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Attorneys at Law

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August 26, 2008

**VIA ELECTRONIC FILING**

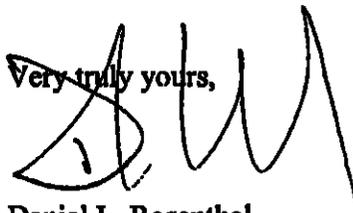
Surface Transportation Board  
Attention: Secretary  
395 E. Street, S.W.  
Washington, D.C. 20423-0001

223373

Re: Springfield Terminal Railway Company v. Fore River Warehousing  
and Storage Co., Inc.  
Docket No.: NOR 42108

Dear Sir or Madam:

Enclose please find the Motion of Respondent Fore River Warehousing and Storage Co., Inc. for Leave to File Rebuttal to Springfield Terminal Railways Company's Reply to Motion to Dismiss Claim for 2004 Demurrage. The Rebuttal itself is attached to the Motion as Tab I. I have inquired of counsel to Springfield Terminal Railway Co., Keith Jacques, as to whether Springfield Terminal Railway Company assents to the motion, but have not received a reply.

Very truly yours,  


Daniel L. Rosenthal

DLR:sms

Enclosures

cc: Keith Jacques, Esq.  
Michael Cella

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET NO. NOR 42108**

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

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**MOTION OF RESPONDENT FORE RIVER  
WAREHOUSING AND STORAGE CO., INC.,  
FOR LEAVE TO FILE REBUTTAL TO  
SPRINGFIELD TERMINAL RAILWAYS COMPANY'S  
REPLY TO MOTION TO DISMISS CLAIM FOR 2004 DEMURRAGE**

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(207) 774-7499 (facsimile)**

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**THE SPRINGFIELD TERMINAL RAILWAY COMPANY --  
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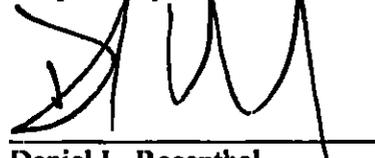
**MOTION OF RESPONDENT FORE RIVER  
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FOR LEAVE TO FILE REBUTTAL TO  
SPRINGFIELD TERMINAL RAILWAYS COMPANY'S  
REPLY TO MOTION TO DISMISS CLAIM FOR 2004 DEMURRAGE**

Fore River Warehousing and Storage Co., Inc. ("Fore River") hereby moves for leave to file a rebuttal to Petitioner Springfield Terminal Railway Company's ("STRC") Reply to Fore River's motion to dismiss STRC's Petition for Declaratory Order. The basis for this motion is that STRC's rebuttal mischaracterizes the Order issued on July 16, 2008 by the United States District Court for the District of Maine, requiring a response and clarification.

Accordingly, Fore River respectfully requests that the Board grant leave to file a rebuttal, and accept for filing the Rebuttal attached hereto at Tab 1.

Dated: August 26, 2008

Respectfully Submitted,



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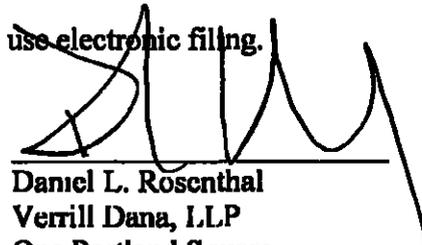
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(207) 774-4000

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 26th day of August 2008, per agreement of the parties to use electronic filing.

Dated: August 26, 2008

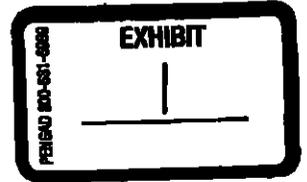


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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**DOCKET NO. NOR 42108**

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

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**REBUTTAL OF RESPONDENT FORE RIVER  
WAREHOUSING AND STORAGE CO., INC.,  
TO SPRINGFIELD TERMINAL RAILWAYS COMPANY'S REPLY TO  
MOTION TO DISMISS CLAIM FOR 2004 DEMURRAGE**

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**BEFORE THE  
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**DOCKET NO. NOR 42108**

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

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**REBUTTAL OF RESPONDENT FORE RIVER  
WAREHOUSING AND STORAGE CO., INC.,  
TO SPRINGFIELD TERMINAL RAILWAYS COMPANY'S REPLY TO  
MOTION TO DISMISS CLAIM FOR 2004 DEMURRAGE**

Fore River Warehousing and Storage Co., Inc. ("Fore River") hereby rebuts Petitioner Springfield Terminal Railway Company's ("STRC") Reply to Fore River's motion to dismiss STRC's 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.

STRC mischaracterizes the Order issued on July 16, 2008 by the United States District Court for the District of Maine (the "July 16 Order"), attached as Exhibit A to Fore River's motion. Contrary to STRC's characterization, the court did not dismiss the case with any intention "to get the parties before the Surface Transportation Board." (See STRC Reply at 3.) Indeed, the entire point of the dismissal was that STRC had failed to "get before the Surface Transportation Board" on a timely basis since September 6, 2007 -- when the court stayed the action for precisely that purpose.

Were the court's intent not self-evident, the terms of the July 16 Order make clear that the court understood and intended that upon dismissal, the chips would fall where they may. The July 16 Order stated, "[t]he Court does find good cause to make its

dismissal WITHOUT PREJUDICE to Plaintiff pursuing whatever remedies *(if any) may still* be available to it from the STB." (Ex. A to Fore River's motion to dismiss at 1 (emphasis added).) Clearly, the court understood that dismissal might result in STRC not "still" having any or all remedies available at the STB. That is particularly true given that STRC itself conceded that dismissal probably would bar its subsequent pursuit of— at a minimum -- the 2004 demurrage charges. In opposing dismissal of the court action, STRC stated:

If this Court determines that a dismissal of the underlying action is appropriate under Rule 41(b), Plaintiff urges this Court to dismiss this case without prejudice. While a dismissal without prejudice likely will result in a portion of Plaintiff's claim (the 2004 demurrage charges) being barred by the statute of limitations, a dismissal without prejudice would enable Plaintiff to pursue the 2006 demurrage charges before the STB.

(Plaintiff's Reply Memorandum in Support of its Motion to Enlarge Stay and in Opposition to Defendant's Motion to Dismiss at 3 (emphasis added).)<sup>1</sup>

Thus, the court's order cannot be read as STRC urges. Indeed, the court's order must be understood in the context of the clear case law, in the First Circuit and elsewhere, holding that a dismissal without prejudice does not toll the statute of limitations, but instead leaves matters as if no complaint had ever been filed. (Fore River's motion at 6-7.) See also *Dupuy v. McEwen*, 495 F.3d 807, 810 (7th Cir. 2007) (A "dismissal without prejudice, because it merely allows the suit to be refiled, will allow adjudication of issues relating to the settlement only if the refiled suit is timely; and when a suit is dismissed without prejudice, the statute of limitations continues to run from the date . . . on which the claim accrued."); *Brennan v. Kulick*, 407 F.3d 603, 606 (3rd Cir. 2005) ("[T]he dismissal of a complaint without prejudice after the statute of limitations has run

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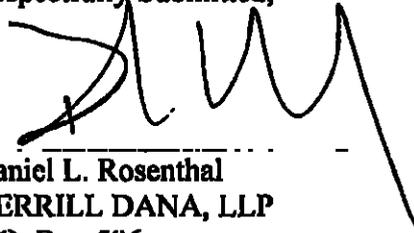
<sup>1</sup> A copy of this filing is attached hereto as Exhibit A.

forecloses the plaintiff's ability to remedy the deficiency underlying the dismissal and refile the complaint.”) (internal citation and quotation omitted); *In re Franklin Savings Corp.*, 385 F.3d 1279, 1286 (10th Cir. 2004) (“[T]he dismissal of an earlier suit without prejudice does not authorize a subsequent suit brought outside of the otherwise binding period of limitations.”); *Wilson v. Grumman Ohio Corp.*, 815 F.2d 26, 27 (6th Cir. 1987) (“It is generally accepted that a dismissal without prejudice leaves the situation the same as if the suit had never been brought, and that in the absence of a statute to the contrary, a party cannot deduct from the period of the statute of limitations the time during which the action so dismissed was pending.”); *Goff v. United States*, 659 F.2d 560, 562 (5th Cir. 1981) (“It is . . . well established that the fact that a dismissal of an earlier suit was without prejudice does not authorize the bringing of the suit later outside of an otherwise binding limitations period.”); *Moore v. St. Louis Music Supply Co., Inc.*, 539 F.2d 1191, 1194 (8th Cir. 1976) (“Dismissal without prejudice operates to leave the parties as if no action had been brought at all. Following such dismissal the statute of limitations is deemed not to have been suspended during the period in which the suit was pending.”); *Bomer v. Ribicoff*, 304 F.2d 427, 428-29 (6th Cir. 1962) (“An action dismissed without prejudice leaves the situation the same as if the suit had never been brought. In the absence of a statute to the contrary, a party cannot deduct from the period of the statute of limitations the time during which the action so dismissed was pending.) (citations omitted); *Casanova Ortiz v Reyes*, 528 F.Supp.2d 9, 11 (D.P.R. 2007) (“[A] prescriptive period is not tolled by filing a complaint that is subsequently dismissed without prejudice.”) (internal citations omitted).

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: August 26, 2008

Respectfully Submitted,



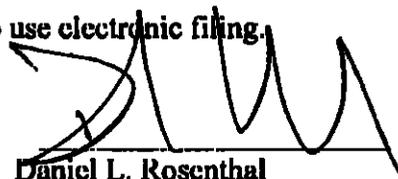
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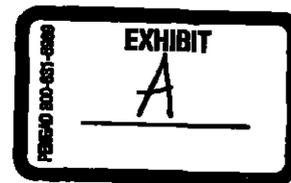
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Attorney for Respondent  
Fore River Warehousing &  
Storage Co., Inc.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE



THE SPRINGFIELD TERMINAL, )  
RAILWAY COMPANY, )

Plaintiff )

v. )

FORE RIVER WAREHOUSING )  
AND STORAGE CO , INC., )

Defendant )

Civil No. 07-52-GZS

**PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO ENLARGE  
STAY AND IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

Plaintiff, the Springfield Terminal Railway Company ("Springfield Terminal"), hereby submits the following Reply Memorandum in Support of its Motion to Enlarge Stay and in Opposition to Defendant's Motion to Dismiss pursuant to Rule 41(b) as follows:

At the outset, Plaintiff recognizes that if this matter is to proceed, it must proceed before the Surface Transportation Board ("STB") and not this Court. The undersigned apologizes for the procedural oversights which have resulted in a delay in the commencement of the STB action and the need for extensions of the stay. The undersigned further apologizes for his good faith filing of a Motion for Further Extension of the Stay despite the Court's March 13, 2008 Order indicating that there would be no further extensions. The undersigned is well aware of the importance of complying with scheduling deadlines established by this Court.

The undersigned entered his appearance in this case on May 5, 2008. Prior to that time, Plaintiff was represented by Michael Montembeau, an associate with Smith Elliott Smith &

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Garmey. In early May, Mr. Montembeau abruptly resigned from the firm. Upon information and belief, Mr. Montembeau now practices law out of state. At the time of his departure, the undersigned understood based upon Mr. Montembeau's departure memorandum and a review of the file that the parties were involved in settlement discussions and that this matter was stayed. A copy of the Court's March 13 Order extending the stay to June 6 and indicating that there would be no further extensions of the stay was not included in the file nor does it appear from the file that Mr. Montembeau forwarded the Order to the Plaintiff.

In early June, the undersigned learned from his client that settlement discussions had been uneventful. Accordingly, the undersigned began efforts to prepare a declaratory judgment action before the STB and potentially retain alternative counsel to represent Plaintiff before the Board. Plaintiff in good faith also requested a further extension of the stay, not aware of this Court's March 13 Order, in order to allow Plaintiff not only the opportunity to complete the filing but also to obtain a Scheduling Order from the STB setting forth the course of that proceeding. Despite the complexity of proceeding before the STB, Plaintiff is prepared to complete that filing promptly and without further delay.

The undersigned recognizes that communications regarding the status of this case during the transition of counsel should have been better. While the undersigned cannot speak to what occurred before his Entry of Appearance and first involvement in this case, Mr. Montembeau's departure from this firm unfortunately resulted in miscommunications regarding the status of the case and the anticipated future course of the proceedings. In retrospect, given the recent developments perhaps further investigation regarding the status of the case should have been made. However, the information available to the firm at the time of the transition did not suggest that any additional investigation was necessary.

**CERTIFICATE OF SERVICE**

I hereby certify that on June 26, 2008, I electronically filed Plaintiff's Reply Memorandum in Support of its Motion to Enlarge Stay and in Opposition to Defendant's Motion to Dismiss with the Clerk of Court using the CM/BCF system, which will send notification of such filing(s) to the following:

Daniel L. Rosenthal, Esq.  
Verrill & Dana  
One Portland Square  
Portland, ME 04112

/s/ Keith R. Jacques, Esq.  
Keith R. Jacques, Esq.