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November 29, 2006

BY FED EX

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

Re: Savannah Port Terminal Railroad, Inc. -- Motion for Declaratory Order
Docket No. FD34920

Dear Secretary:

Enclosed for filing are an original and 10 copies of Answer and Cross-Complaint of Respondent Capital Cargo, Inc. along with a Certificate of Service.

Thank you for your attention to this matter.

Very truly yours,

Daniel L. Rosenthal

DLR:sms
Enclosures

cc: P. Campbell Ford, Esq. (by fed ex)
Thomas Mahoney, III, Esq. (by fed ex)
Ronald C. Berry, Esq.
James T. Kilbreth, Esq.

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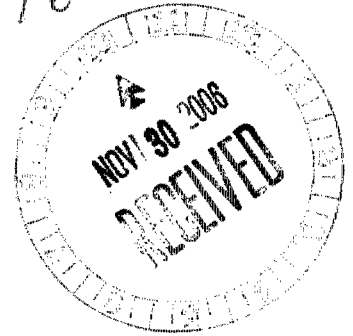
**BEFORE THE
SURFACE TRANSPORTATION BOARD**

DOCKET NO. FD34920

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

**ANSWER AND CROSS-COMPLAINT OF
RESPONDENT CAPITAL CARGO, INC.**

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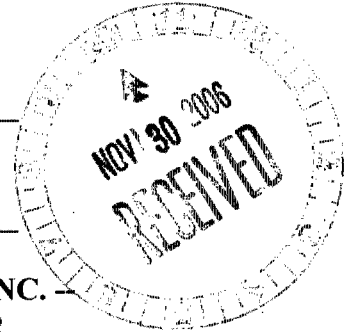
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**SAVANNAH PORT TERMINAL RAILROAD, INC. –
PETITION FOR DECLARATORY ORDER**



**ANSWER AND CROSS-COMPLAINT
OF RESPONDENT CAPITAL CARGO, INC.**

Pursuant to 49 C.F.R. § 1111.4, Respondent Capital Cargo, Inc. (“Capital Cargo”), hereby answers Petitioner Savannah Port Terminal Railroad, Inc.’s (“SPTR”) Petition for Declaratory Order (the “Petition”), responding as follows to the separately-numbered paragraphs in the Petition:

1. Except as otherwise stated specifically herein, Capital Cargo denies the allegations in paragraph 1 of the Petition. Answering further, Capital Cargo denies that it is obligated to pay any demurrage to SPTR, where such demurrage arises from the failure of SPTR to provide the minimum three deliveries per day, of three rail cars each, to Capital Cargo’s facility at the Garden City Terminal in Garden City, Georgia (the “Contract Service Obligation”), as required under a contract between Capital Cargo and the Georgia Ports Authority (“GPA”), which SPTR expressly and freely assumed.

Capital Cargo additionally denies that its track is “inadequate,” and that its decision to lease the facility at issue was the cause of the accrual of demurrage charges. As set forth below, this track is the same one that Capital Cargo leased from the GPA pursuant to the same lease that: (1) calls for rail service to be provided to the facility on

that track, (2) gives rise to the Contract Service Obligation, and (3) was expressly and freely assumed by SPTR.

2. Except as otherwise stated specifically herein, Capital Cargo denies the allegations in paragraph 2 of the Petition. Answering further, Capital Cargo objects to SPTR's request. Capital Cargo denies that any condition precedent as described in paragraph 2 of the Petition existed under the parties' contract, or was in any other way applicable or operative. Capital Cargo denies that SPTR's charges for demurrage in the amount of \$149,648.00 were reasonable, including without limitation to the extent that the demurrage charges arose from the failure of SPTR to meet its Contract Service Obligation.
3. Capital Cargo admits the allegations in paragraph 3 of the Petition.
4. Capital Cargo admits the allegations in paragraph 4 of the Petition.
5. Capital Cargo admits the allegations in paragraph 5 of the Petition.
6. Capital Cargo admits the allegations in paragraph 6 of the Petition.
7. Capital Cargo admits the allegations in paragraph 7 of the Petition.
8. Capital Cargo admits the allegations in paragraph 8 of the Petition.
9. Capital Cargo admits the allegations in paragraph 9 of the Petition.
10. Capital Cargo admits the allegations in paragraph 10 of the Petition.
11. Capital Cargo admits the allegations in paragraph 11 of the Petition. Answering further, Capital Cargo states that Article 3 of the Lease states *inter alia* that "Lessor agrees to provide rail service to the Premises as long as the present rail access is maintained by Lessee." Article 18 of the Lease states that "Failure of Lessor or Lessee to complain of

any act or omission on the part of the other party no matter how long the same may continue, shall not be deemed to be a waiver by said party of any of its rights hereunder.”

12. Capital Cargo admits the allegations in paragraph 12 of the Petition.

13. Capital Cargo admits the allegations in paragraph 13 of the Petition. Answering further, Capital Cargo states that the easement agreement states, *inter alia*:

- a. “Beginning on the commencement date and for as long thereafter as this Agreement remains in effect, SPTRR shall bear full common carrier responsibility for the provision of rail transportation services on the Premises in accordance with applicable tariffs, *contracts* and laws.” (Exhibit to SPTR Petition at ¶ 5 (emphasis added).)
- b. “Initially, said rail transportation services shall be performed by SPTR in accordance with GPA’s existing Tariff as shown on Exhibit ‘C’ and attached hereto and by reference made a part hereof, *and contracts and other agreements with its users and with other carriers, which SPTRR hereby agrees to adopt and/or assume*. Subject to any limitations set forth in such contracts or as may have been or may be prescribed by the STB, SPTRR thereafter may modify or cancel any such Tariff or agreement in such lawful manner as it deems appropriate.” (*Id.* at ¶ 6 (emphasis added).)
- c. “SPTRR shall provide efficient and economical railroad transportation services, including service to customers along the Tracks . . . commensurate with the reasonable needs and requests of GPA and its customers. . . . SPTRR agrees to cooperate with GPA to ensure that adequate rail service, at competitive costs, is at all times furnished to users of the Premises” (*Id.* at ¶ 8(b).)

14. Capital Cargo admits the allegations in paragraph 14 of the Petition.

15. Except as otherwise stated specifically herein, Capital Cargo denies the allegations in paragraph 15 of the Petition. Answering further, Capital Cargo states that 49 U.S.C. § 10702 speaks for itself, and states that if and to the extent that section 10702 applies, SPTR has failed to satisfy the requirements of that statute. Answering further, Capital Cargo states that the transportation and service at issue in this case are governed by a contract and therefore pursuant to 49 U.S.C. § 10709, such transportation or service are

not subject to the jurisdiction of the STB, decisions of the STB or courts under section 10702, or regulations promulgated pursuant to section 10702.

16. Except as otherwise stated specifically herein, Capital Cargo denies the allegations in paragraph 16 of the Petition. Answering further, Capital Cargo states that 49 U.S.C. § 10746 speaks for itself, and states that if and to the extent that section 10746 applies, SPTR has failed to satisfy the requirements of that statute. Answering further, Capital Cargo states that the transportation and service at issue in this case are governed by a contract and therefore pursuant to 49 U.S.C. § 10709, such transportation or service, including issues relating to demurrage, are not subject to the jurisdiction of the STB, decisions of the STB or courts under section 10746, or regulations promulgated pursuant to section 10746.
17. Capital Cargo denies the allegations in paragraph 17 of the Petition. Answering further, Capital Cargo states that the transportation and service at issue in this case are governed by a contract and the tariffs were not part of that contract.
18. Capital Cargo denies the allegations in paragraph 18 of the Petition. Answering further, Capital Cargo states that the transportation and service at issue in this case are governed by a contract and the referenced tariff was not part of that contract.
19. Capital Cargo is without information sufficient to form a belief as to the allegations in the first sentence of paragraph 19 of the Petition, and therefore denies the same. Capital Cargo admits the allegations in the second sentence of paragraph 19 of the Petition.
20. Capital Cargo denies the allegations in paragraph 20 of the Petition. Answering further, Capital Cargo states that the transportation and service at issue in this case are governed by a contract and the referenced tariff was not part of that contract.

21. Capital Cargo admits the allegations in all but the last sentence of paragraph 21 of the Petition. Capital Cargo denies the argumentative allegations in the last sentence of paragraph 21 and, answering further, states that Capital Cargo was being billed pursuant to a contract, not any tariff.
22. Except as otherwise stated specifically herein, Capital Cargo denies the allegations in paragraph 22 of the Petition. Answering further, Capital Cargo states that while SPTR provided rail service, SPTR did not always meet its Contract Service Obligation of providing three deliveries per day of three cars each. While SPTR has charged demurrage on occasion, and Capital Cargo has paid some demurrage charges, those charges were neither assessed nor paid pursuant to any tariff, and were paid only where demurrage arose from something other than the failure of SPTR to meet its Contract Service Obligation. Capital Cargo has refused to pay demurrage charges arising from the failure of SPTR to meet its Contract Service Obligation.
23. Capital Cargo denies the allegations in paragraph 23 of the Petition. Answering further, Capital Cargo states that the parties' contract contained no written-objection requirement and in fact included an express anti-waiver provision, and to the extent that any referenced tariff did contain such a requirement, such referenced tariff was not part of the contract and did not apply. In the alternative, if and to the extent any written-objection requirement existed, SPTR waived such requirement and/or is estopped from raising such requirement as a defense to Capital Cargo's objections to demurrage charges.
24. Capital Cargo denies the allegations in paragraph 24 of the Petition. Answering further, Capital Cargo states that the cited case speaks for itself and does not reflect the current state of the law. The parties' contract contained no written-objection requirement and in

fact included an express anti-waiver provision, and if and to the extent that any referenced tariff did contain such a requirement, such referenced tariff was not part of the contract and did not apply.

25. Capital Cargo denies the allegations in paragraph 25 of the Petition. The parties' contract contained no written-objection requirement and in fact included an express anti-waiver provision, and if and to the extent that any referenced tariff did contain such a requirement, such referenced tariff was not part of the contract and did not apply. In the alternative, if and to the extent any written-objection requirement existed, SPTR waived such requirement and/or is estopped from raising such requirement as a defense to Capital Cargo's objections to demurrage charges.
26. Capital Cargo states that the cited case speaks for itself and no response is required. To the extent that a response is required, Capital Cargo denies the allegations in paragraph 26 of the Petition. Answering further, Capital Cargo states that the cited case is irrelevant because the parties' contract contained no written-objection requirement and in fact included an express anti-waiver provision, and if and to the extent that any referenced tariff did contain such a requirement, such referenced tariff was not part of the contract and did not apply. In the alternative, if and to the extent any written-objection requirement existed, SPTR waived such requirement and/or is estopped from raising such requirement as a defense to Capital Cargo's objections to demurrage charges. In addition, the cited case does not reflect the current state of the law.
27. Capital Cargo states that the cited tariffs speak for themselves and no response is required. To the extent that a response is required, Capital Cargo denies the allegations in paragraph 27 of the Petition. Answering further, Capital Cargo states that the cited

tariffs are irrelevant because the parties' contract contained no written-objection requirement and in fact included an express anti-waiver provision, and if and to the extent that any referenced tariffs did contain such a requirement, such referenced tariffs were not part of the contract and did not apply. In the alternative, if and to the extent any written-objection requirement existed, SPTR waived such requirement and/or is estopped from raising such requirement as a defense to Capital Cargo's objections to demurrage charges.

28. Except as otherwise stated specifically herein, Capital Cargo denies the allegations in paragraph 28 of the Petition. Capital Cargo admits that it alleges that SPTR was required to make three deliveries per day of three cars each, and that SPTR should not have charged demurrage when it failed to do so. Answering further, Capital Cargo states that the cited tariff speaks for itself and no response is required. The cited tariff is irrelevant because the parties' contract contained no written-objection requirement and in fact included an express anti-waiver provision, and if and to the extent that any referenced tariff did contain such a requirement, such referenced tariff was not part of the contract and did not apply. In the alternative, if and to the extent any written-objection requirement existed, SPTR waived such requirement and/or is estopped from raising such requirement as a defense to Capital Cargo's objections to demurrage charges.

29. Capital Cargo states that the cited tariff speaks for itself and no response is required. To the extent that a response is required, Capital Cargo denies the allegations in paragraph 29 of the Petition. Answering further, Capital Cargo states that the cited tariff is irrelevant because the parties' contract contained no written-objection requirement and if and to the extent that any referenced tariff did contain such a requirement, such and in

fact included an express anti-waiver provision, referenced tariff was not part of the contract and did not apply. In the alternative, if and to the extent any written-objection requirement existed, SPTR waived such requirement and/or is estopped from raising such requirement as a defense to Capital Cargo's objections to demurrage charges.

30. Capital Cargo denies the allegations in paragraph 30 of the Petition. Answering further, Capital Cargo states that the cited tariffs are irrelevant because the parties' contract contained no written-objection requirement and in fact included an express anti-waiver provision, and if and to the extent that any referenced tariffs did contain such a requirement, such referenced tariffs were not part of the contract and did not apply. In the alternative, if and to the extent any written-objection requirement existed, SPTR waived such requirement and/or is estopped from raising such requirement as a defense to Capital Cargo's objections to demurrage charges.¹

31. Except as otherwise stated specifically herein, Capital Cargo denies the allegations in paragraph 31 of the Petition. Capital Cargo admits the allegation that Capital Cargo is permitted to question demurrage charges arising in April and May 2005, to which Capital Cargo objected in writing.

32. Capital Cargo denies the allegations in paragraph 32 of the Petition. Answering further, Capital Cargo states that it is not obligated to pay any demurrage charges arising from the failure of SPTR to meet its Contract Service Obligation, and that any such charges were unreasonable.

33. Capital Cargo denies the allegations in paragraph 33 of the Petition. Answering further, Capital Cargo states that SPTR's Contract Service Obligation is to make three deliveries

¹ SPTR sets forth a "Summary" at page 12 of its Petition, between paragraphs 30 and 31. To the extent that a response to the "Summary" is required, Capital Cargo denies all of the allegations therein.

per day of three cars each, and that SPTR is not entitled to charge demurrage when it fails to meet that obligation.

34. Capital Cargo denies the allegations in paragraph 34 of the Petition. Answering further, Capital Cargo states that SPTR's Contract Service Obligation is to make three deliveries per day of three cars each, and that SPTR is not entitled to charge demurrage when it fails to meet that obligation.
35. Except as otherwise stated specifically herein, Capital Cargo denies the allegations in paragraph 35 of the Petition. Capital Cargo admits that it paid demurrage prior to April 2003, where such charges arose from something other than the failure of SPTR to meet its Contract Service Obligation. Capital Cargo has refused to pay demurrage charges arising from the failure of SPTR to meet its Contract Service Obligation.
36. Except as otherwise stated specifically herein, Capital Cargo denies the allegations in paragraph 36 of the Petition. Capital Cargo admits that there have been times when SPTR has fulfilled its Contract Service Obligation. Capital Cargo objects to the characterization of its three-car track as "short," and states that this is the same track that Capital Cargo leased from the GPA pursuant to the same lease that: (1) calls for rail service to be provided to the facility on that track, (2) gives rise to the Contract Service Obligation, and (3) was expressly and freely assumed by SPTR. In addition, SPTR is not entitled to charge demurrage when it fails to meet its Contract Service Obligation and the reasons for SPTR's failure to meet that obligation are irrelevant.
37. Capital Cargo denies the allegations in paragraph 37 of the Petition. Answering further, Capital Cargo states that SPTR is not entitled to charge demurrage when it fails to meet its Contract Service Obligation, and the reasons for SPTR's failure to meet that obligation

are irrelevant. The issue of terminal congestion is irrelevant to the extent that SPTR relies on such assertions to defend its failure to meet its Contract Service Obligation and to justify its demurrage charges arising from such failure.

38. Except as otherwise stated specifically herein, Capital Cargo denies the allegations in paragraph 38 of the Petition. Capital Cargo admits that it contested SPTR's purported justifications for failing to meet its Contract Service Obligation and charging demurrage arising from such failure, and argued that the reason for SPTR's conduct was SPTR's desire to increase its profitability and service new customers. However, SPTR is not entitled to charge demurrage when it fails to meet its Contract Service Obligation, and the reasons for SPTR's failure to meet that obligation are irrelevant. The issue of terminal congestion is irrelevant to the extent that SPTR relies on such assertions to defend its failure to meet its Contract Service Obligation and to justify its demurrage charges arising from such failure.

39. Capital Cargo is without information sufficient to form a belief as to the allegations in paragraph 39 of the Petition and therefore denies the same. Answering further, Capital Cargo states that SPTR is not entitled to charge demurrage when it fails to meet its Contract Service Obligation, and the reasons for SPTR's failure to meet that obligation are irrelevant. The issue of terminal congestion is irrelevant to the extent that SPTR relies on such assertions to defend its failure to meet its Contract Service Obligation and to justify its demurrage charges arising from such failure.

40. Capital Cargo is without information sufficient to form a belief as to the allegations in paragraph 40 of the Petition and therefore denies the same. Answering further, Capital Cargo states that SPTR is not entitled to charge demurrage when it fails to meet its

Contract Service Obligation, and the reasons for SPTR's failure to meet that obligation are irrelevant. The issue of terminal congestion is irrelevant to the extent that SPTR relies on such assertions to defend its failure to meet its Contract Service Obligation and to justify its demurrage charges arising from such failure.

41. Except as otherwise stated specifically herein, Capital Cargo denies the allegations in paragraph 41 of the Petition. Capital Cargo admits that Mr. Meyer testified that he saw SPTR engines heading in a direction inconsistent with deliveries to Port customers and that he would call the office and learn he did not get three deliveries in a given day. Answering further, Capital Cargo states that SPTR is not entitled to charge demurrage when it fails to meet its Contract Service Obligation, and the reasons for SPTR's failure to meet that obligation are irrelevant. The issue of terminal congestion is irrelevant to the extent that SPTR relies on such assertions to defend its failure to meet its Contract Service Obligation and to justify its demurrage charges arising from such failure.
42. Capital Cargo is without information sufficient to form a belief as to the allegations in paragraph 42 of the Petition and therefore denies the same. Answering further, Capital Cargo states that SPTR is not entitled to charge demurrage when it fails to meet its Contract Service Obligation, and the reasons for SPTR's failure to meet that obligation are irrelevant. The issue of terminal congestion is irrelevant to the extent that SPTR relies on such assertions to defend its failure to meet its Contract Service Obligation and to justify its demurrage charges arising from such failure.
43. Capital Cargo is without information sufficient to form a belief as to the allegations in paragraph 43 of the Petition and therefore denies the same. Answering further, Capital Cargo states that SPTR is not entitled to charge demurrage when it fails to meet its

Contract Service Obligation, and the reasons for SPTR's failure to meet that obligation are irrelevant. The issue of terminal congestion is irrelevant to the extent that SPTR relies on such assertions to defend its failure to meet its Contract Service Obligation and to justify its demurrage charges arising from such failure.

44. Capital Cargo is without information sufficient to form a belief as to the allegations in paragraph 44 of the Petition and therefore denies the same. Answering further, Capital Cargo states that SPTR is not entitled to charge demurrage when it fails to meet its Contract Service Obligation, and the reasons for SPTR's failure to meet that obligation are irrelevant. The issue of terminal congestion is irrelevant to the extent that SPTR relies on such assertions to defend its failure to meet its Contract Service Obligation and to justify its demurrage charges arising from such failure.

45. Capital Cargo is without information sufficient to form a belief as to the allegations in paragraph 45 of the Petition and therefore denies the same. Answering further, Capital Cargo states that SPTR is not entitled to charge demurrage when it fails to meet its Contract Service Obligation, and the reasons for SPTR's failure to meet that obligation are irrelevant. The issue of terminal congestion is irrelevant to the extent that SPTR relies on such assertions to defend its failure to meet its Contract Service Obligation and to justify its demurrage charges arising from such failure.

46. Capital Cargo is without information sufficient to form a belief as to the allegations in paragraph 46 of the Petition and therefore denies the same. Answering further, Capital Cargo states that SPTR is not entitled to charge demurrage when it fails to meet its Contract Service Obligation, and the reasons for SPTR's failure to meet that obligation are irrelevant. The issue of terminal congestion is irrelevant to the extent that SPTR

relies on such assertions to defend its failure to meet its Contract Service Obligation and to justify its demurrage charges arising from such failure.

47. Capital Cargo denies the allegations in paragraph 47 of the Petition.

48. Capital Cargo denies the allegations in paragraph 48 of the Petition. Answering further, Capital Cargo objects to the characterization of its three-car track as “short,” and states that this is the same track that Capital Cargo leased from the GPA pursuant to the same lease that: (1) calls for rail service to be provided to the facility on that track, (2) gives rise to the Contract Service Obligation, and (3) was expressly and freely assumed by SPTR. In addition, SPTR is not entitled to charge demurrage when it fails to meet its Contract Service Obligation, and the reasons for SPTR’s failure to meet that obligation are irrelevant.

49. Except as otherwise stated specifically herein, Capital Cargo denies the allegations in paragraph 49 of the Petition. Capital Cargo admits that there was an unexpected influx of cars to Capital Cargo from CSX in 2005, which rendered Capital Cargo unable to load and unload those cars within forty-eight hours even if SPTR had adhered to its Contract Service Obligation in the subject time frame. Capital Cargo has calculated what demurrage would have been due other than charges arising from SPTR’s failure to meet its Contract Service Obligation, and the amount is approximately \$4,000.00.

50. Capital Cargo denies the allegations in paragraph 50 of the Petition.

51. Except as otherwise stated specifically herein, Capital Cargo denies the allegations in paragraph 51 of the Petition. Capital Cargo admits that SPTR placed Capital Cargo on a cash-only basis on May 5, 2005, under which SPTR purported to require Capital Cargo to pay demurrage on the three rail cars currently on Capital Cargo’s track before SPTR

would haul away the three empty cars and deliver three new ones. Capital Cargo also admits that elected not to give in to SPTR's unlawful and unjustified demands to be paid demurrage. What prevented other cars from being delivered was SPTR's dogged refusal to live up to its Contract Service Obligation, and to refrain from insisting upon being paid for demurrage to which SPTR was not entitled.²

WHEREFORE, Capital Cargo respectfully requests that SPTR's Petition be dismissed and this proceeding discontinued, and that Capital Cargo be awarded all such further relief as this Board deems appropriate under the circumstances.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

SPTR's Petition fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

SPTR's claims are barred, in whole or in part, for lack of jurisdiction in the Surface Transportation Board.

THIRD AFFIRMATIVE DEFENSE

SPTR's claims are barred, in whole or in part, because the demurrage charges at issue are not authorized by the contracts of the parties.

FOURTH AFFIRMATIVE DEFENSE

SPTR's claims are barred, in whole or in part, because the demurrage charges at issue are unreasonable and violate 49 U.S.C. § 10746.

FIFTH AFFIRMATIVE DEFENSE

² SPTR sets forth another "Summary" at pages 21-22 of its Petition, following paragraph 51. To the extent that a response to the "Summary" is required, Capital Cargo denies all of the allegations therein.

SPTR's claims are barred, in whole or in part, by the doctrine of waiver.

SIXTH AFFIRMATIVE DEFENSE

SPTR's claims are barred, in whole or in part, by the doctrine of estoppel.

SEVENTH AFFIRMATIVE DEFENSE

SPTR's claims are barred, in whole or in part, by the doctrine of laches.

EIGHTH AFFIRMATIVE DEFENSE

SPTR's claims are barred, in whole or in part, by SPTR's own inequitable conduct.

NINTH AFFIRMATIVE DEFENSE

SPTR's claims are barred, in whole or in part, by SPTR's failure to mitigate its alleged damages.

CROSS-COMPLAINT³

Pursuant to 49 C.F.R. § 1111.4, Capital Cargo hereby cross-complains against SPTR as follows:

1. Capital Cargo is engaged in the shipping and terminal business. Capital Cargo has leased a certain facility located at 250 Brampton Road, Garden City, Georgia, since 1995. At all relevant times, the facility has included a railroad track capable of accommodating three rail cars at any one time.
2. Capital Cargo's facility is located within a rail and maritime terminal known as the Garden City Terminal. The Garden City Terminal is owned by the Georgia Ports Authority ("GPA"). GPA is the lessor of Capital Cargo's facility.

³ Capital Cargo's cross-complaint is stated purely in the alternative from its defenses as set forth in its answer and motion to dismiss. Capital Cargo asserts, as set forth in those filings, that SPTR's petition should be dismissed and this proceeding discontinued. The basis for that assertion is that the issues in this case are the subject of a contract and that the STB lacks jurisdiction. If the STB agrees, then it will be unnecessary to reach Capital Cargo's cross-complaint because the case would return to the Georgia Superior Court. Capital Cargo's cross-complaint is pleaded in the alternative from the assertions in Capital Cargo's answer and motion to dismiss, and is premised upon the proposition that service and/or demurrage are governed by applicable statutes and regulations rather than the contract.

3. Capital Cargo receives and ships rail cargo from the leased property. Capital Cargo's intent and expectation in leasing the property was that adequate rail service would be available to meet Capital Cargo's needs and allow Capital Cargo to earn a certain level of profit.
4. From the inception of Capital Cargo's business at the property in 1995, GPA provided rail service by delivering and picking up rail cars from the leased facility within a reasonable period of time, usually within hours of Capital Cargo's request. The service would be performed on as many occasions as Capital Cargo requested during any given day, week or month.
5. If more than three rail cars arrived at the GPA terminal for delivery to Capital Cargo, GPA would hold the excess cars off-site and would make them available within two hours of notification by Capital Cargo that the cars should be delivered. GPA did not treat such cars as delivered to Capital Cargo for purposes of demurrage calculations or any other delay charges until the cars were actually delivered to Capital Cargo's facility.
6. In or about 1998, GPA and SPTR signed an Easement Agreement under which SPTR assumed GPA's rail carrier obligations, including without limitation GPA's obligations under existing contracts.
7. SPTR has, at times, failed and/or refused to make three deliveries per day of three rail cars each.
8. When SPTR has failed and/or refused to make three deliveries per day of three rail cars each, SPTR has treated the ensuing backup of cars as a condition attributable to Capital Cargo, has treated the cars it has failed and/or refused to deliver as "constructively"

delivered, and has calculated demurrage charges to include the time prior to actual delivery to Capital Cargo.

9. Capital Cargo has contested the reasonableness and propriety of demurrage charges arising from SPTR's failure and/or refusal to make three deliveries per day of three rail cars each, and has refused to pay such charges.
10. In response to Capital Cargo's declination to pay such demurrage charges, SPTR refused to provide service.
11. SPTR's failure and/or refusal to provide Capital Cargo with three deliveries per day of three rail cars each violated 49 U.S.C. § 11101.
12. SPTR's failure and/or refusal to provide Capital Cargo with three deliveries per day of three rail cars each violated SPTR's contractual obligations to Capital Cargo.⁴
13. SPTR's demurrage charges arising from SPTR's failure and/or refusal to make three deliveries per day of three rail cars each violated 49 U.S.C. §§ 10702 and 10746.
14. SPTR's failure and/or refusal to provide service unless Capital Cargo paid demurrage charges violated 49 U.S.C. §§ 10702 and 11101.
15. SPTR's demurrage charges were unreasonable and violated 49 U.S.C. §§ 10702 and 10746.
16. SPTR's conduct as described herein has proximately caused damage to Capital Cargo.

WHEREFORE, Capital Cargo respectfully requests that the STB enter an order:

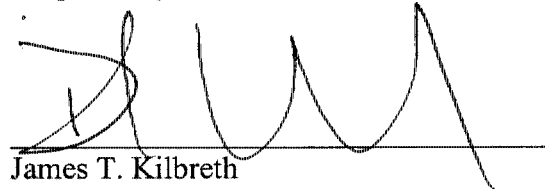
- a. declaring that SPTR may not fail and/or refuse to make three deliveries per day of three rail cars each to Capital Cargo;

⁴ As set forth in the footnote above, Capital Cargo's cross-complaint is pleaded in the alternative from its answer and motion to dismiss, and the contractual nature of the transportation in this case calls for dismissal of the case and elimination of any need for the STB to address the cross-complaint. Nevertheless, the allegation that SPTR violated its contractual obligations to Capital Cargo is included in this cross-complaint to prevent any argument or finding that Capital Cargo has somehow waived its position that SPTR breached the contract.

- b. declaring that SPTR may not charge demurrage arising from SPTR's failure and/or refusal to make three deliveries per day of three rail cars each to Capital Cargo;
- c. declaring that SPTR may not refuse to provide service unless Capital Cargo pays demurrage charges arising from SPTR's failure and/or refusal to make three deliveries per day of three rail cars each to Capital Cargo;
- d. declaring that SPTR's demurrage charges were unreasonable; and
- e. awarding Capital Cargo damages in an amount to be determined at trial; and awarding Capital Cargo all such further relief as this Board deems appropriate under the circumstances.

Dated: November 29, 2006

Respectfully submitted,



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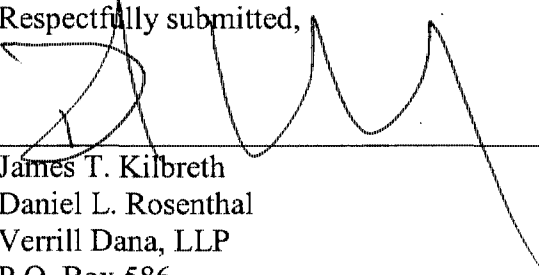
Attorneys for Respondent
Capital Cargo, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished to P. Campbell Ford, Esq., Attorney for Savannah Port Terminal Railroad, Ford, Miller & Wainer, P.A., 1200 Riverplace Blvd., Suite 600, Jacksonville, FL 32207 via federal express this 29th day of November 2006.

Dated: November 29, 2006

Respectfully submitted,

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

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