

218931

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD34920

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

**REPLY OF RESPONDENT CAPITAL CARGO, INC.
TO MOTION OF SAVANNAH PORT TERMINAL RAILROAD, INC.
TO STRIKE CAPITAL CARGO'S REPLY
TO SPTR'S MOTION TO DISMISS
CAPITAL CARGO'S CROSS-COMPLAINT**

**James T. Kilbreth, Esq.
Daniel L. Rosenthal, Esq.
Suzannah B. Pogue, Esq.
Verrill Dana, I.L.P
One Portland Square
Portland, ME 04112
(207) 774-4000 (telephone)
(207) 774-7499 (facsimile)**

**Ronald C. Berry, Esq.
RONALD C. BERRY, P.C.
P.O. Box 10223
134 Habersham Street
Savannah, GA 31401
(912) 231-8777 (telephone)
(912) 231-1087 (facsimile)**

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD34920

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

**REPLY OF RESPONDENT CAPITAL CARGO, INC.
TO MOTION OF SAVANNAH PORT TERMINAL RAILROAD, INC.
TO STRIKE CAPITAL CARGO'S REPLY
TO SPTR'S MOTION TO DISMISS
CAPITAL CARGO'S CROSS-COMPLAINT**

Respondent Capital Cargo, Inc. ("Capital Cargo") hereby replies to the motion of Petitioner Savannah Port Terminal Railroad, Inc. ("SPTR") to strike Capital Cargo's reply to SPTR's motion to dismiss Capital Cargo's cross-complaint. SPTR's motion is nothing more than a reply to Capital Cargo's opposition to SPTR's motion, packaged under a different name. SPTR's arguments go directly to the merits of the issues raised on the motion to dismiss, and have no place in a motion to strike. Accordingly, the motion should be denied.

In its motion to dismiss, SPTR contends that Capital Cargo's cross-complaint states a contractual claim -- which may not be brought in the STB. In opposition, Capital Cargo reiterates the point made clear in the cross-complaint itself: the claim stated therein is a *statutory* claim pleaded in the *alternative* from the contractual arguments set forth in Capital Cargo's answer to SPTR's petition, and in Capital Cargo's own motion to dismiss.

As evidenced by its continued argument on these points in the motion to strike, SPTR either does not understand the concept of alternative pleading, or hopes that by

sheer persistence it can turn the statutory basis for Capital Cargo's cross-complaint into a contractual one. Whatever the case may be, SPTR's misguided contentions must be resolved on the motion to dismiss itself -- not on a motion to strike Capital Cargo's reply. There is nothing "redundant, irrelevant, immaterial, impertinent, or scandalous," 49 C.F.R. § 1104.8, in Capital Cargo's reply, and there is no basis on which to strike it.

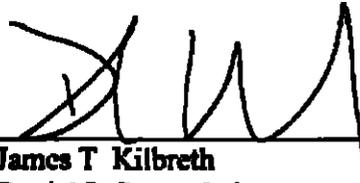
SPTR does not even cite section 1104.8 in support of its motion. Instead, SPTR argues that Capital Cargo's reply is "completely inaccurate and inconsistent with its Cross Complaint . . ." (SPTR motion to strike at 3.) In other words, says SPTR, Capital Cargo's reply should be stricken because the arguments therein are wrong. That clearly is not a basis under section 1104.8 -- or any other standard -- for striking a filing.

Indeed, the motion to strike is best understood as nothing more than the same kind of reply brief that SPTR inaccurately chides Capital Cargo for filing. (SPTR Motion to Strike Capital Cargo's Rebuttal to SPTR's Response to Capital Cargo's Motion to Dismiss at 3.) The motion to strike simply rehashes the dubious arguments set forth in various other filings that SPTR has already made with the STB. A reply by any other name is still a reply, and if 49 C.F.R. § 1104.13(c) bars Capital Cargo's rebuttal to SPTR's opposition to Capital Cargo's motion to dismiss, then it also bars SPTR's motion to strike. The only difference between the two filings is that Capital Cargo did not try to sneak its reply into the record by calling it something else.

For the foregoing reasons, the motion to strike should be denied.

Dated: March 30, 2007

Respectfully submitted,

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

**James T Kilbreth
Daniel L. Rosenthal
Suzannah B Pogue
VERRILL DANA, LLP
P.O Box 586
One Portland Square
Portland, ME 04112-0586
(207) 774-4000**

**Ronald C. Berry
RONALD C. BERRY, P.C.
P.O. Box 10223
134 Habersham Street
Savannah, GA 31401
(912) 231-8777**

**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 30th day of March 2007

Dated: March 30, 2007

Respectfully submitted,



James T. Kilgore
Daniel L. Rosenthal
Suzannah B. Pogue
Verrill Dana, LLP
P O Box 586
One Portland Square
Portland, ME 04112-0586
(207) 774-4000

Ronald C. Berry
RONALD C BERRY, P.C.
P.O. Box 10223
134 Habersham Street
Savannah, GA 31401
(912) 231-8777

Attorneys for Respondent
Capital Cargo, Inc.