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1055 THOMAS JEFFERSON STREET NW SUITE 500 WASHINGTON, DC 20007
TELEPHONE: 202/342-5200 FACSIMILE: 202/342-5219

RICHARD BAR
BRENDAN COLLINS
STEVEN JOHN FELLMAN
EDWARD D. GREENBERG
KATHARINE FOSTER MEYER
DAVID K. MONROE
TROY A. ROLF
DAVID P. STREET
KEITH G. SWIRSKY
THOMAS W. WILCOX
CHRISTOPHER B. YOUNGER

SVETLANA B. LYUBCHENKO

MINNESOTA OFFICE:
700 TWELVE OAKS CENTER DRIVE, SUITE 204
WAYZATA, MN 55391
(T) 952/449-8817 (F) 952/449-0614

WRITER'S DIRECT E-MAIL ADDRESS
TWILCOX@GKGLAW.COM

WRITER'S DIRECT DIAL NUMBER
202-342-5248

December 7, 2015

By E-Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Docket No. FD 35981, Finch Paper LLC – *Petition for Declaratory Order*

Dear Ms. Brown:

Accompanying this letter for filing in the referenced docket is a Petition For Declaratory Order submitted on behalf of Finch Paper LLC. Please note that the required filing fee of \$1,400.00 is being separately hand-delivered to the Board by courier today.

Do not hesitate to contact the undersigned with any questions or if you need additional information.

Sincerely,

Thomas W. Wilcox
Attorney for Finch Paper LLC

cc: John K. Fiorella, Esq.

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket FD 35981

FINCH PAPER LLC -- PETITION FOR DECLARATORY ORDER

Pursuant to 4 U.S.C. §554(e) and 49 U.S.C. §721, and upon the order of the U.S. District Court for the Northern District of New York, *Delaware and Hudson Railway Company, t/a CP Rail v. Finch Paper LLC*, 1:15-cv-417, (N.D.N.Y. 2015), attached hereto as Exhibit 1, Finch Paper LLC (“Finch”) hereby petitions the Surface Transportation Board (“Board” or “STB”) for an order declaring that certain practices and actions of the Delaware and Hudson Railway Company c/p CP Rail (“CP Rail”) related to its attempted assessment of demurrage charges against Finch are unreasonable practices in violation 49 U.S.C. §10702 and also are contrary to §10746, that CP Rail has, on a continuous basis since October 2012, violated its statutory common carrier obligations to Finch under 49 U.S.C. §11101, and that CP Rail is liable for damages to Finch under 49 U.S.C. §11704 for its violations of §11101.

I.

The Parties

Finch Paper LLC is a Delaware Limited Liability Company with its principal place of business in Glens Falls, New York. Finch owns and operates a paper manufacturing mill that has been located along the banks of the Hudson River in the heart of Glens Falls, New York for 150 years.

According to the Complaint filed in the Northern District of New York, discussed in more detail below and attached as Exhibit 2, CP Rail is a trade name for the Canadian Pacific Railway's United States subsidiary, the Delaware and Hudson Railway Company ("D&H"). The D&H is described in the complaint as "a Delaware Corporation trading under the registered name of CP Rail" with its principal place of business "in New York." *Id.* at 1.

II.

Factual Background and Procedural History of Court Proceedings

Finch's mill in Glens Falls manufactures paper and paper products. The raw materials utilized by Finch include pulp from trees grown in forests and tree farms within a 90 mile radius of the mill. Finch's continued existence therefore is vital to the local economies and citizens of that region of upstate New York. The mill is located at the end of an approximately 3.5 mile line of rail owned and operated by CP Rail that extends from its Fort Edward, New York rail yard. CP Rail delivers carloads of wood pulp, ammonia, caustic soda, sulfur, and corn starch to the facility for use in the paper manufacturing process. These rail cars are moved in and out of the paper mill's track facilities via switching operations conducted by CP Rail from the Fort Edward yard and from CP Rail's yard in Whitehall, New York, located 45 miles upstream on CP Rail's main line. The mill has no other access to railroad transportation, and so it is captive to CP Rail for rail service.

In its Complaint CP Rail asked the District Court to order Finch to pay CP Rail \$1,349,050 in demurrage charges, and \$9,158 in other charges, assessed to Finch by CP Rail during certain months between 2013 and 2015. On June 11, 2015, Finch filed an Answer to the Complaint in which Finch denied liability and set forth numerous affirmative defenses to the

claim for payment asserted by CP Rail. The Answer and affirmative defenses raise numerous factual and legal issues within the Board's jurisdiction and unique expertise.

Finch also asserted a Counterclaim against CP Rail for damages based upon the fact that CP Rail has, since October, 2012, continuously violated its obligations under 49 U.S.C. §11101 when it unilaterally and substantially reduced rail service to Finch's facility from five days per week to only three days per week. This reduction in service, despite Finch's repeated oral and written protests and requests that service be restored to prior levels, and CP Rail's failure to adhere to even its unilaterally imposed reduced schedule - violated CP Rail's statutory obligations to Finch under §11101 and has caused significant economic harm to Finch. A copy of the Answer and Counterclaim is attached as Exhibit 3.

On July 9, 2015, Finch moved the District Court to stay further action in the court proceeding and to refer six questions to this Board under the doctrine of primary jurisdiction. These questions, which are set forth below, sought referral to the Board of a number of factual and legal issues related to Finch's affirmative defenses, as well as several factual and legal issues pertaining to Finch's interrelated counterclaim asserting that CP Rail has, since October, 2012, continuously and repeatedly violated its obligations under 49 U.S.C. §11101. On November 10, 2015, the District Court granted Finch's motion and referred all six of the questions raised by Finch to this Board for resolution.¹ The District Court also stayed further action in the complaint proceeding pending the STB's ruling on the issues referred.

¹ The District Court slightly reworded several of the issues as drafted by Finch, but did not change their substance.

III.

Questions Referred to the Board for Resolution

In its November 10, 2015 Order, the District Court referred the following questions to the STB for resolution:

- (a) Whether CP Rail's violated its statutory common carrier obligations to Finch Paper under 49 U.S.C §11101 by reducing the frequency of CP Rail's switching services to the Facility;
- (b) Whether CP Rail also violated its common carrier obligations under 49 U.S.C. §11101 by failing to provide switching services even in accordance with its reduced switching schedule;
- (c) Whether some or all of the demurrage charges CP Rail seeks to recover arose, in whole or in part, from delays caused by CP Rail or from CP Rail's inability to deliver railcars due to the fault of CP Rail, whether through the alleged violation of 49 U.S.C. §11101 described in Finch Paper's Counterclaim or through other actions or inactions on the part of CP Rail;
- (d) Whether CP Rail's calculation and assessment of demurrage charges against Finch Paper after "constructively placing" its railcars was improper, because the delays preventing the "actual placement" of those railcars were the fault CP Rail, making the assessment of the demurrage charges an unreasonable practice in violation of 49 U.S.C. §10702;
- (e) Whether the demurrage charge CP Rail has established in Tariff #2 specific to railcars of ammonia is reasonable and in accordance with 49 U.S.C. §10746, or is an unreasonable practice under 49 U.S.C. §10702; and
- (f) Whether the terms and conditions contained in CP Rail's Tariff #2 pertaining to the assessment of demurrage, and rules and practices used by CP Rail to apply the tariff terms to Finch Paper, are consistent with the language and policy goals of 49 U.S.C. §10702 and §10746.

Finch accordingly submits these questions to the Board for its consideration and resolution.

IV.

Request for Procedural Schedule and the Need for Discovery

Consistent with the Board's disposition of other petitions for declaratory orders prompted by the referral of issues to the Board by state or federal courts, Finch requests that the Board establish a procedural schedule under the Board's Modified Procedures at 49 C.F.R. Part 1112. STB Docket No. 42068, *Capitol Materials Inc. – Petition for Declaratory Order – Certain Rates and Practices of Norfolk Southern Railway Co.*, (served January 16, 2002); STB Finance Docket No. 33971, *Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA*, (served December 22, 2000). To date, no appreciable factual record has been developed in the court proceeding, and there has been no discovery. Accordingly, Finch proposes the Board adopt the following procedural schedule, with "D" being the service date of the decision by the Board or the Director of the Office of Proceedings commencing a declaratory order proceeding in this docket:

Close of Discovery – D + 120 days

Finch's opening statement – D + 150 days

CP Rail's reply statement – D + 180 days

Finch's rebuttal statement – D + 210 days

Good cause exists for including a 120-day period for the parties to conduct discovery prior to Finch's submission of its Opening Statement. The filings by both parties before the District Court, and the November 10 Order all demonstrate that this is a proceeding that will require the development of a factual record, rather than one presenting purely legal questions. In declaratory order proceedings where the factual record needs to be developed, the Board routinely includes a discovery component in the procedural schedule. *See, e.g.*, STB Finance

Docket No. 35324, *Teck Metals Ltd – Petition for Declaratory Order – Practices of Wheeling & Lake Erie Railway Co.*, (served January 22, 2010), STB Docket No. 42106, *Ameropan Oil Corporation – Petition for Declaratory Order – Reasonableness of Demurrage Charges* (served May 29, 2008); STB Docket No. 42102, *Railroad Salvage & Restoration, Inc., - Petition for Declaratory Order – Reasonableness of Demurrage Charges* (served December 20, 2007).

In this proceeding, there is no legitimate dispute that there are numerous factual issues bearing on the questions referred to the Board that will require discovery in order to develop the record for decision. These factual issues include, *inter alia*, (1) whether the delays giving rise to the demurrage charges it seeks to collect were caused by CP Rail or through other actions or inactions on the part of CP Rail, including its breach of an agreement between the parties that CP Rail had a standing instruction to deliver ammonia rail cars into the facility upon arrival; (2) whether CP Rail's actions or inaction concerning its rail lines and the tracks owned and operated by Finch were the reason railcars could not be placed for unloading at Finch's facility or picked up when unloaded; (3) CP Rail's internal policies and practices that led to the adoption by CP Rail of the demurrage charges and methods of calculation of demurrage contained in CP Rail Tariff #2 and related documents; (4) whether CP Rail's demurrage charges and practices are inconsistent with the language and policy goals of 49 U.S.C. §§10702 and 10746; (5) the circumstances and business reasons for CP Rail abruptly and dramatically reducing service to Finch's facility in 2012 and the resulting business harm to Finch from this action; and (6) the extent to which CP Rail has failed to meet even its unilaterally imposed reduced schedule, and the resulting business harm to Finch from such failures, including reduced production and increased costs to procure raw materials from truck transporters. Development of these and other relevant facts through discovery are required to resolve claims that a given practice by a

carrier is unreasonable, or if it has violated its common carrier obligation, because resolution of both legal questions turn on the particular facts of the dispute. *See, e.g., Union Pacific R.R. v. Bartlett & Co.*, 393 F.Supp. 1347, 1353 (W.D. Mo. 1975). STB Docket 42060 *North American Freight Car Ass'n, et al v. BNSF Railway Co.* (served January 26, 2007).

The need to develop the factual record underlying the legal issues in dispute through discovery was expressly acknowledged by CP Rail before the District Court. CP Rail represented that there are “a myriad of additional facts necessary for Defendant to prevail on [its counterclaim against CP Rail]” Order at 8. Indeed, CP Rail cited the need to develop a factual record through discovery as a reason to not refer any issues to the STB. *See Id.* at 19 (rejecting CP Rail’s arguments that referral to the STB was premature, because “a factual record has not been developed”). The District Court also rejected CP’s argument that referral was inappropriate because the STB is a small agency with limited resources and a chronic inability to timely resolve issues presented to it. The District Court concluded, that “the allegations in the Complaint and Counterclaim make clear that there are factual issues best resolved pursuant to the STB’s jurisdiction” and that discovery was not needed in the District Court “to establish that predicate.” *Id.* at 20. Thus, the District Court is looking to the Board to develop the factual record underlying the issues presented in the referred questions.

This is, therefore, clearly not a proceeding that involves largely legal issues or a factual record sufficient for the STB to resolve the controversies without discovery. Accordingly, inclusion of a period for the parties to engage in discovery is warranted, and the 120 day period Finch proposes for discovery in this proceeding is appropriate.

IV.

Conclusion

For all the reasons set forth in this Petition, the Board should commence a Declaratory Order proceeding in this Docket, and adopt the procedural schedule proposed by Finch.

Respectfully submitted,



Thomas W. Wilcox
Brendan Collins
Svetlana Lyubchenko
GKG Law, P.C.
The Foundry Building
1055 Thomas Jefferson Street NW
Suite 500
Washington, DC 20007
(202) 342-5248

Attorneys for Finch Paper LLC

December 7, 2015

EXHIBIT 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DELAWARE AND HUDSON RAILWAY
COMPANY, t/a CP Rail,

Plaintiff,

v.

1:15-cv-417

FINCH PAPER LLC,

Defendant.

THOMAS J. McAVOY
Senior United States Judge

DECISION and ORDER

Plaintiff Delaware and Hudson Railway Company, t/a CP Rail ("CP") commenced the instant action, alleging that Defendant Finch Paper, LLC ("Finch") had amassed unpaid demurrage charges on rail tracks owned by the Plaintiff. Defendant answered the Complaint, filed a counterclaim, and filed a motion for an order referring the action to the Surface Transportation Board ("STB") pursuant to the primary jurisdiction doctrine. See *dk.* # 21. Plaintiff filed a motion to dismiss Defendant's counterclaim for failing to state a claim upon which relief could be granted. See *dk.* # 20. The parties have briefed the issues and the Court has determined to resolve the matter on submissions.

I. BACKGROUND

This action concerns demurrage charges that Plaintiff alleges Defendant owes for rail cars owned by Plaintiff and left on tracks controlled by Defendant. Plaintiff commenced this action by filing a Complaint on April 8, 2015. See *dk.* # 1 ("Compl.").

The Complaint asserts jurisdiction pursuant to 28 U.S.C. § 1337, alleging that the matter arose under 49 U.S.C. § 10743(a) as a suit for interstate freight and transportation charges. Id. at ¶ 1. Plaintiff alleged that the instant matter arose from charges assessed under tariffs that Plaintiff published for supplemental services to railcars that CP performed for Finch. Id. at ¶ 7. The tariff in question was the Canadian Pacific Tariff # 2 Railcar Supplemental Services tariff ("Tariff # 2"). Id.

In this context, demurrage amounts to damages owed by the charterer of a railcar to the car's owner "for the charterer's failure to load or unload cargo by the agreed time." Bryan A. Gardner, BLACK'S LAW DICTIONARY, 8th Ed. (2004). Count One of Plaintiff's Complaint alleges that CP performed railcar supplemental services for Finch at Glen Falls, New York. Compl. at ¶ 8. Rail cars were placed on Finch's Glens Falls track "after the free time to unload the cars had expired" under Tariff # 2. Id. The demurrage "charges accrued at times between September 2013 and March 2015. Id. Plaintiff contends that Defendant owes damages of \$1,349,050 and has refused Plaintiff's demands to pay those charges. Id. at ¶¶ 9-10. Count Two of the Complaint seeks damages for switching and handling services performed by Plaintiff for Defendant on the Glens Falls tracks between 2013 and 2015. Id. at ¶ 12. Under Tariff #2, Plaintiff alleges, Defendant owes \$9,158 for services performed and has refused to pay those bills. Id. at ¶¶ 13-14.

Defendant filed an answer with affirmative defenses and a counterclaim on June 11, 2015. See dk. # 14 ("Answer"). As an affirmative defense, Defendant alleges that "[a]ny amounts owed to Plaintiff must be setoff against those amounts that Plaintiff owes Defendant as damages pursuant to 49 U.S.C. § 11704(b) for failure to provide

service upon reasonable request pursuant to 49 U.S.C. § 11101, i.e., by failing and/or refusing to provide reasonable switching services.” Id. at ¶ 18. Another of Defendant’s affirmative defenses contends that “[s]ome or all of the demurrage charges that Plaintiff seeks to recover are unreasonable pursuant to 49 U.S.C. § 10702 and do not fulfill the purposes and requirements of 49 U.S.C. § 10746.” Id. at ¶ 19. A third affirmative defense contends that “[t]he rules and/or practices pursuant to which Plaintiff seeks to compute, assess, and recover some or all of the demurrage charges in this case are unreasonable pursuant to 49 U.S.C. § 10702.” Id. at ¶ 20. Defendant also contends that “[t]he rules and/or practices pursuant to which Plaintiff seeks to recover some or all of the demurrage charges in this case do not fulfill the purposes and requirements of 49 U.S.C. § 10746.” Id. at ¶ 22.

In addition, Defendant asserts a counterclaim alleging a violation of 49 U.S.C. § 11101. Defendant alleges that the counterclaim is “compulsory” because it arises “out of the same transactions and occurrences that are the subject matter of the Complaint” and insists that the Counterclaim should be stayed pending a decision by the STB pursuant to the primary jurisdiction doctrine. Id. at ¶¶ 34, 36.

The counterclaim alleges that Finch’s paper manufacturing facility in Glens Falls was constructed in 1865 and is “rail-served” only by Plaintiff. Id. at ¶ 37. CP delivers railcars of ammonia, wood pulp, starch, sulfur and caustic soda by a rail line that extends several miles from CP’s Fort Edward rail yard to Finch’s facility. Id. CP’s rail service for Defendant involves “switching rail cars of raw materials into the Facility, and switching empty rail cars of raw material out of the Facility after they are unloaded.” Id. at ¶ 38. While Finch has several tracks at the facility, those tracks have limited storage.

Id. at ¶ 39. Defendant's production process requires switching of railcars in and out of the plant on a regular basis. Id. at ¶ 40.

Defendant alleges that before October 1, 2012, CP provided once-daily switching services at the facility daily Monday through Friday and "occasionally on weekends." Id. at ¶ 41. These switching services delivered railcars from CP's main line onto the facility's tracks. Id. On September 24, 2012, CP announced that as of October 1, 2012, the company would permanently reduce switching services at the facility to once daily on Mondays, Wednesdays and Fridays. Id. at ¶ 44. CP also imposed a new requirement that switching services needed to be requested by 8 AM on the day Finch desired the switching. Id. Despite numerous requests from Defendant, CP refused to alter this decision. Id. at ¶ 45. In addition to this formal reduction in services, Plaintiff also began failing or refusing to provide switching services even on the three designated days. Id. at ¶ 46.

Defendant alleges that CP's alleged refusal and failure to provide weekday switching services, and its failure to provide the promised reduced services, caused "a severe disruption of the flow of cars into and out of the Facility." Id. at ¶ 47. This situation, Defendant alleges, "caused shortages of railcars carrying raw material, which in turn has severely hampered the ability of Finch to operate its facility." Id. The situation also significantly disrupted the Defendant's operations and led to significant additional costs for Finch. Id. at ¶ 48. These actions, Defendant alleges, have also led to improper demurrage charges against Finch. Id. at ¶ 49.

Until June 1, 2012, Finch had an agreement with CP to lease certain tracks from the Plaintiff near the facility. Id. at ¶ 42. These tracks held up to 26 rail cars. Id. If the

cars were located on the leased tracks CP did not assess demurrage charges against Defendant. Id. CP terminated this lease and storage agreement on May 7, 2012, and after June 1, 2012 Defendant no longer had the ability to store railcars. Id. at ¶ 43.

Defendant alleges that Plaintiff's conduct caused damages in several ways, including "(1) improperly assessed demurrage charges; (2) significant additional costs in obtaining raw materials from alternative sources using other transportation modes such as truck; (3) additional costs in attempting to manage and operate its Facility as a result of limited raw materials caused by the lack of rail deliveries; and (4) increased labor costs." Id. at § 51. Defendant also alleges that such conduct violated Plaintiff's obligation to provide service under 49 U.S.C. § 11101. Id. at § 50.

Plaintiff then filed the instant motion to dismiss the Defendant's counterclaim, and Defendant filed the instant motion to dismiss and/or stay pursuant to the primary jurisdiction doctrine. The parties briefed the issues, bringing the case to its present posture.

II. LEGAL STANDARD

This matter involves a motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6). In addressing such motions, the Court must accept "all factual allegations in the complaint as true, and draw[] all reasonable inferences in the plaintiff's favor." Holmes v. Grubman, 568 F.3d 329, 335 (2d Cir. 2009). This tenet does not apply to legal conclusions. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 678. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to

relief that is plausible on its face.” Id. (quoting Bell Atl. v. Twombly, 550 U.S. 544, 570 (2007)). The Court will address the standard that applies to motions raising the issue of primary jurisdiction at the appropriate time.

III. ANALYSIS

Two motions are before the Court. For reasons that will become apparent, the Court will first address Plaintiff’s motion to dismiss the Counterclaim.

A. Plaintiff’s Motion to Dismiss the Defendant’s Counterclaim

Plaintiff argues that Defendant’s Counterclaim fails to state a claim upon which relief can be granted. Plaintiff argues that the Counterclaim fails to allege facts sufficient to make Defendant’s right to relief on the Counterclaim plausible, as required by the standard stated above. Plaintiff insists that the Counterclaim is rife with conclusory statements, such as allegations that the Plaintiff’s actions caused a “severe disruption in the flow of cars into and out of the Facility,” and “significant disruptions to Finch’s operations,” and that no other factual allegations in the Counterclaim would support these conclusions. Plaintiff suggests that Defendant’s Counterclaim needed to include allegations of “when the alleged disruptions in the flow of car occurred, the specific circumstances that led to the alleged disruptions, or how the disruptions in questions [sic] disrupted Finch’s operations.” Plaintiff’s Brief, dkt. # 20-1, at 4-5. Likewise, Plaintiff complains, Defendant’s allegation that CP’s conduct led Defendant to incur “significant additional costs” is conclusory, and that the Counterclaim would be plausible only if Finch included “further specifics on the circumstances of the alleged damages or even when the alleged damages occurred.” Id. at 5.

Plaintiff also contends that the facts pled do not support a claim that CP failed to provide adequate service,¹ since whether the service is adequate must be judged by the circumstances: “[w]hether or not CP’s alleged actions were a violation of its obligation to provide service would depend on the specific facts, taking into account circumstances that may have justified the carrier’s actions.” Id. at 7. Thus, Plaintiff insists, Defendant must “allege more than simply that it did not receive the frequency of services that it would have preferred.” Id.² While Plaintiff does not assert that the claims are barred by the statute of limitations, Plaintiff contends that Defendant’s failure to bring them earlier demonstrates their implausibility.³ Instead, Plaintiff insists, Defendant’s Counterclaim serves only one purpose: to invoke the jurisdiction of the STB.

The Court will deny the motion. Defendant brings the instant counterclaim alleging that Plaintiff violated 49 U.S.C. § 11101. In relevant part, that statute provides

¹Plaintiff’s brief does not explain the legal standard for such a claim, but instead simply states that specific facts not alleged in the Counterclaim are required to prove that cause of action.

²Plaintiff insists that the plausibility standard requires that Defendant plead facts concerning “whether Finch’s volumes were sufficient to justify the cost of providing five-day-a-week switching and how the frequency of switches affected the total number of rail cars that Finch received over a given period of time. Did Finch receive 0, 1, 50 or 100 less rail cars in a year due to the alleged decreased switching frequency? How many cars did Finch in fact receive? How many switches does Finch claim CP missed and when? Finch does not say. Finch’s omission of these key factual allegations underscores the implausibility of its Counterclaim.”

³Plaintiff cites to no case law for the proposition that a claim not barred by the applicable statute of limitations should be dismissed because being filed at a date later than a party would expect makes that claim implausible. The Court is aware of no such standard.

that “[a] rail carrier providing transportation or service subject to the jurisdiction of the [STB] under this part shall provide the transportation or service on reasonable request.”

49 U.S.C. § 11101(a). A party seeking damages pursuant to 49 U.S.C. 11704 must show both a violation of the statute and damages as a result of that violation.

Reaemco, Inc. v. Allegany Airlines, 496 F.Supp. 546, 559 (S.D.N.Y. 1980); see also, 49 U.S.C. § 11704. Defendant here alleges that, by unilaterally deciding to limit service in a way that prevented Defendant from accessing materials necessary for production in 2012, Plaintiff violated its obligations under the law and damaged Defendant’s ability to operate its business. Such allegations make it plausible that Defendant is entitled to relief on this claim.

Plaintiff’s argument here, as explained above, is not really that Defendant has failed to plead facts, which if proved, would entitle Defendant to relief. Instead, Plaintiff insists that the facts as pled are insufficient to prove that the Defendant’s conduct was not reasonable under the circumstances. Plaintiff suggests a myriad of additional facts necessary for Defendant to prevail on this claim. The Court is unpersuaded that such additional facts are necessary to state a plausible claim to relief. The Court notes that a pleading is insufficient when it “offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action [.]’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id. When considering a motion to dismiss in the discrimination context “the question is not whether the plaintiff is *likely* to prevail, but whether the well-pleaded

factual allegations *plausibly* give rise to an inference of unlawful discrimination, *i.e.*, whether plaintiffs allege enough to '[nudge] their claims across the line from conceivable to plausible.'" Vega v. Hempstead Free School Dist., No. 14-2265-cv, Slip. Op. at 30, 801 F.3d 72, — (2d Cir. Sept. 2, 2015) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Courts have found that "the notion that *Twombly* imposed a heightened standard that requires a complaint to include specific evidence, factual allegations in addition to those required by Rule 8, and declarations from the persons who collected the evidence is belied by the *Twombly* opinion itself." Arista Records, LLC v. Doe 3, 604 F.3d 110, 119 (2d Cir. 2010). Plaintiff's argument—summarized above—demands just this type of evidence. Defendant's allegations here, which describe the specific conduct by Plaintiff that led to the Defendant's inability to obtain materials to operate its business, is sufficient to draw an inference that Plaintiff could be liable for this conduct. Plaintiff's demand for exact numbers and dates demands fact pleading that Twombly and Iqbal do not require. See, e.g., Hedges v. Town of Madison, 456 Fed. Appx. 22, 23 (noting that the Supreme Court's post-Twombly pleading standard "did not 'require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its fact.')" (quoting Twombly, 550 U.S. at 570).⁴

⁴Plaintiff also contends that Defendant's allegations of damages are implausible because the period in which they occurred extends to a time earlier than when Plaintiff began assessing demurrage charges, and it is implausible that Plaintiff's actions in 2012 would have caused damages that were only calculated in 2014. The Court reads Defendant's allegations to be that changes in switching procedures disrupted Defendant's business, and that the damages resulting from those changes began in 2012, when the changes first occurred. Charges for demurrage constituted only a part of the resulting damages. Plaintiff's argument is unpersuasive in this respect as well.

Plaintiff's argument that Defendant's Counterclaim fails to state a claim because the Counterclaim's purpose may be to invoke the jurisdiction of the STB is equally unavailing. The Court is here required to evaluate the pleadings in the light most favorable to the Defendant, and to make all inferences in the Defendant's favor. Plaintiff asks the Court to assume that Defendant's Counterclaim serves some improper purpose because the Counterclaim may include facts that implicate the expertise of the STB, and to dismiss the Counterclaim as result. Nothing in the caselaw cited by the Plaintiff permits the Court to ignore the facts alleged in the Counterclaim and dismiss a properly pled claim because that claim might have procedural implications. The Plaintiff's motion will be denied.

B. Defendant's Motion to Refer Issues to the STB

Defendant invokes the primary jurisdiction doctrine and moves to refer certain issues in the action to the STB and stay the lawsuit pending the Board's ruling. "Primary jurisdiction applies where a claim is originally cognizable in the courts, but enforcement of the claim requires, or is materially aided by, the resolution of threshold issues, usually of a factual nature, which are placed within the special competence of the administrative body." Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 58-59 (2d Cir. 1994). The primary jurisdiction doctrine has a "twofold" purpose: "the desire for uniformity and the reliance on administrative expertise." Tassy v. Brunswick Hosp. Center, Inc., 296 F.3d 65, 68 (2d Cir. 2002). A court deciding "whether to apply the primary jurisdiction doctrine . . . must examine whether doing so would serve either of those purposes." Id. A court may also consider "judicial economy as an interest that the primary jurisdiction doctrine can serve." TCG New York, Inc. v. City of White Plains,

305 F.3d 67, 74 (2d Cir. 2002). “The concern for consistency and uniformity is more prevalent in cases involving issues of broad applicability such as the reasonableness of rates or tariffs.” Tassy, 296 F.3d at 69. The doctrine does not apply to cases where the “issues involved . . . ‘are neither beyond the conventional expertise of judges nor within the special competence’” of the administrative agency. Id. at 70-71. In making this decision, “whether an agency is statutorily authorized to resolve a particular issue is not itself determinative of whether to apply the doctrine. Rather, the pertinent questions are whether referral to the agency is necessary to promote uniformity and whether the agency’s expertise would assist the court in resolving difficult factual issues.” Id. at 72. A court should ask “whether an agency’s review of the facts ‘will be a material aid’ to the court ultimately charged with applying those facts to the law.” Id. (quoting Ricci v. Chi. Mercantile Exch., 409 U.S. 289, 305 (1973)).

In the Second Circuit, “[t]here is no fixed formula for deciding when the doctrine applies.” General Elec. Co. v. MV Nedlloyd, 817 F.2d 1022, 1026 (2d Cir. 1987).

“Analysis is on a case-by-case basis.” Id. In applying the doctrine of primary jurisdiction, however, courts are to apply four factors:

- (1) whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency’s field of expertise;
- (2) whether the question at issue is particularly within the agency’s discretion;
- (3) whether there exists a substantial danger of inconsistent rulings; and
- (4) whether a prior application to the agency has been made.

Ellis v. Tribune Television Co., 443 F.3d 71, 82-83 (2d Cir. 2006). “The court must also balance the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings.” National

Communications Ass'n, Inc. v. American Tel. and Tel. Co., 46 F.3d 220, 223 (2d Cir. 1995).

Defendant argues that this case implicates the primary jurisdiction doctrine because the matter arises under the Interstate Commerce Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 10101 et seq., and addresses whether CP can collect demurrage charges pursuant to its tariffs, the reasonableness of those charges, and the reasonableness of the rules and practices governing the calculation and assessment of such charges. Moreover, the Defendant argues, the Counterclaim asserts a violation of CP's obligation to provide service under the Act. Defendant asserts that the following issues should be determined by the STB:

1) whether CP Rail violated its statutory common carrier obligations to Finch Paper under 49 U.S.C. § 11101 by dramatically reducing the frequency of CP Rail's switching services to the Facility; 2) whether CP Rail also violated its common carrier obligations under 49 U.S.C. § 11101 by failing to provide switching services even in accordance with its reduced switching schedule; 3) whether some or all of the demurrage charges CP Rail seeks to recover arose, in whole or in part, from delays caused by CP Rail or from CP Rail's inability to deliver railcars due to the fault of CP Rail, whether through the alleged violation of 49 U.S.C. § 11101 described in Finch Paper's Counterclaim or through other actions or inactions on part of CP Rail; 4) whether CP Rail's calculation and assessment of demurrage charges against Finch after 'constructively placing' its railcars was improper, because the delays preventing the 'actual placement' of those railcars were the fault of CP Rail, making the assessment of the charges an unreasonable practice in violation of 49 U.S.C. § 10702; 5) whether the demurrage charge CP Rail has established in Tariff # 2 specific to railcars of ammonia is reasonable and in accordance with 49 U.S.C. § 10746, or is an unreasonable practice under 49 U.S.C. § 10702; and 6) whether the terms and conditions contained in CP Rail's Tariff # 2 pertaining to the assessment of demurrage, and the rules and practices utilized by CP Rail to apply the tariff terms to Finch Paper, are consistent with the language and policy goals of 49 U.S.C. §§ 10702 and 10746.

Defendant argues that the four factors cited above support primary jurisdiction for the STB. First, Plaintiff's Complaint and Defendant's defenses, as well as the

Counterclaim, involve complex matters of transportation law, practice and policy that are best addressed through the STB's expertise. Doing so would also promote uniformity in federal regulation. Second, Defendant contends that the issue here is the reasonableness and terms of the Plaintiff's tariffs and that such issues are properly addressed by the STB and not this Court. Third, Defendant contends that a substantial risk of an inconsistent ruling will occur if the Court, rather than the STB addresses the reasonableness of the tariff and whether CP violated its common carrier obligations. Whether CP may reduce its service and then charge demurrage to the Defendant has, Defendant argues, "profound implications" for nationwide rail service. As to the fourth factor, Defendant admits that no prior application to the STB has been made, but contends that failing to do so does not alter the calculus on the other factors. Plaintiff responds that this matter does not invoke any particular expertise from the STB, but simply involves a contract claim for demurrage.

The Court agrees with the Defendant that the primary jurisdiction doctrine should be invoked in this matter. "The primary jurisdiction doctrine serves two interests: consistency and uniformity in the regulation of an area which Congress has entrusted to a federal agency, and the resolution of technical questions of facts through the agency's specialized expertise, prior to judicial consideration of the legal claims." Golden Hill Paugussett Tribe of Indians, 39 F.3d at 59. "[I]ssues of fact not within the ordinary ken of judges and which [require] administrative expertise should be resolved primarily by the agency, which Congress has vested with authority over the subject matter, even though the ascertained facts later serve 'as the premise for legal consequences to be judicially defined.'" Id. at 60 (quoting Far East Conference, 342

U.S. at 574).

The Court finds that the factors articulated by the Second Circuit Court of Appeals favor permitting the STB to exercise its expertise in considering the issues identified by the Defendant, and that doing so will promote uniformity on issues of national importance such as the reasonableness of assessing demurrage charges after certain policy changes. As to the first factor, the claims, counterclaim, and defenses⁵ that are the subject of this lawsuit concern specific matters of the reasonableness of rates and assessments of demurrage and questions of whether Plaintiff violated an obligation to provide service on reasonable request that are beyond the ordinary ken of a district court judge. Such matters invoke the particular expertise of the STB and would be better answered by that body than by this Court. Primary jurisdiction “has been applied . . . when an action otherwise within the jurisdiction of the court raises a question of the validity of a rate or practice included in a tariff filed with an agency . . . particularly when the issue involves technical questions of fact uniquely within the expertise and experience of an agency such as matters turning on an assessment of industry conditions.” Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 304 (1976). Just such issues exist here, as Defendant argues that the demurrage charges are unreasonable and the switching practices contrary to promised service, while Plaintiff

⁵The Supreme Court has determined that a court may find that a party invoking the defense of the unreasonableness of a shipping rate may invoke the primary jurisdiction doctrine, even if that defense would more properly be raised as a counterclaim. A court is permitted to consider such defenses as counterclaims when considering the primary jurisdiction doctrine. See Reiter v. Cooper, 507 US. 258, 263 (1993). Plaintiff admits this, but argues that the defenses, like the Counterclaim, are insufficiency pled. The Court rejects this argument for substantially the same reasons that the Court denies Plaintiff’s motion to dismiss the Counterclaim.

insists that industry conditions justified changes in switching practices. The STB is best equipped to address those problems as an initial matter.

As to the second factor, the Court finds that the issue here is more than a matter of contract interpretation of the type regularly decided by this Court. Instead, the issues raised by the Complaint, answers and Counterclaim all address technical questions that combine specific factual issues with regulatory concerns. Such matters are peculiarly within the expertise of the STB and this Court should first defer to that body.

As to the third and fourth factors, the Court finds that there exists a substantial danger of inconsistent rulings if the issues raised by the Plaintiff's practices are left to this Court rather than placed before the STB. See Ellis, 443 F.3d at 88. The Court's decision here, especially to the extent that the Court must evaluate Plaintiff's actions in providing switching service and assessing demurrage rates, create a definite concern that the Court's conclusions may be inconsistent with that of the STB. Such a decision would disrupt the efficient administration of railroad rates and should be avoided. The third factor therefore weighs in favor of granting the Defendant's motion. No prior application has been made to the STB, and therefore this factor weighs against granting the Defendant's motion. See Id., 443 F.3d at 89 ("If prior application to the agency is present, this factor provides support for the conclusion that the doctrine of primary jurisdiction is appropriate. On the other hand, if prior application to the agency is absent, this factor may weigh against referral of the matter to the agency on the basis of primary jurisdiction.").

In sum, the Court finds that the issues raised by this litigation invoke the special expertise of the STB and are not simply contractual issues which could be determined

by the Court applying common-law principles. Permitting the STB to address these issues will lead to more consistent rulings on these matters of rates, the reasonableness of rates, and the obligations of carriers under the federal regulatory scheme. Deferring to the STB under the primary jurisdiction doctrine is appropriate, since “[a] federal agency and a district court are not like two trains, wholly unrelated to one another, racing down the parallel tracks towards the same end . . . It is desirable that the agency and the court go down the same track—although at different times—to attain the statute’s ends by their coordinate action.” Golden Hill Paugusett Tribe of Indians, 39 F.3d at 59.

Plaintiff’s arguments for denying the Defendant’s motion are unpersuasive. As explained above, the Court finds that the issues raised by Plaintiff’s Complaint and Defendant’s Counterclaim and affirmative defenses implicate the particular expertise of the STB in terms of the application and reasonableness of rates. Determining those issues requires more than a simple application of contract law, particularly when it comes to understanding whether changes in switching procedures and schedules represented a disruption in service that violated federal law regarding the reasonableness of rates and the provision of services. Plaintiff’s claim that this is a “simple collection case” is true only if there is no dispute about whether the collection that Plaintiff seeks to make and whether the changes in schedule that allegedly led to the demurrage violated the reasonable service requirements in the federal transportation law subject to the STB’s regulation. Accepting the claims in the Complaint and Counterclaim as true, the Court must find that the issue is about more

than how much demurrage the parties' contract requires the Defendant to pay.⁶ The STB is best equipped to evaluate these claims.

Plaintiff's contention that the Court should consider the potential of lengthy delays that may appear at the STB in deciding the demurrage issue is equally unpersuasive. Plaintiff disputes Defendant's position that Ellis prohibits a Court from considering the length of time the STB would likely require to resolve the issue in question when considering whether to invoke the primary jurisdiction doctrine. The Court agrees that the Second Circuit's position in Ellis was ambiguous and seems to permit a continued consideration of judicial economy in applying the primary jurisdiction doctrine. While Court of Appeals in Ellis noted that "courts (including this Court) have sometimes refused to recognize a primary jurisdiction claim where agency referral would result in undue delay," the Court also found that "more recently, we have noted that such considerations of judicial economy should not be considered because 'the Supreme Court has consistently held that there are only two purposes to consider in determining whether to apply the primary jurisdiction doctrine—uniformity and expertise' and 'the Supreme Court has never identified judicial economy as a relevant factor.'" Ellis, 443 F.3d at 90 (quoting Tassy, 296 F.3d at 68 n.2). At the same time, the Court also noted that other courts had found that judicial economy could have been considered as part of "agency expertise" or some other factor. Id. In the end, the court declined to

⁶The Court notes that a motion to dismiss a claim pursuant to the primary jurisdiction doctrine is brought pursuant to Federal Rule of Civil Procedure 12(b)(6). Tassy v. Brunswick Hosp. Center, Inc., 296 F.3d 65, 66 (2d Cir. 2002). As with other such motions, a court "must construe the complaint in the light most favorable to the plaintiff, accepting all the allegations in the complaint as true." Id. at 67.

resolve the issue because “this case . . . involves highly complicated factual and policy disputes that the FCC is uniquely well-situated to address.” Id. As explained above, the same factors apply here, and any potential delay does not overcome the need to access the STB’s expertise.

Plaintiff also argues that, should the Court determine that the Defendant has stated a claim with respect to the Counterclaim and finds that the Counterclaim should be considered by the STB, the Court should either “stay Finch’s Counterclaim or dismiss it without prejudice.” Plaintiff argues that the Counterclaim is unrelated to the demurrage claims, and therefore the Counterclaim should be dismissed.

The Court disagrees with the Plaintiff that the Counterclaim is unrelated to the demurrage claims. The Defendant’s Counterclaim arises from a dispute about the service that led to the demurrage charges in the first place. Even if the demurrage charges were unrelated to those claims that should be referred to the STB, the process which Plaintiff seeks to invoke focuses on a different question: whether the claims that are not subject to primary jurisdiction should be stayed pending the outcome of the referred claims before the STB, or whether the Court can consider claims not before the Board while the Board considers the matters referred to it. Typically, when a court finds that some claims are subject to the primary jurisdiction doctrine and others are not the court considers whether judicial efficiency would be best served by staying the case and letting the agency resolve issues that are also before the court. Courts have often dismissed the claims sent to the agency and stayed those that remain before the court. See, e.g., Bankruptcy Estate of B.J. McAdams, Inc. v. Sugar Foods Corp., 171 B.R. 12, 15-16 (treating an affirmative defense of unreasonable rates as a counterclaims,

referring the counterclaim to the ICC and staying remainder of the case because “[r]eferral would further notions of judicial economy, particularly given that the ICC decision may moot some or all of plaintiff’s claims, and again enable the ICC to determine issues uniquely within its expertise.”); F.P. Corp. v. Ken Way Transp., Inc., 821 F.Supp. 1032, 1038-39 (E.D. Pa. 1993) (staying underlying action to recover undercharges while ICC determined reasonableness of rates); Lewis v. Shepard’s/McGraw-Hill, Inc., 829 F.Supp. 348, 351-52 (D. Colo. 1993) (staying action for underpayment of tariff rates until ICC decided on reasonableness of rates); In re Lifschultz Fast Freight Corp., 157 B.R. 397, 401 (N.D. Ill. Bkr. 1993) (finding that the court “has the discretionary power to stay proceedings on” claims when referring other claims to the agency). Plaintiff does not seek to invoke that procedure, but instead simply asks the Court to dismiss the Counterclaim without prejudice. That would be inappropriate under the circumstances, and the Court declines to do so.

Finally, Plaintiff argues that referral to the STB is premature, as a factual record has not been developed. STB, the Plaintiff points out, is a small agency and referring an issue to that agency would cause unnecessary delay. CP again argues that Defendant’s allegations are “conclusory,” and predicts that the evidence, once collected, will demonstrate that the claims are unfounded. Plaintiff cites to New York State Thruway Auth. v. Level 3 Communs., LLC, 734 F.Supp.2d 257, 271 (N.D.N.Y. 2010), where the court denied a motion to refer issues to the FCC because “there [were] no technical questions of fact uniquely within the FCC’s expertise[.]” Further, the Court found, “[n]o matter how the FCC rules, discovery will have to be pursued in this litigation.” Id. Moreover, the FCC might have been aided if discovery revealed facts

that would “actually benefit any discussion before the FCC.” Id. If discovery revealed such information, the court pointed out, “the doctrine of primary jurisdiction can be raised again.” Id.

Plaintiff’s argument unavailing in this respect. Here, as explained, the allegations in the Complaint and Counterclaim make clear that there are factual issues best resolved pursuant to STB’s jurisdiction, and additional discovery is not necessary to establish that factual predicate. There can be no doubt that the STB is equipped to determine such factual and legal issues as have already been raised before this Court. The doctrine of primary jurisdiction applies, and the Defendant’s motion must be granted.

IV. CONCLUSION

For the reasons stated above, the Plaintiff’s motion to dismiss the Defendant’s Counterclaim, dkt. # 20, is hereby **DENIED**. The Defendant’s motion to refer this case to the Surface Transportation Board, dkt. # 21, is hereby **GRANTED**, and the following issues are referred to that agency:

1. Whether CP Rail violated its statutory common carrier obligations to Finch Paper under 49 U.S.C. § 11101 by reducing the frequency of CP Rail’s switching services to the Facility;
2. Whether CP Rail also violated its common carrier obligations under 49 U.S.C. § 11101 by failing to provide switching services even in accordance with its reduced switching schedule;
3. Whether some or all of the demurrage charges CP Rail seeks to recover

arose, in whole or in part, from delays caused by CP Rail or from CP Rail's inability to deliver railcars due to the fault of CP Rail, whether through the alleged violation of 49 U.S.C. § 11101 described in Finch Paper's Counterclaim or through other actions or inactions on the part of CP Rail;

4. Whether CP Rail's calculation and assessment of demurrage charges against Finch after 'constructively placing' its railcars was improper, because the delays preventing the 'actual placement' of those railcars were the fault of CP Rail, making the assessment of the charges an unreasonable practice in violation of 49 U.S.C. § 10702;

5. Whether the demurrage charge CP Rail has established in Tariff # 2 specific to railcars of ammonia is reasonable and in accordance with 49 U.S.C. § 10746, or is an unreasonable practice under 49 U.S.C. § 10702; and

6. Whether the terms and conditions contained in CP Rail's Tariff # 2 pertaining to the assessment of demurrage, and the rules and practices utilized by CP Rail to apply the tariff terms to Finch Paper, are consistent with the language and policy goals of 49 U.S.C. §§ 10702 and 10746.

The action is STAYED in this Court pending STB's ruling on those issues. The Defendant shall file a status report on the progress of the case before the STB within 180 days of the date of this Order, and every 90 days thereafter until the case is resolved by the STB. At that time, the parties may move to lift the stay in this Court.

IT IS SO ORDERED.

Dated: November 10, 2015

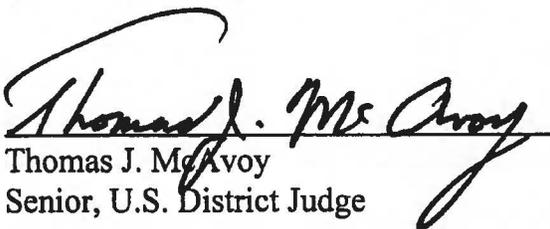

Thomas J. McAvoy
Senior, U.S. District Judge

EXHIBIT 2

PARTIES

4. Plaintiff **CP** consists of a Delaware Corporation with a principal place of business in New York, **CP** does business throughout Canada and in several states in the United States including the State of New York,

5. Defendant, **FINCH** is a Delaware Limited Liability Company, with its main office at 1 Glen Street, Glens Falls, New York.

6. Plaintiff and its connecting carriers at all times mentioned were common carriers by railroad engaged in interstate commerce and doing business in the United States and Canada.

7. The subject matter of this action stems from charges assessed under tariffs published by the Plaintiff for supplemental services of railcars and performed by **CP** for **FINCH**, in the United States. The tariff which applies to the charges included in this action is Canadian Pacific Tariff #2 Railcar Supplemental Services (hereinafter "CP Tariff #2") for the various dates that the charges accrued.

FIRST COUNT

8. The subject matter of this Count stems from demurrage charges assessed under CP Tariff #2" published by the plaintiff for Railcar Supplemental Services performed by **CP** for **FINCH** in Glen Falls, New York. The railcars in question accrued demurrage at CP Station 03971 "Glen Falls". These railcars were constructively placed pursuant to **CP** Tariff #2 and constructive placement notice was given to **FINCH**. Therefore, all the accrued demurrage at "Glen Falls" accrued on the tracks of **CP** awaiting notice from defendant Finch and they were placed at Finch's Glen Falls track after the free time to unload the cars had expired pursuant to CP Tariff #2. These charges accrued at times between September 2013 and March 2015 and are listed on Exhibit "A" to this Complaint.

9. Pursuant to the applicable tariff, there accrued to **CP** charges for these services the sum of **\$1,349,050.00 USD**. A listing of the charges and the amount due for each is attached hereto as Exhibit "A."

10. These charges were billed and payment demanded for the services rendered by **CP** to **FINCH**; however, said defendant has failed and refused to pay the bills noted in this Complaint.

WHEREFORE, Plaintiff, **CP** demands that judgment be entered in its favor against the defendant, **FINCH**, in the amount of **\$1,349,050.00 USD**. Additionally, **CP** demands a judgment against said defendant for any other charges which may be due at the time of hearing, together with prejudgment interest from the date of service, and for the costs and disbursements on the First Count of the Complaint

SECOND COUNT

11. Plaintiff repeats the allegations of Paragraphs 1 through 10 of the First Count of the Complaint as if set forth at length herein.

12. The subject matter of this Count stems from charges assessed under tariffs published by the Plaintiff for supplemental services performed by **CP** for defendant, **FINCH**, at Glen Falls, NY. **CP** performed switching and handling services at the request of **FINCH** for periods between 2013 and 2015.

13. Pursuant to Canadian Pacific Tariff #2 for Supplemental Services, including but not limited to changes and corrections to shipping documents, there accrued to **CP** charges for these services the sum of **\$9,158.00 USD**. A listing of the charges and the amount due for each is attached hereto as Exhibit "B".

14. These charges were billed and payment demanded for the services rendered by CP to FINCH however, said defendant has failed and refused to pay the bills noted in this Complaint. Therefore CP makes demand on this Second Count of the Complaint for **\$9,158.00 USD** plus interest and costs.

DEMAND

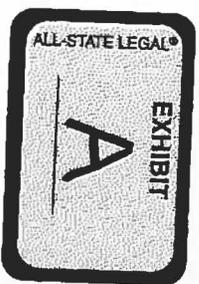
WHEREFORE, Plaintiff, CP, demands that judgment be entered in favor of CP against the defendant, FINCH, in the total amount of **\$1,358,205.00 USD**. Additionally, CP demands judgment against defendant for any other charges which may be due at the time of hearing, together with prejudgment interest from the dates of service, and for the costs and disbursements of the Complaint.

CAPEHART & SCATCHARD, P.A.
A Professional Corporation
Attorneys for Plaintiffs

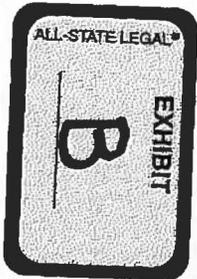
DATED: **April 8, 2015**

By: John K. Fiorilla
John K. Fiorilla, Esq.
8000 Midlantic Dr., Ste 300S, Box 5016
Mt. Laurel, NJ 08054
jfiorilla@capehart.com
Phone: 856-914-2054
Fax: 856-235-2796

Reference	Document Date	Amount	Currency	Net Due Date	CRM Case / Case Status	Submitter	Customer / Lead car	Contracts	Terminal	Material	Bill of Materials / Pro Bill Number
900603149	5/14/2014	57,240.00	USD	5/29/2014	3.8E+09 Closed/Declined		GLENSFALLS,NY			MINNEAPC DEMURRAG	
900568781	10/15/2013	10,500.00	USD	8/29/2013	3.8E+09 Closed/Declined		GLENSFALLS,NY			MINNEAPC DEMURRAG	
900606480	6/16/2014	330,710.00	USD	7/1/2014	3.8E+09 Closed/Declined		3971			MINNEAPC DEMURRAG	
900608310	7/14/2014	440,700.00	USD	7/29/2014	3.8E+09 Closed/Declined		3971			MINNEAPC DEMURRAG	
900611576	8/18/2014	165,290.00	USD	9/2/2014			3971			MINNEAPC DEMURRAG	
900612723	9/15/2014	54,020.00	USD	9/30/2014			3971			MINNEAPC DEMURRAG	
900616655	10/24/2014	90,220.00	USD	11/8/2014			3971			MINNEAPC DEMURRAG	
900619543	11/14/2014	175,240.00	USD	11/29/2014			3971			MINNEAPC DEMURRAG	
900635005	3/17/2015	25,130.00	USD	4/1/2015			3971			MINNEAPC DEMURRAG	
		1349050									



Reference	Document	Dal Amount	Currency	Net Due Date	CRM Case Case Statu: SubmissStz	Customer Lead car	Contracts	Terminal	Material Gi	Tariff item, Pro	Bill Number
900579019	9/24/2013		612 USD	10/9/2013	3.8E+09 Closed/Declined	3971 CN	413892	D&H	HANDLING 2 31		121531
900632490	2/19/2015		63 USD	3/6/2015	3.8E+09 New	3971 GATX	060307	D&H	SWTGCHGS		136175
900633439	2/25/2015		420 USD	3/12/2015		3971 GATX	205516	D&H	SWTGCHGS		136903
900634679	3/13/2015		63 USD	3/28/2015		3971 CGTX	013904	D&H	SWTGCHGS		137183
900634680	3/13/2015		210 USD	3/28/2015		3971 GATX	202934	D&H	SWTGCHGS		137184
900634681	3/13/2015		189 USD	3/28/2015		3971 CGTX	013904	D&H	SWTGCHGS		137286
900634682	3/13/2015		420 USD	3/28/2015		3971 UTLX	954528	D&H	SWTGCHGS		137288
900634683	3/13/2015		210 USD	3/28/2015	3.8E+09 New	3971 SHPX	202699	D&H	SWTGCHGS		137371
900635006	3/17/2015		420 USD	4/1/2015		3971 UTLX	954595	D&H	SWTGCHGS		137338
900635152	3/18/2015		95 USD	4/2/2015		3971 PROX	032934	D&H	HANDLING		137016
900635153	3/18/2015		189 USD	4/2/2015		3971 UTLX	954523	D&H	SWTGCHGS		137501
900635154	3/18/2015		840 USD	4/2/2015		3971 GATX	202989	D&H	SWTGCHGS		137504
900635720	3/20/2015		420 USD	4/4/2015		3971 CGTX	013904	D&H	SWTGCHGS		137105
900635792	3/20/2015		105 USD	4/4/2015		3971 UTLX	951258	US BILL	HANDLING		137309
900635849	3/23/2015		630 USD	4/7/2015		3971 UTLX	953283	D&H	SWTGCHGS		137645
900635970	3/24/2015		210 USD	4/8/2015		3971 PROX	032936	D&H	SWTGCHGS		137723
900635971	3/24/2015		100 USD	4/8/2015		3871 UTLX	954595	D&H	HANDLING		137724
900635973	3/24/2015		252 USD	4/8/2015		3971 GATX	202950	D&H	SWTGCHGS		137726
900636627	3/31/2015	1,270.00	USD	4/15/2015		3971 GATX	202608	D&H	HANDLING		137185
900636629	3/31/2015		535 USD	4/15/2015		3971 UTLX	951258	D&H	SWTGCHGS		137308
900636630	3/31/2015	1,905.00	USD	4/15/2015		3971 PROX	032936	D&H	HANDLING		137528
		9158									



CIVIL COVER SHEET 1:15-CV-417

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

DEFENDANTS

DELAWARE AND HUDSON RAILWAY COMPANY, a DE Corporation t/a

FINCH PAPER LLC, a Delaware Limited Liability Company

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number) John K. Fiorilla, Esq., Capehart & Scatchard, P.A., 8000 Midlantic Drive, Suite 300 S, Mt. Laurel, NJ 08054 (856) 234-6800

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with 5 columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Land Condemnation, Personal Injury, etc.

V. ORIGIN

(Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from another district (specify), 6 Multidistrict Litigation, 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 USC §1337(a) Brief description of cause: Suit for interstate freight charges

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ 1,358,205.00 CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

04/08/2015 s/ John K. Fiorilla, Esq.

FOR OFFICE USE ONLY

RECEIPT # 3251404 AMOUNT \$400.00 APPLYING IFP JUDGE TJM MAG. JUDGE TWD

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44**Authority For Civil Cover Sheet**

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553
Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

EXHIBIT 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DELAWARE AND HUDSON RAILWAY
COMPANY, a Delaware Corporation, t/a CP
Rail

Plaintiff,

-against-

FINCH PAPER LLC, a Delaware Limited
Liability Company

Defendant.

ANSWER AND COUNTERCLAIM

Case Number. 1:15-CV-417 [TJM/TWD]
Hon. Thomas J. McAvoy,
Senior U.S. District Judge
Hon. Therese Wiley Dancks,
U.S. Magistrate Judge

Defendant FINCH PAPER LLC (“Finch Paper” or “Defendant”), a Delaware Limited Liability Company, by and through its attorneys, Young Sommer Ward Ritzenberg Baker & Moore LLC (as local counsel to GKG Law, P.C.), answers the Complaint of DELAWARE AND HUDSON RAILWAY COMPANY, a Delaware Corporation, t/a CP Rail, (“CP Rail”) as follows:

JURISDICTION

1. Admit.

VENUE

2. The Defendant has insufficient knowledge or information to admit or deny paragraph 2 of Plaintiff’s Complaint and therefore denies same.

3. Admit.

PARTIES

4. The Defendant has insufficient knowledge or information to admit or deny paragraph 4 of Plaintiff's Complaint and therefore denies same.

5. Admit.

6. The Defendant has insufficient knowledge or information to admit or deny paragraph 6 of Plaintiff's Complaint and therefore denies same.

7. The Defendant has insufficient knowledge or information to admit or deny paragraph 7 of Plaintiff's Complaint and therefore denies same.

FIRST COUNT

8. The Defendant denies that the demurrage charges at issue have been properly assessed, that the railcars at issue were lawfully constructively placed, or that constructive notice placement was properly given to the Defendant. The Defendant has insufficient knowledge or information to admit or deny the remainder of paragraph 8 of the Plaintiff's Complaint and therefore denies same.

9. Defendant denies paragraph 9 of Plaintiff's Complaint.

10. Defendant admits that Plaintiff billed and demanded payment from Defendant for certain alleged services and that the Defendant has refused to pay those bills and, except as so admitted, Defendant denies that the amounts billed and demanded were properly assessed or are owed and therefore denies the remaining allegations in paragraph 10 of the Plaintiff's Complaint.

SECOND COUNT

11. Defendant incorporates by reference its responses to paragraphs 1 through 10 of the Complaint as if fully set forth herein.

12. The Defendant has insufficient knowledge or information to admit or deny the first sentence of paragraph 12 of Plaintiff's Complaint and therefore denies same. Defendant has insufficient knowledge or information to interpret or understand the full meaning and/or import of the second sentence of paragraph 12 of the Complaint and therefore denies the same.

13. The Defendant admits that some of the charges for supplemental services set forth in paragraph 13 and listed on Exhibit B to Plaintiff's Complaint accrued to CP and that Defendant has already approved and processed \$5,773 of those charges for payment to CP and, except as so admitted, Defendant denies that it owes the remaining \$3,385 in charges, which are referenced on Exhibit B by numbers 900634683, 900636627, and 900636630, Defendant affirmatively asserts that it successfully disputed these three referenced charges and that Plaintiff agreed between March and May of 2015 to withdraw those charges, and Defendant otherwise denies the remaining allegations in paragraph 13 of Plaintiff's Complaint.

14. The Defendant denies that it failed or refused to pay any and/or all of the charges referenced in paragraph 14 of the Complaint, Defendant further denies that it has liability for all of the \$9,158 in charges referenced in paragraph 14 of Plaintiff's Complaint, Defendant affirmatively asserts that it has already approved and processed \$5,773 of those charges for payment to CP, Defendant further asserts that it successfully disputed \$3,385 of the charges identified in paragraph 14 of Plaintiff's Complaint and that Plaintiff agreed, prior to the commencement of this action, to withdraw and/or cancel \$3,385 in charges between late March of 2015 and May of 2015, and Defendant otherwise denies the remaining allegations in paragraph 13 of Plaintiff's Complaint.

15. Defendant denies all other allegations not otherwise addressed herein.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

16. The Complaint fails to state a claim against the Defendant upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

17. Pursuant to 49 U.S.C. § 10501 and the doctrine of primary jurisdiction, this action must be stayed pending a decision by the United States Surface Transportation Board on referral of the questions raised in this case.

THIRD AFFIRMATIVE DEFENSE

18. Any amounts owed to Plaintiff must be setoff against those amounts that Plaintiff owes Defendant as damages pursuant to 49 U.S.C. § 11704(b) for failure to provide service upon reasonable request pursuant to 49 U.S.C. § 11101, i.e., by failing and/or refusing to provide reasonable switching services.

FOURTH AFFIRMATIVE DEFENSE

19. Some or all of the demurrage charges that Plaintiff seeks to recover are unreasonable pursuant to 49 U.S.C § 10702 and do not fulfill the purposes and requirements of 49 U.S.C. § 10746.

FIFTH AFFIRMATIVE DEFENSE

20. The rules and/or practices pursuant to which Plaintiff seeks to compute, assess, and recover some or all of the demurrage charges in this case are unreasonable pursuant to 49 U.S.C. § 10702.

SIXTH AFFIRMATIVE DEFENSE

21. Some or all of the demurrage charges that Plaintiff seeks to recover arise, in whole or in part, from delays or the inability to deliver railcars which were caused by or were the fault of Plaintiff.

SEVENTH AFFIRMATIVE DEFENSE

22. The rules and/or practices pursuant to which Plaintiff seeks to recover some or all of the demurrage charges in this case do not fulfill the purposes and requirements of 49 U.S.C. § 10746.

EIGHTH AFFIRMATIVE DEFENSE

23. Plaintiff's claims are barred, in whole or in part, by one or more of the doctrines of waiver, estoppel, laches and/or unclean hands.

NINTH AFFIRMATIVE DEFENSE

24. Plaintiff's Complaint does not identify and describe with sufficient specificity the demurrage charges Plaintiff seeks to collect from Defendant.

TENTH AFFIRMATIVE DEFENSE

25. Plaintiff's assessment of some or all of the demurrage charges associated with switching railcars containing ammonia into Defendant's facility during portions of the time period covered by the Complaint breached an agreement between the parties whereby the Plaintiff had standing instructions to immediately deliver railcars loaded with ammonia directly to the Defendant's facility, and Defendant was ready to receive the ammonia cars when Plaintiff constructively placed them.

ELEVENTH AFFIRMATIVE DEFENSE

26. The Plaintiff's assessment of demurrage charges was unlawful because its constructive placement of the cars was caused by unlawful actions of the Plaintiff.

TWELFTH AFFIRMATIVE DEFENSE

27. Plaintiff's claims for damages are barred and/or limited by its failure to mitigate damages.

THIRTEENTH AFFIRMATIVE DEFENSE

28. Any damage suffered by Plaintiff, which is hereby specifically denied, was caused by an intervening and/or superseding cause, and was not caused by the acts, omissions, or conduct of the Defendant, or of any person for whom the Defendant is responsible.

FOURTEENTH AFFIRMATIVE DEFENSE

29. Any damage suffered by Plaintiff, which is hereby specifically denied, was caused by act, omission, or conduct of Plaintiff or of a person under Plaintiff's authority or control or for whom Plaintiff is responsible, and was not caused by the acts, omissions, or conduct of the Defendant, or of any person for whom the Defendant is responsible.

FIFTEENTH AFFIRMATIVE DEFENSE

30. Plaintiff has waived, forfeited and/or relinquished its right to collect certain of the alleged charges set forth in its Complaint and/or has otherwise released Defendant from any liability for these charges.

SIXTEENTH AFFIRMATIVE DEFENSE

31. Plaintiff's Complaint must fail because Defendant has paid and/or is in the process of paying certain of the alleged charges set forth in Plaintiff's Complaint.

SEVENTEENTH AFFIRMATIVE DEFENSE

32. Plaintiff's Complaint must fail based on the doctrine of accord and satisfaction.

EIGHTEENTH AFFIRMATIVE DEFENSE

33. Plaintiff's Complaint must fail based on the lack and/or failure of consideration for certain of the alleged charges set forth in Plaintiff's Complaint.

COUNTERCLAIM - VIOLATION OF 49 U.S.C. § 11101

Defendant Counter-Claimant Finch Paper, LLC ("Finch") states as follows for the following counterclaim against Plaintiff Counter-Defendant Delaware & Hudson Railway Company, t/a CP Railway ("CP").

JURISDICTION AND VENUE

34. This is a compulsory counterclaim arising out of the same transactions and occurrences that are the subject matter of the Complaint. As a compulsory counterclaim, it is within the ancillary jurisdiction of this Court pursuant to Rule 13, Federal Rules of Civil Procedure. This Court also has jurisdiction over this counterclaim pursuant to 28 U.S.C. § 1331 (federal question) and Section 1337 (interstate commerce).

35. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(b) and § 9613(b) because the claim arose in this district, and because the claim is a compulsory counterclaim.

36. Pursuant to 49 U.S.C. § 10501 and the doctrine of primary jurisdiction, this Counterclaim must be stayed pending a decision by the United States Surface Transportation Board on referral of the questions raised by Defendant in this counterclaim.

FACTUAL ALLEGATIONS

37. Finch's paper manufacturing facility in Glens Falls, New York (the "Facility") was constructed in 1865. The Facility is rail-served only by CP. CP delivers railcars of ammonia,

wood pulp, starch, sulfur and caustic soda, via rail line extending several miles from CP's Fort Edward rail yard to the Facility.

38. The rail service CP provides to Finch consists of switching rail cars of raw materials into the Facility, and switching empty rail cars of raw materials out of the Facility after they are unloaded.

39. Finch owns and maintains several tracks on its property at the Facility, but these tracks have limited storage space.

40. The production process at the Facility and the raw materials Finch uses require switching of railcars in and out of the plant on a regular basis.

41. Prior to October 1, 2012, CP provided switching services to the Facility by which CP delivered railcars from the CP's main line railroad onto Facility tracks once a day on Monday, Tuesday, Wednesday, Thursday and Friday of each week, and occasionally on weekends.

42. Prior to June 1, 2012, Finch leased certain tracks from CP in the vicinity of the Facility that held up to 26 rail cars. When Finch's cars were located on the leased track, they were not assessed demurrage charges by CP.

43. On May 7, 2012, CP terminated the lease and storage track agreement effective June 1, 2012, eliminating Finch's ability to store railcars.

44. On September 24, 2012, CP announced that, effective October 1, 2012, it was permanently reducing its switching services to the Facility to one switch per day, which switches would only occur on Mondays, Wednesdays, and Fridays of each week. CP also imposed a new cut-off time for requesting switching services of 8:00 AM on the day Finch desired such services.

45. CP refused to rescind its decision to reduce its provision of switching services to the Facility despite numerous requests from Finch.

46. In addition to reducing scheduled switching from five days a week to only three days a week, CP began failing or refusing to provide switches on even those three days.

47. The refusal and failure of CP to provide daily switches five days a week, and its refusal and/or failure to adhere to its reduced switching schedule, has resulted in a severe disruption of the flow of cars into and out of the Facility. This has caused shortages of railcars carrying raw material, which in turn has severely hampered the ability of Finch to operate its facility.

48. CP's failure to provide adequate service to the Facility because of its decision to reduce the number of days it provides switching services, and its non-compliance with the reduced switching schedule, has caused significant disruptions to Finch's operations. It also has caused Finch to incur significant additional costs.

49. CP's decision to reduce switching services and its failure to comply with even that reduced schedule has resulted in the improper assessment of demurrage charges against Finch.

50. CP's unilateral reduction of switching services to the Facility from one switch, five days per week, to one switch only three days per week, is a violation of CP's common carrier obligation to provide service pursuant to 49 U.S.C. § 11101, as is CP's non-compliance with the reduced switching schedule.

51. CP's unlawful reduction of common carrier switching services to Finch, and its non-compliance with that reduced switching schedule, has caused Finch to incur damages in the form of (1) improperly assessed demurrage charges; (2) significant additional costs in obtaining raw materials from alternative sources using other transportation modes such as trucks; (3)

additional costs in attempting to manage and operate its Facility as a result of limited raw materials caused by the lack of rail deliveries; and (4) increased labor costs.

REQUEST FOR RELIEF

WHEREFORE, Defendant FINCH prays for the following relief:

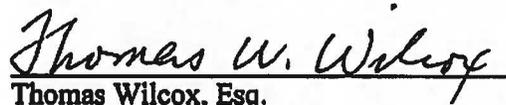
- A. that the Court deny the relief requested by the Plaintiff in its Complaint;
- B. that the Court dismiss the Complaint, with prejudice, in its entirety;
- C. that the Court enter judgment in favor of Defendant Finch on its counterclaim against Plaintiff; and
- D. that the Court provide the Defendant with such other and further relief as it may deem just and proper, including (without limitation) costs, attorneys' fees and equitable relief.

Dated: June 12, 2015
Albany, New York

FINCH PAPER LLC
By its attorneys,



Kristin Carter Rowe, Esq. (Bar Roll No. 301098)
Dean Sommer, Esq. (Bar Roll No. 102643)
YOUNG, SOMMER, WARD, RITZENBERG,
BAKER & MOORE, LLC
Local counsel
Five Palisades Drive, Suite 300
Albany, NY 12205
Tel: (518) 438-9907
Fax: (518) 438-9914



Thomas Wilcox, Esq.

Brendan Collins, Esq

GKG LAW, P.C.

1055 Thomas Jefferson Street NW, Ste. 500

Washington, D.C. 20007

Tel: (202) 342-5248

Fax: (202) 342-5222

TO: CAPEHART & SCATCHARD, P.A.
Attorneys for Plaintiff
John K. Fiorilla, Esq.
8000 Midlantic Dr., Ste. 300S, Box 5016
Mt. Laurel, NJ 08054
Tel: (856) 914-2054
Fax: (856) 235-2796

CERTIFICATE OF SERVICE

I do hereby certify that on this 7th day of December 2015, I have served a copy of the foregoing Petition for Declaratory Order by first class mail to:

John K. Fiorilla, Esq.
8000 Midlantic Drive
Suite 300S, Box 5016
Mt. Laurel, NJ 08054


Thomas W. Wilcox