

March 11, 2010

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BY HAND DELIVERY

Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20024

Re: STB Docket No. 42118

Dear Acting Secretary Quinlan:

Enclosed for filing in the above-referenced docket are an original and ten copies of Norfolk Southern's Motion to Dismiss Brampton's Complaint, together with three disks containing electronic copies.

Please date stamp the extra copy provided and return it with our waiting messenger.

Thank you for your assistance.

Sincerely,



David L. Meyer

Enclosures

cc (with enclosures): Jason C. Pedigo, Esq. (counsel for Complainants)
John M. Scheib, Esq.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

BRAMPTON ENTERPRISES, LLC
D/B/A/ SAVANNAH RE-LOAD

v.

Docket No. 42118

NORFOLK SOUTHERN RAILWAY
COMPANY

**NORFOLK SOUTHERN'S
MOTION TO DISMISS COMPLAINT**

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Pursuant to 49 C.F.R. § 1111.5, Defendant Norfolk Southern Railway Company ("Norfolk Southern" or "NS") requests that the Surface Transportation Board dismiss the complaint filed by Brampton Enterprises in the above-referenced docket.

LEGAL STANDARD AND SUMMARY OF ARGUMENT

The Board may dismiss a complaint at any time if the complaint "does not state reasonable grounds for investigation and action." 49 U.S.C. § 11701(b). In this case it is unusually clear that the Complaint filed by Brampton Enterprises, LLC ("Brampton"), understood in the context of NS's pertinent tariffs and the record of the related federal

court collection action,¹ offers no reasonable basis for further Board consideration and should accordingly be dismissed in its entirety.²

First, Brampton's Complaint is time-barred by Section 11705(c), which establishes a two-year limitations period for complaints seeking to recover damages under 49 U.S.C. § 11704(b) for "an act or omission of [a] carrier in violation of this part." As the Board has explained, this means that the complainant "may not recover damages resulting from claims that accrued more than 2 years before the complaint was filed." *Groome & Associates, Inc. v. Greenville County Economic Development Corp.*, STB Docket No. 42087 (served July 27, 2005), p. 7. Because Brampton did not file its Complaint until January 29, 2010, it may not recover damages resulting from claims that accrued prior to January 28, 2008.

Application of this limitation to Brampton's complaint is straightforward. Brampton's damages claim is based entirely on NS's allegedly unreasonable "imposition" of a demurrage deposit requirement (Compl., ¶¶ 33-38), which allegedly caused Brampton to be "unable to receive, warehouse, or reload freight delivered by rail" (*id.*, ¶ 41), and thereby "ruptured its business relationship with Galaxy Forwarding, the freight forwarding company which sent rail freight to Brampton's facility at the time the

¹ NS's relevant tariffs are attached hereto as Exhibits A and B to the Verified Statement of Paul C. Young ("Young V.S.") (attached hereto as Exhibit 1). Pertinent portions of Brampton's submissions to the District Court in the related federal action (*Norfolk Southern Ry. v. Brampton Enterprises, LLC*, No. CV407-155 (S.D. Ga.) ("*NS v. Brampton*") are attached to the Verified Statement of Karen E. Escalante ("Escalante V.S.") (attached hereto as Exhibit 2).

² Unlike in *Dairyland Power Cooperative v. Union Pacific*, STB Docket No. 42105 (served July 29, 2008), which involved complex issues relating to UP's fuel surcharge program, the conclusion that NS's imposition of a deposit requirement here is straightforward and driven by facts already before the Board.

demurrage deposit was imposed” (*id.*, ¶ 22). On the face of Brampton’s Complaint, therefore, it is plain that any claim Brampton might have had accrued in the summer of 2007 when these events occurred. Because that is more than two years before Brampton filed its complaint, Brampton’s claims must be dismissed.

Second, Brampton’s substantive claims concerning the “unreasonableness” of NS’s imposition of a demurrage deposit requirement do not warrant further investigation. The uncontested facts demonstrate that NS acted reasonably when it imposed on Brampton the per-car deposit requirement set forth in NS’s applicable tariff, as a result of Brampton’s persistent refusal to pay demurrage bills for cars that were consigned to and accepted by it for delivery. Brampton’s various theories about the “unreasonableness” of NS’s action are entirely meritless, and in key respects merely hypothetical. As we explain in detail below, the Board has before it all the facts necessary to conclude that NS’s applicable tariff establishes a reasonable demurrage security deposit program and that NS acted reasonably when it applied its tariff to Brampton.³

Third, in dismissing this case, the Board should re-emphasize for the benefit of all participants in the Nation’s rail network – as well as courts that may be called upon to adjudicate actions to collect unpaid demurrage – that demurrage is an important component of the national rail transportation policy, and serves the vital purpose of encouraging the efficient use of rail cars. Railroads are charged by statute with administering a system of demurrage payments so that users of the network have

³ Although NS believes this case should be dismissed now, so as not to squander the resources of the Board and the parties, if the Board nonetheless concludes that Brampton’s Complaint warrants further investigation, NS will submit additional evidence, and seek discovery from Brampton confirming the reasonableness of NS’s actions and demonstrating the invalidity of Brampton’s damages claims.

appropriate incentives to load and unload cars in a timely manner. *See, e.g.*, 49 U.S.C. § 10746. In the case of railcars delivered for unloading, the only way that system can function is for railroads to be able to collect demurrage charges from the entity they understand to be responsible for the unloading, namely the named consignee or the disclosed principal on whose behalf the consignee is acting. Because railroads are not able to look behind every shipment to determine who the beneficial owner of the freight is so that demurrage can be charged to that entity, the law has long presumed – as it does today in 49 U.S.C. § 10743 – that the consignee listed on the bill of lading is responsible for the demurrage *unless and until* the consignee discloses its agency status or notifies the railroad that the delivery was made in error.

In September 2008, Brampton persuaded the U.S. District Court for the Southern District of Georgia to exonerate it – incorrectly – from the underlying demurrage charges that it owed NS. That ruling alone, however, cannot make unreasonable NS’s decision to impose a deposit requirement in July 2007. Just as importantly, the Board should not permit that erroneous outcome to disrupt the previously well-established “rules of the road” that guided the Nation’s demurrage system as a whole.

BACKGROUND

The salient facts pertinent to this motion are relatively straightforward. Brampton operates a rail-served warehouse and transloading facility located on NS’s rail system in Savannah, Georgia. Brampton does business at that facility under the trade name “Savannah Re-Load” (for convenience we will generally use the term Brampton to refer to this business). During the first half of 2007, a substantial number of railcars were delivered to Brampton for unloading.

For many of those cars, Brampton (*i.e.*, “Savannah Re-Load”) was named as the consignee on the applicable bill of lading.⁴ In accord with its shipping instructions, NS dutifully delivered those cars to Brampton’s Savannah facility. NS notified Brampton that such cars were available for delivery, and Brampton accepted NS’s delivery of those cars.⁵ At no time prior to the federal court litigation involving NS’s efforts to collect past due demurrage did Brampton ever inform NS that it was not the true consignee, or provide NS with written notice informing it that Brampton was acting as an agent for another party, as called for by 49 U.S.C. § 10743(a)(1).⁶

Unfortunately, many of the cars delivered to Brampton were not unloaded and returned empty within the two-day free period established by NS’s applicable demurrage tariff (NS Tariff 6004-B, *Young V.S.*, ¶ 4 & Exh. B). As a result, the cars delivered to

⁴ Brampton has consistently disputed that it was ever the “true consignee,” but there is no question that, as the district court in the related action held, the “majority of the bills of lading for the freight identified Savannah Re-Load [*i.e.*, Brampton] as the consignee who was to receive the goods.” *Norfolk Southern Ry. v. Brampton Enterprises, LLC*, No. CV407-155 (S.D. Ga. Sept. 15, 2008) (“S.D. Ga. Order”), p. 2 (attached as Exhibit A to Brampton’s Complaint).

⁵ *E.g.*, *Norfolk Southern Ry. v. Groves*, 586 F.3d 1273, 1275 (11th Cir. 2009) (“*Groves*”) (Escalante, V.S., Exh. G) (“Before rail cars were delivered, Norfolk would notify Savannah that rail cars from certain shippers had arrived and were ready for delivery.”). Although Brampton argued in the district court that it did not accept the “freight” in the sense of inspecting the contents as would the beneficial owner or its agent (*see, e.g.*, Brampton’s Brief in Support of Defendant’s Motion for Partial Summary Judgment, *NS v. Brampton* (May 30, 2008), p. 10 (Escalante V.S., Exh. E)), Brampton never disputed that it approved NS’s placement of railcars consigned to it on its siding, so that Brampton could unload those cars and conduct its business. Indeed, Brampton’s desire to have NS deliver those railcars is the very foundation for Brampton’s claims in this case. *See* Compl., ¶¶ 6-8 (alleging, *inter alia*, that “when Norfolk Southern refuses to deliver freight to Brampton’s facility, Brampton has no alternative means to receive freight”).

⁶ *See* note 18, below.

Brampton incurred demurrage charges under that tariff, and despite NS's demand Brampton refused to pay any such charges. (Compl., ¶ 9.)

Based on this experience, NS decided to impose on Brampton a per-car demurrage security deposit requirement, as set forth in NS Tariff 8002-A (Item 6160). Specifically, on July 31, 2007, NS notified Brampton that it would be required to provide NS with a deposit in the amount of \$1,200 in connection with each railcar delivered for unloading at Brampton's Savannah facility. (Compl., ¶¶ 13-14, 18.) In accordance with NS's tariff, the deposit amount was calculated to be \$1,200 because that was the maximum amount of demurrage charges that Brampton had accrued on any one railcar during the preceding 12-month period. NS Tariff 8002-A (Item 6160(C)); *Young V.S.*, ¶ 6 & Exh. A.

After NS imposed this deposit requirement, Brampton did not submit any deposits to NS for more than a year. *Young V.S.*, ¶ 7. Instead, it stopped receiving railcars entirely, apparently having instructed its freight forwarder to redirect shipments to other receivers in the Savannah area.⁷ It was not until October 22, 2008 – nearly 15 months after NS imposed the deposit requirement – that Brampton submitted its first demurrage deposit to NS. *Young, V.S.*, ¶ 7. Each of Brampton's specific deposits is detailed in Table 1 below. In total, Brampton submitted deposits on only three occasions, covering only eight railcars, and amounting to only \$9,600 in funds, with no more than \$7,200 on deposit at any one time. *See Young V.S.*, ¶¶ 7-9.

⁷ Nor did Brampton seek an injunction from the Board against NS's imposition of its demurrage deposit requirement, either in 2007 when that requirement was established or at any subsequent time.

TABLE 1			
All Demurrage Deposits Paid By Brampton			
<u>Date Deposit Received</u>	<u>Amount of Deposit</u>	<u>Date Railcar Returned Empty</u>	<u>Date Deposit Refunded</u>
10/22/2008	\$2,400	10/23/2008	11/26/2008
12/10/2008	\$6,000	12/17-18/2008	1/8/2009
12/16/2008	\$1,200	12/22/2008	2/19/2009

In October 2007, NS filed a complaint in the United States Southern District Court for the Southern District of Georgia to collect from Brampton the underlying unpaid demurrage charges that had prompted imposition of the security deposit requirement. (Compl., ¶ 23.) As the district court’s order recounts, Brampton asked the court to grant summary judgment against NS’s claims on the ground that it could not be held responsible for the demurrage charges because it was not the “true consignee,” even though the bills of lading identified it as the consignee. S.D. Ga. Order, p. 3 (attached as Exhibit A to Brampton’s Complaint). Brampton did not quarrel with NS’s calculation of the amount of demurrage owed, and has never contested the fact that *someone* owes demurrage on the cars that Brampton received and unloaded. The district court – ignoring federal statute and longstanding precedents – agreed with Brampton’s position and entered summary judgment in favor of Brampton on September 15, 2008.⁸ NS appealed that ruling to the Eleventh Circuit, which entered an order affirming the district court’s judgment on November 2, 2009 (*see Escalante V.S., Exh. G*). NS promptly

⁸ When these issues were under consideration by the district court, NS did not refer the question of Brampton’s liability for demurrage to the Board because NS regarded that liability as established by the well-settled precedents discussed below.

sought rehearing of that decision, which was denied. NS is evaluating whether to seek review of the Eleventh Circuit's ruling by the U.S. Supreme Court.

On the heels of the Eleventh Circuit's ruling regarding NS's underlying demurrage claims, Brampton filed its complaint with the Board seeking \$249,000 in damages resulting from NS's imposition of a demurrage deposit requirement. The imposition of that requirement, Brampton contends, was an "unreasonable practice" and led to Brampton being unable to receive railcars and in turn to the "rupture" of Brampton's business relationship with Galaxy Forwarding, the entity that was sending freight to Brampton's facility in 2007. (Compl. ¶¶ 21-22).

Brampton supports its claims by relying on a purely hypothetical example of how much it would have had on deposit with NS based on various assumptions about a pace of railcar deliveries, the amount of demurrage that would have been due on those hypothetical cars (Brampton assumes zero), and the amount of time NS would have taken to refund any amounts on deposit (assuming Brampton did not actually incur demurrage commensurate with the deposit amount on each railcar delivered). (Compl., ¶ 20.) Based on these hypothetical assumptions, Brampton asserts, "it was forced to cease warehousing rail freight" and it suffered an "inability to receive rail freight" which ruptured its business relationship with Galaxy Forwarding and caused it lost profit damages in the amount of \$249,000. (Compl., ¶¶ 21-22, 39-46.) Should the Board institute an investigation, Brampton will not be able to support its hypothetical allegations with real evidence. Among other things, Brampton's Complaint ignores the fact that (a) such funds were never deposited with NS and (b) the deposit cap set forth in

NS's tariff would have precluded deposits of the magnitude Brampton alleges. *See* pages 20 & 37-38 below.

ARGUMENT

I. Brampton's Damages Claims Are Barred by the Two-Year Statute of Limitations of 49 U.S.C. § 11701(c)

Brampton's damages claims are barred in their entirety by Section 11705(c), which establishes a two-year limitations period for complaints seeking to recover damages under 49 U.S.C. § 11704(b) for "an act or omission of [a] carrier in violation of this part." Brampton's claim is subject to this limitations period because Brampton seeks to recover damages under Section 11704(b) based on the allegation that NS's "unreasonable rules and practices" violated Section 10702(2). (Compl., ¶¶ 42-44.)

As the Board has explained, a complainant may not "recover damages resulting from claims that accrued more than 2 years before the complaint was filed." *Groome & Associates, Inc. v. Greenville County Economic Development Corp.*, STB Docket No. 42087 (served July 27, 2005), p. 7.⁹ Because Brampton did not file its Complaint until January 29, 2010, Brampton may not recover damages resulting from claims that accrued prior to January 28, 2008.

All of Brampton's damages claims accrued in 2007, when NS imposed its demurrage deposit requirement, and certainly no later than the second half of 2007 when Brampton ceased receiving railcars. A claim under 49 U.S.C. § 11704(b) must be based on "acts or omissions" that violate the carrier's statutory obligation. As the Board has

⁹ *See also Reaemco, Inc. v. Allegheny Airlines*, 496 F. Supp. 546, 559 (S.D.N.Y. 1980) (action barred where claimed violations of the Interstate Commerce Act took place more than two years prior to the commencement of the suit).

explained, “the Interstate Commerce Act generally defines ‘accrual’ of a cause of action as the result of an affirmative act.” *Groome & Associates, Inc. v. Greenville County Economic Development Corp.*, STB Docket No. 42087 p. 7. This is an age-old principle. See Memorandum: *When a Cause of Action Accrues Under the Act to Regulate Commerce*, 15 I.C.C. 201, 204 (1909) (in “complaints for the recovery of damages for alleged violations of the interstate commerce laws of which this Commission has jurisdiction, the cause of action accrues when the carrier does the unlawful act or fails to do what the law requires, on account of which damages are claimed.”).

Here, we know precisely what “affirmative act” Brampton complains of: the imposition of the security deposit requirement in 2007. As the Complaint spells out, Brampton’s claims are based entirely on NS’s allegedly unreasonable “imposition” of a demurrage deposit requirement (Compl., ¶¶ 33-38), which allegedly caused Brampton to be “unable to receive, warehouse, or reload freight delivered by rail” (*id.*, ¶ 41), and thereby “ruptured its business relationship with Galaxy Forwarding, the freight forwarding company that sent rail freight to Brampton’s facility at the time the demurrage deposit was imposed” (*id.*, ¶ 22).¹⁰ All of these events occurred in the summer of 2007, more than two years before Brampton filed its complaint.¹¹

¹⁰ When it sought summary judgment on NS’s demurrage claims in the federal court collection action, Brampton asserted as an undisputed fact that Galaxy Forwarding was the “only freight forwarding company that sent rail cars to [Brampton’s] facility.” Brampton’s Statement of Material Facts and Conclusions of Law in Support of Brampton’s Motion for Partial Summary Judgment, *NS v. Brampton* (May 30, 2008), ¶ 8 (Escalante V.S., Exh. F).

¹¹ Although NS continued to require a deposit during 2008, the Complaint spells out with clarity that the cause of Brampton’s future lost profits occurred in 2007, when the imposition of a deposit requirement *immediately* led to Brampton’s decision that it could
(footnote continued on next page ...)

Brampton acknowledges the two-year limitations period when it states that it seeks to recover only its lost profits “during the two-year period preceding the date this Complaint is received for filing.” (Compl., ¶ 46). However, the law is clear that claims for lost profits do not accrue for statute of limitations purposes when the profits allegedly were lost,¹² but when the conduct allegedly causing the injury occurred. *See, e.g., Blue Ribbon Beef Co., Inc. v. Napolitano*, 696 A.2d 1225, 1229 (R.I. 1997) (cause of action accrued for statute of limitations purposes when defendant allegedly breached contract, ultimately causing cessation of plaintiff’s business, and not later when plaintiff failed to earn profits from that business); *see generally City of Miami v. Brooks*, 70 So.2d 306, 308 (Fl. 1954) (“The general rule, of course, is that where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. It is not material that all damages resulting from the act shall have been sustained at that time and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a

(... footnote continued)

no longer receive railcars and thereby ruptured its business relationship with Galaxy Forwarding (again, the only entity directing railcars to Brampton’s Savannah facility, *see* note 10, above). By January 2008 (two years before the Complaint was filed), Brampton had already gone more than five months without receiving a single railcar from Galaxy or anyone else (as confirmed by the fact that Brampton paid no deposits on railcars until more than a year after the deposit requirement was imposed, *see Young V.S.*, ¶ 7). As Brampton’s “managing member,” William Groves, testified at his deposition in the federal court case, Brampton’s relationship with Galaxy “terminated” in August or September 2007: “By mid-September [2007] once the last of Galaxy’s invoices had been paid to Savannah Re-Load, that would have been it.” Deposition of William S.R. Groves *NS v. Brampton* (Apr. 23, 2008), Tr., pp. 36; *see also id.*, pp. 30-31 (*Escalante V.S.*, Exh. D).

¹² Brampton would not, for example, have any claim for a refund of deposits paid after January 2008, since all such deposits have already been refunded. *See Young V.S.*, ¶¶ 7-10.

later date.”); *Sopha v. Owens-Corning Fiberglas Corp.*, 230 Wis.2d 212, 601 N.W.2d 627 (Wis. 1999) (“all injuries caused by a single transaction or series of transactions by a tortfeasor are part of a single cause of action so that a ‘later injury from the same tortious act does not restart the running of the statute [of limitations]’”).

Thus, as in cases like *Blue Ribbon Beef*, Brampton’s cause of action arose in 2007, when, according to Brampton’s own allegations, NS’s imposition of a deposit requirement first caused it to lose profits that it allegedly would have earned from its relationship with Galaxy. Accordingly, the Board should dismiss Brampton’s complaint as time-barred pursuant to Section 11705(c).

II. Brampton’s Complaint Offers No “Reasonable Grounds” for Further Investigation of the Reasonableness of Norfolk Southern’s Decision to Impose a Demurrage Deposit Requirement in Accordance with NS’s Tariffs

Brampton’s Complaint should also be dismissed on the merits. Demurrage deposits are not per se unreasonable, *Rail General Exemption Authority – Miscellaneous Agricultural Commodities – Petition of G&T Terminal Packaging Co., Inc., et al., to Revoke Conrail Exemption*, Ex Parte No. 346 (Sub-No. 14A) (ICC served June 13, 1989) (“*G&T Terminal*”), pp. 7-8 (citing *Illinois Central Gulf R. Co. - Security Deposits*, 358 I.C.C. 312 (1978)). Accordingly, reviewing the reasonableness of a carrier’s application of its demurrage deposit program to a particular situation is a fact-driven inquiry. The facts as alleged by Brampton here, and as submitted by Brampton in support of its motion for summary judgment in the related federal court action, amply demonstrate that NS acted reasonably in applying its demurrage deposit program to Brampton.

A. Norfolk Southern's Demurrage Deposit Program is a Reasonable and Vital Part of Its Demurrage System

The reasonableness of NS's actions begins with its establishment, in NS Tariff 8002 (Item 6160) of a reasonable security deposit program for demurrage and other charges. Deposit programs of this sort are not merely reasonable, but important in ensuring collection of demurrage charges by rail carriers in fulfillment of their statutory car supply obligations.

1. Demurrage Charges are a Vital Component of the System of Railroad Car Supply

Demurrage is a vital part of the railroad car supply system. Section 10746 of the ICCTA indeed demands that rail carriers establish demurrage charges and related rules so as to "fulfill[] the national needs related to (1) freight car use and distribution; and (2) maintenance of an adequate supply of freight cars to be available for transportation of property." 49 U.S.C. § 10746; *see also, e.g., Savannah Port Terminal R.R. – Petition for Declaratory Order – Certain Rates & Practices as Applied to Capital Cargo, Inc.*, STB Finance Docket No. 34920 (served May 30, 2008), p. 2 n.3. As the Board has recently reaffirmed, "[d]emurrage charges ... serve two purposes: (1) to compensate the railroad for added costs (e.g., for the car-hire charges it pays to the carrier owning the equipment being held) or loss of the use of assets; and (2) to encourage shippers to return freight cars to the system, thereby making the entire system more efficient." *North America Freight Car Association, v. BNSF Ry.*, STB Docket No. 42060 (Sub-No. 1) (served Jan. 26, 2007).

2. Demurrage Deposit Programs Are a Customary and Accepted Means of Requiring that Demurrage Be Paid

Given the importance of demurrage charges as part of a system of incentives or the efficient use and handling of cars, it is equally important that participants in the rail network engaged in the handling of those cars – including their loading at origin and their unloading at destination – not be able to sidestep the car handling requirements mandated by Congress so as to avoid responsibility for demurrage. As a result, it has long been established that demurrage deposit programs are an important, and necessarily reasonable, part of a demurrage regime. The ICC observed that it had “previously held that tariffs providing for prepayment or guarantee of payment of such charges are permissible and effective methods of encouraging payment,” and as a result there is nothing per se unreasonable or unlawful about a payment security plan.” (*G&T Terminal*), pp. 7-8 (citing *Illinois Central Gulf R. Co. – Security Deposits*, 358 I.C.C. 312 (1978)).¹³ And the implementation of such demurrage deposit programs has been upheld on several occasions when challenged. See, e.g., *Railroad Salvage & Restoration, Inc., & G.F. Weideman International, Inc. – Petition for Investigation & for Emergency Relief Under 49 U.S.C. 721(B)(4) – Security Deposit for Demurrage Charges, Missouri & Northern Arkansas R.R. (Revised Item 1010)*, STB Docket No. 42109 (served July 25, 2008) (“*Railroad Salvage - July 2008*”) (upholding reasonableness of carrier’s deposit program); *G&T Terminal*, pp. 7-8 (same).

¹³ Indeed, the ICC had long held that even more onerous requirements, such as the requirement of “prepayment of charges in advance of actual transportation” or the measures aimed at protecting carriers “in the matter of charges, such as surety bonds, were reasonable and appropriate. *T.N. & B.B. Sample v. Atchison, Topeka & Santa Fe Ry.*, 139 I.C.C. 324 (1928); see also *Illinois Central Gulf*, 358 I.C.C. at 319.

In light of the importance of demurrage, and rail carriers' obligations to establish demurrage charges in order to encourage efficient car utilization, the ICC previously made clear that it would be "manifestly unfair" to require a carrier to continue to provide service (*i.e.*, to continue to deliver cars for unloading) "without payment of any past or future [detention and/or demurrage] charges" simply because such charges were subject to dispute. *G&T Terminal*, p. 9. Brampton's position in this case appears to be the same as that rejected by the Board in *G&T Terminal*. Although Brampton may have disputed that it was properly responsible for the demurrage charges that NS assessed against it in the past, that dispute did not disable NS from requiring security for the payment of demurrage charges on future shipments as a precondition for continuing to deliver cars to Brampton.

3. Norfolk Southern's Demurrage Deposit Tariff Is Straightforward and Reasonable

Norfolk Southern did not invent the idea of a demurrage security deposit in order to impose one on Brampton. To the contrary, and in accord with the ICC's command in *G&T Terminal* (at p. 8), that security deposit programs be non-discriminatory, NS has long had in place a tariff that sets forth straightforward and reasonable terms that NS applies in an even-handed manner. Those terms are published in Item 6160 of NS Tariff 8002-A (Young V.S., ¶ 2 & Exh. A). As Brampton acknowledges, under this tariff *all shippers and receivers* are subject to a deposit requirement in the event that (a) they are not on NS's credit list *and* (b) they have failed to pay demurrage charges after specific

written demand to do so. (Compl., ¶ 13); *see also* Tariff 8002-A (Item 6160(A)) (emphasis in original).¹⁴

In the event a deposit is required, it is entirely forward looking. For each car tendered for delivery (as in the case of a receiver like Brampton), a deposit must be paid in an amount designed to reflect the potential amount of demurrage obligation that could accrue with respect to that car. That amount is calculated based on the maximum amount of demurrage charges that that customer itself accrued on any one car during the preceding 12-month period. *Id.*, Item 6160(C); *see also* Young V.S., ¶ 6 (describing calculation of deposit in Brampton's case).

For customers receiving multiple cars, NS's tariff also establishes a ceiling on the customer's aggregate deposit obligation (the "total amount deposited") that is also based on the customer's actual demurrage history. That ceiling is equal to the amount of "existing past due demurrage ... accrued by the customer plus \$397.00." Tariff 8002-A (Item 6160(D)). That ceiling never came into play with respect to Brampton, because it never had funds on deposit that came close to the maximum established by NS's tariff. *See* Young V.S. ¶ 10.¹⁵

Under NS's tariff, amounts on deposit are applied to any demurrage charges associated with the specific car (*i.e.*, the "corresponding equipment," *see* Tariff 8002-A

¹⁴ Any deposit requirement is automatically discontinued if a customer is placed on NS's credit list or has satisfied all outstanding demurrage charges and "given assurance to the railroad's credit office that future demurrage ... charges will be paid" *Id.*, Item 6160(F).

¹⁵ The maximum amount required to be deposited by Brampton with NS would have been the total amount of past due demurrage charges, \$70,680 plus \$397, or approximately \$71,077. This amount is a small fraction of the outrageous hypothetical amounts that Brampton cites in its Complaint. (Compl. ¶ 20).

(Item 6160(E)) to which the deposit applies. Once the amount of any such charges becomes known (which as the ICC observed cannot be calculated in advance of the car's unloading and empty release to NS – *see G&T Terminal*, p. 10), the remaining balance of the deposit (if any) is refunded. *Id.*, Item 6160(D). All three of the deposits Brampton made were refunded in full in this manner, within an average of 38 days after the corresponding cars were returned empty to NS. (Young V.S., ¶ 10.)

B. There Are No Reasonable Grounds for Investigation of Brampton's Claims that NS's Imposition of a Deposit Requirement Was Unreasonable

Brampton's Complaint sets forth four alternative bases for claiming that NS's imposition of a demurrage deposit requirement in July 2007 was unreasonable. First, Brampton argues that NS acted unreasonably when it imposed any deposit requirement at all, because, according to Brampton, Brampton was not responsible for *any* past-due demurrage charges. (Compl., ¶ 33). Second, Brampton contends that NS acted unreasonably when it imposed a deposit requirement based on past-due amounts that NS did not actually contend that Brampton owed, and when NS later failed to reduce the amount of the deposit Brampton was required to make after reducing the aggregate amount of past-due demurrage it claimed Brampton owed. (Compl., ¶¶ 35-37). Third, Brampton asserts that NS's demurrage deposit requirement constituted an unreasonable effort to coerce payment by Brampton of disputed past-due amounts. (Compl., ¶ 34). Finally, Brampton asserts that NS's deposit requirement was unreasonable because it imposed on Brampton an "undue financial burden." (Compl., ¶¶ 38-39). As we explain below, the Board has before it sufficient undisputed facts to determine that none of Brampton's theories has merit and thus that no further investigation of Brampton's claims is warranted.

1. NS's Failure to Date to Collect Past-Due Demurrage Charges from Brampton Does Not Render NS's Imposition of a Deposit Requirement Unreasonable

Brampton first alleges that it was unreasonable for NS to impose a deposit requirement based on past due demurrage charges that Brampton asserts it was not obligated to pay, as subsequently determined by the Southern District of Georgia and the Eleventh Circuit in the related federal court action. (Compl., ¶ 33).

There is no merit to this assertion. The uncontested facts establish that NS acted reasonably when it required Brampton to make demurrage security deposits in connection with potential deliveries of railcars at a time when Brampton had refused to pay substantial past-due demurrage bills. The reasonableness of NS's actions must, of course, be judged in light of the circumstances as of 2007, when NS acted. This is a hornbook principle when the law tests the validity of a person's conduct against a "reasonableness" standard. *Cf., e.g., Yerkes v. Northern Pac. Ry. Co.*, 112 Wis. 184, 193 (1901) ("The rule has been repeatedly laid down that due care is to be tested by the surrounding circumstances, and that no definition is complete or correct which does not embody that element. Ordinary care is the care ordinarily exercised by the great mass of mankind, or its type, the ordinarily prudent person, under the same or similar circumstances, and the omission of the last qualification, 'under the same or similar circumstances,' or 'under like circumstances,' is error."); *Edwards v. Lamarque*, 475 F.3d 1121, 1127 (9th Cir. 2007) ("In evaluating the reasonableness of [defendants'] actions, a reviewing court must consider the circumstances at the time of [its] conduct, . . . and cannot 'second-guess' its decisions or view them under the 'fabled twenty-twenty vision of hindsight.'"). When NS informed Brampton that a demurrage deposit would be required, NS reasonably believed – and continues to this day to believe – that Brampton was properly responsible

for substantial amounts of demurrage charges that it had simply refused to pay. NS's position was – and remains – supported by statute and well-established Board and judicial precedent.

This is not a case where NS imposed a security deposit as a result of a shipper or receiver's refusal to pay demurrage bills that NS knew to be erroneously computed, or which NS failed to check were correctly computed. *Cf. Illinois Central Gulf, R.R. – Security Deposits – Payment of Demurrage Charges*, 358 I.C.C. 312, 318 (1978) (suggesting that carriers should “check to ascertain that demurrage computations are accurate prior to imposition of a security deposit”). Although the precise amount of demurrage charges that Brampton owed and refused to pay was adjusted from time to time, there is no dispute about the following:

- (1) Brampton (doing business as “Savannah Re-Load”) was the named consignee on bills of lading for a substantial number of railcars that were delivered to its Brampton Road facility (as the District Court held, “the majority of the bills of lading for the freight identified Savannah Re-Load as the consignee who was to receive the goods”);¹⁶
- (2) Brampton was notified by NS that the cars were available for delivery, and Brampton accepted them by approving NS's placement of those cars on

¹⁶ S.D. Ga. Order, p. 2 (attached as Exhibit A to Brampton's Complaint).

Brampton's spur, so that Brampton could "unload[] it in order to re-load it into an appropriate container for export via container ship;"¹⁷

- (3) Brampton never informed NS that it was not the true consignee of the shipments that NS delivered to it;¹⁸
- (4) Brampton unloaded those cars and returned them empty to NS, in many cases long after they were placed by NS, thereby incurring substantial demurrage charges; and
- (5) Brampton was sent bills for this demurrage, and refused to pay those bills; Brampton acknowledges that NS's unpaid and past-due demurrage bills totaled at least \$57,000 as of July 31, 2007, when NS imposed a security deposit requirement for future deliveries. (Compl., ¶¶ 12, 14.)

Far from constituting an "unreasonable practice," NS's decision to implement its security deposit tariff in these circumstances was entirely reasonable, and indeed an important step in maintaining the integrity of NS's overall demurrage program, which is

¹⁷ Affidavit of William Groves, Exhibit A to Brampton's Brief in Support of Defendant's Motion for Partial Summary Judgment, *NS v. Brampton* (May 30, 2008), p. 2 (Escalante V.S., Exh. E); *see also* note 5, above.

¹⁸ Brampton acknowledged in the federal court action "that it did not deny being the named consignee," but argued that this was because NS never informed it of that fact. Brampton's Response to Norfolk Southern's Statement of Undisputed Material Facts and Conclusions of Law, *NS v. Brampton* (Apr. 7, 2008), ¶¶ 8-9 (Escalante V.S., Exh. C). Brampton also acknowledged that it did not provide the notice required by 49 U.S.C. § 10743 because that statute did not apply to it. To support that view, Brampton asserted that it was "not an agent for any entity." Brampton's Statement of Material Facts and Conclusions of Law in Support of Brampton's Motion for Partial Summary Judgment, *NS v. Brampton* (May 30, 2008), ¶ 25 (Escalante V.S., Exh. F); *see also* Brampton's Brief in Support of Defendant's Motion for Partial Summary Judgment, *NS v. Brampton* (Feb. 18, 2008), pp. 7-8 (noting that Brampton "is not an agent" and reasoning that 49 U.S.C. § 10743 therefore "is inapplicable") (Escalante, V.S., Exh. E).

designed to carry out the statutory mandate of Section 10746. NS was reasonably entitled to conclude that Brampton would continue to incur demurrage charges on future deliveries, would be responsible for the payment of those charges, and would nonetheless continue to refuse to pay. Imposition of a deposit requirement in such circumstances is a “permissible and effective method[] of encouraging payment.” *G&T Terminal*, p. 8.¹⁹

a. Based on Its Tariff and Long-Standing Precedent, NS Reasonably Determined in 2007 that Brampton Owed Demurrage

In 2007, NS reasonably concluded that a combination of its demurrage tariff and well-established precedent made Brampton responsible for demurrage charges incurred on cars consigned to it and accepted by it for delivery. The proper analysis of Brampton’s responsibility for demurrage charges begins with the applicable tariff. As the Board explained in *R. Franklin Unger, Trustee of the Indiana Hi-Rail Corp, Debtor – Petition for Declaratory Order – Assessment and Collection of Demurrage and Switching Charges*, STB Docket No. 42030 (served June 14, 2000), a shipper’s “obligation to pay demurrage charges” arises not “out of the contract of carriage for the freight itself,” but “out of [the rail carrier’s] lawful establishment of such charges [in the carrier’s tariff].” *Id.*, p. 4. Here, NS Tariff 6004-B, which was in effect at the time

¹⁹ The fact that Brampton *disputed* its responsibility to pay demurrage charges is no obstacle to the imposition of a deposit requirement. To the contrary, the customer’s refusal to pay demurrage charges is generally treated as a pre-condition to the imposition of a security deposit requirement, and every case that has addressed the reasonableness of a particular deposit program arose in the context of a customer’s refusal to pay disputed demurrage balances. See *Railroad Salvage- July 2008*, p. 5 (upholding reasonableness of a prospective deposit requirement “imposed as a result of the dispute over past charges,” the validity of which remained at issue in a related Board proceeding); *G&T Terminal*, p. 4 (upholding reasonableness of a deposit program where shipper “dispute[d] the validity of the D/D charges claimed by Conrail” and asserted that “none of the D/D charges [wa]s legitimately due Conrail”).

demurrage charges were assessed against Brampton, provided (at Item 850) that “[d]emurrage charges will be assessed against the consignor at origin or consignee at destination who will be responsible for payment,” and defined “[c]onsignee” (at Item 200) as the “party to whom a shipment is consigned or the party entitled to receive the shipment.” Young V.S., Exh. B. NS’s demurrage tariff thus clearly applied to Brampton, since the “majority of the bills of lading for the freight identified Savannah Re-Load as the consignee who was to receive the goods.” S.D. Ga. Order, p. 2 (attached as Exhibit A to Brampton’s Complaint).

Under very longstanding Board and judicial precedent, receivers of railcars are liable for the payment of demurrage in these circumstances. That line of precedent began nearly a century ago. In 1923, Judge Learned Hand concluded that it was “indeed settled” that the “consignee of goods shipped by a carrier becomes liable for the freights established in its tariffs, regardless of his knowledge of their amount, or of any agreement between the parties,” and that “the same rule would necessarily apply to demurrage charges.” *In re Tidewater Coal Exch.*, 292 F. 225, 234 (S.D.N.Y. 1923) (Hand, J.). The application of this rule to warehousemen like Brampton who are named as consignees on the bill of lading, but who claim not to be the true consignees of the freight is equally well established. As Judge Hand observed, when the carrier does not know that the named consignee is not the true consignee, the named consignee is nonetheless “treated as the presumptive owner and compelled to pay.”“ If, on the other hand, the named consignee is known to be “only an agent” for another party, the “principal alone would [be] liable.” *Id.*

These core principles have been applied repeatedly over the ensuing decades, by both the courts and the ICC. *See, e.g., Middle Atlantic Conference v. United States*, 353 F. Supp. 1109 (D.D.C. 1972) (three-judge panel affirming ICC order) (*affirming Responsibility for Payment of Detention Charges, Eastern Central States*, 335 I.C.C. 537, 541-42 (1969)). In *Middle Atlantic Conference*, the court, relying on *Tidewater Coal* and numerous other authorities, explained that liability for demurrage can be “imposed legislatively through the device of a tariff” on “warehousemen, and others similarly situated, who appear as *consignees* on the bill of lading,” unless such parties put the carrier on notice that they are not the true consignee. 353 F. Supp at 1120-21 (emphasis in original).

These longstanding principles are now embodied directly in Section 10743 of the ICCTA, which makes consignees liable for payment even where they are “an agent only, not having beneficial title to the property,” *unless* the consignee “gives written notice to the delivering carrier before delivery of the property” that it is merely an agent and provides the name and address of the beneficial owner of the property. 49 U.S.C. § 10743(a)(1).

The U.S. Court of Appeals for the Third Circuit recently applied these principles in a case presenting the same facts that NS faced when it determined that Brampton was responsible for demurrage charges under NS Tariff 8004-B. That court, in a carefully reasoned opinion, agreed with the carrier’s position that demurrage was properly assessed in such circumstances. *See CSX Transportation, Inc. v. Novolog Bucks County*, 502 F.3d 247 (3d Cir. 2007). In the *Novolog* case, Novolog was a “private port” that functioned as a transloader of freight from railcars to other means of transportation. CSXT delivered

loaded railcars to Novolog, and Novolog unloaded those cars and returned them empty to CSXT. The bills of lading identified Novolog as the consignee. Consistent with Brampton's position here, Novolog asserted that it was not the true consignee and in fact had no ownership interest in the shipments, but merely "received and forwarded cargo on behalf of others and on their instructions." 502 F.3d at 251. During a period of high shipping volume, Novolog was not able to unload cars within the two-day free period under CSXT's demurrage tariff. Like Brampton, Novolog refused to pay, claiming it was not the true consignee and thus not a party to the transportation contract. The Third Circuit disagreed, holding squarely 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)."

502 F.3d at 254.

Novolog and almost a century of consistent authority amply support the reasonableness of NS's decision to impose a demurrage deposit obligation on Brampton after it refused to pay tens of thousands of dollars of demurrage charges for cars that it accepted for delivery and for which it was the named consignee. From NS's perspective in 2007, and with this information available to it at that time, there was no other party but Brampton that NS could reasonably have billed for demurrage associated with the unloading of these cars, and Brampton's refusal to pay those charges reasonably warranted imposing a deposit requirement.

b. The Later-Decided Federal Court Decisions Are at Best Irrelevant, and in any Event Were Wrongly Decided

The fact that Brampton ultimately persuaded a federal district court that it was not liable for demurrage charges under these circumstances, and managed to have that ruling sustained on appeal, is simply not relevant to the question whether NS's imposition of the deposit requirement was, as Brampton charges, an "unreasonable practice." First, the only question here is whether NS took reasonable actions based on the information available to it at the time it acted. As noted above, the reasonableness of NS's conduct in July 2007 cannot be judged in light of judicial decisions rendered more than a year later, especially ones that deviated so substantially from almost 100 years of precedent. *See, e.g., Edwards v. Lamarque*, 475 F.3d 1121, 1127 (9th Cir. 2007).

Second, and more fundamentally, the decisions of the federal courts in the related action cannot govern the result here, which seeks affirmative relief from the Board based on the Board's own determination of the reasonableness of NS's conduct in a case submitted to it for adjudication under 49 U.S.C. § 10702. In this action, the Board must give effect to its own precedents regarding the reasonableness of demurrage deposits assessed pursuant to a tariff. *E.g., G&T Terminal; Illinois Central Gulf*. Moreover, to the extent that the validity of the underlying demurrage charges are themselves called into question, the Board must heed its own well-established jurisdiction to determine responsibility for demurrage. *See, e.g., PCI Transportation, Inc. v. Fort Worth & Western R.R.*, STB Docket No. 42094 (Sub-No. 1) (served Apr. 25, 2008), p. 10 (where the transportation is pursuant to a tariff rather than a Section 10709 contract that ousts the

Board's jurisdiction, it is for the Board to determine "whether the disputed demurrage charges were properly assessed under that tariff").²⁰

The Board thus may not find NS's demurrage deposit requirement to be unreasonable without independently concluding that it should have been clear to NS that Brampton had no responsibility for the underlying demurrage charges that it refused to pay. No such conclusion is possible, however. NS appropriately concluded – consistent with the long line of precedent summarized above – that Brampton was responsible for demurrage on railcars that, at least so far as NS was aware at the time, were validly consigned to Brampton and that unquestionably had been accepted by Brampton for delivery and unloading without (as Brampton acknowledges) Brampton ever having sent NS the written notice of agency required by 49 U.S.C. § 10743.

In the federal court action, Brampton managed to persuade the courts that the *Novolog* case, and the long line of precedent discussed above, was simply inapplicable to it. Although it did not dispute that it was *named* as the consignee on the bills of lading, it asserted that this designation was a mistake on the part of the shippers. It argued that it could not have informed NS that it was not the consignee because it had no idea it was ever listed as such. And it likewise could not have informed NS that it was an "agent" pursuant to 49 U.S.C. § 10743 because it was not an agent; as Brampton explained, it was not "an agent for any entity" when it unloaded the railcars that were delivered.²¹

Brampton also contended that, although it approved of the delivery of railcars by NS so

²⁰ As explained above (at note 8), NS did not previously seek the Board's guidance on the underlying issue of Brampton's liability for demurrage because NS regarded it to be clearly established by applicable precedents.

²¹ See note 18, above.

that it could unload them (and thereby earn substantial profits),²² it never “accepted” the contents of the shipments in the sense that the beneficial owner of the freight or its agent would.²³

The federal district court found on this basis that Brampton had never become a “party to the transportation contract” (S.D. Ga. Order, p., 5 (attached as Exhibit A to Brampton’s Complaint)), and thus could not be held contractually liable for demurrage charges.²⁴ But that ruling reflected an unduly narrow view of the circumstances that are sufficient to establish a party’s responsibility for demurrage. The governing statute and precedent give weight to the carrier’s right to collect demurrage charges from the receiver when that receiver is a named consignee and accepts railcars for delivery and unloading, unless prior to delivery the receiver provides the carrier with the written notice required

²² See notes 5 & 17, above; see also *Groves*, 586 F.3d at 1275 (Escalante V.S., Exh. G).

²³ See Brampton’s Brief in Support of Defendant’s Motion for Partial Summary Judgment, *NS v. Brampton* (May 30, 2008), p. 10 (“Defendant Savannah Re-Load does not dispute that it unloaded the freight delivered to its premises according to the instructions it received from Galaxy Forwarding. However, Savannah Re-Load submits that unloading freight for export according to instructions from a freight forwarding company does not constitute an ‘acceptance’ of it.”) (Escalante V.S., Exh. E).

²⁴ The district court and 11th Circuit’s rulings also ignore key facts acknowledged by Brampton in its Complaint in this action. For example, when NS notified Brampton that railcars consigned to it were available for delivery, Brampton accepted those cars, apparently without first inquiring (of the shipper, Brampton’s freight forwarder, NS, or anyone else) whether doing so might entail some responsibility for their subsequent handling (as would plainly be the case given Brampton’s identification as the consignee). And, contrary to Brampton’s portrayal of itself in federal court as an innocent third-party to whom shippers recklessly sent railcars, Brampton affirmatively pleads in this action that it had a sufficiently robust relationship with its freight forwarder to have expected to earn \$249,000 in profits from future railcar deliveries. (Compl., ¶ 46). Under these circumstances, the Board should not countenance Brampton’s efforts to disclaim responsibility for demurrage charges. And it certainly may not conclude that NS’s actions in imposing a deposit requirement were unreasonable after Brampton flatly refused to pay substantial past-due demurrage charges.

by Section 10743 that it is merely an agent. *See Novolog*, 502 F.3d at 254-62. The district court and court of appeals addressing NS's claim misapplied the precedents relied upon by *Brampton*, which involved situations where the entities from which the carrier was seeking to collect demurrage were, both objectively and from the carrier's perspective, far less involved in the contract of carriage relationship between shipper and carrier than was *Brampton*.²⁵

The rulings of the district court and the court of appeals also improperly ignore the vital role that demurrage plays in encouraging efficient railroad car utilization, and the appropriate responsibilities of participants in the rail network who accept the delivery of railcars for unloading. If accepted, those rulings would create a gaping void in the

²⁵ Courts have rejected demurrage claims where (a) the carrier is *aware* that the receiver is merely an agent and not the true consignee when it delivers cars to the receiver (as in *Illinois Central v. South Tec Development Warehouse, Inc.*, 337 F.3d 813, 821 (7th Cir. 2003) ("apparent that IC understood South Tec not to be a consignee but an agent") and *Ingersoll Mill. Mach. Co. v. M/V Bodena*, 829 F.2d 293 (2d Cir. 1987) (carrier itself altered bill of lading to show receiver as consignee)); (b) the receiver accepts cars for delivery *as an agent* and is *not* named as the consignee on the bills of lading (as in such cases as *CSX Transportation, Inc. v. City of Pensacola, Florida*, 936 F. Supp. 880, 883-84 (N.D. Fla. 1995) (defendant not listed as consignee, but only occasionally as "in care of" recipient); *Union Pacific R.R. v. Ametek, Inc.*, 104 F.3d 558 (3d Cir. 1997)) (receiver "merely an agent of its customers"); or (c) a connecting carrier is listed as the consignee but that carrier did not have any involvement in the delayed handling of those cars (as in such cases as *Southern Pacific Transportation Co. v. Matson Navigation Co.*, 383 F. Supp. 154, 157 (N.D. Cal 1974)) (connecting carrier-consignee with "no culpability for delay") and *Western Maryland Ry. v. South African Marine Corp.*, 1987 WL 16153 (S.D.N.Y. 1987) (following *Matson*)).

Only one lower court decision declined to enforce demurrage obligations in circumstances where a named consignee accepted cars for delivery and exercised responsibility for railcar handling, and that one decision – *Union Pacific R.R. v. Carry Transit*, Civ. No. 3:04-CV-1095-B (N.D. Tex. Oct. 27, 2005) – was expressly criticized as "unpersuasive" in *Novolog*, 502 F.3d at 262. (Other district court decisions, like the lower court ruling in *Novolog* and *CSX Transportation, Inc. v. Port Erie Plastics, Inc.*, No. 05-139 Erie (W.D. Pa. Sept 29, 2006), were vacated by the court of appeals, *see* 295 Fed. Appx. 496 (3d Cir 2008) (vacating *Port Erie*)).

ability of railroad demurrage programs to implement incentives for the efficient handling of freight cars on the Nation's rail network, in contravention of the policies of Congress and the Board. See *North America Freight Car Association, v. BNSF Ry.*, STB Docket No. 42060 (Sub-No. 1) (served Jan. 26, 2007) (key goal of demurrage is "to encourage shippers to return freight cars to the system, thereby making the entire system more efficient"). In situations where shipments are consigned to a receiver who (like Brampton) accepts the delivery of railcars for unloading and thereby takes custody of those cars, that receiver (or the principal on whose behalf it is acting) is *the only entity* in a position to ensure that the railcars are handled efficiently. Yet the federal court rulings here allow such receivers to escape responsibility for demurrage altogether, and to make matters worse they do so in a way that encourages the receivers to assert (as Brampton did here) that there was no principal on whose behalf it was acting, so that there is no entity with the authority (or incentive) to influence the warehouseman's car handling practices to avoid its own responsibility for demurrage charges. The result is both obvious and improper: no entity that has control over the unloading and empty release of such railcars would be subject to the carrier's demurrage tariffs, and the incentives those tariffs provide for efficient car handling would be vitiated.²⁶

²⁶ Brampton may contend, as it did in the district court, that the delays were caused by its forwarder consigning more cars to Brampton than Brampton could unload in a timely manner. But if Brampton's position is accepted, it would be free to delay unloading those cars indefinitely without incurring responsibility for demurrage, and without NS being able to turn to any principal that would have authority to influence Brampton's conduct. Brampton's position would also absolve it from any responsibility for working with its forwarder to control the flow of traffic to its facility.

2. The Reasonableness of NS's Per-Car Deposit Requirement Does Not Depend on the Specific Amount of Past-Due Demurrage Owed by Brampton

There is likewise no merit to Brampton's related assertions that it was unreasonable for NS to impose a deposit requirement based on past-due demurrage charges that NS itself did not contend Brampton owed, or to fail to "adjust" the amount of the deposit requirement after NS reduced its demand for payment of past-due demurrage charges. (Compl., ¶¶ 35-37). These contentions make no sense for the simple reason that the amount of the deposit Brampton was required to make never had anything to do with the *total* amount of its past-due demurrage charges. The *only* deposit requirement at issue is the \$1,200 *per-car* deposit requirement imposed on July 31, 2007. Under NS's tariff, Brampton's obligation to submit deposits in that amount was triggered by the fact that there was *some* outstanding past-due balance that Brampton refused to pay, not the precise amount of that balance. In fact, as Brampton freely acknowledges, Brampton had refused to pay *any* past due demurrage, and it acknowledges that at the time when a deposit was first required, NS was seeking payment of at least \$57,000 of past-due demurrage balances. (Compl., ¶ 12.) Moreover, the amount of the per-car deposit Brampton was required to make was calculated based on the demurrage charges accrued on specific equipment (*see* Tariff 8002-A (Item 6160(C))), and thus there was no occasion for NS to adjust that amount based on changes in the total past-due balance. Because NS at all pertinent times reasonably asserted that Brampton owed significant unpaid demurrage charges that it refused to pay, it was entirely reasonable for NS to maintain a \$1,200 per car deposit requirement even when it reduced the total payment it was demanding from Brampton.

To be sure, NS's deposit program *does* take into account the total amount of past-due demurrage charges, but in a way that is favorable to the customer. NS places a ceiling on the total amount of funds that a customer must have on deposit that is based on the outstanding past-due balance. *See* Tariff 8002-A (Item 6160(D)). In Brampton's case, however, that ceiling never came into play, because Brampton never had more than \$7,200 on deposit with NS (Young V.S., ¶ 10), whereas the amount of NS's outstanding demurrage claims never fell below \$57,300. (Compl., ¶ 12).

3. NS's Imposition of a Per Car Deposit Requirement Did Not Unreasonably "Coerce" the Payment of Past-Due Demurrage Charges

Brampton's third contention is that it was unreasonable for NS to impose a deposit requirement that sought to "coerce Brampton to pay" demurrage charges that Brampton did not owe. (Compl., ¶ 34). This claim rests on a complete mischaracterization of NS's security deposit program. As discussed above, the only deposit required of Brampton was a forward-looking, per-car deposit that would be returned to Brampton if no demurrage charges were incurred on the specific car to which the deposit applied, *regardless* of whether Brampton had paid any of the past-due balances. Far from being coercive, moreover the magnitude of that per-car deposit was set (again, pursuant to NS's applicable tariff) based on the potential amount of demurrage that might be incurred on the specific car to which the deposit applied, taking account of Brampton's own history of unloading delays. *See* NS Tariff 8002-A (Item 6160(C)); Young V.S., ¶ 6. NS's deposit requirement is thus wholly unlike that criticized in *Railroad Salvage & Restoration, Inc., and G.F. Weideman International, Inc. – Petition for Investigation and for Emergency Relief under 49 U.S.C. 721(B)(4) – Security Deposit for Demurrage Charges, Missouri & Northern Arkansas Railroad Company, Inc.*, STB

Docket No. 42107 (served June 30, 2008) (“*Railroad Salvage - June 2008*”), where the carrier insisted on payment of the entire amount of past due demurrage – totaling almost \$400,000 – before it would deliver even a single car.²⁷

In *G&T Terminal*, by contrast, the ICC held that the carrier had not unreasonably covered payment of disputed amounts even where the customer was required to provide a \$50,000 letter of credit in order to avoid an embargo of its shipments. *G&T Terminal*, p. 9-10. It is far clearer than in *G&T Terminal* that NS’s \$1,200 per-car deposit does not raise any issue of coercion.

4. NS’s Deposit Requirement Did Not Impose an Undue Financial Burden on Brampton

Finally, Brampton contends that it was unreasonable for NS to impose a deposit requirement because doing so “imposed an undue financial burden on Brampton.” (Compl., ¶ 38-39). Brampton presumably does not base this argument on the fact that it could not afford to make a \$1,200 deposit in order to have a railcar delivered, but on the assertion that, *if* it had received a large number of railcars, it might – *hypothetically* – have had significantly more than \$1,200 on deposit with NS. This is not a valid basis for concluding that NS’s deposit requirement was unreasonable, for several reasons.

First, Brampton cannot assert an undue financial burden where it was never required to make *any deposit* in excess of the \$1,200 per car deposit. Brampton could have, but did not, avail itself of the option of establishing credit with NS. Tariff 8002-A (Item 6160(D)).

²⁷ In that case, the carrier demanded a deposit equal to *the higher of* “\$10,000 or the amount of ‘existing past due accessorial charges.’” *Railroad Salvage - June 2008*, p. 1.

Second, NS imposed no lump-sum deposit requirement of any kind, much less one that approaches the size of the \$50,000 letter of credit obligation upheld as reasonable by the ICC in *G&T Terminal* (at pp. 9-10) or the \$25,000 deposit upheld in *Railroad Salvage- July 2008* (at p. 5). Indeed, even when Brampton did receive a handful of railcars in the fall of 2008 (15 months after the deposit requirement was established), it never had more than \$7,200 in funds on deposit with NS. *See* page 11 & Table 1, above, p. 11; *Young V.S.*, ¶ 10. Under the Board's precedents, these modest amounts could not constitute an undue financial burden.

Third, Brampton's assertions about the magnitude of funds it *might* have been required to deposit with NS had it continued to receive railcars at its historical pace are pure fiction. NS's Tariff contains a ceiling on a customer's total deposit obligation. Had it received multiple cars, the total amount of its deposit would have been capped at the greater of \$2,310 or the total amount of past-due demurrage charges plus \$397 (Tariff 8002-A (Item 6160(D))), and in all events would have been far less than the fanciful sums asserted in the Complaint. For example, had Brampton's unpaid demurrage balance been \$70,680 (as Brampton alleges, ¶ 24), the maximum amount that Brampton would have been required to deposit with NS would have been \$71,077. This is a far cry from the "\$216,000 to \$486,000" figure Brampton's asserts in its Complaint (at ¶ 21).

Even if that ceiling had been reached, moreover, it could not have imposed an unreasonable financial burden on Brampton. Brampton itself asserts that the flow of railcars it expected would have been substantial – five railcars per day, or more than 1,500 per year (Compl., ¶ 20) – and that it would have earned \$249,000 in *profits* (not revenue) from the unloading of those cases (*id.*, ¶ 46). That alleged profit stream – which

would have supported payment of deposits that, under the ceiling established by NS's tariff would have been at most a tiny fraction of \$249,000 (*see* page 37, above) – establishes beyond doubt that the deposit requirement could not have imposed an undue financial burden on Brampton.

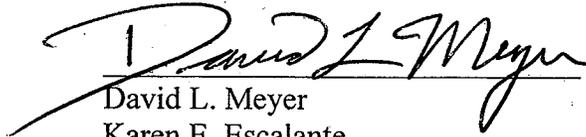
The only case where the Board has suggested that a deposit requirement might impose an undue financial burden – *Railroad Salvage - June 2008* – addressed a deposit requirement wholly unlike the one at issue here. In that case, the carrier imposed a *lump sum* deposit obligation (of almost \$400,000) that was many times larger than the ceiling that would have applied in this case, and one that was (also unlike in this case) completely untethered from the level of demurrage charges that the carrier might expect would be incurred on future cars received by the customer. *Id.* (customer asked to pay security charges in the full amount of \$399,530 amount of post demurrage charges that carrier claimed was due). This case presents no comparable concerns of burden.²⁸

CONCLUSION

For the foregoing reasons, the Board should dismiss Brampton's Complaint in its entirety.

²⁸ NS notes that, in the context a deposit program like NS's, allowing a customer to avoid making deposits in such circumstances based on a claim of "financial burden" would be tantamount to allowing that customer to avoid responsibility for demurrage charges themselves on the same basis, a result that could not be squared with the statutory scheme or Board precedents. Because receivers are not entitled to the free use of railcars, they should not be allowed to claim unreasonable hardship based on the fact that they might be held financially responsible for the demurrage charges they incur.

Respectfully submitted,



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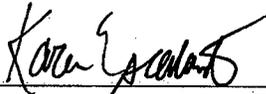
James A. Hixon
John M. Scheib
Norfolk Southern Railway Company
Three Commercial Place
Norfolk, Virginia 23510
*Attorneys for Norfolk Southern
Railway Company*

Dated: March 11, 2010

CERTIFICATE OF SERVICE

I, Karen E. Escalante, certify that on this date a copy of Norfolk Southern Railway Company's Motion to Dismiss Complaint of Brampton Enterprises, filed on March 11, 2010, was served by email and by first-class mail, postage prepaid, on all parties of record, specifically:

Jason C. Pedigo
Ellis, Painter, Ratterree & Adams LLP
Post Office Box 9946
Savannah, GA 31412
912.233.9700
jpedigo@epra-law.com



Karen E. Escalante

Dated: March 11, 2010

Exhibit 1

VERIFIED STATEMENT

OF

PAUL C. YOUNG

1. My name is Paul C. Young. Since 1989, I have been employed by Norfolk Southern Railway Company (“NS”). Since February 1, 2010, I have been Director of NS’s Revenue Waybill Operations Department. Between 2002 and 2010 I was Manager, Process Improvement. As Manager, Process Improvement I had significant involvement and responsibilities relating to NS’s billing of demurrage charges.

2. As a result of my job responsibilities I am familiar with NS’s Tariff 8002-A (Item 6160), which governs security deposits for payment of demurrage, storage and other accessorial charges, and NS Tariff 6004-B, which governed NS's demurrage charges from September 15, 2000 to January 31, 2009. I am also familiar with NS’s notice to Brampton Enterprises, LLC, d/b/a Savannah Re-Load (“Brampton”) that, as a result of unpaid demurrage balances it would be required to make security deposits in accordance with NS’s tariff, and the specific occasions on which Brampton made such deposits.

3. Attached as Exhibit A hereto is a copy of NS’s Tariff 8002-A (Item 6160). This Item has been in effect since March 1, 2000.

4. Attached as Exhibit B is a copy of NS Tariff 6004-B, which was in effect from September 15, 2000 to January 31, 2009 when it was superseded by Tariff 6004-C.

This tariff governed the demurrage charges incurred by Brampton during 2007 that led NS to impose a deposit requirement after Brampton refused to pay past-due amounts.

5. On July 31, 2007, NS notified Brampton that it would be required to provide NS with a security deposit of \$1,200 in connection with each car delivered for unloading to Brampton's facility at 139 Brampton Road, Savannah, Georgia, in accordance with Tariff 8002-A.

6. The amount of the per-car deposit was calculated in accordance with Tariff 8002-A (Item 6160(C)) to reflect the maximum amount of demurrage charges that Brampton incurred on any one car during the preceding 12-month period.

7. After NS established a security deposit requirement, Brampton did not attempt to receive railcars at its 139 Brampton Road location – and did not make any security deposit payments to NS whatsoever – until almost 15 months later. On October 22, 2008, Brampton submitted a wire transfer in the amount of \$2,400 as a security deposit on two carloads of freight it wished to have delivered by NS. Those two cars were delivered to Brampton on October 23 and returned empty on the same date. Brampton's deposit was returned in full on November 26, 2008, 34 days later. Brampton's October 22 wire transfer, and NS's check refunding this deposit are Exhibit C hereto.

8. On December 10, 2008, NS received a check dated December 8, 2008 in the amount of \$6,000 as a security deposit on five carloads of freight Brampton wished to have delivered by NS. Two of those cars were delivered to Brampton on December 16 and returned empty on December 17. Three of the cars were delivered on December 18 and returned empty on the same date. Brampton's deposit was returned in full on January

8, 2009, 20-21 days after the cars were returned empty. Brampton's December 8 check, and NS's check refunding this deposit are Exhibit D hereto.

9. On December 16, 2008, NS received a check dated December 11, 2008 in the amount of \$1,200 as a security deposit on one carload of freight Brampton wished to have delivered by NS. That car was delivered to Brampton on December 22, 2008 and returned empty on the same date, and Brampton's deposit was returned in full on February 19, 2009, 59 days after the car was returned empty. Brampton's December 11 check, and NS's check refunding this deposit are Exhibit E hereto.

10. The three security deposit payments described in paragraphs 7-9 above are the only demurrage deposits ever made by Brampton to NS. In total, they related to eight railcars, and involved \$9,600 in funds. Brampton never had more than \$7,200 in funds on deposit with NS at any one time. The average amount of time between receipt of funds from Brampton and the return of any balance not used for demurrage charges was 38 days.

VERIFICATION

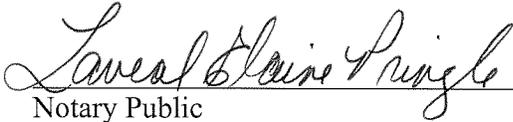
State of Georgia)
)
) SS
)
County of Fulton)

Paul C. Young, being duly sworn, deposes and says that he has read the foregoing statement, knows the facts asserted therein are true and that the same are true as stated.



Paul C. Young

Subscribed and sworn to before me this 10 day of March, 2010.



Notary Public

Notary Public of DeKalb County, Ga

My Commission expires: December 19, 2012.

Exhibit A

NORFOLK SOUTHERN RAILWAY COMPANY

VISION: BE THE SAFEST, MOST CUSTOMER-FOCUSED AND SUCCESSFUL TRANSPORTATION COMPANY IN
THE WORLD

FREIGHT TARIFF

NS 8002 - A

(For Cancellation, See Page 13)

LOCAL AND JOINT FREIGHT TARIFF

PUBLISHING

RULES AND CHARGES ON

ACCESSORIAL SERVICES

AT STATIONS ON

NORFOLK SOUTHERN RAILWAY COMPANY

ISSUED FEBRUARY 1, 2000

EFFECTIVE MARCH 1, 2000

ISSUED BY
J. H. Huddleston, Manager-Pricing Services
NORFOLK SOUTHERN RAILWAY COMPANY
110 Franklin Road, S. E.
Roanoke, VA 24042-0047

SECTION 6
RULES AND CHARGES FOR MISCELLANEOUS SERVICES

ITEM 6150

PARTIAL PREPAYMENT OF FREIGHT CHARGES

Freight charges on consignments intended for flag stations (stations at which there are no freight agents) must invariably be prepaid to destination.

Shipments will not be accepted from connecting lines partially prepaid, except under the following conditions:

- (A) When a carrier tendering a shipment at a junction point where additional prepayment of freight is necessary, shall authorize its junction agent to guarantee to its connection sufficient amount to carry the shipment to destination. The agent's claim for relief, if unable to collect from consignees, shall be adjusted on its merits, the voucher minimum rule not to apply in such cases.
- (B) When shipper delivers to an agent a shipment destined to a point not located on any line or railroad and to which the through rate cannot be ascertained, agents are authorized to accept same if an amount is paid sufficient to cover freight charges to nearest point of final delivery to which rate is known.
- (C) In all cases the reason for putting the extra amount of prepaid waybills should be carefully explained on the waybills.

ITEM 6160

SECURITY DEPOSITS FOR PAYMENT OF DEMURRAGE STORAGE AND OTHER ACCESSORIAL CHARGES

- (A) A security deposit to insure payment of any demurrage, storage and other accessorial charges that may accrue will be required from every customer who:
 - 1. Is not on the railroad's credit list **and**
 - 2. Fails to pay demurrage, storage and other accessorial charges after specific written demand referring to this tariff provision.
- (B) The deposit must be paid in cash, certified check, cashier's check or money order before any freight car is delivered to such customer for loading or unloading. A deposit on one unit of equipment will not be transferable to another.
- (C) The deposit for each car shall be in the minimum amount of \$196.00 or up to the maximum amount of demurrage, storage and other accessorial charges that accrued on any one car during the preceding 12 months.
- (D) However, in the case of a customer receiving multiple cars for loading or unloading, the total amount required to be deposited shall not exceed the higher of the following two numbers:
 - 1. \$2,310.00 or
 - 2. the amount of existing past due demurrage, storage and other accessorial charges accrued by the customer plus \$397.00.

Continued

ISSUED FEBRUARY 1, 2000

EFFECTIVE MARCH 1, 2000

ISSUED BY
C. J. Orndorff, Director-Marketing Services
NORFOLK SOUTHERN RAILWAY COMPANY, 110 Franklin Road, S. E, Roanoke, VA 24042-0047

SECTION 6
RULES AND CHARGES FOR MISCELLANEOUS SERVICES

ITEM 6160 Concluded

- (E) The deposit will be refunded after payment has been received for demurrage, storage and other accessorial charges on the corresponding equipment, should such charges have been incurred. The customer's request for refund must be made in the manner and to the office designated by the railroad. If no refund request is received by that designated office within thirty (30) days after the equipment is released, the railroad will refund the remainder of the deposit to the customer after deducting any unpaid demurrage, storage and other accessorial charges on that equipment.
- (F) Deposits will no longer be required after the customer either:
1. Is placed on the railroad's credit list, or
 2. Has paid all outstanding demurrage, storage and other accessorial charges, and has given assurance to the satisfaction of the railroad's credit office that future demurrage, storage and other accessorial charges will be paid within the credit period.

ITEM 6170

IMPACT TESTING

1. NS will, when suitable arrangements can be made, furnish a locomotive, crew and sufficient empty cars on not less than five days notice for the purpose of impact testing, load and tie down configurations to determine suitability for regular usage.
2. A charge of \$1260.00 per car will be made for the motive power and crew necessary to run the test for not more than eight hours. For each hour in excess of eight hours, not to exceed four additional hours, a charge of \$210.00 per car per hour will be made. After a total of twelve hours have elapsed, a new crew will be assigned and the charges start as a new test.
3. For each car furnished by the carrier, whether for load bearing or as impact cars, a charge of \$289.00 per car per hour will be made. Such charge includes moving the cars to and from the test location and all switching necessary to conduct the test. Demurrage will not apply when cars are held for such tests.
4. All charges accrue whether or not the test is successful. Not less than five days written application to the carrier is required and service will be provided, subject to availability of equipment and crew.

ITEM 6180

EXERCISING CARS

1. When the NS is requested to exercise (See Note 1) freight cars, such service will be performed and the charges published in the applicable switching tariff for intra-plant (See Note 2), intra-terminal or inter-terminal switching, as the case may be, will be assessed when such tariffs do not provide a specific charge expressly for exercising.

NOTE 1: Exercising is defined as the movement of a loaded or empty car for the purpose of preventive maintenance or preventing damage to equipment.

NOTE 2: When cars are moved over tracks leased by shippers, the intra-plant switching charge will be assessed, provided there is no movement over railroad owned tracks.

ISSUED FEBRUARY 1, 2000

EFFECTIVE MARCH 1, 2000

ISSUED BY
C. J. Orndorff, Director-Marketing Services
NORFOLK SOUTHERN RAILWAY COMPANY, 110 Franklin Road, S. E, Roanoke, VA 24042-0047

Exhibit B

NORFOLK SOUTHERN RAILWAY COMPANY

VISION: BE THE SAFEST, MOST CUSTOMER-FOCUSED AND SUCCESSFUL
TRANSPORTATION COMPANY IN THE WORLD

**FREIGHT TARIFF NS 6004-B
CANCELS
FREIGHT TARIFF NS 6004-A**
(For cancellation see item 1)

DEMURRAGE RULES AND
CHARGES

STORAGE RULES AND
CHARGES

Applying at all NS points in the United States and other points as specifically Provided herein.

Also at points on other roads
(See Item 4)

ISSUED August 23, 2000

EFFECTIVE September 15, 2000

ISSUED BY
R. C. Scharpf, Director Marketing Services
NORFOLK SOUTHERN RAILWAY COMPANY
110 Franklin Road, S.E.
Roanoke, VA 24042-0047

ITEM 1 - CANCELLATION NOTICE

This tariff cancels Rates, rules, regulations and charges published in Demurrage Rules and Charges and Storage Provisions in the following Tariffs:
NS Tariff 6004-A.

ITEM 2 - TABLE OF CONTENTS

SUBJECT	ITEM
ALLOWANCES FOR RELIEF	400
CARS HELD FOR LOADING	600
CARS HELD FOR OTHER THAN LOADING AND UNLOADING	800
CARS HELD FOR UNLOADING	700
CARS NOT SUBJECT TO DEMURRAGE RULES	550
DEMURRAGE CALCULATION	950
DEMURRAGE ON PRIVATE CARS	1550
DEMURRAGE PLAN	850
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SECTION 1 DEMURRAGE RULES AND CHARGES	500 - 950
SECTION 2 STORAGE, HAZARDOUS COMMODITIES	1000
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ITEM 4 - LIST OF PARTICIPATING CARRIERS

ABBREVIATION	NAME OF CARRIER
NS	Norfolk Southern Railway Company Includes the following subsidiaries and affiliated carriers: Norfolk and Western Railway Company Norfolk Southern Railway Company Alabama Great Southern Railroad Company, The Atlantic and East Carolina Railway Company Camp Lejeune Railroad Company Chesapeake Western Railway Cincinnati, New Orleans and Texas Pacific Railway Company, The Central of Georgia Railroad Company Georgia Southern and Florida Railway Company State University Railroad Company Tennessee, Alabama & Georgia Railway Company Tennessee Railway Company
	All NS Handling Line Stations on carriers named in note 3700 of The Official Railroad Station List OPSP 6000-series. (See item 5) (See Note 1 this item)

Note 1 - The provisions of this tariff will also apply on traffic to or from Norfolk Southern Handling Lines as defined in Note 3700 of OPSP 6000-Series when traffic is billed from or to the NS stations numbers assigned to the handling line station. The carriers shown in Column 1 of Note 3700 are a party to this tariff except, where pricing authorities provide for specific demurrage provisions.

RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS

ITEM 5 - APPLICATION OF REFERENCE PUBLICATIONS

The following publications contain rules, regulations, charges and allowances specifically referred to herein or may apply directly or indirectly along with the terms of demurrage, storage etc that is covered in this publication.

NS Conditions of Carriage #1-Series
NS Conditions of Carriage #2-Series (Coal)
NS 6303 Rules for Handling Hazardous Materials
NS 6500 Canadian Car Demurrage Rules and Charges
NS 8001 Switching
NS 8002 Accessorial Services
NS 9209 Demurrage at Lamberts Point, VA
AAR 2 -- Hazardous Materials Shipping Descriptions (49-series STCC numbers)
BOE 6000 Bureau of Explosives Rules
RER 6411 Official Railway Equipment Register
RPS 6007 Mileage Allowances and Rules
RPS 6008 Demurrage Rules and Charges on Coal etc., at mines
RPS 6740 Heavy Duty Flat Car Charges
OPSL 6000 Official Railroad Station List
STCC 6001 Standard Transportation Commodity Code
UFC 6000 Uniform Freight Classification

ITEM 20 - REFERENCE TO TARIFFS, ITEMS, NOTES, RULES, ETC.

Where reference is made in this tariff to tariffs, items, notes, rules, etc. such references are continuous and include supplements to and successive issues of such tariffs and reissues of such items, notes, rules, etc.

ITEM 40 - CONSECUTIVE NUMBER

Where consecutive numbers are represented in this tariff by the first and last numbers connected by the word "to" or a hyphen they will be understood to include both of the numbers shown. If the first number only bears a reference mark such reference mark also applies to the last number shown and to all numbers between the first and last numbers.

ITEM 75 - METHOD OF CANCELLING ITEMS

As this tariff is supplemented, numbered items with letter suffixes will be used in alphabetical sequence starting with A. Example: Item 445-A cancels Item 445, and Item 365-B cancels Item 365-A in a prior supplement, which in turn cancelled Item 365.

ITEM 100 - METHOD OF DENOTING REISSUED MATTER IN SUPPLEMENTS

Matter brought forward without change from one supplement to another will be designated as "Reissued" by a reference mark in the form of a square enclosing a number (or letter, or number and letter) being that of the supplement in which the reissued matter first appeared in its currently effective form. To determine its original effective date, consult the supplement in which the reissued matter first became effective

RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS

ITEM 200 - GLOSSARY OF TERMS

FOR THE PURPOSE OF APPLYING PROVISIONS IN THIS PUBLICATION, THE FOLLOWING ARE DEFINED AND SHALL GOVERN:

1. **Actual Placement:** - When a car is placed in an accessible position for loading or unloading or at a point designated by consignor or consignee.
2. **Allowance Days:** - Are days in addition to credits earned for which charges will not be assessed. Car Days are reduced by the number of allowance days.
3. **Car Days:** - A twenty four (24) hour period or fraction thereof commencing 0001 hours (Local Time) after actual or constructive placement until the car is released and available to NS.
4. **Closed Gate:** - When a car cannot be placed on consignee's siding at time of arrival due to siding having a locked gate-, door and/or standing instructions not to place any cars unless the consignee first contacts NS for placement instructions. All cars are constructively placed at time of arrival.
5. **NS Track:** - All tracks which NS provides for its own uses and purposes and other tracks located inside of its right-of-way or yards and terminals.
6. **Consignee:** - The party to whom a shipment is consigned or the party entitled to receive the shipment.
7. **Consignor:** - The party in whose name cars are ordered.
8. **Constructive Placement:** - When a car cannot be actually placed because of any condition attributable to the consignor or consignee, such car will be held at an available hold point and notice will be given the consignor or consignee that the car is held awaiting instructions. Car Days will begin if instructions to NS are not received before 0001 hours (See Car Days), of day following notification.
9. **Credit Day:** - Non-chargeable day. Credits can only be earned on those cars released from demurrage.
10. **Forwarding Instructions:** - A bill of lading or other suitable order containing all the necessary information to transport the shipment to final destination. Bill of lading or other suitable order must be given to NS via electronic data interchange or facsimile to the Agency Operations Center at 1-800 580-6092.
11. **Holidays:** - The following days will be considered NS Holidays: New Year's Day, Labor Day, President's Day, Thanksgiving Day, Memorial Day, Christmas Day, Independence Day
12. **Loading:** -The complete or partial loading of a car in conformity with NS loading and clearance rules, and the furnishing of forwarding instructions.
13. **Open Gate:** - When a consignee does not place any restrictions (physical or otherwise) on NS to place cars on their siding upon arrival.
14. **Private Car:** - A car bearing other than railroad reporting marks and which is not a railroad controlled car.
15. **Private Track:** - Trackage assigned for individual use including privately owned or leased tracks.
16. **Public Delivery Track:** - Any accessible track open to the general public for loading or unloading.
17. **Railroad-Controlled Cars:** - A car provided to NS directly, by car companies or others, for indiscriminate use by NS in servicing any of its customers.
18. **Reload:** - When the same car is completely unloaded and then loaded. Reloading will be expressed (with cars unloading demurrage) from date of tender to date forwarding instructions are received.
19. **Stopped in Transit:** - When cars are held enroute because of any condition attributable to the consignor or consignee, or owner.
20. **Tender:** - When NS gives notification that a car is available for unloading or loading by either actual or constructive placement to consignor or consignee.
21. **Unloading:** - The complete unloading of a car and notice from the consignee that the car is empty and available to NS.
22. **Assignee:** - A shipper who has requested and has been assigned cars to a specific pool of cars for their use.
23. **Assignee car:** - A car of any ownership specifically requested and assigned to a shipper-From a pool of assignment service cars .
24. **Free Day:** - A non-chargeable storage day.
25. **Storage Day:** - A 24hour period, or part thereof.
26. **Time:** - Local time is applicable. Time is expressed on the basis of the 24-hour clock. (EXAMPLE: 12:01 AM is expressed as 0001 hours.)

RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS

ITEM 250 - APPLICATION AT POINTS IN CANADA

Demurrage rules and charges published herein will apply at Niagara Falls, ON, Fort Erie, ON, and Welland Junction, ON, on cars moving from Canada to the United States of America via Black Rock, Buffalo or Suspension Bridge, NY, held for reconsignment or otherwise, and on cars destined for consignees located in Black Rock, Buffalo or Suspension Bridge, NY, while awaiting final delivery orders, or when delivery cannot be effected due to inability of consignees to receive same. On such cars held at Niagara Falls, ON, Fort Erie, ON, and Welland Junction, ON, these rules will apply the same as if cars were held under like conditions at Black Rock, Buffalo or Suspension Bridge, NY, except that Canadian Car Demurrage Rules and Charges will apply on such cars originating in Canada moving via Black Rock, Buffalo or Suspension Bridge, NY or destined for consignees located in Black Rock, Buffalo or Suspension Bridge, NY, when held at Canadian border points for Canadian Government form B-13 or account other Canadian Government regulations.

ITEM 300 - NOTIFICATION REQUIREMENTS

1. The following notifications (including by electronic means) will be furnished as indicated:

Cars for Private Tracks

- (a) Notification of constructive placement on all cars held on NS tracks due to any condition attributable to consignee or consignor.
- (b) Delivery of car upon consignee tracks will constitute notification.
- (c) Delivery upon industrial interchange tracks of consignee or party entitled to receive same, will constitute notification.

Cars for Public Delivery Tracks

Notice of arrival will be given to party entitled to receive notification when car is actually placed.

Cars Stopped In Transit

Notice shall be sent or given to the consignee, consignor or owner ordering the car stopped upon arrival of car at the point of stoppage.

Refused Carload Freight

When advised of refusal of car at destination, notice will be sent or given to consignor or owner .

2. Notification information provided:

- (a) Car Initial and Number
- (b) If contents transferred enroute. NS will furnish car initial and number of the original car.

3. Methods and procedures for notification:

- (a) Notification may be sent or given:
 - (1) In writing by U.S. or Canadian mail. When claim is made that notice was mailed at a later date or delayed through postal service, the date of mailing shall be determined by the postmark. If no postmark or no date appear, the records of NS shall govern.
 - (2) By personal telephone communication or electronic means. When consignor or consignee utilizes an electronic or mechanical device (either in written, oral or keyed data form) notification left on such device will be considered as having been given to consignor or consignee, as of the date and time transmitted.
- (b) Notice of arrival shall be sent or given: - Upon arrival of cars at destination (notification is given 7 days a week) for all cars held under order notify or other provisions which require surrender of bill of lading or payment of lawful charges.

RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS

ITEM 350 NOTIFICATION TO NS:

- (a) When NS personnel are not on duty to receive forwarding instructions, empty release information or other disposition, consignor/consignee will have until 0001 hours (See Car Days, item 200) of the next day personnel are on duty to furnish such instructions, and they will be considered as having been furnished at the date and time the instructions could have been furnished.
- (b) When electronic or mechanical devices are used to furnish notification to NS, the recorded date and time that instructions are received will govern.

ITEM 400 - ALLOWANCES PERMISSIBLE FOR RELIEF OF DEMURRAGE CHARGES:

In order to be allowed relief as indicted, a claim must be presented to NS, in writing, by the last day of the calendar month following the month in which the bill was issued, stating fully the conditions for which relief is claimed.

- 1. **Railroad Error:** - If, through railroad error, demurrage charges are assessed demurrage will be adjusted to the amount that would have accrued but for such error. (Run around and bunching of cars will not be considered as a railroad error.)
- 2. **Weather Interference:** - When because of earthquakes, tornadoes, hurricanes, floods or heavy snow, the operations of the consignor or consignee are disrupted, the demurrage directly chargeable thereto will be eliminated, provided the disruption exceeds two (2) days in duration.
- 3. **Strike Interference:** - When it is impossible to load or unload or receive cars from or make cars available to NS because of strike interference at the point where the loading or unloading is to be accomplished, demurrage days will be charged for at the rate of \$30.00 per day during the period of strike interference, provided:
 - (a) The disruption exceeds five (5) days in duration during one calendar month.
 - (b) The provisions of this item will not apply to: - (1.) Cars for unloading when waybills are dated four (4) days after the beginning of strike interference. (2.) Cars for loading when ordered after the beginning and prior to the ending of strike interference.
- 4. **Switching Delays:**
 - (a) This allowance will be calculated and deducted from car days for car ordered and all others held under constructive placement when all cars on the patron's siding are empty and available at the time a switch is missed or should have been made. If all cars on the patron's siding are not empty at the time of alleged switching failure, allowance will be for the car so ordered and not placed.
 - (b) When a car is ordered for placement or delivery and this is not accomplished because non-service, allowance will be given for delay in placement. This allowance will apply to the car ordered placed, when held under constructive placement on NS tracks.
 - (c) The allowance day(s) will be deducted from the Car Days for all day(s) after which the placement order was given to, but not including, the day on which the car is actually placed.
 - (d) For example, if a car is ordered placed on day 3 of the month, but not actually placed until day 5 of the month, day 4 of the month will be an allowance day and not a chargeable demurrage day for that car and all cars held under constructive placement on NS tracks during that time.

ITEM 450 - CARS AWAITING CUSTOMS INSTRUCTIONS PAYMENT OF DUTIES:

Cars delayed on carriers' tracks longer than forty-eight (48) hours, awaiting completion of customs documentation or payment of duties, will begin to accrue normal demurrage charges.

SECTION 1

DEMURRAGE RULES AND CHARGES

SECTION 1
DEMURRAGE RULES AND CHARGES

ITEM 500 - CARS SUBJECT TO DEMURRAGE

GENERAL APPLICATION
(See exceptions Item 550)

- (A) Applicable at all points on NS.
- (B) The disposition of a car at its point of detention determines the purpose for which the car is held and the rules applicable thereto.
- (C) All railroad controlled cars held for or by consignors or consignees for any purpose are subject to demurrage rules and charges in this section, except as follows:
- (1) Cars moving under freight rates requiring application of special demurrage rules - When authorized in contracts or other agreements.
 - (2) Private cars are not subject to demurrage rules except when specifically requested by customer as provided in Item 1550.
 - (3) Cars containing freight refused or unclaimed to be sold by NS for the time held beyond legal requirements.
 - (4) Cars assigned to shippers returned to points of assignment under load when material is authorized to be returned without freight charges under provisions of freight publication.
 - (5) Cars assigned to shippers returned empty to point of assignment while subject to storage rules.
 - (6) Empty railroad equipment moving on own wheels under transportation charges as freight. (Subject to Item 1450)
 - (7) Cars for loading or unloading of NS company material while on NS tracks or private sidings connecting therewith.
 - (8) Cars of railroad ownership, leased for storage of commodities, while held on lessee's tracks.
 - (9) Empty cars placed and not used for loading only if rejected and found as unsuitable for loading.

ITEM 550 - CARS NOT SUBJECT TO DEMURRAGE RULES AND CHARGES:

Export Coal - On cars consigned, reconsigned or declared for export when charges are specifically provided in tariffs, except as otherwise provided. This includes such cars held in transit because they cannot reasonable be accommodated at the ports and carload shipments loaded in open top equipment when held subject to Freight Tariffs: NW 9209 Demurrage at Lamberts Point, VA.

Shipments in open top equipment - When held subject to special demurrage in train load freight Publication CR-4605 series.

Cars used in handling coal at mines - When covered by demurrage rules and charges in Tariff RPS 6008 series or other tariffs.

SECTION 1
DEMURRAGE RULES AND CHARGES

ITEM 600 - RULE GOVERNING CARS HELD FOR LOADING:

Loading: is the complete or partial loading of a car in conformity with NS loading and clearance rules, including the furnishing of forwarding instructions.

Tender: The notification, actual or constructive placement of an empty car placed on orders of the consignor.

Release:

- (a) On date forwarding instructions are received; when received by U.S. or Canadian mail, such instructions will be considered received after 0001 hours (See Car Days, Item 200) on date received.
- (b) On empty cars placed on interchange tracks of consignor performing his own switching, time will also continue until cars are returned to an interchange track.
- (c) On cars found to be overloaded or improperly loaded while at origin will not be considered released until the load has been adjusted.

Computation:

- (a) Car Days will be computed from the first 0001 hours (See Car Days, Item 200) after tender until release.
- (b) On cars placed prior to date for which ordered, Car Days will be computed from the first 0001 hours of the day for which car was ordered until car is released.
- (c) On empty cars appropriated, without being ordered, will be considered as having been ordered and actually placed on the day so appropriated.

Credits: - One (1) credit will be earned for each car released on which disposition is given.

SECTION 1
DEMURRAGE RULES AND CHARGES

ITEM 700 - RULES GOVERNING CARS HELD FOR UNLOADING:

Unloading: is the complete unloading of a car and advice from consignee to NS that the car is empty and available or a car has been reloaded and forwarding instructions are received.

Tender: The notification, actual or constructive placement of each loaded car.

Release:

- (a) Date and time that NS receives advice that the car is empty.
- (b) Cars placed on interchange tracks of a consignee doing its own switching, must also be returned to the interchange track for release.
- (c) When cars are unloaded by NS, those cars will be released at the time the request to unload is received by NS from the consignee.
- (d) When the same car is unloaded and reloaded, when forwarding instructions are received.

Computation: Car Days will be computed from the first 0001 hours (See Car Days, Item 200) after tender until release.

Credits:

- (a) Two (2) credits will be earned for each car released from unloading.
 - (b) One (1) additional credit will be provided when the same car is reloaded if customer has not released the car to the railroad from the unloading transaction. (When car is held for loading after being emptied, in one continuous transaction, a total of three (3) credits will be earned).
-

SECTION 1
DEMURRAGE RULES AND CHARGES

ITEM 800 - RULE GOVERNING CARS HELD FOR PURPOSES OTHER THAN LOADING OR UNLOADING

Applicable to Cars Held:

- (a) On orders of the consignor or consignee.
- (b) While awaiting proper disposition from the consignor or consignee.
- (c) As a result of conditions attributable to the consignor or consignee.

Disposition: That information, which allows NS to either tender or release the car from the consignor's or consignee's account.

Tender: The notification, actual or constructive placement of a loaded car.

Release: Date and time that NS receives advice that the car is released and on which disposition is given on cars.

Computation: Car Days will be computed from the first 0001 hours: (See Car Days, Item 200).

- (a) After tender until release, on cars: (1) Partially unloaded. (2) Reconsigned. (3) Stopped in transit.
- (b) After tender until date of refusal on refused loaded cars (consignee).

Credits: No (Zero) credits will be earned for each car released.

SECTION 1
DEMURRAGE RULES AND CHARGES

ITEM 850 - DEMURRAGE PLAN

1. Billing will be tendered on a monthly basis for all cars released during a calendar month.
 2. Customers having facilities at separate stations cannot be combined.
 3. Credit days and car day charges for cars held for unloading or other purposes will be kept separately from cars held for loading.
 4. Credit days earned in one calendar month cannot be carried over to another month.
 5. Demurrage charges will be assessed against the consignor at origin or consignee at destination who will be responsible for payment.
 6. Customer having two or more facilities at the same station with NS may combine the accounts into one if requested in writing.
 7. All days count including Saturday and Sundays. Seven (7) holidays will not be subject to demurrage (See Holidays, Item 200).
-

ITEM 950 - DEMURRAGE CALCULATION:

1. Total car days for all railroad-controlled cars will be added. (Car/days are net of holidays (See Holidays, Item 200) and non-service allowance days).
 2. Total credits for all railroad-controlled cars will be added.
 3. If total credits equal or exceed total net car days, demurrage charges will not be assessed.
 4. If total net car days exceed the total credits, calculation of charges will be made as follows:
 - (a) Subtract total credit days from total car days to determine chargeable days.
 - (b) The number of chargeable days will be assessed \$60.00 per day.
-

SECTION 2

STORAGE
HAZARDOUS MATERIALS
EXPLOSIVES
WASTE
(See item 1000)

SECTION 2

STORAGE - HAZARDOUS MATERIALS

ITEM 1000 - STORAGE OF EXPLOSIVES, HAZARDOUS MATERIALS, SUBSTANCES OR WASTES

(Subject to publication BOE 6000 - hazardous materials regulations of the Department of Transportation)

Application: This item applies to cars held on NS tracks (excluding leased tracks) containing:

- (a) Class A, B or C Explosives, named in Part 172 Commodity List, Publication BOE 6000.
- (b) Hazardous materials, substances, or wastes requiring the use of 4-digit identification number on shipping document, placards or panels, as named in Part 11 Section 172.101, Publication BOE 6000.

Demurrage charges for railroad-controlled cars will be in addition to charges provided in this item and Storage Charges on private cars will be in addition to this item.

Storage Days will Commence: After the date of constructive placement and on each car, two free days are given to the Consignee. Storage days commence from the third day 0001 hours (See Time, Item 200) and continue until the car is ordered placed on private tracks or released.

Storage Plan:

- (a) Charges will be billed on a monthly basis, for all cars released from storage during each calendar month.
 - (b) Charges will be assessed against the Consignee at destination or against the Consignor at origin, who will be responsible for payment.
 - (c) Two (2) free days are given on each car.
 - (d) Chargeable storage rate is \$50.00 per day.
-

SECTION 3

STORAGE RULES AND CHARGES

SECTION 3
STORAGE RULES AND CHARGES

ITEM - 1050 GLOSSARY OF TERMS:

For the purpose of establishing the provisions of this section, the definitions in item 200 will apply.

ITEM 1100 - STORAGE OF PRIVATE CARS:

1. **NON-APPLICATION:** - The storage of Private car provisions do not apply to: (See Exception)
 - (a) Empty cars of private ownership, which are not railroad controlled cars.
 - (b) Cars of private ownership on private or leased tracks.
2. **APPLICATION:** - This item applies to loaded private cars held on NS tracks under constructive placement after notice of arrival is given to the consignee and loaded private cars held on NS tracks waiting forwarding instructions from the consignor.
3. **STORAGE DAYS WILL COMMENCE:** - After the date of constructive placement and on each car, two free days are given to the consignee. Chargeable storage days commence from the third day 0001 hours (See Item 200) and continue until the car is ordered placed on private tracks or released.

STORAGE PLAN:

- (a) Charges will be billed on a monthly basis, for all cars released from storage during each calendar month.
- (b) Charges will be assessed against the consignee at destination on cars waiting placement or the consignor at origin on cars waiting forwarding instructions.
- (c) Two (2) free days are given on each loaded car being held for consignee on constructive placement. No free time is allowed for consignor for loaded cars held on NS tracks awaiting forwarding instructions.
- (d) Chargeable storage rate is \$20.00 per day.

Exception: On empty private cars at Louisville, KY stored or held on railroad tracks a charge of \$50.00 per car day will apply after 72 hours. (See Time, Item 200)

SECTION 3
STORAGE RULES AND CHARGES

ITEM 1150 – ASSIGNED CARS NOT SUBJECT TO STORAGE:

The storage of assigned car provisions do not apply to:

1. Empty cars of private ownership, which are not railroad controlled cars.
 2. Cars with an inside length of 69 feet or greater, except:
 - (a). Cars with mechanical destinations of "XL", "XM" or "XP" are not included in this exemption, thus charges will apply.
 - (b). Assigned bulkhead flat cars, mechanical designation "FB" or "FBS" with inside length less than 75 feet will not be exempted, thus charges will apply.
 3. Cars with a mechanical designation of "FM" having a carrying capacity of 200,000 pounds or more.
 4. In determining these exemptions, the car descriptions listed in the Official Railway Equipment Register RER 6410-Series shall govern.
-

SECTION 3
STORAGE RULES AND CHARGES

ITEM 1250 - STORAGE OF ASSIGNED CARS

APPLICATION:

- a. This item applies to specific empty cars, as requested by and assigned to a specific shipper (assignee), at NS origin stations, when NS is required to hold such cars on its premises or private sidings connected therewith.
- b. Before specific cars are assigned to a shipper, the shipper must request in writing of originating road-haul carrier(s) the assignment at least ten (10) days before their intended use for a specific number of cars.
- c. At such time as the assignee wishes to reduce the number of cars in an assignment, assignee must notify NS:

Director Equipment Marketing,
Norfolk Southern Corporation,
110 Franklin Road S.E.,
Roanoke VA 24042-0041

in writing or confirm verbal notification in writing and specify the effective date of release of such car or cars. Notice must be given at least 24 hours prior to effective date of release. The originating road-haul carrier(s) will have the prerogative of selecting the car or cars to be removed from the assignment. Storage charges prescribed by these rules will accrue on cars so selected until the effective date of release unless such cars are previously removed by the originating carrier(s) in which case storage charges will terminate on the date of such removal. However, no car will be released from an assignment by oral or written notice until all shipper owned appurtenances have been removed by assignee.

ITEM 1300 - STORAGE OF ASSIGNED CARS:

1. **NOTICE OF ARRIVAL:** - Notice will be given assignee within 24 hours after arrival of car at hold point.
2. **STORAGE DAYS:** - Chargeable storage days will commence from the second 0001 hour (See Time, Item 200) following notice of arrival and continue until the car is placed on demurrage status or is released from the assignment.
3. **STORAGE PLAN:**
 - (a) Storage charges will be assessed against assignee.
 - (b) Storage plans will be maintained individually by pool assignment number.
 - (c) Settlement of charges will be made on a monthly basis on all cars released from storage during each calendar month.
 - (d) One (1) free day is given on each car.
 - (e) Chargeable storage rate is \$10.00 per day
4. **RELIEF FOR DISRUPTION IN ASSIGNEE'S OPERATIONS:**
 - (a) When it is impossible to load, or receive for loading, empty assigned car because of cessation of operations for a period of five (5) consecutive days or more, resulting from a strike, work stoppage, flood or other interference at assignee's plant, storage charges will be suspended during the duration of the interference.
 - (b) To claim suspension of charges, assignee must furnish a written notice to NS within seven (7) days after the date interference ceased, stating: (1.) Date and time Interference began. (2.) Date and time Interference ceased, and (3.) Cause of such Interference.
 - (c) The period of suspension will be from the first 0001 hours (See Time, Item 200) following date on which interference began. until the first 0001 hours (See Time, Item 200) following, expiration of the four (4) day period immediately following resumption of operations.
 - (d) Relief will be restricted to a maximum of two (2) such cessation's in any calendar year, subject to a maximum of 30 days per calendar year.
 - (e) A cessation beginning in one calendar year and continuing uninterrupted into the following year will be considered as one (1) cessation occurring in the year in which the interference began.

SECTION 3
STORAGE RULES AND CHARGES

ITEM 1350 - STORAGE OF ASSIGNED CARS:

RELIEF FOR PARTIAL DISRUPTION IN ASSIGNEE'S OPERATIONS:

1. Storage charges will be adjusted when a partial shutdown lasts five (5) or more consecutive days and results in a 30 percent or more reduction in normal loading of assigned cars.
2. Adjustment of charges require that assignee presents written notice within seven (7) days following cessation of the partial shutdown which shows: (a.) Date and time partial shutdown began. (b.) Date and time partial shutdown ceased. (c.) Total number of assigned cars loaded during the partial shutdown.
3. Storage charges will be adjusted as follows:
 - (a) Beginning with the first 0001 hours (See Time, Item 200) following the date and time the Partial shutdown began, and
 - (b) Continuing until the first 0001 (See Time, Item 200) following resumption of operations, by reducing the amount of such storage charges by the car day factor furnished by assignee. (The car day factor is by assignee). (The car day factor is subject to verification by NS).
4. Relief will be restricted to a maximum of two (2) partial shutdowns in any calendar year, subject to maximum of 30 days per calendar year. A partial shutdown beginning one year and continuing uninterrupted into the following year will be considered as one (1) partial shutdown occurring in the year in which it began.

ITEM 1400 - STORAGE OF ASSIGNED CARS:

RELIEF FOR CAR DEFECTS:

1. Relief will be granted from storage charges on an assigned car while held for repair of safety or mechanical defects, from the time of actual discovery of the defect until car is again made available for loading.
2. If storage delays have been incurred on a car prior to the discovery of the defect, such-days will be included in the calculation of charges.
3. Storage days will resume from the first 0001 hours (See Time, Item 200) following notification to assignee of the availability of car for loading.

ITEM 1450 - STORAGE OF RAILWAY EQUIPMENT - MOVING ON OWN WHEELS:

A. APPLICATION:

This item applies to railway equipment, held on NS tracks, that will move or has moved on its own wheels, as freight, subject to transportation charges.

B. STORAGE DAYS WILL COMMENCE:

- (1) At Origin or enroute: From the first 0001 hours (See Time, Item 200) following receipt of the equipment and continuing until a document is given NS containing all necessary information to forward the equipment.
- (2) At Destination: From the first 0001 hours (See Time, Item 200) after notice of arrival is given consignee and continuing until equipment is released from hold tracks. (Notice of arrival will be given consignee within 24 hours after arrival of equipment at hold point).

C. STORAGE PLAN:

- (1) Unless otherwise advised, charges will be assessed against the consignor, if storage delays occurred at origin or enroute or the consignee if storage delays occurred at destination.
 - (2) Settlement of charges will be made on an individual basis for equipment released from storage during each calendar month.
 - (3) One (1) free day will be allowed on each car released from storage.
 - (4) Chargeable storage rate is \$30.00 per day.
-

SECTION 3
STORAGE RULES AND CHARGES

ITEM 1500 - GENERAL ELECTRIC CO

Empty cars bearing reporting marks BN 630850, MKT 14005, MP 819825, MP 819899, TTX 80627, TTX 80631, TTX 80633, TTX 80636-80637 and UP 50051 assigned to General Electric Co. will be subject to a storage charge of \$15.00 per car, per day or fraction thereof while held for loading at Rome, GA.

ITEM 1550 – DEMURRAGE ON PRIVATE CARS HELD OR STORED ON PRIVATE TRACKS

Loaded private cars held on private tracks at destination will be subject to demurrage rules and charges in Section 1 of this tariff (same as on Railroad-owned cars) only when, before the car leaves point of shipment or reconsignment, the bill of lading, shipping order, reconsigning order or other shipping document used to direct movement to the point at which held indicates car is "subject to ITEM 1550, Tariff NS 6004-Series".

- THE END -

Exhibit C

BB&T Wire Transfer Services Request

Date: 10/22/08

Branch: 8429304 Caller's Name:MARY LORZA

Transfer #:081022-001359

Reporting Branch: 8429304

Phone #:912-330-7264 International Transfer:N

Customer Type:C

Branch Location:404

Transfer Amount:

2400.00

Application: DDA

Debit Account #:0005146429248

GLA Ticket #:

Repetitive #:

Originator Name: BRAMPTON ENTERPRISES LLC

Address:

139 BRAMPTON RD

GARDEN CITY

GA 31408-2205

Receiving Bank: PNCBANK, NATIONAL ASSOC

ABA/Routing:031000053

Bank City/State:PHILADELPHIA, PA

Further Credit Bank:

Beneficiary Account:8614967554

Beneficiary Account Type:

Beneficiary Name: NORFOLK SOUTHERN RAILWAY COMPANY

Address:

1200 PEACHTREE STREET NE

ATLANTA, GA 30309

Originator Reference:

Originator to Beneficiary Information :

DEMURRAGE DEPOSIT

Bank to Bank Information:

[Prev](#) [Next](#)

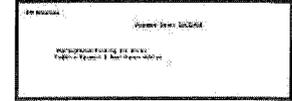
Lockbox 532888 - Thoroughbred Funding Inc - Weekly CD on 10/24/2008

Check for Wire Transaction ID G-1000001

The next transaction (G-1000002) was also received in this envelope.

Lockbox	ATL-530001	Ledger Date	10/22/2008	Amount	\$ 2,400.00
ABA/RT	053101121	Account	0005146429248	Check Num	081022006328
Batch	700	Item	3		

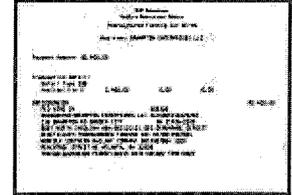
Envelope



Check



Page 1



[Prev](#) [Next](#)

A/R Advantage		Payment Number: 081022006328	
FedWire Payment Advice		Payment Date: 10/22/08	
Remitter: BRAMPTON ENTERPRISES LLC			
		2,400.00	
Paid to: Thoroughbred Funding Inc Wires			
081022006328	053101121	0005146429248	

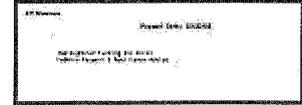
PNC Bank Atlanta A/R Advantage.

[Prev](#) [Next](#)

Lockbox 532888 - Thoroughbred Funding Inc - Weekly CD on 10/24/2008

Page 1 for Wire Transaction ID G-1000001

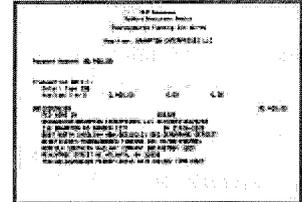
Envelope



Check



Page 1



[Prev](#) [Next](#)

A/R Advantage
FedWire Remittance Advice
Thoroughbred Funding Inc Wires
Remitter: BRAMPTON ENTERPRISES LLC

Payment Amount: \$2,400.00

Transaction Detail:

Detail Type	Amount	Debit	Credit
195	2,400.00	0.00	0.00

081022006328 \$2,400.00
 FED WIRE IN 006328
 ORIGINATOR:BRAMPTON ENTERPRISES LLC AC/0005146429248
 139 BRAMPTON RD GARDEN CITY GA 31408-2205
 BB&T NORTH CAROLINA ABA:053101121 OBI:DEMURRAGE DEPOSIT
 BENEFICIARY:THOROUGHbred FUNDING INC AC/8614967554
 NORFOLK SOUTHERN RAILWAY COMPANY 8614967554 1200
 PEACHTREE STREET NE ATLANTA, GA 30309
 TRN:081022006328 FEDREF:00145 DATE:081022 TIME:0927

PNC Bank Atlanta A/R Advantage.

NOTICE: The attached check is tendered in full payment of items stated below. If incorrect, return both check and statement.

DATE 11/26/2008 VENDOR 5-

NORFOLK SOUTHERN RAILWAY COMPANY

REFUND OF DEMURRAGE DEP FOR RAIL CARS ALM001154 & FP617180

99999957371 811U11242 51 090000122RE 10/01/08	2400.00	.00	2400.00
	TOTAL -		2400.00

Replaced 8636515 - stopped paid 11/25/08

Reissued check # 8642283 on 11/26/08 See following

Mary

Direct inquiries to e-mail address acctapcheckinquiry@nscorp.com

NO. 8642283

THIS IS WATERMARKED PAPER - DO NOT ACCEPT WITHOUT NOTING WATERMARK - HOLD TO LIGHT TO VERIFY WATERMARK



Norfolk Southern Railway Company, vendor account
For itself and/or as Agent for Operating Subsidiaries and Corporate Affiliates

Wachovia Bank, N.A.

Number 8642283
88-7270
2560

DATE: 11/26/2008

Two Thousand Four Hundred Dollars and 00-Cents

PAY \$*****2,400.00

Pay To: SAVANNAH RELOAD LLC
C/O BRAMPTON ENTERPRISES LLC
139 BRAMPTON RD
GARDEN CITY GA 314082205

VOID AFTER 180 DAYS

W. J. ...
TREASURER

8642283 25607270 2079900067648

WACHOVIA

Account	Amount	Date	Check #
000002079900067648	\$2,400.00	20081208	8642283

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Norfolk Southern Railway Company, vendor account

For itself and/or as Agent for Operating Subsidiaries and Corporate Affiliates

Wachovia Bank, N.A.

Number 8642283

68-7270
2560

DATE: 11/26/2008

Two Thousand Four Hundred Dollars and 00 Cents

Pay To

SAVANNAH RELOAD LLC
C/O BRAMPTON ENTERPRISES LLC
139 BRAMPTON RD
GARDEN CITY GA 314082205

PAY \$*****2,400.00

VOID AFTER 180 DAYS

William J. Romig
TREASURER

⑈864 2 283⑈ ⑆25607270⑆ ⑆2079900067648⑈

DO NOT WRITE BELOW THIS LINE

HOLD HERE
FOR DEPOSIT ONLY
BRAMPTON ENTERPRISES LLC
C/O SAVANNAH RELOAD
PAY TO THE ORDER OF
DRBT BRANCH BANKING & TRUST

1030181130

0664641

Exhibit D



OFFICIAL CHECK

5000644892

ISSUING BRANCH 8429304-SAVANNAH - POOLER

DATE DECEMBER 08, 2008

68-236/514

PAY TO THE ORDER OF NORFOLK SOUTHERN RAILROAD

BB&T \$6,000.00 DOLLARS

\$ **** \$6,000.00 ****
DOLLARS

BB&T

AUTHORIZED SIGNATURE

Marek Kowalski

MEMO/PURCHASER BRAMPTON ENTERPRISES, LLC

⑈5000644892⑈ ⑆051402369⑆0001019010097⑈

[Prev](#) [Next](#)

Lockbox 532888 - Thoroughbred Funding Inc - Weekly CD on 12/12/2008

Envelope (B)



Check for Check Transaction ID G-2233003

Lockbox	ATL-532797	Ledger Date	12/10/2008	Amount	\$ 6,000.00
ABA/RT	051402369	Account	0001019010097	Check Num	5000644892
Batch	101	Item	10	Env Type	ROS Company Mail

Check



Page 1

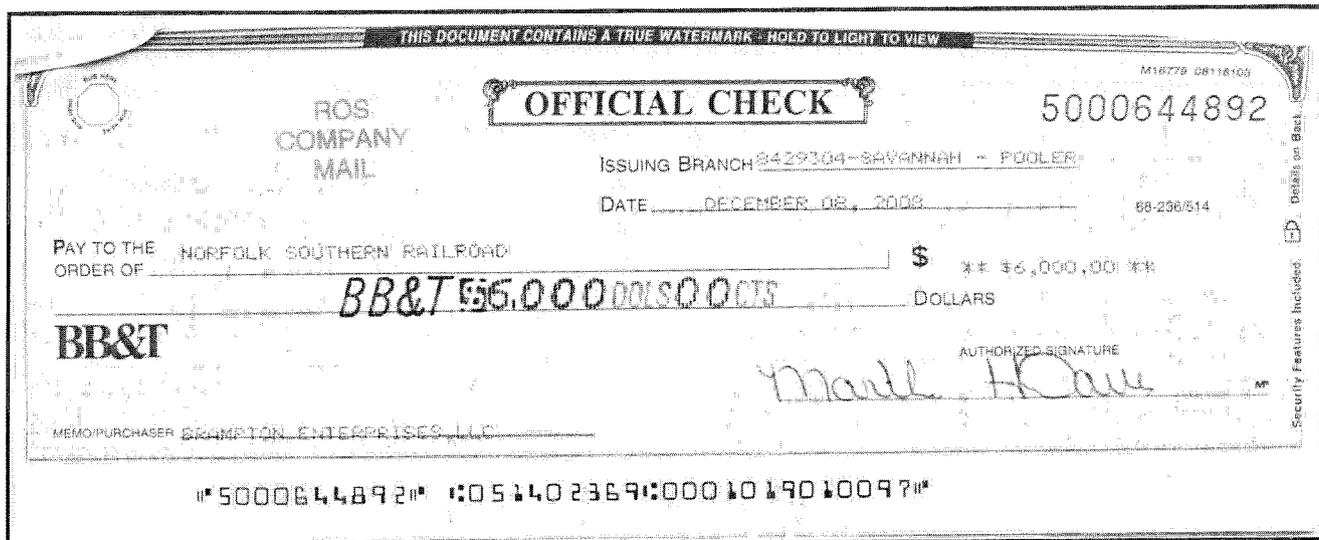


Transaction-level Keyed Fields

Remitter Name BRAMPTON ENTERPRISES INC

Invoice	Payment Type	Sort Code	Document Amount
1	0110580029	PBN	\$ 6,000.00

[Prev](#) [Next](#)



PNC Bank Atlanta A/R Advantage.

[Prev](#) [Next](#)

Lockbox 532888 - Thoroughbred Funding Inc - Weekly CD on 12/12/2008

Page 1 for Check Transaction ID G-2233003

Invoice	Payment Type	Sort Code	Document Amount
1	0110580029	PBN	\$ 6,000.00

Envelope (B)



Check



Page 1



[Prev](#) [Next](#)

DIRECT INQUIRIES TO: ANITA BROWN (404) 527-3488 (FAX 589-6710)	PAYMENT DUE 05-29-07	REMIT TO: NORFOLK SOUTHERN RAILWAY P.O. BOX 532797 ATLANTA GA 30353-2797	AMOUNT DUE \$6,000.00
1200 PEACHTREE ST. N.E. ATLANTA GA 30309 ANITA.BROWN@NSCORP.COM		WITH THIS PORTION OF FREIGHT BILL	
SAVANNAH RELOAD LLC 139 BRAMPTON RD GARDEN CITY GA 31408-2205		FREIGHT BILL NO. 0110580029	CUSTOMER NO. 0110580029
CREDIT TERMS 00 Days		DUE DATE 05-29-07	FREIGHT BILL DATE 05-29-07

PNC Bank Atlanta A/R Advantage.

WACHOVIA

Account	Amount	Date	Check #
000002079900067648	\$6,000.00	20090114	8650600

THIS IS WATERMARKED PAPER - DO NOT ACCEPT WITHOUT NOTING WATERMARK - HOLD TO LIGHT TO VERIFY



Norfolk Southern Railway Company, vendor account
 For itself and/or as Agent for Operating Subsidiaries and Corporate Affiliates

Wachovia Bank, N.A. Number 8650600
 88-7270
 2560

DATE: 01/08/2009

Six Thousand Dollars and 00 Cents

Pay To SAVANNAH RELOAD LLC
 PO BOX 7055
 GARDEN CITY GA 314187055

PAY \$*****6,000.00

VOID AFTER 180 DAYS

William Romig
 TREASURER

⑈8650600⑈ ⑆25607270⑆ ⑆2079900067648⑈

333705949

0643882

DO NOT WRITE BELOW THIS LINE

FOR PAY TO THE ORDER OF WATERMARK
 3881 BRANDEGEAN WAY
 FOR DEPOSIT ONLY
 RAMPTON, VA 22135
 DO NOT WRITE WATERMARK IS ABSENT.
 703-571-1000

Exhibit E

[Prev](#) [Next](#)

Lockbox 532888 - Thoroughbred Funding Inc - Weekly CD on 12/19/2008

Envelope (B)



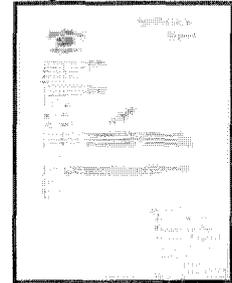
Check for Check Transaction ID G-2249001

Lockbox ATL- Ledger 12/16/2008 Amount \$ 1,200.00
 532797 Date
 ABA/RT 051402369 Account 0001019010097 Check Num 5000644900
 Batch 100 Item 1 Env Type ROS Company Mail

Check



Page 1

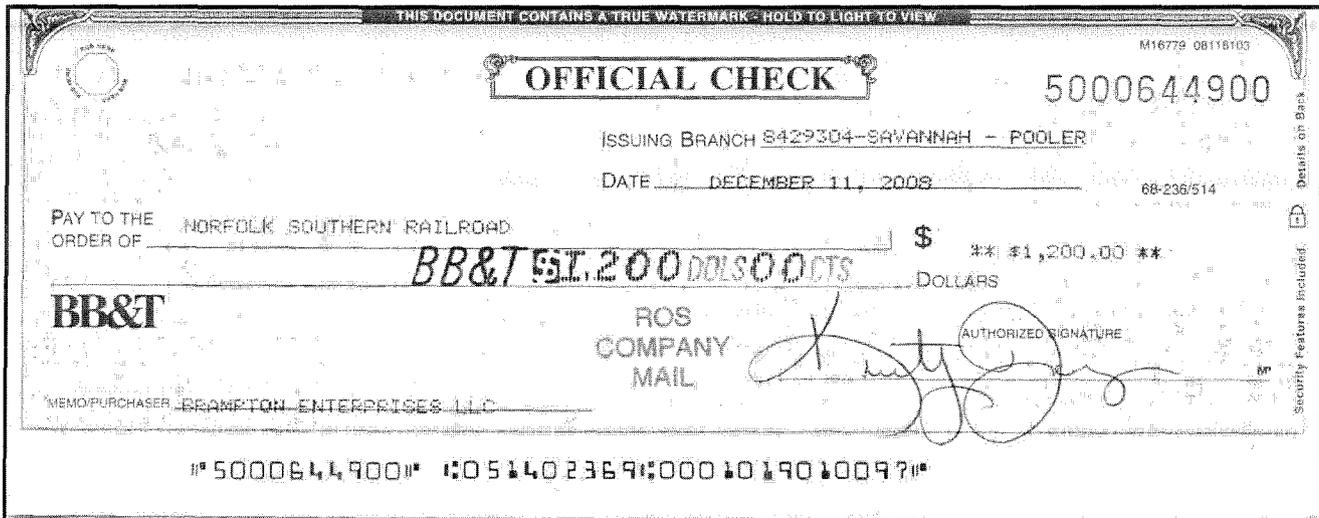


Transaction-level Keyed Fields

Remitter Name BRAMPTON ENTERPRISES LLC

Invoice	Payment Type	Sort Code	Document Amount
1		PUI	\$ 1,200.00

[Prev](#) [Next](#)



PNC Bank Atlanta A/R Advantage.

WACHOVIA

Account	Amount	Date	Check #
000002079900067648	\$1,200.00	20090303	8659042

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Norfolk Southern Railway Company, vendor account
For Itself and/or as Agent for Operating Subsidiaries and Corporate Affiliates

Wachovia Bank, N.A.

Number 8659042

88-7270
2580

DATE: 02/19/2009

One Thousand Two Hundred Dollars and 00 Cents

Pay To

SAVANNAH RELOAD LLC
PO BOX 7055
GARDEN CITY GA 314187055

PAY \$*****1,200.00

VOID AFTER 180 DAYS

William Roming
TREASURER

⑈8659042⑈ ⑆25807270⑆ ⑆2079900067648⑈

12308E8360

0623682

DO NOT WRITE BELOW THIS LINE

DO NOT ACCEPT IF WATERMARK IS ABSENT
HOLD TO LIGHT TO VERIFY WATERMARK

Exhibit 2

VERIFIED STATEMENT

OF

KAREN E. ESCALANTE

1. My name is Karen E. Escalante. I am an associate with the law firm of Morrison & Foerster LLP. Morrison & Foerster LLP represents Norfolk Southern Railway Company ("NS") in the above-captioned matter.

2. Attached hereto as Exhibit A is a true and correct copy of Brampton's Brief in Support of its Motion for Summary Judgment, including Exhibit A (Affidavit of William Groves), filed on February 18, 2008 in *Norfolk Southern Ry. v. Brampton Enterprises, LLC*, No. CV 407-155 (S.D. Ga.)

3. Attached hereto as Exhibit B is a true and correct copy of Brampton's Statement of Material Facts as to Which There Exists No Genuine Issue To Be Tried, filed on February 18, 2008 in *Norfolk Southern Ry. v. Brampton Enterprises, LLC*, No. CV 407-155 (S.D. Ga.).

4. Attached hereto as Exhibit C is a true and correct copy of Brampton's Response to Norfolk Southern's Statement of Undisputed Material Facts and Conclusions of Law, filed on April 7, 2008 in *Norfolk Southern Ry. v. Brampton Enterprises, LLC*, No. CV 407-155 (S.D. Ga.).

5. Attached hereto as Exhibit D is a true and correct copy of selected pages from the transcript of the Deposition of William S.R. Groves, taken on April 23, 2008 in *Norfolk Southern Ry. v. Brampton Enterprises, LLC*, No. CV 407-155 (S.D. Ga.).

6. Attached hereto as Exhibit E is a true and correct copy of Brampton's Brief in Support of its Motion for Partial Summary Judgment, including Exhibit A (Affidavit of William Groves), filed on May 30, 2008 in *Norfolk Southern Ry. v. Brampton Enterprises, LLC*, No. CV 407-155 (S.D. Ga.).

7. Attached hereto as Exhibit F is a true and correct copy of Brampton's Statement of Material Facts and Conclusions of Law, filed on May 30, 2008 in *Norfolk Southern Ry. v. Brampton Enterprises, LLC*, No. CV 407-155 (S.D. Ga.).

8. Attached hereto as Exhibit G is a true and correct copy of the decree of the Eleventh Circuit in *Norfolk Southern Ry. v. Groves*, 586 F.3d 1273 (11th Cir. 2009).

VERIFICATION

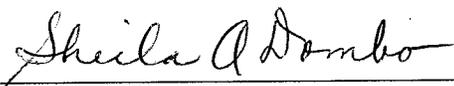
District of Columbia)
)
Washington) ss.):

Karen Escalante, being duly sworn, deposes and says that she has read the foregoing statement, knows the facts asserted therein are true and that the same are true as stated.



Karen Escalante

Subscribed and sworn to before me
this 11th day of March 2010.



Notary Public

SHEILA A. DOMBO
District of Columbia
My Commission Expires
May 14, 2011

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

NORFOLK SOUTHERN RAILWAY COMPANY)	
)	
v.)	CIVIL ACTION NO. CV407 155
)	
BRAMPTON ENTERPRISES, LLC)	
d/b/a SAVANNAH RE-LOAD)	
)	

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Brampton Enterprises, LLC d/b/a Savannah Re-Load (hereinafter "Brampton Enterprises") moves for summary judgment because it is not liable to the Plaintiff for any demurrage which may have accrued with respect to the rail freight at issue in this lawsuit. In order to sue the Defendant for demurrage, the Plaintiff must establish a contract, statute, or custom which renders the Defendant liable. No contract exists and the controlling statute and custom permit the Plaintiff to sue the freight consignee. Because it is not the consignee for this freight, Brampton Enterprises cannot be held liable for demurrage.

Statement of Facts

Defendant Brampton Enterprises operates a warehouse business under the trade name "Savannah Re-Load" which handles, among other things, freight arriving via rail. (Affidavit of Billy Groves, attached hereto as Exhibit "A," p. 1). Freight forwarding companies unilaterally give Savannah Re-Load notice that a given shipment—in these cases arriving on railcars delivered by Plaintiff Norfolk Southern Railway Company—is enroute to Brampton Enterprises' facility. *Id.* After it arrives at the Defendant's facility, Brampton Enterprises workers unload the freight and forward it to various ports for

export according to instructions from the freight forwarding company. (*Id.*) The freight forwarding companies make their transport arrangements without input from and without giving notice to Brampton Enterprises. (*Id.*) Importantly, Brampton Enterprises is never a party to the transportation contract; it simply operates as instructed by the freight forwarding companies. (*Id.*)

Brampton Enterprises never has any ownership interest in any freight it handles and is never the freight's final destination. (Groves Aff., p. 1). Nor does it ever retain the rail freight or use it for its own benefit. (*Id.*, p. 2). It does not inspect or evaluate the freight to see if it arrives in conformity with the purchase or transportation contract. (*Id.*) In fact, Brampton Enterprises does not receive a copy of the purchase or transportation contract; because the freight is not consigned to Brampton Enterprises, it has no way of knowing what to look for in an inspection or how to evaluate the freight even if it wanted to do so. (*Id.*) No one, including the Plaintiff, provides Brampton Enterprises with a copy of the bill of lading or informs it of the bill of lading's contents. (Groves Aff., p. 1).

Beginning in late 2006, Brampton Enterprises began handling freight sent to its facility by the freight forwarding companies on rail cars delivered by the Plaintiff. (Groves Aff., p. 1). The Plaintiff claims that in March of 2007, these railcars began incurring demurrage charges which it seeks to assess against Brampton Enterprises. (Comp., ¶ 8). As is set forth more fully below, the Plaintiff may only recover demurrage against a consignee or a party to the transportation contract. Because Defendant is not a party to any transportation contracts; the issue before the Court is whether another's unilateral act of identifying "Savannah Re-Load" as the consignee without Brampton Enterprises' knowledge or permission is sufficient to make it a consignee and therefore

liable for demurrage. Plaintiff is still in the process of gathering and producing all relevant bills of lading; however, it now moves for summary judgment with respect to liability.¹

Summary Judgment Standard

A motion for summary judgment should be granted “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). “[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 2552 (1986). “When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial.” FED. R. CIV. P. 56(e)(2).

Argument and Citation of Authority

A. What is demurrage

Demurrage is “a charge exacted by a carrier from a shipper or consignee on account 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

¹ Defendant has produced 23 documents bearing the title “Shipping Instructions and Bill of Lading.” (Copies of which are attached hereto as Exhibit “B.”). Defendant believes this lawsuit concerns scores, if not hundreds of railcar deliveries. Therefore, the parties are still sorting through how many bills of lading list Defendant as consignee and the accuracy of Defendant’s demurrage calculation.

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 (3rd Cir. 2007)(emphasis added)(quoting *Union Pacific Railroad 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, Fla.*, 936 F.Supp. 880, 883 (N.D. Fla.,1995)(citations omitted). Plaintiff publishes its demurrage tariff on its website; Tariff 6004-B, Section 1, Item 850 states that demurrage will be assessed against the “consignee at destination who will be responsible for payment.”² (A copy of this tariff is attached as Exhibit “C.”).

B. Only a consignee or a party to the transportation contract may be liable for demurrage.

The seminal case addressing demurrage liability is *Middle Atlantic Conference v. U.S.*, 353 F.Supp. 1109, 1121 (D.C. D.C., 1972). In that case, various motor carrier associations sought approval for a tariff which would hold warehousemen and others with no connection to the transportation contract liable for demurrage.³ The court conducted an exhaustive, in depth analysis of demurrage in reaching its opinion that one must be a consignee or a party to the transportation contract in order to be liable under the tariff. “Land carriers in the United States must rely upon liabilities created according to common law principles.” *Id.* at 1115 (footnote omitted). As a result, “[b]efore such

² <http://www.nscorp.com/nscportal/nscorp/pdf/NS6004-B.pdf>

³ “Under prior statutory regimes, railroads’ tariffs, including tariffs regarding demurrage charges, had to be filed with the Interstate Commerce Commission (ICC). After the enactment of the Interstate Commerce Commission Termination Act (ICCTA) in 1996, the Interstate Commerce Commission was replaced with the Surface Transportation Board (STB) and filing of tariffs was no longer required.” *CSX Transp. Co. v. Novolog Bucks County, supra*, at 251, n. 1.

transportation-related assessments as detention⁴ 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. Under such circumstances the liability, as for freight charges, must be founded either on contract, statute or prevailing custom.” *Id.* at 1118.

Certainly warehousemen are free to assume liability for detention charges by contractual undertaking and this is sometimes done through average demurrage agreements to promote their own business and in some instances to obtain the benefits of lower detention costs for the benefit of their customers. However, absent any custom, statutory or contractual basis, for reasons heretofore stated, it would be unlawful to attempt unilaterally to impose such liability on a party outside the contract of transportation by means of a tariff approved by the Commission. A tariff is an inappropriate instrument to “legislate” liability with respect to a nonconsenting party and we find that the Commission acted properly in declining to approve a tariff which purported to do so.

Mid. Atl. Conf., *supra*, at 1122 (footnotes omitted)(emphasis added). This line of reasoning has been adopted by numerous courts.⁵ The only distinguishing factor between *Middle Atlantic Conference* and the instant case is that here, Plaintiff claims bills of lading identify the Defendant as consignee.

⁴ “Motor carriers term such delay as detention. Railroads refer to it as demurrage.” *Middle Atlantic Conference*, *supra*, at 1113.

⁵ See, e.g. *Illinois Cent. R. Co. v. South Tec Development Warehouse, Inc.*, 337 F.3d 813 (7th Cir. 2003); *Union Pacific R. Co. v. Ametek, Inc.*, 104 F.3d 558, 563 (3rd Cir. 1997); *CSX Transp., Inc. v. City of Pensacola, Fla.*, 936 F.Supp. 880 (N.D. Fla., 1995); *Southern Pac. Transp. Co. v. Matson Navigation Co.*, 383 F.Supp. 154, (D.C. Cal. 1974).

There is no “custom, statut[e] or contract[.]” which permits the Plaintiff to recover demurrage from Brampton Enterprises unless it is the freight consignee. The parties have no contract that addresses demurrage. (Groves Aff., p. 1; Pl. Supp. Resp. to Def. First Req. to Prod., a copy of which is attached as Exhibit “D.”). Under “the comprehensive survey of the law in *Middle Atl. Conference*. . .no industry-wide custom permits [holding non-consignees responsible for demurrage charges].” *South Tec, supra*, at 820. The relevant statute only permits Plaintiff to seek demurrage from a consignee. It states:

Liability for payment of rates for transportation for a shipment of property by a shipper or consignor. . . is determined under this subsection when the transportation is provided by a rail carrier under this 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 billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates 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)(emphasis added). “As emphasized above, the statute applies only to agents who are also consignees, and not to agents who are not consignees. *Illinois Cent. R. Co. v. South Tec Development Warehouse, Inc.*, 337 F.3d

813, 817 (7th Cir. 2003)(emphasis in original). Defendant is not a party to any transportation contracts and there is no relevant custom; therefore Plaintiff must prove that Brampton Enterprises was the consignee for the freight at issue in this lawsuit in order to collect demurrage.

C. The sole basis for the Plaintiff to claim that Defendant is a consignee is its allegation that the Defendant is identified as consignee on the relevant bills of lading.

Brampton Enterprises is never the consignee for the freight it handles. (Groves Aff., p. 2). It does not order the freight and is never a party to any contracts concerning its purchase or transport. (*Id.*). It never retains the freight, takes an ownership interest in it, or uses it for its own benefit. (*Id.*). Nor does it inspect or evaluate the freight to see if it arrives in conformity with the purchase or transportation contract. (*Id.*). In fact, Brampton Enterprises does not receive the purchase or transportation contract; because the freight is not consigned to Brampton Enterprises, the Defendant has no way of knowing what to look for in an inspection or how to evaluate the freight even if it wanted to do so. (*Id.*). Brampton Enterprises has none of these rights, powers, or obligations because it is not the freight consignee. See generally, *Grove v. Brien*, 49 U.S. 429, 439, (1850)(“The effect of a consignment of goods, generally, is to vest the property in the consignee. . . .”); *Reed Oil Co. v. Smith*, 154 Ga. 183, 186-187, 114 S.E. 56, 58 (1922)(“When goods are forwarded by an express company, to be paid for on delivery, the consignee is ordinarily entitled to a reasonable opportunity to examine the goods, to ascertain whether they answer the description ordered by him.”); *Saunders Bros. v. Payne*, 29 Ga. App. 615, 615-616, 116 S.E. 349, 350 (1923)(“the consignee may be presumed to be the owner of the goods which have been accepted for

shipment; and such a consignee may direct the manner of the transportation of a shipment addressed to him. . . .”). In light of Defendant’s relationship with the rail freight it handles, it is not the freight consignee.

The Plaintiff has taken the position that Defendant is a consignee because the bills of lading associated with this freight say so. However, even if true, this fact by itself does not render Brampton Enterprises liable to the Plaintiff for demurrage.

D. Even if bills of lading do list “Savannah Re-Load” or “Brampton Enterprises, LLC” as a consignee, this fact alone is insufficient to make it liable for demurrage.

Even assuming bills of lading list Defendant as a consignee, this by itself does not transform Defendant into a consignee. A bill of lading is a contract, *National Shipping Co. of Saudi Arabia v. Omni Lines, Inc.*, 106 F.3d 1544, 1547 (11th Cir. 1997), and it is a fundamental tenant of contract law that parties to a contract cannot bind a non-party, *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). Therefore, a bill of lading can no more bind a non-party (Brampton Enterprises) without that party’s consent than any other contract.

The Seventh Circuit (and virtually every other court to consider this issue) agrees, stating that “[b]eing listed by third parties as a consignee on some bills of lading is not alone enough to make [the defendant] a legal consignee liable for demurrage charges. . . .” *Illinois Cent. R. Co.*, *supra*, at 821(emphasis added). See also, *Union Pacific railroad Co. v. Carry Transit*, No. 3:04-CV-1095, p. 4 (N.D. Tex. Oct. 27, 2005)(“The Court declines to untether the law of demurrage from its contractual moorings. . . [the] unilateral decision to name a non-party to the transportation contract. .

.as a consignee without its consent does not render the non-party liable for demurrage charges.”);⁶ *CSX Transp., Inc. v. City of Pensacola, Fla.*, 936 F.Supp. 880, 884 (N.D.Fla.,1995)(“The unilateral action of one party in labeling an intermediary as a consignee does not render the putative consignee liable for demurrage.”); *Ingersoll Mill. Mach. Co. v. M/V Bodena*, 829 F.2d 293, 300 (2nd Cir. 1987)(“A carrier. . . may not unilaterally alter a bill of lading so as to bind the shipper without the authorization of the shipper.”); *Western Maryland Ry. Co. v. South African Marine Corp.*, 1987 WL 16153, 4 (S.D. N.Y. 1987)(“[W]e decline to hold, as plaintiff urges, that a connecting ocean carrier is liable for rail demurrage charges as a matter of law merely by virtue of being named by the shipper as the consignee in the rail bills of lading.”); *Southern Pac. Transp. Co. v. Matson Navigation Co.*, 383 F.Supp. 154, 157 (D.C. Cal. 1974)(“[W]here, as here, a connecting carrier-consignee is merely named in the railroad bill of lading without either more involvement on its part, or some culpability for the delay, it cannot be held liable to the railroad for demurrage. To hold otherwise on these facts would be to place a connecting carrier's liability totally within the shipper's control, a result the Court cannot sanction.”); *Missouri, K. & T. Ry. Co. of Texas v. Capital Compress Co.*, 50 Tex. Civ. App. 572, 574, 110 S.W. 1014, 1015 (Tex.Civ.App. 1908).

In fact, Defendant is aware of only one case which has ever adopted the truism that one can be “made” a consignee simply because the bill of lading says so. In *CSX Transportation Company v. Novolog Bucks County*, 502 F3d 247 (3rd Cir. 2007), the Third Circuit broke with the above 100 years of precedent and held that nothing more than unilateral inclusion in a bill of lading can turn an entity into a consignee and

⁶ This opinion is attached as Exhibit “E”.

therefore subject it to demurrage. Using circular logic, it held that this is true because a consignee is “nothing more than the person to whom cargo is delivered following instructions.” *Id.* at 257. As a result, one completely unconnected with the transportation contract can become a consignee against its will and without its consent.

This holding is flawed for several reasons. First, the Third Circuit’s incredibly broad definition of consignee glosses over the fact that a bill of lading is a contract and shares the same limitations as any other contract. It is supposed to reflect the identity of the consignee, not create one out of whole cloth. To hold otherwise is to place form over function; akin to holding that a tenant is merely one who is identified as such in a lease agreement and therefore becomes liable for rent irrespective of whether it was actually a party to the lease or ever occupied the leased property. This result is contrary to basic contract law.⁷

Second, the statutory language which the Third Circuit appears to use in support of its conclusion does not profess to define who is a consignee. The court initially observed that the Interstate Commerce Commission Termination Act “does not define the term ‘consignee’ or its cognates.” *CSX Transp. Co.*, *supra*, at 257. Nevertheless, it appears to hold that Section 10743(a)(1) supports its self-fulfilling definition of “consignee” by “envisag[ing] specifically the situation where ‘the shipper or consignor instructs the rail carrier transportation the property to deliver it to a consignee that is an agent only’ . . . i.e., where the person designated by the shipper or consignor as the consignee [but] is not in fact the person who would normally be responsible for the

⁷ *CSX Transp. Co.* criticizes the 7th Circuit’s decision in *South Tec* by labeling its holding a “‘designation plus’ analysis under which the entity named as the consignee on the bill of lading would be presumptively liable for demurrage only if ‘other factors’ were present.” *CSX Transp. Co.*, *supra*, at 260. That is inaccurate; the 7th Circuit merely requires a plaintiff to prove a defendant is the actual consignee, without mere reference to the bill of lading, before holding the defendant liable for demurrage.

charges, but is only an agent (more properly designated, for instance, as a ‘care of party).” *Id.*, 258 (quoting 49 U.S.C. 10743(a)(1)(both emphases in original). However, this statutory language is completely silent on the issue of who is the consignee. In fact, the statute states that regardless of who receives the property, “the consignee is liable for rates billed at the time of delivery for which the consignee is otherwise liable. . . .” 49 U.S.C.A. § 10743.

Third, the court stated that requiring more than mere designation on a bill of lading “would also frustrate the plain intent of Section 10743, which is to facilitate the effective assessment of charges by establishing clear rules for liability.” Its reasoning is that the “named consignee”⁸ can avoid liability by notifying the carrier of its agency status and the identity of the beneficial owner pursuant to Section 10743(a)(1)(A)(B).⁹ This holding appears to assume that Defendant receives the bills of lading prior to delivery and is therefore capable of satisfying this statute. However, Defendant was never given any bills of lading, perhaps because it has never been a party to the transportation agreement and is not a consignee in the first place. (Groves Aff., p. 1-2). Moreover, even if Brampton Enterprises did receive bills of lading, it would still be unable to satisfy Section 10743(a)(1)(B)’s requirement that it notify the carrier of the beneficial owner: no one gives this information to Brampton Enterprises. Brampton Enterprises does not receive copies of the transportation contracts or the bills of lading.

⁸ This term does not appear in the 49 U.S.C. 10743.

⁹ The Third Circuit also criticizes the 7th Circuit’s holding that a consignee need only notify a carrier in accordance with Section 10743 where the carrier does not already have notice. *CSX Transp. Co., supra*, at 260. It claims this will have the practical effect of requiring the carrier to determine whether “a sufficient number of bills of lading have clarified the agency relationships so as to exempt the consignee from the statutory requirements.” *Id.* This is also incorrect. Defendant is a for-profit warehouse. It stated as much in registering its trade name and advertises this fact on its website. Plaintiff need not parse through bills of lading to discover this fact; in fact the bills of lading are completely irrelevant on this point because Defendant does not draft, consent to, or preview them.

(Groves Aff., p. 2). It therefore cannot inform the Plaintiff of the identity of the beneficial owner. Thus Defendant is not in a position to give the required information to Norfolk Southern. As a result, the Third Circuit's rule is completely unworkable because Brampton Enterprises neither knows that it needs to give notice nor is it given the information necessary to provide proper notice. These facts are further proof that it is inappropriate to disregard the contractual nature of a bill of lading. Doing so imposes impossible obligations upon the Defendant.

Conclusion

Plaintiff can only recover against parties to the transportation agreement and the freight consignee. Its sole basis for alleging that Defendant is the consignee is the fact that Defendant is listed a consignee on some bills of lading without Brampton Enterprises' knowledge or permission. This unilateral act of another is insufficient to transform Brampton Enterprises into a consignee for the reasons given above. Therefore, because Brampton Enterprises is neither a party to the transportation contract nor a consignee, it cannot be liable for any demurrage allegedly incurred.

This 18th day of February, 2008.

s/ Jason C. Pedigo, Esq.

Jason C. Pedigo

Georgia Bar No. 140989

Attorney for Defendant

Ellis, Painter, Ratterree & Adams LLP

Post Office Box 9946

Savannah, Georgia 31412

Telephone: (912) 233-9700

Email: jpedito@epa-law.com

CERTIFICATE OF SERVICE

This is to certify that I, Jason C. Pedigo, have this day served the following counsel of record with a true and correct copy of the foregoing document(s) as indicated below:

Chad D. Mountain
Keenan Cohen & Howard P.C.
One Pitcairn Place
165 Township Line Road, Suite 2400
Jenkintown, PA 19046

Benjamin M. Perkins
Oliver, Manor & Gray LLP
Post Office Box 10186
Savannah, Georgia 31412

- depositing a copy in the United States Mail in a properly addressed envelope with adequate postage affixed thereto to ensure delivery;
- via electronic mail: cmountain@freightlaw.net, bperkins@omg-law.com
- via facsimile number:
- by hand delivery.

This 18th day of February, 2008.

s/ Jason C. Pedigo, Esq.

Jason C. Pedigo
Georgia Bar No. 140989
Attorney for Defendant
Ellis, Painter, Ratterree & Adams LLP
Post Office Box 9946
Savannah, Georgia 31412
Telephone: (912) 233-9700
Email: jpedigo@epra-law.com

EXHIBIT "A"

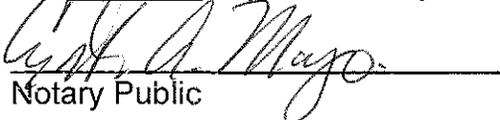
consignee on any bill of lading and has never been informed that any bill of lading identifies it as a consignee.

Brampton Enterprises does not have any contractual agreement with Norfolk Southern or any other company regarding demurrage. Prior to initiating this lawsuit, Norfolk Southern never once informed Brampton Enterprises that it believed Brampton Enterprises owed demurrage because Brampton Enterprises was a consignee on any bill of lading. Had it done so, I would have immediately informed it that Brampton Enterprises is a warehouse only and is never the consignee for the freight it handles.

Irrespective of what may appear on any bill of lading, Brampton Enterprises has never had any of the freight it handles consigned to it. Brampton Enterprises does not order the freight it handles and is never a party to any contracts concerning its purchase or transport. It never retains the rail freight, takes an ownership interest in it, or uses it for its own benefit. Nor does it inspect or evaluate the freight to see if it arrives in conformity with the purchase or transportation contract. In fact, Brampton Enterprises does not receive a copy of the purchase or transportation contract; because the freight is not consigned to Brampton Enterprises, it has no way of knowing what to look for in an inspection or how to evaluate the freight even if it wanted to do so."


WILLIAM GROVES

Sworn to and subscribed before me
this 12th day of February, 2008.


Notary Public

My commission expires **CYNTHIA A. MAYO**
(NOTARIAL SEAL) Notary Public, Effingham County, Georgia
My Commission Expires May 8, 2011

384056v1
005578-000001

Exhibit B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

NORFOLK SOUTHERN RAILWAY)
COMPANY)
)
v.) CIVIL ACTION NO. CV407 155
)
BRAMPTON ENTERPRISES, LLC)
d/b/a SAVANNAH RE-LOAD)
)

**STATEMENT OF MATERIAL FACTS AS TO WHICH
THERE EXISTS NO GENUINE ISSUE TO BE TRIED**

- 1) Defendant Brampton Enterprises operates a warehouse business under the trade name "Savannah Re-Load" which handles, among other things, freight arriving via rail. (Affidavit of Billy Groves, a copy of which is attached as Exhibit "A" to the Brief in support of Defendant's Motion for Summary Judgment, p. 1).
- 2) Freight forwarding companies unilaterally give Savannah Re-Load notice that a given shipment is enroute to Brampton Enterprises' facility. (*Id.*)
- 3) Brampton Enterprises is never involved in the purchase or booking of the rail freight it handles. (*Id.*).
- 4) Brampton Enterprises does not order the freight it handles and is never a party to any contracts concerning its purchase or transport. (Groves Aff., p. 2).
- 5) It never retains the rail freight, takes an ownership interest in it, or uses it for its own benefit. (*Id.*).
- 6) Upon the freight's arrival at the Defendant's facility, Brampton Enterprises workers unload it and forward it to various ports for export. (*Id.*, p. 1).

- 7) Defendant does not inspect or evaluate the freight to see if it arrives in conformity with the purchase or transportation contract. (*Id.*, p. 2).
- 8) Brampton Enterprises has no way of knowing what to look for in an inspection or how to evaluate the freight even if it wanted to do so. (*Id.*).
- 9) Defendant forwards the freight according to instructions from the freight forwarding companies. (Groves Aff., p. 1).
- 10) The freight forwarding companies make their transport arrangements without input from and without giving notice to Brampton Enterprises. (*Id.*)
- 11) Brampton Enterprises does not receive a copy of the purchase or transportation contract. (*Id.*, p. 2).
- 12) Brampton Enterprises does not have any contractual agreement with Norfolk Southern or any other company regarding demurrage. (*Id.*)
- 13) Brampton Enterprises is never the freight's final destination. (*Id.*)
- 14) Neither the freight forwarding companies nor the Plaintiff provide Brampton Enterprises with a bill of lading or inform it of the bill of lading's contents. (Groves Aff., p. 1).
- 15) Brampton Enterprises does not draft, approve of, preview or receive any bills of lading associated with this rail freight which identifies the consignee or consignor. (*Id.*)
- 16) Brampton Enterprises has never received or viewed a bill of lading associated with the rail freight it handles which identifies the consignee or consignor either before, during, or after the freight arrives. (*Id.*)

- 17) Brampton Enterprises has never consented to being listed as a consignee on any bill of lading and has never been informed that any bill of lading identifies it as a consignee. (*Id.*, pp. 1-2)
- 18) Beginning in late 2006, Brampton Enterprises began handling freight sent to its facility by the freight forwarding companies on rail cars delivered by the Plaintiff. (Groves Aff., p. 1).
- 19) The Plaintiff claims that in March of 2007, these railcars began incurring demurrage charges which it seeks to assess against Brampton Enterprises. (Comp., ¶ 8).
- 20) The Plaintiff may only recover demurrage against a consignee or a party to the transportation contract.
- 21) The sole basis for Plaintiff's claim that Defendant is liable for demurrage is its belief that Defendant is the consignee for the rail freight at issue.
- 22) The sole basis for Plaintiff's belief that Defendant is the consignee for the rail freight at issue is its claim that Defendant is listed as the consignee on the bills of lading associated with this freight.
- 23) Prior to initiating this lawsuit, Norfolk Southern never once informed Brampton Enterprises that it believed Brampton Enterprises owed demurrage because Brampton Enterprises was a consignee on any bill of lading. (Groves Aff., p. 2).
- 24) Had it done so, Defendant would have immediately informed it that Brampton Enterprises is a warehouse only and is never the consignee for the freight it handles. (*Id.*).

This 18th day of February, 2008.

s/ Jason C. Pedigo, Esq.

Jason C. Pedigo

Georgia Bar No. 140989

Attorney for Defendant

Ellis, Painter, Ratterree & Adams LLP

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Email: jpedito@epa-law.com

CERTIFICATE OF SERVICE

This is to certify that I, Jason C. Pedigo, have this day served the following counsel of record with a true and correct copy of the foregoing document(s) as indicated below:

Chad D. Mountain
Keenan Cohen & Howard P.C.
One Pitcairn Place
165 Township Line Road, Suite 2400
Jenkintown, PA 19046

Benjamin M. Perkins
Oliver, Manor & Gray LLP
Post Office Box 10186
Savannah, Georgia 31412

- depositing a copy in the United States Mail in a properly addressed envelope with adequate postage affixed thereto to ensure delivery;
- X via electronic mail: cmountain@freightlaw.net, bperkins@omg-law.com
- via facsimile number:
- by hand delivery.

This 18th day of February, 2008.

s/ Jason C. Pedigo, Esq.
Jason C. Pedigo
Georgia Bar No. 140989
Attorney for Defendant
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Exhibit C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

NORFOLK SOUTHERN RAILWAY)
COMPANY,)

Plaintiff,)

v.)

CIVIL ACTION NO. CV407 155

BRAMPTON ENTERPRISES, LLC,)
d/b/a SAVANNAH RE-LOAD,)

Defendant.)

**DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF
UNDISPUTED MATERIAL FACTS AND CONCLUSIONS OF LAW**

1. Denied. Defendant admits that Norfolk Southern transported freight on behalf of various shippers that was delivered to Savannah Re-Load; however, Savannah Re-Load denies it was the freight consignee or that it is "Savannah Re-Load, LLC."

2. Denied. Plaintiff has not provided documentation which permits Defendant to calculate the amount of demurrage which allegedly accrued and denies that it owes demurrage in accordance with the terms of the controlling tariff.

3. Defendant denies that this is a complete statement of the manner in which demurrage is calculated.

4. Defendant denies that this is a complete statement of the manner in which demurrage is calculated.

5. Denied.

6. Defendant denies it is liable for demurrage but admits that Norfolk Southern sought payment from it for demurrage.

7. Defendant denies that consignee is the "receiver of the freight" but admits that Norfolk Southern sought payment from it due to the documents which are attached to Mr. Young's affidavit.

8. Defendant admits that it disputed the manner in which the demurrage charges were calculated and admits that it did not deny being the named consignee because Plaintiff never informed it of this fact, never provided the bills of lading in question, and never stated that this was the basis for its claim for demurrage.

9. Defendant admits that it never disputed it was the sole consignee for the freight shipments in question because it never occurred to it to defend itself against an allegation that Plaintiff never made. No one ever provided Defendant with the bills of lading and Plaintiff never informed it that the demurrage charges were based upon its alleged status as the consignee.

10. Admitted.

11. Defendant admits that it has not paid for the demurrage charges but denies being liable for them.

This 7th day of April, 2008.

s/ Jason C. Pedigo

Jason C. Pedigo

Georgia Bar No. 140989

Ellis, Painter, Ratterree & Adams LLP

P.O. Box 9946

Savannah, Georgia 31412

912.233.9700

Attorney for Defendant

jpedito@epa-law.com

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

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

CIVIL ACTION NO. CV407 155

CERTIFICATE OF SERVICE

This is to certify that I have on this day served all the parties in this case in accordance with the directives from the Court Notice of Electronic Filing ("NEF") which was generated as a result of electronic filing.

Submitted this 7th day of April, 2008.

s/ Jason C. Pedigo
Jason C. Pedigo
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Exhibit D

IN THE MATTER OF:

NORFOLK SOUTHERN RAILWAY

vs.

BRAMPTON ENTERPRISES, LLC, ET AL.

DEPOSITION OF: WILLIAM S.R. GROVES

TAKEN ON : APRIL 23, 2008

***CONDENSED/ INDEX/
EXHIBITS***



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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

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

CIVIL ACTION
NO. 4:07-CV-0155

Deposition of WILLIAM S.R. GROVES, taken by
counsel for the Plaintiff, pursuant to notice and by
agreement of counsel, under the Federal Rules of Civil
Procedure, reported by Annette Pacheco, CSR, RPR, RMR,
B-2153, in the offices of Ellis, Painter, Ratterree &
Adams, 2 East Bryan Street, Savannah, Georgia, on
Wednesday, April 23, 2008, commencing at 12:53 p.m.

Transcript Prepared By:

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Page 2

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 19 912-233-9700
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 21
 22
 23
 24
 25

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1 EXHIBITS
 2 DEFENDANT'S PAGE
 3 EXHIBIT NO. DESCRIPTION IDENTIFIED

4 No. 8 A demurrage bill dated
 5 April 2007 with
 6 attachments 110

7 No. 9 An e-mail dated April 30,
 8 2007 to Mark Sayers and
 9 George Troficanto from
 10 Roni Vitale 112

11 No. 10 An e-mail dated May 21,
 12 2007 to Savannah Div. from
 13 Mark Sayers 115

14 No. 11 An e-mail dated June 8,
 15 2007 to C.W. Trimble from
 16 Mark Sayers 117

17 No. 12 An e-mail dated June 11,
 18 2007 to Anita Brown from
 19 Mark Sayers 119

20 No. 13 An e-mail dated June 22,
 21 2007 to Kitty Paul from
 22 Mark Sayers with
 23 attachments 121

24 No. 14 An e-mail dated July 2,
 25 2007, to Anita Brown
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No. 15 Two pages of e-mails 127

No. 16 A letter dated July 18,
 2007, to Greg Ausborn,
 Kitty Paul and Anita
 Brown from William
 Groves with attachments 128

No. 17 An e-mail dated July 25,
 2007, to Billy Groves
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No. 18 A letter to Greg from
 William S.R. Groves 135

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 8 * * * * *
 9 EXHIBITS
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12 No. 1 A document entitled
 13 "Amended Notice of Rule
 14 30(b)(6) Deposition
 15 Notice of Corporate
 16 Designee(s) for Savannah
 17 Reload" 87

18 No. 2 A track lease 91

19 No. 3 An e-mail dated January
 20 29, 2007 94

21 No. 4 A faxed document to
 22 Savannah Re-Load from
 23 Lisa Miele 98

24 No. 5 A calendar page of
 25 February 2007 101

No. 6 A multipage document
 listing cars placed,
 cars released, a freight
 bill and demurrage bills 103

No. 7 A release sheet 104

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 3 EXHIBIT NO. DESCRIPTION IDENTIFIED

4 No. 19 A letter dated July 31,
 5 2007 to Bill Groves from
 6 Denise B. Scott with an
 7 attachment 138

8 No. 20 An e-mail dated August 7,
 9 2007 to Mark Sayers and
 10 Bill Groves from Roni
 11 Vitale 139

12 No. 21 A Bowater shipping
 13 specification sheet 143

14 No. 22 A document entitled
 15 "Combination Pick Up
 16 Order/Delivery Permit/
 17 Dock Receipt" 146
 18
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1 A. That were sales and marketing, no.
 2 Q. Okay.
 3 A. There were other folks --
 4 Q. Sure.
 5 A. -- but I know they didn't work in the
 6 sales and marketing division.
 7 Q. Gotcha. Who are Savannah's customers?
 8 I know that, I know what Savannah does but does it
 9 have a set amount of set customers that it has?
 10 A. I wouldn't say set, no. We have a list
 11 of folks that we perform services for but it's not set
 12 by any means.
 13 Q. Okay.
 14 A. I mean, our customers come and go as
 15 they see fit.
 16 Q. Okay.
 17 A. We --
 18 Q. Galaxy Forwarding is a company --
 19 A. Okay.
 20 Q. -- that's come up as litigation. How
 21 are they related to Savannah?
 22 A. Galaxy Forwarding was a customer of
 23 Savannah Re-Load.
 24 Q. You just said that customers come and
 25 go. Are they one of those? Galaxy's no longer a

Page 31

1 customer?
 2 A. That is correct.
 3 Q. Okay. When did they cease being a
 4 customer?
 5 A. End of July, first of August 2007.
 6 Q. To help me get a better sense of who
 7 your customers are, is it one of these types of
 8 operations where people just contact you when they
 9 need your services and then you might not hear from
 10 them again?
 11 A. Yes, that is correct.
 12 Q. All right. So, there's no base
 13 customers that you have?
 14 A. I would say there is a base of customers
 15 that we have just because we do have some customers
 16 that have been with us since the day we started
 17 operating.
 18 Q. Okay.
 19 A. Since they've been with us for that
 20 period of time, I mean, I would consider them to be a
 21 base customer. However, again, if they wanted to
 22 leave tomorrow...
 23 Q. Sure. Is there any type of written
 24 contracts, for example, that you had with Galaxy
 25 Forwarding?

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1 A. No.
 2 Q. Any of your other what you call base
 3 customers, do you have any written contracts with
 4 them?
 5 A. Yes, we do.
 6 Q. Okay. What are the names of those
 7 companies? Is it multiple companies?
 8 A. It's multiple companies. I don't think
 9 I could go down the whole list in my head.
 10 Q. Okay. More than five?
 11 A. Yes.
 12 Q. Okay. Are the contracts different --
 13 A. No.
 14 Q. -- for each customer?
 15 A. The contracts are all the same. No, I'm
 16 sorry. That's not correct. The contracts are
 17 different because the rate structures are different.
 18 Q. And are these contracts for performing
 19 the same service or does it depend on the customer?
 20 A. It depends on the customer. It depends
 21 on the customer's product.
 22 Q. Okay. And the contracts -- who's your
 23 largest customer currently?
 24 A. My largest customer currently would be
 25 Georgia-Pacific Corporation.

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1 Q. And what does Savannah do for
 2 Georgia-Pacific?
 3 A. We export OSB, which is oriented strand
 4 boards, which is a type of plywood.
 5 Q. And the contract for them is that rates
 6 relating to storing or what exactly is the contract?
 7 I assume it assigns rates to some service that
 8 Savannah provides?
 9 A. The way that these contracts are set up,
 10 it's basically a rate confirmation. We give --
 11 someone calls and asks us for a rate. We give them a
 12 rate. We put it in writing. We send it out to them.
 13 In addition to that, there is a disclaimer that is
 14 included on the back that was written by our counsel
 15 that basically limits the amount of claim that the
 16 customer can file against us, even in a catastrophic
 17 event, i.e., the warehouse burns down, hurricane comes
 18 through and blows out everything, something of that
 19 nature. But that is what's in that contract.
 20 Q. And this is a transloading contract
 21 or --
 22 A. I don't follow what --
 23 Q. Well, Georgia-Pacific brings in the
 24 OSB. What happens?
 25 A. Yes. They bring in the OSB on flatbed

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1 trucks. We unload the flatbed trucks, store it for a
 2 short period of time, load it into containers and take
 3 the containers to the Port Authority.
 4 Q. And then the containers being the
 5 standard metal shipping containers?
 6 A. That is correct. Yes.
 7 Q. Currently, how is Savannah being
 8 serviced since there's no rail service; correct?
 9 There's no rail service?
 10 A. That is correct.
 11 Q. Is everything brought in by truck?
 12 A. That is correct.
 13 Q. Okay. You mentioned van truck.
 14 A. Yes.
 15 Q. What's a van truck?
 16 A. It would be like Schneider, orange
 17 trailers, like a covered trailer with walls and doors
 18 on the back as opposed to just a deck, like a flatbed.
 19 Q. Gotcha. A 50-foot?
 20 A. A 53-foot van. I'm sorry. Yes.
 21 Q. Now, what does Savannah do for Galaxy?
 22 A. Galaxy Forwarding forwarded rail cars to
 23 Savannah Re-Load. Savannah Re-Load, those rail cars
 24 were filled with paper products, generally liner
 25 board, roll pulp and bale pulp, also some print paper.

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1 Savannah Re-Load unloaded the contents of those cars,
 2 stored them in the warehouse for a short period of
 3 time until a booking instruction was forwarded to us
 4 by Galaxy Forwarding.
 5 We would then take the cargo using the
 6 guidelines that Galaxy gave us and load that cargo
 7 into shipping containers and deliver it to the Port.
 8 It's basically the same model that we do for the OSB,
 9 except the material is delivered via rail instead of
 10 truck.
 11 Q. All right.
 12 A. I'm sorry. Let me just clear one thing.
 13 Galaxy did also send cargo by van. Not all of the
 14 cargo that came from Galaxy Forwarding came by rail.
 15 Q. Okay. Who was responsible at Savannah
 16 for the business relationship with Galaxy?
 17 A. Mark Sayers.
 18 Q. Did you say he's the GM?
 19 A. I'm sorry?
 20 Q. What's his position again?
 21 A. General manager.
 22 Q. How long was Galaxy a customer of
 23 Savannah? I know you said it terminated in '07.
 24 A. October of '06 through end of July of
 25 '07. End of July or first week of August, you know,

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1 right in that time period.
 2 Q. And did you have any discussions with
 3 Galaxy when the relationship ended?
 4 A. Can you --
 5 Q. Well, what was the reason for the
 6 ending of the relationship? Was any reason provided
 7 by Galaxy?
 8 A. Yes. No rail service.
 9 Q. And just so we're clear, did Savannah
 10 or Galaxy terminate the relationship?
 11 A. Neither party, I guess, really
 12 terminated the relationship as, you know, the avenue
 13 where they delivered 95 percent of their freight was
 14 no longer available. So, but, no, I guess the
 15 relationship would have terminated terminated, let's
 16 see, August, September. By mid-September once the
 17 last of Galaxy's invoices had been, you know, had been
 18 paid to Savannah Re-Load, that would have been it.
 19 Q. Okay. Where's Galaxy Forwarding based?
 20 Do they have operations in Savannah?
 21 A. No. I should remember this. I'm 99
 22 percent sure they're based in Boston, Massachusetts.
 23 Q. Miami?
 24 A. No. It's in the northeast. That's
 25 their only -- I'm sorry. The only office that we

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1 dealt with was in the northeastern U.S. Galaxy may
 2 have operations all over, but if they do, I'm not
 3 familiar with those.
 4 Q. So, they have no local office at --
 5 A. No, they had no local representatives.
 6 Q. And you said that Galaxy forwarded rail
 7 cars to Savannah; is that correct?
 8 A. That is correct.
 9 Q. Okay. How would Savannah know or learn
 10 that there were rail cars coming from Galaxy?
 11 A. Sometimes we would be notified by
 12 e-mail. Sometimes we would not be notified at all.
 13 Q. The e-mail from Galaxy?
 14 A. That's correct.
 15 Q. When the rail cars -- I assume Norfolk
 16 Southern at some point would tell Savannah that the
 17 rail cars were available; is that correct? Or how
 18 did the relationship work with Savannah after they
 19 got to Norfolk Southern?
 20 A. After they got to Norfolk Southern?
 21 Q. Did you receive any notification from
 22 Norfolk Sunday that there were rail cars available?
 23 A. Yes, we would. We would receive Picker
 24 reports from Norfolk Southern and pipeline reports.
 25 Picker and pipeline reports.

Exhibit E

Statement of Facts

Defendant Savannah Re-Load is a warehouseman; it receives freight at its facility, unloads it from the container in which it arrives (in this case, rail cars), and then re-loads it for export through the Georgia Ports Authority. (Affidavit of Billy Groves, attached as Exhibit "A"). Savannah Re-Load does not purchase the freight it unloads, has no ownership interest in it, and is not a party to the transportation contract that results in the freight's shipment to its facility. (Groves Aff., p. 2-3). Instead, freight arrives at Savannah Re-Load's facility at the direction of a freight forwarder, Galaxy Forwarding, Inc. (*Id.*, p. 1). Galaxy Forwarding makes arrangements to transport freight for its customers; it elected to export the subject freight using Savannah Re-Load's services. (*Id.*).

Galaxy Forwarding is the only freight forwarding company that sent rail cars to Defendant's facility. (Groves Aff., p. 1). It was aware of Savannah Re-Load's operational capacity and made its own determination regarding the amount of freight to send to Savannah Re-Load. (Affidavit of Mark Sayers, Attached as Exhibit "B"). It arranged transportation for the subject freight shipments without consulting Savannah Re-Load in advance. (Groves Aff., p. 1).

When Galaxy Forwarding sent freight to Defendant's facility, it usually, but not always, sent an email informing Savannah Re-Load that the subject freight was enroute and giving the shipping instructions for its export.¹ (Groves Aff., p. 2). This notice gave no information regarding the actual consignee or beneficial owner. (*Id.*). Instead, it provided a "booking number" which Savannah Re-Load used to match the freight with

¹ In those instances where Savannah Re-load does not receive an email from Galaxy Shipping, it must unload the freight and use a shipping specification sheet which accompanies the freight to request the shipping instructions. (Groves Aff., p. 2).

the container ship which would export it.² (*Id.*) Once it knew the appropriate vessel, Savannah Re-Load could deliver the cargo to that ship. (*Id.*)

The Plaintiff has sued Savannah Re-Load for the demurrage which it claims accrued on the rail cars it delivered to Savannah Re-Load's facility between March and August, 2007. Plaintiff's lawsuit against Savannah Re-Load is premised upon a common law rule which holds that a consignee is liable for demurrage upon acceptance of the freight.³ (Dkt. 30, p. 5). According to Norfolk Southern, Savannah Re-Load is named as the consignee in the relevant bills of lading, accepted delivery of the freight, and failed to return the rail cars within the "free time" provided by Norfolk Southern's demurrage tariff. (Dkt. 30, pp. 1-3). Plaintiff argues that these facts—even though Savannah Re-Load did not consent to or know of its consignee designation—bind Savannah Re-Load to the transportation contract and render it liable for demurrage.

Savannah Re-Load moved for summary judgment (Dkt. 25) on the grounds that it is not the consignee merely because another entity erroneously and unilaterally identified it as such. In other words, Savannah Re-Load argued that it is not the consignee merely because the bill of lading says so. The Plaintiff disagreed, relying upon the only case which has ever supported its position: *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247, 251 n. 1 (3rd Cir. 2007). It argues this case permits it to collect demurrage from anyone listed as consignee on the bill of lading, irrespective of whether that entity is, in reality, the consignee. (Dkt., 30, pp. 6-7). It also argues that if Savannah Re-Load was not the actual consignee, then it was required to reject the

² A sample of this shipping instruction was also attached as Exhibit "B" to Savannah Re-Load's Consolidated Reply Brief. (Dkt.42).

³ The limits of the common law rule that a consignee becomes bound to the transportation contract upon acceptance of the shipment is examined more fully in Defendant's Brief supporting its Motion for Summary Judgment. (Dkt. 26).

freight or to "provide written notice of agency." (Dkt. 30, p. 10). Its failure to do so, Plaintiff argues, subjects it to liability.

After Savannah Re-Load moved for summary judgment, the Plaintiff produced approximately 3,800 pages of documentation, including the bills of lading which it claims entitle it to demurrage; some of these bills of lading prompt this Motion.

The bills of lading produced by the Plaintiff reveal that it seeks demurrage for numerous shipments which do not actually identify Savannah Re-Load or Brampton Enterprises, LLC; instead, many of them identify fictitious entities such as "Savannah Re-Load LLC" or "Savannah Reload."⁴ Though these are obviously close approximations, neither is Defendant's name. Other bills of lading identify the consignee as the "Port of Savannah."⁵ Savannah Re-Load therefore seeks a ruling that, in the event a bill of lading can unilaterally transform Savannah Re-Load into a consignee, then it must accurately and precisely identify the Defendant in order to do so.

Second, Plaintiff has argued that the fact Savannah Re-Load is not the actual consignee is irrelevant because a "named consignee" can avoid demurrage by refusing to accept the freight or giving the carrier timely written notice of agency. (Dkt. 30, p. 8). It goes on to state that "Savannah [Re-Load] never undertook the simple steps [of providing notice of agency] to avoid liability for the demurrage." (Dkt. 30, p. 10). However, Savannah Re-Load is not an agent of the consignee or of anyone else;

⁴ For example, see NS 1284-1285 and NS 1318-1319, respectively; Plaintiff attached these four documents to Mr. Young's affidavit. (Dkt. 46).

⁵ For example, see NS 1237-1238; attached to Mr. Young's affidavit. (Dkt. 46). These bills of lading put Savannah Re-Load's name below the "Port of Savannah."

therefore it moves for summary judgment that it is not a “consignee that is an agent only” and therefore not subject to the statute giving rise to this requirement.

Finally, the concept of “acceptance” is important in this litigation. Pursuant to the common law rule that a consignee is liable for demurrage upon acceptance of the freight, the Plaintiff has argued that Savannah Re-Load is liable for demurrage because it is the named consignee and accepted the subject freight. (Dkt. 30, p. 3). Savannah Re-Load seeks a ruling that unloading freight for export according to instructions from a freight forwarding company is not acceptance of the freight.

A. Bills of lading which do not identify “Brampton Enterprises, LLC” or “Savannah Re-Load” as consignee cannot bind the Defendant to the transportation contract.

Assuming the fact that someone has unilaterally and erroneously identified Savannah Re-Load as the consignee—an act not disclosed to or consented to by the Defendant—is enough to bind it to the transportation contract, it stands to reason that the Defendant should only be liable for those bills of lading which do in fact identify it, and not some other entity, as the consignee. In other words, in order to bind the Defendant to the transportation contract, the Plaintiff should be able to rely upon only those bills of lading which correctly identify “Savannah Re-Load” or Brampton Enterprises, LLC” as the consignee.

“[I]t is well settled that the terms of the bills of lading are strictly construed against the carrier.” *Crowley Liner Services, Inc. v. Transtainer Corp.*, 2007 WL 433352, 7 (S.D. Fla., 2007)(citing *The Caledonia*, 157 U.S. 124, 137 (1895)). This principle should apply here. Plaintiff seeks to use these erroneous bills to its advantage without respect

to whether Savannah Re-Load is actually the freight consignee. It should therefore be required to show that it—not a fictitious entity—is the named consignee in order to bind it to a transportation contract.

Some bills of lading identify the consignee as either “Savannah Re-Load LLC,” “Savannah Reload,” or “Port of Savannah” or some other imperfect variation of this Defendant’s name.⁶ However, Brampton Enterprises, LLC has never done business under any of those names. Though very close to its trade name, Savannah Re-Load, neither version is correct. Brampton Enterprises has registered its trade name as “Savannah Re-Load.” (Groves Aff., p. 1). Therefore, alternative, incorrect appellations do not identify the Defendant, Brampton Enterprises, LLC.

Plaintiff may argue that these incorrect names are “close enough” and sufficiently identify the Defendant’s trade name. However, this argument overlooks the fact that the Plaintiff seeks more than \$70,000 in demurrage using one solitary hyper-technical basis: someone erroneously identified the Defendant as consignee without its knowledge or permission. Without this error, Plaintiff would have no argument it is entitled to demurrage from Savannah Re-Load. If it can recover in this manner, then the hyper-technical nature of this claim should cut both ways; it should not be permitted to recover where Defendant is not named as consignee, no matter how close the spelling may be. Therefore, Defendant seeks a ruling that, in order to bind it to the transportation contract, the bill of lading must correctly identify it.

⁶ See notes 5 and 6, *supra*.

B. Savannah Re-Load is not a “consignee that is an agent only” because it is not a agent for any entity.

Norfolk Southern has consistently argued that the Third Circuit’s holding in *Novolog, supra*. should apply here; that Savannah Re-Load is subject to demurrage even if it is not the actual consignee because, under 49 U.S.C.A. § 10743, there are two ways for a “named consignee” to avoid demurrage: “(1) refusing the freight and (2) by providing the carrier timely written notice of agency.” (Dkt. 30,p. 8; see *also*, Dkt. 47, p. 2). Stated another way, Plaintiff tries to use 49 U.S.C.A. § 10743 to expand the common law to reach warehousemen who are not the consignee but may have been erroneously identified as such on the bill of lading. However, this rule does not apply to Savannah Re-load because it is limited to those instances where a consignee is an agent.⁷

In *Novolog*, the Third Circuit referred to 49 U.S.C.A. § 10743 as the “ICCTA’s consignee-agent liability provision” and, held that it “adds precision to the common law, tradition [that a consignee is liable for demurrage] by clearly laying out what a named consignee/recipient must do to avoid liability on the grounds that it is an agent.” *Novolog*, 502 F3d. at 255-256. The Third Circuit makes this logical leap upon the assumption that the defendant port was an agent; it did not purport to apply this statute to those situations where the recipient is not an agent for the freight’s beneficial owner.⁸

The existence of an agency relationship is necessary because the statute only purports to apply to deliveries to “consignees who are agents only.” 49 U.S.C.A. §

⁷ Savannah Re-Load has previously pointed out that it is not an agent for the freight’s beneficial owner. (Dkt. 42, p. 10).

⁸ The defendant in *Novolog* did not take the position that it was not an agent for the actual consignee; therefore this issue was not before the Third Circuit.

10743(a)(1). Here, however, Savannah Re-Load has not acted as anyone's agent. "The relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf." O.C.G.A. § 10-6-1. "The distinguishing characteristic of an agent is that he is vested with authority, real or ostensible, to create obligations on behalf of his principal, bringing third parties into contractual relations with him." *Process Posters, Inc. v. Winn Dixie Stores, Inc.*, 263 Ga. App. 246, 250, 587 S.E.2d 211, 215 (2003). In other words, the relationship arises where the principal authorizes another to act for him. Here, Savannah Re-Load has no contact with the freight's beneficial owner; it is not even given the owner's name. (Groves Aff., p. 2). Neither the beneficial owner or any other entity has vested Savannah Re-Load with authority to create obligations on its behalf. (*Id.*). Savannah Re-Load's only function with respect to the subject freight was to unload it for export via container ship. Therefore, Savannah Re-Load is not a "consignee that is an agent only." Because it is not a "consignee that is an agent only," Savannah Re-Load seeks a ruling that 49 U.S.C.A. § 10743 is inapplicable.

C. Unloading freight, by itself, does not constitute acceptance of the shipment.

When it originally moved for summary judgment, Savannah Re-Load limited its argument to whether one was a consignee merely because an erroneous bill of lading said so. In opposing this Motion, Plaintiff stressed that the fact that Savannah Re-Load is not the actual consignee is "not determinative, only its role in accepting delivery of and freight as consignee is determinative of its liability to Norfolk Southern." (Dkt. 30, p. 7). It further emphasized the importance of acceptance by arguing that "Savannah [Re-

Load] is mistaken that the issue of 'acceptance of freight' is not an issue in a demurrage case. In order for a rail carrier to assess a consignee with demurrage, the consignee must accept delivery of the freight." (Dkt. 47, p. 2). "Savannah [Re-Load's] acceptance of delivery of the freight, and its failure to notify Norfolk Southern of its agent status, are the critical factors that leave Savannah [Re-Load] liable for demurrage." (*Id.*)(emphasis in original).

Plaintiff goes even further with this emphasis on acceptance by using it to distinguish the various cases which have held that one is not the consignee merely because a bill of lading incorrectly says so. For example, the Seventh Circuit has held that "being listed by third parties as a consignee on some bills of lading is not alone enough to make [defendant] a legal consignee liable for demurrage charges, although it, coupled with other factors, might be enough to render [defendant] a consignee." *Illinois Cent. R. Co. v. South Tec Development Warehouse, Inc.*, 337 F.3d 813, 821 (7th Cir. 2003). Plaintiff claims that one of the "other factors" contemplated by the Seventh Circuit is whether the consignee accepted the freight. (Dkt. 47, p. 3). Likewise, Plaintiff distinguished three cases unfavorable to its position by claiming that, unlike the defendants in those cases, Savannah Re-Load accepted the freight and therefore is liable.⁹ (Dkt. 47, pp. 3-4). "Here, factors other than being listed solely as the consignee

⁹ Plaintiff was distinguishing *Union Pacific railroad Co. v. Carry Transit*, No. 3:04-CV-1095 (N.D. Tex. Oct. 27, 2005); *CSX Transp., Inc. v. City of Pensacola, Fla.*, 936 F.Supp. 880 (N.D.Fla.,1995); and *Western Maryland Ry. Co. v. South African Marine Corp.*, 1987 WL 16153 (S.D. N.Y. 1987). In reality, each of those defendants received rail freight as part of their business operations, just as Savannah Re-Load did.

existed (acceptance of freight and failure to notify rail carrier or agent status) clearly result in Savannah being liable for demurrage.” (Dkt. 47, p. 3).¹⁰

Plaintiff accentuates acceptance because it is the mechanism by which the consignee adopts, and becomes a party to, the transportation contract. As Plaintiff has stated, a “consignee becomes a party to the transportation contract, and is therefore bound by it, upon accepting the freight; thus it is subject to liability for transportation chargers even in the absence of a separate contractual agreement or relevant statutory provision.” (Dkt. 30, p. 5, *citing Novolog*, 502 F.3d at 255). Defendant Savannah Re-Load does not dispute that it unloaded the freight delivered to its premises according to the instructions it received from Galaxy Forwarding. However, Savannah Re-Load submits that unloading freight for export according to instructions from a freight forwarding company does not constitute an “acceptance” of it.

There are legal ramifications associated with “accepting” freight which highlight the difference between accepting it and unloading it for export. This difference shows that Savannah Re-Load never accepted the freight it unloaded. For example, a consignee is expected to “examine the goods, to ascertain whether they answer the description ordered by him.” *Reed Oil Co. v. Smith*, 154 Ga. 183, 186-187, 114 S.E. 56, 58 (1922). Savannah Re-Load never had or undertook this obligation. (Groves Aff., p. 3). In fact, it did not have the ability to examine the goods it unloaded because it had no way to determine whether they “answered the description ordered;” Savannah Re-Load was not a party to nor provided with the purchase agreement. (*Id.*).

¹⁰ With respect to *South African Marine Corp.*, the Plaintiff referred to acceptance of the freight as “involvement on [Savannah Re-Load’s] part” that made the instant case “much different.” (Dkt. 47, p. 4).

In the context of sales, acceptance of the freight carries significant legal consequences for the consignee.¹¹ If he accepts the goods, then, under the Uniform Commercial Code, the consignee has "no subsequent right to reject for nonconformity." *Imex Intern., Inc. v. Wires EL*, 261 Ga. App. 329, 334, 583 S.E.2d 117, 122 (2003). "It is well settled that acceptance precludes rejection of the goods accepted." *Contract Sales & Service Intern., Inc. v. American Exp. Travel Related Services Co., Inc.*, 216 Ga. App. 61, 61, 453 S.E.2d 62, 63 (1994).

As set forth above, Savannah Re-Load is not an agent for the actual consignee or the beneficial owner, it therefore does not act on its behalf to inspect or accept the shipments. This lack of agency and the fact that it knows nothing about the purchase contract prevents Savannah Re-Load from inspecting the subject freight. Savannah Re-Load does not know what the actual consignee has ordered, what specifications the actual consignee requires, or how to determine whether the freight conforms in quantity, quality, fitness, or condition to what the actual consignee has ordered. (Groves Aff., p. 3). It also has no way of knowing whether the freight has been delivered in a timely manner. (*Id.*). Moreover, Savannah Re-Load exports the freight; there may be some event during the course of the freight's remaining journey which impacts the actual consignee's willingness to accept it. It would lead to an absurd result if the actual consignee could not reject non-conforming freight or freight which sustained damaged after it left Savannah simply because an entity with whom it has no relationship, Savannah Re-Load, "accepted" the freight.

¹¹ Because it is not privy to the purchase or transportation contracts associated with subject freight, and because it is not given the name of the actual consignee, Savannah Re-Load does not know whether the freight at issue is governed by the Uniform Commercial Code. However, Plaintiff does not appear to limit its lawsuit to only those shipments which are not governed by the UCC.

These same principles apply outside of the UCC. Some circuits have recognized a general rule that “[i]n an action to recover from a carrier for damages to a shipment. . . under the [Interstate Commerce Act]. . . the consignee has a duty to accept them and mitigate damages unless the goods are deemed ‘totally worthless.’” *Oak Hall Cap and Gown Co., Inc. v. Old Dominion Freight Line, Inc.*, 899 F.2d 291, 294 (4th Cir. 1990). This rule makes sense where the freight is delivered to the actual consignee or an agent of the actual consignee; such an entity can “accept” the goods and is in a position to mitigate damages. In contrast, Savannah Re-Load is not the actual consignee, an agent for the consignee, able to determine whether goods are “totally worthless” or in a position to mitigate the actual consignee’s damages.

Finally, Savannah Re-Load does not realize any of the benefits of ownership that come with accepting good consigned to it. “The effect of a consignment of goods, generally, is to vest the property in the consignee. . . .” *Grove v. Brien*, 49 U.S. 429, 439, (1850). “[T]he consignee may be presumed to be the owner of the goods which have been accepted for shipment. . . .” *Saunders Bros. v. Payne*, 29 Ga. App. 615, 615-616, 116 S.E. 349, 350 (1923). However, Savannah Re-Load does not have any ownership interest in the freight it handles. This is evidence that it has not “accepted” the freight as the term applies to consignees, by unloading it for export. Therefore, Savannah Re-Load requests the Court rule that it has not accepted the freight for purposes of demurrage simply by unloading it for export.¹²

Conclusion

¹² In its consolidated response brief, Savannah Re-Load argued that there was no evidence that it accepted the freight at issue. (Dkt. 42, p. 12). It premised this position on the distinction between unloading and accepting freight.

For the foregoing reasons, Savannah Re-Load moves for summary judgment on the grounds that (1) even if unilateral and erroneous inclusion is sufficient, a bill of lading must accurately identify Savannah Re-Load in order to transform it into a consignee; (2) 49 U.S.C.A. 10743(a) is inapplicable because Savannah Re-Load is not an agent; and (3) Savannah Re-Load does not accept freight by virtue of unloading it for export.

This 30th day of May, 2008.

s/ Jason C. Pedigo
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Georgia Bar No. 140989
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Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

NORFOLK SOUTHERN RAILWAY)	
COMPANY,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. CV407 155
)	
BRAMPTON ENTERPRISES, LLC)	
d/b/a SAVANNAH RE-LOAD,)	
)	
Defendant.)	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the within and foregoing document on all parties in accordance with the directives from the Court Notice of Electronic Filing ("NEF") which was generated as a result of electronic filing.

This 30th day of May, 2008.

s/ Jason C. Pedigo
Jason C. Pedigo
Georgia Bar No. 140989
Ellis, Painter, Ratterree & Adams LLP
Post Office Box 9946
Savannah, Georgia 31412
Telephone: (912) 233-9700
Email: jpedigo@epra-law.com
Attorneys for Defendant

EXHIBIT "A"

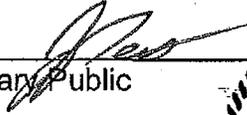
Brampton Enterprises would log onto the Georgia Ports Authority computer system and determine which ship will export the freight.

Once the freight arrived at its facility, Brampton Enterprises unloaded it in order to re-load it into an appropriate container for export via container ship. Using the booking number, Savannah Re-Load ensured that the freight was delivered to the correct freighter ship in the correct container for export. The shipping instructions did not contain the identity of the actual consignee or the beneficial owner; Brampton Enterprises never knew the identity of those entities. In those instances where the freight was not preceded by a shipping instruction, Savannah Re-Load forwarded to Galaxy Forwarding a copy of the shipping specification sheet that accompanied each shipment. Galaxy Forwarding used that sheet, an example of which is attached as Exhibit "B", to determine the booking number which it then provided to Brampton Enterprises.

Brampton Enterprises does not have any agency agreement with any of its customers or with the beneficial owner of the freight it unloads for export. Brampton Enterprises has never agreed to, or been vested with the authority to, act for another, create obligations on another's behalf, or exercise any legal rights of another. Though it unloads freight for export, Brampton Enterprises has never agreed to or been authorized to accept freight for the beneficial owner of the freight it handles. It never retains the rail freight, takes an ownership interest in it, or uses it for its own benefit. Nor does it inspect or evaluate the freight to see if it arrives in conformity with the purchase or transportation contract. In fact, Brampton Enterprises does not receive a copy of the purchase or transportation contract and therefore has no way of knowing what to look for in an inspection or how to evaluate the freight even if it wanted to do so."


WILLIAM GROVES

Sworn to and subscribed before me
this 27th day of May, 2008.


Notary Public

My commission expires
(NOTARIAL SEAL)

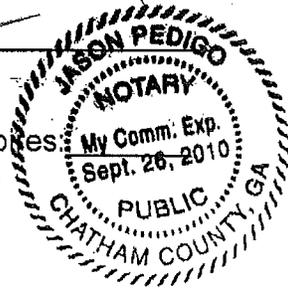


EXHIBIT "A"

COMBINATION PICK UP ORDER / DELIVERY PERMIT / DOCK RECEIPT

TO
SAVANNAH RE-LOAD
MARK/GEORGE

GALAXY FORWARDING, INC. PICKUP FROM
45-407 RIVER DRIVE SOUTH

JERSEY CITY, NJ 07310
Phone (201)-963-9525 Fax (201)-963-0528
INFO@GALAXYFORWARDING.COM

SHIPPER/EXPORTER
GESPA (OVERSEAS) LTD
C/O GALAXY FORWARDING, INC.
45-407 RIVER DRIVE SOUTH
JERSEY CITY, NJ 07310 US

BOOKING NUMBER **CHS074866**
EXPORT REFERENCES
Reference No. 7-512R
P.O. No. RPWF70277

SUPPLIER

CHARGES FOR ACCOUNT OF

PLACE OF DELIVERY

UNLOADING / LOADING MODE

DELIVERING CARRIER

CAR / TRUCK NUMBER REFERENCE

CUT OFF DATE

6/11/2007

SAILING DATE

6/14/2007

FOR PROMPT PICKUP / DELIVERY PLEASE CALL IN ADVANCE

EXPORTING CARRIER

MSC FLORIDA

PORT OF LOADING

SAVANNAH, GA

ONWARD INLAND ROUTING

AIR/SEA PORT OF DISCHARGE

DAMMAM

VOYAGE #

13R

Particulars Furnished by Shipper

MARKS & NOS.	NO. OF PKGS	DESCRIPTION OF PACKAGES AND GOODS	GROSS WEIGHT	MEASUREMENT
RPWF70277		FLUFF PULP IN ROLLS		
		TRUCK/CAR #	# OF ROLLS	
		MB5178	156	141361 LBS
		CIRR90059	156	140215 LBS

BEST REGARDS,
JOE DELLACAMERA

BY:

DATE: 5/29/2007

NOTES>>>

ABOVE ITEMS RECEIVED IN APPARENT GOOD ORDER AND CONDITION (EXCEPT AS MAY BE NOTED). THIS PICKUP / DELIVERY ORDER IS SUBJECT TO THE TERMS AND CONDITIONS OF THE RECEIVING CARRIER'S BILL OF LADING. COPIES OF WHICH ARE AVAILABLE UPON REQUEST.

ARRIVED _____ AM _____ PM

BY RECVNG CLERK _____

STARTED _____ AM _____ PM

DATE _____

FINISHED _____ AM _____ PM

PLACED ON LOCATION _____

(c) O.A.S.I.S. - BODR62

EXHIBIT "B"

Page: 1 of 2
2007.04.28 08:29:35 CST

INTERNATIONAL PAPER

Shipping Packing List Final - Prepaid

Ship-To: SAVANNAH RE-LOAD
NORFOLK-SOUTHERN TRACK C-44 PORT WENTWORTH GA 31408-2205

Attn: Receiving Department
Fax#: 914-696-9260

Ship-From: CENTRAL NATIONAL-GOTTESMAN INC
THREE MANHATTANVILLE RD PURCHASE NY 10577-2110
JENSEN RD PRATTVILLE AL 36067-4801

BOL No: 03668320094106658 **Stop #:** 0001

Carrier: NS

Vehicle ID: NS 412524

Seal #: NA

Shipment No: 2030410665

Conainerboard

Account Exec.: RIM JENSEN GRAVES / 5014131500 **Sales Rep:** Kai Meyer

Delivery #: 80988642 **Customer PO#:** 5126896

Material: 100123 42KRAFTLINER.92 17/82W.58D **Grade:** 4712 **Basis Weight:** 42.00 **Surface:** DF **Color:** NAT

Manufactured under International Paper Company Order: 106199

Order	Item	Len/Dia	Width	Roll	Set	Units	Unit #	Weight (LBS)	Length (FT)	Area (MSF)
106199	D4	58.06 IN	92.58125 IN	2271160169	C	1	2271160169	6,076.000	18,700.00	144.195
				2271160160	Z	1	2271160160	6,156.000	18,700.00	144.195
				2271160163	C	1	2271160163	5,990.000	18,506.00	142.699
				2271160164	Z	1	2271160164	6,054.000	18,506.00	142.699
				2271160332	Z	1	2271160332	6,298.000	19,179.00	147.888
				2271160336	Z	1	2271160336	6,286.000	19,151.00	147.711
				2271160340	Z	1	2271160340	6,220.000	19,077.00	147.102
				2271160344	Z	1	2271160344	6,424.000	19,664.00	150.455
				2271160353	A	1	2271160353	5,374.000	16,864.00	128.495
				2271160354	B	1	2271160354	6,222.000	18,941.00	146.958
				2271160357	A	1	2271160357	6,172.000	18,941.00	146.958
				2271160359	B	1	2271160359	6,244.000	19,092.00	148.755
				2271160361	A	1	2271160361	6,190.000	19,092.00	148.755
				2271160362	B	1	2271160362	6,230.000	19,974.00	148.307
				2271160365	A	1	2271160365			

Smartform: ZSD_PL_F01276_EXP_FACTLIST

This document is intended as a preliminary tally only. The information contained is to be used as shipment notification, not as invoicing detail.

Page: 2 of 2
2007.04.26 08:29:35 CST

INTERNATIONAL PAPER

Shipping Packing List Retail - Prepaid

Ship-To: SAVANNAH RE-LOAD
NORFOLK SOUTHERN TRACK C-44 PORT WENTWORTH GA 31408-2205

Attn: Receiving Department
Fax#: 914-698-9260

Sold-To: CENTRAL NATIONAL-GOTTESMAN INC
THREE MANHATTANVILLE RD PURCHASE NY 10577-2110

Ship-From: Prattville Mill
JENSEN RD PRATTVILLE AL 36067-4901

BOL No: 93886320004108668 **Stop #:** 0001
Carrier: NS
Vehicle ID: NS 412524
Seal #: NA **Shipment No:** 20004108668

2271160366	B	1	2271160368	6,170.000	18,974.00	146.307
2271160369	A	1	2271160369	6,210.000	19,074.00	147.078
2271160370	B	1	2271160370	6,150.000	19,074.00	147.078
2271160379	A	1	2271160379	5,014.000	18,494.00	142.608
2271160374	B	1	2271160374	5,950.000	18,494.00	142.608
			Units (Rolls):	121,710.000	373,333.00	2,878.749
			Packages:	20	373,333.00	2,878.749
Item Subtotals (QTY Shipped):						
Shipment Totals:						

This document is intended as a preliminary bill only. The information contained is to be used as shipment notification, not as invoicing detail.

Simulation: ZSD_DL_F0127A_EXP_PACKLIST

Exhibit F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

NORFOLK SOUTHERN RAILWAY)
COMPANY)
v.) CIVIL ACTION NO. CV407 155
BRAMPTON ENTERPRISES, LLC)
d/b/a SAVANNAH RE-LOAD)

DEFENDANT'S STATEMENT OF MATERIAL FACTS AND CONCLUSIONS OF LAW

Statements of Material Fact

1. Defendant Brampton Enterprises, LLC db/a Savannah Re-Load (sometimes referred to as "Savannah Re-Load") is a warehouseman. (Affidavit of Billy Groves, attached as Exhibit "A" to the Brief in support of Defendant's Motion for Partial Summary Judgment).
2. In its capacity as a warehouseman, Defendant receives freight at its facility, unloads it from the container in which it arrives (in this case, rail cars), and then re-loads it for export through the Georgia Ports Authority. (*Id.*).
3. Savannah Re-Load is not a party to the transportation contract that results in the freight's shipment to its facility. (Groves Aff., p. 2-3).
4. Savannah Re-Load unloads the freight at the direction of a freight forwarder, Galaxy Forwarding, Inc. (*Id.*, p. 1).
5. Galaxy Forwarding caused the subject freight to be delivered to Savannah Re-Load's facility. (*Id.*).
6. Galaxy Forwarding is a freight forwarding company that makes arrangements to transport freight for its customers. (*Id.*)

7. Galaxy Forwarding elected to export the subject freight using Savannah Re-Load's services. (*Id.*).

8. Galaxy Forwarding is the only freight forwarding company that sent rail cars to Defendant's facility. (Groves Aff., p. 1).

9. Galaxy Forwarding was aware of Savannah Re-Load's operational capacity. (Affidavit of Mark Sayers, Attached as Exhibit "B" to the Brief in support of Defendant's Motion for Partial Summary Judgment)

10. Galaxy Forwarding made its own determination regarding the amount of freight to send to Savannah Re-Load. (Groves Aff., p. 1)

11. Galaxy Forwarding arranged transportation for the subject freight shipments without consulting Savannah Re-Load in advance. (*Id.*).

12. When Galaxy Forwarding sent freight to Defendant's facility, it usually sent an email informing Savannah Re-Load that the subject freight was enroute and giving the shipping instructions for its export. (Groves Aff., p. 2).

13. This notice gave no information regarding the actual consignee or beneficial owner. (*Id.*).

14. The notice from Galaxy Forwarding provided a "booking number" which Savannah Re-Load used to match the freight with the container ship which would export it. (*Id.*).

15. Once it knew the appropriate vessel, Savannah Re-Load could deliver the cargo to that ship. (*Id.*).

16. Brampton Enterprises, LLC does business under the registered trade name of "Savannah Re-Load." (Groves Aff., p. 1).

17. Brampton Enterprises has never done business under any trade name other than "Savannah Re-Load." (*Id.*).

18. Brampton Enterprises, LLC has never done business under the trade name of "Savannah Re-Load LLC." (*Id.*).

19. Brampton Enterprises, LLC has never done business under the trade name of "Savannah Reload." (*Id.*).

20. Brampton Enterprises, LLC has never done business under the trade name of "Port of Savannah." (*Id.*).

21. Plaintiff seeks demurrage for bills of lading which identify the consignee as "Savannah Re-Load LLC," "Savannah Reload," or "Port of Savannah." (For example, see NS 1284-1285, NS 1318-1319, and NS 1237-1238, respectively, attached to Dkt. 46).

22. Prior to this litigation, Savannah Re-Load did not know the identity of the subject freight's actual consignee or beneficial owner. (Groves Aff., p. 2).

23. The shipping instructions Savannah Re-Load received from Galaxy Forwarding did not contain the identity of the actual consignee or the beneficial owner. (*Id.*).

24. Savannah Re-Load did not have an agency agreement with any of its customers or with the beneficial owner of the freight it unloads for export. (*Id.*).

25. Savannah Re-Load is not an agent for any entity. (*Id.*).

26. Brampton Enterprises has never agreed to, or been vested with the authority to, act for another, create obligations on another's behalf, or exercise any legal rights of another. (*Id.*).

27. The actual consignee and/or beneficial owner of the subject freight never authorized Savannah Re-Load to accept freight on its behalf. (*Id.*).

28. Savannah Re-Load never retains the subject rail freight, takes an ownership interest in it, or uses it for its own benefit. (Groves Aff., p. 2).

29. Savannah Re-Load does not inspect or evaluate the subject freight to see if it arrives in conformity with the purchase or transportation contract. (*Id.*).

30. Savannah Re-Load does not receive a copy of the purchase or transportation contract and therefore has no way of knowing what to look for in an inspection or how to evaluate the freight even if it wanted to do so. (*Id.*).

31. Savannah Re-Load cannot determine whether the freight it unloads is "totally worthless." (*Id.*).

Conclusions of Law

1. "[I]t is well settled that the terms of the bills of lading are strictly construed against the carrier." *Crowley Liner Services, Inc. v. Transtainer Corp.*, 2007 WL 433352, 7 (S.D. Fla., 2007)(citing *The Caledonia*, 157 U.S. 124, 137 (1895)).

2. "The distinguishing characteristic of an agent is that he is vested with authority, real or ostensible, to create obligations on behalf of his principal, bringing third parties into contractual relations with him." *Process Posters, Inc. v. Winn Dixie Stores, Inc.*, 263 Ga. App. 246, 250, 587 S.E.2d 211, 215 (2003).

3. A consignee is expected to "examine the goods, to ascertain whether they answer the description ordered by him." *Reed Oil Co. v. Smith*, 154 Ga. 183, 186-187, 114 S.E. 56, 58 (1922).

4. Under the Uniform Commercial Code, a consignee has “no subsequent right to reject for nonconformity” if he has accepted the goods. *Imex Intern., Inc. v. Wires EL*, 261 Ga. App. 329, 334, 583 S.E.2d 117, 122 (2003).

5. “In an action to recover from a carrier for damages to a shipment. . . under the [Interstate Commerce Act]. . . the consignee has a duty to accept them and mitigate damages unless the goods are deemed ‘totally worthless.’” *Oak Hall Cap and Gown Co., Inc. v. Old Dominion Freight Line, Inc.*, 899 F.2d 291, 294 (4th Cir. 1990).

6. “The effect of a consignment of goods, generally, is to vest the property in the consignee. . . .” *Grove v. Brien*, 49 U.S. 429, 439, (1850).

This 30th day of May, 2008.

s/ Jason C. Pedigo

Jason C. Pedigo

Georgia Bar No. 140989

Ellis, Painter, Ratterree & Adams LLP

Post Office Box 9946

Savannah, Georgia 31412

Telephone: (912) 233-9700

Email: jpeditgo@epa-law.com

Attorneys for Defendant

Exhibit G

parties, the plaintiffs have demonstrated: (1) that a reasonable jury could determine that defendants violated the Fourth Amendment; and (2) that the rights at issue were clearly established at the time of defendants' unlawful conduct. Consequently, I would reverse the grant of summary judgment.



**NORFOLK SOUTHERN RAILWAY
COMPANY, Plaintiff–
Appellant,**

v.

**Billy GROVES, individually, d.b.a.
Savannah Re–Load, Savannah
Re–Load, et al., Defendants,**

**Brampton Enterprises, LLC,
d.b.a. Savannah Re–Load,
Defendant–Appellee.**

No. 08–15418.

United States Court of Appeals,
Eleventh Circuit.

Nov. 2, 2009.

Background: Rail carrier sued warehouseman for demurrage accrued over six month period. Warehouseman denied liability for demurrage charges and, despite being named as consignee on bills of lading, maintained it was not party to shipping contracts. The United States District Court for the Southern District of Georgia, No. 07-00155-CV-4, William T. Moore, Jr., Chief Judge, 2008 WL 4298478, granted summary judgment in favor of warehouseman. Rail carrier appealed.

Holding: The Court of Appeals, Fay, Circuit Judge, held that freight re-loader could not, without notice, be made consignee by unilateral action of third party.

Affirmed.

1. Carriers ⇌53

“Bill of lading” is basic transportation contract between shipper-consignor and carrier; its terms and conditions bind shipper and all connecting carriers. 49 U.S.C.A. § 80101 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

2. Carriers ⇌100(1)

Carriers have right to assess charges against parties to transportation contract for delay in releasing transportation equipment; motor carriers term such “delay” as detention while rail carriers refer to it as “demurrage.”

See publication Words and Phrases for other judicial constructions and definitions.

3. Carriers ⇌100(1)

Unlike maritime law, railroad carrier can collect demurrage even if shipping contract contains no provision to that effect.

4. Carriers ⇌100(1)

Demurrage charges are properly assessed even if cause for delay is beyond party's control, unless carrier itself is responsible for delay.

5. Carriers ⇌100(1)

“Consignor,” for purposes of liability for demurrage charges, is one who dispatches goods to another on consignment. 49 U.S.C.A. § 80101(2).

See publication Words and Phrases for other judicial constructions and definitions.

6. Carriers ⇌100(1)

“Consignment,” for purposes of liability for demurrage charges, is quantity of goods delivered by that act, especially in a single shipment.

See publication Words and Phrases for other judicial constructions and definitions.

7. Carriers ⇨100(1)

“Consignee,” for purposes of liability for demurrage charges, is one to whom goods are consigned. 49 U.S.C.A. § 80101(1).

See publication Words and Phrases for other judicial constructions and definitions.

8. Federal Courts ⇨776, 802

Court of Appeals reviews district court's grant or denial of summary judgment *de novo*, considering all facts and reasonable inferences in light most favorable to nonmoving party.

9. Carriers ⇨100(1)

Demurrage is considered part of transportation charge and under tariff system is imposed as matter of law; however, before such transportation-related assessments such as detention charges can be imposed on party there must be some legal foundation for such liability outside mere fact of handling goods shipped.

10. Carriers ⇨194

Liability for freight charges may be imposed only against consignor, consignee, or owner of property, or others by statute, contract, or prevailing custom.

11. Principal and Agent ⇨136(1)

Agent for disclosed principal is not liable to third person for acts within the scope of agency.

12. Carriers ⇨100(1)

Agent-consignee can avoid demurrage liability by notifying carrier of its agency status and providing carrier with name and address of shipment's beneficial owner prior to accepting delivery. 49 U.S.C.A. § 10743(a)(1).

13. Carriers ⇨104

Statute governing liability for payment of rates does not establish presumption of liability for demurrage charges; statute applies only to agents who are also

consignees and further speaks only to non-liability in certain narrow situations, but in no way can be read to impose liability on agent who is not party to contract. 49 U.S.C.A. § 10743(a)(1).

14. Contracts ⇨15

In order for contract to be binding and enforceable, there must be meeting of the minds on all essential terms and obligations of contract.

15. Carriers ⇨194

Party must assent to being named as consignee on bill of lading to be held liable as such, or at the least, be given notice that it is being named as consignee in order that it might object or act accordingly.

16. Carriers ⇨100(1)

Warehouseman that received freight at its facility, unloaded it from containers in which it arrived, reloaded it into appropriate containers for export, and forwarded it to various ports according to instructions received from freight forwarder was not liable to rail carrier for demurrage charges, even though it was named consignee on bills of lading for freight shipments at issue, where it did not agree to be so named and was not aware of its designation as such; freight reloader could not, without notice, be made consignee by unilateral action of a third party. 49 U.S.C.A. § 10743(a)(1).

Paul D. Keenan, Keenan, Cohen & Howard, PC, Jenkintown, PA, for Plaintiff-Appellant.

Jason Carl Pedigo, Ellis, Painter, Ratterree & Adams, LLP, Savannah, GA, for Defendants.

Appeal from the United States District Court for the Southern District of Georgia.

Before CARNES, FAY and ALARCÓN,* Circuit Judges.

* Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting by

designation.

FAY, Circuit Judge:

This appeal arises from a dispute between a rail carrier and a warehouseman regarding liability for demurrage, *i.e.*, penalties assessed for the undue detention of rail cars. Norfolk Southern Railway Company sued Brampton Enterprises, LLC d/b/a Savannah Re-Load for demurrage accrued over the six month period from March to August 2007. Savannah Re-Load denied liability for the demurrage charges and, despite being named as consignee on the bills of lading, maintained it was not a party to the shipping contracts. Norfolk Southern asserts that as the named consignee Savannah Re-Load became a party to the contracts by accepting the shipments. The district court granted summary judgment in favor of Savannah holding that a freight re-loader cannot, without notice, be made a consignee by the unilateral action of a third party. We affirm.

I.

Brampton Enterprises operates a warehouse business under the trade name Savannah Re-Load (“Savannah”). As a warehouseman, Savannah receives freight at its facility, unloads it from the containers in which it arrives, reloads it into appropriate containers for export, and forwards it to various ports according to instructions received from the freight forwarder. Savannah has no ownership interest in the freight it handles and is not a party to the transportation contracts. The freight forwarding companies make transportation arrangements without input from or notice to Savannah.

In late 2006 Galaxy Forwarding (“Galaxy”) began sending freight to Savannah’s facility via railcar delivered by Norfolk

Southern Railway Company (“Norfolk”). According to Savannah owner William “Billy” Groves, Galaxy was aware of Savannah’s operational capacity and controlled the amount of freight it received. Galaxy merely informed Savannah when shipments were en route and provided it with instructions regarding the export of the shipment. Galaxy was the only freight forwarder to send Savannah freight via rail and arranged transportation for all the freight shipments at issue. These freight shipments originated from various domestic shippers and were being exported to overseas recipients by Galaxy. Savannah had no knowledge of the origins or final destinations of the freight it handled.

[1] Norfolk transported the rail freight to Savannah pursuant to bills of lading¹ received from Galaxy. Before rail cars were delivered, Norfolk would notify Savannah that rail cars from certain shippers had arrived and were ready for delivery. Once Savannah approved the delivery, Norfolk would perform a “switch” by removing any empty rail cars and replacing them with new rail cars to unload. Norfolk would perform only one “switch” per day delivering as many as five cars at a time.

Beginning in March 2007, Galaxy began sending rail freight to Savannah at such a volume that demurrage began to accrue. Pursuant to Norfolk’s tariff, a customer is allowed two days to unload freight without incurring demurrage. At the end of each month, a customer’s total demurrage days are netted against total credits. Credits are calculated by multiplying the number of rail cars delivered during a particular month by two, which accounts for the two “free” days all customers are given to un-

1. A bill of lading is “the basic transportation contract between the shipper-consignor and the carrier; its terms and conditions bind the shipper and all connecting carriers.” *South-*

ern Pac. Transp. Co. v. Commercial Metals Co., 456 U.S. 336, 342, 102 S.Ct. 1815, 1820, 72 L.Ed.2d 114 (1982).

load delivered rail cars. If total demurrage exceeds total credits, those days are charged at the daily rate published in Norfolk's tariff.

[2-4] The right to assess detention or demurrage charges against parties to a transportation contract for delay in releasing transportation equipment is well established at common law. Motor carriers term such a delay as detention while rail carriers refer to it as demurrage. Prior to rail transport, demurrage was recognized in maritime law as the amount to be paid for delay in loading, unloading, or sailing beyond the time specified. Unlike maritime law, a railroad carrier can collect demurrage even if the shipping contract contains no provision to that effect. In the railroad setting, demurrage charges serve a twofold purpose: "One is to secure compensation for the use of the car and of the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention." *Turner, Dennis & Lowry Lumber Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 271 U.S. 259, 262, 46 S.Ct. 530, 531, 70 L.Ed. 934 (1926). As such, demurrage charges are properly assessed even if the cause for the delay is beyond the party's control, unless the carrier itself is responsible for the delay.

[5-7] While demurrage remains a matter of contract, railroads are now required by federal statute to assess demurrage charges subject to oversight by the Surface Transportation Board. Norfolk seeks demurrage charges against Savannah pur-

suant to the Interstate Commerce Commission Termination Act (ICCTA), requiring rail carriers to "compute demurrage charges, and establish rules related to those charges . . ." 49 U.S.C. § 10746 (1995). Norfolk publishes the applicable demurrage rules and charges in Freight Tariff NS 6004-B, which states in relevant part that "[d]emurrage charges will be assessed against the consignor² at origin or consignee³ at destination who will be responsible for payment." Tariff NS 6004-B, Item 850(5) (2000) (footnotes added). Thus, Norfolk is required by the ICCTA and the terms of its own tariff to assess demurrage charges against the shipment's consignee for any delay in unloading the rail cars at their destination.

Savannah was a named consignee on the bills of lading for the freight shipments at issue. However, many of these bills of lading also named an ultimate consignee and printed copies of the electronic bill of lading data submitted by Norfolk did not actually contain the word consignee. Savannah maintains that it did not consent to being named on the bills of lading and was never informed that any bill of lading identified it as a consignee. The record indicates that neither Galaxy, Norfolk, nor any other entity provided Savannah with the bills of lading for the freight it handled. Thus, Savannah was a named consignee on the bills of lading without notice of, or consent to, such designation.

In addition to the freight at issue in this appeal, Norfolk routinely delivered freight to Savannah's facility pursuant to bills of

2. A consignor is "[o]ne who dispatches goods to another on consignment." BLACK'S LAW DICTIONARY 327 (8th ed. 2004). A consignment is "[a] quantity of goods delivered by this act, esp. in a single shipment." BLACK'S LAW DICTIONARY 327 (8th ed. 2004).

3. A consignee is "[o]ne to whom goods are consigned." BLACK'S LAW DICTIONARY 327 (8th

ed. 2004). The Federal Bills of Lading Act and Norfolk's Tariff define consignee in a consistent manner. See 49 U.S.C. § 80101(1) (1994) (" 'consignee' means the person named in a bill of lading as the person to whom the goods are to be delivered"); Tariff NS 6004-B, Item 200(6) (2000) ("The party to whom a shipment is consigned or the party entitled to receive the shipment").

lading where Savannah was not the named consignee. The instant dispute arose when Norfolk began invoicing Savannah for demurrage on all shipments delivered to Savannah's facility irrespective of whether Savannah was the named consignee. Savannah refused to pay and in late 2007 Norfolk sued for demurrage on all shipments, without regard for who was named as consignee. After Savannah moved for summary judgment, Norfolk amended its complaint, to exclude demurrage for freight shipments where Savannah was not named as consignee. This amendment had the effect of reducing Norfolk's demand from \$133,080.00 to \$70,680.00.

In early 2008 Savannah moved for summary judgment on all claims arguing that it was not liable for demurrage because Norfolk could "only recover demurrage against a consignee or a party to the transportation contract." Savannah stated that "the issue before the Court is whether another's unilateral act of identifying 'Savannah Re-Load' as the consignee without [its] knowledge or permission is sufficient to make it a consignee and therefore liable for demurrage." Norfolk moved for partial summary judgment as to the issue of Savannah's liability for demurrage. Norfolk argued that Savannah was liable for demurrage because Savannah was identified as consignee on the bills of lading at issue, Savannah accepted delivery of the rail cars and the freight, and Savannah did not notify Norfolk of its agent status.

The district court granted Savannah's motion for summary judgment and denied Norfolk's motion for partial summary judgment, holding that Savannah was not liable for demurrage. The court stated that a bill of lading is essentially a contract and Savannah could not be made a party to that contract without its knowledge or consent. In sum, the court held that Savannah "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." Norfolk appeals the district court's denial of its motion for partial summary judgment and grant of summary judgment to Savannah.

II.

[8] We review a district court's grant or denial of summary judgment *de novo*, considering all the facts and reasonable inferences in the light most favorable to the nonmoving party. *See Owner-Operator Indep. Drivers Ass'n, Inc. v. Landstar Sys. Inc.*, 541 F.3d 1278, 1287 (11th Cir. 2008). Under Fed.R.Civ.P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323, 106 S.Ct. at 2553 (internal quotations omitted). If the movant succeeds in demonstrating the absence of a material issue of fact, the burden shifts to the non-movant to show the existence of a genuine issue of fact. *See Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1116 (11th Cir.1993).

A. Demurrage liability

[9, 10] We begin our analysis by examining the basis for the district court's

decision, and in doing so, review several fundamental principles of law that define demurrage liability. First, demurrage is considered part of the transportation charge and under the tariff system is imposed as a matter of law. However, “[b]efore such transportation-related assessments such as detention charges can be imposed on a party . . . there must be some legal foundation for such liability outside the mere fact of handling the goods shipped.” *Middle Atl. Conference v. United States*, 353 F.Supp. 1109, 1118 (D.D.C.1972) (three-judge panel).⁴ In *Evans Prods. Co. v. Interstate Commerce Comm’n*, the Seventh Circuit held that “[l]iability for freight charges may be imposed only against a consignor, consignee, or owner of the property, or others by statute, contract, or prevailing custom.” 729 F.2d 1107, 1113 (7th Cir.1984) (citations omitted); see also *S. Pac. Transp. Co. v. Matson Navigation Co.*, 383 F.Supp. 154, 156 (N.D.Cal.1974) (“The obligation to pay demurrage arises either out of contract, statute or prevailing custom”); *Middle Atl.*, 353 F.Supp. at 1118 (liability for demurrage “must be founded either on contract, statute or prevailing custom”). Norfolk has not offered any evidence of prevailing industry custom or applicable statute that would hold nonparties to a shipping contract liable for demurrage. Furthermore, it is undisputed that Savannah is neither consignor nor owner of the freight. Thus, Savannah is liable for demurrage only if it were the consignee or contractually assumed responsibility for the charges.

A freight handler such as Savannah is free to contractually assume liability for demurrage charges and “this is sometimes done through average demurrage agreements to promote their own business and

in some instances to obtain the benefits of lower detention costs for the benefit of their customers.” *Middle Atl.*, 353 F.Supp. at 1122. However, in the instant case, there is no evidence to suggest that Savannah independently contracted with either Norfolk or Galaxy regarding demurrage charges. This leaves us only with the question of Savannah’s consignee status to determine demurrage liability.

As mentioned previously, the bill of lading is the basic transportation contract between the shipper-consignor and the carrier. Thus, as an original party to the shipping contract, a consignor is clearly liable for demurrage. However, “a consignee’s liability is quasi-contractual, and arises by operation of law when the consignee accepts delivery of the goods . . .” *Consol. Rail Corp. v. Com., Pa. Liquor Control Bd.*, 90 Pa.Cmwlth. 595, 496 A.2d 422, 424 (1985). See also *Pittsburgh v. Fink*, 250 U.S. 577, 581, 40 S.Ct. 27, 63 L.Ed. 1151 (1919) (“The weight of authority seems to be that the consignee is prima facie liable for the payment of the freight charges when he accepts the goods from the carrier”). By accepting delivery of a shipment, the consignee’s conduct assumes a quasi-contractual significance by virtue of the transportation contract, which identifies the parties and assigns responsibility for particular charges. The contract implied from the acceptance of a shipment extends no further than the conditions upon which its delivery is made dependant. Unless the bill of lading provides to the contrary, the consignor remains primarily liable for the freight charges and pursuant to the carrier’s tariff, the consignee becomes liable for demurrage charges at the freight’s destination. Thus, only an original party to the rail transpor-

4. We note that research has disclosed very few opinions by federal circuit courts dealing with the narrow issue presented in this case.

Thus, we have cited those authorities that are available.

tation contract, or a consignee by virtue of acceptance of the goods, may be liable for demurrage. As a district court in our circuit put it, “all the reported opinions agree that only a party to the rail transportation contract may be liable for demurrage.” *CSX Transp., Inc. v. City of Pensacola, Fla.*, 936 F.Supp. 880, 884 (N.D.Fla.1995); see also *Union Pac. R.R. Co. v. Ametek, Inc.*, 104 F.3d 558 (3d Cir. 1997) (holding demurrage could not be assessed against a warehouse that was not a consignee or other party to the transportation contract); *Matson*, 383 F.Supp. at 156 (the obligation to pay demurrage “arises out of the contractual relationship and may only be imputed to parties to the contract”); *Middle Atl.*, 353 F.Supp. 1109 (finding a carrier’s proposed tariff unlawful to the extent that it attempted to impose liability for demurrage charges on non-parties to the transportation contract); *Missouri, K. & T. Ry. Co. of Texas v. Capital Compress Co.*, 50 Tex.Civ.App. 572, 110 S.W. 1014, 1016 (1908) (holding a cotton compress company not liable to carrier for demurrage because “[t]he findings of fact fail to show any contractual relation between them in reference to the shipment of the cotton”).

[11, 12] There are exceptions to a consignee’s demurrage liability. A consignee may avoid demurrage liability by notifying the carrier of its agency status prior to accepting delivery of the shipment. “The law is well settled that an agent for a disclosed principal is not liable to a third person for acts within the scope of agency.” *Middle Atl.*, 353 F.Supp. at 1120–21; See also *Whitney v. Wyman*, 101 U.S. 392, 396, 25 L.Ed. 1050 (1879) (“Where the principal is disclosed, and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so”). The ICCTA recognizes the common law rule of agency and provides in relevant 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 billed at the time of delivery for which the consignee is otherwise liable, but not for additional rates 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) (1995). Thus, an agent-consignee can avoid demurrage liability by notifying the carrier of its agency status and providing the carrier with the name and address of the shipment’s beneficial owner prior to accepting delivery.

Thus far our analysis has surveyed the undisputed aspects of demurrage liability. The parties agree that an entity must be a party to the transportation contract to be liable for demurrage charges, that a consignee becomes a party to the transportation contract upon accepting the freight consigned to it, and that a consignee may avoid demurrage liability by disclosing its agency status prior to accepting delivery of the shipment. We now turn to the key question of whether Savannah was a consignee in the context of this case.

B. A consignee by any other name . . .

The issue before the court is whether Savannah was a consignee of the freight delivered by Norfolk. Norfolk contends that Savannah was a consignee because it was identified as such on the bills of lading and accepted delivery of the shipments.

Savannah argues that it cannot be made a consignee merely because a third party unilaterally listed it as such without its knowledge or consent. Both the Seventh and Third Circuits have addressed this issue in cases involving similar fact patterns. See *Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813 (7th Cir.2003); *CSX Transp. Co. v. Novolog Bucks County*, 502 F.3d 247 (3d Cir. 2007), cert. denied, — U.S. —, 128 S.Ct. 1240, 170 L.Ed.2d 65 (2008). The Seventh and Third Circuits reached differing conclusions on this issue resulting in a conflict of authority among the two circuits. See *South Tec*, 337 F.3d at 821; *Novolog*, 502 F.3d at 262.

In *South Tec*, the Seventh Circuit reasoned that the preliminary issue was whether the defendant warehouseman was a consignee. Although the case was remanded to the district court for 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 charges" *South Tec*, 337 F.3d at 821.

Like *South Tec*, the defendant in *Novolog*, who was named as consignee without its authorization, argued that "the shipper's or carrier's unilateral decision to designate [it] as the consignee, without [it]'s permission and where [it] is not the ultimate consignee of the freight, cannot establish its status as a consignee for purposes of demurrage liability under the statute or otherwise." *Novolog*, 502 F.3d at 257. The Third Circuit disagreed for three reasons. See *id.* First, because "nothing in the statutory language [of section 10743(a)(1)] suggests that it intends to restrict the term 'consignee' to the ultimate consignee of the freight or use it to mean anything other than the person to whom the bill of lading authorized delivery

and who accepts that delivery." *Id.* Second, because "to hold that the documented designation of an entity as a consignee and that entity's acceptance of the freight is insufficient to hold it presumptively liable for demurrage charges would frustrate the plain intent of the statute, which is to establish clear, easily enforceable rules for liability." *Id.* Third, because it would be equitable to treat the named consignee as presumptively liable, as under the statutory scheme "the named consignee can avoid liability in two ways: first, by refusing the freight . . . and second, by providing the carrier timely written notice of agency under Section 10743(a)(1), if appropriate." *Id.* at 259.

The *Novolog* court declined to follow the Seventh Circuit's conclusion in *South Tec* and held that "an entity named on a bill of lading as the sole consignee, without any designations clearly indicating any other role, is presumptively liable for demurrage fees on the shipment to which that bill of lading refers." *Id.* at 262. A party may rebut that presumption by showing that it never accepted delivery of the shipment, or that it was acting as an agent and followed the notification provisions of 49 U.S.C. § 10743(a)(1). See *id.* at 250, 259. Ultimately, the *Novolog* court remanded the case because "the factual record was not sufficiently developed . . . [t]o determine what the bills of lading showed." *Id.* at 250.

Norfolk relies almost exclusively on the Third Circuit's decision in *Novolog* and argues that as the named consignee on the bills of lading, Savannah was required to either refuse delivery of the shipments or comply with the agency notification requirements of the ICCTA to avoid demurrage liability. However, Norfolk incorrectly assumes that Savannah is the consignee for the shipments at issue simply because it is listed as such on the

bills of lading. Norfolk has made no effort to establish Savannah's status as a consignee through either interrogatories or deposition testimony. In fact, Savannah's status as a consignee was neither alleged nor admitted in the pleadings.

[13] Norfolk further argues that section 10743(a)(1) establishes a presumption of liability for demurrage charges. However, section 10743(a)(1) "applies only to agents who are also consignees, and not to agents who are not consignees." *South Tec*, 337 F.3d at 817. Furthermore, that section "speaks only to the 'nonliability' in certain narrow situations . . . but in no way can be read to impose liability on an agent not a party to the contract." *Middle Atl.*, 353 F.Supp. at 1120. If we were to accept Norfolk's assertion that section 10743(a)(1) establishes a presumption of liability, then we would also have to accept that merely naming an entity as consignee on a bill of lading creates a presumption of that status. We are unwilling to accept either proposition and agree with the district court 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."

Norfolk maintains that Savannah had either actual or constructive knowledge of its designation as consignee on the bills of lading. Yet, Norfolk has failed to present any evidence that Savannah was informed of its consignee designation prior to delivery. Thus, no evidence of actual knowledge exists in the record. Norfolk asks: "if Savannah is neither the consignee nor a disclosed agent of a consignee, how or why is Savannah accepting delivery of the freight?" This question implies that Savannah should have known it was the named consignee because freight shipments may only be delivered to and accepted by the consignee. However, we find this argument inconsistent with the

record, which indicates that Norfolk made numerous deliveries to Savannah where it was not the named consignee. Norfolk later amended its complaint to exclude these shipments from its claim for demurrage charges. Savannah cannot be expected to either refuse delivery or notify Norfolk of its agency status when it has no knowledge of which shipments, if any, it has been designated as consignee.

Norfolk emphasizes that it is "well-established and oft-repeated" that a "consignee becomes a party to the contract, and is therefore bound by it, upon accepting the freight . . ." *Novolog*, 502 F.3d at 254. However, this does not answer the key question: how does an entity become a consignee in the first place?

[14, 15] As previously defined, a consignee is the party designated to receive a shipment of goods. But, consignee status is more than a mere designation. The term takes on a legal significance due to the quasi-contractual relationship that arises between the consignee and the carrier. "Although a consignee's liability may rest upon quasi-contract, a party's status as consignee is a matter of contract and must be established as such." *Consol. Rail Corp. v. Com., Pa. Liquor Control Bd.*, 90 Pa.Cmwlth. 595, 496 A.2d 422, 424 (1985). Like any contractual relationship, there must be a meeting of the minds between the parties. This Circuit has previously recognized that "it is a fundamental principle of contracts that in order for a contract to be binding and enforceable, there must be a meeting of the minds on all essential terms and obligations of the contract." *Browning v. Peyton*, 918 F.2d 1516, 1521 (11th Cir.1990); *see also, e.g.*, REST (SECOND) OF CONTRACTS § 17(1) (1981) ("the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration"). Furthermore, it is a ten-

ent of contract law that “a third-party cannot be bound by a contract to which it was not a party.” *Miles v. Naval Aviation Museum Found., Inc.*, 289 F.3d 715, 720 (11th Cir.2002); *see also E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002) (“It goes without saying that a contract cannot bind a nonparty.”); *Union Pac. R.R. Co. v. Carry Transit, Inc.*, No. 3:04-CV-1095B, 2005 U.S. Dist. LEXIS 45568, at *13 (N.D.Tex. Oct. 27, 2005) (“It is a fundamental tenet of contract law that parties to a contract cannot bind a non-party.”). Thus, a party must assent to being named as a consignee on the bill of lading to be held liable as such, or at the least, be given notice that it is being named as a consignee in order that it might object or act accordingly.

[16] Given these legal principles, we agree with the district court’s holding that Savannah was not a consignee, and thus not liable for demurrage charges. Savannah did not agree to be named as consignee on the bills of lading between Norfolk and the various shippers, and was not aware of its designation as such. Savannah cannot be made a party to shipping contracts without its consent or notice of such, and thus cannot be liable to Norfolk for demurrage.

Not only is this approach in keeping with the legal principles outlined above, it also has the greatest support in the case law. *See Matson*, 383 F.Supp. at 157 (reserving the question of whether a consignee who has played an active role in the railroad transportation contract or has an interest in or control over the goods may be liable for the demurrage, but stating: “[W]here, as here, a connecting carrier-consignee is merely named in the railroad bill of lading without either more involvement on its part, or some culpability for the delay, it cannot be held liable to the railroad for demurrage. To hold other-

wise on these facts would be to place a connecting carrier’s liability totally within the shipper’s control, a result the Court cannot sanction.”); *W. Maryland Ry. Co. v. S. African Marine Corp.*, No. 86 CIV 2059, 1987 WL 16153, at *4 (S.D.N.Y. Aug. 13, 1987) (“[W]e decline to hold, as plaintiff urges, that a connecting ocean carrier is liable for rail demurrage charges as a matter of law merely by virtue of being named by the shipper as the consignee in the rail bills of lading.”); *Carry Transit, Inc.*, 2005 U.S. Dist. LEXIS 45568, at *14 (shipper’s unilateral decision to list defendant as consignee on bills of lading without its consent did not transform defendant into an actual consignee liable for demurrage); *Capital Compress Co.*, 110 S.W. at 1016 (entity not liable for demurrage where mistakenly listed as consignee on bill of lading, because there was no contractual relationship between that entity and the carrier); *CSX Transp. v. Pensacola*, 936 F.Supp. at 884 (stating in dicta that “[t]he unilateral action of one party in labeling an intermediary as a consignee does not render the putative consignee liable for demurrage” and indicating that an agreement to be contractually bound is key to demurrage liability); *Evans Prods.*, 729 F.2d at 1113 (“No liability [for freight charges] exists merely on account of being named in the bill of lading . . .”).

III.

For the foregoing reasons, the summary judgment of the district court is,

AFFIRMED.

