

FORD, MILLER & WAINER, P.A.

ATTORNEYS AT LAW

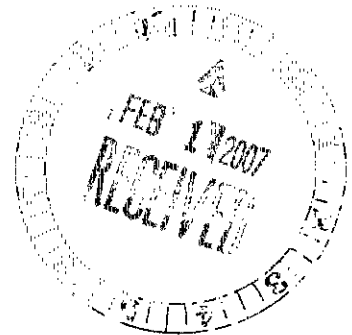
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January 30, 2007



Attn: Secretary
Surface Transportation Board
1925 "K" Street NW
Suite 700
Washington DC 20423

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Office of Proceedings

FEB 01 2007

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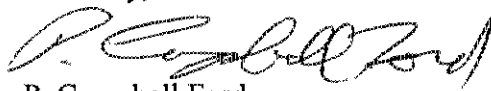
RE: Savannah Port Terminal Railroad, Inc. – Petition for Declaratory Order-
Certain Rates & Practices as Applied to Capital Cargo, Inc.
STB Docket No. FD34920

218557

Dear Secretary:

Please find enclosed an original and ten (10) copies of Savannah Port Terminal Railroad's ("SPTR") Motion to Dismiss Capital Cargo's Cross Claim against SPTR. Should you have any questions, please do not hesitate to contact me. A copy has been provided to opposing counsel.

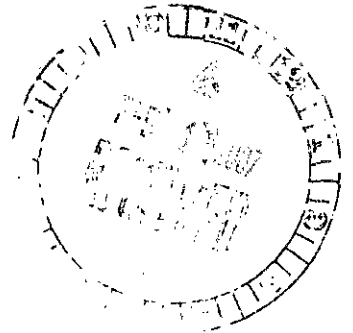
Sincerely,


P. Campbell Ford

Enclosure/

Original Motion to Dismiss
10 Copies of Motion to Dismiss

C: Ron Berry, Esquire (1 copy only)
James T. Kilbreth, Esquire (1 copy only)
Thomas Mahoney III, Esquire (1 copy only)



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. FD34920

**SAVANNAH PORT TERMINAL RAILROAD, INC.- PETITION FOR
DECLARATORY ORDER- CERTAIN RATES AND PRACTICES AS APPLIED
TO CAPITAL CARGO, INC.**

**SAVANNAH PORT TERMINAL RAILROAD, INC.'S MOTION TO DISMISS
CAPITAL CARGO'S CROSS-COMPLAINT**

**SUBMITTED ON BEHALF OF SAVANNAH PORT TERMINAL
RAILROAD, INC. BY**

P. Campbell Ford, Esquire
Florida Bar No. 0480495
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1200 Riverplace Blvd., Suite 600
Jacksonville, FL 32207
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**BEFORE THE
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CAPITAL CARGO'S CROSS-COMPLAINT**

Pursuant to 49 C.F.R. § 1111.5, SPTR files this Motion to Dismiss Capital Cargo's Cross-Complaint, and states:

Capital Cargo has brought a cross-claim against SPTR for an alleged breach of contract for failure to provide three (3) deliveries per day.

There is No Contract Between SPTR and Capital Cargo

Capital Cargo's Cross-Claim is based upon an allegation that SPTR failed to fulfill a contractual obligation to provide Capital Cargo with three (3) deliveries per day. (See ¶ 12, Cross-Claim). Capital Cargo has failed to attach any alleged contract with SPTR that would support this allegation and, in fact, there is no such contract. It appears Capital Cargo is basing its cross-complaint on its lease agreement with Georgia Ports Authority ("GPA"), which is not a party to this action. SPTR obviously cannot breach a contract to which it was not even a party, and as such, could not have breached the GPA lease agreement. It should also be noted that without a contract, Capital Cargo has no basis to even assert a reach of contract claim against SPTR.

Capital Cargo's Claim for Breach of Contract is Outside the Jurisdiction of the STB

Even if there was a contract between SPTR and Capital Cargo, Capital Cargo's claim is for an alleged breach of that contract,¹ and the STB must dismiss Capital Cargo's cross-claim pursuant to 49 U.S.C. §10709. 49 U.S.C. § 10709 states in relevant part,

(a) One or more rail carriers providing transportation subject to the jurisdiction of the Board under this part may enter into a contract with one or more purchases of rail services to provide specified rates and conditions.

(c)(2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States court, unless the parties otherwise agree.

Id. The STB does not have jurisdiction over service contracts, which Capital Cargo is alleging that SPTR breached. As such, Capital Cargo's entire cross-claim is outside of the jurisdiction of the STB and must be dismissed.

Capital Cargo was Required to Provide a Written Notice of Default Under the Lease

In order to bring a claim for what Capital Cargo has alleged is a failure to meet contractual obligations, Capital Cargo is required under the contract to first notify GPA in writing, setting forth the nature of the default under the Lease. (Art. 19, Lease). GPA then has thirty (30) days to cure the default. Capital Cargo failed to do provide the thirty (30) day notice despite alleging that it has received less than three (3) deliveries per day in the past. The only default notice that Capital Cargo submitted to the GPA was dated May 6, 2005 and indicated that it was not receiving rail service at all pursuant to Articles 3 & 14(b) of the Lease. This issue was addressed and resolved on May 19, 2005 in a written settlement agreement with Capital Cargo, which has been previously identified as

¹ SPTR continues to emphasize, and Capital Cargo has admitted, that the Lease is silent as to the number of deliveries per day to be made to Capital Cargo.

Exhibit B to SPTR's Petition for Declaratory Order. Because Capital Cargo has not issued a default notice to GPA regarding the number of deliveries per day that Capital Cargo insists is a contractual arrangement, it is not even entitled to bring a claim before the Board at this time.²

Capital Cargo's Cross-Claim is Moot

SPTR and Capital Cargo reached a settlement agreement on May 19, 2005, (after all of the outstanding demurrage at issue was accrued), whereby SPTR agreed to provide Capital Cargo three (3) deliveries per day, at specified times. Under the agreement if Capital Cargo does not receive three (3) deliveries when requested, SPTR has agreed not to charge demurrage for the applicable delivery. Accordingly, Capital Cargo's request that the STB issue a declaratory order addressing whether SPTR is required to make three (3) deliveries per day and whether SPTR can charge demurrage when unable to make the three (3) deliveries is moot and not at issue. Capital Cargo's cross-claim should be dismissed as it is premature without having the thirty (30) day notice and it is now factually and legally impossible as SPTR cannot now charge demurrage without having provided three (3) deliveries per day.

Conclusion

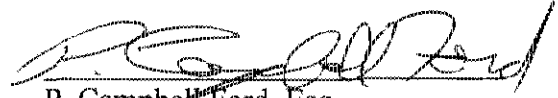
Capital Cargo's Cross-Claim should be dismissed by the STB for several reasons: (1) despite Capital Cargo claiming that SPTR breached the terms of a contract, there is no contract between the two parties, and Capital Cargo has not attached the contract upon

² If Capital Cargo now provided a thirty (30) day notice with an opportunity to cure, then such a notice would be completely without basis or logic as the three (3) day delivery requirement is in fact now a contractual requirement pursuant to the settlement agreement and SPTR was actually providing three (3) deliveries per day. Capital Cargo left the facility anyway to achieve its underlying goal, which is to inhabit its new thirteen (13) car track facility to increase its business.

which it asserts its claims, (2) in order for Capital Cargo to even bring a claim for breach of contract, it must first satisfy the default notice requirement under Article 19 of the lease, (3) a claim for breach of contract falls outside of the jurisdiction of the STB, and (4) Capital Cargo's claim is moot at this point as SPTR freely admits that it has reached a service agreement with Capital Cargo that renders Capital Cargo's request for declaratory order moot.

VERIFICATION

I, P. Campbell Ford, declare under penalty of perjury that the foregoing is true and correct and that I am qualified and authorized to file this pleading. Executed on January 30, 2007.

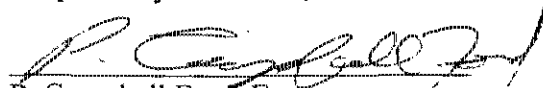

P. Campbell Ford, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Secretary Surface Transportation Board, 1925 "K" Street NW, Suite 700, Washington, DC 24023 via overnight mail and to Daniel L. Rosenthal, Verrill Dana LLP, P.O. Box 586, One Portland Square, Portland, ME 04112-0586 via U.S. Regular Mail on this 30th day of January, 2007.

Dated: January 30, 2007

Respectfully submitted,



P. Campbell Ford, Esq.

Florida Bar No. 0480495

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Attorneys for Defendants Rail Link,

Inc., and Savannah Port Terminal

Railroad, Inc.