

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET NO. FD34920**

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**SAVANNAH PORT TERMINAL RAILROAD, INC. --  
PETITION FOR DECLARATORY ORDER**

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**REBUTTAL OF RESPONDENT CAPITAL CARGO, INC.  
TO RESPONSE OF SAVANNAH PORT TERMINAL RAILROAD, INC.  
TO CAPITAL CARGO, INC.'S MOTION TO DISMISS**

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Respondent Capital Cargo, Inc. (“Capital Cargo”) hereby rebuts the response of Petitioner Savannah Port Terminal Railroad, Inc. (“SPTR”) to Capital Cargo’s Motion to Dismiss (the “Response” to the “Motion”). The Motion establishes that the STB does not have jurisdiction over this matter because:

- The transportation and service at issue in this case are the subject of a contract between Capital Cargo and SPTR, which extends to and includes the topic of demurrage as raised in SPTR’s Petition; and
- the overwhelming majority of shipments at issue in this case involved commodities that appear to be exempt from subtitle IV of Title 49 pursuant to 49 U.S.C. § 1039.11(a) and 49 U.S.C. § 10502.

Moreover, Capital Cargo did not waive its objections to most of the demurrage charges at issue in this case by failing to object in writing, because: (1) no such requirement applied; (2) even if such a requirement did apply, SPTR waived it; and (3) no law or policy prevents such a waiver.

In response, SPTR does not appear to dispute that if there is a contract at issue in this case, then dismissal is required. Instead, SPTR argues that there is no contract between Capital Cargo and SPTR (while simultaneously relying on selected contract provisions); and invents an artificial distinction between exemption of the commodities at issue from regulation of “rail

transportation” and exemption from regulation of demurrage. Both of these positions, and all of the ancillary and subsidiary arguments with which SPTR tries to bolster them, are misguided. Capital Cargo’s Motion should be granted, the Petition should be dismissed, and this proceeding should be discontinued pursuant to 49 U.S.C. § 10709.

**I. There is an enforceable contract between Capital Cargo and SPTR.**

SPTR essentially concedes that if there is a contract between Capital Cargo and SPTR, then the Petition is not properly in the STB and the case must return to the Georgia Superior Court.<sup>1</sup> (Response at 4.) Given this concession, SPTR devotes much of its Response to the mystifying claim that there is no contract -- while also arguing that various provisions of the contract call for SPTR to prevail.

It bears reminder that the “law certainly seems to be settled . . . , issues of contract interpretation, determinations of breach, and appropriate remedies, if any, are properly determined by the courts [and not the STB].” *Entergy Services, Inc. v. Union Pacific R.R. Co.*, 99 F.Supp.2d 1080, 1086 (D. Neb. 2000).<sup>2</sup> Thus, the Petition must be dismissed for lack of jurisdiction if a contract exists that covers the subject matter of this case. (Motion at 12-15.)

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<sup>1</sup> It bears noting, at the outset, that SPTR’s reliance on the decision of the Georgia Superior Court referring this matter to the STB is misplaced. Grasping at straws, SPTR notes that Capital Cargo did not appeal the decision. However, Georgia law does not allow such an interlocutory decision to be appealed of right, and the multi-step discretionary appeal process that is available is both time-consuming and inherently uncertain. Ga. Code Ann. § 5-6-34. Interpreting Capital Cargo’s course of action in this case -- asking the STB, in its expertise, to recognize the contractual nature of this dispute and return it to the Georgia Superior Court, rather than undertaking an appeal process that might not even result in consideration of the merits of the appeal -- as any kind of concession simply reeks of desperation on SPTR’s part.

Moreover, SPTR itself cites the STB’s expertise in the law governing railroads. Given that expertise, there is nothing inappropriate about the STB (which routinely considers issues under 49 U.S.C. § 10709) reaching a result contrary to that of the Georgia Superior Court (which does not). Indeed, the Georgia Superior Court did not cite, or apparently consider, section 10709 in this case.

<sup>2</sup> See also authorities cited at pages 12 through 15 of the Motion.

There is clearly an enforceable contract between Capital Cargo and SPTR. (Motion at 15-19.)<sup>3</sup> Pursuant to the Easement Agreement that SPTR signed with the Georgia Ports Authority (“GPA”), SPTR gained an easement over GPA’s property for the purpose of providing rail service to GPA tenants within the Garden City Terminal, and assumed GPA’s contractual service obligations to Capital Cargo (and others) under the Lease. (Motion at 6-7; Ex. L to SPTR Petition.) That GPA’s own obligations had been developed and ratified over time makes them no less binding upon both GPA and, by voluntary contractual assumption, SPTR. SPTR’s assumption of those obligations was express and unambiguous, and Capital Cargo is entitled to enforce them.<sup>4</sup>

Capital Cargo is a third party beneficiary of SPTR’s promises, with full power to enforce them. Georgia law provides:

(a) As a general rule, an action on a contract, whether the contract is expressed, implied, by parol, under seal, or of record, shall be brought in the name of the party in whom the legal interest in the contract is vested, and against the party who made it in person or by agent.

(b) The beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on the contract.

Ga. Code Ann. § 9-2-20.

SPTR acknowledges the existence of the Lease and the Easement Agreement, and also recognizes that it cannot alter or amend the terms of the contract between Capital Cargo and GPA. (Response at 4, 6.) Given all of this, it is unclear how SPTR can assert that it has no

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<sup>3</sup> The full background of this matter, including the factual underpinnings of the Lease and Easement Agreement, and the implementation thereof, is set forth in pages 3-11 of the Motion.

<sup>4</sup> SPTR’s observation that Capital Cargo did not attach a copy of a contract between Capital Cargo and SPTR to the Motion -- as if the Motion may be resolved on that basis alone -- is puzzling. The Lease and Easement Agreement were both attached as exhibits to SPTR’s own Petition, and Capital Cargo cited both documents in its Motion. (*E.g.*, Motion at 4-7.) SPTR itself asserted that “[t]he end result of the lease and easement agreements was that SPTR began to provide the railcar switching service for the tenants at the Port Terminal, including the delivery and pick-up of railcars to Capital Cargo.” (SPTR Petition at 7, ¶ 14.)

contractual obligation to Capital Cargo as a clear third party beneficiary of the Easement Agreement. The contention is based more in rhetoric than in reason.

## II. 49 U.S.C. § 10709 applies to this case.

Because the provision of rail transportation by SPTR to Capital Cargo is the subject of a contract, enforceable by Capital Cargo against SPTR, 49 U.S.C. § 10709 deprives the STB of jurisdiction over this entire proceeding. (Motion at 15-19.) Beyond arguing that there is no contract at all, SPTR's next tactic in trying to avoid section 10709 is to argue that the statute does not apply to *this* contract. However, SPTR's contention -- that the parties' contract does not provide for "specified services under specified rates and conditions," as referenced in section 10709 -- misreads the statute. The statute clearly does not require that a contract set forth *all of the* "specified services under specified rates and conditions," *in writing*.

An entire body of law establishes that, as was the case here, contract terms may be defined by the conduct of the parties. *See, e.g., Pine Valley Apts. v. First State Bank*, 237 S.E.2d 716, 718-19 (Ga. App. 1977).<sup>5</sup> In fact, contract terms may be "left open to subsequent agreement of the parties" which may be evidenced from the parties conduct. *Holland v. Holland Heating & Comp.*, 432 S.E.2d 238, 240 (Ga. App. 1993) ("In light of the parties' subsequent actions, performance and acceptance of such performance, the evidence as a whole was sufficient to establish an enforceable contract. . ."); *see also* Motion at 15-16.

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<sup>5</sup> *See also* Ga. Code Ann. § 13-2-2(1) ("Parol evidence is inadmissible to add to, take from, or vary a written contract. All the attendant and surrounding circumstances may be proved and, if there is an ambiguity, latent or patent, it may be explained; so, if only a part of a contract is reduced to writing (such as a note given in pursuance of a contract) and it is manifest that the writing was not intended to speak the whole contract, then parol evidence is admissible. . ."); Ga. Code Ann. § 13-2-3 ("The cardinal rule of construction is to ascertain the intention of the parties. If that intention is clear and it contravenes no rule of law and sufficient words are used to arrive at the intention, it shall be enforced irrespective of all technical or arbitrary rules of construction."); Ga. Code Ann. § 13-2-4 ("The intention of the parties may differ among themselves. In such case, the meaning placed on the contract by one party and known to be thus understood by the other party at the time shall be held as the true meaning.").

Nothing in section 10709 says otherwise, and the STB has recognized that contract terms need not be written in order to create a valid contract for purposes of the statute. *See, e.g., Wisconsin Central*, 2001 WL 688877 \*3 (STB Docket No. 41995 served June 20, 2001) (recognizing STB’s lack of authority to review unsigned contract that parties had treated as binding); *Cross Oil Refining & Marketing, Inc. v. Union Pacific Railroad Company*, 1998 WL 744366 \* 1-2 (STB Finance Docket No. 33582 served Oct. 27, 1998) (rejecting plaintiff’s assertion that there was no contract because all terms were not specified); *H.B. Fuller Co. v. Southern Pacific Transportation Comp.*, 1997 WL 476350, at 2 (STB Docket No. 41510 served Aug. 22, 1997) (STB lacked jurisdiction where contract referenced incorporating tariff schedule, but did not specify terms or rates; “issues regarding the breach, or precise construction of [contract] terms will have to be resolved in an appropriate court of law.”).

Consistently declining jurisdiction over contract matters between parties, the STB has properly concluded that its entry into the business of evaluating private contracts “could lead to [the STB’s] re-examination of private agreements whenever one carrier party becomes dissatisfied with the outcome of its own bargaining, and this kind of regulatory intervention is inappropriate.” *Wisconsin Central*, 2001 WL 688877 \*3 (STB Docket No. 41995 served June 20, 2001).

In the present case, the Lease expressly required GPA to provide “specified services” in writing -- *i.e.*, “to provide rail service to the Premises as long as the present rail access is maintained by Lessee [Capital Cargo].” (Ex. I to SPTR Petition at Article 3.) GPA did provide rail services to Capital Cargo, including providing three shipments of rail cars a day. As one of many practices, GPA did not charge Capital Cargo demurrage fees for forty-eight hours, and did not charge demurrage if cars backed up longer than that due to a failure to provide three

deliveries per day. The parties -- including SPTR, after it expressly assumed GPA's contractual service obligations -- operated in this manner for years, filling in the specific terms of the contract by their conduct -- *i.e.*, "specifying" the rates and conditions of the service.

There is now a dispute over the "specified" services, rates and conditions -- including demurrage. However, that is a contract dispute -- and section 10709, as the STB has repeatedly held, clearly deprives the STB of jurisdiction to delve into the contract and declare the outcome. This dispute is properly resolved in the Georgia Superior Court, not the STB.

**III. Arguments relating to the proper interpretation and application of the contract belong in the Georgia Superior Court, not the STB.**

For the same reasons, SPTR's arguments that center on contract interpretation must be resolved in the Georgia Superior Court, rather than the STB.

**A. The non-waiver provision of the Lease**

SPTR insists that certain tariff provisions regarding written objections to demurrage are both applicable and incapable of being waived. In doing so, SPTR strains frantically to escape a contrary provision in the Lease stating that "[f]ailure of Lessor or Lessee to complain of any act or omission on the part of the other party no matter how long the same may continue, shall not be deemed to be a waiver by said party of any of its rights hereunder." (Ex. I at Article 18; Motion at 19-20.) This Lease provision confirms that the tariffs' written-objection provisions were never part of the contract.

First, SPTR contends that this provision does not apply to demurrage. However, this is a matter of contract interpretation that is not properly considered in the STB. Accordingly, the inquiry should proceed no further.

Nevertheless, it bears noting that SPTR's interpretation of the parties' contract is unduly narrow. The Lease is the building block of the contract, establishing the basic obligation to

provide service. That obligation was fine-tuned and ratified over time, including arrangements on demurrage. Applying Article 18 of the Lease strictly to the written undertakings in the Lease -- but not to the subsequent refinements and elaborations upon the basic service obligation in the Lease -- would contravene the spirit of the contract. There is no basis for such an artificial and unnatural interpretation.

Second, SPTR contends that applying the Lease's non-waiver provision to the tariffs' written-notice obligations would render the latter meaningless. This is, again, a matter of contract interpretation beyond the jurisdiction of the STB. Moreover, SPTR's argument is misguided for the fundamental reason that the tariffs do not apply in this case. Indeed, as set forth below and in the Motion, SPTR agrees that the Lease did not incorporate the tariffs and accordingly they are entirely inapplicable. Accordingly, there is no need to harmonize them with the Lease at all.

**B. The notice-of-default provision of the Lease**

SPTR next argues that Capital Cargo has failed to provide proper notice of default under Article 19 of the Lease. This argument is puzzling given that SPTR refers to a May 6, 2005 letter from Capital Cargo to GPA, providing notice of default. More fundamentally, this argument jumps right to the merits of Capital Cargo's claim for breach of contract -- a landscape in which the STB has no jurisdiction. *If* SPTR is correct that Article 19 applies here,<sup>6</sup> and *if* in fact Capital Cargo has failed properly to invoke it, then SPTR *might* prevail.<sup>7</sup> However,

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<sup>6</sup> This is hardly a given. Article 19 refers to termination of the contract. Capital Cargo is not trying to terminate the contract; quite to the contrary, Capital Cargo is trying to get SPTR to comply with the contract. Moreover, Article 19 repeatedly refers to defaults by the lessee, not the lessor -- suggesting that the notice-and-cure provision is there to protect the lessee (Capital Cargo), not the lessor (GPA). Of course, these issues simply drive home the point that consideration of the meaning and applicability of Article 19 is a task for a court, not the STB.

<sup>7</sup> Or it might not. It remains to be seen how, if at all, SPTR was prejudiced by any failure to give notice. SPTR can hardly claim that it was unaware of Capital Cargo's grievance regarding three switches per day and demurrage as related thereto -- or that SPTR did not have every opportunity, for months on end, to fix the problem.

whatever outcome is reached must be reached in Georgia Superior Court, not the STB. SPTR cannot dispute that the applicability of Article 19 is a contract issue, and not even SPTR seems to dispute that the STB does not have jurisdiction to resolve such issues. Accordingly, by making this argument SPTR itself simply confirms the contractual nature of this dispute.

**IV. SPTR agrees that the tariffs were not incorporated into the parties' contract, and therefore they are inapplicable.**

SPTR does not argue that the tariffs' written-objection provisions are part of the parties' contract. Indeed, were that the case then such provisions would be beyond the jurisdiction of the STB.

Rather, SPTR agrees with Capital Cargo that the tariffs are *not* part of the contract -- proclaiming that Capital Cargo "admits" that the Lease did not incorporate the tariffs. (Response at 9.) SPTR seems to think that this fact makes the tariffs applicable. However, the parties' contract defines the scope of their relationship, and its failure to incorporate or otherwise apply the tariffs renders them entirely inapplicable. 49 U.S.C. § 10709(b) (a "party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract."); *see also* authorities cited at pages 13-14 of Capital Cargo's motion.<sup>8</sup> The tariffs could apply *only if* they were incorporated into the contract -- and SPTR agrees that they were not. Accordingly, nothing about the tariffs changes the jurisdictional analysis or the outcome of the case.

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<sup>8</sup> As set forth in Capital Cargo's motion, Capital Cargo was not told about or given, and did not know of or see, any tariff containing written notice provisions -- until this litigation was underway. (Motion at 19.) SPTR responds that Capital Cargo must have seen the tariffs, because otherwise it could not have known about the requirement that demurrage be paid after the expiration of a forty-eight hour "free" period. SPTR's argument ignores the myriad ways, other than through the tariffs, by which Capital Cargo could have become aware of demurrage obligations. Most obviously, such a provision could be -- and was -- the subject of an agreement developed and confirmed through custom and practice. The concept of demurrage, and the means by which demurrage could be charged, is not the exclusive domain of tariffs.

**V. The STB may consider SPTR's actions that directly contradict its current position.**

Assuming, strictly for the sake of argument, that the written-notice tariff provisions apply at all, SPTR clearly waived them. (Motion at 20.) SPTR misses the mark in objecting to Capital Cargo's observation of the inconsistency between SPTR's assertion that demurrage charges cannot be waived, on one hand, and SPTR's own (purportedly good-faith) negotiations with Capital Cargo on the other.

First, SPTR overstates the "privileged" nature of such "settlement" negotiations. Rule 408 of the Federal Rules of Evidence does not automatically bar all evidence of negotiations. Rather, Rule 408(a) renders such evidence inadmissible to prove liability for, invalidity of, or the amount of a claim disputed as to its validity or amount. Moreover, Rule 408(b) expressly allows admission of such evidence for other purposes.

Second, under 49 C.F.R. § 1111.4, the Federal Rules of Evidence are not applicable wholesale to these proceedings. Rather, section 1111.4 states that

Any evidence which is sufficiently reliable and probative to support a decision under the provisions of the Administrative Procedure Act, or which would be admissible under the general statutes of the United States, or under the rules of evidence governing proceedings in matters not involving trial by jury in the courts of the United States, will be admissible in hearings before the Board. The rules of evidence will be applied in any proceeding to the end that necessary and proper evidence will be conveniently, inexpensively, and speedily produced, while preserving the substantial rights of the parties.

In the present situation, SPTR's conduct in negotiating demurrage charges, and waiving such charges for the Georgia Ports Authority, is directly probative on its contention that such charges are incapable of being waived.<sup>9</sup> SPTR's acts are entirely inconsistent with an intent to rely on a non-waivable written-objection requirement, and constitute a waiver. (Motion at 20.)

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<sup>9</sup> As set forth in the motion, the principle that such charges cannot be waived does not apply to contract-service cases and is based on outmoded policies. (Motion at 20-23.)

The point is not that by negotiating to waive (and waiving) such charges, SPTR is admitting that they are not properly assessed. Rather, the point is that negotiating is fundamentally inconsistent with the legal assertion that there can be no negotiation.

**VI. The exemption of commodities under 49 C.F.R. § 1039.11 applies to demurrage.**

SPTR evidently concedes that the commodities at issue in this case are exempt from rail transportation pursuant to 49 C.F.R. § 1039.11. Nevertheless, SPTR tries to avoid the consequent dismissal of its Petition by arguing that demurrage is not included within the term “rail transportation.” This argument is baseless. Congress provided the STB with authority to create exemptions pursuant to 49 U.S.C. § 10502 as part of the overall deregulation of the rail industry, as discussed in the Motion. *Fort Worth & Western R. Co., Inc.*, 1996 WL 498863 (STB Finance Docket No. 32955, August 27, 1996).

In enacting the Staggers Rail Act of 1980 ... Congress made clear its intent that the ICC (as predecessor to the Board in the area of exemption authority) would use its expanded exemption authority under former section 10505 to free certain transactions and service from the administrative and financial costs associated with continued regulation:

The policy underlying this provision is that while Congress has been able to identify broad areas of commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress. The conferees expect that, consistent with the policies of this Act, the Commission will pursue partial and complete exemption from remaining regulation .... Congress reaffirmed this policy in the conference report accompanying ICCTA, which reenacted the existing exemption provisions as section 10502.

*Id.* (quoting H.R. Rep. No. 422, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 168-69 (1995)).

Consistent with this deregulatory intent, Congress allowed the STB to exempt a “person, class of persons, or a transaction or service . . .” from regulation, “to the maximum extent consistent with this part.” 49 U.S.C. § 10502. The policy underpinnings behind section 10502 confirm the clear lack of any analytically sound basis upon which to distinguish demurrage from any other facet of “rail transportation” or to conclude that the latter term does not encompass the former.

Indeed, it has long been recognized that “[d]emurrage charges are part and parcel of the transportation charges, and are covered by the same rules of law.” *Davis v. Timmonsville Oil Co.*, 285 F.470, 472 (4th Cir. 1922) (cited in *Transportation Co. v. Novolog Bucks County*, 2006 WL 1451280, \*14 (E.D.Pa.)). “Demurrage is considered as part of the transportation charge . . . .” 22 *Williston on Contracts* § 59:24 (4<sup>th</sup> ed.); *cf., e.g., CSX Transp., Inc. v. City of Pensacola, Florida*, 936 F. Supp. 880, 883-84 (N.D. Fla. 1995) (only a party to a contract for transportation may be liable for demurrage). This stands to reason, given the policy behind demurrage -- to keep rail cars in circulation -- and the consequent interrelationship of transportation and demurrage. This case is a prime example of the intertwining of demurrage and transportation; one cannot be divorced from the other in any way that is logically sustainable. There is no basis for regulating one and not the other.

Accordingly, SPTR’s argument is unfounded. The Motion should be granted and the Petition should be dismissed as to all exempt cargo.<sup>10</sup>

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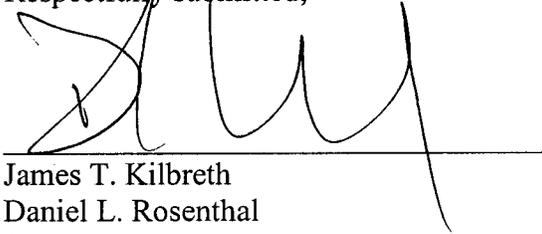
<sup>10</sup> SPTR’s other arguments warrant only passing consideration. That Capital Cargo has not paid the small amount of demurrage that it agrees is owed is hardly surprising; the parties are in litigation. In addition, Capital Cargo’s leasing of a thirteen-car track is irrelevant, and it is hardly “pathetic” for Capital Cargo to try to enforce the contractual obligations that SPTR voluntarily assumed with respect to the three-car track.

**CONCLUSION**

For the foregoing reasons, Capital Cargo respectfully requests that the STB grant Capital Cargo's motion.

Dated: February 21, 2007

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'JKR', is written over a horizontal line.

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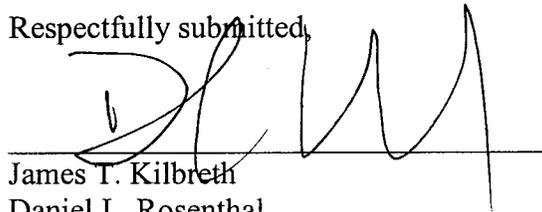
Attorneys for Respondent  
Capital Cargo, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been furnished to P. Campbell Ford, Esq., Attorney for Savannah Port Terminal Railroad, Ford, Miller & Wainer, P.A., 1200 Riverplace Blvd., Suite 600, Jacksonville, FL 32207 via federal express this 21st day of February 2007.

Dated: February 21, 2007

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'DKM', is written over a horizontal line. The signature is fluid and cursive.

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TO DISMISS CROSS-COMPLAINT**

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Respondent Capital Cargo, Inc. (“Capital Cargo”) hereby replies to the motion of Petitioner Savannah Port Terminal Railroad, Inc. (“SPTR”) to dismiss Capital Cargo’s cross-complaint. SPTR’s motion is based on the misguided notion that Capital Cargo’s cross-complaint asserts a claim for breach of contract -- and therefore that dismissal is warranted pursuant to 49 U.S.C. § 10709. In reality, Capital Cargo has made clear that its cross-complaint is *not* rooted in a contract, but is instead asserted *in the alternative to* the contractual claims asserted in the complaint in Georgia Superior Court, and the contractual defenses asserted in Capital Cargo’s Answer and Motion to Dismiss in the STB. In contrast to those claims and defenses, the cross-complaint need be reached *only if* the STB denies Capital Cargo’s motion to dismiss and determines that SPTR’s petition for declaratory order (the “Petition”) is not rooted in a contract. Accordingly, Capital Cargo’s cross-complaint is precisely the opposite of what SPTR says it is, and dismissal is entirely unwarranted if the Petition itself is not dismissed.

In addition, given that the facts and issues raised in the cross-complaint mirror those at issue in SPTR’s own Petition, SPTR’s contention that the cross-complaint states contractual claims is effectively an admission that the claims at issue in the Petition are likewise creatures of contract. Accordingly, SPTR confirms the basis for Capital Cargo’s motion to dismiss the

Petition and discontinue this entire proceeding pursuant to 49 U.S.C. § 10709. SPTR simply confirms that this case belongs in Georgia Superior Court, not the STB.

### **BACKGROUND<sup>1</sup>**

In May 2005, Capital Cargo filed a verified complaint in Georgia Superior Court, asserting various claims arising from: (1) SPTR's insistence that Capital Cargo was only entitled to one delivery of three cars per day to Capital Cargo's facility in the Garden City Terminal in Garden City, Georgia, rather than three deliveries per day; (2) SPTR's issuance of demurrage charges for backups arising from the refusal to provide three switches per day; and (3) SPTR's refusal to provide any service at all until and unless the illegitimate demurrage was paid. SPTR then persuaded a judge to stay the case without regard to 49 U.S.C. § 10709 and filed its Petition, claiming the demurrage charges.

Capital Cargo's position is that SPTR is contractually obligated to provide the three switches per day -- and that: (1) demurrage arising from SPTR's failure to fulfill its contractual service obligations is not properly assessed, and (2) SPTR is liable for damages arising from its failure to provide service. Capital Cargo moved to dismiss SPTR's Petition on the basis that the transportation and relationship between the parties -- including the claimed demurrage -- are the subject of a contract, and that the STB therefore lacks jurisdiction pursuant to 49 U.S.C. § 10709.

While Capital Cargo is fully confident in its argument for dismissal of the Petition in its entirety, out of an abundance of caution Capital Cargo filed a cross-complaint on expressly non-contractual bases. Specifically, Capital Cargo alleged that:

- SPTR's failure and/or refusal to provide Capital Cargo with three deliveries per day of three rail cars each violated 49 U.S.C. § 11101. (Answer and Cross-Complaint, ¶ 11);

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<sup>1</sup> The full background of this matter is set forth in pages 3-11 of Capital Cargo's Motion to Dismiss SPTR's petition.

- SPTR’s demurrage charges arising from SPTR’s failure and/or refusal to make three deliveries per day of three rail cars each violated 49 U.S.C. §§ 10702 and 10746. (*Id.*, ¶ 13);
- SPTR’s failure and/or refusal to provide service unless Capital Cargo paid demurrage charges violated 49 U.S.C. §§ 10702 and 11101. (*Id.*, ¶ 14); and
- SPTR’s demurrage charges were unreasonable and violated 49 U.S.C. §§ 10702 and 10746. (*Id.*, ¶ 15).

Capital Cargo pleaded these statutory claims simply to ensure that if the STB did not view the issues in this case as arising from a contract under section 10709, then Capital Cargo’s claims would be cast and preserved on statutory (rather than contractual) grounds and would be properly asserted in this proceeding.

Capital Cargo made this point clearly in the cross-complaint, stating:

Capital Cargo’s cross-complaint is stated purely in the alternative from its defenses as set forth in its answer and motion to dismiss. Capital Cargo asserts, as set forth in those filings, that SPTR’s petition should be dismissed and this proceeding discontinued. The basis for that assertion is that the issues in this case are the subject of a contract and that the STB lacks jurisdiction. If the STB agrees, then it will be unnecessary to reach Capital Cargo’s cross-complaint because the case would return to the Georgia Superior Court. Capital Cargo’s cross-complaint is pleaded in the alternative from the assertions in Capital Cargo’s answer and motion to dismiss, and is premised upon the proposition that service and/or demurrage are governed by applicable statutes and regulations rather than the contract.

(Answer and Cross-Complaint, 16 n. 3.)

As a further precaution, Capital Cargo included as paragraph 12 the allegation that “SPTR’s failure and/or refusal to provide Capital Cargo with three deliveries per day of three rail cars each violated SPTR’s contractual obligations to Capital Cargo.” (*Id.*, ¶ 12.) Capital Cargo explained the basis for including this allegation as follows:

As set forth in the footnote above, Capital Cargo’s cross-complaint is pleaded in the alternative from its answer and motion to dismiss, and the

contractual nature of the transportation in this case calls for dismissal of the case and elimination of any need for the STB to address the cross-complaint. Nevertheless, the allegation that SPTR violated its contractual obligations to Capital Cargo is included in this cross-complaint to prevent any argument or finding that Capital Cargo has somehow waived its position that SPTR breached the contract.

*(Id., 18 n. 4.)*

### **ARGUMENT**

SPTR's motion is founded entirely on a false premise: that Capital Cargo is asserting claims for breach of contract in its cross-complaint. In reality, Capital Cargo has gone to great lengths to make clear that the cross-complaint is pleaded in the alternative from Capital Cargo's defenses and motion to dismiss, and need not be reached unless Capital Cargo's motion is denied. If that is the case, then the STB will have concluded that the issues in this case are not creatures of contract -- and at that point, Capital Cargo's claim may properly be considered on a statutory instead of contractual basis. The inclusion of paragraph 12 in the cross-complaint does not change this reality. Rather, the footnote accompanying paragraph 12 simply reiterates and confirms that while Capital Cargo believes the claims in this case are contractual, if for some reason the STB disagrees then Capital Cargo's position may be advanced on alternative statutory grounds. Thus, the primary assertion underlying SPTR's Motion is completely wrong.

Moreover, SPTR's belief that Capital Cargo's claims in the cross-complaint really are the subject of a contract simply confirms the correctness of Capital Cargo's argument in its own motion to dismiss.

If Capital Cargo's claims are contractual, then it follows inexorably that SPTR's petition must be dismissed. That is because the claims in SPTR's petition are the flip side of the claims in Capital Cargo's cross-complaint. SPTR claims that it can charge demurrage even where it has not provided three switches per day; Capital Cargo responds that SPTR must provide three

switches and therefore cannot charge demurrage where delays are attributable to failure to provide the contractually-required level of service.<sup>2</sup> If one set of claims cannot be heard by the STB, then neither can the other. While Capital Cargo is separately filing a rebuttal of SPTR's reply to Capital Cargo's motion to dismiss<sup>3</sup>, it bears noting in consideration of SPTR's motion that SPTR appears to agree that this whole case is the subject of a contract -- and therefore may not proceed in the STB.<sup>4</sup>

Finally, SPTR's contention that Capital Cargo's claims are moot is puzzling. While there is indeed a settlement agreement in place concerning *future* arrangements, that settlement agreement did not resolve Capital Cargo's claims arising from *previous* failures to provide service. (Letter from Ronald C. Berry, Esq. to P. Campbell Ford, Esq., dated July 15, 2005, copy attached hereto as Exhibit A.) Accordingly, the settlement agreement has nothing to do with Capital Cargo's effort to avoid paying improper demurrage charges and also to recover damages. Indeed, SPTR itself proclaims that

SPTR and Capital Cargo did enter into an agreement on May 19, 2005, regarding the service to be provided to Capital Cargo going forward. This agreement post-dates all of the outstanding demurrage issues raised by SPTR in its Petition for Declaratory Order *and is irrelevant to this matter.*

(SPTR Response to Capital Cargo's Motion to Dismiss at 4 n. 1 (emphasis added).) Obviously the settlement agreement cannot be irrelevant in one of SPTR's filings with the STB, but

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<sup>2</sup> Capital Cargo also contends that SPTR is liable for damages arising from the failure to provide the agreed-upon service.

<sup>3</sup> Specifically, Capital Cargo addresses SPTR's misguided argument that there is no contract between Capital Cargo and SPTR. It is unclear why SPTR makes that argument in its Motion to Dismiss, given that the Motion is premised on the idea that Capital Cargo's Cross Complaint states a claim for breach of contract.

<sup>4</sup> It also bears noting that SPTR's argument regarding written notice of default is entirely irrelevant in considering the motion to dismiss. That is because written notice is an issue -- if at all -- under the contract, and the cross-complaint is an alternative statutory claim rather than a contractual claim. Capital Cargo addresses the notice issue in its rebuttal to SPTR's reply to the motion to dismiss.

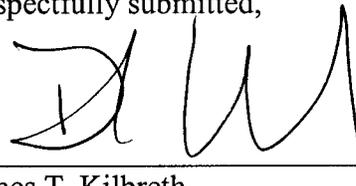
dispositive in the other. The reality is that the settlement agreement is irrelevant to the cross-complaint, and SPTR's motion should be denied.

**CONCLUSION**

For the foregoing reasons, Capital Cargo respectfully requests that the STB deny SPTR's motion.

Dated: February 21, 2007

Respectfully submitted,



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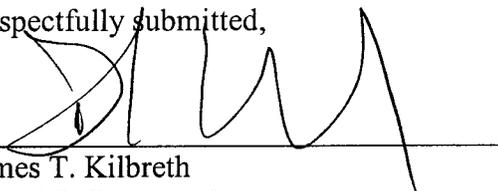
Attorneys for Respondent  
Capital Cargo, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been furnished to P. Campbell Ford, Esq., Attorney for Savannah Port Terminal Railroad, Ford, Miller & Wainer, P.A., 1200 Riverplace Blvd., Suite 600, Jacksonville, FL 32207 via federal express this 21st day of February 2007.

Dated: February 21, 2007

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'JK', written over a horizontal line.

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July 15, 2005

VIA FACSIMILE TO:

P. Campbell Ford, Esquire  
Ford, Miller & Wainer, P.A.  
1200 Riverplace Boulevard, Suite 600  
Jacksonville, FL 32207

Re: Capital Cargo, Incorporated v. Rail Link, Inc., Savannah Port  
Terminal Railroad, Inc. and Georgia Ports Authority  
Civil Action No. CV 05-755-AB

Dear Mr. Ford:

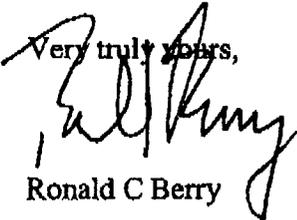
This will confirm our phone conversation yesterday relative to your June 14 letter:

- (1) You have not settled your client's counterclaim for demurrage.
- (2) I have not settled my client's damage claims.
- (3) It was you (in your May 19 letter) and not me, that suggested we resolve this matter by charging demurrage only after three deliveries had been made on any given day. This totals approximately \$3,400.
- (4) Therefore there was no significant increase in volume from my client causing demurrage.
- (5) It is simply inconceivable to me that your client can take on new business from new customers (some of whom are not on GPA property?) without any increase in capacity to handle the business thus reducing service to my client, and then expect my client to pay for this loss of service in the form of demurrage charges. Then to justify this behavior by attempting to place the "fault" on my client because it can only receive three cars goes beyond the pale.



Mr. Ford  
Page Two  
July 15, 2005

This case is losing its luster fast and should be allowed to die a natural death.

Very truly yours,  
  
Ronald C Berry

RCB/nea

cc: Tom Mahoney (via fax)  
Kenny Meyer (via fax)  
Rob Kelly (via fax)