

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

241148

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STB Docket FD 35981

PETITION FOR DECLARATORY ORDER – FINCH PAPER LLC

REPLY TO MOTION TO COMPEL DISCOVERY

Delaware and Hudson Railway Company d/b/a Canadian Pacific (“CP”) hereby replies in opposition to the Motion to Compel Discovery filed by Finch Paper LLC (“Finch”) on July 1, 2016 (the “Motion”) and, in support of its opposition to the Motion, states as follows.

INTRODUCTION AND BACKGROUND

In April 2014, CP inspected the tracks at Finch’s paper mill, including tracks used to receive toxic by inhalation (TIH) commodities, and determined that portions of the track were unsafe. While the tracks were out of service for repair, Finch utilized CP yards to stage raw materials, including TIH, for the plant. As a result, Finch incurred substantial demurrage charges which Finch refused to pay, including charges totaling more than \$400,000 that Finch repeatedly represented were “chargeable” and “undisputed.” In April 2015, CP sued Finch in federal court in New York to recover this significant unpaid demurrage and other charges.

In response to CP’s suit to collect the unpaid demurrage, Finch filed a litany of tenuous counterclaims. Finch alleged that CP began breaching its common carrier obligation beginning in 2012 when CP reduced the frequency that CP serves Finch, as well as various unreasonable practice claims. Based on its counterclaims, Finch then asked the Court to refer the action to the Surface Transportation Board (the “Board” or “STB”). In light of CP’s concern that Finch’s

counterclaims were brought for tactical reasons and were not well founded, CP asked the Court first to allow discovery to determine whether there were any genuine issues that merited referral to the STB—concerns that have been borne out in recent discovery.

The Court referred the common carrier and unreasonable practice claims to the STB for discovery and guidance, and in the meantime stayed the federal court case. On December 7, 2015, Finch filed its pending petition for declaratory order and discovery commenced soon after. CP responded to Finch's first set of written discovery and its second set of written discovery, *more than four months ago and two months ago* respectively. CP objected to the requests that are the subject of Finch's motion on, *inter alia*, relevance and burdensome grounds. The discovery requests at issue in the Motion seek wholly irrelevant information and are unduly burdensome, requiring in many instances a special study. In addition, CP objected to producing documents that contained other customer's competitive information. CP reaffirmed its objections in meet and confers regarding the first and second sets of Finch's discovery requests.

Despite discovery closing in less than a week, and months after CP responded to Finch's discovery requests, Finch brings this eleventh-hour Motion asking the Board to allow it to engage in an unduly burdensome and unjustified fishing expedition. CP has already produced several thousand documents, including documents that contain information that Finch purports to be seeking to compel. Like the filing of the counterclaims, Finch's untimely motion to compel is unfounded and appears to be intended to further delay this proceeding and ultimately the federal court case. The Board should therefore deny Finch's Motion in its entirety and allow this proceeding to move forward towards resolution.

ARGUMENT

A. **Finch's Motion to Compel is Untimely and Seeks to Further Delay Resolution of this Matter.**

Earlier this month, Finch filed its Motion belatedly seeking wholly irrelevant documents and information. Indeed, on March 9, 2016—*more than four months ago*—CP objected to Finch's Document Request Nos. 30 and 34, as those document requests seek documents that are irrelevant to the questions before the Board and are otherwise unduly burdensome requests. Similarly, on April 26, 2016—*more than two months ago*—CP objected to Finch's Interrogatory Nos. 15-19 and Document Request Nos. 40-42 and 44, as those requests again sought documents and information completely irrelevant and are unduly burdensome, including requiring a special study. Both sets of objections were clear that no document production or interrogatory answers were forthcoming.

Finch cryptically refers to a “meet and confer” and “subsequent correspondence” in a misguided attempt to excuse its significant delay in filing its Motion and delaying the resolution of this case. Motion at 3, 5-7. CP repeatedly stated that it was objecting to these document requests and interrogatories. In its March 9, 2016 responses to Document Request Nos. 30 and 34, CP stated its objection to providing the sought documents.¹ And in its April 26, 2016 responses to Finch's Interrogatory Nos. 15-19 and Document Request Nos. 40-42 and 44, CP there too unequivocally stated its objection to providing the sought documents and information.² During a meet and confer between counsel for the parties which occurred on March 23, 2016, CP stated it was standing on its objection and that it would not be producing those requested

¹ See CP's Responses and Objections to Finch Paper's First Document Requests (Ex. A to Finch's Motion), pp. 1-4, 16-18.

² See CP's Responses and Objections to Finch Paper's Second Set of Interrogatories (Ex. B to Finch's Motion), pp. 1-6; CP's Responses and Objections to Finch Paper's Second Document Requests (Ex. C to Finch's Motion), pp. 1-7.

documents. This was confirmed in a May 9, 2016 letter from CP to counsel for Finch, in which CP explained that Finch has provided no basis for CP to reconsider its objection. The May 9 letter also confirmed CP's view that the documents and information sought by Finch's second set of discovery requests were irrelevant to this matter.³ At a May 26, 2016 meet and confer among counsel for the parties, CP again explained that the documents sought were irrelevant and unduly burdensome.

Finch filed its Motion on July 1, 2016. Thus, Finch's Motion was filed nearly four months after CP's responses to Finch's first set of discovery requests, more than two months after CP's responses to Finch's second set of discovery requests, and five weeks after the last meet and confer between the parties.⁴ The motion was therefore filed well after the 10-day time period set forth in the STB Rules. 49 CFR § 1114.31 (stating that a "motion to compel an answer must be filed with the Board . . . within 10 days after expiration of the period allowed for submission of answers to interrogatories"). Moreover, the filing of its Motion as discovery is coming to a close is essentially a request by Finch to reopen discovery, resulting in even further delay in the resolution of the proceeding before the Board, and thereby resolution of the pending lawsuit in federal court. Accordingly, the Motion should be denied as untimely.

Even if timely, however, the Motion, as explained below, must be denied as seeking irrelevant information, third party competition sensitive information and documents, and otherwise containing unduly burdensome discovery requests.

³ See May 9, 2016 Letter, attached as Ex. 1.

⁴ There is no reasonable basis for Finch to have waited weeks to file its motion to compel, particularly where discovery is set to close, and especially where CP previously objected in full (indicating no forthcoming documents or information) to Finch's overly broad, unduly burdensome discovery requests seeking irrelevant documents and information. Similarly, to the extent that Finch asserts it can indefinitely "reserve its objections," see Motion at 3, n. 1, that suggestion should be disregarded as well, as it would encourage piecemeal and protracted discovery litigation.

B. The Documents and Information Sought by Finch are Irrelevant.

Although parties are entitled to discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding,” 49 C.F.R. § 1114.21(a)(1), the Board requires “more than a minimal showing of potential relevancy” before granting a motion to compel discovery. *Potomac Elec. Power Co. v. CSX Transp., Inc.*, 2 S.T.B. 290, 292, 1997 WL 274205 at *1 (1997). “Discovery requests must be narrowly drawn, directed toward a relevant issue, and not used for a general fishing expedition.” *Duke Energy Corp. v. Norfolk Southern Ry. Co.*, STB Docket No. 42069, 2002 WL 1730020, at *3 (STB served July 26, 2002). In other words, the party seeking discovery “must demonstrate a real, practical need for the information.” *Coal Rate Guidelines, Nationwide*, 1 I.C.C. 2d 520, 548, 1985 WL 56819 at * 22 (1985). As described below, the documents and information sought by Finch are not relevant to the questions before the Board and therefore there is no basis to grant Finch’s belated Motion.

1. Finch’s First Set of Discovery Requests

Document Request No. 30 broadly seeks “all documents relating or referring to any notices or enforcement actions by the Federal Railroad Administration pertaining to the rail lines and tracks used by [CP] to provide rail service to the [Finch Paper] Facility.” Finch argues that these documents are relevant to the demurrage charges it refuses to pay. *See* Motion at 4 (asserting “the extent to which FRA compliance issues with CP’s lines caused delays in delivering cars to Finch’s facility or picking them up can impact whether demurrage charges were the result of delays caused by CP”); Motion at 4-5 (asserting there are “questions” regarding CP’s decision to “restrict service to the Finch facility due to alleged defects in Finch’s plant tracks,” resulting in demurrage charges); Motion at 5 (asserting that “[t]he condition of

CP's track, as reflected in FRA notices or enforcement actions, is relevant to the issue of whether the assessment of demurrage in these circumstances was reasonable").⁵ Finch is wrong.

The disputed demurrage charges have nothing to do with the conditions of CP's tracks outside Finch's facility. The time that it takes CP to deliver a properly-ordered car is not included in demurrage charged to Finch. Finch incurred this demurrage because Finch *failed to order* in rail cars, choosing instead to let them sit for days, weeks, and sometimes months in CP's rail yards. Accordingly, the condition of CP's tracks outside Finch's plant does not affect demurrage and simply is not relevant.

Moreover, a request for all documents relating to FRA enforcement actions and notices is not a request that is "narrowly drawn" to obtain information about the track conditions or any possible delays in CP's service to Finch. Indeed, it appears to be aimed at gathering information regarding CP's safety compliance record which is not at issue in this proceeding.

Importantly, CP has already produced information that reflects the conditions of CP's track used to serve the Finch facility and any delays in servicing Finch. These documents include the crew exception reports which detail issues encountered in providing service to Finch, FRA Form 97 Incident Reports, and CP's maintenance records for CP tracks used to serve Finch. Accordingly, Finch already has the information to which it claims that it is entitled.

Document Request No. 34 demands that CP produce "all [its] Customer Audit Safety forms from 2013 to the present." These are forms that CP uses to document CP's safety inspections of its customers' track facilities. CP performed such an inspection of Finch on April

⁵ Finch also asserts without explanation the information requested is "relevant to the question of reduction of service" Motion at 5. Simply stating that information is relevant does not make it so. Finch has not provided any basis to connect the condition of tracks outside the Finch facility to a "reduction in services" or a "violation of CP's obligations as common carrier." Finch has certainly not met its burden to demonstrate that this information is relevant such that its motion to compel should be granted.

24, 2014 and determined that portions of Finch's tracks were in unsafe condition and ordered their closure. CP produced the April 24, 2014 Customer Safety Audit Form pertaining to the track closure at Finch's facility due to the unsafe track conditions. Finch, however, argues that it is entitled to the Customer Safety Audit Form for all CP customers since 2013 on the grounds that they are somehow "highly relevant" to the issues in this proceeding. Motion at 5. Finch wrongly and without foundation asserts that these documents will show the impact of CP's mid-2012 decision to reduce costs across the CP rail system on Finch and other CP customers and whether CP's 2012 reduction in service frequency to Finch violated CP's statutory common carrier obligation "to Finch and other CP customers." *Id.*

CP's service to other CP customers is decidedly not at issue in this proceeding. The Board has been asked to determine only whether CP violated its common carrier obligation to Finch. *See, e.g.,* Petition at 4. Finch is not entitled to conduct discovery into whether CP is meeting its common carrier obligation to any customer other than Finch.

Safety audit reports that show the condition of other CP customers' track facilities have nothing to do with when or how often CP serves Finch. Finch's claim that documents created from 2013 on are relevant to decisions and actions taken in 2012 are even more mystifying. At bottom, Finch's bare assertion that they are "highly relevant" does not make them so. Further, safety audits may contain information about CP's other rail customers' facilities that those customers might consider to be competition sensitive. Absent a compelling need for this information, the Board should not risk potentially harmful disclosure of other rail customer's information.

Notices or enforcement actions by the FRA and Customer Audit Safety forms pertaining to tracks other than at the Finch facility has absolutely nothing to do with the issues before the

Board and would not provide additional information relevant to the issues in this proceeding; asking for these additional irrelevant documents is nothing more than a fishing expedition. Thus, as CP has repeatedly stated since March, there is no legitimate basis for requiring CP to produce the documents requested by Document Request Nos. 30 and 34.

2. Finch's Second Set of Discovery Requests

Finch's second set of discovery requests are even more far afield. Finch's incredibly overbroad requests ask CP to identify, and produce all documents relating to or referring to, business plans over a period of four years that called for the reduction, both nationally and locally in the New York service area, in the number of employees (Interrogatory No. 15 and Document Request No. 40) and in the number of locomotives (Interrogatory No. 17 and Document Request No. 41), and to then identify how many employees and contractors whose positions were eliminated after July 2012 had been involved in providing rail transportation services to Finch (Interrogatory No. 16). Finch further asked CP to describe the extent to which CP allocated train crews, locomotives, and track capacity away from providing rail service to customers in the New York service area and used them for other customers on other parts of CP's system between 2012 and 2015 and to provide all documents relating to or referring to the same (Interrogatory No. 18 and Document Request No. 42).

Additionally, Finch asked CP to describe any changes CP made to its customer service department between 2012 and 2015 and the extent of those changes, including the extent to which these changes altered the customer service department as it applied to Finch (Interrogatory No. 19). Finally, Finch demanded that CP "produce all documents that discuss the extent to which the CP service problems in the Upper Midwestern United States and Chicago that were the primary focus of CP's participation in STB Docket No. EP 724, United States Rail Service

Issues, affected CP's ability to provide rail service to Finch Paper and other customers located on the New York service area portion of CP's system." (Document Request No. 44).

The majority of Finch's assertions in its Motion as to why this information is purportedly relevant are nothing more than perfunctory statements that such information is relevant to its "common carrier obligations." See Motion at 8-10. Finch asserts that the discovery sought is relevant as to "whether CP's reductions in the number of its employees, including engineers and train crews, adversely impacted CP's ability to satisfy its service obligations to Finch" and "whether changes to CP's customer service department and its operations left CP unable to adequately service its customers." Motion at 8.

Documents and information regarding personnel and equipment changes made by CP are beside the point. The question before the Board is whether the service CP provides violated its common carrier obligations to *Finch* "by reducing the frequency of CP Rail's switching services" or "by [allegedly] failing to provide switching services." Petition at 4. At issue is not whether CP had sufficient resources allocated to provide adequate service to Finch, but whether CP in fact provided Finch adequate service on reasonable request. And the answer to the latter does not turn on the former. How CP internally manages the service it provides to Finch is irrelevant to the questions before the Board.⁶

Moreover, Finch's requests go well beyond service to Finch. Finch asks for documents and information regarding staffing, equipment and other issues at a CP system-wide basis and for documents that discuss impacts on other customers. CP's service to other customers is not at issue here.

⁶ The implications of Finch's argument are troubling as it suggests that the Board should determine the railroad's appropriate staffing and equipment levels.

To the extent that Finch's requests also seek information specific to CP service to Finch, CP conducted a reasonable search for documents that specifically discuss service to Finch and produced responsive non-privileged documents, if any. These documents include documents related to CP's restructuring of service to Finch in 2012 and related crew and equipment needs which are arguably responsive to Document Request Nos. 40, 41 and 42. CP also produced documents that identify why CP service to Finch was, on occasion, delayed or not provided. Accordingly, sufficient information has been produced to address the issues referred to the Board in this proceeding. The additional production Finch now seeks to compel is wholly irrelevant and should be denied.

C. Finch's Discovery Requests are Unduly Burdensome.

Even if some of the sought information is arguably relevant, the motion to compel must still be denied because the burden of producing that information outweighs its limited value. *See Reasonableness of BNSF Ry. Co. Coal Dust Mitigation Tariff Provisions*, STB Docket No. FD 35557, 2012 WL 2378133, at * 4 (STB served June 25, 2012) (explaining that "[a]ll discovery requests entail the balancing of the relevance of the information sought against the burden of producing that information"). Looking to the Federal Rules of Civil Procedure, as Finch states in its Motion the Board should do, those rules explain that discovery must be "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). That includes evaluating "the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* Likewise, "[u]nder 49 CFR 1114.21(c), discovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought." *Canadian Pacific Ry. Co.—Control—Dakota, Minnesota & Eastern Railroad Corp.*, STB Docket No. FD 35081, 2008 WL 820744, at *1 (STB served March 27, 2008). The

documents and information sought by Finch through the requests that are the subject of its Motion are unduly burdensome and would require a special study. The discovery should therefore be denied.

To begin, most of the discovery requests concern a period of four years and would require CP to conduct another costly search to gather, review, and produce any such documents and to provide such information. To date, CP has already spent a considerable amount of time and money responding to Finch's numerous document requests and interrogatories, having produced more than 6,300 documents, consisting of nearly 15,000 pages. As described above, this document production included documents which already provide sufficient information to answer the referred matters before the Board. *See Duke Energy Corp.*, 2002 WL 1730020, at *5-6 (denying motion to compel discovery requests where "sufficient" information has already been produced); *Canadian Pacific Ry. Co.*, 2008 WL 820744, at *3 ("Based on the information provided in response to this . . . document request, and given the statements made by applicants in their reply, no further production is necessary.").

The Customer Audit Reports that Finch seeks would be unduly burdensome as the documents are not centrally maintained. It would require CP to undertake search and collection efforts at yard offices across CP's system. Furthermore, responding to the second set of discovery would require a special study, as Finch seeks information and documents in a form that CP does not maintain in the ordinary course of business and is not readily available in the form requested by Finch. The information sought would require CP to undertake a time-consuming and costly analysis to determine which employees, contractors, train crews and locomotives were involved in providing rail transportation services to Finch. As such, the motion to compel should be denied. *See Waterloo Railway Co.—Adverse Abandonment—Lines*

of Bangor & Aroostook R.R. & Van Buren Bridge Co. in Aroostook Cnty., Me., AB 124 (Sub-No. 2), 2003 WL 21009328, at *4 (STB served May 6, 2003) (“CN states further that burdensome special studies would be necessary to provide the information on transit times if it is not readily available, and we have no reason to question this assertion. If information on transit times is not readily available, we will not require CN to finance a special study to produce it.”).

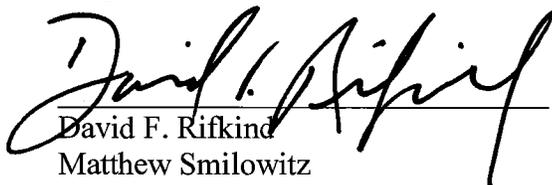
Accordingly, any potential limited relevance of the information and documents sought by Finch’s overbroad and unduly burdensome discovery requests is heavily outweighed by the significant burden in searching, compiling, reviewing, and producing the demanded documents and information. The Motion should therefore be denied.

CONCLUSION

For the foregoing reasons, there is no basis to order the discovery in Finch’s untimely Motion. Rather, the Board should deny Finch’s Motion in its entirety and allow this proceeding, and ultimately the federal court case, to proceed towards final resolution.

Dated: July 21, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July 2016, a copy of the foregoing Reply to Motion to Compel Discovery was served by first class mail, postage pre-paid, and by electronic mail on:

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EXHIBIT 1



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May 9, 2016

VIA E-MAIL

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Re: Petition for Declaratory Order of Finch Paper LLC ("Finch") before the Surface Transportation Board ("STB" or the "Board") – STB Docket FD 35981

Dear Counsel:

We are in receipt of your letter dated May 2, 2016 (the "May 2 Letter"). In addition to responding to your May 2 Letter, this letter serves to summarize the outstanding material issues with Finch's responses to CP's document requests and interrogatories. Several interrogatories at the heart of Finch's claims in this proceeding remain wholly unanswered. Similarly, Finch's document production has been lacking both in substance and format; in fact, CP has produced more than eight times the amount of pages of documents that have been produced by Finch.

Finch has also yet to provide any revised interrogatory answers or additional documents following the parties' April 14, 2016 meet and confer conference (or, for that matter, respond to the April 20 email memorializing the same). Accordingly, despite the insinuation in your letter, and as described in more detail below, it is Finch (and not CP), which has failed to provide significant amounts of discovery, both with respect to documents and interrogatory answers. We request that Finch provide the revised interrogatory answers and a response to each of the issues herein on or before Monday, May 16, 2016.

A. CP's Discovery Requests to Finch

On April 14, 2016, counsel for the parties conducted a meet and confer conference (the "April 14 meet and confer") at our offices concerning Finch's deficient responses to CP's first set of document requests and interrogatories. Nearly three weeks ago, we sent you an email memorializing our agreements during that conference but we have received no response to that email. Nor have we been provided any revised interrogatory answers or any document production since that meeting.

Without waiving the additional issues raised at the April 14 meet and confer, we note below some of the most significant still outstanding deficiencies in your interrogatory answers and document production and request an immediate response by Finch as to the same.

1. CP's Interrogatories

Interrogatory No. 1: At the April 14 meet and confer, we requested that Finch complete its answer to this interrogatory by providing the additional information requested by the interrogatory, *i.e.*, titles/positions of the named individuals and description of the facts of which each person is aware. You agreed to provide titles/positions, and to speak with Finch about what additional specific information you are willing to provide. To date, we have received no follow-up information or even a response as to what additional specific information Finch is willing to provide. Please provide a revised interrogatory answer.

Interrogatory No. 2: At the April 14 meet and confer, we discussed CP's need for a description as to exactly which demurrage charges Finch disputes. Indeed, Finch has brought this petition for declaratory order before the Board and yet it has not provided any specifics as to the purported inappropriate demurrage charges. You agreed to supplement your answer with a narrative response which provides this information. CP suggested that a chart containing the disputed charges, dates those charges were originally disputed, the basis for the dispute, and the status/result of that dispute is appropriate. Please supplement your interrogatory answer.

Interrogatory No. 3: At the April 14 meet and confer, we noted that although it is Finch who brought this petition for a declaratory order, in CP's view, Finch has not provided any specifics as to the purported inappropriate demurrage charges or the basis for its non-descript and unfounded assertion that "assessment of demurrage charges against Finch are unreasonable practices." You agreed to consider supplementing your answer to this interrogatory but we have heard nothing further from you on this issue. Please advise us of your position on this interrogatory answer.

Interrogatory No. 4: At the April 14 meet and confer, we stated that Finch must provide specifics as to the basis for Finch's assertion that "CP Rail has, on a continuous basis since October 2012, violated its statutory common carrier obligations." You agreed to consider supplementing your answer but we have heard nothing further from you on this issue. Please advise us of your position on this interrogatory answer.

Interrogatory No. 5: At the April 14 meet and confer, we discussed that your answer directing CP to documents that will be produced by Finch was an insufficient answer to this interrogatory as oral communications requested by CP by their nature of being oral communications would likely not be able to be derived from the documents produced. You indicated you would ask your client about specific oral communications not otherwise memorialized and would consider providing a further narrative response. We have yet to hear anything further from you on this matter. Please advise us of your position.

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Brendan Collins, Esq.
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Interrogatory Nos. 7 and 8: In your response to these interrogatories, Finch provided the non-descript answer of directing CP to documents that will be produced by Finch. At the April 14 meet and confer, CP requested that Finch provide an itemization of the alleged missed switches. You indicated you would take that under consideration and let us know. We have yet to hear anything further from you on this matter. Please advise us of your position.

Interrogatory No. 13: At the April 14 meet and confer, CP requested that you expand Finch's answer to this interrogatory, including when and how Finch purportedly delivered "standing instructions" to CP to deliver ammonia rails cars into the Finch Paper Facility and the substance of those purported instruction(s). You indicated you would take that under consideration and let us know. We have yet to hear anything further from you on this matter. Please advise us of your position.

Interrogatory No. 14: At the April 14 meet and confer, you indicated that you would revisit your answer and let us know if you were willing to provide the requested information in narrative/statistical format as opposed to simply referring CP to documents. We have yet to hear anything further from you on this matter. Please advise us of your position.

Interrogatory No. 16: At the April 14 meet and confer, we discussed that the methods and procedures used to unload railcars are relevant because they establish a baseline of how many employees are needed to unload, which is relevant to showing other factors that are contributing to demurrage. We agreed to limit this request to 2012 to the present. You indicated you would take that under consideration and let us know. We have yet to hear anything further from you on this matter. Please advise us of your position.

Interrogatory Nos. 24 and 26: At the April 14 meet and confer, CP requested Finch expand its answers to those interrogatories. You indicated you would take that under consideration and let us know. We have yet to hear anything further from you on this matter. Please advise us of your position.

2. CP's Document Requests

We requested that you produce documents in a format similar to CP's document production to you. This includes providing your document productions in a unitized format, instead of piles of paper documents scanned into large PDFs. Particularly as to emails, the documents produced by Finch to date are not easily reviewable as separate documents. As we discussed during the April 14 meet and confer, at a minimum, Finch should be producing documents in the same format as the document productions by CP to Finch. By way of comparison, to date, CP has produced 4,518 separate unitized documents; Finch has produced 19. We have yet to hear anything further from you on this matter. Please advise us of your position.

Additionally, as to specific document requests, below are some of the additional material deficiencies in your document production:

Thomas Wilcox, Esq.
Brendan Collins, Esq.
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Document Request No. 1: At the April 14 meet and confer, we noted that Finch has not produced documents in specific response to this request as of yet; you indicated that you would look again at your interrogatory responses to ensure that documents referenced in your answers have or will be produced. Please confirm that documents referenced in your interrogatory answers have or will be produced.

Document Request No. 2: At the April 14 meet and confer, we discussed that CP is seeking all communications between CP and Finch, as it believes that nearly all of these will relate somehow to rail service. You indicated that you had not yet done a search for all communications between the parties. We agreed that you would speak with your client about searching for communications between our clients, since the universe of documents would largely include documents relevant to this case. We have yet to hear anything further from you on this matter. Please advise us of your position.

Document Request No. 3: Your response had requested a meet and confer to narrow the scope of the document request. At the April 14 meet and confer, we agreed that this request does not include documents as to those raw materials which have no rail component. We discussed that the request, however, does seek documents related to the raw materials themselves, as the price of the materials will be relevant to Finch's purported damages claim independent of their transport. Having narrowed the request, you agreed to produce responsive non-privileged documents. Please let us know when you intend to provide those documents.

Document Request Nos. 4 and 5: At the April 14 meet and confer, we noted that notwithstanding your relevance objection, Finch produced a few documents responsive to Request No. 4. We agreed that Request No. 5 is a more specific subset of Request No. 4, and discussed the relevance of documents stating policies and procedures, as these relate to how Finch manages its pipeline, prioritizes certain cars, etc. and would be relevant to demurrage. You indicated you would consider responding to these requests. We have yet to hear anything further from you on this matter. Please advise us of your position.

Document Request No. 15: In light of your vague and ambiguous objection, we explained at the April 14 meet and confer that this request is seeking documents showing to what extent Finch internalized the cost of demurrage when scheduling the unloading of rail cars or scheduling the release of rail cars to be switched out of the Finch Paper Facility. Having now an understanding of the documents sought by the request, you indicated you would look for responsive documents, to the extent that they exist. Please let us know when you intend to provide documents responsive to this request.

Document Request No. 20: At the April 14 meet and confer, we agreed that this request seeks documents with a "qualitative" component, in that it requests documents relating to quality/reliability issues, as well as to the amount/adequacy of rail service, and you agreed that Finch would produce these non-privileged documents. Please let us know when you intend to provide documents responsive to this request.

Finally, in addition the specific document requests and interrogatories discussed above, you have previously indicated that you will produce reasonably-available, non-privileged document responsive to several of CP's other document requests and interrogatories. Accordingly, please let us know when you intend to provide the remainder of documents responsive to the other document requests and interrogatories to which you agreed to provide responsive documents.¹

B. Finch's Discovery Requests to CP

1. Matters in your May 2 Letter regarding Finch's First Set of Discovery Requests

As to the matters raised in your May 2 Letter, we respond in turn below but note initially that, to date, CP has produced 4,518 separate unitized documents, totaling 8,476 pages of documents, more than eight times the amount of pages of documents produced by Finch. Thus, any suggestion that CP has not been diligent in its document production is wholly without merit.

Document Request No. 4: As noted in Brendan Collins' March 28, 2016 email (the "March 28 email"), CP intends to produce documents reasonably related to (not "all documents relating or referring to" as suggested in your May 2 Letter) the Local Service Reliability Program referenced in CP emails from the Spring 2012. CP has produced documents relating or referring to the Local Service Reliability Program. CP is continuing to search for documents that are responsive to this request and will produce additional non-privileged, responsive, reasonably available documents, if any, as soon as practicable.

Document Request No. 5: CP is continuing to search for documents that are responsive to this request and will produce privileged, responsive, reasonably available documents, if any, as soon as practicable. We do not, however, agree with your overbroad suggestion that "all documents constituting, referring, or relating to 'profile DA12' or 'profile DA13' . . . are relevant and covered by this document request."

Document Request No. 6: As noted in your March 28 email, CP agreed it will produce "high level" documents responsive to the request. We agreed that Finch will not at this time pursue customer by customer analysis of the effect of the reduction of switching services on customers other than Finch. CP is continuing to search for responsive documents and intends to produce additional non-privileged, responsive, reasonably available documents, if any, as soon as it is practicable.

Document Request No. 11: As noted in your March 28 email, CP agreed to produce documents from January 1, 2012 to the present reflecting how demurrage is assessed and CP's policies in that regard. CP has produced responsive documents and is continuing to

¹ The foregoing is not meant to be an exhaustive list of the outstanding issues but serves as a summary of some of the material matters which require an immediate response by Finch.

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search for documents that are responsive to this request and will produce additional non-privileged, responsive, reasonably available documents, if any, as soon as practicable.

Document Request No. 16: As noted in your March 28 email, CP agreed to produce documents from January 1, 2012 to the present in which there is a substantive discussion of "constructive placement" of railcars over this time period, and documents relating to any changes in CP's definition or policies regarding constructive placement of railcars. CP has produced responsive documents and is continuing to search for documents that are responsive to this request and will produce additional non-privileged, responsive, reasonably available documents, if any, as soon as practicable.

Document Request No. 21: We disagree with your statement in your March 28 email and again in your May 2 Letter that during our meet and confer conference CP agreed to provide documents relating to the "bunching" of ammonia railcars. Indeed, document request no. 21 makes no reference to "bunching." Rather, at the meet and confer conference, we stated that we would agree to revisit your request as to the tracking of "bunching" and to determine whether responsive information was available and in what form. We are in the process of making that determination and expect to supplement this response when we are in a position to do so.

Document Request No. 27: As noted in your March 28 email, CP agreed to produce documents responsive to the request at a policy level from January 1, 2012 forward. CP has produced responsive documents and is continuing to search for documents that are responsive to this request and will produce additional non-privileged, responsive, reasonably available documents, if any, as soon as practicable. As noted in the March 28 email, CP will not, however, produce all documents relating to demurrage charges being assessed against third parties on a case by case basis.

Document Request Nos. 28 and 29: As noted in your March 28 email, CP will produce maintenance and repair records and documents relating to track outages, as well as derailments on mainline track from the Whitehall Yard to the Finch Paper Facility from January 1, 2012 to the present. CP has produced responsive documents and is continuing to search for documents that are responsive to this request and will produce additional non-privileged, responsive, reasonably available documents, if any, as soon as practicable.

Document Request No. 32: As noted in our initial objections and during the meet and confer conference, this document request (like many others) seeks irrelevant documents. In the spirit of reaching a middle ground as to this request, and as noted in your March 28 email, we agreed to provide in addition to the exceptions reports which CP has produced, forensics documents relating to the derailment on the track of the Lehigh Cement Company, which, to the extent they exist, CP still intends to produce and will do so as soon as it is practicable.

Document Request Nos. 30 and 34: As we have previously stated, we do not believe that the documents sought by this request bear any relevance to any issue in this case or are

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likely to lead to the discovery of relevant evidence. To the extent an FRA reportable incident interfered with service to Finch, that information should be reflected in the exception reports which have been produced. Your letter requesting reconsideration provides no reasons for doing so. Should you provide a legitimate basis for reconsideration, we would revisit our response. Until you do, however, we are standing on our objection.

Document Request Nos. 15, 22, 23, and 31: CP has produced documents responsive to these requests. CP is continuing to search for documents that are responsive to these requests and will produce additional non-privileged, responsive, reasonably available documents in line with CP's previous agreement as to the documents it will produce in response to these requests, if any, as soon as practicable.

2. Matters in your May 2 Letter regarding Finch's Second Set of Discovery Requests

CP largely objected because, in CP's view, the documents and information sought by Finch's Second Set of Interrogatories and Document Request are irrelevant to this matter. We are, however, as with Finch's first set of document requests and interrogatories, willing to conduct a meet and confer conference among counsel to discuss Finch's position as to why it believes that the documents and information sought in Finch's Second Set of Discovery Requests are somehow relevant. If you are interested in such a conference, please propose a date and time for the same. We would be happy to host the conference at our offices.

Please provide the revised interrogatory answers noted above and otherwise let us know your response to each of the issues raised by CP during the parties' April 14 meet and confer, and now again in this letter, on or before Monday, May 16, 2016. We look forward to hearing from you shortly.

Sincerely,

STINSON LEONARD STREET LLP



David F. Rifkind
Matthew Smilowitz