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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. NOR 42108

**THE SPRINGFIELD TERMINAL RAILWAY COMPANY --
PETITION FOR DECLARATORY ORDER**

**MOTION OF RESPONDENT FORE RIVER
WAREHOUSING AND STORAGE CO., INC.,
TO DISMISS CLAIM FOR 2004 DEMURRAGE**

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Pursuant to 49 C.F.R. § 1111.5, Fore River Warehousing and Storage Co., Inc. ("Fore River") hereby moves to dismiss Petitioner Springfield Terminal Railway Company's ("STRC") Petition for Declaratory Order (the "Petition") to the extent that the Petition seeks a declaratory order that STRC is entitled to collect any demurrage charges purportedly arising in 2004. The basis for this motion is that the applicable statute of limitations, 49 U.S.C. § 11705, bars STRC's effort to collect all purported demurrage charges accruing more than three years prior to July 8, 2008—the date STRC filed the Petition. STRC apparently seeks to recover demurrage purportedly accruing in both 2004 and 2006. Because all of the demurrage accruing in 2004 accrued more than three years prior to July 8, 2008, the Petition must be dismissed as to all such demurrage.

FACTUAL BACKGROUND

STRC filed a complaint in this matter in the United States District Court for the District of Maine on March 27, 2007 (the "Maine Litigation"). Relying on 49 U.S.C. §

10746, the complaint sought approximately \$150,000 in purported demurrage charges assessed on Fore River in 2004 and 2006.¹

According to STRC's allegations in its Complaint in the Maine Litigation, which is attached to STRC's Petition, the following sequence of events occurred with respect to the 2004 charges:

- (1) During April, May, June, and October 2004, STRC "provided Fore River with appropriate notification of the delivery and placement of certain railcars that had been consigned to Fore River for unloading." (Complaint ("Compl.") ¶ 14.)
- (2) During April, May, June and October of 2004, Fore River purportedly incurred demurrage charges. (Compl. ¶ 15.)
- (3) By letters dated May 18, 2004; June 11, 2004; July 23, 2004; and November 12, 2004, STRC notified Fore River of the purported demurrage charges. (Compl. ¶ 16.)
- (4) STRC's invoices for the purported 2004 demurrage charges, totaling \$34,320, are dated:
 - (i) June 23, 2004 for April's purported demurrage charge, with a remittance date of July 23, 2004; (Compl. ¶ 18; Exhibit C to Compl.)
 - (ii) July 30, 2004 for May's purported demurrage charge, with a remittance date of August 29, 2004; (Id.)
 - (iii) August 30, 2004 for June's purported demurrage charge, with a remittance date of September 29, 2004; (Id.)

¹ It bears noting that Fore River contests all of the demurrage charges in this case

- (iv) January 31, 2005 for October's purported demurrage charge, with a remittance date of March 2, 2005. (*Id.*)

On September 6, 2007, the Court stayed the case so that questions could be referred to the STB. (July 16, 2008 Order, United States District Court for the District of Maine, attached as Exhibit A, at 1.) However, STRC twice failed to act to initiate a proceeding within the deadlines set by the Court, the last of which was June 26, 2008. (*Id.*) STRC filed its Petition with the Surface Transportation Board ("STB") on July 7, 2008. On July 16, 2008, in light of STRC's "failure to follow the Court's orders and bring this matter to the STB prior to June 26, 2008," the Court dismissed the Complaint in the Maine Litigation without prejudice pursuant to Federal Rule of Civil Procedure 41(b). *Id.*

ARGUMENT

I. The Petitioner's Claims For The 2004 Purported Demurrage Charges Are Subject To A Three-Year Statute Of Limitations.

49 U.S.C. § 11705(a) states that "[a] rail carrier providing transportation or service subject to the jurisdiction of the Board under this part must begin a civil action to recover charges for transportation or service provided by the carrier within 3 years after the claim accrues." 49 U.S.C. § 11705(g) further clarifies that "[a] claim related to a shipment of property accrues under this section on delivery or tender of delivery by the rail carrier."

This Board itself has decided that claims for demurrage charges are properly subject to this three-year statute of limitations. In *Engelhard Corporation-Petition for Declaratory Order- Springfield Terminal Railway Company and Consolidated Rail*

Corporation, in which the current Petitioner, STRC, was a defendant, this Board noted that:

The purpose of section 11705(g) . . . is to fix one date on which causes of action between a shipper and a carrier with respect to a specific shipment accrue. Fixing one date prevents a situation where one party's claim arising out of a specific shipment would be time barred but the other party's claim would not. This approach makes sense for claims of the type that are known at or shortly after the time of delivery, such as freight charges and demurrage, and thus these are the types of claims to which section 11705(g) historically has been found to apply. Indeed, the cases cited by the Defendants in support of their argument that section 11705(g) should apply . . . all deal with demurrage charges.

2004 WL 2154643, *3 (S.T.B. Sept. 27, 2004) (internal citations omitted); *see also Union Pacific R.R. Co. v Coast Packing Co.*, 236 F. Supp. 2d 1130, 1133 (C.D. Cal. 2002)

("Plaintiff concedes in its opposition, claims based on § 10746 are subject to the three-year statute of limitations in § 11705(a)."); *Springfield Terminal R.R. Co v United States Surface Transp. Bd.*, 472 F. Supp. 2d 89, 94 n.10 (D. Mass. 2007) (Springfield Terminal Railway Company "reli[es] on cases holding that demurrage charges fall under the limitation period of § 11705(g) Moreover, a demurrage charge is a penalty that a shipper or consignee pays as a term of the bill of lading and therefore does fall clearly within § 11705(g)'s 'claim related to a shipment of property' language.").

II. The Three-Year Statute Of Limitations Bars All Of The Purported Demurrage Charges From 2004.

According to STRC's own chronology, the demurrage charges began accruing in this matter in April, May, June and October of 2004. These clearly are the "delivery or tender dates" under section 11705(g) and, therefore, these are also the dates that the

statute of limitation began to run on any potential action to collect these purported demurrage charges.

By the express terms of section 11705(a), any claims concerning these charges were barred after April, May, June and October 2007, respectively. However, STRC's Petition was not filed with this Board until July 7, 2008—some seven months after the statute of limitations had expired. Thus, these claims are time-barred and, to the extent the Petition seeks a recovery thereon, it should be dismissed.²

III. A Dismissal Without Prejudice Does Not Toll The Applicable Statute Of Limitations.

Because section 1104.13 of the STB's rules do not allow a reply to a reply, Fore River addresses the possibility that STRC may try to argue that the pendency of its Complaint in the Maine Litigation, which has now been dismissed, may somehow have allowed it to escape the statute of limitations.

While STRC may have filed its Complaint in the Maine Litigation within the limitations period, that is wholly irrelevant - because on July 16, 2008, the District Court granted Fore River's Motion to Dismiss and dismissed the case without prejudice pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

Although the Court in the Maine Litigation stated that STRC could "pursu[c] whatever remedies (if any) may still be available to it from the STB," the statute of limitations is not tolled when a case is dismissed without prejudice. Thus, the claims for the 2004 purported demurrage charges are time barred by §11705. *See Chico-Velez v Roche Prods., Inc* 139 F.3d 56, 59 (1st Cir. 1998) ("A prescriptive period is not tolled

² Without belaboring the point, even if STRC somehow tried to argue for a different date from which to begin running the statute, STRC could produce no meaningful alternative starting point that would prevent the expiration of the statute of limitations. For the sake of argument, even the last relevant date—the March 2, 2005 deadline for payment—is still outside the three-year statute of limitations.

by filing a complaint that is subsequently dismissed without prejudice. In such cases, dismissal of the original suit, even though labeled as without prejudice, nevertheless may sound the death knell for the plaintiff's underlying cause of action if the sheer passage of time precludes the prosecution of a new action."').³ Thus, STRC cannot escape from section 11705(a).

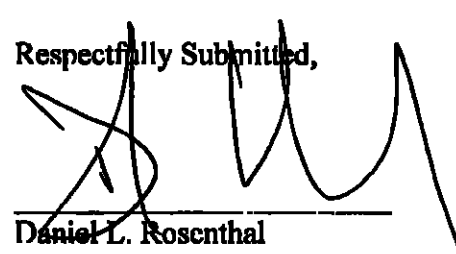
CONCLUSION

Under 49 U.S.C. § 11705(a), the applicable three-year statute of limitations in this matter expired in, at the latest, October of 2007 with respect to the 2004 demurrage charges. As STRC failed to file its Petition with this Board until July 7, 2008, its efforts to collect all purported demurrage charges with tender dates of April, May, June and October 2004 are time barred.

Accordingly, STRC's Petition for Declaratory Order must be dismissed to the extent that the Petition seeks to recover purported demurrage charges accruing in 2004.

Dated: July 25, 2008

Respectfully Submitted,



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³ In *Chico-Velez v Roche Products, Inc.*, the First Circuit cited the following cases in support of the proposition that a dismissal without prejudice does not toll a prescriptive period: *Garfield v J C Nichols Real Estate*, 57 F.3d 662, 666 (8th Cir 1995) ("A dismissal without prejudice does not toll a statute of limitation. Indeed, its effect is just the opposite. Once a dismissal without prejudice is entered and the pending suit is dismissed, it is as if no suit had ever been filed.") (citation omitted); *Robinson v. Willow Glen Academy*, 895 F.2d 1168, 1169 (7th Cir.1990); *Cardio-Medical Assoc. v Crozer-Chester Med. Ctr.*, 721 F.2d 68, 77 (3d Cir.1983); *Stein v Reynolds Secs, Inc.*, 667 F.2d 33, 34 (11th Cir.1982); cf. *Hilton Int'l v Union De Trabajadores*, 833 F.2d 10, 11 (1st Cir.1987).

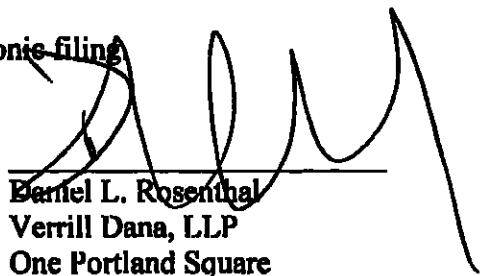
Attorney for Respondent
Fore River Warehousing &
Storage Co., Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished to Keith R.

Jacques, Attorney for Springfield Terminal Railway Company, Smith Elliott Smith &
Garmey, 199 Main Street, PO Box 1179, Saco, ME 04072 via electronic mail this 25th
day of July 2008, per agreement of the parties to use electronic filing

Dated: July 25, 2008



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UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

THE SPRINGFIELD TERMINAL
RAILWAY COMPANY,

Plaintiff

v.

FORE RIVER WAREHOUSING AND
STORAGE CO., INC.,

Defendant

Civil No. 07-52-P-S

**ORDER AFFIRMING THE
RECOMMENDED DECISION OF THE MAGISTRATE JUDGE**

No objections having been filed to the Magistrate Judge's Recommended Decision (Docket No. 11) filed August 15, 2007, the Recommended Decision is **AFFIRMED**.

Accordingly, it is **ORDERED** that the Defendant's Motion to Stay and Refer the Seven Specific Questions delineated by Fore River to the Surface Transportation Board (Docket No. 6) is hereby **GRANTED**.

/s/ George Z. Singal
Chief United States District Judge

Dated this 6th day of September, 2007.