APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

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FINAL JUDGMENT

July 3, 2018

FRANK H. EASTERBROOK, Circuit Judge

Before:
AMY C. BARRETT, Circuit Judge
J. P. STADTMUELLER, District Court Judge[*]

No. 17-2343

WISCONSIN CENTRAL LIMITED,
Plaintiff - Appellee

v.

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[*]Of the Eastern District of Wisconsin, sitting by designation.

TIENERGY, LLC,
Defendant / Third Party Plaintiff - Appellant

v.

ALLIED TRACK SERVICES, INC.,
Third Party Defendant - Appellee

Originating Case Information:

District Court No: 1:15-cv-02489
Northern District of Illinois, Eastern Division
District Judge Amy J. St. Eve

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

No. 17-2343

WISCONSIN CENTRAL LIMITED,
Plaintiff-Appellee,

v.

TIENERGY, LLC,
Defendant / Third Party
Plaintiff-Appellant,

v.

ALLIED TRACK SERVICES, INC.,
Third Party
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:15-cv-02489 — **Amy J. St. Eve**, *Judge*.

ARGUED JANUARY 11, 2018 — DECIDED JULY 3, 2018

Before EASTERBROOK and BARRETT, *Circuit Judges*, and STADTMUELLER, *District Judge*.[*]

BARRETT, *Circuit Judge*. Demurrage is a charge that rail carriers are statutorily required to impose when rail cars are detained beyond the time the tariff allows for loading or unloading. It serves two functions: it secures the rail carrier compensation for the use of the car, and it serves the public's interest in making the cars available t o transport other property. The sooner a car is back in service, the sooner it is available to move the property of others.

This case involves demurrage that accrued when rail cars belonging to Wisconsin Central were detained at TiEnergy's facility after delivering a load of railroad ties. Wisconsin Central sued TiEnergy to recover the charges, asserting that TiEnergy was liable for them as consignee of the goods. TiEnergy argued that it had not agreed to be the consignee; it maintained that Allied, the c ompany that shipped the ties, should foot the bill. The district court held TiEnergy respon sible, and we affirm its judgment.

I.

Allied Track Services, Inc. entered into two agreements to facilitate the shipment of approximately 100,000 railroad ties. It contracted with Wisconsin Central Limited's parent company, Canadian National Railway, to have Wisconsin Central ship the ties to

[*]Of the Eastern District of Wisconsin, sitting by designation.

TiEnergy, LLC's facility in Wisconsin. That contract incorporated CN Tariff 9000, which provided that demurrage would begin to accrue on the cars after two days of unloading time. Wisconsin Central also entered into an oral agreement with TiEnergy, which is in the business of processing and disposing of used railroad ties. TiEnergy agreed to receive the ties at its Wisconsin facility, where it would grind them. It would then sell the ties to Xcel Energy, which would burn them to generate power. When the process was complete, TiEnergy would provide Allied with proof that the ties had been incinerated in an environmentally safe manner.

Allied listed TiEnergy as the consignee of the railroad ties on all relevant bills of lading, and the ties were shipped to TiEnergy's Wisconsin facility. After receiving the ties, TiEnergy went forward with its plan: it unloaded, ground, and sold them to Xcel Energy. The approximately 100 rail cars used to ship the ties, however, remained on the track and sidetrack beyond the two- day unloading period permitted by the tariff. Daily demurrage charges started to accrue on each car.

Canadian National began billing TiEnergy for the demurrage. When it received the invoices, TiEnergy contacted both Canadian National and Allied to object. TiEnergy said that it had not agreed to be identified as the consignee on the bills of lading and that it thus could not be held responsible for demurrage. In the meantime, the cars remained on TiEnergy's track, and the demurrage charges

continued to climb.

Wisconsin Central sued TiEnergy, seeking to recover approximately $100,000 in demurrage. TiEnergy filed a third party complaint against Allied seeking indemnification or contribution. A flurry of motions followed the close of discovery: Wisconsin Central filed a motion for summary judgment against TiEnergy, TiEnergy filed a cross-motion for summary judgment against Wisconsin Central, and Allied filed a motion for summary judgment against TiEnergy. In its opinion, the district court granted the motions filed by Wisconsin Central and Allied; it denied the one filed by TiEnergy. TiEnergy appeals the district court's grants of summary judgment in favor of Wisconsin Central and Allied.[1]

II.

Before we turn to the merits, we have two

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[1]One of TiEnergy's complaints on appeal is that the district court improperly considered facts submitted by Wisconsin Central in violation of Northern District of Illinois Local Rule 56.1, which governs the procedures that parties must follow in making and opposing summar y judgment motions. If the district court had not considered these facts, TiEnergy says, it would have been entitled to summary judgment. We review a district court's decisions regarding litigants' compliance with local rules for abuse of discretion, *see Raymond v. Ameritech Corp.* , 442 F.3d 600, 604 (7th Cir. 2006), and we find no abuse in the district court's conclusion that Wisconsin Central's response to TiEnergy's Local Rule 56.1(b)(3)(C) statement was properly filed. *Wisconsin Central, Ltd. v. TiEnergy, LLC*, No. 15 C 2489, 2017 WL 1427065 (N.D. Ill. Apr. 21, 2017).

jurisdictional matters to address. The first concerns appellate jurisdiction. TiEnergy invoked our jurisdiction under 28 U.S.C. § 1291, which gives us "jurisdiction of appeals from all final decisions of the district courts of the United States." To make the entry of final judgment clear, Federal Rule of Civil Procedure 58(a) provides that "[e]very judgment and amended judgment must be set out in a separate document." While the district court docketed a Rule 58 judgment order reflecting its final disposition of the claims brought by Wisconsin Central against TiEnergy, it did not do so for the third-party claim that TiEnergy asserted against Allied. Because a judgment is not final for purposes of § 1291 until it disposes of all claims in the suit, *General Insurance Co. of America v. Clark Mall Corp.*, 644 F.3d 375, 379 (7th Cir. 2011), the absence of the Rule 58 judgment order disposing of TiEnergy's third-party claim creates some uncertainty about our appellate jurisdiction.

We asked the parties to address this issue in supplemental briefing. They contend —and we agree —that although the district court failed to issue a separate judgment disposing of all the claims, it clearly signaled in its opinion that it was finished with the case. Rule 58's "separate document" requirement is important because it keeps jurisdictional lines clear. We have said, however, that a district court's failure to comply with the formal requirement is not fatal to our jurisdiction if the district court has otherwise indicated its intent to finally dispose of all claims. *Borrero v. City of Chicago*, 456 F.3d 698, 699–700 (7th Cir. 2006). The district court did so here. *See Wisconsin Cent., Ltd. v.*

TiEnergy, LLC, No. 15 C 2489, 2017 WL 1427065 (N.D. Ill. Apr. 21, 2017).

The second matter —and one on which we also ordered supplemental briefing —concerns original jurisdiction. Be cause this case focuses on the bill of lading, which is the shipping contract between the parties, it sounds like a breach-of-contract claim. But if this case is simply a contract dispute, we probably lack jurisdiction over it. Contract claims arise under state law, so they typically require diversity jurisdiction, and both Wisconsin Central and TiEnergy are citizens of Illinois. 28 U.S.C. § 1332; *see also Strawbridge v. Curtiss*, 7 U.S. 267 (1806) (holding that the diversity statute requires that the citizenship of all plaintiffs be different from the citizenship of all defendants). In an exceptional circumstance, the presence of a federal issue can transform a state-law claim into one that arises under federal law. *See Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005) (holding that a state cause of action arises under federal law if, among other things, it requires resolution of a substantial and contested federal issue). There might be an argument for that here, but Wisconsin Central has not made it.[2]

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[2]This case involves the Interstate Commerce Commission Termination Act, which succeeded the Interstate Commerce Act. When the Interstate Commerce Act was in effect, the Supreme Court held that an action to collect shipping charges, which was an action for breach of contract, presented a federal question arising under it. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 534 (1983); *Louisville & Nashville R.R. Co. v.*

Rather than asserting a contract claim that nonetheless arises under federal law, Wisconsin Central's complaint sought to recover demurrage pursuant to a provision of the Interstate Commerce Commission Termination Act that as signs liability for the payment of transportation rates. 49 U.S.C. § 10743. Demurrage charges have long been treated as "rates for transportation" under that provision, *see CSX Transportation Co. v. Novolog Bucks County*, 502 F.3d 247, 256–57 (3rd Cir. 2007) (interpreting and recounting the history of the phrase), and consignees are presumptively liable for it. Section 10743(c) grants rail carriers a cause of ac tion to en force that liability, and Wisconsin Central has invoked that grant here. A cause of action arises under the law that created it, *American Well Works Co. v. Layne & Bowler Co.* , 241 U.S. 257, 260 (1916), which means that this case arises under federal law. Jurisdiction exists pursuant to 28 U.S.C. § 1337(a), which grants jurisdiction over "any civil action or proceeding arising under any Act of Congress regulating commerce."

Rice, 247 U.S. 201 (1918); *see also Kansas City Terminal Ry. Co. v. Jordan Mfg. Co.*, 750 F.2d 551 (7th Cir. 1984). We applied this reasoning to a suit seeking the collection of demurrage charges under that statute. *Atchison, T. & S.F. Ry. Co. v. Springer*, 172 F.2d 346 (7th Cir. 1949). Neither Wisconsin Central's complaint nor its supplemental brief frames its claim as a state contract claim that presents a substantial and contested issue of federal law under the Interstate Commerce Commission Termination Act. Thus, we need not confront the question whether a claim for failure to pay demurrage fees required by the shipping contract arises under the statute currently in force.

In its supplemental brief, TiEnergy contends that § 1337(a) carries an amount-in-controversy requirement that deprives us of jurisdiction. That provision limits federal jurisdiction over cases filed under 49 U.S.C. § 11706 or 49 U.S.C. § 14706 when the "matter in controversy for each receipt or bill of lading exceeds $10,000." TiEnergy says that this limit applies, because the demurrage charges sought by Wisconsin Central include numerous invoices for less than $10,000.

This argument is frivolous. Section 1337(a)'s amount-in-controversy limitation is plainly applicable only to cases filed under 49 U.S.C. § 11706 or 49 U.S.C. § 14706, and Wisconsin Central brought this action pursuant to 49 U.S.C. § 10743. Moreover, the causes of action that § 1337 limits — those brought under § 11706 or § 14706—involve actions brought *against*, not *by* rail carriers. This suit presents a federal question over which we have jurisdiction, and nothing in § 1337(a) changes that.

III.

Section 10743 codifies the common-law rule that the consignee of freight is presumptively liable for demurrage accrued at the destination. *Illinois Cent. R.R. Co. v. South Tec Dev. Warehouse, Inc.*, 337 F.3d 813, 820 (7th Cir. 2003) (explaining that in the absence of a contract providing otherwise, only a consignee is liable for demurrage). Given this presumption, the parties agree that TiEnergy's liability for demurrage turns on whether it is a "consignee" for purposes of §

10743. The tricky thing is that being a consignee under 10743 requires more than mere custody of the freight. *Cf.* BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "consignee" to mean "[o]ne to whom goods are consigned" and "consign" to mean "transfer to another's custody or charge"). We consider other factors as well: whether the party agreed by contract to consignee status, whether the party was designated as consignee in the bill of lading, and the nature of the party's relationship to the freight. *South Tec* , 337 F.3d at 820–22.

In denying that it was the consignee of the railroad ties, TiEnergy emphasizes that it neither agreed to nor knew about its designation as consignee on the bill of lading. That is its best fact, because being unilaterally designated as the consignee on the bill of lading is not enough to render a recipient of freight liable for demurrage. *South Tec*, 337 F.3d at 821.[3] At

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[3]There is a circuit split on this question. The Third Circuit has held that a recipient named as consignee in the bill of lading is liable for demurrage regardless of whether it agreed to be designated as consignee. *CSX Transp. Co. v. Novolog Bucks Cty.*, 502 F.3d 247 (3rd Cir. 2007). The Eleventh Circuit, in contrast, has said that unilateral designation as consignee on a bill of lading is not enough to confer consignee status; a recipient of the freight is not liable for demurrage unless it consented to or at least had notice of the designation. *Norfolk S. Ry. Co. v. Groves*, 586 F.3d 1273, 1282 (11th Cir. 2009). We have not squarely addressed the issue, but the position we have expressed in dicta is closer to the Eleventh Circuit's than the Third Circuit's. *See South Tec*, 337 F.3d at 820 –21. Because of this split in authority, the Surface Transportation Board has promulgated the following regulation governing demurrage liability:

the same time, this fact does not get TiEnergy off the hook, because even a unilaterally designated party can be liable for demurrage when other factors are present reflecting an interest in or control of the goods. *Id*. This test is de signed to separate intermediaries like warehouses and trans loaders from recipients who have a legal or beneficial ownership interest in the freight. Those who merely handle the freight are not consignees; those with a relationship to it have that status.

TiEnergy denies that it had any interest in or control of the railroad ties delivered by the detained railcars. According to TiEnergy, it was an intermediary like a warehouse or transloader. It

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> Any person receiving rail cars from a carrier for loading or un loading who detains the cars beyond the period of free time set forth in the governing demurrage tariff may be held liable for demurrage if the carrier has provided that person with actual notice of the demurrage tariff providing for such liability prior to the placement of the rail cars.

49 C.F.R. § 1333.3. In the course of its rulemaking proceedings, the Board concluded that demurrage is not part of the "rates for transportation" governed by § 10743. *Demurrage Liability*, *Final Rule*, 2014 WL 1399404 (April 9, 2014) (asserting that "49 U.S.C. § 10743 … appl[ies] to carriers' line-haul rates, but not to demurrage charges."). The new rule does not apply here, because it took effect on July 15, 2014, and the demurrage on Wisconsin Central's cars accrued in November 2013. And the parties have not asked us to overrule our precedent treating demurrage as part of the "rates for transportation" under § 10743. *See South Tec*, 337 F.3d at 817. Thus, we do not address either the rule or the soundness of the Board's interpretation of the statute.

received ties belonging to Allied and —acting solely on Allied's behalf —forwarded them to Xcel for incineration. Like other intermediaries relieved of liability for demurrage, TiEnergy says that it acted merely as an agent with no interest of its own in the goods.

Classifying TiEnergy as an intermediary jams a square peg into a round hole. To begin with, TiEnergy is not in the freight-transfer or cargo-storage business. It is in the business of processing and disposing of used railroad ties. That distinguishes TiEnergy from the entities that present the hard cases for demurrage liability—warehousemen, pier operators, transloaders, and connecting carriers. *See CSX Transp. Co. v. Novalog Bucks Cty.*, 502 F.3d 247, 250 (3d Cir. 2007). Unlike these entities, TiEnergy is not an intermediary indifferent to freight that it stores or transfers from one mode of transportation to the next. It agrees to take railroad ties so that it can use them —as it did when the ties from Allied arrived at its facility. TiEnergy ground the ties, thereby exhibiting its control of them. And it sold the ties to Xcel, thereby demonstrating that it enjoyed their benefit. TiEnergy's claim that it functioned solely as Allied's agent in selling the ties to Xcel Energy for incineration is belied by the fact that it kept the full payment for itself.[4]

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[4]The claim that TiEnergy functioned as Allied's agent is also belied by the fact that Allied offered to help TiEnergy move the cars off the track, but was unable to do so because TiEnergy did not authorize it.

The only conclusion a juror could reasonably draw from these undisputed facts is that TiEnergy had both control of and an interest in the ties. And under *South Tec*, that means that it had consignee status. 337 F.3d at 820–22. Consignees are liable for demurrage; thus, TiEnergy owes Wisconsin Central the fees accrued for the detained rail cars.[5]

It is worth noting that if TiEnergy had been a consignee functioning only as Allied's agent, the statute offered it a way out of liability for transportation rates. Under § 10743(a)(1), a "consignee that is an agent only, not having beneficial title to the property" has an option that other consignees do not: it can give the carrier written notice that it lacks beneficial title and the name and address of the person who does. If the agent takes that step, it escapes liability for "additional rates that may be found to be due after delivery." § 10743(a)(1). Demurrage accrues after delivery, so an agent-consignee who invokes this exception does not have to pay it. TiEnergy, however, did not invoke this exception. It thus remains subject to the default rule that consignees must pay when rail cars delivering shipments are detained longer than the time the tariff allows.

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[5]TiEnergy argued in the district court that weather conditions prevented it from releasing the cars. The district court treated that argument as waived "because TiEnergy did no t develop this argument or support it with any legal authority." TiEnergy's one-sentence assertion that "this finding was directly contrary to the record" is not reason for us to disturb the district court's finding.

IV.

TiEnergy insists that if it is found liable for the demurrage charges, it is entitled to either indemnification or contribution from Allied. Indemnification shifts the entire loss to the other party, while contribution distributes it among multiple parties. Both remedies look to fault when distributing loss. *See Schulson v. D'Ancona & Pflaum LLC*, 821 N.E.2d 643, 647 (Ill. App. Ct. 2004).[6]

TiEnergy concedes that no written contract obligated Allied to indemnify it for any demurrage liability it incurred. (In fact, the parties had no written contract memorializing any of the details of their agreement.) Because it nonetheless asserts that Allied breached its agreement to assume responsibility for demurrage, it is presumably claiming that Allied and TiEnergy entered an oral contract regarding indemnity. It points to no evidence, however, supporting this assertion. TiEnergy's breach-of-contract claim therefore fails.

TiEnergy also argues that Allied must indemnify it because of an alleged agency relationship between the two. This argument fails for several reasons, but we can stop with this basic point: TiEnergy was not Allied's agent. A hallmark of the principal/agent relationship is the principal's right to

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[6]The parties do not explicitly address the choice -of-law issue, but they both assume that Illinois law applies to the indemnification and contribution claims.

control the conduct of the agent. *See Wilson v. Edward Hosp.*, 981 N.E.2d 971, 978 (Ill. 2012). It is undisputed that Allied exercised no control over the manner in which TiEnergy disposed of the ties; nor, as we have already said, did TiEnergy sell them to Xcel on Allied's behalf.

TiEnergy's claim for contribution in tort fares no better. This argument relies on the Illinois Joint Tortfeasor Contribution Act, 740 ILCS 100/2, which—as its name suggests—permits one joint tortfeasor to seek contribution from another. Yet TiEnergy has not even tried to make the case that Wisconsin Central's claim for demurrage sounds in tort. *Cf. Guerino v. Depot Place P'ship*, 730 N.E.2d 1094, 1099 (Ill. 2000) (holding that there is no claim under the Act when liability is predicated on a contract). Moreover, as the district court ob served, Allied is not liable to Wisconsin Central for the demurrage; so even if this is a tort, there is no joint tortfeasor from whom to collect. The Act is wholly inapplicable.

* * *

The district court correctly held that TiEnergy must pay Wisconsin Central the demurrage fees. Its judgment is AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ILLINOIS
EASTERN DIVISION

WISCONSIN CENTRAL LTD,
Plaintiff,

vs. CASE NO. 1:15-CV-02489
Honorable Amy J. St. Eve

TIENERGY, LLC,
Defendant.

TIENERGY, LLC,
Third-Party Plaintiff,

vs.

ALLIED TRACK SERVICES, INC.,
f/k/a SWIFT RAILROAD CONTRACTORS
CORPORATION,
Third-Party Defendant.

ORDER OF JUDGMENT

The Court, pursuant to its Memorandum Opinion and Order filed April 21, 2017 and the

Minutes entered on May 15, 2017, grants judgment in favor of the Plaintiff, Wisconsin Central LTD, and against Defendant, Tienergy, LLC, in the amount of **One Hundred Fifteen Thousand Seven Hundred Sixty Eight dollars and 19/100 Dollars ($115,768.19)**, which includes unpaid invoices for demurrage charges totaling $104,595.00, plus prejudgment interest totaling $11,173.19 from the date of the invoices until May 15, 2017 as set forth in the schedule attached
hereto as Exhibit A.

Dated: May 31, 2017

ENTERED

/s/
Honorable Amy J. St. Eve
United States District Court Judge

Calculation Date 5/16/2017

Freight Bill#	Date	Amount	Rate		Interest as of Calc	Total
752502153	1/18/2014	$ 1,890.00	3.25%	$ 0.17	$ 204.30	$ 2,094.30
752502890	1/18/2014	$43,200.00	3.25%	$ 3.85	$4,669.74	$47,869.74
752472046	2/1/2014	$ 2,610.00	3.25%	$ 0.23	$ 278.88	$ 2,888.88
752472367	2/1/2014	$ 4,524.00	3.25%	$ 0.40	$ 483.39	$ 5,007.39
752486025	2/1/2014	$ 4,176.00	3.25%	$ 0.37	$ 446.20	$ 4,622.20
752486305	2/1/2014	$ 4,698.00	3.25%	$ 0.42	$ 501.98	$ 5,199.98
752489629	2/1/2014	$ 2,784.00	3.25%	$ 0.25	$ 297.47	$ 3,081.47
752489814	2/1/2014	$ 2,088.00	3.25%	$ 0.19	$ 223.10	$ 2,311.10
752493319	2/1/2014	$11,310.00	3.25%	$ 1.01	$1,208.47	$12,518.47
752496529	2/1/2014	$11,745.00	3.25%	$ 1.05	$1,254.95	$12,999.95
752512647	2/1/2014	$ 8,100.00	3.25%	$ 0.72	$ 865.48	$ 8,965.48
753513537	2/1/2014	$ 3,600.00	3.25%	$ 0.32	$ 384.66	$ 3,984.66
752512883	7/22/2014	$ 3,870.00	3.25%	$ 0.34	$ 354.58	$ 4,224.58
TOTALS		$104,595.00			$11,173.19	$115,768.19

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ILLINOIS
EASTERN DIVISION

WISCONSIN CENTRAL, LTD.,
Plaintiff,

v. Case No. 15 C 2489

TIENERGY, LLC,
Defendant.

TIENERGY, LLC,
Third-Party Plaintiff,

v.

ALLIED TRACK SERVICES, INC., f/k/a
SWIFT RAILROAD CONTRACTORS
CORPORATION,
Third-Party Defendant.

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge:

On March 24, 2015, Plaintiff Wisconsin Central Ltd. ("Wisconsin Central") filed a one-count Complaint against Defendant TiEnergy, LLC ("TiEnergy") seeking demurrage charges in the amount of $104,595.00 pursuant to the Interstate Commerce Commission Termination Act ("ICCTA"), specifically, 49 U.S.C. § 10743.[1] On October 13, 2015, Defendant/Third-Party TiEnergy filed a First Amended Third-Party Complaint against Third-Party Defendant Allied Track Services ("Allied") seeking indemnification, contribution, and damages for breach of contract in relation to Plaintiff Wisconsin Central's demurrage charges.

Before the Court are Plaintiff Wisconsin Central's Federal Rule of Civil Procedure 56(a) motion for summary judgment against Defendant TiEnergy and Defendant TiEnergy's Rule 56(a) cross-motion for summary judgment against Plaintiff Wisconsin Central in relation to Wisconsin Central's Complaint against TiEnergy. Also before the Court is Third-Party Defendant Allied's Rule 56(a) summary judgment motion against Third-Party Plaintiff TiEnergy concerning the TiEnergy's First Amended Third-Party Complaint.

For the following reasons, the Court grants Wisconsin Central's and Allied's motions for summary judgment [51, 52] and denies TiEnergy's motion for summary judgment [56]. In addition, the Court grants

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[1]The parties do not dispute the amount of the demurrage charges at issue in this lawsuit.

TiEnergy's motion to strike Allied's Rule 56.1(b) response as stated in detail below. [74]. The Court further grants TiEnergy's motion to strike Wisconsin Central's January 5, 2017 "certification," also discussed directly below. [73]. Last, the Court denies Plaintiff Wisconsin Central's motion for oral argument in regard to its summary judgment motion. [82]. Wisconsin Central must file a proposed order of judgment stating the demurrage charges and calculating the appropriate pre-judgment interest with the Court by no later than May 8, 2017.

BACKGROUND

I. Northern District of Illinois Local Rule 56.1

A. Standards

"The purpose of Rule 56.1 is to have the litigants present to the district court a clear, concise list of material facts that are central to the summary judgment determination. It is the litigants' duty to clearly identify material facts in dispute and provide the admissible evidence that tends to prove or disprove the proffered fact." *Curtis v. Costco Wholesale Corp.*, 807 F.3d 215, 219 (7th Cir. 2015). Local Rule 56.1(a) "requires the party moving for summary judgment to file and serve a 'statement of material facts as to which the moving party contends there is no genuine issue and that entitle the moving party to a judgment as a matter of law.'" *Id.* at 218 (citation omitted). "The non-moving party must file a response to the moving party's statement, and, in the case of any

disagreement, cite 'specific references to the affidavits, parts of the record, and other supporting materials relied upon.'" *Petty v. Chicago,* 754 F.3d 415, 420 (7th Cir. 2014) (citation omitted); *see also* L.R. 56.1(b)(3)(A). Local Rule 56.1(b)(3)(C) requires the non-moving party to file a separate statement of additional facts. *See Thornton v. M7 Aerospace LP*, 796 F.3d 757, 769 (7th Cir. 2015).

Local Rule 56.1 statements and responses should identify the relevant admissible evidence supporting the material facts – not make factual or legal arguments. *See Zimmerman v. Doran,* 807 F.3d 178, 180 (7th Cir. 2015). "When a responding party's statement fails to dispute the facts set forth in the moving party's statement in the manner dictated by the rule, those facts are deemed admitted for purposes of the motion." *Curtis*, 807 F.3d at 218 (quoting *Cracco v. Vitran Exp., Inc.,* 559 F.3d 625, 632 (7th Cir. 2009)). The Seventh Circuit "has consistently upheld district judges' discretion to require strict compliance with Local Rule 56.1." *Flint v. City of Belvidere,* 791 F.3d 764, 767 (7th Cir. 2015).

B. The Parties' Local Rule 56.1 Filings

Despite these well-settled local procedural rules that articulate how litigants must present material facts at summary judgment in the Northern District of Illinois, the parties have failed to follow the letter or the spirit of the rules to assist the Court in determining the relevant, admissible evidence. To explain, although Defendant TiEnergy's motion for

summary judgment is against Plaintiff Wisconsin Central, Third-Party Defendant Allied has filed a response to TiEnergy's Rule 56.1(a) Statement of Facts. Because TiEnergy's summary judgment motion is directed at Wisconsin Central's claims – as set forth in Wisconsin Central's Complaint – the Court, in its discretion, will not consider Third-Party Defendant Allied's Rule 56.1(b)(3)(A) Response to TiEnergy's Rule 56.1(a) statement because Allied is not an "opposing party" as contemplated by Rule 56.1(b). On the other hand, Allied filed a proper Rule 56.1 response to TiEnergy's Rule 56.1(b)(3)(C) Statement of Additional Facts in relation to Allied's summary judgment motion, which has considerable overlap with TiEnergy's Rule 56.1 Statement. The Court will consider Allied's response in this context.

Further, instead of filing a Rule 56.1(b)(3)(A) Response to TiEnergy's Rule 56.1(a) Statement of Facts, Plaintiff Wisconsin Central included a three paragraph "rebuttal" as part of its response brief in opposition to Defendant TiEnergy's summary judgment motion. Because these rebuttal paragraphs are in contradiction of Local Rule 56.1, the Court will not consider them. Similarly, Wisconsin Central attempted to respond to TiEnergy's Rule 56.1(a) Statement of Fact ¶ 19 by attaching a "certification" to its summary judgment response brief. The Court will not consider this "certification" because Wisconsin Central failed to follow Local Rule 56.1(b). Nonetheless, the Court notes that Wisconsin Central did file a proper Rule 56.1 response to TiEnergy's Rule 56.1(b)(3)(C) Statement of Additional Facts that the

Court will consider. Also, in its legal memoranda, Wisconsin Central cites directly to evidence in the record instead of citing Rule 56.1 statements, which defeats the purpose of Rule 56.1. *See LaSalvia v. City of Evanston,* 806 F. Supp. 2d 1043, 1046 (N.D. Ill. 2011) ("The Court also disregards any citations to the record in the parties' legal memoranda that do not reference their Local Rule 56.1 Statements of Fact."); *see also Malec v. Sanford,* 191 F.R.D. 581, 586 (N.D. Ill. 2000). The Court will disregard these citations.

Next, in support of its Rule 56.1 statements and responses, TiEnergy relies upon TiEnergy President Steven Berglund's affidavit in which he contradicts his June 21, 2016 deposition testimony, thereby violating the "sham affidavit" rule. *See Cook v. O'Neill,* 803 F.3d 296, 298 (7th Cir. 2015) ("A 'sham affidavit' is an affidavit that is inadmissible because it contradicts the affiant's previous testimony... unless the earlier testimony was ambiguous, confusing, or the result of a memory lapse."); *see also McCann v. Iroquois Mem'l Hosp.*, 622 F.3d 745, 751 (7th Cir. 2010) (sham affidavit rule "applies when the change is incredible and unexplained"). The Court will not consider Berglund's affidavit under this rule and, also, because Berglund's affidavit is not notarized or signed under penalty of perjury. *See Sheikh v. Grant Reg'l Health Ctr.*, 769 F.3d 549, 551 (7th Cir. 2014); Fed.R.Civ.P. 56(c)(4). The Court further notes that affidavits must be based on personal knowledge and that parties cannot rely upon inadmissible hearsay at summary judgment. *See Jackson v. City of Peoria, Ill.,* 825 F.3d 328, 330 (7th Cir. 2016); *Cairel v. Alderden*, 821 F.3d

823, 830 (2016).

In short, by failing to follow Local Rule 56.1, the parties have pointed the Court to a "proverbial haystack" of evidence asking the Court to find the needle. *See Boss v. Castro,* 816 F.3d 910, 914 (7th Cir. 2016). It is not the role of the district court in our adversary system to scour the record looking for material facts at summary judgment. *See Zoretic v. Darge,* 832 F.3d 639, 641 (7th Cir. 2016). With these standards in mind, the Court turns to the relevant facts of this lawsuit.[2]

II. Relevant Facts

Wisconsin Central is a railroad common carrier doing business in Illinois, Wisconsin, and Michigan. (R. 53, Pl.'s Rule 56.1 Stmt. Facts ¶ 1.) Wisconsin Central's parent company, Canadian National Railway ("CN"), delivers notices and bills to customers of Wisconsin Central. (*Id.* ¶ 1; R. 58, Def.'s Rule 56.1 Stmt. Facts ¶ 4.) Defendant TiEnergy, an Illinois limited liability company, is in the business of processing and disposing of used railroad ties and maintains a facility in Ashland, Wisconsin. (Pl.'s Stmt. Facts ¶¶ 2, 3; Def.'s Stmt. Facts ¶¶ 7, 8.) Third-Party Defendant Allied, formerly known as Swift Railroad Contractors Corporation ("Swift"), is a full service rail contractor offering maintenance of way services with

[2]The Court also notes that the parties' arguments made for the first time in their reply briefs are waived. *See Wedemeyer v. CSX Transp., Inc.*, 850 F.3d 889, 897 (7th Cir. 2017).

a facility located in Grimsby, Ontario. (Pl.'s Stmt. Facts ¶ 5; Def.'s Stmt. Facts ¶ 9.) Allied bought and re-branded Swift in 2014, and thus the Court will refer to these corporations collectively as "Allied." (Def.'s Stmt. Facts ¶ 11.)

As relevant to this matter, Allied contracted with its customer Huron Central Railroad ("Huron") to dispose of used railroad ties and, in an effort to carry out this project, Allied contacted TiEnergy, which is in the business of disposing of used railroad ties in an environmentally safe manner. (R. 51-2, Allied Rule 56.1 Stmt. Facts ¶¶ 7, 9; Def.'s Stmt. Facts ¶ 14.) Allied and TiEnergy had an oral understanding that Allied would facilitate the shipment of Huron's used railroad ties to TiEnergy's facilitity in Ashland, Wisconsin, at which point TiEnergy would take possession of the ties and safely dispose of them. (Allied Stmt. Facts ¶¶ 8, 9; Def.'s Stmt. Facts ¶ 18.) In particular, once TiEnergy took possession of Huron's railroad ties at its Ashland facility, it would grind them and then sell them to its customer XCel Energy, that subsequently incinerated the ground railroad ties. (Pl.'s Stmt. Facts ¶ 9; Allied Stmt. Facts ¶¶ 13, 16; Def.'s Stmt. Facts ¶18.)

In 2013, Allied entered into an agreement with CN – Wisconsin Central's parent company – to have CN ship the Huron ties by rail from Sault Ste. Marie, Ontario to Ashland, Wisconsin. (Def.'s Stmt. Facts ¶ 19; Ex. I, Trans. Agmt. CN 526617-AA.) The agreement between Allied and CN states that the contract incorporates the CN Tariff 9000 series.

(Trans. Agmt. CN 526617-AA, Bates WC000010.) As such, CN Tariff 9000 provided the procedure and pricing for freight and optional service charges. (Pl.'s Stmt. Facts ¶ 14.) Under CN Tariff 9000, demurrage would begin to accrue two days after the railcars were placed at the Ashland facility.[3] (*Id.* ¶¶ 15, 16, 20.)

At the time relevant to the movement of the approximately 100 railroad cars containing Huron's used railroad ties, Allied named TiEnergy as the consignee on the bills of lading. (Pl.'s Stmt. Facts ¶ 11.) TiEnergy maintains that it did not know that Allied had listed it as a consignee. (Def.'s Stmt. ¶ 31; R. 62, TiEnergy's Rule 56.1 Add'l Stmt. Facts ¶ 20.) Allied's commercial manager, Richard Middaugh, testified that he did not recall whether he told TiEnergy that it was being listed as a consignee when setting up the shipping instructions with CN. (R. 69, Allied's Rule 56.1 Resp. ¶ 20.) Middaugh, however, maintains that after TiEnergy raised this issue with CN in December 2013, he advised TiEnergy that it had been properly identified as the consignee. (*Id.*)

Starting in November 2013, CN began invoicing TiEnergy for demurrage charges based on the delay in CN's railroad cars moving in and out of TiEnergy's

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[3]TiEnergy's argument that it did not receive actual notice of the demurrage tariff in violation of 49 C.F.R. § 1333.3 fails because the events at issue in this lawsuit predate the Surface Transportation Board's promulagation of the regulation set forth in 49 C.F.R. § 1333.3. *See CP Rail v. Leeco Steel, LLC,* No. 14 C 6892, 2015 WL 6859287, at *2 n.2 (N.D. Ill. Nov. 9, 2015).

Ashland facility. (Def.'s Stmt. Facts ¶ 33; R. 64, Def.'s Rule 56.1 Add'l Facts ¶ 29; Allied Stmt. Facts ¶ 21.) Once TiEnergy received the first demurrage invoice, it immediately objected and contacted CN and Allied stating that it was not responsible for the demurrage charges and that Allied should not have listed TiEnergy as the consignee on the bills of lading. (Def.'s Stmt. Facts ¶ 35.) CN continued to send demurrage invoices to TiEnergy, after which TiEnergy took the position it was not responsible for the charges and refused to pay. (*Id.* ¶ 45.) This lawsuit followed.

LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). A genuine dispute as to any material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). In determining summary judgment motions, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). The party seeking summary judgment has the burden of establishing that there is no genuine dispute as to any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986). After "a properly supported motion for summary judgment is made, the adverse party 'must

set forth specific facts showing that there is a genuine issue for trial.'" *Anderson*, 477 U.S. at 255 (quotation omitted). "To survive summary judgment, the nonmoving party must show evidence sufficient to establish every element that is essential to its claim and for which it will bear the burden of proof at trial." *Diedrich v. Ocwen Loan Servicing, LLC*, 839 F.3d 583, 591 (7th Cir. 2016) (citations omitted).

ANALYSIS

Demurrage, which "is the right of a carrier to assess charges for undue detention of its equipment," is "a well established institution in the transportation industry." *Prince Mfg. Co. v. United States,* 437 F. Supp. 1041, 1044 (N.D. Ill. 1977). Specifically, demurrage is "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." *Illinois Cent. Co. v. South Tec Dev. Warehouse, Inc.,* 337 F.3d 813, 815 n.1 (7th Cir. 2003) (citation omitted). Demurrage charges serve two purposes: (1) "to secure compensation for the use of the car and of the track which it occupies" and (2) "to promote car efficiency by providing a deterrent against undue detention." *I. C. C. v. Oregon Pac. Indus., Inc.*, 420 U.S. 184, 187, 95 S.Ct. 909, 43 L.Ed.2d 121 (1975) (citation omitted).

When a railroad common carrier seeks to impose liability for demurrage charges, the charges "may be imposed only against a consignor, consignee, or owner of property, or others by statute, contract, or

prevailing custom." *Evans Prods. Co. v. I.C.C.,* 729 F.2d 1107, 1113 (7th Cir. 1984); *see also South Tec,* 337 F.3d at 820. When determining demurrage charges, courts look to the relevant bill of lading, which is the "basic transportation contract between the shipper-consignor and the carrier; its terms and conditions bind the shipper and all connecting carriers." *South Pacific Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 342, 102 S.Ct. 1815, 72 L.Ed.2d 114 (1982); *see also Jackson Rapid Delivery Serv., Inc. v. Thomson Consumer Elecs., Inc.,* 210 F. Supp. 2d 949, 952 (N.D. Ill. 2001) ("To determine if there is a contractual promise to pay we look primarily to the bills of lading, bearing in mind that the instrument serves both as a receipt and as a contract."). In other words, a bill of lading "records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract for carriage." *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 94, 130 S.Ct. 2433, 177 L.Ed.2d 424 (2010) (citation omitted).

A "consignee is the party designated to receive a shipment of goods," but the term "consignee" is "more than a mere designation." *Norfolk S. Ry. Co. v. Groves,* 586 F.3d 1273, 1281 (11th Cir. 2009). To clarify, the "term takes on a legal significance due to the quasi-contractual relationship that arises between the consignee and the carrier." *Id.* As the Seventh Circuit teaches, however, "[n]o liability exists merely on account of being named in the bill of lading." *Evans Prod.,* 729 F.2d at 1113. More specifically, under

Seventh Circuit case law, a unilateral decision to name a consignee on a bill of lading is not enough to create liability for demurrage charges. *See South Tec,* 337 F.3d at 821. The Seventh Circuit's holding is consistent with the Eleventh Circuit's recognition that a party's status as a consignee is a matter of contract, and "[l]ike any contractual relationship, there must be a meeting of the minds between the parties." *Groves,* 586 F.3d at 1281; *see, e.g., CP Rail v. Leeco Steel, LLC*, No. 14 C 6892, 2015 WL 6859287, at *3 (N.D. Ill. Nov. 9, 2015).[4] Nevertheless, a consignee's liability may also arise "by operation of law when the consignee accepts delivery of the goods[.]" *Groves,* 586 F.3d at 1278. "Thus, only an original party to the rail transportation contract, or a consignee by virtue of acceptance of the goods, may be liable for demurrage." *Id.* at 1278-79 (citing *Pittsburgh & C. Ry. Co. v. Fink,* 250 U.S. 577, 581, 40 S.Ct. 577, 63 L.Ed. 1151 (1919).

As discussed, that Allied listed TiEnergy as a consignee on the relevant bills of lading, alone, is not enough to establish TiEnergy's liability for demurrage charges. *See Evans,* 729 F.2d at 1113. As the Seventh Circuit explains, "being listed by third parties as a

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[4]In *CP Rail*, Judge Gettlemen determined that the plaintiff had failed to properly allege liability because it did not show a meeting of the minds as to defendant's status as a consignee. *See CP Rail v. Leeco Steel, LLC*, No. 14 C 6892, 2015 WL 6859287, at *3 (N.D. Ill. Nov. 9, 2015). Judge Gettlemen did not discuss whether the plaintiff had sufficiently alleged that the defendant was a consignee by operation of law – as is the case here – although he did reject the plaintiff's argument in regard to an implied-in-fact contract under Wisconsin law. *See id.* at *4.

consignee on some bills of lading is not alone enough to make [defendant] a legal consignee liable for demurrage charges, although it, *coupled with other factors,* might be enough to render [defendant] a consignee." *South Tec.,* 337 F.3d at 821 (emphasis added). Thus, the Court turns to other relevant factors to determine whether TiEnergy is a consignee by operation of law, including whether the "consignee has played an active role in the railroad transportation contract or has an interest in or control over the goods," *see South Pacific Transp. Co. v. Matson Navigation Co.,* 383 F. Supp. 154, 157 (N.D. Cal. 1974), or whether the consignee accepted delivery of the goods. *See Groves,* 586 F.3d at 1278 ("a consignee's liability is quasicontractual, and arises by operation of law when the consignee accepts delivery of the goods[.]")); *see also Universal Am-Can, Ltd. v. Nw. Steel & Wire Co.,* No. 01 C 50220, 2002 WL 88924, at *1 (N.D. Ill. Jan. 22, 2002) ("Consignees may be liable for freight charges based on acceptance of delivery even where the initial liability for the charges rests with the consignor.").

Here, it is undisputed that Allied and TiEnergy had an oral agreement that Allied would facilitate the shipment of Huron's used railroad ties to TiEnergy's facilitity in Ashland, Wisconsin, at which point TiEnergy would take possession of the ties and safely dispose of them. There is also undisputed evidence in the record that TiEnergy accepted the railroad cars containing Huron's ties at its Ashland facility and unloaded the ties. (Allied Stmt. Facts. ¶ 16.) Further, TiEnergy had a beneficial interest in the ties because

once TiEnergy took possession of them at its Ashland facility, it ground them up and then sold them to its customer XCel Energy to be incinerated. Viewing the evidence and all reasonable inferences in TiEnergy's favor, by accepting the Huron ties at the Ashland facility, TiEnergy is a consignee by operation of law. *See Groves,* 586 F.3d at 1278 ("By accepting delivery of a shipment, the consignee's conduct assumes a quasi-contractual significance by virtue of the transportation contract, which identifies the parties and assigns responsibility for particular charges."); *C.F. Arrowhead Servs., Inc. v. AMCEC Corp.,* 614 F. Supp. 1384, 1387 (N.D. Ill. 1985) (party "liable for charges by operation of law because it accepted delivery of goods"). Moreover, TiEnergy had a beneficial interest in the goods because after processing the railroad ties, it sold them to XCel, further underscoring the conclusion that TiEnergy was a consignee. *See Matson Navigation,* 383 F. Supp. at 157. The Court therefore grants Wisconsin Central's motion for summary judgment and denies TiEnergy's cross-motion for summary judgment.

Thus, the Court turns to Allied's motion for summary judgment to determine TiEnergy's and Allied's responsibilities as consignee (TiEnergy) and shipper/consignor (Allied) under the circumstances. As the *Groves* decision instructs, "[u]nless the bill of lading provides to the contrary, the consignor remains primarily liable for the freight charges and pursuant to the carrier's tariff, the consignee becomes liable for demurrage charges at the freight's destination." *Groves,* 586 F.3d at 1278; *see also Steel Transp., Inc. v.*

Joseph T. Ryerson & Sons, Inc., No. 86 C 7328, 1987 WL 12927, at *2 (N.D. Ill. June 24, 1987) ("The general rule is that a consignee [] becomes liable for freight charges when it accepts the freight."). There "are exceptions to a consignee's demurrage liability," including that "an agent-consignee can avoid demurrage liability by notifying the carrier of its agency status and providing the carrier with the name and address of the shipment's beneficial owner prior to accepting delivery." *Groves,* 586 F.3d at 1278-79; *see also South Tec,* 337 F.3d at 816-17; 49 U.S.C. § 10743(a)(1).

It is undisputed that the demurrage charges at issue resulted from the railroad cars' delayed movement in and out of TiEnergy's facility. (Allied Stmt. Facts. ¶ 21.) More specifically, in November 2013, Allied informed TiEnergy that it would work with CN to release the first shipment of railcars from Sault Ste. Marie, Ontario for delivery to TiEnergy's siding facility in Ashland. (*Id.* ¶¶ 15, 16; R. 66-1, Berglund Dep., at 62-63.) In response, when communicating with Allied, TiEnergy's President Steven Berglund agreed to be responsible for releasing the cars from TiEnergy's siding facility back to CN after unloading them. (Allied Stmt. Facts ¶ 16; Berglund Dep., at 64-65). Once the first load of cars arrived at TiEnergy's siding facility and were unloaded, Berglund was unable to release the cars back to CN, after which he asked for Allied's assistance. (Allied Stmt. Facts ¶ 17.) Immediately thereafter, Allied obtained direction from CN on how Allied could also release the railcars from TiEnergy's

facility so that there could be multi-customer access to release the railcars back to CN. (*Id*. ¶ 18.) This process required TiEnergy to send CN a letter on its letterhead authorizing Allied to release the cars on TiEnergy's siding. (*Id*.; Berglund Dep., at 70.) It is undisputed that TiEnergy never provided the necessary authorization to CN that would allow Allied to release the cars or have any control over the movement of the railcars in TiEnergy's facility. (Allied Stmt. Facts ¶ 19; Berglund Dep., at 71.) Without TiEnergy's necessary authorization, only TiEnergy could release the railcars back to CN. (Allied Stmt. Facts ¶¶ 18, 19; Berglund Dep., at 70-71.) Also, despite CN's notices to TiEnergy, TiEnergy did not affirmatively "order in" cars to be placed in its siding, resulting in delays of the incoming railway cars. (Allied Stmt. Facts ¶¶ 24, 27; Berglund Dep., at 89.)

Construing the evidence and all reasonable inferences in TiEnergy's favor, because Allied did not have the authority to release the railcars back to CN once they were at TiEnergy's Ashland facility and TiEnergy did not affirmatively "order in" cars as required, TiEnergy is liable and responsible for the demurrage charges at issue. *See Groves,* 586 F.3d at 1278. TiEnergy's argument that it falls within the "agent" exception to its demurrage liability is without merit because there is no evidence in the record that TiEnergy notified CN of its agency status and provided CN with the name and address of the shipment's beneficial owner prior to accepting delivery. *See Groves,* 586 F.3d at 1279; *South Tec,* 337 F.3d at 816-17; *see also* 49 U.S.C. § 10743(a)(1). Similarly,

TiEnergy's perfunctory suggestion that the weather conditions in December 2013 excuses it from liability – presumably that the snowfall triggered a "force majeure" event under the CN Tariffs – fails because TiEnergy did not develop this argument or support it with any legal authority. *See United States v. Cisneros,* 846 F.3d 972, 978 (7th Cir. 2017) ("perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived.").

Accordingly, Allied did not breach the simple, oral agreement with TiEnergy and TiEnergy's attempts to add promises and obligations to that agreement are not supported by the record. *See Life Plans, Inc. v. Security Life of Denver Ins. Co.,* 800 F.3d 343, 349 (7th Cir. 2015) ("To survive summary judgment, the non-moving party must show evidence sufficient to establish every element that is essential to its claim and for which it will bear the burden of proof at trial."). As to TiEnergy's other claims in its First Amended Third-Party Complaint, it is undisputed that Allied and TiEnergy did not have an agreement that Allied would indemnify TiEnergy for any demurrage charges incurred. (Allied Stmt. Facts ¶ 31.) TiEnergy's implied indemnification argument fares no better because TiEnergy was not "blameless" under the circumstances. *See Schulson v. D'Ancona & Pflaum LLC,* 354 Ill. App. 3d 572, 576 (1st Dist. 2004) ("Under implied indemnity, a promise to indemnify will be implied by law where a blameless party is derivatively liable to the plaintiff based on the party's relationship with the one who actually caused the plaintiff's injury."). Last, TiEnergy's argument based

on the Illinois' Joint Tortfeasor Contribution Act, 740 ILCS 100/2, is similarly unavailing because Allied is not "subject to liability in tort." *See Board of Trs. of Cmty. Coll. Dist. No. 508 v. Coopers & Lybrand,* 208 Ill. 2d 259, 278 (Ill. 2003). The Court therefore grants Allied's summary judgment motion as to TiEnergy's First Amended Third-Party Complaint.

On a final note, TiEnergy's argument that Wisconsin Central has no right to collect the demurrage charges because CN – not Wisconsin Central – was the party to the contract with Allied is unavailing. To clarify, the transportation contract at issue specifically includes a disclosure that CN is contracting on behalf of its United States operating companies, which includes Wisconsin Central, CN's wholly-owned operating railroad subsidiary. (R. 66-9 TiEnergy's Ex. I, Trans. Agmt. CN 526617-AA.)

CONCLUSION

For the reasons set forth above, the Court grants Wisconsin Central's and Allied's summary judgment motions and denies TiEnergy's motion for summary judgment.

Date: April 21, 2017

ENTERED

/s/
AMY J. ST. EVE
United States District Court Judge

APPENDIX E

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 8, 2018

Before

FRANK H. EASTERBROOK, *Circuit Judge*
AMY C. BARRETT, *Circuit Judge*
JOSEPH P. STADTMUELLER, *District Judge*

No. 17-2343

WISCONSIN CENTRAL LIMITED,
Plaintiff-Appellee,

v.

TIENERGY, LLC,
Defendant/Third Party Plaintiff
Appellant,

v.

ALLIED TRACK SERVICES, INC.,
Third Party Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 15-cv-02489-AJS

Amy J. St. Eve,
Judge.

O R D E R

Defendant/Third Party Plaintiff-Appellant filed a petition for panel rehearing and rehearing en banc on July 17, 2018. No judge in regular active service has requested a vote on the petition for rehearing en banc[*], and all members of the original panel have voted to deny rehearing.

Accordingly, IT IS ORDERED that the petition for rehearing and rehearing en banc is DENIED.

[*]Circuit Judge Amy J. St. Eve did not participate in the consideration of this petition for rehearing.