IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CSX TRANSPORTATION CO.	:	CIVIL ACTION
	:	
v.	:	
	:	
NOVOLOG BUCKS COUNTY	:	NO. 04-4018

O'NEILL, J. MAY 24, 2006

MEMORANDUM

Plaintiff, CSX Transportation Co., a Virginia railroad shipping company with its principal place of business in Florida, filed a complaint on August 24, 2004 (and amended complaint on November 18, 2004) alleging that defendant, Novolog Bucks County, a Pennsylvania corporation with its principal place of business in Pennsylvania that operates a private railroad port at the U.S. Steel Fairless Works on the Delaware River, for demurrage charges assessed pursuant to 49 U.S.C. § 10746, the related rules promulgated by the U.S. Surface Transportation Board, and CSX Tariff 8100 for Novolog's failure to release CSX's railcars in a timely manner. CSX seeks $260,304 in demurrage charges, with interest, and attorneys fees. Novolog filed its answer and counterclaim on November 21, 2004 (and amended answer and counterclaim on December 15, 2004) alleging that CSX breached a Refund Contract under which CSX promised to pay Novolog a switching fee for the movement of its railcars at Novolog's facility, to which CSX filed its answer on January 11, 2005. Novolog seeks $52,899 in switching fees, with interest, and attorneys fees. Before me now are the parties' cross motions for summary judgment, responses, replies, and surreplies thereto as well as the transcript of the parties' April 27, 2006 oral argument in this case.

BACKGROUND[1]

I. The Parties

A. Novolog

Novolog operates a private railroad port on the Delaware River as a tenant at the U.S. Steel Fairless Works facility in Fairless, Pennsylvania. Novolog serves both as a port of origin and destination for cargo. Novolog is hired by exporters and, in exceptional circumstances by manufacturers, to load or unload the exporters' cargo to and from rail cars. Novolog is recognized as an "open gate" facility, meaning that within its 700 car facility it receives and holds rail cars on its tracks at the convenience of railroad carriers.

B. CSX

CSX is a railroad carrier that moves freight from origin to destination pursuant to instructions received electronically from various shippers. According to John Underwood, CSX's Manager of Supplemental Revenue, CSX is obligated, as a common carrier, to take the product as delivered and ship it to the requested destination. CSX cannot refuse to transport freight irrespective of excessive volume of rail cars to a single destination. CSX does not have any process that allows it to monitor or limit its ability to move the freight to an ultimate destination. The only process available for CSX to monitor this flow is by a "local person." There is nothing that restricts CSX from taking receipt of the rail cars when they are loaded and moving them to the ultimate destination.

Although the Fairless facility is operated by Novolog, rail services within in and around

[1]The parties have failed to provide a clear or comprehensive statement of the facts. Nevertheless, I have found within the melee sufficient facts from which I may determine whether there are a genuine issues of fact that preclude summary judgment. I find that there are.

the port frequently are provided by Conrail Shared Assets, an entity related to CSX; that is, all rail cars are delivered and picked up by Conrail, with the exception of "unit trains" which are delivered and picked up directly by CSX and the Norfolk Southern Railway Co. The Conrail crew routinely moves rail cars between Novolog's port and Conrail's local rail servicing yard at Morrisville, Pennsylvania.

II. The Contracts

A. Transportation Contracts

In early 2003, CSX entered into numerous freight agreements with various steel companies for the shipment to and eventual export of steel cargo from Novolog's port. The timing and logistics of these agreements were negotiated by CSX and the steel companies. Novolog was not a party to these negotiations or the resulting agreements. Novolog did not execute any contract designating Novolog as the shipper, consignor, or consignee for the shipment of the steel cargo. The steel cargo was not ordered in Novolog's name and Novolog did not furnish forwarding directions for that cargo. Novolog did not enter into any express contract with CSX to assume liability for demurrage charges pursuant to CSX's tariff.

Notwithstanding Novolog's lack of participation in these agreements, Novolog was engaged in unloading full railcars for export and loading empty cars for import. With respect to inbound railcars (Novolog's export business), Novolog received full railcars, unloaded them according to shipping instructions from various domestic steel companies, which identified Novolog as the "ship to" party or the consignee, and eventually released the railcars back to CSX. CSX asserts--without evidentiary support--that Novolog had contracts with these steel companies for the handling of the steel freight. CSX further asserts--without evidentiary support-

-that Novolog knew that the steel was inbound before it arrived and had specific instructions from shippers on how to handle the steel freight.

With respect to outbound railcars (Novolog's import business), Novolog received empty rail cars from Conrail, loaded those cars at its facility, and released them to Conrail with a bill of lading detailing shipping instructions and the final destination. In this context, CSX asserts that Novolog frequently was the actual party that ordered the empty railcars from Conrail. CSX also asserts that for all the traffic that originated at Novolog's facility Novolog is named as the shipper on the waybills.

B. Refund Contract

Novolog alleges that CSX and Novolog entered into a Refund Contract under which CSX agreed to pay Novolog twenty one dollars per loaded car for the movement of the CSX railcars at the port and for Novolog's switching services. The Refund Contract is signed by David Reid, President and CEO of Novolog, on behalf of Novolog, but is not signed by anyone at CSX. Nevertheless, Novolog performed the movement and switching services and sent CSX three invoices pursuant to the terms of the agreement. CSX refuses to make payment for these services because it asserts that it never entered into any agreement for them.

III. Congestion at Novolog's Port

During the early part of 2003, numerous steel manufacturers found it commercially advantageous to export steel in high volume. According to David Reid, numerous "customers" contacted Novolog about the prospect of exporting their steel via Novolog's port. Because Novolog did not have significant activity at its port at that time, Novolog allowed these customers to ship and/or receive the steel freight at Novolog's port. Upon arrival, Novolog

unloaded these railcars according to instructions received from the respective exporters of the steel goods. An exceptionally large volume of railcars arrived at Novolog's facility in March 2003. This led to significant track congestion at and between Novolog's port and Conrail's Morrisville facility. Consequently, railcars destined for Novolog could not arrive because both facilities were full. As a further consequence, Novolog held the railcars beyond the two day free time period provided for by CSX. In turn, CSX sent Novolog invoices for demurrage charges and placed an embargo with the Association of American Railroads. At that time, individuals from Novolog, CSX, Norfolk Southern Railroad, and Conrail met to discuss the excessive congestion at Novolog. No solution to this problem was presented to Novolog, but the parties agreed that it was Novolog's problem to fix.

IV. Demurrage Invoices

Between December 2002 and August 2003, CSX sent Novolog twelve demurrage invoices: seven for inbound demurrage and five for outbound demurrage. CSX asserts that each of the railcars which incurred demurrage is identified on each invoice, and each rail car has a corresponding bill of lading or waybill which identifies the shipper, the origin, the consignee, and the destination of the rail car.

With respect to the inbound demurrage invoices, CSX asserts that Novolog was the consignee of record on all inbound freight because: (1) Novolog is named as the consignee on the waybill for each loaded railcar delivered to Novolog's facility; and (2) the data fed by CSX into the "car and train reporting" computer system instructed the Conrail crew at Morrisville to deliver the cars to Novolog. With respect to outbound demurrage invoices, CSX asserts that Novolog was the consignor of all outbound freight because: (a) Novolog is listed as the shipper

and Fairless, PA is listed as the origin on the waybill; and (b) Novolog ordered the empty rail car for its own transportation purposes.

Novolog never filed a formal dispute with CSX to object to the demurrage charges. However, Novolog has refused to pay the demurrage charges because it was not a party to the transportation contract and did not have responsibility for or control over the volume of railcars that entered its facility.

V. The Evidence

In support of its motion, CSX proffers the following evidence: (1) the July 13, 2004 email from Kay Fearrington, Senior Manager of Credit & Collections at CSX, to Sandra Kelley, Easter Ball, and Michael Bogdan at Novolog informing them of the demurrage charges (CSX-0001); (2) the July 13, 2004 table listing twelve amounts due from Novolog for monthly demurrage charges (CSX-0002); (3) eleven "original incidental bills" created by CSX listing Novolog as the shipper with the port of origin as Fairless, PA and billed to Novolog for monthly demurrage charges plus interest pursuant to CSX Tariff 8100 (CSX-0003--CSX-0033); (4) a copy of CSX Tariff 8100, Section VIII-C Demurrage Provisions (CSX-0034--CSX-0068); (5) the September 23, 2005 deposition of Armand Pellicione; (6) the November 9, 2004 table listing twelve amounts due from Novolog for monthly demurrage charges (CSX-0069); (7) twelve "original incidental bills" with supporting documentation[2] from the local rail yard listing Novolog as the shipper and the port of origin as Fairless, PA, and billed to Novolog for monthly demurrage charges plus interest

[2]Confusingly, the only legible and comprehensible portions of the supporting documentation appear to be created by Novolog. These documents show the port of origin to be "Fairless, PA (Shared Assets)," the shipper to be various steel companies, the consignee to be various other steel companies at various destinations, and the route to be via CSX.

pursuant to CSX Tariff 8100 (CSX-0070--CSX-0136);[3] (8) seven printouts from CSX's accounts receivable listing Novolog as the consignee, AK Steel Corp. as the shipper, Middletown, OH as the origin, and Fairless, PA as the destination (CSX-0137--CSX-0143);[4] (9) seventeen pages of an excel spreadsheet created by CSX listing Novolog as the consignee and Fairless, PA as the destination (CSX-0144--CSX-0160);[5] (10) 198 pages of outbound (import) waybills listing the port of origin as Fairless, PA, the port of destination Jacksonville, FL, CSX as the route, various steel companies as consignees, and Novolog as the shipper (CSX-0169--CSX-366).

CSX also proffers the following evidence: (11) 563 pages of inbound (export) waybills listing the port of origin as various locations, the port of destination as Fairless, PA, CSX as the route, Novolog as the consignee, and various steel companies as the shipper (CSX-0367--CSX-0929); (12) two cancelled embargo notices created by John Carroll, Senior Assistant Vice President for Business Services at the Association of American Railroads listing CSX as the railroad, Novolog as the party which CSX's freight was "Consigned, Reconsigned To, of Intended For," and complaining of accumulation (CSX-0930--CSX-0931); (13) 169 transaction car event inquiry pages listing Novolog as the consignee (CSX-1003--CSX-1171); (14) the September 7, 2005 deposition of Reid; (15) the December 9, 2005 deposition testimony of

[3]Novolog argues that these documents contain inadmissible hearsay. See Pamintuan v. Nanticoke Mem'l Hosp., 192 F.3d 378, 387 n. 13 (3d Cir. 1999) (holding that a reviewing court may only consider evidence that would be admissible at trial).

[4]Novolog argues that these documents are not actual samples of bills of lading. See id.

[5]Novolog argues that these spreadsheets are unauthenticated. See id.

Underwood; (16) his January 5, 2006 declaration;[6] and (17) his February 6, 2006 second affidavit.

In support of its position, Novolog proffers the following evidence: (a) the Refund Contract drafted by CSX with an effective date of December 16, 2002 and end date of December 31, 2003 signed by Reid but not signed by anyone from CSX (NOV-0001--NOV-0003); (b) three quarterly invoices created by Novolog and "sold to" CSX pursuant to the Refund Contract for switching fees (NOV-0004--NOV-0006); (c) the September 12, 2003 email from Reid to someone named Marion at CSX stating that Novolog was not the shipper or consignee or freight forwarder of the steel goods in CSX's railcars and explaining Novolog's view of the demurrage charges (NOV-0007--NOV-0008); (d) the October 27, 2003 letter from Kiran Burgess, Assistant Director of Supplemental Revenue at CSX, to Reid informing him of CSX's final demand for payment of demurrage (NOV-0009); (e) the April 10, 2003 letter from Reid to J.M. Woodall protesting CSX's demurrage charges and discussing the cooperative plan created by joint efforts of Novolog and local CSX personnel to release CSX's railcars as soon as possible (NOV-0010--NOV-0012); (e) the April 10, 2003 CSX Coil Car Report (NOV-0013); (f) the April 9, 2003 letter from J.M. ("Mike") Woodall, Vice President of Metals at CSX, to Reid advising him of CSX imposing demurrage charges and a possible embargo against Novolog (NOV-0015); (g) a copy of CSX Tariff 8100, Section VIII-C Demurrage Provisions (NOV-0016--NOV-0029); (h)

[6]Novolog argues that Underwood's Declaration is inadmissible for summary judgment purposes because: (1) it is not made upon his personal knowledge; (2) contains conclusory statements; (3) contains inadmissible hearsay; and (4) fails to attach the referenced documents. See id. I need not address these evidentiary arguments at this time because I find there to be a genuine issue of fact as to whether CSX demurrage charges arose out of a contractual relationship.

one bill of lading dated March 25, 2003 sent from Bob Francis at Steel Dynamics, Inc. to Trevor Ryals at Triorient Trading Inc. listing Novolog as the "ship to" party, Triorient as the "sold to" party, Steel Dynamics as the shipper, and CSX as the carrier (NOV-0158); and (i) the undated declaration of Reid.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides, in relevant part, that 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." Fed. R. Civ. P. 56(c) (2004). The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions . . . which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). After the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (2004).

I must determine whether any genuine issue of material fact exists. An issue is genuine if the fact finder could reasonably return a verdict in favor of the non-moving party with respect to that issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is material only if the dispute over the facts "might affect the outcome of the suit under the governing law." Id. In making this determination, I must view the facts in the light most favorable to the non-moving party, and the non-moving party is entitled to all reasonable inferences drawn from those facts. Id. However, the nonmoving party may not rest upon the mere allegations or denials of the

party's pleading. See Celotex, 477 U.S. at 324. The non-moving party must raise "more than a mere scintilla of evidence in its favor" in order to overcome a summary judgment motion and cannot survive by relying on unsupported assertions, conclusory allegations, mere suspicions. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989). If the evidence for the nonmoving party is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249-50 (citations omitted).

Cross motions are claims by each party that it alone is entitled to summary judgment; they do not constitute an agreement that if one is denied the other is necessarily granted or that the losing party waives judicial consideration and determination of whether genuine issues of material fact exist. Rains v. Cascade Indus., Inc., 402 F.2d 241, 245 (3d Cir. 1968). If any such issue exists it must be disposed of at trial and not on summary judgment. Id. For the reasons that follow, I find that genuine issues of material fact exist and will deny both parties' motions.

DISCUSSION[7]

I. Liability for Demurrage

Demurrage, in the context of railroads, is defined as "a charge exacted by a carrier from a shipper or consignee on account of a failure on the latter's part to load or unload cars within the specified time prescribed by the applicable tariffs; the purpose of the charge is to expedite the loading and the unloading of cars, thus facilitating the flow of commerce, which is in the public interest. Demurrage is extended freight and is the amount payable for delays by receiver in

[7]Novolog argues in its response brief that CSX appears to assert a new theory of liability in its motion for summary judgment in violation of Federal Rule of Civil Procedure 37(c)(1). See Nicholas v. Pa. State Univ., 227 F.3d 133, 148 (3d Cir. 2000). I disagree and will focus on the parties' substantive arguments.

loading or unloading cargo; it is stipulated damages for detention." Black's Law Dictionary 432 (6th ed. 1990) citing St. Louis, Southwestern Ry. Co. v. Mays, 177 F. Supp. 182, 183 (D. Ark. 1959) and Hellenic Lines Ltd. v. Director Gen. of India Supply Mission, 319 F. Supp. 821, 831 (S.D.N.Y. 1970); see also Ill. Cent. R.R. Co. v. South Tec Dev. Warehouse, 337 F.3d 813, 815 (7th Cir. 2003) (quoting same); Union Pac. R.R. Co. v. Ametek, Inc., 104 F.3d 558, 559 (3d Cir. 1997) ("Railroads charge shippers and receivers of freight 'demurrage' fees if the shippers or receivers detain freight cars on the rails beyond a designated number of days."); CSX Transp., Inc. v. City of Pensacola, Fla., 936 F. Supp. 880, 883 (N.D. Fla. 1995) ("[D]emurrage is the fee a railroad charges for the undue detention of the carrier's railcars. It is intended to both compensate for the delay, and to promote efficiency by deterring undue delays."); Middle Atl. Conference v. United States, 353 F. Supp. 1109, 1113-15 (D. D.C. 1972) (discussing history of demurrage).[8]

Congress provides for such demurrage charges by common carriers by statute:

> A rail carrier providing transportation subject to the jurisdiction of the Board under this part shall compute demurrage charges, and establish rules related to those charges, in a

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[8]The Court of Appeals for the Sixth Circuit similarly has defined demurrage to mean:

> an expense shippers incur for retaining railcars beyond the "free time" period. Demurrage charges are an integral part of the established rules and regulations relating to the use and movement of railcars. The charges are neither rates nor penalties, rather, they have a unique status as car service rules. Demurrage charges serve two purposes. First, they compensate railroads for the lost opportunity to profit from the use of their cars. Iversen v. United States, 63 F. Supp. 1001, 1005 (D. D.C. 1946). Second, they promote the overall efficiency of the rail system by creating an incentive to return the cars promptly. Id. Free time is that period of time which, under normal circumstances, affords the shipper a sufficient opportunity to unload a car and release it to the railroad.

Cleveland Elec. Illuminating Co. v. Interstate Commerce Comm'n, 685 F.2d 170, 171 (6th Cir. 1982).

> way that fulfills 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. Therefore, "[a]s a regulated common carrier, CSX is required to file a tariff schedule with the I.C.C. in which all of its freight rates and miscellaneous charges, included demurrage, are specified." Pensacola, 936 F. Supp. at 883 citing 49 U.S.C. § 10762(a). Moreover, "the carrier is under a duty to collect and the shipper or consignee is under a duty to pay the same. They have no choice in the matter, and it is not a legitimate subject for compromise or settlement between them." Mays, 177 F. Supp. at 184. "A carrier may not collect at a different rate for a service included in its filed tariff, even with the consent of the other party." Pensacola, 936 F. Supp. at 883 citing 49 U.S.C. § 10762(a). CSX and other rail carriers also have published detention periods for its consignors[9] and consignees.[10] CSX set the free time at two days, meaning that its demurrage charges begin to accrue when a rail car has been detained beyond that period. The demurrage charges and detention periods are stated in

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[9]Consignor means: "One who sends or makes a consignment; a shipper of goods. The person named in a bill of lading as the person from whom the goods have been received for shipment." Black's Law Dictionary 307 (6th ed. 1990) (internal citations omitted). For purposes of this discussion, shipper is synonymous with consignor.

[10]Consignee means: "One to whom a consignment is made. Person named in bill of lading to whom or to whose order the bill promises delivery. In a commercial use, 'consignee' means one to whom a consignment may be made, a person to whom goods are shipped for sale, or one to whom a carrier may lawfully make delivery in accordance with his contract of carriage, or one to whom goods are consigned, shipped, or otherwise transmitted." Black's Law Dictionary 307 (6th ed. 1990) (internal citations omitted). Consignee is defined in CSX's Tariff to mean, "The party to whom a shipment is consigned, or the party entitled to receive the shipment." Typically, as here, consignees play no role in the negotiation of rates, the payment of freight rates, the routing of freight, or the preparation of the bill of lading.

CSX Tariff 8100 which is published by CSX on its web site and are specifically incorporated into all transportation agreements.

CSX asserts that a shipper or consignee that accepts the actual or constructive placement of a rail car for loading or unloading at its facility necessarily agrees to accept liability for demurrage charges pursuant to the published tariff, irrespective of fault, even where the defendant alleges that it is only an agent. CSX argues that Novolog is liable for its demurrage charges because: (1) Novolog was named as consignee on each electronic bill of lading[11] and waybill;[12] (2) CSX delivered its railcars to Novolog pursuant to those bills of lading and waybills; and (3) congestion at Novolog's port facility caused the railcars to be held either at the Conrail receiving yard in Morrisville or at Novolog's port facility beyond the free time set forth in CSX's tariff. I disagree.

[11]"The 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." S. Pac. Trans. Co. v. Commercial Metals Co., 456 U.S. 336, 342 (1982). Black's Law Dictionary similarly defines bill of lading to mean, "Document evidencing receipt of goods for shipment issued by person engaged in business of transporting or forwarding goods and it includes airbill. An instrument in writing, signed by a carrier or his agent, describing the freight so as to identify it, stating the name of the consignor, the terms of the contract for carriage, and agreeing or directing that the freight be delivered to the order or assigns of a specified person at a specified place. It is receipt for evidence of title to goods." Black's Law Dictionary 168 (6th ed. 1990).

[12]Waybill means: "Written document made out by carrier listing point of origin and destination, consignor and consignee, and describing goods included in shipment and transportation costs. Such constitutes the written description of the shipment in the event of any claim by or against common carrier." Black's Law Dictionary 1593 (6th ed. 1990).

A. Fault

A finding of fault plays a limited role in determining demurrage liability. The Court of Appeals for the Fourth Circuit has explained:

> Demurrage charges are part and parcel of the transportation charges, and are covered by the same rules of law. They are a part of the tariff, and must be collected from the shipper or the consignee of the freight to the same extent as the charge for carriage. A penalty is imposed on the carrier for failure to collect; the purpose of the law being, of course, to secure absolute equality between shippers.

Davis v. Timmonsville Oil Co., 285 F.470, 472 (4th Cir. 1922) (internal citations omitted); see also City of New Orleans v. S. Scrap Material Co, Ltd., 491 F. Supp. 46, 48 (E.D. La. 1980); Colo. & S. Ry. Co. v. S. Roofing & Sheet Metal Co., 374 F. Supp. 24, 25 (W.D. Okla. 1974). Therefore, demurrage may be assessed against a shipper/consignor "where the detention occurs through no fault of the shipper, even though the cause of detention is beyond the shipper's control." Union Pac., 490 F.2d at 1390 quoting Chrysler Corp. v New York Cent. R.R., 234 I.C.C. 755, 758 (1939). Demurrage also may be assessed against a receiver/consignee "even though the detention occurs through no fault of the consignee, for a cause that is beyond the consignee's control." New Orleans, 491 F. Supp. at 48. However, demurrage may not be assessed against the shipper or consignee in the limited circumstance "where the delay is the fault of the carrier," Union Pac., 490 F.2d at 1390 quoting Pa. R.R. v. Moore-McCormack Lines, Inc., 370 F.2d 430 (2d Cir. 1966) (internal quotations omitted), because "a carrier may not be permitted to recover demurrage incurred from its own failure to act in a reasonable manner." Ill. Cent. Gulf R.R. Co. v. S. Rock, Inc., 644 F.2d 1138, 1141 (5th Cir. 1981).[13]

[13]CSX also argues--without legal authority--that as a common carrier, it is required to provide rail service at a reasonable rate to any shipper that requests its transportation services regardless of the capacity of the destination; it cannot deny its services to any shipper at any time

Here, there is no evidence to suggest that the congestion at Novolog's port was caused by any fault on the part of CSX. CSX thus argues that Novolog is responsible to pay demurrage charges because: (1) it is the named consignee on the bills of lading and waybills; (2) it accepted and received the railcars from CSX; and (3) retained constructive or actual physical custody of the railcars beyond the free time. However, CSX has not asserted any contractual relationship with Novolog from which demurrage liability may arise.

B. Contractual Relationship

A comprehensive review of the relevant case law demonstrates that liability for demurrage must arise out of a contractual relationship. See S. Pac. Trans. Co. v. Matson Navigation Co., 383 F. Supp. 154, 156 (N.D. Cal. 1974) ("The promise to pay demurrage need not be an express one, but may be implied in order to compensate the carrier for the use of its equipment. But, while the obligation to pay may be implied, the promise nonetheless arises out of the contractual relationship and may only be imputed to parties to the contract.") (internal citations omitted); Middle Atl. Conference, 353 F. Supp. at 1118 (finding that the relevant case law "do[es] not require that there be a specific contract to pay demurrage but it must arise out of contract and in practically every instance the obligation is only enforced upon persons who are

for any reason. CSX therefore asserts that it does not have any duty to monitor the ingress or egress of railcars at Novolog's port facility or prevent shippers from requesting transportation of their freight to Novolog's port irrespective of any congestion there.

parties to the contract of carriage."). A contractual relationship is therefore a condition precedent to demurrage liability.[14]

In other words, in order for a carrier to establish liability for demurrage, it must first establish that it had a contractual relationship regarding the railcars with the entity that detained the railcars. Only after a contractual relationship is established between the parties can demurrage liability be imposed against a party for detaining the railcars. If a contractual relationship with respect to the railcars is established, liability may then be imposed in one of three ways: via specific contractual provision regarding demurrage or, in the absence of a contractual provision, under statutory tariff or prevailing industry custom. See Evans Prods. Co v. Interstate Commerce Comm'n, 729 F.2d 1107, 1113 ("Liability for freight charges may be imposed only against a consignor, consignee, or owner of the property, or others by statute, contract, or prevailing custom.").

CSX does not seek to impose demurrage liability via specific contractual provision or industry custom. Rather, CSX justifies imposition of demurrage charges upon Novolog via its tariff. However, the cases are legion in holding that responsibility for demurrage charges cannot be imposed unilaterally against an individual or entity that was not a party to either a transportation contract or an independent contract in which that party specifically accepts liability for demurrage. See South Tec, 337 F.3d at 820 ("[B]eing listed by third parties as a consignee on some bills of lading is not alone enough to make [the warehouse] a legal consignee liable for

[14]I note that there continues to be a "dearth of precise precedent" on this issue. See Middle Atl. Conference, 353 F. Supp. at 1116. Possibly, the dearth "is attributable to the rarity of attempts by carriers to hold persons liable for demurrage who were not parties to the contract." Id.

demurrage charges, although it, coupled with other factors, might be enough to render [it] a consignee."); Union Pac., 104 F.3d at 564 (holding that demurrage could not be assessed against a warehouse because it "was not a party to the underlying transportation contracts, and it did not separately agree contractually to accept liability."); Evans Prods., 729 F.2d at 1113 ("Attempts to support tariffs assessing freight charges against others tangentially involved in the shipment, such as warehousemen, pier operators, brokers, steamship agencies and others similarly situated have failed. No liability exists merely on account of being named in the bill of lading, or handling the property.") (citations and quotations omitted); Pensacola, 936 F. Supp. at 884 ("[O]nly a party to the rail transportation contract may be liable for demurrage. . . . The unilateral action of one party in labeling an intermediary as a consignee does not render the putative consignee liable for demurrage."); Matson, 383 F. Supp. at 158 (N.D. Cal. 1974) ("[O]ne not a party to the contract of transportation cannot be charged demurrage") (internal citations omitted); Middle Atl. Conference, 353 F. Supp. at 1116 (holding "that the proposed tariff was unlawful insofar as it attempted to impose liability for demurrage charges upon an agent who was not a party to the contract of transportation.").

CSX fails to establish the initial requirement that it entered into an agreement with Novolog regarding the transportation, handling, storage or other disposition of the railcars from which liability under statute/tariff may arise. Although Novolog asserts the validity of the Refund Contract, under which the parties may have had a contractual relationship and from which it may be possible for demurrage liability to arise, CSX asserts that the Refund Contract is not a valid contract. As discussed below, I find there to be genuine issues of material fact as to whether the parties entered into any agreement under the terms of the Refund Contract.

Moreover, because the parties fail to raise the issue, I decline to discuss whether the present demurrage liability may arise from a quasi-contractual theory. See Matson, 383 F. Supp. at 158-59; Middle Atl. Conference, 353 F. Supp. at 1125. For purposes of discussing demurrage liability, I find there to be genuine issues of material fact as to whether there was a contractual relationship between the parties.

C. Agency Relationship

Citing the decision of the Court of Appeals of New York, Pennsylvania R.R. Co. v. Titus, 109 N.E. 857 (N.Y. 1915), and general principles of agency law, CSX asserts that an undisclosed agent of a consignee principal is liable for demurrage charges where it is designated as the consignee in the bill of lading. CSX thus argues that Novolog's failure to disclose any agency relationship it may maintain with its exporters or importers (the ultimate consignees) to CSX places Novolog in the position of responsibility for paying its demurrage charges. CSX appears to argue further that if "an agent for a disclosed principal is not liable to a third person for acts within the scope of the agency," see Middle Atl. Conference, 353 F. Supp. at 1120, then an agent for an undisclosed principal is liable to a third person for acts within the scope of the agency.

However, the Court of Appeals for the Seventh Circuit specifically rejected the theory that the general rule of agency law--that an agent who refuses to disclose the identity of its principal is personally liable for charges incurred on behalf of the principal--permits railroads to broaden their tariffs to reach non-consignee agents and held that this rule of law only applies where an agent actually is entering into a contract on behalf of the principal. See Evans Prods., 729 F.2d at 1113; see also South Tec, 337 F.3d at 817; Middle Atl. Conference, 353 F. Supp. at 1120 (noting that "a careful reading of that section requires a conclusion that it speaks only to the

'nonliability' in certain narrow situations of warehousemen, and others similarly situated, who appear as consignees on the bill of lading, but in no way can be read to impose liability on an agent not a party to the contract."). I agree with the Seventh Circuit and find CSX's argument to the contrary unavailing.

Notwithstanding Evans Products, CSX persists in arguing that an agent of an undisclosed principal is liable for demurrage under statute. Citing 49 U.S.C. § 10743(a)(1), CSX argues that "[t]he only way a named consignee that is serving as an agent for the shipper can avoid liability for demurrage is to provide the carrier with written notice of its status as an agent on each shipment prior to delivery." Section 10743 provides:

> Liability for payment of *rates for transportation* for a shipment of property by a shipper or consignor to a consignee other than the 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.

(emphasis added). CSX's reliance on this statute is misplaced because Section 10743 relates only to the payment of rates for shipment of freight not demurrage and, as discussed above, demurrage charges are distinct from transportation rates.

D. Knowledge of Demurrage Practice

CSX also argues that Novolog should be liable for its demurrage tariff because: (1) it was intimately familiar with the rail industry's practice of imposing demurrage charges; (2) through its receipt of notices and requests for rail car, it implicitly confirmed that it was the consignee for each bill of lading; and (3) it understood that when railcars pile up beyond the free time, demurrage charges will accrue. However, knowledge of the tariffs and/or the overbooking of its port for export and import is not sufficient to incur liability for the detention of those cars. See Matson, 383 F. Supp. at 158 (rejecting railroad's argument that connecting carrier should be liable for demurrage because although the connecting carrier "was not a stranger to the contracts of transportation" and "knew shipments would occasionally arrive unbooked or prematurely, [] this fact alone does not make [the connecting carrier] a party to the contract with the ensuing liabilities that would follow from that status.").[15] Moreover, the case law is clear that no industry-wide custom permits the imposition of demurrage charges against a nonparty that is unilaterally designated as the consignee. See Evans Prods., 729 F.2d at 1113.

E. Prior Precedent

I find a review of the major cases in this area to be instructive. This case is analogous to Illinois Central R.R. Co. v. South Tec Dev. Warehouse, Inc., 337 F.3d 813 (7th Cir. 2003). In South Tec, the Court of Appeals for the Seventh Circuit reversed the district court's grant of summary judgment in favor of plaintiff railroad carrier and remanded the case to the district court

[15]CSX also argues--without legal authority--that Novolog should be liable for its demurrage charge because Novolog received a specific benefit from holding the railcars beyond the allotted free time, i.e. Novolog was able to continue to receive railcars and use CSX's railcars to store the surplus steel cargo as it struggled to unload all of the railcars.

to determine whether defendant warehouse was the consignee of the shipments because it found that the district court improperly relied upon 49 U.S.C. § 10743(a)(1) to hold that an agent of a principal consignee is liable for demurrage charges unless it provides written notice of its status as agent to the carrier prior to shipment. Id. In South Tec, the railroad carrier sued a warehouse that was not a party to the transportation contract for demurrage charges arising out of the detention of its railcars resulting from congestion at the warehouse and its subsequent delays in unloading the paper cargo. Id. at 815-16. Here, Novolog is a noncontractual party who was unilaterally listed in the bills of lading as the consignee and whose congestion problems at its port caused delays in unloading/loading steel freight and, consequently, in releasing CSX's railcars.

Following Ametek, Middle Atlantic Conference, and Evans Products, the South Tec Court found that no industry-wide custom permits the imposition of demurrage charges against nonconsignees and determined that the warehouse "would be liable only if it were a consignee or if it contractually assumed responsibility for the demurrage charges." Id. at 820. Finding no evidence that the warehouse contractually assumed liability for demurrage, the court analogized Pensacola and Matson, to conclude that the unilateral designation of a party as consignee on some bills of lading, without more, is not sufficient to make the party legally a consignee and, thus, liable for demurrage charges. Id. at 821-22. The Court remanded the case to the district court "to determine who was the legal consignee (or consignees) of the paper shipments in question and presumably liable for the demurrage charges" and encouraged the district court to "consider whether [the warehouse] contractually assumed responsibility for the demurrage charges." Id. at 822. Here, I find there to be a genuine issue of material fact as to whether

Novolog entered into a contractual relationship with CSX for the disposition of its railcars or whether it contractually assumed liability for demurrage. Like the South Tec court, I conclude that the unilateral designation of Novolog as consignee on the relevant bills of lading is not sufficient to make Novolog a legal consignee for purposes of imposing demurrage liability.

The Court of Appeals' decision in Union Pacific R.R. Co. v. Ametek, Inc., 104 F.3d 558 (3d Cir. 1997), also is instructive. In affirming the district court's grant of summary judgment against plaintiff railroad carrier and in favor of defendant receiver of freight and the Interstate Commerce Commission, the Court held that the ICC and district court properly concluded that liability for demurrage tariffs could not be imposed upon an entity that was not a party to the transportation contract. Id. In Ametek, the railroad carrier unilaterally sought to impose demurrage tariffs against the receiver of freight who was merely an agent of its customers and was not the consignor or consignee designated on the bills of lading. Id. at 559-60.

Following Payment of Detention Charges, Eastern Central States, 332 I.C.C. 585 (1968), aff'd 335 I.C.C. 537 (1969), and Middle Atlantic Conference, the Ametek Court held that demurrage liability could not be imposed upon a person who is not a party to the transportation contract or an agent for a disclosed principal acting within the scope of agency. Id. at 563. Finding that the receiver of freight was not a party to the transportation contract the Court concluded that the district court and ICC had not erred in determining "that liability for the demurrage tariff could not be imposed on [the receiver of freight] as the consignee or an agent of the consignor." Id. While acknowledging that a receiver of freight is free to assume demurrage liability via independent contract, the Court concluded that the parties' proposed, but unsigned,

draft contract was not sufficient to support a "contractual exception to the agent nonliability rule." Id. at 564.

Similarly, in the instant case, Novolog was not a party to the transportation contract and is alleged to be acting as an agent for various unnamed consignees. CSX attempts to distinguish this case from Ametek by arguing that in contrast to the bills of lading in Ametek, which named the consignee as another entity in care of the receiver of freight, the bills of lading in the present case list Novolog as the consignee without any "care of" language and Novolog never took any affirmative steps to disclose any agency relationship. CSX appears to assert the position that if demurrage liability cannot be imposed upon an agent for a disclosed principal acting within the scope of agency, then it can be imposed upon an agent who fails to disclose its principal. However, this position was specifically rejected in Evans Products Co. v. Interstate Commerce Commission, 729 F.2d 1107 (7th Cir. 1984).

In Evans Products, the Court enforced the ICC's decision to allow plaintiff railroad carrier to charge for empty repair switches, but set aside the ICC's decision to allow the carrier to assess repair switching charges against defendant repair facilities because the repair facilities were not liable to for demurrage charges as they were neither owners, consignors, or consignees of the railcars. Id. In Evans Products, the carrier unilaterally sought to impose switching charges against repair facilities who receive the railcars from their owners or lessors. Id. at 1108-10.

Following Matson and Middle Atlantic Conference, inter alia, the Evans Products Court 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." Id. at 1113 (internal citations omitted). The Court further held that "[a]ttempts to support tariffs assessing freight

charges against others tangentially involved in the shipment, such as warehousemen, pier operators, brokers, steamship agencies, and other similarly situated have failed. No liability exists merely on account of being named in the bill of lading or handling the property." Id. (internal citations omitted). Finding that although the repair facilities received damaged railcars and released the repaired cars on behalf of the owners/lessors, the repair facilities did not own the cars, they were not consignors or consignees, they did not determine the further disposition of the cars, and they had not contracted to assume liability for switching charges. Id. Rather, the Court found that the transportation contract was for shipment of goods and was between the shipper and the carrier alone. Id. The Court thus determined that there was no prevailing custom to charge repair facilities and that there was no liability under statute or contract. Id.

Moreover, the Evans Products Court rejected the argument that an agent of an undisclosed principal may be held liable for charges incurred on behalf of the principal and ruled that "the possibility that repair facilities acting as agents will withhold the identities of their principals, and thus will assume contractual responsibility for those repair switching charges, is too broad a generalization to find its way into a tariff blanketly placing ultimate liability on the repair facilities for all repair switches they order." Id. at 1113-14. The Court therefore concluded that "[r]epair facilities, neither consignor, consignee, or owner, nor obligated by statute, contract, or prevailing custom, may not be named as liable for repair switching charges in [the carrier's] tariff." Id. at 1114. CSX does not address this precedent.

This case is also analogous to CSX Transportation, Inc. v. City of Pensacola, 936 F. Supp. 880 (N.D. Fla. 1995). In Pensacola, the Court granted in part defendant port's motion for summary judgment against CSX and held that the port was not legally liable for demurrage

because it was not a party to the transportation agreements between CSX and the shippers or receivers of the freight and the port was never listed on the bills of lading as owner, consignor, or consignee, but instead as the "care of" party. Id. CSX sued the port for demurrage charges arising out of the extended detention of its railcars at the port which resulted from unexpected congestion at the port. Id. at 882.

CSX argues that the Pensacola case is not applicable to the instant action because "the defendant in that case was not identified as a consignee on any bill of lading," but rather "was identified as the 'care of' party only." CSX argues that "[i]dentifying the defendant as a 'care of' party gave the carrier in the Pensacola case express notice that it was dealing with an agent only."

However, CSX cannot avoid the central issue of the Pensacola case: "whether the Port is liable to CSX for demurrage charges when the Port caused the delays giving rise to the demurrage, but when the Port is not a party to the contract of transportation with CSX." Id. Following Matson and Middle Atlantic Conference, the Court held that "only a party to the rail transportation contract may be liable for demurrage" and "[t]he unilateral action of one party in labeling an intermediary as a consignee does not render the putative consignee liable for demurrage." Id. at 884. Finding "nothing in the record to indicate that the Port contractually agreed in the transportation agreement to be responsible for CSX's demurrage," the Court determined that "CSX's demurrage claims lie against the parties shipping or receiving under the contract for transportation of the goods, not the Port." Id. Rejecting CSX's argument that the port was liable under statutory tariff, the Court held that notwithstanding the language of CSX's or the port's tariff "the law seems well-settled that only the parties to the contract for the transportation of goods are liable for demurrage." Id. at 885. The Court therefore concluded that

"[a]s a matter of law, as a nonparty to the contracts for transportation of the goods the Port is not directly liable for demurrage under CSX's filed tariff." Id. Although Novolog was listed as the consignee on the bills of lading, rather than the "care of" party, it cannot be held liable for demurrage because there is insufficient evidence to demonstrate that it entered into a contractual relationship with CSX.

I also find this case to be analogous to Southern Pacific Transportation Co. v. Matson Navigation Co., 383 F. Supp. 154 (N.D. Cal. 1974). In Matson, plaintiff railroad sought demurrage charges against defendant connecting carrier as a result of its inability to receive the railcars because the shipment either was not booked on the connecting carrier or arrived before the scheduled receiving period. Id. at 155-156. The Court denied the railroad's motion and granted the connecting carrier's cross motion for summary judgment and held "that a connecting carrier which appears neither as shipper nor consignee in a bill of lading cannot be held liable by the railroad carrier for demurrage where the shipment either was not booked on the connecting carrier or arrived before the scheduled receiving period." Id. at 157.

CSX argues that in contrast to Matson, where the connecting carrier was named as consignee on only a few shipments, Novolog is named on all of the shipments for which CSX is charging demurrage. CSX argues that the Matson court "placed significant weight upon the fact that the vast majority of the shipments at issue put the railroad on notice that the agent named as consignee for a few shipments was really just an agent, and not liable for demurrage." CSX argues that, by contrast, Novolog did not provide any notice of its agency status and was the only consignee listed for each shipment. I disagree with CSX's reading of Matson.

Finding that neither party had directed the Court to a controlling statute or prevailing custom, the Matson Court focused on the contracts involved. Id. at 156. Following Middle Atlantic Conference, the Court held: "The promise to pay demurrage need not be an express one, but may be implied in order to compensate the carrier for the use of its equipment. But, while the obligation to pay may be implied, the promise nonetheless arises out of the contractual relationship and may only be imputed to parties to the contract." Id. (internal citations omitted). Rejecting the railroad's agency arguments, the Court determined that irrespective of the connecting carrier's agency status, it would not be liable for demurrage because it was not a party to the railroad bill of lading under which demurrage accrued. Id. With respect to the limited circumstances where the connecting carrier was named as consignee on the railroad bill of lading, the Court held that "where, 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." Id. at 157 (internal citations omitted). Similarly rejecting the railroad's argument that the connecting carrier should be liable for demurrage because "it knew shipments would occasionally arrive unbooked or prematurely," the Court held that "this fact alone does not make [the connecting carrier] a party to the contract with the ensuing liabilities that would follow from that status." Id. at 158.

This case also is analogous to Middle Atlantic Conference v. United States, 353 F. Supp. 1109 (D. D.C. 1972). In Middle Atlantic Conference, the Court affirmed the order of the ICC which "prohibit[ed] motor common carriers from specifying in their tariffs that certain

warehousemen, pier operators, brokers, steamship agencies, and others similarly situated . . . , who are neither consignors nor consignees, are to be liable under certain circumstances for charges for the undue detention (demurrage) of trucks being loaded or unloaded at their premises," and held that the proposed tariff of plaintiff motor carrier association was unlawful insofar as it attempted to impose demurrage liability upon an agent who was not a party to the transportation contracts. Id. at 1111.

Upon a comprehensive review of the pertinent case law history, the Middle Atlantic Conference Court held that "[b]efore such transportation-related assessments as detention 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." Id. at 1118. Specifically, the Court stated that liability "must be founded either on contract, statute or prevailing custom. The adjudicated cases do not require that there be a specific contract to pay demurrage but it must arise out of contract and in practically every instance the obligation is only enforced upon persons who are parties to the contract of carriage." Id. (internal citations omitted). Rejecting an intervening plaintiff's argument that the right to demurrage exists independent of a contractual relationship, the Court held that "demurrage may be assessed *against the parties to the transportation contract* (or against the merchandise) without the necessity of there being and specific independent contract to pay demurrage." Id. at 1119 (emphasis in original). Acknowledging that "parties to a contract of carriage are perfectly free among themselves to contract with respect to the payment of demurrage," the Court specified that "where they have not become contractually obligated to pay demurrage because common law principles exonerate them from liability, and they are not made liable by statute or custom, liability cannot then be

imposed upon them legislatively through the device of a tariff." Id. at 1120. Raising the agency issue sua sponte the Court held that "an agent for a disclosed principal is not liable to a third person for acts within the scope of the agency." Id. at 1120-21. The Court therefore concluded that the motor carrier association's unilateral attempt to impose demurrage liability on a party outside the transportation contract was unlawful. Id. at 1126.

The only case that arguably supports CSX's case is Shaver Trans. Co. v. Louis Dreyfus Corp., 414 F. Supp. 1040 (D. Or. 1976). In Shaver, the Court held, inter alia, that defendant grain merchant was liable to plaintiff transportation company for demurrage charges arising out of the overdue detention of the transportation company's barge because although the grain merchant was not a party to the transportation contract it was the ultimate purchaser and consignee of the grain cargo and frequently had payed demurrage charges as a matter of custom. Id.

Rejecting the grain merchant's initial arguments that it could not be liable for demurrage by statute because the tariff was invalid or by custom because no custom existed, the Shaver Court held that the tariff was not invalid and that "there was a long established custom in the grain trade . . . that the consignee who unload a barge is required to pay demurrage for delays in unloading at the consignee's facilities." Id. at 1043. Rejecting the grain merchant's final argument that it "cannot be liable for demurrage by contract because it was not a party to [the transportation] contracts," the Court found that the grain merchant was the ultimate purchaser and consignee of the grain and concluded that the grain merchant was liable for demurrage under the applicable tariff and custom of which it was well aware and by which it frequently paid demurrage. Id.

This case is distinguishable from the present action. Although the Shaver court found that the grain merchant was not a party to the transportation contract, it implicitly found that it was a party to a contract for the purchase of the grain as it was the ultimate purchaser and consignee of the grain and frequently paid demurrage liability when barges were detained. In view of this distinction and the other cases discussed above, I hold that the unilateral designation of an entity as consignee on bills of lading is not sufficient to make that entity a legal consignee for purposes of imposing demurrage liability; demurrage liability must arise out of a contractual relationship regarding the railcars for which demurrage liability is sought.

F. Recourse

CSX argues that "if the court rules that Novolog is not liable for demurrage, it has created an untenable situation for the rail industry. In effect, Novolog could order in or receive a rail car, as consignee, and then keep it indefinitely, use it exclusively for storage on its facility, or even sell it for scrap! The rail carrier would have no recourse." I disagree.

This is not a case of *damnum absque injuria*. As discussed above, CSX may have legal recourse against Novolog via tariff for demurrage charges if it can first establish that it had a contractual relationship with Novolog regarding the movement or handling of the railcars that were detained. However, there remain genuine issues of material fact in this case as to whether the parties ever had such a contractual relationship from which demurrage liability may arise. Should CSX establish such a contractual relationship at trial, it may then proceed to impose demurrage liability against Novolog via its tariff. To the extent it is found that CSX and Novolog did not have a contractual relationship, CSX may pursue its claim for demurrage against another party with which it did have a contractual relationship relating to the movement or

handling of these railcars. CSX's motion for summary judgment will be denied with respect to demurrage liability.

Novolog's motion for summary judgment with respect to demurrage liability similarly will be denied because Novolog asserts that CSX entered into a contract with it for switching services. A reasonable jury could infer from this contractual relationship, if established at trial, that Novolog implicitly accepted statutory liability for detention of the railcars. In other words, such a contractual relationship, if established at trial, may satisfy the initial requirement for demurrage and provide a sufficient basis from which CSX may impose demurrage liability via its tariff.

II. Liability for Switching Services (the Refund Contract)

Novolog counterclaims that CSX breached the unsigned Refund Contract, under which it promised to pay Novolog twenty one dollars per loaded car for its switching services. The Refund Contract provides in Paragraph 9 that the contract "shall be construed (except for matters referring to federal laws or regulations) according to the laws of the State of Florida."

Notwithstanding this provision, CSX argues that Pennsylvania contract law applies. However, there do not appear to be substantial differences between Florida and Pennsylvania contract law. To prevail on a breach of contract claim under Pennsylvania law, plaintiff must first prove the existence of a valid contract. See Matthews v. Unisource Worldwide, Inc., 748 A.2d 219, 221 (Pa. Super. Ct. 2000). Pennsylvania law is clear that "a contract is created when there is mutual assent to the terms of a contract by the parties with the capacity to contract." Shovel Transfer and Storage, Inc. v. Pa. Liquor Control Bd., 739 A.2d 133, 136 (1999) citing Taylor v. Stanley Co. of Am., 158 A. 157 (1932). "As a general rule, signatures are not required

unless such signing is expressly required by law or by the intent of the parties." Id. citing L.B. Foster Co. v. Tri-W Constr. Co., 186 A.2d 18, 19 (Pa. 1962). Moreover, "an offer may be accepted by conduct and what the parties do pursuant to the offer is germane to show whether the offer is accepted." Hartman v. Baker, 766 A.2d 347, 351 (Pa. Super. Ct. 2000).

Under Florida law, "[a] contract is created where the last act necessary to make a binding agreement takes place. Where one contracting party signs the contract, and the other party accepts and signs the contract, a binding contract results." D.L. Peoples Group, Inc. v. Hawley, 804 So. 2d 561, 563 (Fla. Dist. Ct. App. 2002). However, "[a] contract may be binding on a party despite the absence of a party's signature. The object of a signature is to show mutuality or assent, but these facts may be shown in other ways, for example, by the acts or conduct of the parties." Integrated Health Servs. of Green Briar, Inc. v. Lopez-Silvero, 827 So. 2d 338, 339 (Fla. Dist. Ct. App. 2002) quoting Gateway Cable T.V., Inc. v. Vikoa Contr. Corp., 253 So. 2d 461, 463 (Fla. Dist. Ct. App. 1971); Sosa v. Shearform Mfg., 784 So. 2d 609 (Fla. 5th DCA 2001) ("Even if parties do not sign a contract, they may be bound by the provisions of the contract, if the evidence supports that they acted as if the provisions of the contract were in force.").

Here, CSX argues that it never entered into the Refund Contract with Novolog because there is no evidence to demonstrate: (1) that CSX drafted the agreement; (2) that CSX signed the draft agreement; (2) that Novolog sent the Refund Contract back to CSX; (4) when and in what manner the Refund Contract was entered into; (4) that the parties agreed to the terms of the

Refund Contract; and (5) that CSX acted according to the Refund Contract.[16] Notwithstanding the lack of CSX's signature, Novolog asserts that the parties entered into the Refund Contract because: (a) CSX drafted and forwarded the contract to Novolog; (b) Novolog accepted and signed the contract in its original form; and (c) Novolog performed the rail switching services according to the contract.[17]

Without any evidence to demonstrate that CSX accepted and signed the agreement or acted pursuant to its terms, there is insufficient evidence to establish as a matter of law that the parties entered into a valid contract for switching services. Accordingly, Novolog's motion for summary judgment with respect to the Refund Contract will be denied. Similarly, the existence of the draft contract signed by Novolog creates a genuine issue of material fact that precludes CSX's cross motion.

An appropriate order follows.

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[16]CSX also argues that to the extent that there was a meeting of the minds on the Refund Contract, the contract terms do not obligate CSX to pay for the switching fees because Paragraph 4, third bullet point, of the Refund Contract states that "[r]efunds will not be honored unless all line-haul rates and accessorial charges have been paid" and Novolog has failed to pay demurrage charges for detaining CSX's railcars. Novolog argues that CSX's interpretation should be rejected because this provision is ambiguous and should be construed against CSX as the drafter. I do not address this issue because I find there to be genuine issues of material fact with respect to whether the parties entered into the Refund Contract.

[17]I must note that counsel for Novolog simply has cut and paste, word for word, large portions of his arguments with respect to this issue from his motion for summary judgment into his response brief. Response, reply, and surreply briefs are intended to shed greater light on the substantive issues and address new arguments or nuances raised by opposing counsel; they are not fora for reiterating word for word one's prior argument.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CSX TRANSPORTATION CO.	:	CIVIL ACTION
	:	
v.	:	
	:	
NOVOLOG BUCKS COUNTY	:	NO. 04-4018

ORDER

AND NOW, this 24th day of May 2006, upon consideration of the parties' cross motions for summary judgment, responses, replies, and surreplies thereto as well as the transcript of the parties' April 27, 2006 oral argument in this case, and for the reasons set forth in the accompanying memorandum, it is ORDERED that the parties' cross motions for summary judgment are DENIED. It is further ORDERED that CSX's motion for leave to file a supplemental brief is DENIED.

s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.