Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423

C. L. CONSULTING AND MANAGEMENT CORP.—PETITION FOR DECLARATORY ORDER—REASONABLENESS OF DEMURRAGE CHARGES

Docket No. FD 36042

COMMENTS OF NEW YORK TERMINALS, LLC AND NY TERMINALS II, LLC d/b/a NEW YORK TERMINALS, ON THE PETITION FOR DECLARATORY ORDER

New York Terminals, LLC and NY Terminals II, LLC d/b/a "New York Terminals" (hereinafter collectively referred to as "NYT") submit the following comments to the Surface Transportation Board ("Board") and respectfully request the Board to grant the Petition for Declaratory Order filed by C. L. Consulting and Management Corp. In this proceeding the Board is asked to resolve the issue of whether or not it is an unreasonable practice to assess a "hazardous materials" storage charge on rail tank cars that contain a material that does not fit within the definitions of a "hazardous material" or an "elevated temperature material" prescribed by the Pipeline and Hazardous Materials Safety Administration ("PHMSA"). This not a routine demurrage issue. Rather it is a unique unreasonable practice issue that is within the Board's primary jurisdiction and, accordingly, should be resolved by the Board.

NYT submits that it is an interested party and has standing to participate in a declaratory order proceeding before the Board. NYT has been

named as the defendant in a civil action filed by Norfolk Southern Railway Company (NSR) in the U.S. District Court, District of New Jersey, Case No. 2:14-CV-07664 (the "District Court Case"). In that case, NSR seeks payment of $294,360.00 for storage of tank cars that, at the time they were placed in storage on NSR's tracks, contained ordinary asphalt. At that time, the asphalt was not and could not be deemed a hazardous material. Nonetheless, in the District Court Case, NSR seeks to collect both a $60 storage charge and an additional $100 storage charge based on claim that the asphalt was a hazardous material.

NYT is involved in unloading asphalt from rail tank cars that NSR and CSX Transportation delivers to its storage terminal located at Elizabeth, New Jersey. Under present NYT management, the facility has been engaged in these processes since 2011. NYT hereby confirms that its experience both mirrors and substantiates the conclusions of the GATX study submitted by CLC. Without exception, the temperature of the asphalt in the subject tank cars was below 212° F when the tank cars were placed in storage on NSR's tracks. Accordingly, not one of the railcars contained material that fit within PHMSA's definition of a hazardous, material.

As explained in the Verified Statement of Craig G. Royston, NYT's Manager of Operations:

> [W]ithout exception, when cars are placed at NYT's facility at Elizabeth, New Jersey for unloading following transit and are not placed in storage, the temperature of the asphalt will always be lower than

> 212° F. Based on NYT records, the normal temperature of the asphalt when received in the summer months will range between 90° F and 120°F. As a result, even in the middle of summer, in order to unload the asphalt, the cars must be reheated for several hours.
>
> In the winter, the reheating process may take several days because the asphalt has congealed and hardened to the point that it will not flow. When cars are received in the winter and the ambient temperature is below freezing, the temperature of the asphalt will range between 70° F and 105°F. The above averages involve all tanks cars that are used to transport asphalt.

Stated in slightly different terms, assuming the same ambient temperature during the (average) eight-day journey from the closest origin point, the temperature of asphalt in the cars when constructively placed will not vary from the temperature of asphalt that is delivered directly to NYT.

Under the terms of NSR's tariff, after two days' free time, NSR, in the absence of extenuating circumstances, is entitled to collect $60 per day for storage of cars, the $60 charge adequately rewards NSR for the storage of the tank car on its track. When the car contains a hazardous material, NSR collects an additional storage charge of $100 per car per day. Because asphalt after cooling to under 212° F is deemed by PHMSA to be a non-hazardous material, NSR's practice of treating it as a hazardous material is unreasonable. Simply put, the cooled asphalt imposes no further or additional obligations on NSR than other non-hazardous materials.

Because the standard $60 storage charge adequately compensates NSR for the use of its tracks for storing rail cars containing non-hazardous

materials, NYT submits that it is inequitable and unreasonable for NSR to charge an additional $100 "hazardous materials" storage charge for that same car, when placed in storage, contains a material that does not meet the definition of a "hazardous material." when it is placed in storage.

NYT acknowledges that when the asphalt was initially loaded, it unquestionably satisfied the definition of an "elevated temperature material." However, by the time the railcars reached New Jersey, whatever concerns and dangers that were associated with the elevated temperature at which the asphalt had been loaded, had long since been vitiated. NSR's additional storage charges, therefore, do not reflect the reality inherent in PHMSA's recognition that ordinary asphalt at a temperature below 212° F is not a hazardous material.

Based on NYT's experience, which is corroborated by the GATX study, when a tank car containing asphalt spends more than three days in transit, the asphalt can no longer be defined as hazardous. Because all of the cars at issue were in transit more than seven (7) days before they reached New Jersey, at the time they were placed in storage on tracks located at NSR's Oak Island yard, the asphalt was not a hazardous commodity. Therefore, NSR is not entitled to collect the $100 storage charge that it assesses for hazardous materials.

For all of the above-stated reasons, the Board should institute a declaratory order proceeding to resolve the unique issue presented by CLC's petition.

Respectfully submitted,

/s/ Spencer Robbins

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VERIFIED STATEMENT OF CRAIG G. ROYSTON, NEW YORK TERMINALS II MANAGER OF OPERATIONS

I, Craig G. Royston, being duly sworn, according to law, upon his oath, deposes and says:

1. I am the Operations Manager for New York Terminals II, LLC., a liquid bulk storage terminal located in Elizabeth, New Jersey. In that capacity I am fully familiar with the operations of the terminal, particularly information about the unloading of railcars containing asphalt.

2. In this matter I will advise that one of our customers at our liquid bulk storage facility is C.L. Consulting and Management Corp.. They order asphalt from various suppliers which is shipped by railcar to our terminal. When received at our terminal many days later the asphalt in the railcars has hardened and the temperature for the asphalt in the railcars has cooled considerably.

3. Without exception, when cars are placed at NYT's facility in Elizabeth, New Jersey for unloading following transit and are not yet placed in storage, the temperature of the

asphalt will always be lower than 212 degrees F. Based on my review of information, the normal temperature of asphalt when received in the summer months will range between 120 degrees F and 190 degrees F. As a result, even in the middle of the summer, in order to unload the asphalt, the cars must be reheated for 2 to 3 days.

4. In the winter, the reheating process may take several days because the asphalt has congealed and hardened to the point that it will not flow. When cars are received in the winter and the ambient temperature is below freezing, the temperature of the asphalt will range between 120 degrees and 190 degrees. The above averages involve all tank cars that are used to transport asphalt.

JACQUELINE RUAS
NOTARY PUBLIC
STATE OF FLORIDA
Comm# FF200790
Expires 3/23/2019

Craig G. Royston

Sworn and subscribed to
Before me this day of July, 2016.

FL Ltr R235-107-53-420-0
expires 11/20/2022

CERTIFICATION of SERVICE

I hereby certify that on July 12, 2016, I served to Richard H. Streeter, Esq., Eric Palombo, Esq., Arthur Neiss, Esq., and John Scheib via email rhstreeter@gmail.com; EPalombo@freightlaw.net; aneiss@beattielaw.com; and john.scheib@nscorp.com a copy of Comments of New York Terminals LLC and NY Terminals II, LLC d/b/a New York Terminals, on the Petition for Declaratory Order as well as a Verified Statement of Craig Royston.

Dated: July 12, 2016

Spencer B. Robbins, Esq.
Robbins & Robbins, LLP