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April 1, 2009

ELECTRONIC FILING

Honorable Anne K. Quinlan
Acting Secretary
Surface transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

**RE: STB FINANCE DOCKET NO. 35229, REPLY TO PACIFIC
HARBOR LINE, INC.'S PETITION FOR DECLARATORY ORDER**

Dear Acting Secretary Quinlan:

Enclosed for electronic filing in the above reference proceeding is Los Angeles Harbor Grain Terminal's Reply to the Petition for Declaratory Order filed by Pacific Harbor Line, Inc.'s on March 12, 2009.

Very truly yours,

ANDERSON & POOLE, P.C.

By:



DEIDRE VON ROCK-RICCI

Attorneys for

Los Angeles Harbor Grain Terminal

DVR/rje/9346.1000
Enclosure

cc: Los Angeles Harbor Grain Terminal

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB FINANCE DOCKET NO. 35229

**LOS ANGELES HARBOR GRAIN TERMINAL'S REPLY TO
PACIFIC HARBOR LINE, INC.'S PETITION FOR DECLARATORY ORDER**

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Dated and Filed: April 1, 2009

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**LOS ANGELES HARBOR GRAIN TERMINAL'S REPLY TO
PACIFIC HARBOR LINE, INC.'S PETITION FOR DECLARATORY ORDER**

I. INTRODUCTION

Los Angeles Harbor Grain Terminal ("LA Harbor") hereby submits this Reply in response to the Petition for Declaratory Order ("Petition") filed by Pacific Harbor Line, Inc. ("PHL") on March 12, 2009.¹

PHL appears to allege that LA Harbor is a consignee and to an extent proceeds with its request on that basis. As further set forth below, the issue of whether LA Harbor is a consignee or an agent is a matter already settled by law and is not appropriate for a declaratory order proceeding.

Perhaps cognizant of that fact, PHL also requests clarification of an agent's obligations in connection with PHL's imposition of accessorial charges. Likewise, this matter has long been addressed by legislation, the courts, private contract and tariff. Such well settled precedent is clearly inappropriate for a declaratory order proceeding.

Accordingly, LA Harbor hereby respectfully requests that the Board deny PHL's Petition outright because the matter for which PHL petitions the Board is more

¹ For the record, LA Harbor objects to the jurisdiction of the Surface Transportation Board ("Board"). In filing this Reply, LA Harbor explicitly reserves the right to object to the jurisdiction of the Board.

appropriately resolved through private contractual negotiations, rule making or legislation and otherwise at this point has previously been settled by existing statutes and precedent.

II. STATEMENT OF FACTS

LA Harbor provides services at the Port of Los Angeles and Port of Long Beach which include transloading dry commodities and bulk liquids shipped to the Ports from consignors via rail. In this role LA Harbor is an agent who facilitates for the consignor² the loading of the shipped goods onto containers for export by ship to the consignee.

PHL is a short line haul rail operator which operates within the Port of Los Angeles to interchange train cars from their line haul rail partners to operators who unload the hauled commodities and prepare them for further transportation, storage or delivery.

On or about 2006 PHL instituted a new Tariff which imposed select storage and demurrage charges. The Tariff specifically imposes responsibility for such accessorial charges as follows:

Responsibility

Demurrage and storage fees will be assessed to, and payment will be the responsibility of the shipper at origin, the consignee at destination, or any other third party mutually agreed to in writing with our railroad to accept responsibility for all demurrage charges.

FT PHL 8100, p. 10.

A true and correct copy of said PHL Tariff is attached as Exhibit A hereto.

As is evident by the face of the Petition, LA Harbor does not fit into any of the

² PHL incorrectly identifies LA Harbor as "an agent of a consignee" when in fact LA Harbor and other intermediaries similarly situated act as agents for consignors.

categories of persons PHL defines as responsible for demurrage and storage fees. Consequently, PHL seeks an alternate way to extract the fees from LA Harbor or "its principal.

III. DISCUSSION

"A declaratory order proceeding is intended to clarify the law as it applies to particular issues." James Riffin-Petition for Declaratory Order, STB Finance Docket No. 34997, 1 (May 1, 1998). To the extent the law requires no clarification as to the issues raised by the Petition, a declaratory proceeding is inappropriate.

A. LA Harbor Is Not A Consignee.

Here, the issue of whether LA Harbor is a consignee is a matter of law that is well settled and in need of no clarification. As PHL well knows, LA Harbor and those similarly situated provide services to various customers solely in transloading property from railcars to containers destined for export. At no time does LA Harbor have any ownership interest in the property of its customers, nor does it ever exercise any control over such property. Never is LA Harbor a "proper" party to the transportation contract between a railroad, the railroad's customers, or PHL, nor does it receive copies of such contracts.

As LA Harbor merely acts as an agent for the consignor under the bill of lading, it is not liable for accessorial charges because under well established agency law, the agent of a disclosed principal is not liable to third persons (e.g., the railroad and PHL) when acting within the scope of the agency relationship. See, Union Pacific R.R. v. Ametek, Inc. (3d Cir. 1997) 104 F.3d 558, 563. See also, 4 SORKIN, GOODS IN TRANSIT,

(2003) § 25.01; Whitney v. Wyman, 101 U.S. 392, 396 (1879); Valkenburg, K-G v. The S.S. Henry Denny, (7th Cir. 1961) 295 F.2d 330,333; United Packinghouse Workers v. Maurer-Neuer, Inc., (10th Cir.1959) 272 F.2d 647,649; cert. Denied, (1960) 362 U.S. 904, 4 L.Ed.2d 555, 80 S. Ct. 611; New York Board of Trad v. Director General, (1920) 59 I.C.C. 205, 208, 211; RESTATEMENT (SECOND) OF AGENCY § 320 (1957); 3 C.J.S. AGENCY § 215 (1936); 3 AM. JR. 2D AGENCY § 294 (1962). While PHL may dispute LA Harbor's status as an agent, it certainly is in no need of clarification of the well settled law regarding that subject.

B. The Law Regarding An Agent's Obligations In Connection With Accessorial Charges Requires No Clarification.

Without the benefit of any contract, tariff, legal authority or assertion of prevailing custom, PHL takes the position in the Petition that LA Harbor has three affirmative obligations:

- (1) to notify PHL of its agency status prior to the due date of the first invoice PHL issued to [LA Harbor],
- (2) to forward the PHL invoices for storage charges, in a timely manner, to its principal for payment, and
- (3) if PHL does not timely receive payment from [LA Harbor's] principal, to provide PHL with the identity of the principal, upon PHL's request.

Petition at p. 3.

What PHL asks is *not* for a clarification of any existing law, but rather an imposition of an obligation in the nature of contract, approved tariff provision, new legislation or unilateral creation of a prevailing custom simply based upon nothing more than "PHL's position."

1. **The Relief Sought By The Petition Is Not Supported By Contract, Law or Prevailing Custom.**

Legally, PHL has no right to the relief requested. It is well established that agents are not liable for demurrage charges. Middle Atlantic Conference v. United States of America and Interstate Commerce Commission, 353 F.Supp. 1109 (D. D.C. 1972). The Middle Atlantic Conference decision, supported by extensive precedent, held decisively that “before transportation-related assessments as detention charges can be imposed on a party on a prescribed basis there must be some legal foundation for such liability outside the mere fact of handling the goods shipped. Id. at 1118. In affirming the ICC’s denial of motor carriers’ proposed tariff to charge such assessments, the Court found that:

What the carriers here attempt is not to collect demurrage on claims arising *ex delicto* out of the wrongful conduct of warehousemen but instead to establish throughout a large part of the nation a regular system of demurrage charges that will make warehouseman liable for such charges as a more or less normal incidence of their everyday commercial transactions. Under such circumstances the liability, as for freight charges, must be founded either on contract, statute or prevailing custom.

Id.

Here, PHL’s “position” would likewise create an affirmative obligation upon LA Harbor and those similarly situated throughout the nation which has no basis in contract, statute or prevailing custom. It appears that PHL is attempting to enforce upon agents existing ICCTA obligations as to consignees acting as agents. Specifically, to the extent a consignee claims it is not liable for demurrage charges, it is required by statute to give written notice to the delivering carrier before delivery of the

property of: (a) the agency and absence of beneficial title; and (b) the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading. 49 U.S.C. §10743(a)(1). By its Petition PHL seeks to impose such obligations on one who is merely an agent, not a consignee acting as an agent.

This request is not for a clarification of law, but is in the nature of legislation of new law. It is settled that the “ICCTA’s consignee-agent liability provision applies only to consignees” and entities who are not consignees are therefore not obligated to comply with its statutory notice provisions. Norfolk Southern Railway Co. v. Brampton Enterprises, LLC., 2008 U.S. Dist. LEXIS 83286, *8, *13 (S.D. GA 2008)³ (The ICCTA’s consignee-agent liability provision, 49 U.S.C. § 10743(a)(1), “applies only to agents who are also consignees, and not to agents who are not consignees”) (citing Ill. Cent. R.R. Co. v. S. Tec Develop. Warehouse, Inc., 337 F.3d 813, 817 (7th Cir. 2003) (the “South Tec” case). Therefore, an entity that is not a consignee is not obligated to comply with the statutory notice provision in order to avoid liability for demurrage, and such an entity does not become a consignee by operation of the statute or by unilateral designation by a third party. Id.⁴

By its request PHL essentially seeks to enforce the ICCTA notice provisions

³ A copy of this LEXIS citation case is attached hereto as Exhibit B for the Board’s ready reference.

⁴ Norfolk Southern Railway Co. follows the 7th Circuit’s decision in South Tec, finding the holding in CSX Transportation Co. v. Novolog Bucks County, 502 F.3d 247 (3rd Cir. 2007) to be contrary to established precedent. The Norfolk Southern Railway Co. court found the 3rd Circuit ruling in Novolog Bucks County to impose greater obligations on consignees and agents than is otherwise permitted by established law. See Norfolk Southern Railway Co., 2008 U.S. Dist. LEXIS 83286 at *11-12.

upon an agent and goes further to require imposition of additional affirmative obligations upon LA Harbor and those similarly situated to assist PHL in collections activities. The request is not only beyond any applicable law but really goes beyond the pail.

2. The Relief Sought By The Petition Is Not Supported By Fact.

“In order to clarify the law regarding the issues before it, the Board generally considers the facts as presented by petitioner.” James Riffin-Petition for Declaratory Order, STB Finance Docket No. 34997, 1 (May 1, 1998). The “facts” presented by Petitioner are that PHL has a “position” which implies that PHL is unaware of LA Harbor’s agency status and that PHL is ignorant of the “principal”, the consignor whom it further implies is liable for its accessorial charges. Such implications are facially flawed.

Principally, implicit in LA Harbor’s role as a transloader is that it is an agent rather than a consignee. The very definition of “consignee” requires such person to have beneficial title to the property. Specifically, a consignee is necessarily a party to the contract for carriage. Middle Atlantic Conference, 353 F. Supp. 1109; Evans Prods. Co. v. Interstate Commerce Comm’n. 729 F.2d 1107, 113 (7th Cir. 1984) (“Liability for freight charges may be imposed only against a consignor, consignee, or owner of the property, or others by statute, contract, or prevailing custom.”). Even the very statute which appears to have motivated PHL’s request states that a consignee is an agent only when, “not having beneficial title to property.” See 49 U.S.C. § 10743(a)(1). What is more, it cannot be argued that PHL does not have or has not had ample notice of the agent relationship between LA Harbor and its consignors. In this clear event, providing

“notice” of its agency status to PHL before the arrival of every PHL car for transloading puts an unreasonable and wholly unnecessary burden upon LA Harbor and all those similarly situated. South Tec, 337 F.3d at 821-822.

Moreover, PHL does this Board a grave disservice by implying that it has no knowledge of the “principal” upon whom it would seek to impose accessorial charges. It is LA Harbor’s information and belief that PHL is provided all of the carriage documentation by its rail partners on or before the time PHL interchanges the train cars from said carriers. In that event, PHL knows or reasonably should know the identity and contact information of the consignor and consignee. In the unlikely event PHL does not have such documentation, it is in the position of easily obtaining such information from the applicable rail partner. PHL’s position that it must impose an affirmative obligation upon LA Harbor and those similarly situated to provide such information cannot not be substantiated.

Further implied in PHL’s “position” is that if LA Harbor does not comply with its proposed 3-step procedure, that LA Harbor may be liable for the charges, in the vein of the obligations of consignees acting as agents under 49 U.S.C. 10743(a)(1). This position has already been soundly denied. “We rejected, in Evans Products, 729 F.2d at 1113-14, the theory that the general rule of agency law that an agent that refuses to disclose the identity of its principal is personally liable for charges incurred on behalf of the principal” South Tec, 337 F.3d at 820, fn. 5. Also denied in Evans Products is PHL’s position that without the imposition of the requested obligations upon LA Harbor and others similarly situated is that it will be left without any recourse for payment of the accessorial charges. See Petition at p. 3, as contrasted with Evans Products, 729 F.2d

at 1114, fn. 9, where the court found that the charges sought for collection remained enforceable against those persons properly chargeable under the transportation contract.

In all events, the obligations requested by PHL can only be contractual in nature, as they have no grounds in law or prevailing custom. However, LA Harbor is not a party to the transportation contracts subject to the Petition, nor does it become so even if it were listed on the bills of lading. Southern Pacific Transportation Co. v. Matson Navigation Co., 383 F.Supp. 154, 157 (N.D. Cal. 1974); See also, Evans Prods Co., 729 F.2d at 1113 (“no liability exists merely on account of being named in the bill of lading”).

Should PHL wish to attempt to enforce its 3-step procedure, its remedies lie elsewhere, whether at the legislative, rule making or industry level it is not for LA Harbor to say. It is abundantly clear, however, that PHL is not entitled to a declaratory proceeding with this Board based on this Petition. In fact, what LA Harbor *is* entitled to is this Board upholding its duty to “foster sound economic conditions in transportation,” “to encourage honest and efficient management of railroads,” and “to prohibit predatory pricing and practices,” particularly as applicable to private enterprises at the mercy of rail carriers such as PHL. 49 U.S.C. § 10101; See also, Wilson v. IESI NY Corp., 444 F. Supp. 2d 298, 310-11 (M.D. PA 2006)(regulatory authority shall be exercised to protect the general public from regulated companies.).

C. LA Harbor Objects to the Procedural Schedule Set Forth In The Petition.

Should the Petition be granted and a procedural schedule set, LA Harbor objects

to that set forth in the Petition. The issues are not narrow and do require the development of a factual record. Discovery in this proceeding is necessary and appropriate, particularly in the areas concerning LA Harbor's agent status, PHL's knowledge thereof and PHL's knowledge and information regarding the underlying transportation contracts at issue. Such discovery would likely take not less than 120 days to be completed. LA Harbor therefore requests the following schedule:

Day 1: A discovery schedule of not less than 120 days be imposed upon the day the Board institutes any declaratory proceeding;

Day 180: Petitioner's Opening Statement is due

Day 240: Respondent's Reply Statement is due

Day 255: Petitioner's Rebuttal Statement is due.

IV. CONCLUSION

As the Discussion began so this Reply concludes: "A declaratory order proceeding is intended to clarify the law as it applies to particular issues." James Riffin-Petition for Declaratory Order, STB Finance Docket No. 34997 (May 1, 1998) . The Petition offers no law of any nature requiring clarification.

Pursuant to 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. Here, there is no controversy or any uncertainty at issue. PHL makes its request for the imposition of obligations upon LA Harbor and those similarly situated which has no basis in contract, statute, common law or prevailing custom.

Because there exists no authority to grant the Petition to consider a matter which

is nothing more than PHL's personal "position" the Petition must be DENIED.

Respectfully submitted,
ANDERSON & POOLE, P.C.

Dated: April 1, 2009

By: 
DEIDRE VON ROCK-RICCI
ELLIS ROSS ANDERSON
Attorneys for
Los Angeles Harbor Grain Terminal

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Los Angeles Harbor Grain Terminal Reply to Pacific Harbor Line, Inc.'s Petition for Declaratory Order was served on April 1, 2009, by first-class mail, postage pre-paid, on the following:

Mark Sidman
Weiner Brodsky Sidman Kider P.C.
1300 19th Street NW
5th Floor
Washington DC 20036-1609

Dated: April 1, 2009


Deidre Von Rock-Ricci, Esq.

EXHIBIT A

FT PHL 8100

PACIFIC HARBOR LINE, INC.

FREIGHT TARIFF PHL 8100

NAMING
RULES AND CHARGES
GOVERNING
STORAGE
AT STATIONS ON THE
PACIFIC HARBOR LINE, INC.

STORAGE AND HAZARDOUS MATERIAL PROVISIONS

ISSUED: September 9, 2006

EFFECTIVE: October 1, 2006

Pacific Harbor Line, Inc.
Manager of Business Development
340 Water Street
Wilmington, CA 90744

(The provisions published herein, if effective, will not result in an effect on the quality of the human environment.)

FT PHL 8100

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 <i>Method of Canceling Items</i> As this tariff is supplemented, numbered items with lettered suffixes cancel correspondingly numbered items in the original tariff or in a prior supplement. Letter suffixes will be used in alphabetical sequences starting with A. Example: Item 100-A cancels Item 100 and Item 200-B cancels Item 200-A in a prior supplement which in turn cancelled Item 200.	
For explanation of abbreviations and reference marks, see last page of tariff.	

Section I: Extended time

Using a car...

When we move a shipment for you, our switch rates include the movement of your shipment from our interchange to you. PHL's switch fee is usually absorbed by our line haul rail partners. These rail partner's line haul rates include the movement of your shipment from origin to destination, as well as a limited time for you to load or unload the railcar.

From time to time, you may need to use a railcar for a longer period of time, or have us hold a car on our track. If you cannot accept a railroad-owned railcar when we are ready to deliver it to you, or if you keep a railroad-owned car on your private siding for an extended period, our rail partner will charge a fee, which is called demurrage. Your cost ends when you release the car and make it available for us to pull it from your siding. For more on demurrage, see the demurrage tariffs of the BNSF and the UP.

If you cannot accept a privately-owned railcar when we are ready to deliver it to you, we charge a fee which is called storage. Your cost ends when we spot the railcar on your private siding. There is no storage charge to you when you keep a privately owned railcar on your private siding for an extended period. For more on storage, see Section II.

There are additional charges for handling hazardous materials, in addition to applicable storage charges, see Section III.

We encourage the efficient use of our cars and track. It helps us to efficiently plan the placement of cars - so you get the car you want when you want it - and your shipments arrive at their destination without unnecessary delay.

Efficient asset utilization helps us supply the right car, at the right place, at the right time. That benefits you, and every one of our customers.

Applicable demurrage or storage fees will begin and end at 0001 hrs. each day and fees will be assessed based on a 24 hour period or fraction thereof.

For explanation of abbreviations and reference marks, see last page of tariff.

Section II: Storage – private cars

We give you credit days for loading and unloading cars, which you can use to offset debit days during a service period. We also provide you with credit days for some holidays. Storage fees for extended use are assessed beginning at the time of constructive placement, and extend until the car is placed on your private track. Credit days are awarded as follows:

PRIVATE LOADED CARS NOT CONTAINING HAZARDOUS MATERIALS	ITEM 8200
Private loaded cars held on our track.....2 credit days allowed	\$50 per car, per day

PRIVATE EMPTY CARS NOT CONTAINING HAZARDOUS MATERIALS	ITEM 8250
<p>Private empty cars held on our track.....2 credit days allowed</p> <p>Liability: We accept no liability and the user of the storage agreement releases our railroad from such liability, with respect to any damage, loss or injury to the empty car(s) or its/their contents, while in stored status, except to the extent caused by the negligence or intentional acts of our company.</p>	<p>\$35 per car, per day</p> <p>The party responsible for charges on this car is the party responsible for the car while empty on our track, which may be the origin or destination industry located on our railroad.</p>

COMPUTATION OF STORAGE CHARGES	ITEM 8350
<p>Computation of storage charges will begin at the first 0001 (12:01 a.m.) after the time that constructive placement begins, and ends at the time the rail car is placed on your private track.</p> <p>Credit days will be allowed for loading and unloading, based on items in this tariff.</p> <p>For cars containing hazardous materials or hazardous material residue, see Section III, Items 8500 through 8800, for additional charges and requirements.</p>	

For explanation of abbreviations and reference marks, see last page of tariff.

Section III: Hazardous materials

Safety is our first priority

We never compromise safety. We are particularly diligent when it comes to the safe transportation of hazardous materials, including empty cars with hazardous material residue. No credit days will be allowed for any car containing hazardous materials or hazardous material residue.

Hazardous Materials are defined as "Hazardous Wastes" and "Hazardous Substances" as named in Hazardous Materials Regulations of the U.S. Department of Transportation in 40 Code of Federal Regulations (CFR) 260 through 263 and 49 CFR 171.8 or successor thereof, requiring the use of 4-digit identification numbers on shipping documents, placards or panels.

The following criteria reflect specific regulations of this railroad and North American regulatory authorities:

LOADING, UNLOADING AND STORAGE	ITEM 8500
<p>Hazardous materials may not be loaded, unloaded or stored on our tracks. Shippers, consignees and unloaders must take cars into a recognized secure facility without delay.</p>	

OVERLOADED OR IMPROPERLY LOADED CARS	ITEM 8550
<p>Overloaded, improperly loaded or improperly secured cars will not be pulled unless it is determined that it is safe to do so, and authorized by regulatory agencies. This may require such things as weight reduction, return to origin, or movement towards destination under restriction (e.g., check pressure en route).</p>	

RAILROAD CARS CONTAINING HAZARDOUS MATERIALS OR HAZARDOUS MATERIAL RESIDUE	ITEM 8600
<p>Additional Charge for Hazardous Materials in railroad-owned railcars.....0 credit days allowed</p> <p>This charge will be in addition to, and run concurrent with, any applicable per day demurrage charges.</p> <p>This charge applies to cars that are transporting hazardous materials, or have residue from a previous movement of hazardous materials.</p>	<p>\$75 per car, per day</p>

PRIVATE CARS CONTAINING HAZARDOUS MATERIALS OR HAZARDOUS MATERIAL RESIDUE	ITEM 8700
<p>Hazardous Materials in private cars.....0 credit days allowed</p> <p>This charge applies to cars that are transporting hazardous materials, or have residue from a previous movement of hazardous materials.</p>	<p>\$150 per car, per day</p>

For explanation of abbreviations and reference marks, see last page of tariff.

Section III: Hazardous materials (Cont'd)

SECURING LEAKING CARS	ITEM 8800
<p>Cars carrying dangerous goods/hazardous materials (or cars containing residue of dangerous goods/hazardous materials) which are found to be leaking may be moved to an isolation track for securement. The cost of securement varies widely, depending on the work involved. Securement fees will be assessed, and invoiced, on a case by case basis.</p>	<p>\$2000 for switching. This charge does not include securement fees, which vary depending on the work involved.</p> <p>Payment of these charges is the responsibility of the origin or destination industry located on our railroad, or the owner of the commodity and/or third party tank car transloader.</p>

For explanation of abbreviations and reference marks, see last page of tariff.

Section IV: Miscellaneous Storage Items

NOTIFICATION BY CUSTOMER TO RAILROAD

ITEM 8900

All notification of car placement, hold, availability or release must be made using www.railconnect.com, by email, or fax. Notification must include the car initial and number, date, time and any other relevant information. The recorded date and time that the instructions are received will govern.

During plant shutdowns, shipper assigned cars must be released from assignment to prevent accruing demurrage charges from our Class 1 partner railroads, or storage charges from PHL.

NOTIFICATION BY RAILROAD TO CUSTOMER

ITEM 8910

The railroad will provide notification if rail cars are ready to be delivered, are stopped en route, or are refused, by notifying the affected party (usually the consignee) electronically, by facsimile or by mail. Notice will be provided at these times:

- Cars to be delivered to a public track --- notice will be given when the car is placed or constructively placed.
- Cars to be delivered to the track of consignee --- notice will be given upon a constructive placement if car(s) are held on railroad tracks due to reasons attributable to the consignor or consignee.
- Cars delivered to track of consignee will constitute notice.
- Cars stopped en route --- notice will be given to the consignor, consignee or owner responsible for the car being stopped upon arrival of the car at the point of stoppage. Notification will be given when, but not limited to, cars that are damaged, over-loaded or improperly loaded.
- Refused loaded car(s) --- When a loaded car is refused at destination, railroad will give notice of such refusal to the consignor or owner in writing or electronically, and include car initial, car number, commodity and if lading is transferred en route, the initials and number of the original car.

BILLING

ITEM 8930

You will be billed monthly for all cars released during the calendar month. Customers having facilities at separate stations cannot combine charges or credits accrued. Credits earned and storage days accrued will be calculated separately in accordance with charges and credits in this tariff. Excess credits earned in one calendar month cannot be used to offset storage days in another calendar month. Unless otherwise agreed upon and approved by this railroad, storage charges are the responsibility of consignor at origin, and consignee at destination.

Your storage bill will include the total days accrued for all cars released during a calendar month. Total credits earned for early releases of cars will also be added. Then, if the total days exceed the total credits, charges will apply, based on charges outlined in this tariff.

PAYMENT

ITEM 8940

If you are the party responsible for storage charges (as published in this tariff or other documents) and have not established credit with us, or have had your credit cancelled by us, you will be subject to Liquidated Damages interest of 20% A.P.R., in addition to Demurrage and Storage charges. Interest will begin to accrue for charges not paid within thirty (30) days from the date of the Bill for the Storage charges.

For explanation of abbreviations and reference marks, see last page of tariff.

Section IV: Miscellaneous Storage Items (Cont'd)

EXTENSION OF CREDIT

ITEM 8950

To establish credit with us, contact:

Credit Administration
 Pacific Harbor Line, Inc.
 53 West Jackson Blvd.
 Suite 335
 Chicago, IL 60604

CLAIMS

ITEM 8960

At times, there may be circumstances when charges are assessed, and the reasons for charges are beyond your control. We may provide relief for storage or hazardous material charges, provided you submit a claim, in writing, within thirty (30) days of the billing date, along with supporting documentation. Your claim must fully state the circumstance under which you request relief, and including the car initial, car number and location. Circumstances under which a claim may be made include:

- A. **Improper charges** (If you believe we have improperly assessed charges.)
- B. **Bunching** (When cars for loading are greater than the normal daily number of cars for placement, due to delay or irregularity created by us, you will be allowed free time equal to what you would have received had the car been placed as ordered. When cars for unloading are greater than the normal daily number of cars as a result of our railroad, or Acts of God as described below, you will be allowed free time equal to what you would have received had the cars not been bunched. For the purpose of applying this item, cars which moved from different points or over different routes to destination, and arriving on different dates, will not be considered bunched, even if tendered for delivery on the same day. The consignee will be allowed free time equal to what would have been received if the cars had been placed or tendered for placement, in the order of their arrival.)
- C. **Weather interference** (Acts of God, including, but not limited to flood, storm, earthquake, hurricane, tornado, or to other severe weather or climatic conditions, as long as the condition lasted at least two (2) days.)
- D. **Strike interference** (When you cannot load, unload or receive a car from us, or cannot make a car available to us because of strike interference at the rail location served by us, storage days will be charged at a reduced rate of \$35.00 per day during the period of strike interference, provided the disruption exceeds ten (10) days during one calendar month; when we cannot provide service to you due to strike interference at our company, storage days will not begin until we can place the car at your facility. This does not apply to:
 - An inbound car, when the waybill is dated four (4) days or more after the beginning of strike interference.
 - An empty car ordered for loading, when the order was placed after the beginning and prior to the ending of strike interference.)
- E. **Missed switch allowance** (An allowance for a missed switch will be offered for any car held under Constructive Placement Notification when we are unable to place the car in response to your orders.)
- F. **Railroad error** (If through our error, storage charges are assessed, the charges will be adjusted to the amount that would have accrued if we had not made an error.)

HOLIDAYS

ITEM 8970

The term "Holiday" means:

New Year's Day, July 4th, Labor Day, Thanksgiving Day, and Christmas Day.

For explanation of abbreviations and reference marks, see last page of tariff.

Notes and Definitions

ACTUALLY PLACED

A car is actually placed when it has moved to the track of the shipper or consignee, or the "care of" party, or team track.

CAR DEMURRAGE RULES AND REGULATIONS

Any cars handled under this tariff will be subject to demurrage rules and charges.

CAR RELEASE

Advice provided by the shipper or consignee to authorized railroad personnel, that the car is loaded or unloaded and available. This information must include the identity of the shipper or consignee, the party furnishing information, and the car(s) initial and number.

CLASSIFICATION GOVERNING

The term "Uniform Freight Classification" when used herein means Freight Tariff Uniform Freight Classification 6000-Series.

CONSIGNEE

The party to whom a shipment is consigned or the party entitled to receive the shipment.

CONSIGNOR

The party in whose name a car(s) is ordered; or the party who furnishes forwarding directions.

CONSTRUCTIVE PLACEMENT

Constructive placement is the industry term for cars held available for placement but held on our tracks, either at your request, awaiting your instructions, or because you are not able to accept cars.

CREDIT

A non-chargeable demurrage day. Credits may be earned when a car is released by the customer and is used to offset chargeable demurrage days. Credits have no monetary value and are not carried over to a future service month.

DEMURRAGE DAY

A twenty-four (24) hour period (calendar day), or part thereof, commencing 0001 after tender.

DIVERSION

An order provided by the consignor instructing that a car be delivered to a location other than the one indicated on the original forwarding instructions.

EMPTY CAR(S) ORDERED AND NOT USED

Empty car(s), placed for loading as ordered, and subsequently released without being used in transportation service or, empty cars received from foreign railroad without being utilized by Customer.

LOADED CAR

A car that is completely or partially loaded

LOADING

The complete or partial loading of a car(s) in conformity with loading and clearance rules and, the furnishing of forwarding instructions.

ORDER DATE

The date that the consignor requests empty car(s) to be furnished for loading.

For explanation of abbreviations and reference marks, see last page of tariff.

Notes and Definitions (Cont'd)

PARTIAL UNLOADING

The partial unloading of a car(s) and furnishing of the proper forwarding or handling instructions.

PRIVATE CAR

A car bearing other than railroad reporting marks that is not railroad-controlled.

PRIVATE TRACK

Tracks that are not owned or leased by the railroad.

RECONSIGNMENT

An order provided by the consignor to bill a car to other than the original consignee. (An order to turn over the car to another party that does not require any additional movement of the car is not a reconsignment).

RESPONSIBILITY

Demurrage and storage fees will be assessed to, and payment will be the responsibility of the shipper at origin, the consignee at destination, or any other third party mutually agreed to in writing with our railroad to accept responsibility for all demurrage charges.

SERVICE PERIOD

One calendar month.

SHIPPER ASSIGNED CAR

A railroad car that is put in a car pool for sole utilization of a customer.

STATION LISTS AND CONDITIONS

This tariff is governed by Tariff OPSL 6000-Series, for:

- Additions or changes in Name, Location or Abandonments of Stations.
- Prepay Requirements.
- Restrictions as to acceptance or delivery of freight.
- Changes in station facilities.
- When a station is abandoned, all provisions applicable thereto are cancelled, effective on the date of abandonment.

STORAGE AGREEMENT

An agreement that entitles our railroad to provide storage services for a specified number of cars at a specific location at a negotiated storage fee, and negotiated and agreed to by us and the owner, lessee, shipper or receiver of a private car.

TENDER

The notification, actual or constructive placement, of an empty or loaded car(s).

TIME FOR CALCULATION OF DEMURRAGE ON RAILROAD OWNED EQUIPMENT

Demurrage time begins at 00:01 (12:01 a.m. local time) after placement or notification of constructive placement, notice of availability or hold or notice of being held. It ends when the responsible party has provided us with the necessary instruction and/or documentation to release or order in the car and moves it forward.

TIME FOR CALCULATION OF STORAGE ON PRIVATELY OWNED EQUIPMENT

Storage time begins at 00:01 (12:01 a.m. local time) after placement or notification of constructive placement, notice of availability or hold or notice of being held. It ends when the car has been placed on private tracks, or when instructions for diversion, reconsignment or reshipment are received by our authorized personnel.

UNLOADING

The complete unloading of a car, and the advice received from the consignee that the car is empty and available to the railroad.

For explanation of abbreviations and reference marks, see last page of tariff.

FT PHL 8100

EXPLANATION OF ABBREVIATIONS AND REFERENCE MARKS

ABBR / REF	EXPLANATION
ABBR BNSF CFR PHL OPSL REF UP	Abbreviation BNSF Railway Company Code of Federal Regulations Pacific Harbor Line, Inc. Official Railroad Station List, OPSL 6000-series Reference Union Pacific Railroad Company
[A] [C] [I] [R] [NC]	Addition Change in wording resulting in neither an increase or decrease in charges Increase Reduction Brought forward without change

(Underscored portion denotes change.)

EXHIBIT B



LEXSEE 2008 U.S. DIST LEXIS 83286

NORFOLK SOUTHERN RAILWAY COMPANY, Plaintiff, v. BRAMPTON ENTERPRISES, LLC d/b/a SAVANNAH RE-LOAD, Defendant.

CASE NO. CV407-155

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

2008 U.S. Dist. LEXIS 83286

**September 15, 2008, Decided
September 15, 2008, Filed**

SUBSEQUENT HISTORY: Motion denied by *Norfolk Southern Ry. v. Brampton Enters., LLC, 2009 U.S. Dist. LEXIS 7141 (S.D. Ga., Feb. 2, 2009)*

COUNSEL: [*1] For Norfolk Southern Railway Company, Plaintiff: Benjamin Mason Perkins, Patrick T. O'Connor, Oliver Maner, LLP, Savannah, GA; Paul D. Keenan, PRO HAC VICE, Chad D. Mountain, Keenan, Cohen & Howard, PC, Jenkintown, PA.

For Billy Groves, individually doing business as Savannah Re-Load, Savannah Re-Load, Defendants: Jason Carl Pedigo, Ellis, Painter, Ratterree & Adams LLP, Savannah, GA.

For Brampton Enterprises, LLC, doing business as Savannah Re-Load, Defendant: Jason Carl Pedigo, LEAD ATTORNEY, Ellis, Painter, Ratterree & Adams LLP, Savannah, GA.

JUDGES: WILLIAM T. MOORE, JR., CHIEF JUDGE, UNITED STATES DISTRICT JUDGE.

OPINION BY: WILLIAM T. MOORE

OPINION

ORDER

Before the Court are the Motion for Summary Judgment by Defendant Brampton Enterprises, LLC d/b/a Savannah Re-Load ("Savannah Re-Load")(Doc. 25) and the Motion for Partial Summary Judgment by Plaintiff Norfolk Southern Railway Company (Doc. 29).

For the reasons that follow, Savannah Re-Load's Motion for Summary Judgment is **GRANTED**, and Norfolk Southern's Motion for Partial Summary Judgment is **DENIED**.¹

1 Norfolk Southern's Request for Oral Argument (Doc. 50) is **DENIED**.

BACKGROUND

Defendant Savannah Re-Load is a warehouse business that receives and forwards freight. [*2] In late 2006, Savannah Re-Load began handling freight shipped on rail cars owned by Plaintiff Norfolk Southern.

Norfolk Southern transported freight on behalf of various shippers and delivered it to Savannah Re-Load. The majority of the bills of lading for the freight identified Savannah Re-Load as the consignee who was to receive the goods. A "bill of lading" is a "document of title acknowledging the receipt of goods by a carrier or by the shipper's agent" and "a document that indicates the receipt of goods for shipment and that is issued by a person engaged in the business of transporting or forwarding goods." Blacks' Law Dictionary 159 (7th ed. 1999). A "consignee" is "one to whom something is consigned or shipped." See Webster's Third New International Dictionary (1971) (unabridged). "Consign" means "[t]o transfer to another's custody or charge" or "[t]o give (goods) to a carrier for delivery to a designated recipient." Black's Law Dictionary 303 (7th ed. 1999).

Under the controlling tariff set by Norfolk Southern, a consignee is allowed two days to unload freight without incurring demurrage charges. Demurrage is "a charge exacted by a carrier from a shipper or consignee on ac-

count [*3] of a failure to load or unload cars within the specified time prescribed by the applicable tariffs. Railroads charge shippers and receivers of freight 'demurrage' fees if the shippers or receivers detain freight cars on the rails beyond a designated number of days." *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247, 251 n.1 (3d Cir. 2007)(quoting *Union Pac. R.R. Co. v. Ametek, Inc.*, 104 F.3d 558, 559 n.2 (3d Cir. 1997)). "It is intended to both compensate for the delay, and to promote efficiency by deterring undue delays." *CSX Transp., Inc. v. City of Pensacola*, 936 F. Supp. 880, 883 (N.D. Fla. 1995)(internal citation omitted).

Norfolk Southern alleges that Savannah Re-Load is liable for demurrage for the failure to timely unload and return the rail cars. It relies on the bills of lading, which identify Savannah Re-Load as a consignee. After the delays, Norfolk Southern sent invoices to Savannah Re-Load for the demurrage charges. ² These invoices also identified Savannah Re-Load as the consignee.

2 Norfolk Southern computes demurrage monthly. At the end of each month, a customer's total demurrage days are netted against total credits for returning rail cars early. If total demurrage [*4] days exceed credits, those days are charged at the daily rate for demurrage as published in Norfolk Southern's tariff. (See Doc. 26 Ex. C.)

Savannah Re-Load maintains that it was not a consignee for the freight and is, therefore, not liable for demurrage. According to Savannah Re-Load, freight-forwarding companies make their transport arrangements--to send freight via Norfolk Southern or other carriers--without Savannah Re-Load's input. (See Groves Aff., Doc. 26 Ex. A.) The freight-forwarding companies unilaterally give Savannah Re-Load notice that a given shipment is enroute to its facility. After the freight arrives at the facility, Savannah Re-Load unloads the freight and forwards it to various ports for export according to instructions from the freight-forwarding company. Savannah Re-Load never takes any ownership interest in the freight it handles and is never the freight's final destination. Savannah Re-Load is never a party to the transportation contract, and only operates as instructed by the freight-forwarding companies. (*Id.*)

Savannah Re-Load also contends that it is neither provided with copies of the bills of lading nor informed of the contents of the bills of lading. (*Id.* at 1.) [*5] With respect to the freight at issue in this case, Savannah Re-Load did not draft, approve of, or receive any bills of lading associated with the rail freight at any time. Similarly, it did not receive copies of the purchase or transportation contracts. In general, Savannah Re-Load does not inspect or evaluate freight to see if it arrives in conformity with the purchase or transportation contract. Sa-

vannah Re-Load admits that it was identified as a consignee in the bills of lading, but claims that this was a unilateral act of the shipper, about which it had no knowledge. (*Id.*)

ANALYSIS

It is well-established that one must be a consignee or a party to the transportation contract in order to be liable for demurrage. *Middle Atl. Conference v. United States*, 353 F. Supp. 1109, 1118 (D.D.C. 1972). The parties agree that the issue before the Court in this case is whether Defendant Savannah Re-Load was a consignee of the freight delivered by Plaintiff Norfolk Southern. Norfolk Southern contends that Savannah Re-Load was a consignee because it was identified as a consignee on the bills of lading and because it accepted delivery of the rail cars and the freight. Savannah Re-Load argues that it [*6] cannot be made consignee merely because a third party unilaterally listed it as such without its knowledge or consent.

I. Savannah Re-Load did not receive notice that it was listed as a consignee.

Savannah Re-Load claims that it did not receive notice that it was listed as a consignee in the bills of lading. The operator of Savannah Re-Load, Billy Groves, states that Savannah Re-Load did not receive any bills of lading and was never informed that the bills of lading identified it as a consignee. (Groves Aff. at 1-2.)

Norfolk Southern acknowledges that it did not provide Savannah Re-Load with bills of lading because this is not standard practice in the industry. Norfolk Southern surmises that Savannah Re-Load received notice of its consignee designation in the forwarding instructions from the freight-forwarding companies, but there is no evidence of this. Norfolk Southern informed Savannah Re-Load of the consignee designation in invoices it sent to Savannah Re-Load for demurrage *after* the delays occurred, and therefore after the demurrage claim arose. There is no other evidence that Savannah Re-Load received any notice that it was designated as a consignee on the bills of lading.

In the [*7] absence of a genuine issue of material fact, the Court finds that Savannah Re-Load had no knowledge that it was listed as a consignee until after the delays occurred.

II. Savannah Re-Load was not a consignee.

The Court holds that Savannah Re-Load cannot be made a consignee by the unilateral action of a third party, particularly where Savannah Re-Load was not given notice of the unilateral designation in the bills of lading. There are no binding decisions on this issue in the Eleventh Circuit, and other courts have issued conflicting

decisions. But, as explained below, the weight of authority supports this holding and provides the more reasonable result under the specific facts of this case.

The Interstate Commerce Commission Termination Act (TCCTA) governs the demurrage liability of consignee-agents when the transportation is provided by a rail carrier. The consignee-agent liability provision provides, in pertinent part:

when the shipper or consignor instructs the rail carrier transporting the property to deliver it to *a consignee that is an agent only*, not having beneficial title to the property, *the consignee* is liable for rates [for transportation] billed at the time of delivery for [*8] which *the consignee* is otherwise liable, but not for additional rates [including demurrage] that may be found to be due after delivery if *the consignee* gives written notice to the delivering carrier before delivery of the property (A) of the agency and absence of beneficial title; and (B) of the name and address of the beneficial owner of the property if it is reconsigned or diverted to a place other than the place specified in the original bill of lading.

49 U.S.C. § 10743 (a) (1).

In a case involving similar facts, the Seventh Circuit held that this statute "applies only to agents who are also consignees, and not to agents who are not consignees." *Ill. Cent. R.R. Co. v. S. Tec Develop. Warehouse, Inc.*, 337 F.3d 813, 817 (7th Cir. 2003). After concluding that the statute only applies to consignees, the court reasoned that the preliminary issue was whether the defendant warehouseman was a consignee. Although the case was remanded to the district court for a final determination of the warehouseman's status, the Seventh Circuit stated that "being listed by third parties as a consignee on some bills of lading is not alone enough to make a [warehouseman] a legal consignee liable for demurrage [*9] charges." *Id. at 821*.

The *South Tec* opinion is consistent with several other decisions. In *Southern Pacific Transportation Co. v. Matson Navigation Co.*, 383 F. Supp. 154 (N.D. Cal. 1974), the court held that the defendant terminal operator was not liable for demurrage. The defendant was not named as consignee on the bills of lading for most of the shipments, but was named as consignee for some of the shipments. First, the court held that the defendant could not be liable for demurrage where the bills of lading

named it as a "care of" party and not as consignee. The court then stated:

Turning now to those instances where [the terminal operator] was named consignee on the railroad bill of lading, the Court observes that the holding set forth above does not necessitate a holding here that anyone named as consignee in a contract of transportation can be held liable for demurrage.

There is no evidence that [the terminal operator] authorized shippers to consign goods to it or that it performed its task differently in those instances. In fact the sole difference between the two situations was the shipper's unilateral decision whom to name as consignee. The instant case differs in this respect [*10] from the others cited by the parties, where the consignee was either the purchaser of the cargo or, at least, the person to whom final delivery was to be made and who thus had an interest in and control over the cargo.

Id. at 157. Based on this reasoning, the court held that the defendant was not liable for demurrage where it was unilaterally named by the shipper as consignee in the bills of lading. To hold otherwise, stated the court, "would be to place a connecting carrier's liability totally within the shipper's control, a result the [c]ourt cannot sanction." *Id.*; see also *Union Pac. R.R. Co. v. Carry Transit, Inc.*, No. 3:04-CV-1095B, 2005 U.S. Dist. LEXIS 45568 (N.D. Tex. 2005) (declining to "untether the law of demurrage from its contractual moorings" and holding that "a [shipper's] unilateral decision to name a non-party to the transportation contract . . . as a consignee without its consent does not render the non-party a consignee liable for demurrage charges"); *W. Md. Ry. Co. v. S. African Marine Corp.*, 1987 U.S. Dist. LEXIS 7323, 1987 WL 16153, *4 (S.D.N.Y. 1987) (holding that a connecting ocean carrier is not liable for rail demurrage charges "merely by virtue of being named by the shipper as the consignee in the rail bills of lading"); [*11] see generally *CSX Transp., Inc. v. City of Pensacola*, 936 F. Supp. 880, 884 (N.D. Fla. 1995) (finding defendant not liable for demurrage where it had not been named as consignee in the bills of lading, but stating in dicta that the "unilateral action of one party in labeling an intermediary as a consignee does not render the putative consignee liable for demurrage").

In opposition to this line of authorities, Norfolk Southern relies on a recent decision by the Third Circuit in *CSX Transportation Co. v. Novolog Bucks County*, 502 F.3d 247 (3d Cir. 2007). The Third Circuit "decline[d] to follow" the authorities cited above, specifically the Seventh Circuit's decision in *South Tec*. *Id.* at 259. Instead, the Third Circuit held that "recipients of freight who are named as consignees on bills of lading are subject to liability for demurrage charges arising after they accept delivery unless they act as agents of another and comply with the notification procedures established in ICCTA's consignee-agent liability provision, 49 U.S.C. § 10743(a)(1)," *Id.* at 254. According to the Third Circuit, the statutory provision applies to an entity listed as consignee on the bill of lading, even if the entity [*12] was unilaterally named as consignee by the shipper, is not a party to the transportation contract, and has no ownership interest in the freight. *Id.* at 252. Under the Third Circuit's reading of the statute, "a transloader or other such entity, if named on the bill of lading as the sole consignee, is *presumptively liable* for demurrage charges arising from unloading delays, unless it accepts the freight as the agent of another and notifies the carrier of its status [as an agent] in writing prior to the delivery." *Id.* at 250 (emphasis added). The court reasoned that consignee status was established by "the documented designation of an entity as a consignee and that entity's acceptance of the freight." *Id.* at 257.

In this case, Norfolk Southern argues, based on the *Novolog* decision, that Savannah Re-Load is liable for demurrage because (1) Savannah Re-Load is identified as a consignee on the bills of lading; (2) Savannah Re-Load accepted delivery of the rail cars and the freight; and (3) Savannah Re-Load did not notify Norfolk Southern of its agent status and the name and address of the beneficial owner. Effectively, Norfolk Southern contends that Savannah Re-Load accepted its status as [*13] consignee by accepting the freight, and it suggests that Savannah Re-Load could have rejected these terms by rejecting the freight or giving notice of its agent status.

The Court disagrees. Consistent with Seventh Circuit's decision in *South Tec*, the Court holds that ICCTA's consignee-agent liability provision applies only to consignees. *South Tec*, 337 F.3d at 817. Therefore, an entity that is not a consignee is not obligated to comply with the statutory notice provisions in order to avoid liability for demurrage, and such an entity does not become a consignee by operation of the statute.

The Court also holds that a theory of acceptance by conduct is inapplicable to a situation where Savannah Re-Load was unaware of terms set unilaterally by third parties. As discussed above, there is no evidence that Savannah Re-Load was provided with the bills of lading or informed of the terms of the bills of lading. The Court

finds that the *Novolog* rule of presumptive liability cannot function in a situation where the receiver of freight is not given notice that it has been listed as a consignee by third parties.

In *South Tec*, the Seventh Circuit suggested that being listed on the bills of lading, "coupled [*14] with other factors," might be enough to render a warehouseman a consignee. *South Tec*, 337 F.3d at 821. Such "other factors" could include receiving notice of a consignee designation, playing an active role in the railroad transportation contract, or having an interest in or control over the goods. *See id.* at 821-22; *W. Md. Ry. Co.*, 1987 U.S. Dist. LEXIS 7323, 1987 WL 16153 at *4; *Matson*, 383 F. Supp. at 157. But factors such as these are not at play in this case.³

3 Norfolk Southern states that after it demanded payment for the demurrage charges, representatives from Savannah Re-Load disputed the manner in which the demurrage charges were calculated, but never disputed that it was the consignee that had responsibility to pay the demurrage charges. With this statement, Norfolk Southern suggests that Savannah Re-Load admitted its liability in negotiations prior to the filing of this lawsuit. This is insufficient to create a legal liability. Savannah Re-Load did not pay any of the demurrage invoices, and Norfolk Southern brought this lawsuit as a result.

Next, Norfolk Southern argues that "regardless of whether Savannah Re-Load was provided with the necessary documentation, the fact remains that the rail cars were [*15] delivered to Savannah [Re-Load] by Norfolk Southern, and that while those rail cars were in the control, custody, and possession of Savannah [Re-Load], the federal law requiring demurrage was frustrated by Savannah [Re-Load]'s detention of rail cars in excess of the allotted amount of time." (Plf.'s Reply at 7.) Although such a rule would be appealing in its simplicity, it is inconsistent with the well-established law that one must be a consignee or a party to the transportation contract in order to be liable for demurrage. *Middle Atl. Conference*, 353 F. Supp. at 1118. And as explained above, Savannah Re-Load cannot be made a consignee by the unilateral action of a third party where Savannah Re-Load was not given notice that it was listed as a consignee in the bills of lading.

CONCLUSION

Accordingly, Savannah Re-Load's Motion for Summary Judgment is **GRANTED**. Norfolk Southern's Motion for Partial Summary Judgment is **DENIED**. The Clerk of Court is **DIRECTED to CLOSE** this case.

SO ORDERED this 15th day of September, 2008.

/s/ William T. Moore, Jr.

WILLIAM T. MOORE, JR., CHIEF JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA