was *prior* to the July 15, 2014 effective date of the Board's *non-retroactive* demurrage regulations. Further, CLC's representations that it had no notice of Norfolk Southern's tariff were both legally irrelevant and demonstrably false. Norfolk Southern provided CLC with copies of its demurrage tariff and the details for the demurrage charges at issue no later than December 30, 2013: *nearly a year* prior to the date that CLC incorrectly asserted it first received notice. See Figure 1 below:<sup>3</sup>

**Figure 1:**

**From:** "Short, Ashley R." <[ashley.short@nscorp.com](mailto:ashley.short@nscorp.com)>  
**Date:** December 30, 2013 at 12:28:37 PM EST  
**To:** "[byouvan@yahoo.com](mailto:byouvan@yahoo.com)" <[byouvan@yahoo.com](mailto:byouvan@yahoo.com)>  
**Cc:** "Cape, Vince H." <[vince.cape@nscorp.com](mailto:vince.cape@nscorp.com)>, "Schamber, Judith A." <[judith.schamber@nscorp.com](mailto:judith.schamber@nscorp.com)>, "McDonald, Matthew C" <[matthew.mcdonald@nscorp.com](mailto:matthew.mcdonald@nscorp.com)>  
**Subject:** CL Consulting & Management Corp - Flint Hills at New York Terminals

Brad,

Per our phone conversation, attached are the invoice details for your review. Once you have reviewed and confirmed responsibility for the charges, we can move forward regarding payment method and other formalities. I have also attached the NS Tariff for your review.

Please let me know if you have any questions.

Thanks,

***Ashley Short***

Customer Account Representative | Revenue Accounting – Demurrage  
Norfolk Southern Railway | P: 404.529.2126 | F: 404.589.8775  
Manage your account online at <https://www2.nscorp.com/accessNS/>

<image001.jpg>  
<Flint Hills - DemurrageDetailsFor1224500595.xls>  
<Flint Hills - DemurrageDetailsFor1316184409.xls>  
<Flint Hills - DemurrageDetailsFor1192148112.xls>  
<Flint Hills - DemurrageDetailsFor1344182033.xls>  
<Demurrage-NS6004-C.pdf>  
<bol\_01742405.pdf>

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<sup>3</sup> Complete email chain is attached as part of Exhibit B hereto. Mr. Youvan handles operations and sales for CLC.

CLC, after apparently realizing the fatal flaw in its original argument, changed course in its reply brief filed with the District Court, and argued the Board should hear this case because Norfolk Southern's practices in the assessment of demurrage to CLC were unreasonable. Specifically, CLC, raised new "reasonableness" issues of constructive placement, bunching, and constructive notice.

In January 2016, the District Court denied CLC's motion to refer this case to the Board, and clearly expressed its intention to retain jurisdiction over this case. *See* Exhibit A at 8-9. The Court found the new demurrage regulations have "only tangential relevance to this particular dispute, which arose before the STB's decision". *Id* at 8. The Court then found that the remaining reasonableness arguments, raised in the reply brief, are part and parcel of a "routine demurrage case" that the courts in the Third Circuit are "well-experienced in resolving". *Id.* at 8-9.

On January 28, 2016, CLC filed its Answer with the District Court that raises the same reasonableness defenses that appear in the instant Petition – including the arguments related to hazardous material. *See* CLC Answer, attached as Exhibit C hereto at 4.

On February 1, 2016, the parties commenced discovery on Norfolk Southern's claims and CLC's defenses. Documents produced by CLC in discovery were telling of how *even CLC* perceives the merits of its own argument. CLC's communications clearly demonstrate that, prior to this litigation, CLC attributed the demurrage to unreasonable practices *by NYT* – its own designated terminal operator. These recently-produced documents show that CLC unquestionably knew that demurrage was accruing "solely" because of operational problems at the terminal and NYT's failure to control the flow of

railcars being sent to the terminal by the shippers of CLC's freight. *See, e.g.,* Figures 2-4 below<sup>4</sup>:

### **Figure 2**<sup>5</sup>

**From:** Brandon C. Rose <brose@mthopeco.com>  
**Sent:** Thursday, December 19, 2013 2:26 PM  
**To:** Tyler Youvan; Brad Youvan  
**Subject:** Re: New York Terminal On Hand and Service Performance

is he really just sharing these emails with you? WOW, talk about giving us a "smoking gun" confirming that his operation is causing all of the delays...

### **Figure 3**

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**From:** Craig Royston  
**Sent:** Wednesday, December 18, 2013 9:26 AM  
**To:** 'Giardnelli, Joan'  
**Cc:** Luciani, Leo; Megali, Mo; Gardner, Tim; Cruz, Oscar; Jones, Llsa; Mills-Stewart, Courtney; Perez, J F; Worrell, Matthew  
**Subject:** RE: New York Terminal On Hand and Service Performance

Good morning. Sorry for the delay in responding, I was gone a little longer than expected due to a flight cancellation.

You're right, our performance has been terrible. The asphalt cars are one I will take a pass on since our customer just orders them in groups that are too large for us to handle despite our requests to slow down. I think its a minimum order requirement from their supplier.

Asphalt cars aside, we went a long time with a reasonable backlog at Bayway, including what I recall as a reasonably good success of scheduling with your guys. However, we have recently (4 weeks or so) been plagued with a recurring compressed air problem on our railcar mover. They kept fixing it and it would last for a time (the run time decreased with every fix). This is what caused the failure to release cars. We always thought the mechanical fix was good and were disappointed. Finally they came up with an alternative way to provide the compressed air over last weekend and it was fixed on Monday night. So far, so good.

We appreciate the effort of your crew to accommodate us through the rough spots we have. Within a short time I trust that we will have learned some lessons, made some adjustments and we will not only keep your yard busy but contribute more to its profitability along with ours.

We hope to begin working through our backlog quickly as soon as we get our switches thawed out....it never ends.

**New York Terminals**  
Craig G. Royston  
General Manager  
P: 908-353-8933 ext 13  
F: 908-353-8894  
M: 201-747-0904

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<sup>4</sup> Complete email chains are attached hereto as part of Exhibit B.

<sup>5</sup> Brandon Rose is the president of CLC. Mr. Rose submitted a verified statement to the Board in support of CLC's Petition which attributes the delays in unloading to inclement weather.

## **Figure 4**

On Jan 23, 2014, at 4:58 PM, Brandon Rose <[brose@mthopeco.com](mailto:brose@mthopeco.com)> wrote:

Dear Joe,

We have been trying to reach you for several weeks by phone to discuss the ongoing problems at NY Terminals. While there are multiple items we should discuss, the largest issue requiring immediate attention relates to rail demurrage charges to us in excess of \$300,000.

I do not know if you are aware of the size and scope of the demurrage problem at NY Terminals, but the terminal has passed along demurrage charges to us for \$300,000, for which we are not responsible. The demurrage occurred solely due to NY Terminals own inability to unload rail cars in a timely fashion.

This demurrage problem continues to exist today, and seems to only be getting larger and worse. We are not the only tenants experiencing the problem, and we are not the only ones who plan to dispute the charges you are asking us to pay. We also have emails from the rail company, complaining about, and documenting NY Terminals poor performance record, which further support that the demurrage was caused by your operational problems.

Please understand we believe we can all work together to approach the rail providers and get these costs reduced or eliminated, but it is clear we need to work together to rectify this situation before it gets even worse. We believe we can work together to resolve these various issues, but it will likely require your involvement, leadership and some operational changes. We would welcome the opportunity to assist in making some improvements, which will only benefit us all.

Please contact either Brad Youvan or myself to arrange for a meeting so we can work together to resolve these problems.

Sincerely,

Brandon Rose  
Tel 917-991-1303

Just weeks before discovery was to close in the District Court, CLC filed the instant Petition raising the same arguments that the parties have been litigating in federal court throughout the course of this case. A status conference is scheduled with the District Court for July 6th. Discovery closes on July 21<sup>st</sup>.

### **ARGUMENT**

Under 5 U.S.C. § 554(e)<sup>6</sup> and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. While the Board has broad discretion in determining whether to issue a declaratory order, it would be pointless for the Board to institute a declaratory proceeding here because declaratory relief would neither terminate a controversy nor remove uncertainty. *See Intercity Transp. Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984); *Delegation of Authority - Declaratory Order Proceedings*, 5 I.C.C.2d 675 (1989).

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<sup>6</sup> CLC's Petition states that it seeks relief under 4 U.S.C. § 554(c). However, because no such statute exists, Norfolk Southern will assume for purposes of this motion that this was simply a typographical error.

The U.S. District Court for the District of New Jersey has already found that this is a routine demurrage dispute that it is well-equipped to resolve. The Board has traditionally dismissed such petitions for declaratory relief, and there is no reason for a different result here. And even if the Board were to consider the merits of CLC's arguments, they would easily fail due to the express language of the federal hazardous material regulations. So, even if the Board opts to proceed with a declaratory order proceeding, it should still deny CLC's Petition on its merits.

**I. Consistent With Its Past Practice, The Board Should Deny CLC's Petition Without Even Considering Its Merits**

While it does not appear to be a frequently-used tactic, CLC is not the first unsuccessful litigant to attempt to file a Petition with the Board after a federal district court declined to grant a motion to transfer. Yet Norfolk Southern's research did not find a single instance where the Board elected to actually proceed with such a petition for declaratory relief on its merits after the District Court specifically elected to retain jurisdiction over the case. CLC's attempted end run around the district court's unfavorable January 2016 decision should suffer the same fate.

While no authority on this issue is cited in CLC's Petition, Norfolk Southern's research found two previous decisions that may be of use to the Board in determining whether to consider the merits of the Petition. The most analogous is *Green Mountain Railroad Corporation - Petition for Declaratory Order*, STB Finance Docket No. 34052 (STB served May 28, 2002). In *Green Mountain*, the Board denied a petition seeking a declaratory order (related to preemption) because the petitioner had "also sought judicial relief, and the District Court, which has enforcement authority, has made clear its desire to resolve the issues raised without referring the matter to the Board." *Id.*

The second case, *Nat'l Solid Wastes Mgmt. Ass'n, et al.--Petition for Declaratory Order* (“NSWMA”), also involved a petition (related to preemption) that was filed with the Board despite ongoing court proceedings in the District of New Jersey and the creation of a substantial record. FIN 34776, 2006 WL 581152, at \*1 (S.T.B. Mar. 8, 2006). As in *Green Mountain*, the District Court in NSWMA “decided not to refer the federal preemption question to the Board, even though it was aware of the option”. *Id.* at 3. Therefore, consistent with *Green Mountain*, the Board elected to deny the petitioner’s request to institute a concurrent declaratory order proceeding.

Norfolk Southern respectfully submits that there is no reason to depart from the same logic that informed the Board’s decisions in *Green Mountain* and *NSWMA*. Having already denied CLC’s motion to transfer, the District Court is clearly aware of the option to refer this matter to the Board. Yet the District Court found that this is a “routine demurrage fee case” and that the Court is “well-experienced in resolving such demurrage disputes.” *See* Exhibit A at 8-9. Given these findings, and the clear similarities to *Green Mountain* and *NSWMA*, the Board should follow the “guidance” established in its past precedent and deny CLC’s request to institute a concurrent declaratory order proceeding. *NSWMA* at \*3.

## **II. A Concurrent Declaratory Order Proceeding Would Unnecessarily Complicate This Dispute**

Another similarity between this case and *NSWMA* that favors declining CLC’s request is that a considerable record has already been generated in the U.S. District Court for the District of New Jersey. *See NSWMA* at \*3 (noting that “an extensive record has evidently been compiled in the [D. N.J]”). The parties have been litigating this dispute in New Jersey for nearly 15 months. CLC has impleaded NYT as a third-party defendant.

Norfolk Southern and CLC have exchanged more than 2,000 pages of documents. The parties have already participated in two status conferences with the Court, and there is a third scheduled for July 6<sup>th</sup>. There are two depositions of fact witnesses scheduled to take place prior to the deadline CLC has proposed for its (impermissible) reply brief to this Board. Under the briefing schedule CLC has proposed to the Board, any ruling on this Petition would occur after the close of discovery on July 21<sup>st</sup>. So this Petition has the significant potential to materially alter the theories and defenses in this case *after the close of discovery* if considered on its merits.

While CLC might argue that the District Court could extend discovery if there is a Board ruling that materially impacts this case after discovery is closed, such a result is uncertain. Even if an extension is granted, having to resume discovery to address new issues raised in a future ruling by the Board (in addition to simultaneously litigating this matter in two forums) will needlessly and significantly add to the costs associated with litigating this relatively-modest dispute.

Norfolk Southern therefore respectfully submits that the Board should simply deny CLC's request to institute a duplicative declaratory order proceeding.

### **III. Even If It Elects To Initiate A Proceeding, The Board Must Deny CLC's Petition On Its Merits**

Denial of CLC's request is also appropriate because CLC's arguments fail on their merits. Other than its arguments related to hazardous material (which were later raised in its Answer), all legal arguments appearing in CLC's Petition have been previously raised in the District Court as a basis for STB jurisdiction and were rejected by that Court in its January 2016 ruling (Exhibit A). This ruling, now the law of the case, precludes re-litigation of these same issues before the Board. *See Arizona v. California*,

460 U.S. 605, 618 (1983) (“when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case”). As the Board has previously explained, a party to a STB proceeding “may not attempt to revisit the law of the case as established in the court's decision by making again the same argument [to the Board] that was unsuccessful in court.” *Canadian Nat'l Ry. Co. & Grand Trunk Corp.*, FD 35087 (SUB-8), 2012 WL 5458828, at \*15 (S.T.B. Nov. 7, 2012). CLC implicitly acknowledged this legal reality in its June 20 letter to the Board, which clarified that the primary focus of its Petition is now simply the hazardous-material (“hazmat”) arguments raised in its Answer.<sup>7</sup>

However, the current hazmat arguments are just the latest in a long line of meritless defenses that CLC has attempted to use to deprive Norfolk Southern - the plaintiff in District Court - of its chosen forum by prefacing those defenses with the word “reasonable”. *See generally Lawrence v. Xerox Corp.*, 56 F. Supp. 2d 442, 452 (D.N.J. 1999) (a plaintiff's choice of forum is a “paramount concern” that is considered “presumptively correct”). Federal District Courts have long ruled upon hazmat classification arguments without Board referral. *See, e.g., Illinois Cent. Gulf R. Co. v. Golden Triangle Wholesale Gas Co.*, 423 F. Supp. 679, 684 (N.D. Miss. 1976), *aff'd*, 586 F.2d 588 (5th Cir. 1978) (demurrage dispute over, *inter alia*, whether hazardous material storage charges imposed by tariff should accurately be deemed demurrage charges). And CLC's Petition does not cite to a single decision, from any jurisdiction, which has ever

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<sup>7</sup> Should the Board nonetheless deem a response required, Norfolk Southern would respectfully submit that these non-hazardous material arguments should be denied for the same reasons as they were in the District Court. *See* Exhibit A. In addition, subsequent discovery has proven a great number of the facts alleged in support of these recycled arguments to be demonstrably false. *See* Exhibit B hereto.

found arguments related to hazmat classification within the exclusive jurisdiction of the Board.

It is unclear why CLC desires so desperately for Norfolk Southern to litigate this case before the Board; but the hazmat arguments in its petition are especially unpersuasive and illogical. CLC complains that Norfolk Southern improperly assessed demurrage on its asphalt shipments at a higher rate applicable to hazmat shipments even though the asphalt may have cooled in transit to a temperature that is no longer technically hazardous. While CLC goes through great lengths in its Petition to explain how it arrived at the conclusion (without any direct evidence) that its asphalt had cooled to a non-hazardous level in transit, it is unclear why it believes this relatively-straightforward theory is so technical that the District Court handling this case cannot be expected to understand it.

Regardless, no technical expertise is required to resolve this issue, as its resolution is readily apparent from existing regulations. Even if the Board is to assume, *arguendo*, that CLC's theory is correct, and its asphalt cooled in transit to a temperature that no longer meets the criteria for being hazardous, this finding would not impact this case in any way. As a matter of law, if a shipment is hazmat when it is tendered to a carrier, it remains a hazmat shipment throughout its journey. *See* 49 CFR §171.1(c). Indeed this regulation makes common sense, as it would be an incredible burden on interstate commerce (not to mention incredibly dangerous) if rail carriers needed to stop at various points in transit to test their hazardous loads, ensure that they remain hazardous, and to re-placard the cars in transit if the temperature falls to a certain range.

Moreover, to the extent that CLC believes it was unreasonable to classify these shipments as hazardous in the first place, its quarrel is with the shippers supplying its asphalt – not Norfolk Southern. 49 CFR §171.1(b) provides that it is the duty of the *shipper*, not the rail carrier, to identify whether material to be shipped by rail is hazardous and marking and placarding it as such for rail transportation. *See also* 49 CFR §173.22. As a matter of law, a rail carrier is entitled to rely upon the shipper’s hazmat designation. *See* 49 CFR §171.2. In fact, a shipper is legally prohibited from representing to a rail carrier that the contents of its shipment are hazardous if this is not the case. *Id*; *see also* 49 CFR §172.401, §172.502. So there can be nothing unreasonable about Norfolk Southern following the law, and treating material as hazardous when it has been represented to Norfolk Southern to be hazardous.

Accordingly, given the complete absence of any objective merit to CLC’s hazmat arguments, even if the Board elects to institute a proceeding, it should not award the relief requested by CLC.

#### **IV. CLC Has No Right To File A Reply Brief**

CLC’s Petition contains a proposed “procedural schedule”, which would allow CLC to file rebuttal comments. As a matter of law, CLC has no right to file such a document, nor has CLC offered any explanation for why a special exception should be made here. *See* 49 C.F.R. 1104.13(c). Accordingly, in light of the clear absence of merit to CLC’s Petition, and the absence of any authority that would authorize such a filing, Norfolk Southern would respectfully submit that the Board should decline to authorize further briefing on CLC’s Petition.

## V. Norfolk Southern Joins CLC's Request For Expedited Consideration Of The Petition

At the end of its Petition, CLC argues that expedited resolution is in the best interests of all involved. While Norfolk Southern obviously disagrees with CLC's rationale for this request, Norfolk Southern does agree that expedited resolution would be in the best interests of all involved. Given the numerous fast-approaching deadlines in the District Court action, a swift decision by the Board to decline the request for a Declaratory Order would promote the ultimate resolution of this dispute without unnecessary delay.

### CONCLUSION

For the foregoing reasons the Board should decline CLC's request to institute a declaratory order proceeding. As the District Court presiding over this case has already found, this is nothing more than a routine demurrage case that the District Court is well-equipped to handle. And CLC should not be permitted to attempt an end run around an unfavorable ruling by the District Court by re-litigating its unsuccessful arguments before the Board.

**KEENAN COHEN & MERRICK. P.C.**

By:

  
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*Attorneys for  
Norfolk Southern Railway Co.*

Date: June 29, 2016

**List of Exhibits**

**Exhibit A:** January 11, 2016 Opinion Of The U.S. District Court for the District of New Jersey, Denying CLC's Motion to Transfer This Dispute To The Board.

**Exhibit B:** Full Email Chains For CLC Communications

**Exhibit C:** CLC Answer And Affirmative Defenses To Norfolk Southern Complaint

**Certificate Of Service**

I certify that I have this day served copies of document and all exhibits thereto upon all parties of record in this proceeding, by electronic mail and first-class U.S. Mail.

**KEENAN COHEN & MERRICK. P.C.**

By:



Chris J. Merrick

# Exhibit A

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

NORFOLK SOUTHERN RAILWAY .  
COMPANY, .  
 .  
Plaintiff, . Case No. 15-cv-02548  
 .  
vs. . Newark, New Jersey  
 . January 11, 2016  
C.L. CONSULTING AND .  
MANAGEMENT CORP., .  
 .  
Defendant. .

TRANSCRIPT OF RECORDED OPINION  
BY THE HONORABLE MICHAEL A. HAMMER  
UNITED STATES MAGISTRATE JUDGE

This oral opinion has been reviewed and revised in accordance  
with L. Civ. R. 52.1

APPEARANCES:

For the Plaintiff: No one was present

For the Defendant: No one was present

Audio Operator:

Transcription Service: KING TRANSCRIPTION SERVICES  
3 South Corporate Drive, Suite 203  
Riverdale, NJ 07457  
(973) 237-6080

Proceedings recorded by electronic sound recording; transcript  
produced by transcription service.

1 (Commencement of proceedings)

2

3 THE COURT: This is the matter of Norfolk Southern  
4 Railway Company versus CL Consulting and Management  
5 Corporation, Civil No. 15-2548. This matter comes before the  
6 Court on the motion of defendant CL Consulting and Management  
7 Corporation to transfer this case to the Surface  
8 Transportation Board of the United States Department of  
9 Transportation, which I will refer to herein as the "STB."  
10 The motion is docketed at Docket Entry Number 10. The Court  
11 has considered the motion papers submitted in support of and  
12 in opposition to the motion, and for the reasons that I will  
13 articulate herein, the Court denies the motion.

14 By way of background, this is a commercial dispute  
15 where plaintiff Norfolk Southern Railway Company seeks to  
16 recover demurrage charges assessed against defendant CLC  
17 under Title 49 U.S.C. § 10746. See generally Complaint,  
18 Docket Entry 1. A demurrage fee is an overage fee. More  
19 specifically, it is a fee "exacted by a carrier from a  
20 shipper or a consignee on account of a failure to load or  
21 unload [rail] cars within the specified time prescribed by  
22 the applicable tariffs. Railroads charge shippers and  
23 receivers of freight 'demurrage' fees if the shippers of  
24 receivers detain freight cars on the rails beyond a  
25 designated number of days." CSX Transportation Company v.

1 | Novolog Bucks County, 502 F.3d 247, 251 at n.1 (3d Cir.  
2 | 2007).

3 |           Plaintiff is a Virginia corporation that operates  
4 | an interstate rail carrier. CLC is a New Jersey corporation  
5 | that resells liquid asphalt cement oil, "which it often  
6 | purchases from refiners [that] ship it to CLC by rail from  
7 | other parts of the county." Certification of Brandon C.  
8 | Rose, July 2, 2015, Docket Entry 10-1, paragraph 2.

9 |           Norfolk alleges in this action that from  
10 | approximately October 2013 through May 2014, it released  
11 | railcars to CLC as "consignee [and that] CLC accepted  
12 | discovery of said railcars." Id. Paragraph 8. Nonetheless,  
13 | CLC did not return the railcars to Norfolk within the  
14 | allotted "free time"; thus, plaintiff alleges that CLC  
15 | incurred demurrage charges "in a total amount of not less  
16 | than \$284,960." Id. at paragraph 9.

17 |           On July 20, 2015, CLC moved to refer and transfer  
18 | this case to the STB. The STB is a successor to the  
19 | Interstate Commerce Commission. It is organized within the  
20 | Department of Transportation but maintains independent  
21 | decision-making authority to resolve disputes concerning the  
22 | rates and services of rail carriers. See generally,  
23 | [www.stb.dot.gov/stb/about/overview/html](http://www.stb.dot.gov/stb/about/overview/html).

24 |           CLC seeks to refer this case to the STB for two  
25 | principal reasons. See Defendant's Brief in Support of

1 | Motion, July 20, 2015, Docket Entry 10. First, CLC claims  
2 | that a recent decision and rule change by the STB make this  
3 | matter an ideal "test case" for the new rules. Id. at 1  
4 | through 2. That is because on April 11, 2014, the STB issued  
5 | a decision altering the established rules relating to  
6 | demurrage charges. See STB Decision, April 11, 2014,  
7 | Exhibit B to the Certification of Christopher J. Merrick,  
8 | Esq., In Opposition to Defendant's Motion to Refer, August 7,  
9 | 2015, Docket Entry 14-4. The decision explains that the new  
10 | rules would "be effective on July 15, 2014." See Decision,  
11 | Docket Entry 14-4 at 1. CLC asserts that in the decision,  
12 | the STB resolved a split among the Federal Circuit courts of  
13 | appeal concerning the amount of notice required in order to  
14 | assess demurrage charges. See Brief in Support of  
15 | Defendant's Motion, Docket Entry 10 at pages 3 through 4.

16 |           In the decision, the STB ruled that any person  
17 | receiving railway cars "from a rail carrier for loading or  
18 | unloading who detains the cars beyond 'free time' ... will  
19 | generally be responsible for paying demurrage if that person  
20 | has actual notice prior to railcar replacement of the  
21 | demurrage tariff establishing such liability." See Decision  
22 | at 1. See also Defendant's Brief in Support of Motion to  
23 | Refer, Docket Entry 10 at page 4.

24 |           Defendant claims that this matter is a test case  
25 | for the STB's decision because CLC "received no actual or

1 | other notice of the demurrage tariff providing for such  
2 | liability ... [meaning that] CLC bears no liability for the  
3 | charges." Brief in Support of Defendant's Motion to Refer,  
4 | Docket Entry 10 at 6.

5 |           Second, CLC contends that the Court can refer this  
6 | matter to the STB under the doctrine of primary jurisdiction.  
7 | Id. at page 8. Under the doctrine of primary jurisdiction,  
8 | courts should "refer a matter to an administrative agency for  
9 | resolution, even if the matter is otherwise properly before  
10 | the Court if it appears that the matter involves technical or  
11 | policy considerations which are beyond the Court's ordinary  
12 | competence and within the agency's particular field of  
13 | expertise." MCI Communications Corporation v. AT&T, 496 F.2d  
14 | 214 at 220 (3d Cir. 1974).

15 |           To determine whether the doctrine of primary  
16 | jurisdiction applies, courts consider the following factors:  
17 | "(1) whether the question at issue is within the conventional  
18 | experience of judges or whether it involves technical or  
19 | policy considerations within the agency's particular field of  
20 | expertise; (2) whether the question at issue is particularly  
21 | within the agency's discretion; (3) whether there exists a  
22 | substantial danger of inconsistent rulings; and (4) whether a  
23 | prior application to the agency has been made." Global Naps  
24 | Inc. v. Bell Atlantic-New Jersey Inc., 287 F. Supp. 2d 532 at  
25 | 549 (D.N.J. 2003).

1           In making this argument, CLC does not challenge  
2 this Court's subject matter jurisdiction. Instead, CLC  
3 maintains that reference is appropriate because, one, it will  
4 prevent inconsistent rulings, since the STB decision created  
5 new rules dealing with demurrage charges. And, two, the  
6 STB's expertise should decide this matter because the primary  
7 issue here is whether plaintiff provided CLC notice of the  
8 demurrage charges. Brief in Support of Defendant's Motion to  
9 Refer, Docket Entry 10 at pages 8 through 10.

10           In opposition, plaintiff first argues that the  
11 STB's decision does not apply here because the claim at issue  
12 accrued before the new regulation's effective date. See  
13 Plaintiff's Brief in Opposition, July 28, 2015, Docket Entry  
14 12 at pages 1 through 2. According to plaintiff, the new  
15 rule change implemented by the STB became effective on  
16 July 15, 2015, which is important because, one, the demurrage  
17 charges at issue in this case arose "between October of 2013  
18 and May of 2014," and, two, Congress did not provide the STB  
19 with express authority to retroactively apply its new rules.  
20 See id. at 1 through 2; see also Complaint, Docket Entry 1 at  
21 paragraph 8. See also STB Decision, Certification Exhibit B,  
22 Docket Entry 14-4 at 1.

23           Norfolk also claims that the doctrine of primary  
24 jurisdiction does not apply because this is not a "test case"  
25 for the STB regulations. Norfolk contends that this is a

1 | "standard demurrage case in which liability arises ...  
2 | pursuant to the law as it existed [before the new STB  
3 | regulations]." Id. at page 5. Thus, because courts in this  
4 | circuit have sufficient expertise with demurrage cases,  
5 | transfer to the STB is unnecessary.

6 |           In its reply, CLC acknowledges that STB's rule  
7 | change did not become effective until July 15, 2014.  
8 | Nonetheless, CLC contends any view "of [Norfolk's] conduct in  
9 | this case is informed by the rule change," even though the  
10 | rule change would not expressly govern Norfolk's conduct.  
11 | See Reply Certification of Brandon C. Rose in Support of  
12 | Defendant's Motion to Refer, July 27, 2015, Docket Entry 13  
13 | at paragraph 3. CLC contends that "the unreasonableness of  
14 | [Norfolk's] conduct ... renders STB jurisdiction of this case  
15 | appropriate and warranted." See id.

16 |           In surreply, which the Court allowed, Norfolk  
17 | argues that, one, CLC has now conceded that the STB's rule  
18 | change would not apply because the effective date of that  
19 | rule change -- July 15, 2014 -- occurred after the demurrage  
20 | charges in this case accrued and, two, CLC's new arguments  
21 | raised in its reply brief do not deprive the Court of  
22 | jurisdiction because CLC's claims simply "involve the  
23 | analysis of precedent and statutory interpretation." See  
24 | Plaintiff's Surreply Brief, August 7, 2015, Docket Entry 14-1  
25 | at 3.

1           After reviewing the record, the parties' arguments,  
2 and the applicable law, the Court concludes that referral to  
3 the STB is unwarranted. CLC appears to seek referral because  
4 the new STB regulations might provide it with a strong  
5 defense; namely, that CLC lacked sufficient notice of  
6 plaintiff's demurrage charges. Even so, CLC has not  
7 explained why referring this matter to the STB is necessary.  
8 First, CLC does not dispute that the new STB rules, which  
9 defendant claims makes this a strong "test case for the STB,"  
10 became effective on July 15, 2014, which is after the accrual  
11 of the demurrage costs that plaintiff seeks in this case.  
12 See Rose Reply Certification, Docket Entry 13 at paragraphs 2  
13 through 4. Thus, there appears to be no dispute that the  
14 demurrage charges at issue here accrued before the STB's rule  
15 change became effective. See id. See also Complaint, Docket  
16 Entry 1 at paragraph 8. See also STB Decision, Exhibit B to  
17 Merrick Certification, Docket Entry 14-4 at 1.

18           Indeed, in its reply, CLC asserted for the first  
19 time that the decision is not the main reason it seeks to  
20 refer this case to the STB. See Rose Reply Certification,  
21 Docket Entry 13 at paragraphs 2 through 3. Thus, the Court  
22 concludes that the STB's decision has only tangential  
23 relevance to this particular dispute, which arose before the  
24 STB's decision.

25           Moreover, this matter appears to be a routine

1 demurrage fee case. Indeed, the courts of the Third Circuit  
2 are well-experienced in resolving such demurrage cases. See  
3 e.g. CSX Transportation Company v. Port Erie Plastics Inc.,  
4 295 F.App'x 496 (3d Cir. 2008); CSX Transportation Company v.  
5 Novolog Bucks County, 502 F.3d 247 (3d Cir. 2007).

6 Accordingly, the doctrine of primary jurisdiction does not  
7 serve as a basis for transferring this matter. See CSX  
8 Transportation, 502 F.3d at 253 ("In addition, the STB's  
9 expertise, while helpful, would not have been crucial to the  
10 determination of the issues here, which involve the analysis  
11 or precedent and statutory interpretation. We therefore hold  
12 that the district court did not abuse its discretion in  
13 denying this motion for conditional referral to the STB.").

14 For those reasons, the Court will deny CLC's motion  
15 to transfer this case to the STB. CLC shall answer, move, or  
16 otherwise respond to the complaint within 14 days of the  
17 filing of this order, which accompany this opinion.

18 That concludes the Court's oral opinion.

19 (Conclusion of proceedings)  
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Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 10 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

s/ **Sara L. Kern**

20th of January, 2016

\_\_\_\_\_  
Signature of Approved Transcriber

\_\_\_\_\_  
Date

Sara L. Kern, CET\*\*D-338  
King Transcription Services  
3 South Corporate Drive, Suite 203  
Riverdale, NJ 07457  
(973) 237-6080

# Exhibit B

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**From:** Brandon C. Rose <brose@mthopeco.com>  
**Sent:** Thursday, December 19, 2013 2:26 PM  
**To:** Tyler Youvan; Brad Youvan  
**Subject:** Re: New York Terminal On Hand and Service Performance

Is he really just sharing these emails with you? WOW, talk about giving us a "smoking gun" confirming that his operation is causing all of the delays...

On Dec 19, 2013, at 2:21 PM, Tyler Youvan <[tyleryouvan@gmail.com](mailto:tyleryouvan@gmail.com)>  
wrote:

Sent from my iPhone

Begin forwarded message:

**From:** Craig Royston <[craig@nyterminals.com](mailto:craig@nyterminals.com)>  
**Date:** December 19, 2013 at 2:17:04 PM EST  
**To:** "Tyler Youvan ([tyleryouvan@gmail.com](mailto:tyleryouvan@gmail.com))" <[tyleryouvan@gmail.com](mailto:tyleryouvan@gmail.com)>, Brad Youvan <[byouvan@yahoo.com](mailto:byouvan@yahoo.com)>  
**Cc:** "Joseph Ioia ([jaiioia@aol.com](mailto:jaiioia@aol.com))" <[jaiioia@aol.com](mailto:jaiioia@aol.com)>, Debra Jessop-Kizilkaya <[debra@nyterminals.com](mailto:debra@nyterminals.com)>  
**Subject:** FW: New York Terminal On Hand and Service Performance

This was recent conversation with CONRAIL on the same issue.

Craig

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**From:** Craig Royston  
**Sent:** Wednesday, December 18, 2013 9:26 AM  
**To:** 'Giardinelli, Joan'  
**Cc:** Luciani, Leo; Megali, Mo; Gardner, Tim; Cruz, Oscar; Jones, Lisa; Mills-Stewart, Courtney; Perez, J F; Worrell, Matthew  
**Subject:** RE: New York Terminal On Hand and Service Performance

Good morning. Sorry for the delay in responding, I was gone a little longer than expected due to a flight cancellation.

CLCM00094

You're right, our performance has been terrible. The asphalt cars are one I will take a pass on since our customer just orders them in groups that are too large for us to handle despite our requests to slow down. I think its a minimum order requirement from their supplier.

Asphalt cars aside, we went a long time with a reasonable backlog at Bayway, including what I recall as a reasonably good success of scheduling with your guys. However, we have recently (4 weeks or so) been plagued with a recurring compressed air problem on our railcar mover. They kept fixing it and it would last for a time (the run time decreased with every fix). This is what caused the failure to release cars. We always thought the mechanical fix was good and were disappointed. Finally they came up with an alternative way to provide the compressed air over last weekend and it was fixed on Monday night. So far, so good.

We appreciate the effort of your crew to accommodate us through the rough spots we have. Within a short time I trust that we will have learned some lessons, made some adjustments and we will not only keep your yard busy but contribute more to its profitability along with ours.

We hope to begin working through our backlog quickly as soon as we get our switches thawed out.....it never ends.

## New York Terminals

Craig G. Royston

General Manager

P: 908-353-8933 ext 13

F: 908-353-8894

M: 201-747-0904

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**From:** Giardinelli, Joan [<mailto:Joan.Giardinelli@Conrail.com>]

**Sent:** Monday, December 16, 2013 9:25 AM

**To:** Craig Royston

**Cc:** Luciani, Leo; Megali, Mo; Gardner, Tim; Cruz, Oscar; Jones, Lisa; Mills-Stewart, Courtney; Perez, J F; Worrell, Matthew

**Subject:** New York Terminal On Hand and Service Performance

Craig – How are you? We need your help in working through the cars on hand for NY Terminal. Currently, we have 48 in Bayway and an additional 18 cars one day away. What we have encountered in the last several months is cars that are released for Conrail to pull are not being set out, or ready, for our crew to pull. This has happened with 184 cars since 10/1. This in turn impacts what we can place to your facility. Our overall Service Performance for NY Terminal is in the low 60<sup>th</sup> percentile; 25 % less than what it should be.

CLCM00095

Just this morning, our engineer spoke to Nadia on the 16 cars released (some from 12/11, but most from Friday). Nadia stated that she wasn't sure if they would be ready even today. Our crew has a full day every day and cannot afford to wait and see every day if you can take your inbound (they have to drill out and make up their train) because the outbounds may not be there for them to pull. In talking to our folks in North Jersey, this is a regular occurrence. What we're asking is for NY Terminal to NOT release anything unless they're set out and ready for us. Those releases automatically schedule on his work every day and we should be able to rely on this being the most current information. The process should not require regular phone calls.

As a heads up, we will be bringing the NY Terminal Yard Inventory up to NS and CSX today so they are aware of the reason for the delays in the event they get inquiries from the shippers.

Please let me know what your thoughts are and if there is something in this that isn't correct, please let me know. We should be working together to get through these cars on hand. Many of the cars are a month old.

If we need to set up a meeting or conference call to discuss further, please let me know.

LSM Trend Charts

[help](#)

Top of Form

Trend Chart Data for QRC 110304 NEW YORK TERMINALS LLC ELIZABETH, NJ  
 from 1-Oct-2013 to 14-Dec-2013 with a Weekly Frequency.

Point	Date	WO Cars A	Add Cars Placed B	Add Cars Pulled C	Cust Missed D	Performance %
1	04-OCT-2013	34	0	0	5	81
2	11-OCT-2013	43	0	0	7	82
3	18-OCT-2013	47	0	0	2	96
4	25-OCT-2013	60	0	0	8	85
5	01-NOV-2013	79	0	0	3	95

CLCM00096

6	08-NOV-2013	87	0	0	53	38
7	15-NOV-2013	54	0	0	15	72
8	22-NOV-2013	51	0	0	10	78
9	29-NOV-2013	72	0	0	19	35
10	06-DEC-2013	71	0	0	48	32
11	13-DEC-2013	48	0	0	14	61
	20-DEC-2013	-	-	-	-	-

Joan Giardinelli  
 Director - Service Planning and Performance  
 Consolidated Rail Corporation  
 1000 Howard Boulevard  
 Mt. Laurel, NJ 08054  
 856-231-2099

CLCM00097

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**From:** Joe <jaioia@aol.com>  
**Sent:** Thursday, January 23, 2014 5:53 PM  
**To:** Brandon Rose; Brad Youvan CL Mgr  
**Subject:** Re: \$300,000 Dispute, NY Terminals Demurrage Problems

Brandon understood, we will reach out to you guys early next week, sorry about the delay, no excuses for not getting back to you, I have been dealing with some personal issues since October no fault of yours  
Thanks for your understanding  
Joe

Sent from my iPhone

On Jan 23, 2014, at 4:58 PM, Brandon Rose <[brose@mthopeco.com](mailto:brose@mthopeco.com)> wrote:

Dear Joe,

We have been trying to reach you for several weeks by phone to discuss the ongoing problems at NY Terminals. While there are multiple items we should discuss, the largest issue requiring immediate attention relates to rail demurrage charges to us in excess of \$300,000.

I do not know if you are aware of the size and scope of the demurrage problem at NY Terminals, but the terminal has passed along demurrage charges to us for \$300,000, for which we are not responsible. The demurrage occurred solely due to NY Terminals own inability to unload rail cars in a timely fashion.

This demurrage problem continues to exist today, and seems to only be getting larger and worse. We are not the only tenants experiencing the problem, and we are not the only ones who plan to dispute the charges you are asking us to pay. We also have emails, from the rail company, complaining about, and documenting NY Terminals poor performance record, which further support that the demurrage was caused by your operational problems.

Please understand we believe we can all work together to approach the rail providers and get these costs reduced or eliminated, but it is clear we need to work together to rectify this situation before it gets even worse. We believe we can work together to resolve these various issues, but it will likely require your involvement, leadership and some operational changes. We would welcome the opportunity to assist in making some improvements, which will only benefit us all.

Please contact either Brad Youvan or myself to arrange for a meeting so we can work together to resolve these problems.

Sincerely,

Brandon Rose  
Tel 917-991-1303

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**From:** bradley youvan <byouvan@yahoo.com>  
**Sent:** Wednesday, February 05, 2014 1:40 PM  
**To:** xmuss@aol.com  
**Cc:** Joseph Ioia (jαιοia@aol.com); Brandon Rose; tyler youvan; Brad  
**Subject:** NY Terminals Demurrage and Operation History  
**Attachments:** CLCM RC Activity .pdf

Spencer,

It was a pleasure meeting you and you discussing the operation at NY Terminals. As discussed we believe the terminal offers a tremendous business opportunity for everyone provided, we can all work together to complete the construction and improve operational issues currently being experienced. In that regard, we are glad to hear that both you and Joe will now be taking a more active role to ensure that things progress smoothly and efficiently.

As you are aware, NY Terminals is facing an embargo from the railroad service provider due to unpaid demurrage charges for storage of rail cars at their transfer terminal. The excessive demurrage is the direct result of NY Terminals inability to manage the rail car operations at the terminal, with numerous equipment breakdowns and labor problems. Based on copies of emails we have from Conrail to NY Terminals (provided to us by NY Terminals in December), these charges have resulted from what Conrail describes as "poor Service Performance" by New York Terminals, with "a rating 25% lower than what it should be".

To be perfectly honest, we wonder, to what extent the owners of NY Terminals understand the details of the various operational problems at the terminal, and hope this email will bring some of the problems to light, so they can be addressed. As you will now be more involved, I thought you might find it helpful if I shared some additional detailed background about the challenges and difficulties we have experienced as tenants, and how these issues have brought us to the position we all find ourselves in today.

For example, despite being told multiple times in writing by NY Terminal's management that NYT could unload 10 rail cars per week for us, NY Terminals has only unloaded 86 of the 130 rail cars you promised us you would unload in the 13 weeks from 10/6/13 until 01/04/14. With NY Terminals only unloading 66% of the railcars they promised, that left a potential for 44 rail cars to be sitting in the railroad's transfer yard accruing demurrage charges. Fortunately we actually ordered and received fewer than 130 rail cars in this time frame, and we believe that there were actually only about 23 rail cars in the railroads transfer yard as of 01/05/14. Based on these facts, your assertion that our excessive ordering of rail cars has caused the demurrage is clearly not correct.

I also feel it vitally important to remind you, that per our agreement we

completed construction of four (4) fully operational unloading spots from our railcars almost two (2) years ago, which are ready to receive and unload our railcars, but these spots have been unusable because NY Terminals has not completed construction on the site as previously promised. If NY Terminals would complete the necessary track work, this would make four (4) additional spots available to quickly and efficiently unload our rail cars, and dramatically reduce the demurrage fees with the rail companies. NY Terminals cannot hold CLC responsible for demurrage when they have failed to make these spots available for use.

Regarding this matter, you should be aware that due to NY Terminal's inability to make these four (4) original unloading spots available as promised, CLC was forced to invest approximately another \$100,000 in steam pipe at your facility to enable the unloading of its rail cars in an area not originally planned for use by or operation, and one which has restricted and limited access because it is often blocked by your other tenant's railcars up track. If we did not both organize and pay for these improvements to your facility I am certain the backlog of railcars and cost of demurrage would be considerably higher.

We have documented these concerns in multiple e-mails to Craig Royston, wherein we complained about NY Terminal's inability to manage the operation efficiently, and specifically called attention to the fact that demurrage was accruing for which we would not be responsible. Despite these e-mails there has been no noticeable improvement or progress made.

NY Terminal's inability to unload the number of cars promised is caused by three (3) factors which are:

- 1) disorganization and lack of commitment by management,
- 2) aging, unserviced and unreliable equipment, which fails regularly,
- 3) and failure to properly complete the construction at the terminal despite numerous promises to do so.

The facts that support these assertions are as follows:

a) We have had numerous written communications with your manager trying to resolve operational problems. In response we have multiple written responses back from him wherein he expresses his frustration and lack of commitment to servicing our needs. Specifically we have been told, "don't much care right now, am on a flight to FLA, will be back on Monday night." or "it is a total expletive show down there, will have to sort it out in AM.", or "you have been sabotaged".

b) As your senior management has admitted in emails, the "terminal is understaffed", with five (5)

CLCM00408

employees terminated or departing since September, and only a single employee hired to replace the five (5) who left.

c) As a result of the lack of personnel and mismanagement of the manpower you do have, we often we have rail cars sitting ready for unloading for days, or waiting to be placed on steam for days. To alleviate this problem CLC employees had to unload some of these cars themselves on several occasions. As of today, 01/5/14, we have three (3) rail cars sitting ready to be unloaded for four (4) days, since Saturday 02/01/14, but the terminal has confirmed in writing that they have no personnel available to handle the unloading, and when they did finally have people we are told, "Line frozen...., we do not know why this happens, something not shutting off tight or guys (NY Terminals manpower) do not follow blow out procedures." It is NY Terminal's responsibility to manage the manpower efficiently to unload our rail cars in a timely fashion. As documented by these responses the delays encountered are the direct result of NY Terminals lack of manpower, and mismanagement of the manpower they do have available.

d) Often there is no qualified and trained personnel available to operate the shuttle wagon, thereby making impossible to move rail cars around, bring loaded cars in or remove empty cars from the yard. The shuttle wagon is a vital piece of equipment, As it's operation is necessary to move railcars in and out of the property. When there is no one available to operate the machine rail cars sit. Although Ny Terminals has tried to get people to fill-in with in adequate experience, and when the car is operated by someone unfamiliar with its operation, safety is sacrificed and rail cars become derailed causing further delays, and problems.

e) NY Terminals does not perform routine maintenance on the shuttle wagon, and chooses not to participate in the regularly scheduled preventive maintenance program offered by the manufacturer of the wagon. As a result of you're choosing to ignore required maintenance, the shuttle wagon has become unreliable. In fact on 11/04/13 the Shuttle wagon broke down, leaving NYT unable to move rail cars for approximately a week. On 12/07/13, only three (3) weeks later, the shuttle wagon broke down a second time, once again leaving NY Terminals unable to move and unload rail cars. The shuttle wagon continues to operate in a state of disrepair today, and needs to be placed on a regularly scheduled service contract.

f) The steam boiler is old, ineffective, inefficient, and regularly operates on less than 50% of capacity. It regularly breaks down. While the breakdown of your old boiler no-longer directly impacts our ability to heat our tank or our rail cars, as we are on our own separate modern hot oil heating and steam generating system, the break down of your old boiler prevents NY Terminals from heating rail cars for their other customers, and unnecessarily congests the rail tracks at the facility. This congestion and delay in heating other customer's railcars thus prevents the prompt and timely spotting of our rail cars to and from the designated spots for asphalt railcars. We do not understand why your management has chosen not to tie into our brand new, modern and extremely efficient hot oil heater and steam generator system, as originally planned. It would increase the productivity of the entire facility at lower fuel costs. A formula for the cost of the natural gas simply needs to be agreed upon. In the meantime, NY Terminals has started taking steam from our system, without permission and without a plan to reimburse us for the natural gas and other costs of operating our unit. We find this unacceptable on many fronts, and are happy to cooperate, but only once a plan is formulated as to how our steam will be managed.

It is also important to point out that we are not the only tenant experiencing demurrage or other problems with NY Terminals. We understand the exact same problems exist with your other tenants, which further supports our position that these demurrage costs are caused by problems NY Terminals has created, and

CLCM00409

are not unique to CLC. If every tenant is experiencing the same or similar problems it is clear that there is systemic problem with the management of NY Terminals.

We also wanted to advise you, that we have been contacted by the two (2) other large tenants using NY Terminals rail services, who seem to have identical experiences to ours, including excessive demurrage and delays to their operations caused by NY Terminals inability to perform. We understand that they both are asking that these problems

We respectfully, once again, request a follow-up meeting to discuss and resolve these various issues now that you have a better understanding of the problems being encountered. We have offered further assistance in the form of advice, suggestions and even the labor necessary to handle our cars, and even offered to pay advanced rent to help your cash flow. Please let us know how we can work with you to further assist and improve the operation. As you know we have committed to and invested in parts of the project by placing equipment at the terminal and we want to see it succeed, and have interest in more tank space. We think we can be of assistance but we need to work together, however, we have not received any response and continue to encounter operational problems. This situation cannot continue and needs to be resolved ASAP. The operation simply does not need to be this difficult, as it is a relatively simple, repetitive operation, and just requires, strong consistent leadership and planning.

Sincerely,

Brad

**Pittman, John T.**

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**From:** Short, Ashley R.  
**Sent:** Monday, December 30, 2013 2:29 PM  
**To:** 'bradley youvan'  
**Subject:** RE: CL Consulting & Management Corp - Flint Hills at New York Terminals

Brad,

The charges are broken out by shipper from the main invoice total; they are not in addition.

If you dispute the charges or notice any discrepancies, you can let me know your reason(s) and I can research for you. Depending on the reasoning, it may have to be reviewed by our Revenue Protection Department.

Thanks,

*Ashley Short*

Customer Account Representative | Revenue Accounting – Demurrage  
Norfolk Southern Railway | P: 404.529.2128 | F: 404.589.6775  
Manage your account online at <https://www2.nscorp.com/accessNS/>



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**From:** bradley youvan [<mailto:byouvan@yahoo.com>]  
**Sent:** Monday, December 30, 2013 2:16 PM  
**To:** Short R.  
**Subject:** Re: CL Consulting & Management Corp - Flint Hills at New York Terminals

Ashley,

I appreciate the conversation and the description of charges.

I have a few questions,

Are these charges already included in the demurrage total that N.S. forwarded or are they in addition to?

Also what is the process and procedures to negotiate and validate accuracy of charges?

Please advise.

Thank you,

Regards Brad

On Monday, December 30, 2013 1:32 PM, Brandon Rose <[brose@mthopeco.com](mailto:brose@mthopeco.com)> wrote:  
Brad,

Are these in addition to, or part of what Craig has already billed us for?

Brandon

On Dec 30, 2013, at 1:09 PM, Bradley Youvan <[byouvan@yahoo.com](mailto:byouvan@yahoo.com)> wrote:

Sent from my iPhone

Begin forwarded message:

**From:** "Short, Ashley R." <[ashley.short@nscorp.com](mailto:ashley.short@nscorp.com)>  
**Date:** December 30, 2013 at 12:28:37 PM EST  
**To:** "[byouvan@yahoo.com](mailto:byouvan@yahoo.com)" <[byouvan@yahoo.com](mailto:byouvan@yahoo.com)>  
**Cc:** "Cape, Vince H." <[vince.cape@nscorp.com](mailto:vince.cape@nscorp.com)>, "Schamber, Judith A." <[judith.schamber@nscorp.com](mailto:judith.schamber@nscorp.com)>, "Mcdonald, Matthew C" <[matthew.mcdonald@nscorp.com](mailto:matthew.mcdonald@nscorp.com)>  
**Subject:** **CL Consulting & Management Corp - Flint Hills at New York Terminals**

Brad,

Per our phone conversation, attached are the invoice details for your review. Once you have reviewed and confirmed responsibility for the charges, we can move forward regarding payment method and other formalities. I have also attached the NS Tariff for your review.

Please let me know if you have any questions.

Thanks,

**Ashley Short**

Customer Account Representative| Revenue Accounting – Demurrage  
Norfolk Southern Railway| P: 404.529.2128| F: 404.589.6775  
Manage your account online at <https://www2.nscorp.com/accessNS/>

<image001.jpg>  
<Flint Hills - DemurrageDetailsFor1224500595.xls>  
<Flint Hills - DemurrageDetailsFor1316184409.xls>  
<Flint Hills - DemurrageDetailsFor1192148112.xls>  
<Flint Hills - DemurrageDetailsFor1344182033.xls>  
<Demurrage-NS6004-C.pdf>  
<bol\_01742405.pdf>

# Exhibit C

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY, NEWARK DIVISION

NORFOLK SOUTHERN RAILWAY COMPANY,

Plaintiff,

v.

C. L. CONSULTING AND MANAGEMENT CORP.,

Defendant.

C. L. CONSULTING AND MANAGEMENT CORP.,

Third-Party Plaintiff,

v.

NEW YORK TERMINALS, LLC AND  
NY TERMINALS II, LLC,

Third-Party Defendant.

Case No. 2:15-CV-02548-MCA-MAH

**ANSWER TO COMPLAINT AND  
THIRD-PARTY COMPLAINT**

Defendant, C. L. Consulting and Management Corp. (“Defendant”), answering the Complaint filed on April 9, 2015 (the “Complaint”) of the Plaintiff Norfolk Southern Railway Company (“Plaintiff”), respectfully alleges as follows:

**AS TO THE PARTIES**

1. Defendant denies knowledge or information sufficient to form a belief concerning the truth of each and every allegation of paragraph 1 of the Complaint.
2. Defendant admits the allegations of paragraph 2 of the Complaint.

**AS TO JURISDICTION**

3. The allegations of paragraph 3 of the Complaint constitute conclusions of law to which no response is required.

4. The allegations of paragraph 4 of the Complaint constitute conclusions of law to which no response is required.

AS TO VENUE

5. The allegations of paragraph 5 of the Complaint constitute conclusions of law to which no response is required.

AS TO THE CAUSE OF ACTION

6. Defendant denies knowledge or information sufficient to form a belief concerning the truth of each and every allegation of paragraph 6 of the Complaint.

7. Defendant denies knowledge or information sufficient to form a belief concerning the truth of each and every allegation of paragraph 7 of the Complaint.

8. Defendant specifically denies that Plaintiff released rail cars into its possession as consignee or otherwise or that Defendant accepted delivery of rail cars from Plaintiff, and otherwise denies each and every remaining allegation of paragraph 8 of the Complaint.

9. Defendant denies each and every allegation of paragraph 9 of the Complaint.

10. Defendant denies each and every allegation of paragraph 10 of the Complaint.

11. Defendant denies each and every allegation of paragraph 11 of the Complaint.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a cause of action upon which relief can be granted.

2. To the extent Plaintiff has suffered damages, all such damages result from the acts or inactions of third parties over whom Defendant had no control.

3. Plaintiff is barred from relief under the doctrine of estoppel.

4. Plaintiff is barred from relief under the doctrine of waiver.

5. Plaintiff is barred from relief for its failure to mitigate damages.

6. Plaintiff is barred from relief under the doctrine of unclean hands.

7. Plaintiff's own actions and/or inactions were directly responsible for the damages, if any, it has suffered.

8. The charges alleged in the Complaint do not constitute demurrage under the Plaintiff's allegedly applicable tariff or otherwise.

9. The claimed demurrage damages the Complaint asserts against Defendant arise from unreasonable practices employed by Plaintiff in violation of 49 U.S.C. § 10702 which, *inter alia*, requires Plaintiff, as a rail carrier providing transportation or service, to establish "reasonable ... rules and practices related to that transportation or service."

10. Defendant had no possession or control over any of the rail cars claimed by Plaintiff to give rise to the demurrage damages alleged. To the extent the Plaintiff's claim is premised on possession or control by Defendant, the assertion of demurrage damages constitutes an unreasonable practice under 49 U.S.C. § 10702.

11. Defendant had no right and no ability to possess or control any of the rail cars claimed by Plaintiff to give rise to the demurrage damages alleged. To the extent the Plaintiff's claim is premised on any right or ability of possession or control by Defendant, it constitutes an unreasonable practice under 49 U.S.C. § 10702.

12. Defendant received no timely notification from Plaintiff of actual or constructive placement of any rail car in issue. Absent such notice, the assertion of demurrage charges by Plaintiff against Defendant is an unreasonable practice under 49 U.S.C. § 10702.

13. Plaintiff failed to mitigate any of the damages it alleges.

14. Upon information and belief, certain of the claimed demurrage charges brought by Plaintiff against Defendant are based and calculated on incorrect, faulty and arbitrary determinations that the product contained in the subject rail cars, when tendered at the termination of transportation by Plaintiff (i.e., when the demurrage charges in issue are alleged to have accrued), constituted hazardous commodities or materials (“elevated temperature liquid”) within the definition set forth in 49 C.F.R. § 171.8 in the regulations of the Pipeline and Hazardous Materials Safety Administration, an agency of the United States Department of Transportation. To the extent the Plaintiff’s claim is premised on incorrect, faulty and arbitrary calculations and determinations, it constitutes an unreasonable practice under 49 U.S.C. § 10702.

15. The tank cars giving rise to the Plaintiff’s claims herein are the same as those at issue in the Plaintiff’s claims in another, earlier-filed action pending in this court captioned Norfolk Southern Railway Company v. New York Terminals, LLC and NY Terminals II, LLC, et al., Case No. 2:14-CV-07664-WJM-MF. Accordingly, the present case should be dismissed. In the alternative, to the extent the Plaintiff’s claim is premised on claims brought by Plaintiff in another action, the assertion of the same claim in this action constitutes an unreasonable practice under 49 U.S.C. § 10702.

16. Plaintiff’s claims herein are based on specious invoices that were generated by the simple and improper expedient of altering invoices to reflect Defendant as Plaintiff’s customer rather than New York Terminals, LLC and NY Terminals II, LLC. Accordingly, this case should be dismissed. In the alternative, to the extent the Plaintiff’s claim is premised on claims brought by Plaintiff in another action and the invoices in that matter were simply changed to reflect a different obligor, the assertion of the same claim in this action constitutes an unreasonable practice under 49 U.S.C. § 10702.

17. The claimed demurrage charges brought by Plaintiff against Defendant resulted from weather interference over which Defendant had no control and, as Defendant had no notification of Plaintiff's charging of demurrage, Defendant had no opportunity to request relief from Plaintiff within 5 calendar days from the date the cars were released, per Plaintiff's allegedly applicable tariff. To the extent Defendant was prohibited, prevented, precluded from challenging, or seeking relief from the Plaintiff's claim in accordance with Plaintiff's tariff, Plaintiff's conduct constitutes an unreasonable practice under 49 U.S.C. § 10702.

18. The claimed demurrage charges asserted in the Complaint against Defendant resulted from weather interference over which Defendant had no control and for which Plaintiff has not made adjustment, in violation of Plaintiff's allegedly applicable tariff. To the extent Plaintiff has failed to make adjustment for such charges in accordance with its tariff, Plaintiff's conduct constitutes an unreasonable practice under 49 U.S.C. § 10702.

19. Defendant's attempts to resolve this alleged dispute by properly attributing liability elsewhere were thwarted by Plaintiff who unreasonably and unjustifiably refused to do so. To the extent Plaintiff refused to resolve this dispute in accordance with its tariff, it constitutes an unreasonable practice under 49 U.S.C. § 10702.

WHEREFORE, Defendant C. L. Consulting and Management Corp. demands entry of judgment dismissing the Complaint together with the costs, attorneys' fees and for such other and different relief as the Court deems appropriate and just.

THIRD-PARTY COMPLAINT

Defendant/Third-party Plaintiff, C. L. Consulting and Managing Corp. (“CLC”),  
complaining of the Third-party Defendants, New York Terminals, LLC and NY Terminals II,  
LLC (together, “NYT”), respectfully alleges as follows:

1. CLC is a New Jersey corporation with principal place of business located at 544 Mt. Hope Road, Wharton, New Jersey.
2. Upon information and belief, the two entities comprising NYT are both New Jersey limited liability corporations and, at all times relevant, were and are doing business at 534 South Front Street, Elizabeth, New Jersey.
3. Pursuant to agreements between CLC and NYT, entitled “New York Terminals Storage and Services Agreement,” dated March 9, 2012 and March 10, 2014 (the “Agreements”), NYT agreed, among other things, to perform the services necessary for the loading and unloading and distribution of liquid asphalt that had been delivered by rail by Plaintiff to storage and other facilities maintained exclusively by NYT.
4. Pursuant to the Agreements, NYT is solely responsible to load and unload all CLC product to be delivered to NYT’s premises and facilities.
5. The Agreements provide that “NYT shall not be liable for any demurrage ... or any damages *unless caused directly by NYT’s actions*” (emphasis supplied).
6. The claim in the Plaintiff’s Complaint is for recovery of demurrage.
7. Apart from ordering certain product (liquid asphalt) from its suppliers who unilaterally arranged for shipment via rail to NYT’s facilities, CLC never had control over, never had possession of, and never had control over the timing of the delivery to the NYT premises and facilities of any rail car alleged in Plaintiff’s Complaint.

8. NYT had exclusive control over, had the opportunity to have and did have possession of, and had control over the timing of the deliveries to the NYT facilities of all rail cars upon which the claim of demurrage is alleged in Plaintiff's Complaint.

9. NYT failed to provide notice to Plaintiff that it was unable or unwilling to accept Plaintiff's rail car deliveries, timely or otherwise.

10. NYT failed to provide notice to CLC that it was unable or unwilling to accept Plaintiff's rail car deliveries, timely or otherwise.

#### FIRST COUNT

11. CLC repeats and realleges each and every allegation of paragraphs 1 through 10 of this Third-party Complaint as if set forth at length herein.

12. NYT knew and had reason to know that Plaintiff's deliveries of the rail cars in issue in the Plaintiff's Complaint were being delayed by NYT's inability to handle, accommodate and process such deliveries.

13. NYT was in breach of the Agreements by failing to notify CLC that it was unwilling or unable to handle the Plaintiff's rail cars and by causing demurrage to be charged by Plaintiff.

14. CLC has incurred damages resulting directly from NYT's breach of the Agreements.

#### SECOND COUNT

15. CLC repeats and realleges each and every allegation of paragraphs 1 through 10 and of the First Count of this Third-party Complaint as if set forth at length herein.

16. NYT's failures to handle, accommodate and process Plaintiff's deliveries of the rail cars alleged in the Plaintiff's Complaint as giving rise to the demurrage charges were "caused directly by NYT's actions."

17. For this reason, any and all demurrage damages allegedly incurred by the Plaintiff resulted directly from the actions of NYT.

18. Plaintiff's claims against CLC are properly asserted against NYT.

19. As CLC is not liable for the damages alleged by Plaintiff, should CLC be found liable by way of the entry of a judgment or otherwise, CLC is entitled to indemnification from NYT whose liability results directly from its actions.

WHEREFORE, Third-party Plaintiff C. L. Consulting and Managing Corp. demands judgment against the Third-party Defendants, New York Terminals, LLC and NY Terminals II, LLC, jointly and severally, together with the attorney's fees, costs and disbursements of this action.

**BEATTIE PADOVANO, LLC**  
Attorneys for Defendant/~~Third-party~~ Plaintiff  
C. L. Consulting and Management Corp.

By: \_\_\_\_\_

  
Arthur M. Neiss  
50 Chestnut Ridge Road  
Montvale, NJ 07645  
(201) 573-1810

Dated: January 28, 2016