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SURFACE TRANSPORTATION BOARD**

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STB Docket FD 35981

PETITION FOR DECLARATORY ORDER - FINCH PAPER LLC

OPENING STATEMENT OF FINCH PAPER LLC

Thomas W. Wilcox
Brendan Collins
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

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VERIFIED STATEMENT OF RICHARD PETRO

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VERIFIED STATEMENT OF THOMAS D. CROWLEY

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<u>EXHIBIT</u>	<u>DOCUMENT DESCRIPTION</u>
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EXHIBIT U

November 18, 2014 email correspondence from Weigel to Collum *et al.*

EXHIBIT V

September 25, 2014 email correspondence from Falvo to Thompson

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket FD 35981

PETITION FOR DECLARATORY ORDER - FINCH PAPER LLC

OPENING STATEMENT OF FINCH PAPER LLC

Pursuant to the Decision served in this proceeding on May 13, 2016, Finch Paper LLC (“Finch”) hereby submits its Opening Statement in support of its Petition asking the Surface Transportation Board (“Board” or “STB”) for an order declaring (1) that Canadian Pacific Railway Company’s (“CP”) United States subsidiary Delaware and Hudson Railway Company, Inc. (which has labeled itself “CP Rail” and “CP” for purposes of this case)¹ has violated its statutory common carrier obligations to Finch under 49 U.S.C. §11101 continuously since October, 2012, (2) that CP is liable for damages to Finch under 49 U.S.C. §11704 caused by the railroad’s ongoing violations of §11101; and (3) that certain practices and actions of CP related to the attempted assessment of demurrage charges against Finch are unreasonable practices in violation 49 U.S.C. §10702 and are contrary to 49 U.S.C. §10746.

¹ Although the Delaware and Hudson Railway, Inc. (typically referred to as the “D&H”) is the legal name of the CP subsidiary railroad that serves Finch’s mill, all of the facts surrounding this dispute involve the policies and practices instituted by CP and administered by employees of CP. Moreover, the complaint filed in the United States District Court for the Northern District of New York that gave rise to the issues referred to the Board set forth in Finch’s Petition was filed by “Delaware & [sic] Hudson Railway Company [sic] a Delaware Corporation trading under the trade name of CP Rail.” As such, all of the documents in the District Court proceeding refer to the plaintiff as “CP Rail” or “CP.” Virtually none of the documents produced in discovery reference the D&H. Because there is essentially no distinction or separation between the D&H and CP for purposes of the issues in the court case and this proceeding, Finch refers to both the D&H and Canadian Pacific Railway as “CP.”

I. INTRODUCTION

This proceeding involves controversies arising out of business decisions by CP starting in the Spring of 2012 whereby CP made wholesale changes to its structure and operations both systemwide and in the upstate New York region where Finch's paper mill is located. Finch's paper mill is situated along the Hudson River at the end of a track owned and operated by CP. The mill's location and footprint limit the existing rail infrastructure onsite and prevent construction of new rail infrastructure. The mill operates 24 hours a day, 7 days a week, 365 days per year.

As explained in more detail in this Opening submission, Finch was one of many CP customers whose rail service suffered from the actions of CP starting in May 2012 and continuing into 2015, (1) drastically reducing the frequency of service to the railroad's customers; (2) significantly cutting personnel, including train crews and locomotives; (3) drastically reducing personnel in its customer service department and replacing them with an ineffective web based system; and (4) revising its demurrage policies in ways that increased demurrage charges collected by CP and the frequency of such collections. Specifically as to Finch, CP unilaterally, on virtually no notice and over Finch's strong objections, first significantly reduced Finch's ability to absorb rail service inconsistencies by terminating a lease track agreement, and then soon thereafter cut with virtually no advance notice, the days it would provide switching services to Finch's facility from five to three days a week. The evidence shows that CP took these actions even though it knew at the time that they carried significant risks of harm to Finch's operations and its facility's viability. The evidence further demonstrates that in 2013-2014, when CP's rail operations nationwide were in such disarray that the Board commenced EP 724, *Rail Service in the United States*, in large part to address CP's dysfunctional

service, and into 2015, CP refused to return to the five days per week schedule and failed to adhere to even the three days per week schedule CP knew it needed to maintain, nearly causing Finch's facility to shut down, and forcing Finch to incur significant costs for alternative transportation in order to maintain production levels.

Finch also demonstrates in this Opening submission that CP's assessment of over \$1,000,000 in demurrage charges against Finch in 2014, for which CP seeks collection in the United States District Court for the Northern District of New York, is an unreasonable practice under 49 U.S.C. §10702. First and foremost, the bulk of the assessed charges arise from railcars loaded with ammonia that Finch needed for its paper production, which invoices are sought despite an express agreement between the parties calling for the immediate delivery of such cars into the facility and waiver of any demurrage calculated by CP's tracking system. Further, these demurrage charges arose due to CP's unilateral decision to substantially curtail its already reduced service to the mill. CP also unreasonably attempted to assess demurrage charges on days when CP refused to provide service to Finch but Finch was able to accept cars. Finally, CP's application of its demurrage policies to Finch generally violate the intent and purpose of 49 U.S.C. §10746.

II. PROCEDURAL BACKGROUND

This declaratory order proceeding originated with the filing of a complaint by CP in the U.S. District Court for the Northern District of New York in April, 2015 seeking a ruling directing Finch to pay \$1,349,050 in demurrage assessed by CP in 2013, 2014, and 2015, and \$9,148 of other accessorial charges assessed over the same timeframe. *Delaware and Hudson Railway Company, t/a CP Rail v. Finch Paper LLC*, 1:15-cv-417, (N.D.N.Y. 2015). On June 11,

2015, Finch filed an Answer denying liability for most of the demurrage charges, and asserting that the \$9,148 in other charges had been successfully disputed by Finch and withdrawn by CP prior to the complaint being filed.² Finch also asserted several Affirmative Defenses, which included (1) that the demurrage charges CP seeks to recover are unreasonable under §10702 and do not fulfill the purposes and requirements of §10746, and (2) that the assessment of demurrage charges for ammonia cars was unreasonable because it breached an agreement between the parties whereby CP had standing instructions to immediately deliver loaded ammonia cars to the mill. Along with its Answer, Finch also asserted a Counterclaim against CP alleging that CP had violated its common carrier obligations under 49 U.S.C §11101, causing Finch to incur damages pursuant to 49 U.S.C. §11704(b).

Finch subsequently filed a motion to refer several issues to this Board that fall within its primary jurisdiction and expertise. On November 10, 2015, the District Court granted Finch's motion and referred six questions to this Board for resolution. The Board instituted this proceeding on February 11, 2016 pursuant to 5 U.S.C. §554(e) and 49 U.S.C. §1321 upon petition by Finch filed on December 7, 2015. In the February 11, 2016 decision, the Board listed the following issues to be resolved in this proceeding:

- (a) Whether CP violated its statutory common carrier obligations to Finch under 49 U.S.C §11101 by reducing the frequency of CP's switching services to the Facility;
- (b) Whether CP 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 seeks to recover arose, in whole or in part, from delays caused by CP or from CP's inability to

² These charges appear to be no longer in dispute, and were not included in the issues for decision eventually referred to the STB.

deliver railcars due to the fault of CP, 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;

- (d) Whether CP'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, making the assessment of the demurrage charges an unreasonable practice in violation of 49 U.S.C. §10702;
- (e) Whether the demurrage charge CP 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's Tariff #2 pertaining to the assessment of demurrage, and rules and practices used by CP to apply the tariff terms to Finch Paper, are consistent with the language and policy goals of 49 U.S.C. §10702 and §10746.

III. SUMMARY OF RELEVANT FACTS

The following factual summary is supported by the attached Verified Statements of (1) the following current employees of Finch: Derek A. Basile, Chief Financial Officer; Stuart W. Alheim, Transportation Manager; and Richard Petro, Maintenance Manager; (2) former Finch employee Deborah H. Taylor, Transportation Coordinator and Invoicing Analyst; and (3) deposition testimony and documents produced by CP and Finch in the discovery phase of this proceeding.

A. Finch Paper and its Glens Falls, New York Paper Mill

Finch Paper owns and operates a paper production mill along the banks of the Hudson River in Glens Falls, New York that manufactures paper and paper products. *See* Maps attached as Exhibit A-1, A-2. In addition to being bordered by the Hudson River on one side, the facility is bordered on its other sides by a Hudson River feeder canal, a dam, and by the Glens Falls municipal wastewater treatment plant. Verified Statement of Derek A. Basile ("Basile V.S.") at

¶ 2. Because of the geographical limitations of the plant the storage and unloading tracks on the Finch property are also limited and cannot be expanded through new construction. As shown on Exhibit A-1, Finch has tracks on its property on which it can receive and store up to 21 railcars of raw materials used in its production process. Verified Statement of Richard Petro (“Petro V.S.”) at ¶ 11.

The mill was constructed in the early 19th Century, and produced lumber, marble and other products before it was purchased by Jeremiah and Daniel Finch, and Samuel Pruyn in 1865. The Finch, Pruyn Company began paper production at the mill in 1905. Finch Paper Holdings, LLC purchased the mill in 2007, and renamed the company Finch Paper LLC. In 2016, Finch Paper and the mill celebrated 150 years of operations. The paper mill is a major employer of the residents of Glens Falls, and it supports many other residents of the surrounding area by utilizing pulp from trees grown in forests and tree farms within a 90 mile radius of the mill. Its 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 CP, which has served the plant its entire existence. The rail line serving the mill originates in CP’s Fort Edward, New York rail yard and terminates within the gates of the mill, thus a portion of the main track within the mill property is owned and maintained by CP. CP would prefer not to maintain this property and track and therefore has repeatedly explored the possibility of having Finch buy its track and property. Such a sale was contemplated by CP in 2009, 2011, and most recently in 2014 and 2015. [

] Exhibit B.

From 1984 until June 6, 2012, Finch leased tracks from CP in CP's Fort Edward Yard, which provided up to 25 available storage spots cars that Finch used for overflow car storage and to manage fluctuations in rail service and demurrage charges. *See* Verified Statement of Stuart W. Alheim ("Alheim V.S.") at ¶ 5. Since the leased track was considered Finch's property, it was not charged demurrage for cars stored on it, including ammonia cars. Exhibit C (CPFinch0008945). [

] Exhibit D

(CPFinch0011136). Nevertheless, not three years later, as part of CP's cost-cutting and other structural changes to the railroad starting in 2012, CP unilaterally, and with less than 30 days warning, terminated Finch's lease effective June 6, 2012, thereby eliminating the 25 available spots. Exhibit E.

Finch depends on CP to deliver carloads of wood pulp, ammonia, caustic soda, sulfur, and corn starch to the facility for use in the paper manufacturing process. These rail cars move in and out of the paper mill's track facilities via switching operations conducted by CP from the Fort Edward rail yard and from CP's yard in Whitehall, New York, located 45 miles upstream on CP's main line. The mill has no other access to railroad transportation, and as CP itself recognizes, is captive to CP for rail service. The mill annually produces approximately [] tons of numerous types of high bright, fine paper products used in business, such as recycled and digital papers. Basile V.S. at ¶ 6.

[] *Id.* at ¶

9. In order to compete with the cost structures of global paper giants like Industrial Paper,

Weyerhaeuser, Domtar and Boise Paper, Finch must operate its mill 24 hours a day, 7 days a week, 365 days a year, and so requires a constant supply of wood pulp and chemicals to remain operational. If Finch ever had to shut down its plant due to a lack of materials [

] *Id.* at ¶ 8.

As a result, it is imperative that CP deliver the pulp and chemicals Finch required for its operations on a timely basis. If CP ever proves unable to do so (which unfortunately it often does), Finch has to ensure that it can obtain a backup supply of chemicals and pulp on short notice via truck. *Alheim V.S.* at ¶ 3; *Petro V.S.* at ¶ 15. The impact of having to do so is not only prohibitively expensive, because such materials are much more expensive to transport by truck than by rail, it also imposes a significant logistical burden on Finch. Rail cars often carry twice as much material as a truck. Consequently, the time and expense in terms of man hours in unloading 4 trucks of caustic or pulp is much greater than what is required to unload 2 railcars. *Petro V.S.* at ¶ 15.

B. CP's Sudden, Unilateral Decision 2012 to Substantially Reduce its Service to Finch and Put the Mill at Risk

Having served the facility for over decades, CP Rail – and CP - are both well aware of the mill's geographical and operational limitations, and they also are keenly aware of how those limitations increase the importance of the mill receiving timely railroad service in order for the plant to survive. A 2009 CP internal description of Finch and its facilities described the situation as follows:

[

]³

³ October 14, 2009 Risk Committee Submission – Finch Paper Co. Track Lease, Exhibit D.

In order to meet its obligations to provide service to the plant, CP provided switching services to the plant five, and sometimes seven days a week. Indeed, in May of 2012, CP announced it was rolling out a “Local Service Reliability Program” (LSRP) on May 22, 2012 that was going to increase service to seven days a week. Exhibit F.

Then, without any prior warning or notice, CP took two precipitous actions that drastically and adversely affected rail service to the mill.

First, [] Alheim V.S. at ¶ 5. This eliminated the 25 car storage spots. *Id.* CP refused to renew the lease or extend the lease term in any way. CP sought to downplay the effect that terminating the lease would have on Finch by reassuring Finch that it would be receiving service up to seven days per week under the LSRP. Alheim V.S. at ¶ 7. Thus, CP explained, cars could be called in whenever needed, largely eliminating Finch’s need for overflow storage space. *Id.*

Only a few months later, CP unilaterally took an action that rendered those assurances meaningless. On October 2, 2014, Mr. Alheim learned, when a switch Finch was expecting did not arrive, that CP had unilaterally reduced the days it would provide switches from five to three days per week on September 24, 2014. Alheim V.S. at ¶ 8. Finch immediately and strenuously protested this action by CP through calls and emails of multiple employees starting on October 3, and through a formal letter from the Chief Executive Officer of Finch to CP’s Mr. Harrison dated October 15, 2012. Exhibit G. That letter stated that “[

]” It also asked for an immediate delay in the reduction of service in order to try and make alternative arrangements for rail deliveries from

Even though CP knew that switching to three days a week for service carried significant risks to Finch's operations, CP decided to place all of that risk on Finch. [

] Exhibit L (CPFinch0009250). [

]

Later, in February of 2013, implicitly recognizing the substantial risk and harm that CP's reduction in service from five days per week to three days a week, and its inability to provide reliable service on those three days was causing Finch, CP agreed to increase its service from three days per week to four days per week effective two days later. *Alheim V.S.* at ¶ 11. CP then failed to implement the change, however, *without notifying Finch that it was reneging on its promise. Id.* Thus, CP continues to agree to schedule service only three days per week at up to the present time.

C. CP's Systemwide Changes that Contributed to its Failures to Meet its Statutory Obligations to Finch

The 2012-2015 time period covered by this dispute was marked by numerous changes to CP's business operations and system that adversely affected its ability to service its customers.

Many of these changes were brought to light and debated in EP 724, *United States Rail Service Issues*, a proceeding commenced on April 1, 2014 primarily due to severe service problems being experienced by rail shippers on the systems of the BNSF Railway and CP. As to the problems on CP's system, the Board noted in early March, 2014:

Numerous CP customers, large and small, have now contacted the Board, expressing their concerns and frustrations about declining service levels and negative impacts on their businesses. These customers have described a common experience, including significant backlogs of unfilled car orders, multiple failures to pick up loaded trains, extend delay of trains on sidings, prioritization of other traffic, and a failure of CP to provide reliable updates on the status of traffic.⁵

While much of the emphasis in EP 724 was on transportation of grain and other commodities in Chicago, Illinois and points west, data submitted by CP in that proceeding provided a glimpse of the reductions in equipment and personnel CP had made to CP's system in upstate New York. For example, in a filing submitted October 24, 2014 at the direction of the Board,⁶ CP confirmed statements in its annual financial reports that since July, 2012 it had eliminated 4,615 system-wide employees and contractors, 981 of which were in the United States.⁷ CP did not indicate it was hiring any new train or engine personnel in the New York area in 2014, despite admitting that 337 U.S. train and engine employees had left CP in 2014. *Id.* at 5. Moreover, CP's data showed that its elimination of personnel had translated into service delays. Specifically, in response to a directive by the Board, CP identified the number of trains

⁵ Letter from Chairman Dan Elliott and Vice Chairman Ann D. Begeman to E. Hunter Harrison, Chief Executive Officer and Director, Canadian Pacific Railway Company, dated March 6, 2014.

⁶ On October 14, 2014, the Board took the unusual step of singling CP out for not complying with Board requests for information "necessary for the Board to fully assess CP's plans for resolving its service problems or responding to the fall service demand." Docket EP 724, *United States Rail Service Issues*, Decision served October 14, 2014.

⁷ Letter from Charles W. Webster to Cynthia T. Brown, Chief, Section of Administration, Office of Proceedings, dated October 24, 2014, submitted in Docket EP 724.

held for four hours or longer, including the D&H, for 2013 and for 2014 to date. That data showed a steady increase in held trains due to lack of crews from zero in May of 2013 to a peak of 395 in August of 2014, eventually totaling 2308 held trains between May of 2013 and October, 2014. *Id.* at 6. The July, 2012 to 2014 time period when CP was drastically cutting personnel and equipment coincided with many of the service failures experienced by Finch that are identified in this Opening Statement.⁸

D. The Failure of CP to Provide Adequate Rail Service to the Mill After Reducing Service to Three Days per Week

1. Service Failures Due to Missed or Delayed Switches

Even though CP knew that its failure to provide reliable three day a week service would place the Finch mill at risk, CP's service after that reduction was woefully inadequate. The facts regarding CP's ability (and inability) to timely provide switches to Finch pursuant to CP's reduced three days per week service are reflected in the attached Verified Statements of Stuart Alheim and Deborah Taylor and the exhibits that accompany their Statements. Mr. Alheim summarizes approximately 100 other instances from October, 2012 to October 15, 2015 where CP failed to timely provide service on the three day per week schedule. Often switches were simply missed, without any advance notice, and replacement switches were not provided. Reasons for such failures included a lack of sufficient crews and equipment and the fact that CP

⁸ During the discovery phase of this case Finch sought from CP the production of documents and information related to the specific cuts to personnel and equipment that CP made to the CP Rail portion of its overall business. CP Rail refused to produce this information, and Finch filed a motion to compel its production on July 1, 2016. By decision served August 16, 2016 the Board accepted Finch's motion and referred it to Administrative Law Judge H. Peter Young for further action and resolution. The decision did not also suspend the procedural schedule established for the parties' respective evidentiary submissions. As such, Finch reserves the right to supplement this opening submission with any additional information and documents ordered to be produced by Judge Young.

often could not keep track of where railcars were located, even when railcars had already been switched out of Finch's facility.

2. Service Failures Due to CP's Flawed Web-based Car Management System

CP's inability to service Finch, and Finch's inability to rely upon CP to provide timely switches to Finch's plant, was compounded by CP's decision in late 2012 to drastically cut personnel and other costs related to its operations and customer service departments and replace those employees with a website. The facts regarding the service failures of CP starting in 2012 and continuing into 2015 stemming from problems experienced by Finch due to CP's dysfunctional website are reflected in the Verified Statement of Deborah Taylor and the exhibits accompanying her Verified Statement.

3. Partial Closure of the Facility's Tracks in April, 2014

On April 7, 2014, during the height of CP's national rail service problems and when Finch's employees Taylor and Alheim were having to contact CP on practically a daily basis concerning website failures and lack of switches into the facility, *see* Alheim V.S. at ¶¶ 49-55; Verified Statement of Deborah A. Taylor ("Taylor V.S.") at ¶ 22-53, CP derailed a loaded ammonia railcar on its track approximately one mile from the mill. Petro V.S. at ¶ 2, Attach. 1. Two weeks later, CP contacted Finch and summarily shut off its service into the facility based on a determination that some of the switches and tracks were unsafe. This action was highly unusual because CP, the Federal Railroad Administration, and Finch itself (through its maintenance contractor) regularly inspected the Finch tracks and they had never determined that it was unsafe and therefore needed to be shut down. Petro V.S. at ¶¶ 2-5.

E. The Agreement Between CP and Finch Concerning Immediate Delivery of Loaded Ammonia Railcars

In 2011 track repairs had been done on Finch track which resulted in ammonia cars stacking up on CP track. Exhibit M. As a result, CP placed an embargo on ordering ammonia cars so that they would not remain on CP track. Once the embargo was lifted, CP [

] *Id.* at CPFinch0008965.

When CP rolled out its Local Service Reliability Program in the Spring of 2012, CP asked Finch to fill out and submit a Standing Instruction Template. *See* Exh. F. Finch did so, instructing CP that any and all railcars carrying anhydrous ammonia were to immediately be brought in to Finch's facility from Fort Edward Yard or from Whitehall Yard. At the time this was considered mutually desirable and beneficial to both CP and Finch because (1) CP did not want cars containing anhydrous ammonia, which is a Toxic Inhalation Hazard ("TIH"), to be on its track for extended periods of time, and (2) Finch did not want to incur the extraordinarily punitive demurrage charges associated with such railcars, which were a magnitude of 10 times the normal demurrage charges assessed by CP. *See* Exh. K., Newell Tr. at 62:10-21 [

]

As a result, Mr. James Cotton, a senior CP representative, wrote to Finch on May 22, 2012, seeking to avoid any confusion that might exist in this regard and asked Finch to make explicit that all ammonia cars were to be placed upon arrival. *Alheim V.S.* at ¶ 96, Attach. 46. Finch routinely did so. *Alheim V.S.* at ¶ 96.

This mutual agreement to a standing order or instruction remained in place until December of 2014 when the parties mutually agreed to terminate it. Basile V.S. at ¶ 21. On occasion CP crews failed to follow the longstanding instructions to switch in loaded ammonia cars immediately upon arrival and/or these cars were identified as constructively placed at Fort Edward or Whitehall by CP's tracking system. When that occurred, any demurrage charges calculated and invoiced for ammonia cars were routinely recognized by CP as erroneous and removed from CP's final invoices. Alheim V.S. at ¶¶ 98-106. Thus, in September of 2012, Finch challenged an invoice from CP on the grounds that \$12,000 of the amount sought was for demurrage charges calculated for ammonia cars and that "Finch[']s current standing instructions are to place any and all ammonia cars upon arrival." Alheim V.S. at ¶ 98, Attach. 48. Mr. Jeffrey Holley, an employee in CP's Supplemental Services & Demurrage Department, [

] (CP Finch 0001385).

The same issue arose again in correspondence dated January 10, 2013. Once again Finch disputed an invoice from CP for (among other reasons) its assessment of demurrage charges on ammonia railcars. Alheim V.S. at ¶ 99. Specifically, Finch noted that it was disputing all 11 days demurrage for the ammonia cars. "We are to receive ammonia as soon as it is available There should not be any demurrage charges for ammonia." *Id.*, Attach. 49. Again, CP recognized that Finch's position was valid and waived the 11 days of demurrage associated with the ammonia cars.

In February of 2013, CP again improperly assessed Finch demurrage on ammonia cars and once again CP recognized its error and corrected the invoice. Alheim V.S. at ¶ 100, Attach.

50. In so doing, CP explicitly recognized that Finch's dispute was valid and that Finch "[

]" (CP Finch 0001397).

The following month, in March of 2013, Mr. Holley wrote to Mr. Jason LaValla, who was the Manager of CP's Service Center or Customer Service Department,⁹ inquiring why all of Finch's ammonia cars were not immediately being spotted despite the standing instructions to do so. *See* Exhibit O. "[

]" (CP Finch 000250). Mr. Holley

speculated that the reason CP's crews were not following the standing order could be "[

]" for placement of the cars. (CP Finch 000252).

In any event, Mr. Holley later did not recall Mr. LaValla ever doing anything to fix the ongoing problem. *See* Deposition Transcript of Jeffrey Holley dated July 22, 2016 ("Holley Tr.") at 79:19-80:10, attached hereto as Exhibit P.¹⁰

Despite the standing order, CP's system continued to improperly generate demurrage charges for ammonia rail cars that were supposed to be brought in immediately -- and CP's employees continued to recognize those errors and correct the invoices. Thus, in January of 2014, Finch challenged demurrage charges on ammonia cars and the invoices were corrected

⁹ Deposition Transcript of Kenneth Weigel dated July 22, 2016 ("Weigel Tr.") at 50:8-9, attached hereto as Exhibit Q.

¹⁰ Mr. Holley's position was that he was not really concerned that Finch kept getting billed every month for charges it did not owe. "[
]" Exh. P, Holley Tr. at 81:6-19. Whether it was fair or reasonable for CP to do was not his concern because "[
]" *Id.* at 83:10-15.

based upon the fact that “Customer has a standing order to have all cars brought out to plant.” Alheim V.S. at ¶ 101, Attach. 51.

CP’s recognition of the validity of the standing order continued into April and May of 2014.¹¹ In November of 2013, Finch had challenged \$6,000 of an invoice based upon the standing order to have all ammonia cars spotted upon arrival. Alheim V.S. at ¶ 102, Attach. 52. CP did not respond for five months but in April of 2014, Mr. Holley finally wrote back to Finch apologizing for CP’s delay in responding and stating that he “[]” (CP Finch 0001426).¹²

On April 25, 2014, Finch once again challenged an ammonia demurrage charge in the amount of \$12,000 on the grounds that the cars should have been brought in immediately. Alheim V.S. at ¶ 105, Attach. 55 (CPFinch0001436). And again, CP corrected the error on its invoice. Indeed, Mr. Holley wrote on May 12, 2104, that he had consulted with the CP Customer Service Representative for Finch and “[]” *Id.* Thus, as of May of 2014, CP confirmed that the standing instructions remained in effect. *Id.*

¹¹ On March 6, 2014, Ms. Taylor wrote to CP noting that ammonia cars when they hit Whitehall were to be brought in immediately and asked why it had not happened on two occasions. Alheim V.S. at ¶ 103, Attach. 53. On April 22, 2014, Ms. Taylor again wrote to CP inquiring why the standing instructions were not being followed, noting that 4 ammonia cars arrived at Whitehall and should have been brought in for delivery yesterday. *Id.* at ¶ 104, Attach. 54. She further noted that due to the standing order, “we should not be incurring any demurrage charges on these cars due to the crew not placing these cars.” She also asked for immediate feedback regarding this issue. *Id.*

¹² Mr. Holley, the CP employee who primarily interacted with Finch regarding demurrage charges, did not specifically recall every time he corrected a CP invoice to Finch based upon CP having erroneously billed for demurrage charges associated with ammonia cars, but testified that [] Exh. P, Holley Tr. at 75:12-76:8.

Despite the fact that standing instructions had been in place for almost two full years, CP's system continued to generate constructive placement notices and demurrage charges for ammonia cars from April through October of 2014 when CP failed to immediately switch them into the facility upon their arrival at Fort Edward or Whitehall. The outstanding demurrage charges generated for ammonia cars from April to October were:

April - \$40,500
May - \$277,500
June - \$376,500
July - \$94,500
August - \$21,000
September - \$40,500
October - \$93,000

Alheim V.S. at ¶ 115.

As he had done so in the past, upon receipt of an invoice containing charges for ammonia railcars, Mr. Alheim would notify his contact Mr. Holley to object and to ask CP to have the amounts removed. Alheim V.S. ¶¶ 98-107.

Mr. Weigel, CP's Manager of Supplemental Services & Demurrage, agreed in April of 2014 that demurrage charges on ammonia railcars had been improperly assessed and thus the charges should be cleared. Merely four months later, in August of 2014 - and after the outstanding ammonia demurrage charges had reached in excess of \$800,000 - Mr. Weigel began to express purported confusion as to the basis for Finch's belief that its ammonia railcars were to be brought directly into its facility and that therefore any demurrage charges assessed for ammonia cars were improper. Alheim V.S. at ¶ 108, Attach. 56.¹³ One week later, in

¹³ Somewhat incredibly, although documents produced in discovery show that Mr. Holley personally corrected numerous invoices to Finch for over two years that were incorrectly charging demurrage charges for ammonia railcars, in some cases after consulting with his supervisor Mr. Weigel about such corrections, Mr. Holley testified that [

correspondence to Finch, Mr. Weigel admitted that [

] Alheim V.S. at ¶ 108, Attach. 57. Nonetheless, contrary to the position that it had taken dating back to 2012, CP now claimed that [

]

Id.

Not surprisingly, other CP personnel involved in determining whether CP had a valid basis pursuing the demurrage charges for ammonia cars noted the inconsistencies in CP's present position. Thus, Mr. Danny Melo, at CP, candidly observed to Jason LaValla, the CP Customer Service representative, that

[

]

Exhibit R (CPFinch0010073).

Ms. Lyndie Falvo, of CP, who CP had brought in to investigate the validity of the demurrage charges CP was now seeking, similarly recognized that as recently as March 12, (2014) [

] Exh. P, Holley Tr. at 104:7-106:2. Mr. Holley also testified [

] *Id.* at 119:12-120:6.

] *Id.*

F. CP Attempts to Leverage the Disputed Outstanding Demurrage to Force Finch to Buy CP Track and Property

Shortly after CP reversed course and denied that CP and Finch had mutually agreed that there was a standing instruction for ammonia cars to be immediately switched into the mill, so that demurrage charges assessed by CP's system would be waived, CP began to attempt to use the huge demurrage charges that had accrued as a cudgel to achieve CP's longstanding goal of forcing Finch to purchase the CP property and track located within the Finch facility. Specifically, on August 25, 2014, four days after [

] *Alheim V.S.* at ¶ 108 Attach. 56. [

] *See Exhibit B.*

Shortly thereafter, a CP employee wrote to Mr. Weigel and Danny Melo, stating “[

]” Exhibit

S (CPFinch0012098). The employee further elaborated that “[

]” *Id.* Even Mr. Weigel, who is far from a shrinking violet, expressed dismay regarding CP's tactics in this regard and testified that [

¹⁴ SSD is Supplemental Service and Demurrage Charges, which are the charges in dispute here.

G. CP's Assessment of Demurrage Charges in 2014

In its Complaint CP has asked the District Court to order Finch to pay CP \$1,349,050 in demurrage charges assessed to Finch by CP during certain months between 2013 and 2015. Of the total amount in the complaint, \$1,323,920 is in dispute, since an invoice for \$25,130 for demurrage charged in February, 2015 (Invoice No. 90063005) was paid by Finch subsequent to the case being filed. Basile V.S. at ¶ 3. The invoices and the amounts in dispute regarding the ammonia cars that CP failed to immediately bring in are as follows:

2013	July - \$10,500
2014	April - \$40,500
	May - \$277,500
	June - \$376,500
	July - \$94,500
	August - \$21,000
	September - \$40,500
	October - \$93,000

Alheim V.S. at ¶ 115.

The amount in dispute arising from CP charging demurrage on days it does not provide service to Finch is \$234,760. Alheim V.S. at ¶ 16.

In November, 2014, the parties engaged in discussions to try and resolve their disagreements over the amounts invoiced, which primarily included the dispute over the continued validity of the parties' agreement concerning the immediate switching of ammonia cars into the Facility, and Finch's charge that CP was wrongfully including in its calculation of demurrage days for which CP declined to provide service but Finch was ready to accept a car that had been placed in either of CP's rail yards. Basile V.S. at ¶ 19. These discussions included Finch submitting a compromise proposal to CP on November, 18, 2015 concerning most of the

demurrage invoices covered by the complaint. Invoice 900619543 for October demurrage issued November 14, 2014 was not included because it had recently been issued. However, there were computational errors in the proposal that required it to be corrected and resubmitted. Finch had not sent a corrected version to CP by May 8, 2015, when it learned that CP had filed its lawsuit in the New York court on April, 2015, seeking collection of 100% of the invoiced demurrage charges. At that point, discussions between the parties ceased. *Id.* at ¶¶ 20-21.

IV. THE APPLICABLE LEGAL STANDARDS

A. CP's Obligations Under 49 U.S.C. §11101

A railroad's provision of common carrier services to a customer is governed by 49 U.S.C. §11101. Under that provision, a railroad has an obligation to provide transportation or service upon reasonable request. Section 11101 does not define what would constitute adequate service on reasonable request. Rather, the Board "has been given broad discretion to conduct case-by-case fact-specific inquiries to give meaning to these terms, which are not self-defining, in the wide variety of factual circumstances encountered." *Granite State Concrete Co., Inc. v. Surface Transportation Board*, 41 F 3d 85, 92 (1st Cir. 2005); *accord, Sherwin Alumina Co., LLC v. Union Pacific Railroad Co.*, STB Docket 42143 (served September 29, 2015) at 4 and note 10. Consequently, whether a railroad is meeting its common carrier obligations to a particular shipper is determined based on the particular facts and circumstances surrounding the requested transportation at issue.

Significantly for application to the facts to Finch's particular facts and circumstances, it is hornbook law that a railroads "cannot lawfully make fulfilling their statutory obligations contingent upon whether they think it is 'worth it' to do so. Rather, a carrier must adhere to its statutory obligations even if it suffers hardship in so doing." *Pejepscot Industrial Park, Inc.*,

d/b/a Grimm Industries – Petition for Declaratory Order, STB Finance Docket No. 33989 (served May 15, 2003) at 12-13 (“*Pejepscot*”), and cases cited therein. *See also*, *Sherwin Alumina, supra*, at note 10 (“Courts and the Board have made clear that when evaluating railroad rules and practices that a railroad may not refuse to provide service simply because it may be inconvenient or unprofitable.”).

A carrier’s statutory obligations under §11101 include switching services, *i.e.*, dropping off loaded cars and picking up unloaded cars. STB FD 34920, *Savannah Port Terminal Railroad, Inc. – Petition for Declaratory Order – Certain Rates and Practices as Applied to Capital Cargo, Inc.* (served May 30, 2008) at 8 (“*Savannah*”). In that case, consistent with the general rules governing §11101, the Board explained that there is no set rule establishing the number of switches a rail carrier is to provide, but rather the Board “looks to what is reasonable under the circumstances.” *Id.* Nonetheless, it is generally established by Board precedent that the industry standard for a carrier providing rail switches to a customer is one switch per day to each facility, five days per week. STB Docket 42068, *Capitol Materials Inc. – Petition for Declaratory Order – Certain Rates and Practices of Norfolk S. Ry. Co.*, (served April, 12, 2004)(“*Capitol Materials*”) at 8. In that proceeding the Norfolk Southern Railway asserted that “providing one switch every weekday to each facility is the standard of service provided to the vast majority of shippers, not only by NS but by all major railroads.” *Id.* *See also* STB FD 35406, *Portland and Western Railroad, Inc. – Petition for Declaratory Order – RK Storage & Warehousing, Inc.* (served July 27, 2011) at 2011 WL 3157556 (S.T.B.) *4 (it was the railroad’s “customary business practice” to provide its customer with one switch per day, Monday through Friday). Such switches are to be provided at the carrier’s “ordinary operating convenience,” which “ordinarily contemplates only one switch except when additional switches are made by a carrier

in its own or the public interest, as distinguished from the industry's interest.” *Detroit Harbor Terminals, Inc., Terminal Allowance et al*, 332 I.C.C. 635 (1968).

A railroad that fails to provide service in accordance with §11101 is liable for damages sustained by its customer as a result of the act or omission that caused the violation of §11101. 49 U.S.C. §11704(b). The federal courts and the Board have concurrent jurisdiction over claims brought under §11704(b), and such claims are also subject to 49 U.S.C. §11705(c), which requires such claims to be formally sought within two years after the claim accrues.¹⁵

B. Legal Rules Applicable to the Assessment of Demurrage

Demurrage is a charge that both compensates rail carriers for the expenses incurred when rail cars are detained by shippers and encourages the prompt return of rail cars to the rail network by serving as a penalty for undue car detention. STB Docket No. 42050, *South-Tec Development Warehouse, Inc. and R.R. Donnelly & Sons Co. – Petition for Declaratory Order – Illinois Central RR Co.*, (served November 15, 2000) at 3, citing *Chrysler Corp. v. New York Central R. Co.*, 234 I.C.C. 755, 739 (1939). In cases such as this one, where the traffic is not covered by a transportation contract, “demurrage is subject to the Board’s regulation under 49 U.S.C. §10702, which requires railroads to establish reasonable rates and transportation-related rules and practices. Moreover, under 49 U.S.C. §10746, rail carriers must compute demurrage charges in a way that will facilitate freight car use and distribution and promote car supply.” *Id.*

¹⁵ Under §11705(c) a claim can accrue on a continuous basis, meaning every day CP violated §11101 after it reduced service to three days per week in October, 2012 constituted a new cause of action for purposes of §11705(c). STB Docket No. 42087, *Groome & Associates, Inc. and Lee K. Groome v. Greeneville County Economic Development Corp.*, (served July 27, 2005) at 8; *Pejepscot* at 14. Finch filed its counterclaim in the New York court on June 11, 2015. While discrete violations 49 U.S.C. §11705(c) might foreclose a party’s ability to collect damages for CP’s violations of 49 U.S.C. §11101 that occurred prior to June 11, 2013, the evidence clearly shows that CP’s violations of §11101 have been ongoing since at least October, 2012 when it cut its service to Finch, and have continued to present day. Thus, the claim is not time barred.

A shipper is not required to compensate a railroad for delay in returning the asset if the railroad and not the shipper is responsible for the delay. STB Docket NOR 42102, *Railroad Salvage & Restoration, Inc. – Petition for Declaratory Order – Reasonableness of Demurrage Charges, et al*, (served July 20, 2010) at 4. Thus, “constructive placement occurs only when a railcar cannot be placed at the shipper’s facility because of a condition attributable to the shipper. Free time cannot run, demurrage cannot accrue, and charges may not be assessed if a railroad’s own disability prevents the actual or constructive placement of a car.” *Id.* at 8.

Additionally, a railroad and a shipper may enter into a separate agreement to waive or not apply certain provisions of the railroad’s demurrage tariff. *Capitol Materials* at 3. Such agreements can be written, or “a mutual understanding based on longstanding pattern of conduct.” *Id.* For example, as applicable to this case, a railroad and shipper can enter into an agreement whereby certain loaded railcars would not be subject to notices of constructive placement generated by the railroad because the railroad agreed to immediately deliver the cars into the shipper’s facility upon their arrival at the railroad’s switching yard. *Id.* at 6 and 11. As set forth above, from May, 2012 to December 5, 2014, CP and Finch had an enforceable agreement whereby CP had “standing instructions” to immediately switch loaded ammonia tank cars into Finch’s facility upon their arrival at CP’s rail yards. Thus, notices of constructive placement for such cars generated by CP were inapplicable, and demurrage charges calculated for ammonia cars were routinely deleted from invoices generated for Finch.

V.
ARGUMENT

**A. CP Violated 49 U.S.C. §11101 by Unilaterally Reducing the Days it
Would Provide Service to Finch From Five to Three Days Per Week**

**1. The Burden Should be on CP to Demonstrate its Departure
from Industry Standard**

As explained above, Board precedent has recognized that the industry standard of switching service for the “vast majority of shippers” by the major railroads is one switch every weekday to each facility of a rail shipper. This is the industry standard CP followed until the 2012, when it made significant cuts to its personnel and railroad generally in order to reduce its operating costs and increase its profits. While the Board looks at what switching levels are appropriate based on the facts and circumstances of each case, it should proceed from the general baseline of five days a week service, and place the burden on the railroad to demonstrate why it is reasonable under the circumstances to summarily cut service to a particular shipper to only one switch, three days per week. This is the flip side of the Board’s determinations in *Savannah* and *Capitol Materials*, where the burden was on the rail shipper to demonstrate that receiving more than one switch per day, five days per week, was reasonable and appropriate under §11101. CP cannot meet this burden in this case.

2. Cutting Finch’s Service For Financial Reasons was Not Lawful

The only reason CP provided to Finch for its service being summarily cut from five days to three per week was that CP had determined the service was not sufficiently profitable. Hence, as explained above, CP told Finch that its days of service were based on [

]

CP made this decision despite the fact that there had been a steady increase in the number of railcars Finch received from CP in the time period from 2008 to 2012. *Alheim V.S.* at ¶ 9.

Accordingly, CP made fulfilling its statutory obligations to Finch “contingent upon whether [it thought] it [was] ‘worth it’ to do so” in direct contravention to the well-established precedent interpreting §11101. *Pejepscot, supra*, at 12-13. As the Board articulated the rule in that case, CP is required to adhere to its statutory obligations “even if it suffers hardship in so doing,” although in this case there is no evidence whatsoever that CP suffered any hardship by providing switching to Finch five days per week. Cutting service as part of a cost-cutting program in order to boost profits is not valid under §11101.

3. CP’s Reduction of Service Violates §11101 Because CP Knew it Would Place Finch’s Facility at Risk

Finally, it was not reasonable under these facts and circumstances for CP to cut service to Finch from five to three days per week because CP was fully aware that doing so would create significant operational and economic risks to the Finch facility if CP did not adhere to the reduced three day per week schedule. Nevertheless, CP affirmatively decided to place 100% of the risks (and associated costs) of CP’s service failures on Finch. When Finch protested the reduction, internal discussions among CP personnel freely acknowledged the huge risks that its decision would create, but CP affirmatively decided to err on the side of reaping the benefits of CP’s ongoing program to reduce its costs and personnel, and to place all of the risks of CP’s service failures on Finch. Since CP knew full well that Finch’s mill must receive rail service five days per week in order to function without the risk of shutting down or incurring significant costs to maintain production, CP’s decision to significantly reduce that service violates §11101’s requirement to provide adequate service to Finch.¹⁶

¹⁶ *See also* Crowley V.S. at pp. 8-10 discussing the interrelationship of CP terminating the lease, reducing service to three days per week, and ensuing demurrage charges.

B. CP Also Violated 49 U.S.C. §11101 Because it Failed to Adhere to Even its Reduced Schedule

Despite CP's Mr. Cotton's recognition that [

] CP in fact provided woefully inadequate service from late 2012 through 2015. CP routinely missed switches and often provided late switches for a variety of reasons from crew shortages, to engine failures, to an inability to keep track of where railcars were on its tracks. These problems were compounded in November of 2012 when CP cut its resources and personnel devoted to customer service and attempted to implement a web based system of managing rail cars without human interaction. As more fully reflected in the attached Verified Statement of Deborah Taylor, CP's website was dysfunctional, making it impossible for Finch to know where railcars it had ordered were and when and if those railcars would be arriving at its Facility. This resulted in Finch incurring extraordinary expenses in having to transport goods by truck on short notice instead of by rail.

1. Service Failures Due to Missed or Delayed Switches

A review of the Verified Statements of Stuart Alheim and Deborah Taylor, as well as the contemporaneous documents attached to their Statements, definitively establish that delayed and missed switches were not sporadic events but instead regular and repeated occurrences. Often these missed switches occurred even after Finch had informed CP that it was running desperately low on chemicals or pulp that Finch needed for its operations. Thus, for example, on January 15, 2013, Finch informed CP that it desperately needed sulfur cars because the shortage of sulfur at Finch's plant was reaching critical levels. Alheim V.S. at ¶ 22, Attach. 5. Although CP confirmed that it had a sulfur railcar in Saratoga Springs and that it would try and make it available for a switch, the car remained unable to be called in the following morning.

Similarly, on May 17, 2013, CP failed to deliver cars that had been ordered by Finch, without notifying Finch that the cars were not coming in. *Id.* at ¶ 24, Attach. 7. When Finch inquired why the railcars had not come in and when they would be delivered, Finch was then told that there had been an engine failure but the cars would be delivered the following day. When the cars did not arrive the following day as promised, Finch contacted CP and was told that the crew that was supposed to provide the switches was not available. *Id.* One of the cars to be delivered contained caustic. As result of CP's failure to deliver the caustic, Finch had to obtain caustic, which was in short supply, by truck delivery on short notice for Sunday morning so the plant could continue to operate. *Id.*

In December of 2013, Finch notified CP that due to its failure to timely deliver ammonia cars, Finch was suffering a critical shortage of ammonia for its plant operations. *Id.* at ¶ 46, Attach. 18. Despite being fully aware of the critical shortage, CP failed to timely bring in ammonia railcars for Finch and as a result, Finch had to bring in ammonia via trucks at considerable additional expense to Finch.

A few months later, the same situation arose. On February 11, 2014, Finch contacted CP regarding 5 ammonia cars that it desperately needed for delivery. Finch sought assurance from CP that the cars would arrive at Whitehall that evening as scheduled. *Id.* at ¶ 52, Attach. 20. Despite CP expressing confidence that the cars would arrive at Whitehall that night, Finch was concerned due to CP's repeated missed switches and because Finch knew it would not make it until Friday the 15th if the ammonia was not delivered. *Id.* Later that day, CP informed Finch that despite CP's assurances, “[

]” *Id.* As a result, Finch had to purchase four truckloads of ammonia. *Id.* at ¶¶ 53-54, Attach. 20. Finch had to do this despite the fact that it had built in extra time for delivery of the ammonia cars. *Id.* at Finch 000737.

A few days later, on February 13, 2014, Finch notified CP that it had not received three cars that it had ordered. *Alheim V.S.* at ¶ 55, Attach. 21.

The problems and service failures became, if anything, more pronounced in early 2015. For example, on February 4, 2015, Finch did not receive its scheduled switch due to an engine failure. *Id.* at ¶ 75. One week later, on February 11, Finch did not receive a switch because the CP crew failed to show up. *Id.* at ¶ 76. Then, on Friday, February 13, 2015, CP again notified Finch that CP’s crew “will not make it to Finch today.” *Alheim V.S.* at ¶ 77, Attach. 33. Given that CP had missed the scheduled switches on both Wednesday and Friday, this put Finch in a desperate situation. Over the next few hours, Finch sent numerous emails to CP inquiring as to the status of the replacement crew and explaining that Finch had “about 24 hours of ammonia left before we will be in need of making some operational changes.” *Id.* at CPFinch0011170-71. The next day when CP still had not responded, two different Finch employees wrote to CP inquiring as to the status of the replacement crew and notifying CP that Finch needed a response by noon of that day. *Id.* Late that evening, CP finally told Finch that “[

]” but that they would work on finding a crew the next day. *Id.* Finch immediately responded that “we may shut down tomorrow without [a switch.] Need all stops pulled on this one. Can’t go this long without a switch.” *Id.*

The next day CP informed Finch that it had not been able to find a crew. *Alheim V.S.* at ¶ 79. No replacement crew was ever provided. *Id.* at Attach. 34.

Two days later, Finch asked whether it could get a special switch to make up for the missed switches it had been experiencing. Alheim V.S. at ¶ 80, Attach. 35. CP told Finch [] *Id.*

CP's repeated and systematic failure to timely provide switches to Finch constituted an ongoing violation of 49 U.S.C. §11101. CP itself concedes that [

] Exh. K, Newell Tr. at 24:13-25:10. The record is replete, however, not only with instances of Finch not receiving switches but also of Finch not receiving any notice that no switch would be coming. Further, while the CP Trainmaster, George Newell, recalls meeting with Finch to address the problems of CP's frequent missed switches, he does not remember [] *Id.* at 30:5-17.

2. Service Failures Due to CP's Dysfunctional Web-Based Car Management System

The service failures experienced by Finch after CP reduced service to the mill in October 2012 were compounded by CP's decision in late 2012 to cut personnel and other costs related to its operations and customer service departments and replace the employees with a website. Taylor V.S. at ¶ 3. Whereas customers previously dealt directly with their respective counterparts to order service and resolve issues, they were now required to handle these tasks by logging on to the website. *Id.* Unfortunately, however, CP's website was fraught with problems, and could not meet Finch's needs. *Id.* at ¶ 4. Finch's just in time operations and geographical constraints made it vital for Finch to at all times be fully aware where in the pipeline the chemicals and pulp it had ordered were so that its plant could remain fully operational. *Id.* at ¶ 8. Finch thus needed to know where the railcars containing chemicals and pulp were located on CP's system, when the cars would arrive, and if there were going to be any unexpected delays in

delivery. *Id.* This proved impossible for Finch, not only because, as reflected above, CP routinely missed switches – without any advance notice – but because CP’s website made it impossible to accurately track the location of railcars and to order those railcars into its facility. *Id.* at ¶ 5. Problems with the website occurred nearly every day. *Id.* at ¶¶ 17-53. As way of example, Finch would be told that cars were available to be called into the facility from Fort Edward, but when this was attempted using the website the cars were unavailable, with no explanation from CP. *Id.* at ¶ 6; Exhibit T.

Throughout January and February of 2013, Finch again attempted to call in railcars from the CP website but was unable to do so, and also was unable to direct cars to specific spots for unloading. *Id.* at ¶ 18, Attach 2. The problem finally became so persistent and systemic that CP itself instructed Finch to stop using the website. *Id.* at Attach. 3. CP noted that “[

]”¹⁷

CP then went to note that:

[

]

Id. at CPFinch000729.

¹⁷ Emphasis supplied.

Finch remained unable to order in cars from the website for all of March, April, May, and into June of 2013. *Id.* at ¶ 19. As a result, on occasion Finch had to order bills of lading via fax, at a charge of \$55. *Id.* at Attach. 4.

The problems with the website continued into the Fall of 2013 and if anything, became more pronounced. *Id.* at ¶ 22. For example, Finch would receive notification that a car had arrived at Whitehall or Fort Edward, but then no such car would be listed on the website, and therefore could not be called in. *Id.* at ¶ 6. Sometimes this was because the CP crew had failed to do the paperwork necessary for CP itself to determine where cars actually were, Taylor at ¶¶ 5-6, while in other instances it was because the CP crew had put the car on the wrong train, thus making it not available for delivery to Finch for another five days. *Id.* at ¶ 7.

Finch also could not order in ammonia cars to a specific spot to be unloaded, upon their arrival, which was imperative for its “just in time” operations. *Id.* at ¶ 11. In early 2014, the problems with being unable to call in cars from the website continued but additional problems also arose. Frequently, the website contained inaccurate information, such as reporting that cars were available to be called in to Finch when they were already at the mill and in some cases, had been for weeks. *Id.* at ¶ 24, Attach. 10.

In February of 2014, Finch complained that two cars it had ordered showed a last location at Whitehall but according to CP’s website were unavailable to be called in for needed switches. *Id.* at ¶ 25, Attach. 11. CP responded that it thought both of the cars were on Finch’s property but Finch confirmed neither of the cars had ever come onto Finch Facility. *Id.* This created enormous problems for Finch because when CP incorrectly believed that railcars containing pulp or chemicals necessary for Finch’s operations had already been delivered to Finch, Finch would have to arrange for the delivery of such materials or chemicals by truck on short notice at

significant extra expense to Finch. *Id.* These problems and the related aggravation and harm to Finch caused by the high cost of trucking and other actions at the mill continued throughout 2014 and 2015. *Id.* at ¶ 24-53.

The inability of CP, through CP Rail, to provide a functioning website that allowed Finch to call in and receive cars for switches on a timely basis constituted an ongoing violation of 49 U.S.C. §11101.

C. CP's Violations of §11101 Resulted in Harm to Finch Recoverable Under §11704(b)

The service failures of CP that have occurred since October, 2012 have resulted in Finch incurring significant costs and logistical and operational complications. This was the outcome CP anticipated when it decided to place 100% of the risk of its failures from a reduced schedule on Finch rather than incur the cost of continuing to provide service five days per week, or enter into an agreement that held CP to any kind of service standard. In his verified statement, Finch's Derek Basile explains that because the Finch mill is space constrained and must operate in a just-in-time manner to try and compete in the marketplace, Finch's damages were incurred when CP failed to provide service week by week. Basile V.S. at ¶ 16. The effect of CP refusing to schedule service more than three days per week, and then regularly missing one or more of those days, has been extremely costly for Finch. *Id.* Due to the mill's limited track storage space, exacerbated by CP's unilateral termination of Finch's longstanding track lease agreement in 2012, CP service failures result in Finch being forced to obtain chemicals and raw materials by other, more costly, means in order to stay in operation. *Id.*

Finch retained Mr. Thomas D. Crowley, President of the economic consulting firm of L.E. Peabody & Associates, Inc., to review Finch's damage calculations. His Verified Statement and accompanying exhibits and workpapers contain a calculation of the additional costs Finch

incurred between September, 2012 and July 2, 2015 to obtain and process raw materials and associated transportation that Finch would not have incurred had CP rail met its service obligations to Finch. As explained in his verified statement, Mr. Crowley has calculated Finch's damages for this time period to be \$481,588, consisting of the following categories and amounts:

1.	Incremental Costs of Shipping Raw Materials by Truck	\$122,149
2.	Incremental Supplier Demurrage Costs	\$124,654
3.	Emergency Starch Deliveries in March, 2014	\$22,722
4.	Purchase of Pulp to Maintain Mill Digester Rate	\$118,790
5.	Offsite storage of Raw Materials	<u>\$93,273</u>
	Total:	\$481,488

CP's service failures in the second half of 2015 and into 2016 have added to these damages, and so the calculation needs to be updated if the Board finds, as it should, that CP has violated its common carrier obligations to Finch and that damages are appropriate. None of these additional costs of obtaining alternative raw materials to keep the plant operating because CP failed to deliver them, as well as the associated administrative and logistical burdens, would have been incurred had CP met its statutory obligations to provide adequate rail service to Finch.

D. CP's Assessment of Demurrage Charges Against Finch for Ammonia Cars was contrary to an Express Agreement that Superseded CP's Tariff 2 Provisions

In this case there can be no question that the parties entered into a separate agreement to waive the literal application of CP's Tariff 2 as it otherwise would have applied to Finch's

ammonia cars.¹⁸ *Capitol Materials, supra*, at 581. CP's argument that Finch is obligated to pay more than \$900,000 in demurrage charges associated with ammonia cars despite CP's repeated acknowledgment that there was an agreement between the parties that these cars were to be brought in immediately to the Finch property, and thus that no demurrage charges therefore would arise, ignores basic principles of jurisprudence, as well as fundamental notions of fairness and equity.

Despite the overwhelming weight of contemporaneous evidence that there was a standing instruction in place for two years, CP now baldly asserts – after the total charges reached almost a million dollars - that no such standing instruction ever existed. Such an assertion ignores CP's own repeated admissions that Finch should not be assessed demurrage charges related to the ammonia cars because there was a standing order in place. *Alheim V.S.* ¶¶ 96-110. For CP to even make such an assertion in this case smacks of desperation and bad faith, especially given that CP itself admits that it never informed Finch that CP the standing instruction had been rescinded and that Finch should start ordering in ammonia cars. Exhibit U (CPFinch0012087).

The one thin reed that CP desperately clings to regarding its assertion that there was never an agreement between CP and Finch that ammonia cars were to be brought in immediately upon arrival, is an email from Mr. Weigel to Mr. Alheim dated November of 2013, in which he states, contrary to the overwhelming evidence to the contrary, that there was no standing instruction. *Alheim V.S.* at ¶ 109, Attach. 58. In that email, Mr. Weigel seeks to [

] But Mr. Weigel's 2013 assertion that there was

¹⁸ The issue whether CP's assessment of the demurrage charges covered by its Complaint was unlawful because it violated a "standing order agreement" between the parties falls within items (c) and (d) of the Court's referral.

no standing instruction is flatly contradicted by the prior statements and actions of CP. Perhaps even more significantly, however, it is flatly contradicted by the subsequent statements and actions of CP and *indeed of Mr. Weigel himself*. Alheim V.S. at ¶ 101, Attach. 51; and ¶ 102, Attach. 52.¹⁹ And then again in May of 2014, when the bulk of the demurrage charges at issue began to accrue, CP's Department responsible for assessing demurrage consulted with its Customer Service Representative who handled Finch, Jason LaValla, who [

] Alheim V.S. at ¶ 105, Attach. 55 (CPFinch0001436).

If CP intended to rescind the parties' agreement and require Finch to call in ammonia railcars, rather than have them brought in immediately, as CP was supposed to have been doing since 2012, at a minimum, it should have told Finch that fact. CP's Trainmaster, George Newell, concedes that if the parties were operating on the assumption that there was a standing instruction, [

] Exh. K, Newell Dep. at 49:11-50:11. The evidence shows that it failed to do so, however. Indeed, in November of 2014 -- when CP was desperately seeking a basis for its assertion that there was no standing instruction (or perhaps that the standing instruction had been rescinded) -- Mr. Weigel asked [

¹⁹ Mr. Weigel further admitted that [

] *Id.* at 58:13- 60:10.

] That inquiry, however, merely confirmed the specious nature of the argument that CP now makes. Mr. Weigel had to admit that “[

]”²⁰ Exh. U. Mr. Weigel concludes, “[]” *Id.*

Finally, Mr Weigel admits that although he personally waived demurrage charges based on the standing instructions in April of 2014, he [

] Exh. Q, Weigel Tr. at 73:6-74:10. In the meantime, Mr. Alheim continued his past practice of disputing each invoice on this basis. Alheim V.S. at ¶ 107. Thus, by the time that Finch learned that CP had purportedly “discovered” that the parties did not have an agreement to bring in ammonia cars immediately upon arrival, CP was already seeking almost a million dollars in demurrage charges.

Parties sometime seek to nullify an agreement and thus avoid their obligations by asserting that there was no meeting of the minds and thus no contract existed. CP has not, and cannot, make that argument here, however, given that CP itself wanted to ensure that ammonia cars were to be brought in immediately and asked Finch to make that agreement explicit. Alheim V.S., ¶ 96, Attach. 46. Further, both parties acknowledged that such an agreement was

²⁰ [

]

in place by repeatedly asserting that there were standing instructions in place to have any and ammonia cars brought in to Finch's property immediately. Finally, there is no legitimate dispute that both parties operated on the basis of that agreement for approximately two years until CP then decided -- after approximately \$800,000 in demurrage had purportedly accrued -- that it no longer wanted to be bound by its agreement. Instead, at that point, it conveniently "discovered" that it had never actually agreed to have Finch's ammonia cars brought in immediately so that CP could either collect more than a million dollars in demurrage charges, or use the threat of such a windfall, [

] CP's attempted bait and switch cannot withstand scrutiny.

In determining whether parties have reached an agreement, courts look not to the parties' subjective beliefs, but instead to their words and conduct. *See, e.g., TRT Transportation, Inc. v. Aksoy*, 506 Fed. Appx., 511, 513, 2013 WL 646392 at *2 (7th Cir. 2013). Thus, a court's inquiry does not require a search for the subjective intent of the parties, but rather centers on the intent embodied in the language the parties used. *William v. Metzler*, 132 F.3d 937, 947 (3d Cir. 1997). As Justice Oliver Wendell Holmes recognized more than a century ago, whether there is an agreement depends "not on the agreement of two minds, in one intention, but on the agreement of two sets of external signs – not on the parties having *meant* the same thing, but on their having *said* the same thing. *Id.*, quoting Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 463 (1897) (emphasis in original); *Samra v. Shaheen. Bus and Inv. Group, Inc.*, 355 F.Supp. 2d 483, 501 (D.D.C. 2005). Thus, whether the parties have reached an agreement is determined by their words and actions, "not by the secret intention of the parties." *Products Mfg. Co. v. Jewett Lumber Co.*, 185 F. 2d 866, 869 (8th Cir. 1950). An agreement cannot be determined "on the

undisclosed assumption or secret surmise of either party.” *Internat’l Casing Group Inc. v. Premium Standard Farms, Inc.*, 358 F. Supp. 2d 863, 869 (W.D. Mo. 2005).

Here, there can be no legitimate dispute, based on the words that CP and Finch used, and their actions, that the ammonia cars were to be immediately brought in to Finch’s property and thus no demurrage was to accrue. The fact that almost two years later, after a huge potential demurrage bill had been calculated, Mr. Weigel “discovered” that this agreement did not exist and that therefore Finch had to call in all ammonia cars, does not alter the fact that such an agreement was firmly in place. At a minimum, CP is estopped from seeking to collect a windfall based upon a purported change in their agreement which it admittedly never bothered to tell Finch about. *See, e.g., Kosakow v. New Rochelle Radiology Assoc. P.C.*, 274 F.3d 706, 725 (2d Cir. 2001) (under federal law, party estopped from pursuing a claim where the party to be estopped: (1) makes a representation of fact to the other party with reason to believe that the other party will rely upon it; and (2) the other party reasonably relies upon it to its detriment). Setting aside CP’s obvious falsehood that the agreement had never existed, CP cannot collect under these circumstances, given the obvious fact that if CP had told Finch that CP was reneging on their longstanding agreement, Finch would have called in ammonia cars to prevent demurrage charges of \$1,500 per day on such cars from accruing to the point that charges exceeded \$700,000 in just two months.

Perhaps implicitly recognizing that its argument cannot pass the straight faced test, CP alternatively argues that during the time period from April through August of 2014, there were not enough spots to switch or store ammonia railcars and thus, even if there were a standing order, could not have brought in the ammonia railcars. This post hoc rationalization, however, cannot pass muster. While CP did unilaterally, and without any advance warning, take some

Finch track out of service in April of 2014, Finch at all times had sufficient slots and storage space to bring in ammonia rail cars. *See* Petro V.S. at ¶¶ 12-13.

In the normal course, Finch had 21 spaces for switching and storing rail cars. *Id.* at ¶ 11. During the time when repairs were being performed on Finch's track between April and August of 2014, there were at least 11 slots available for storing and switching cars, including ammonia cars. *Id.* at ¶¶ 12-13. Obviously, if CP had informed Finch that the parties agreement to have any and all ammonia railcars immediately brought in to Finch's Plant was being rescinded, Finch would have ensured that those slots were used for ammonia cars given the punitive nature of the demurrage charges associated with ammonia cars (\$1,500 per day) as opposed to the relative modest penalty assessed on pulp cars (\$160 per day) or other chemicals such as starch (\$60 per day).

The fact that a supposed lack of space for switching and storing ammonia railcars is just a flimsy excuse for CP to try and extort almost a million dollars in demurrage charges from Finch is further evidenced by its contemporaneous documentation. Presumably, if no space for storing or switching ammonia cars was the real reason that such inordinately high demurrage charges were accruing, CP would have known it at the time. But it was only after CP had brought in Lyndie Falvo to investigate whether there was a legitimate basis for CP to recover the demurrage charges in late September of 2014 that she even inquired as to Finch's track capacity. Exhibit V.

E. CP's Demurrage Policies and Their Application to Finch Violated 49 U.S.C. §§10702 and 10746

Separate and apart from the agreement concerning ammonia cars that superseded Tariff 2's demurrage provisions, CP's demurrage policies and their application to Finch were unreasonable and contrary §10746, which requires a rail carrier to "compute demurrage charges, and establish rules relates to those charges, in a way the fulfills the national needs related to (1)

freight car used and distribution; and (2) maintenance of an adequate supply of freight cars to be available for transportation of property.” For the reasons set forth below, the Board should determine that CP’s assessment of demurrage against Finch was unlawful.

1. CP’s Ammonia Demurrage Charge is Unreasonable

As reflected in the Verified Statement of Thomas D. Crowley at page 3, demurrage is comprised of an amount to compensate the carrier for the use of its facilities and rail cars, and a penalty to ensure prompt return of the car the common carrier service. Here, however CP’s charge of \$1500 per day for ammonia cars is unreasonably high because it essentially a profitable revenue stream for CP because it far exceeds the cost of the railcar to CP. Crowley V.S. at pp. 3-4. He also explains how CP’s per day ammonia demurrage charge is consistent with the practices of other Class I railroads to charge high demurrage for TIH commodities in order to pass on to rail shippers the costs related to the implementation of Positive Train Control (“PTC”) technologies, but that CP’s demurrage charge for ammonia is many multiples of its costs of PTC compliance. *Id.* at 4-5, Table 1. Finally, Mr. Crowley explains how CP’s demurrage policies demonstrate that CP has evaluated the risk associated with ammonia cars on its system, and determined that the \$1500 per car exceeds the monetary value of the risk. *Id.* at 5-6. Thus, even if the Board were to find there was no agreement between the parties establishing a “standing instruction” to switch ammonia cars into Finch’s mill, and to waive any demurrage for cars constructively placed, CP’s \$1500 per car charge is unreasonable.

2. CP Charged Finch Demurrage for Days That CP Refused to Provide Service.

When CP reduced service to the mill from five to three days per week, it nevertheless calculated demurrage by including the days that it now refused to switch cars into the plant, even

though Finch was ready and willing to accept the car. For example, if a railcar arrived on a Monday too late to be switched into the mill that day (actually placed), CP would constructively place that car and begin calculating demurrage pursuant to Tariff 2 until the next day it agreed to provide switching services, which was Wednesday (presuming CP was actually able to provide a switch that day.) However, in many instances Finch had space on its tracks and could accept the car on Tuesday. As such, the placement of the car was not prevented due to a condition attributable to Finch, but rather CP's decision to not provide switching service.

The fallacy of CP's attempt to recover demurrage on days it did not provide service to Finch is reflected in its own contemporaneous statements. When Finch challenged CP's attempt to assess demurrage on days CP refused to provide service, CP justified its position on the grounds that CP was offering Finch service up to 7 days a week but Finch was rejecting the offer. *Alheim V.S.* at ¶ 112, Attach. 59. Specifically, the CP representative who handled the Finch demurrage charges posited Finch had to pay because “[

.]” *Id.* The evidence in the record, however, clearly establishes that CP's assertion lacks any factual basis. The truth is that although Finch sought to continue to receive 5 day per week service in October of 2012, CP refused to provide it on the grounds that it was not economical for CP. *Alheim V.S.* at ¶ 113. Under these circumstances, there is no legitimate basis for CP to seek demurrage from Finch on days that CP refused to provide Finch with service.

The assessment of demurrage under these circumstances was improper. Mr. Alheim calculated that to comprise \$234,760 of the demurrage charges CP now seeks to collect in its court case. *Alheim V.S.* at ¶ 116.

3. CP Wrongfully Charged Finch for Demurrage Accrued as a Result of CP's Actions Further Restricting its Service to the Facility in April, 2014.

Most of the demurrage at issue in this case accrued after CP informed Finch on April 24, 2014 that, effective that day, CP would severely restrict its service to the plant, ostensibly due to issues with Finch's tracks. For the reasons more fully addressed in Richard Petro's Verified Statement, Finch questioned CP's motives concerning the shutdown, and whether it was appropriate, but proceeded to make repairs in order to prevent the mill from shutting down. Petro V.S. at ¶¶ 9-10. At the time of this precipitous action, there were numerous railcars of commodities in transit to Finch's facility, many of them ammonia cars with nowhere else to go until the track repairs demanded by CP were performed. Crowley V.S. at p. 11-12. It took over two months for CP to clear the bottleneck, even though Finch had at least 11 slots available for storing and switching railcars. Nevertheless, during just this two month period CP calculated over \$650,000 in demurrage charges for ammonia cars, and over \$770,000 in total demurrage charges, all of which was invoiced to Finch. *See, id.*, at 11-12.

The assessment of 100% of the calculated demurrage under these circumstances was contrary to §10746. When CP shut down its tracks on virtually no notice, Finch immediately began to comply with CP's demands for track repairs before it would resume service. Petro V.S. at ¶¶ 10-13. In addition, Finch took steps to manage the cars in transit and alleviate the bottleneck created by CP's sudden shut down of Finch's tracks. Basile V.S. at ¶ 10. In short, Finch took all available efforts to relieve the cause of the demurrage accruing, which demurrage was directly caused by CP restricting service to the mill. In cases where the shipper has exercised due diligence to alleviate the cause of demurrage accruing, waiver of the penalty portion of the demurrage charges is warranted. *The Prince Manufacturing Co. v. Norfolk and*

Western Railway Company, 356 I.C.C. 707 (1978) accord, STB Docket No. 42030, *R. Franklin Unger, Trustee of the Indiana Hi-Rail Corporation, Debtor – Petition for Declaratory Order – Assessment and Collection of Demurrage and Switching Charges* (Served June 14, 2000) at 9-10, and note 1. Even if the Board concludes there was no agreement between the parties of a standing instruction to switch ammonia cars, the Board should determine that it was unreasonable for CP to invoice Finch the full demurrage amounts from April, 2014 until the track repairs were completed in August, 2014, and that CP was only entitled to charge Finch demurrage an amount that compensated CP for its costs of the rail cars while they were not in service.

4. Other Actions or Inactions by CP May Have Contributed to the Delay in Delivering Cars, Making the Assessment of Demurrage Improper

As reflected above, Finch’s primary disputes over the assessment of demurrage addressed in this Opening submission are (1) the ammonia car “standing instruction,” (2) CP charging demurrage for days it refused to provide service; and (3) regardless of the standing instruction for ammonia, assessing demurrage when CP refused to utilize certain tracks used for storing and unloading ammonia cars from April, 2014 to August, 2014. Question (g) referred to the Board is “[w]hether some or all of the demurrage charges CP seeks to recover arose, in whole or in part, from delays caused by CP or from CP’s inability to deliver railcars due to the fault of CP, 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.*” (emphasis supplied). In addition to CP improperly taking Finch track out of service, without any advance notice, Finch believes that service problems CP was having “upstream” of Finch’s facility between 2012-2015 may have resulted in CP charging Finch for demurrage that would not have been incurred absent the issues on CP’s system. The discovery of information from CP relevant

to this point is the subject of the pending motion to compel referenced *supra* in note 8. Finch thus reserves the right to supplement this filing with additional arguments on this aspect of question (g) should the Administrative Law Judge order CP to produce the information sought.

**VI.
CONCLUSION AND SUMMARY OF REQUESTED RELIEF**

For all the reasons set forth above, the Board should respond to the questions referred by the District Court by determining as follows,

- (a) CP violated its statutory obligations to Finch under 49 U.S.C. §11101 by precipitously reducing its switching services to Finch's mill from five to three days per week after eliminating the ability of Finch to absorb service fluctuations through leased track.
- (b) CP also violated its statutory obligations to Finch by failing to adhere to its unilaterally imposed reduced schedule.

The Board should further find that CP's violations of §11101 entitle Finch to recoup damages from CP for the costs Finch incurred to procure alternative supplies of raw materials and transportation solely due to CP's failure to timely switch cars in and out of the facility. The Board should further find that under the particular facts and circumstances of Finch's mill, its transportation needs, and the acknowledged risks associated with railroad service failures at this particular facility, CP cannot fulfill its statutory obligations to Finch with a three day per week schedule, and that it must reinstate a five day per week schedule.

- (c) That the demurrage charges CP seeks to recover from Finch are improper because they arose from the actions and delay of CP, including precipitously shutting down service to Finch's facility in April, 2014, and through delays caused by CP's decision to only provide service three days per week. Moreover, CP's assessment of demurrage charges was improper because: 1) it was contrary to an express agreement between the parties governing the immediate delivery of ammonia railcars into the mill, and the waiver of any demurrage charges assessed because ammonia cars were constructively placed in CP's yards; and 2) CP assessed demurrage on days it refused to provide service to Finch.

- (d) That the calculation and assessment of demurrage charges against Finch after “constructively placing” its cars in CP’s rail yards was improper, for the reasons set forth in (c).
- (e) That the \$1,500 per day charge CP has established in Tariff #2 for ammonia cars is unreasonable and not in accordance with §10746; and
- (f) That the rules and practices used by CP to apply the terms of Tariff #2 to Finch are not consistent with the goals of 49 U.S.C. §10702 and §10746. In particular, in the event that the Board does not find an agreement existed establishing a “standing instruction” for ammonia cars, that the assessment of the penalty portion of the ammonia charge was improper and not in accordance with the purpose and goals of §10746.

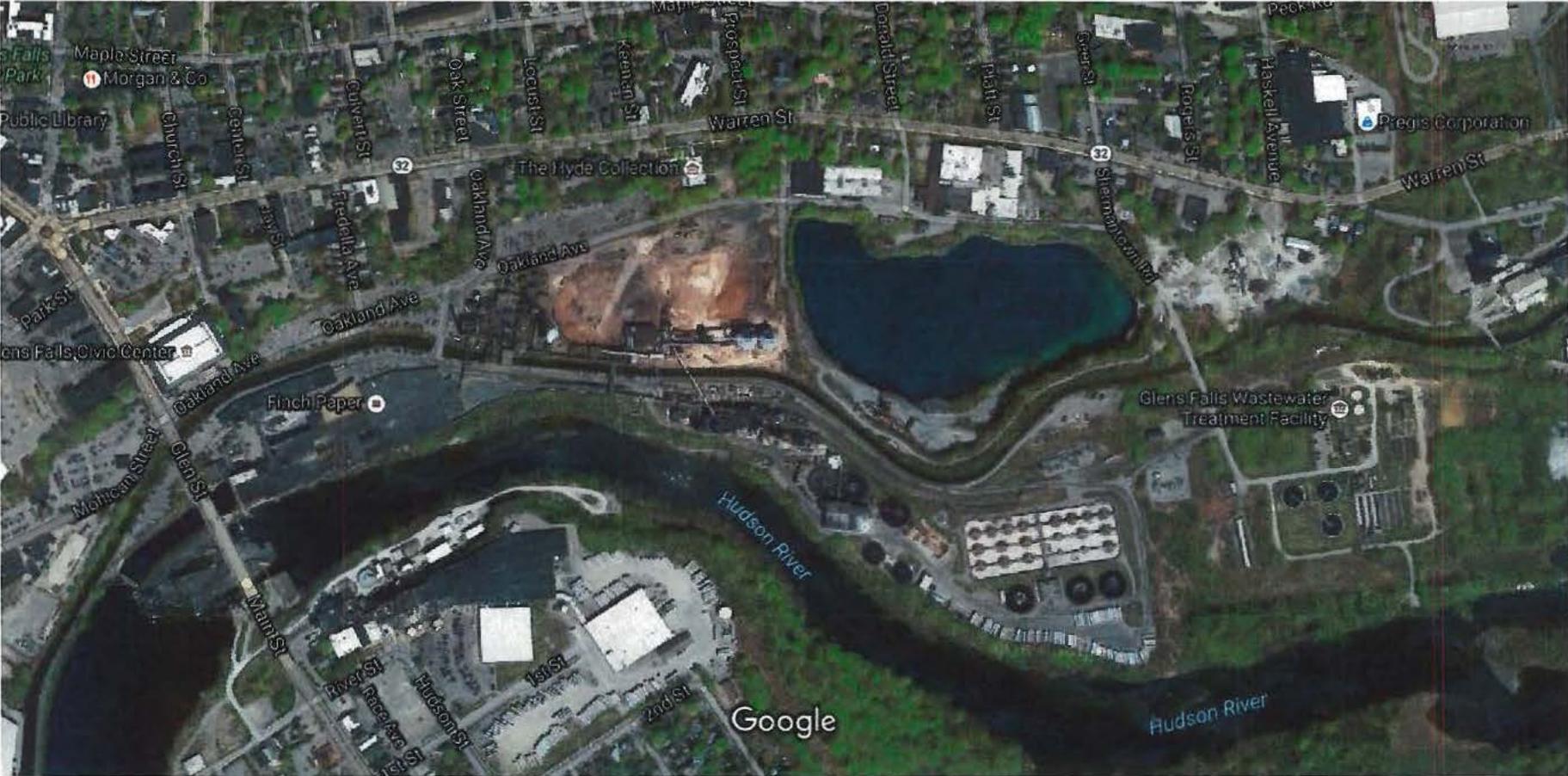
Respectfully submitted,

/ss/ Thomas W. Wilcox
Thomas W. Wilcox
Brendan Collins
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

August 24, 2016

REDACTED
EXHIBIT A-1



REDACTED
EXHIBIT B

REDACTED
EXHIBIT C

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EXHIBIT D

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EXHIBIT V

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket FD 35981

PETITION FOR DECLARATORY ORDER - FINCH PAPER LLC

VERIFIED STATEMENT OF DEREK A. BASILE

1. My name is Derek A. Basile. I am currently Chief Financial Officer (“CFO”) of Finch Paper LLC (“Finch”). I have been employed at Finch since July of 2014, and was initially hired as Vice President of Special Projects. One of my tasks as CFO is to track and manage the costs Finch incurs to purchase raw materials used in our paper production, and the transportation of those materials to our facility for processing, by both railroad and truck.

2. Finch’s paper mill is captive to the Delaware and Hudson Railway, Inc. (“D&H”) for all rail service to the mill. The D&H is a subsidiary of the Canadian Pacific Railway Company, and in all of my interaction with the railroad I refer to it as CP, since all of the employees we deal with regarding rail service to the mill are employees of CP.

3. Although I did not join Finch until July, 2014, I am familiar with the facts and issues addressed herein relating to the failure of CP to provide adequate rail service to the mill starting in 2012 and continuing to this day, and also the assessment by CP of huge demurrage charges against Finch from October, 2013 to November, 2014. I am also familiar with the lawsuit filed against Finch by CP in federal district court in April of 2015 (although Finch was not served with a copy of the complaint in that case until May, 8, 2015). In that case, CP Rail

has asked the court to order Finch to pay CP Rail \$1,349,050 in demurrage charges invoiced over the period of time encompassing October, 2013 to March, 2015. Of the total amount in the complaint, \$1,323,920 is in dispute, since an invoice for \$25,130 for demurrage billed in March, 2015 was paid by Finch subsequent to the case being filed.

4. In this Verified Statement, I provide supplemental factual information concerning the calculation of the damages presented in this Opening submission incurred by Finch due to CP's failure to provide adequate rail switching services to our plant after CP unilaterally reduced its days of service from five to three. These calculations are presented and discussed in the Verified Statement of Thomas D. Crowley, President of L.E. Peabody & Associates, Inc., who Finch retained for this purpose.

5. Finch is a relatively small paper manufacturing facility that is both space and geographically constrained. The facility is bordered on one side by the Hudson River, the other side by a Hudson River feeder canal, and the other sides by a bridge and dam, and a municipal wastewater treatment plant.

6. We have very little ability to store railcars of raw materials onsite, and very limited ability to expand existing track structure. However, the mill also operates 24 hours a day, 7 days per week, 365 days per year. The mill annually produces approximately [

] tons of numerous types of high bright, fine paper products used in business, such as recycled and digital papers.

7. This combination of factors means that our operations are "just-in-time," and our receipt of raw materials must match our production levels. Consequently, when CP fails to provide switching operations due to crew shortages, lack of equipment, or other issues attributable to CP, this causes immediate harm to Finch because we must replace the raw

material that we were depending on receiving from CP with truck deliveries, which are much more costly and difficult to manage logistically.

8. [

]

9. Finch Paper, celebrating our 151st year of operation, [

.] The industry titans increasingly leverage their advantageous cost structures to price smaller competitors, such as Finch Paper, out of the commodity market. [

]

For these reasons, it is imperative the Finch maintains continuity in our 24/7/365 manufacturing process and associated raw material supply chains.

10. When CP Rail shut down our track on April 24, 2014 on no notice, we had numerous railcars either on order or in transit to our mill that CP Rail now refused to switch onto our tracks. We immediately took steps to manage the flow of those cars while track repairs were taking place. These actions included diverting 17 cars to Saratoga. They also included

decreasing the ammonia we ordered via railcar after April 24, 2014 until the cars in the pipeline could be switched on to our tracks and unloaded. Although restricted by the availability of skilled railroad maintenance contractors at the time, Finch used all reasonably available resources to expedite repairs to our tracks, returning them to service at the soonest possible date.

11. [

]. As a result of these chemical shortages, and the resulting inability to manufacture pulp needed in our paper production operations, Finch has had to buy pulp at costs significantly higher than the expense involved in grinding our own pulp.

12. Other employees of Finch have submitted Verified Statements in this proceeding summarizing how starting in 2012 CP's service to our facility became unreliable and inadequate. These problems increased when CP terminated our track leasing agreement in Ft. Edward, NY on June 6, 2012, and then subsequently and suddenly announced in the Fall of 2012 that CP was cutting the days it would conduct switching operations for the mill from the normal five days per week to only three days per week – Monday, Wednesday and Friday.

13. The damages calculated by Mr. Crowley due to CP's failure to provide rail service to our mill are our good faith calculations of the additional costs we incurred to obtain and process raw materials and associated transportation that Finch would not have incurred had CP rail met its service obligations to Finch once it terminated our track leasing agreement and reduced service from five to three days per week. These costs primarily consist of the costs to obtain raw materials by trucking them into our mill, but we incurred other direct costs as well.

14. The damages presented are for the time period from September 24, 2012 to July 2, 2015 but CP's service failures in the second half of 2015 and into 2016 have also added to those damages, and so the calculation would need to be updated if the Board finds that CP has violated its common carrier obligations to Finch and that damages are appropriate in this case.

15. CP was well aware that such costs were a potential outcome of their reduction in service days, as their decisions to terminate the lease and to cut service were made with the knowledge that any precipitous action or service failure on their part would put the mill at risk. CP simply elected to place all of the risk of its service failures on Finch, because CP wanted to lower its operating costs and increase its profits.

16. It is important to understand that because our mill is space constrained and a just-in-time operation, our damages are incurred when CP fails to provide service week by week. This may not be evident when reviewing overall annual rail car and truck numbers. When looked at in the aggregate, one could conclude the reduction from five to three days resulted in little change, but the effect of CP only agreeing to schedule service three days per week, and then regularly missing one or more of those days, is very impactful and costly on a weekly basis. For example, on a Monday, Wednesday, Friday schedule, the failure of CP to bring in an ammonia car Finch expects on a Monday because CP has no available crews means that Finch cannot expect to see another ammonia car until Wednesday at the earliest. Moreover, if CP misses that switch as well, then Finch must now wait until at least Friday. Due to our limited storage space, exacerbated by CP's unilateral termination of our longstanding lease agreement in 2012, Finch cannot continue to operate under these circumstances without obtaining chemicals and materials by other, more costly, means.

17. Thus, when CP fails to deliver the raw materials we have purchased and shipped by rail, Finch has no choice but to try and obtain those quantities of the material by truck in order to maintain production, which is more expensive and harder to manage logistically. While over the relevant time period Finch's mill did not cease operations or diminish production levels, this is only because Finch aggressively, and at significant additional cost, aggravation and organizational disruption, countered CP's service failures with alternative sourcing and transportation, as well as operational adjustments at the mill.

18. The second purpose of this Verified Statement is to briefly discuss one aspect of the demurrage charge dispute between Finch and CP. In November, 2014, the parties engaged in discussions to try and resolve their disagreements over the amounts invoiced by CP. Specifically discussed were the six invoices for demurrage calculated for the months of May, 2014 (billed in June) through September, 2014 (billed in October). However, other invoices for demurrage CP calculated in October, 2013, April, 2014, and October, 2014 were also in dispute.

19. The discussions primarily focused on the dispute over the continued validity of the parties' 2012 agreement concerning the standing order to immediately switch ammonia cars into the Facility, and Finch's charge that CP was wrongfully including in its calculation of demurrage days for which CP Rail declined to provide service but Finch was ready to accept a car that had been placed in either of CP's rail yard.

20. On November 18, 2014 Finch submitted a compromise proposal to CP Rail concerning these invoices. However, there were computational errors in the November 18 proposal that required it to be corrected and resubmitted. The resubmission of the corrected numbers was delayed, however, and it had not been sent by May 8, 2015 when we received a copy of the complaint filed by CP in federal court. The attachment to the complaint included all

of the invoices being discussed, and several other invoices that were also in dispute but not part of those discussions. At that point, discussions between the parties about a compromise ceased.

21. Although there was no resolution of the parties' differences over the invoiced demurrage in the November, 2014 timeframe, CP and Finch mutually agreed as of December 5, 2014 that the parties' agreement that there would be a standing instruction to immediately switch in ammonia cars upon their arrival would no longer be in force.

VERIFICATION

I, Derek A. Basile, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to sponsor this Verified Statement.

A handwritten signature in black ink, appearing to read 'Derek A. Basile', written over a horizontal line.

Derek A. Basile

August 24, 2016

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket FD 35981

PETITION FOR DECLARATORY ORDER - FINCH PAPER LLC

VERIFIED STATEMENT OF RICHARD PETRO

1. My name is Richard Petro. I am the Maintenance Manager for the pulp mill and waste treatment areas on the Finch property. I have been in this position since 2012. In that capacity, my responsibilities include maintenance of Finch owned tracks on Finch's property.

2. On April 7, 2014, CP derailed a loaded ammonia railcar on its track approximately one mile from the mill. Attach. 1. The derailment was caused by a defect in the CP track, rather than crew error. Two weeks later, on April 24, 2014, CP contacted Finch and summarily shut off its service into the facility based on a determination that some of the switches and tracks were unsafe. This action was highly unusual, because CP conducted regular inspections of our track. At least twice a year, CP conducted inspections which included measuring whether the gauges were correct on Finch's track during each of its inspections.

3. In addition to those inspections, on a monthly basis CP would use a truck to drive our track and visually inspect it to determine if any repairs were needed. In CP's prior inspections, including the inspection conducted in the fall of 2013, CP had not identified any issues regarding the safety of Finch's track. CP had never shut down service to Finch due to supposed problems with Finch's track.

4. In addition to CP conducting inspections of Finch track, Finch track was regularly inspected by federal authorities who inspected Finch's track at least once a year. Going back to at least the year 2000, federal authorities have never shut down Finch track. Further, in the years that I have been in my position as Maintenance Manager at Finch, federal authorities have not identified any unsafe track or track that needed to be repaired or replaced.

5. In addition to those regular inspections by other parties, Finch and its outside maintenance contractor conducted their own regular inspections of Finch's track for irregularities. If need be, Finch would make necessary repairs.

6. As result of Finch's own inspection and repair program, Finch itself identified deteriorating track that needed repairs, which repairs were performed in 2011. Those repairs were extensive and included taking out track and replacing rails and ties. These repairs were done on Finch's own initiative and not as a result of any suggestions, recommendations, or demands of CP.

7. In the summer or fall of 2013, Finch also tore out a portion of its track and replaced all of the rails and all of the ties in performing those repairs. Again, this was done on Finch's own initiative and not because CP had mandated or even suggested any track repairs were needed.

8. Finch conducted repairs based upon its own inspection and repair program in 2009, 2011, and 2013.

9. Despite the fact that the derailment of an ammonia car on April 7, 2014 had occurred on CP track, not on Finch track, and despite the fact that CP's regular inspections leading up to April of 2014 had not identified any safety hazard associated with Finch owned track, on April 24, 2014, CP summarily shut down Finch-owned track. It did so primarily based

upon a purported finding that the gauge between the rails on certain track was either too narrow or too wide, or allegedly poor tie conditions. In reaching this conclusion, CP did not shut down or repair any of its own track, which was immediately adjacent to Finch track in the Finch mill. Indeed, incredibly, CP did not even conduct an inspection of its own track but instead summarily shut down portions of Finch track.

10. I disagreed with CP's decision, and questioned whether it was necessary to immediately shut down portions of Finch's track but knew that refusal to comply with CP's demands would have been futile. As a result, Finch made the repairs mandated.

11. In the ordinary course, Finch had 21 slots on its property available for switching or storing railcars.

12. Finch was able to make some repairs required by CP almost immediately (within a few days) thus returning three storage slots to use by early May.

13. During the time that repairs were being conducted on Finch's track as a result of CP's precipitous locking down of Finch's track between the first week of May and August of 2014, at least 11 slots were available for storing and switching railcars. All of those slots were available for storing and switching ammonia railcars.

14. As a result of CP's unilateral reduction of service to Finch from five days per week to three days per week, and CP's abrupt termination of its lease with Finch that allowed Finch to store up to 25 railcars at Fort Edward, Finch took extraordinary steps to try and keep its facility fully operational. These steps included updating track to allow for more storage and making additional locations available for receiving chemicals and pulp by truck. Such steps might have been sufficient to minimize economic damage to Finch if CP railcars had arrived when CP said they would.

15. Finch experiences additional costs when CP misses switches. In addition to having to obtain chemicals or pulp by trucks on short notice, at considerable extra cost compared to obtaining such materials by rail, Finch incurred extra manpower costs. Thus, for example, if CP missed a switch on a Friday, Finch had to hire pipers on a Saturday or a Sunday and pay them time and half for handling the replacement switch.

VERIFICATION

I, Richard Petro, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to sponsor this Verified Statement.

A handwritten signature in cursive script, appearing to read "Richard R. Petro", written over a horizontal line.

Richard Petro

August 19th, 2016

ATTACHMENT 1



DERAILED

Tankers derail

Train cars with anhydrous ammonia derail in Glens Falls



APRIL 07, 2014 5:16 PM • BY MICHAEL GOOT

GLENS FALLS -- No one was injured Monday when **two tanker cars carrying anhydrous ammonia derailed** on the property of Lehigh Northeast Cement Co. plant on Warren Street.

The incident happened at 1:48 p.m. Two cars of the two-engine Canadian Pacific train, which appeared to be pushing at least five cars, got slightly off the rail spur that runs between Hudson Falls and Glens Falls.

"They were on an industrial track and being moved around when the two cars came slightly off the track. They were upright. There were no leaks," said CP spokesman Ed Greenberg.

Rail officials alerted first responders and implemented emergency procedures, according to Greenberg. Canadian Pacific had its own teams go to the site to assess the situation.

Greenberg said special lifting equipment was sent to the scene in order to lift the cars, so tracks underneath could be repaired to allow the train to continue its travels. That process was expected to take several hours Monday.

Glens Falls Assistant Fire Chief John Ellingsworth said he believes the train was bound for Finch Paper, as it was carrying anhydrous ammonia, which is used to soften wood for the papermaking process. The chemical can be deadly when inhaled in heavy quantities.

Access to the property was restricted during the cleanup as a precautionary measure, and the Feeder Canal Trail in the area was closed for a time.

Ellingsworth said he could not recall a similar derailment on this spur.

Glens Falls firefighters and emergency services officials in Warren and Washington



Emergency responders survey a two-car train derailment in the yard of the Lehigh Northeast Cement plant in Glens Falls on Monday, April, 7, 2014. At least one of the tanker cars listed contents of liquified ammonia, but no leaks were reported as plans

FINCH01549

counties were meeting later Monday afternoon to put together a plan for possible evacuations in the event one of the tankers is compromised during the repair process.

were made to set the cars back on track. (Derek Pruitt - dpruitt@poststar.com)

In 2000, nearly 800 people had to be evacuated from their Fort Edward homes when a parked 30,000-gallon railroad tanker in a freight yard off Factory Street began leaking anhydrous ammonia gas from a release valve. Emergency officials set up an overnight shelter at Hudson Falls High School for residents who weren't able to spend the evening with friends or relatives.

In the 2000 incident, 61 people were treated at Glens Falls Hospital after inhaling the gas.

Reporter Don Lehman contributed to this report.

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket FD 35981

PETITION FOR DECLARATORY ORDER - FINCH PAPER LLC

VERIFIED STATEMENT OF STUART W. ALHEIM

1. My name is Stuart W. Alheim. I served as the Senior Transportation Planner at Finch from 2011 through April of 2015. I have served as the Transportation Manager at Finch from April of 2015 to the present.

2. In both of those capacities, I oversee and coordinate interactions between CP and Finch and CP's provision of rail service. My duties include monitoring demurrage charges assessed by CP.

Termination of Lease and Missed and Delayed Switches

3. The Finch paper mill operates 24 hours a day, 7 days a week, 365 days per year, and requires a constant supply of pulp and chemicals to remain operational. If Finch ever had to shut down its plant due to a lack of materials it would have had disastrous consequences. As a result, it was imperative that CP deliver the pulp and chemicals Finch required for its operations on a timely basis. If CP ever proved unable to do so, which often happened, Finch had to ensure that it could obtain a backup supply of chemicals and pulp on short notice. This was done by ordering pulp or chemicals on short notice by truck instead of by rail.

4. CP service to Finch was plagued by missed and delayed switches. As set forth in greater detail below, oftentimes cars simply did not arrive to Finch without CP providing any notice that Finch would not be receiving its switch. On other occasions, cars were delivered to wrong spots at Finch or cars were delivered to Finch that Finch had not even ordered. Such errors on the part of CP were alarmingly commonplace.

5. On June 6, 2012, CP terminated a lease with Finch whereby Finch leased track from CP in CP's Fort Edward Yard. That lease provided up to 25 available storage spots that Finch used for overflow. Historically, the lease track had been used to store railcars containing chemicals needed for Finch's paper mill production, including ammonia railcars. Although the lease had been in existence since 1984, CP terminated the lease without any advance notice or discussion with Finch.

6. Finch's demurrage charges increased significantly following CP's termination of the lease, particularly demurrage relating to pulp cars.

7. Shortly thereafter, CP informed Finch that termination of the lease should not pose a problem for Finch because CP's Local Service Reliability Program (LSRP) would afford Finch the option of receiving service 7 days a week. Thus, cars could be brought in whenever needed, largely eliminating Finch's need for overflow storage space. (In discussions at that time, Finch informed CP that it would only want 5 days per week service because normally Finch did not have sufficient employees on hand on weekends to handle switches.)

8. On October 2, 2012, Finch called CP and inquired why it had not received its switch that day. At that time, Finch was informed that CP had unilaterally reduced its switches to Finch from 5 days per week to 3 days per week. Apparently, two weeks before, CP had sent

an email to this effect to a person who was no longer employed by Finch. Thus, Finch did not receive any advance notice of this drastic reduction in service.

9. CP reduced its service to Finch from 5 to 3 days per week despite the fact that the number of railcars Finch was receiving from CP in the period from 2008 to 2012 was steadily increasing.

10. Finch strenuously objected to that reduction in service. On February 19, 2013, I was part of a large conference call which included Bill Farley, the CP Superintendent of Operations.

11. During that call, CP agreed to increase its service to Finch from 3 days per week to 4 days per week starting on the following Thursday, February 21, 2013. Despite that promise, CP never increased its service to 4 days per week. CP never notified Finch that it was renegeing on that promise and never explained why it had not done so.

12. Following CP's reduction in service from 5 days per week to 3 days per week in late 2012, CP often had delayed or missed switches. Frequently these would occur without any advance notice by CP. Switches were supposed to occur in normal business hours and Finch was supposed to receive notice when cars were leaving Fort Edward and heading to Finch. Often, however, Finch would not receive its cars on its scheduled Monday, Wednesday, or Friday switch and Finch would not receive any notice that it was not receiving a switch. In some instances, only after Finch inquired where its cars were, would CP then tell Finch that it would not be receiving its scheduled switch that day. In many other instances, CP simply ignored Finch's inquiries and it was only when no cars arrived that Finch learned that it was not receiving its scheduled switch.

13. CP missed switches and provided late switches for a variety of reasons. Sometimes it would be due to engine problems, sometime due to weather, and frequently due to: 1) CP crews not showing up; 2) crew shortages; or 3) an inability of a CP crew to complete switches within the 12 hours allowed under federal law.

14. The problem of missed switches was not occasional or intermittent but instead was repeated and systematic. Often this occurred even after I had personally informed CP that there was a vital need for the pulp or chemicals being switched in order for Finch to continue to operate.

15. On some occasions when CP missed switches, Finch would inform CP it was in desperate need of a replacement switch because it was reaching critically low inventory levels of pulp or chemicals needed for Finch's operations. Although at times CP said it would try to find a replacement crew to service Finch, often CP was unable to do so. In those instances, Finch again would have to order pulp or chemicals on short notice by truck instead of by rail.

16. Although missed and delayed switches due to CP crew shortages or absences were common from late 2012 onward, the problem became especially pronounced in late 2014 and early 2015. At that time, we complained to CP, as we had done in the past, that Finch could not function properly unless CP provided timely and reliable switches as scheduled. CP's Trainmaster, George Newell, admitted to me that CP was understaffed and had an insufficient number of conductors and crews to maintain its service.

17. It is difficult to chronicle all of the missed and delayed switches that Finch experienced after CP reduced its service to 3 days per week but I will highlight some examples of them.

18. On October 19, 2012, Finch had not received its switch as of 8 p.m. Attach. 1. (Switches were supposed to occur in normal business hours.) [

] *Id.*

19. [] Attach. 2. As a result, Finch only received two switches that week.

20. On the following Monday, November 26, 2012, the switch did not arrive until 1 a.m. (so actually not until Tuesday November 27th.) Attach. 3. [

] *Id.*

21. On January 7, 2013, Finch wrote to CP inquiring as to the status of three railcars that Finch needed for its paper production. Attach. 4. Two of the cars were supposedly at Fort Edward but did not appear on CP's website for ordering in. One starch car had been shipped in November but apparently had disappeared. Two days later, when CP still had not responded to Finch's request, Finch re-sent the email. *Id.* [

] *Id.*

22. On January 15, 2013, Finch reported that it needed a sulfur car because the shortage of sulfur was reaching critical levels. Attach. 5. [

]

Id. (Finch 00466).

23. On March 18, 2013, two cars that Finch called in did not arrive. Attach. 6. [] *Id.*

24. On Friday, May 17, 2013, CP failed to deliver cars that had been ordered. Attach. 7. Finch was not notified that the cars would not be delivered. *Id.* When Finch asked why the cars had not been delivered, it was told that [

] *Id.*

25. One of the cars to be delivered contained caustic. As a result of CP's failure to deliver the caustic, Finch had to obtain caustic, which was in short supply, by truck delivery on short notice for Sunday morning so the plant could continue to operate. *Id.*

26. On June 12, 2013, no switch was conducted due to CP crew issues.

27. On July 11, 2013, Finch was notified that [] Attach. 8.

28. On July 25, 2013, Finch was informed that [] Attach. 9.

29. On July 31, 2013, the CP crew [

] *Id.* CP did not actually make the switch until August 2, 2013.

30. On the following day, only two of the five cars that were ordered by Finch were delivered. Attach. 11.

31. On August 1, 2013 Finch was told it was not going to be receiving its switch that day due to [] Attach. 12.

32. On August 1, 2013, Finch notified CP that it was imperative that all railcars needed to be moved to Fort Edward in a more consistent fashion because Finch could not continue to receive sporadic switches and remain at full operational capacity. Attach. 13. Finch further complained that not only was it unclear if a rail car in Fort Edward that Finch needed was full or empty, but CP was not [

] *Id.* As a result of CP's cars not moving and CP's refusal to provide switches more than 3 days a week, Finch was having to adopt alternative purchasing and delivering options. *Id.* Those options were limited to obtaining chemicals and pulp by truck, which was more labor intensive, time consuming and considerably more expensive than obtaining those materials by railcar.

33. Finch did not receive the full switch it was supposed to receive on July 31, 2013 until August 2nd.

34. Despite Finch having alerted CP on August 1, 2013, of the problems that CP's sporadic deliveries were causing, one week later, on August 8, 2013, CP notified Finch that [

] *Id.*

35. On August 27, 2013, Finch notified CP that it had brought in 4 cars that Finch had not ordered. Attach. 15, CPFinch000257.

36. On August 29, 2013, no switch was conducted because CP's crew did not show up.

37. On September 3, 2013, no switch was conducted because CP's crew did not show up.

38. On September 12, 2013, the CP crew did not show up and as a result Finch could not receive its switch until Monday, rather than on Friday. Attach. 16.

39. On September 19, 2013, no switch was conducted because CP's crew did not show up.

40. On October 13, 2013, the switch was late.

41. On November 4, 2013, no switch was conducted.

42. On November 11, Finch did not receive a switch because the CP crew did not show up.

43. On November 20, 2013, Finch did not receive a scheduled switch.

44. On December 6, 2013, the CP system was down so no cars were brought in until December 9, 2013.

45. On December 16, 2013, Finch asked CP for estimated arrival dates for certain ammonia cars because it was imperative that they be available for Finch's Friday December 20th switch due to the upcoming holiday. Attach. 17, CPFinch 000111. [

] *Id.* Two day later, Finch informed CP that according to CP's inbound reports, [

] *Id.* On Thursday, Finch again inquired why the two cars that CP [.] *Id.* at CPFinch 0000109.

46. On December 20, 2013, Finch provided notice that due to CP's failure to timely deliver ammonia cars, Finch needed to order in ammonia trucks to maintain sufficient ammonia

levels. Attach. 18, CPFinch 0000196. Finch noted that in addition to the two ammonia cars [

] *Id.* Finch

further complained that it could not plan for production because CP's transit times were so erratic. *Id.* As a result of CP's failure to timely provide switches, Finch had to purchase 4 ammonia trucks for delivery on Monday the 22nd.

47. Finally, Finch notified CP that “[a]gain we are moving into a holiday week with Ammonia cars stuck in-transit. We need this moving as soon as possible. We will be incurring additional costs for trucks as insurance and the potential to be in critical position the middle of next week. Please work with your team to have these moved.” *Id.* Finch further asked that CP update Finch on the status of the ammonia cars. *Id.* CP's response was, “[

]”

48. Ultimately, most of the ammonia cars did not arrive at Finch until late December or January of 2014. *See* Attach. 19.

49. On January 22, 2014, the switch was delayed due to engine issues.

50. On January 31, 2014, a switch was delayed due to a derailment. Material handling cars were not switched once CP did arrive.

51. On February 5, 2014, cars were not placed.

52. On February 11, 2014, Finch contacted CP regarding 5 ammonia railcars that it desperately needed for delivery, and thus needed assurance from CP that they would arrive at Whitehall that evening as scheduled. Attach. 20. CP expressed confidence that the cars would arrive at Whitehall that night. *Id.* at Finch 00739. Internally, Finch expressed concern (understandably given CP's dismal record of failing to provide service as promised) that it

needed CP to be better than pretty confident because Finch would not make it until that Friday the 15th if the ammonia was not delivered. *Id.* As a result, Finch looked at the availability of 4 trucks carrying ammonia as soon as possible in lieu of relying upon CP to provide ammonia railcars. *Id.*

53. Later that day, CP informed Finch that despite CP's assurances, "[

.] *Id.*

54. Finch had built in extra time for delivery of the ammonia cars referenced above but even with a buffer built in, the cars were still not delivered in time for Finch to avoid having to obtain ammonia via truck, rather than rail. *Id.* at Finch 000737.

55. On February 13, 2014, Finch notified CP that it had not received three cars that it had ordered. Attach. 21.

56. On February 17, 2014, Finch was notified that [] Attach. 22. Finch was concerned because CP's failure to provide switches was putting Finch in uncharted territory regarding ammonia levels. *Id.* at Finch 00732. Later that day, CP reported that [] *Id.* at Finch 00731. [] *Id.*

57. On April 7, 2014, no switch was conducted.

58. On April 9, 2014, CP informed Finch that it would be very late in providing its switch. No explanation was given for the delay.

59. On April 20, 2014, no switch was conducted.

60. On May 14, 2014, one railcar was re-spotted despite no request from Finch that this occur, another car was spotted to an incorrect spot and one car did not come in. Attach. 23.

61. On June 6, 2014, CP was late in providing its switch.

62. On July 23, 2014, cars were not brought in due to track work being done in Fort Edward.

63. On July 28, 2014, the crew was late in making its switch. Attach. 24.

64. On August 21, 2014, Finch complained about the inordinate amount of time and effort Finch was having to spend due to CP's failure to provide reliable service. On August 20, 2014, the CP crew arrived late, did not bring in two railcars as requested and incorrectly spotted another 3 cars. Attach. 25, CPFinch 0009747.

65. Finch notified CP that one of the cars that CP failed to bring in on August 20th still had not been brought in as of September 3, 2014, almost two weeks later. Attach. 26.

66. On October 20, 2014, there was a late switch because the CP crew ran out of hours.

67. On November 5, 2014, there was a late switch because the CP crew ran out of hours.

68. On November 17, 2014, CP failed to bring in any of cars that were ordered for Finch's F0301 track and instead brought in two cars that were not ordered. Finch sought an explanation as to why this had happened. Attach. 27. The following day when CP still had failed to respond, Finch again sought an explanation as to why Finch had not received its

requested switches. Finch wrote that “[w]e cannot to afford to receive this kind of service at our facility and we would like to have some answers as soon as possible.” *Id.* Ultimately Finch was told that []
Id.

69. On November 25, 2014, CP itself [

] *Id.* If paperwork is not completed, it is difficult, if not impossible, for Finch and other railroad customers to know where cars are located and whether they can be called in. Further, if the crew does not complete its paperwork, Finch and other customers are not able to release cars from their plants once switches are completed. *Id.*

70. On December 10, 2014, the CP crew ran out of hours and thus Finch missed its switch.

71. On January 6, 2015, Finch informed CP that information was required concerning two cars containing materials that Finch needed. Attach. 29. One car was “stuck” in Ontario, and the other car had disappeared from CP reports and its website. *Id.*

72. On January 21, 2015, CP missed a switch and failed to inform Finch in advance that the switch would not be received. Attach. 30.

73. Five days later, on January 26, 2015, CP informed Finch that [.] Attach. 31. Finch would be running very low on ammonia if did not receive a switch that day. *Id.* Finch followed up it earlier correspondence emphasizing that it was imperative that Finch receive its full switch or face the possibility of a shut down due to ammonia not being available. *Id.* Finch left several

messages and sought confirmation that a replacement crew would be sent to complete the switch.
Id.

74. On February 2, 2015, CP notified Finch at 4:40 p.m. that it would not be receiving its scheduled switch that day. Attach. 32.

75. On February 4, 2015, Finch did not receive its scheduled switch due to an engine failure.

76. One week later, on February 11, Finch did not receive a switch because the CP crew failed to show up.

77. On Friday, February 13, 2015, CP again notified Finch -- at 1:27 p.m. -- that
[

.] *Id.* Finch inquired why it was just being informed late in the day on Friday that no switch was going to be provided. *Id.* It also asked CP to keep it informed when a Saturday switch crew was in place. *Id.*

78. Given that CP had missed the scheduled switch on both Wednesday and Friday, this put Finch in desperate straits. Over the next few hours, Finch sent a number of emails to CP inquiring as to the status of the replacement crew and explaining that Finch had “about 24 hours of ammonia left before we will be in need of making some operational changes.” *Id.* at CP Finch 0011170-71. The next day when CP still had not responded, two different Finch employees wrote to CP inquiring as to the status of the replacement crew and notifying CP that Finch needed a response by noon of that day. *Id.* At 9 p.m. that evening, CP finally told Finch that “[

.]” *Id.*

79. The next day CP informed Finch [] *Id.* No replacement crew was ever provided. Attach. 34. Instead, on the date of its next scheduled switch, [] *Id.*

80. Two days later, Finch asked whether it could get a special switch to make up for the missed switches it had been experiencing. Attach. 35. CP told Finch that [] *Id.*

81. CP did not provide Finch with its February 27, 2015 scheduled switch until March 1, 2015. *See* Attach. 36. At that time the crew removed an ammonia car from Finch property that had not been blown down. *Id.*

82. On March 4, 2015, CP ran out of hours to complete its scheduled switches. Attach. 37. Finch observed that this was happening way too often. *Id.* CP's Trainmaster admitted that [] *Id.*

83. On March 6, 2015, CP failed to provide switches which included pulp cars. Attach. 38. Finch was not told that the cars would not be delivered. *Id.* When it learned that the cars had not been delivered, Finch asked whether the crew would be bringing the cars in that night or first thing in the morning because CP's failure to provide the switches "has put us in a crucial situation for pulp." *Id.* Finch had trucks carrying pulp brought in to the plant on Friday, Saturday and Monday so it could continue to operate. *Id.* The following Monday, March 9, 2015, Finch did not receive a switch. A switch was finally provided on March 10th. 4 days after the scheduled switch on March 6, 2015.

84. On March 11, 2015, CP admitted that [

] Attach. 39. CPFinch 0013004.

85. On March 27, 2015, Finch provided CP with a list of its exceptions that it had thus far in 2015 alone. Attach. 40. The list did not include all of CP's missed and delayed switches but identified missed and delayed switches on January 9th, January 23rd, February 2nd, February 4th, February 9th, February 11th, February 13th, February 16th, March 9th and March 18th. *Id.*

86. On March 27, 2015, CP was unable to provide a switch due to crew shortages. Attach. 41.

87. On April 1, 2015, Finch asked when its switches might be arriving. Attach. 42. More than five hours later, CP informed Finch that the [
] *Id.*

88. Two days later, on April 3, 2015, CP had no crew available so no switch was conducted.

89. Two cars of pulp did not arrive at Finch on April 17, 2015. Attach. 43. Instead, cars not belonging to Finch were delivered. Finch asked whether it could get pulp delivered as part of a make up switch on Sunday. *Id.* [
] *Id.*

90. On May 1, 2015, the switch was late due to CP crew issues.

91. On May 20, 2015, Finch did not receive a complete switch because the CP crew ran out of hours.

92. On July 10, 2015, Finch was told it would not receive its scheduled but that [
] *Id.*

93. On October 12, 2015, Finch did not receive its scheduled switch.

94. On October 14, 2015, Finch did not receive its scheduled switch.

95. On October 15, 2015, Finch asked whether it would be receiving its Friday switch the following day. Attach. 45. It was told it was not. *Id.* Thus, Finch did not receive its scheduled switches on Monday, Wednesday or Friday.

Standing Instructions for Ammonia Cars

96. James Cotton, a senior CP representative, wrote to Finch on May 22, 2012,
[

] Attach. 46. Finch routinely did so.

97. This standing order or instruction remained in place until December of 2014 when based on discussions between CP and Finch, Derek Basile wrote to CP confirming that going forward, the standing instructions would no longer be honored. Attach. 47.

98. While on occasion CP crews did fail to follow the longstanding instructions to bring in ammonia cars immediately upon arrival, when CP failed to do so, any demurrage charges assessed were routinely recognized as erroneous and removed from CP's final invoices. Thus, in September of 2012, I challenged an invoice from CP on the grounds that \$12,000 of the amount sought was for demurrage charges on ammonia cars and that "Finch[']s current standing instructions are to place any and all ammonia cars upon arrival." Attach. 48. Jeffrey Holley, an employee in CP's Supplemental Services & Demurrage Department, [

]” (CP Finch 0001385).

99. The same issue arose again in correspondence dated January 10, 2013. Once again I disputed an invoice from CP for (among other reasons) CP's assessment of demurrage charges on ammonia railcars. Specifically, I noted that Finch was disputing all 11 days demurrage for the ammonia cars. "We are to receive ammonia as soon as it is available There should not be any demurrage charges for ammonia." Attach. 49, CPFinch0001392. Again, CP [

]

100. In February of 2013, CP again improperly assessed Finch demurrage on ammonia cars and once again I recognized its error and CP corrected its invoice. *See* Attach. 50. In so doing, CP explicitly [

] (CP Finch 0001397).

101. Despite the standing order, CP continued to improperly bill Finch for demurrage on ammonia rail cars that were supposed to be brought in immediately -- and continued to recognize its errors and then correct its invoices. Thus, in January of 2014, I challenged demurrage charges on ammonia cars and the invoices were corrected based upon the fact that "Customer has a standing order to have all cars brought out to plant." Attach. 51, CPFinch 0001429-1430.

102. CP's recognition of the validity of the standing order continued into April and May of 2014. In November of 2013, I again challenged \$6,000 of an invoice based upon the standing order to have all ammonia cars spotted upon arrival. Attach. 52. CP did not respond to the challenge for 5 months but in April of 2014, Jeffrey Holley wrote back to me apologizing for

CP's delay in responding and stating that [

] (CP Finch 0001426).

103. On March 6 2014, Deborah Taylor of Finch wrote to CP noting that ammonia cars when they hit Whitehall were to be brought in immediately and asked why it had not happened on two occasions. *See Attach. 53.* CP failed to respond to this inquiry.

104. On April 22, 2014, Deborah Taylor of Finch again wrote to CP inquiring why the standing instructions were not being followed, noting that 4 ammonia cars arrived at Whitehall and should have been brought in for delivery yesterday. *Attach. 54.* She further noted that due to the standing order, "we should not be incurring any demurrage charges on these cars due to the crew not placing these cars." She also asked for immediate feedback regarding this issue. CP ignored this request, as it had ignored the request a year before from its own employee, asking why Finch's ammonia cars were not immediately being spotted despite the standing instructions to do so, and the inquiry a month earlier from Debora Taylor asking why two ammonia cars had not been brought in timely. *See Exhibit O, Finch Opening Evidence Brief.*

105. Finally, on April 25, 2014, I once again challenged an ammonia demurrage charge in the amount of \$12,000 on the grounds that the cars should have been brought in immediately. *Attach. 55, CPFinch0001436.* And again, CP corrected the error on its invoice. Indeed, Mr. Holley wrote on May 12, 2104, that he had consulted with the CP Customer Service Representative for Finch and "[

]" *Id.* Thus, as of May of 2014, CP confirmed that the standing instructions remained in effect.

106. Despite the fact that standing instructions had been in place for two full years, CP failed to immediately bring in a large number of ammonia cars in April through October of

2014., The ammonia demurrage charges that CP has sought to assess against Finch for this time period exceed \$950,000.

107. When I first reviewed CP's invoices covering this time period, I was surprised at their amounts but was not concerned given the longstanding agreement that was in place between CP and Finch that ammonia cars were to be brought in immediately, and the fact that CP had always corrected prior invoices containing ammonia demurrage charges. Nevertheless, I continued my prior practice of notifying CP of the error on each invoice as it was received and requesting that the charges for ammonia be removed. I also subsequently notified CP that Finch was contesting the invoice we received on November 14, 2014 for demurrage calculated by CP for the month of October, 2014.

108. Although Kenneth Weigel, CP's Manager of Supplemental Services & Demurrage, agreed in April of 2014 that Finch's demurrage charges on ammonia railcars [

] See Attach. 56. One week later,
in correspondence to me, Kenneth Weigel admitted that [

] See Attach. 57. Nonetheless, contrary to the position that it had
taken dating back to 2012, CP now [

1]

109. CP relies upon an email from Mr. Weigel to me dated November of 2013 as support [

]

110. Prior to August of 2014, no one from CP informed me or anyone else from Finch that we needed to start ordering in ammonia cars rather than have them brought in immediately as had been the practice since at least May of 2012. While Finch did order in some ammonia cars, that was done so as to direct the cars to specific slots for storing or unloading on Finch property, not because the agreement to have ammonia cars brought in immediately had been rescinded. If CP had intended to rescind the longstanding agreement between CP and Finch to bring in cars immediately, I would have expected CP to notify me and other Finch personnel that it was doing so.

CP Seeks Demurrage for Days CP Refused to Provide Service

111. In addition to seeking demurrage arising out of its own failure to bring in ammonia cars, despite the standing instruction to do so, CP seeks to assess demurrage charges against Finch on days CP refused to provide service. It did so based on the erroneous assumption that Finch was entitled to [

] *See Attach. 59.*

112. On May 20, 2013, I disputed a portion of CP's invoice containing demurrage charges on the grounds that Finch should not be charged demurrage on cars sitting in Fort Edward on days that CP was not providing service to Finch. *Id.* at p. 4. [

] *Id.* at p. 3.

113. As reflected in paragraphs 8-11 above, CP's assertion is false. Although Finch sought to continue to receive 5 day per week service in October of 2012, CP refused to provide it on the grounds that it was not economical for CP. CP made this decision in the face of Finch's strenuous objections. Under these circumstances, there is no legitimate basis for CP to seek demurrage from Finch on days that CP refused to provide Finch with service.

Amounts in Dispute

114. The amount of the demurrage sought by CP in its lawsuit in the U.S. District Court for the Northern District of New York is \$1,349,050. Of this amount, \$954,000 consists of amounts improperly assessed due to CP's failure to follow the standing instruction.

115. The chronology and amounts in dispute regarding ammonia cars are as follows;

2013	July - \$10,500
2014	April - \$40,500
	May - \$277,500
	June - \$376,500
	July - \$94,500
	August - \$21,000
	September - \$40,500
	October - \$93,000

116. CP also improperly seeks \$234,760 in demurrage accruing on days it refused to provide service to Finch.

VERIFICATION

I, Stuart W. Alheim, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to sponsor this Verified Statement.



Stuart W. Alheim

August 19, 2016

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PUBLIC VERSION
BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket FD 35981

PETITION FOR DECLARATORY ORDER - FINCH PAPER LLC

VERIFIED STATEMENT OF DEBORAH A. TAYLOR

1. My name is Deborah A. Taylor. I served as a Transportation Coordinator and Invoicing Analyst at Finch Paper LLC from June of 2012 to November of 2015. I subsequently served as Management Shipping Team Leader until July of 2016.

2. From 2012 through 2015, I was involved in ordering in loaded railcars cars of raw materials from employees at Canadian Pacific Railway (“CP”) for delivery by the Delaware and Hudson Railway to Finch. Prior to late 2012, in this capacity, I would normally interact with Todd Renstrom at CP. I would email him or fax him information regarding the cars that Finch needed to order and he would confirm the order. If necessary, we would talk on the phone to confirm Finch’s orders. Mr. Renstrom would also keep me apprised of where Finch’s cars were on CP’s system or in its railroad yards at Whitehall and Fort Edward, New York, so that I could better monitor when cars could be called in by Finch for switches. I could then relay this information on to Finch’s Pulp Preparation or Material Handling Departments so that they would be better able to plan Finch’s ongoing production.

3. In late 2012, CP informed Finch that it could no longer order, call in or spot railcars by emails or faxes but instead had to do so through a new automated program on the CP

website. The CP website was also supposed to be able to monitor railcars that Finch had ordered. Thus, we were no longer supposed to have human contact with CP employees regarding the ordering in, monitoring and spotting of railcars.

4. From the beginning, CP's website was a disaster. Frequently, cars were not able to be ordered in from the website due to technical errors with the site.

5. The information on the CP website was frequently out of date so that it was difficult, if not impossible, to rely upon the information posted there. Often the information was out of date because train crews would not report what work had been done, including what switches they had performed. Thus, for example, the website might show cars as being at CP's Fort Edward or at Whitehall rail yards even though the cars had actually been delivered and switched to Finch. The failure of the crew to report information regarding cars made it often impossible for Finch to call them in or to order them out.

6. Oftentimes, Finch would receive notice that a car or cars had arrived at Fort Edward but when I went to order them in the next day, they would not appear on the website as available. This could be for a variety of reasons. One reason, as mentioned above, is that the car might have actually been brought in to Fort Edward but the crew had not completed the paperwork so the website would not show the car as being able to be ordered in from the website.

7. Alternatively, the car may have been accurately reported as being delivered to Fort Edward and thus should have been available for delivery to Finch the next day but it nonetheless might be gone the following day. Thus, for example, a car ordered by Finch would be hooked up by the CP crew to the wrong train and sent to Mechanicville, New York instead of to Finch's mill. It became a running joke at Finch that cars we had ordered in and that were

expected for delivery the following day had gone on “field trips.” For some reason, this happened most frequently with starch cars that Finch had ordered. Consequently, instead of receiving the car the next day, it would sometimes take up to five days to get railcars we had ordered sent back to Fort Edward after such a field trip.

8. Although we attempted to make light of CP’s numerous errors and failings, it was a serious matter for Finch when cars were not available to be brought in or when, as often happened, CP simply failed to show up for a switch they had agreed to provide as scheduled. The Finch paper mill operates 24 hours a day, 7 days a week, 12 months a year, and requires a constant supply of pulp and chemicals to remain operational. If Finch ever had to shut down its plant due to a lack of materials it would have had disastrous consequences. As a result, it was imperative that CP deliver the pulp and chemicals Finch required for its operations on a timely basis. If CP ever proved unable to do so, which often happened starting in late 2012, Finch had to obtain a replacement supply of chemicals and pulp on short notice. This was done by ordering pulp or chemicals on short notice by truck instead of by rail.

9. Although CP did not want us to communicate with CP employees and conductors regarding the building up and delivery of railcars to Finch, and instead wanted us to try and do everything through the CP website, some CP conductors ignored CP’s policy in this regard and allowed us to communicate with them directly. This prevented the harm caused to Finch by having to use the CP website from being even worse. Frequently, the information that the CP conductor had been provided as to the build-up and delivery of railcars to Finch was incorrect so the ability to communicate with CP employees and conductors directly was necessary to prevent CP from missing switches, from delivering cars to wrong spots, or from delivering cars to Finch

that Finch had not even ordered. Unfortunately, however, such errors on the part of CP were commonplace.

10. Even if the information on the CP website was correct as to the current location of a railcar, we could still not count on the cars timely delivery because cars would often inexplicably back up in spots on CP's system and not move for extended periods of time. For example, cars frequently bottlenecked in St Luc, Canada. Thus, while the time to move a car from St. Luc to Whitehall might only be a few days, cars would often sit in St. Luc for extended periods before they would move from there. Similarly, cars often backed up in Maine. In tracking railcars on the CP website it was impossible to determine when these logjams would occur, making it extremely difficult to predict when the needed raw materials would actually arrive at the Finch facility.

11. One persistent problem with the CP website was its inflexibility. For example, if a car was ordered in to a specific storage spot on Finch property, it was impossible to later have CP re-spot the car to another location through the website. Respotting of cars was often necessary as a result of CP's inability to timely deliver certain cars or changes in Finch's production needs. CP's IT personnel were never able to make this simple fix to CP's website, however.

12. After CP unilaterally reduced the days it would agree to provide service switch to Finch from 5 days per week to 3 days per week, over Finch's vigorous objections, CP often had delayed or missed switches. Frequently these would occur without any advance notice by CP. Switches were supposed to occur in normal business hours and I was supposed to receive notice when cars were leaving Fort Edward and heading to Finch. Often, at the end of my normal business hours, we would not have received our switches and I would not have received any

notice that we were not receiving a switch, so I would inquire of CP as to the status of our railcars. In some instances, CP would tell me that we were not receiving our scheduled switch that day. In many instances, CP simply ignored my inquiries and when I returned to the office the next day, I would learn that the cars simply had not arrived.

13. CP missed switches and provided late switches for a variety of reasons. Sometimes it would be due to engine problems. Sometimes it was due to weather. Oftentimes, it was due to CP crews simply not showing up, or crew shortages, or an inability of a crew to complete switches within the time allowed under federal law.

14. The problem of missed switches was not intermittent or occasional but instead a repeated and systematic problem. Often this occurred even after Finch had informed CP that there was a vital need for the pulp or chemicals being switched in order for Finch to continue to operate.

15. Missed switches due to CP crew shortages or absences became especially pronounced in late 2014 and early 2015. As a result, in early 2015, Eric Berg, Finch's Division Manager, and I met with George Newell and Christian McMahon of CP to address the problem of frequently missed switches. During that meeting, Mr. Newell admitted that CP did not have enough operational personnel to properly run its operations. He stated that CP was having trouble hiring and retaining staff.

16. It is impossible to chronicle all of the problems that Finch experienced with CP's website but I will attempt to highlight some examples of them.

17. In January of 2013, Finch was told in [] When Finch went to the website, however, it showed that the three cars were not available to be called in from Fort Edward, the

staging site for Finch's switches. *See* Attach. 1. When informed of this problem, I reached out to Todd Renstrom, the CP employee who I often had communicated with directly in ordering cars for Finch before CP insisted that we use its website in ordering cars. [

] *Id.*

18. Later in January of 2013, Finch again attempted to call in railcars from the CP website but was unable to do so, and also was unable to direct cars to specific spots for unloading. Attach. 2. These problems persisted throughout January and February such that Finch was unable to call in railcars containing materials from the website that were needed for the continued operation of its mill. The problem finally became so persistent and systemic that [

] Attach. 3. CP noted that [

]

Id. at CPFinch000729.

19. Finch remained unable to order in cars from the website for all of March, April, May, and into June of 2013. As a result, on occasion Finch had to order bills of lading via fax, at a charge of \$55. *See* Attach. 4.

¹ Emphasis supplied.

20. Finally, in July of 2013, we again began attempting to use the website in order to order in railcars but the problems on the website persisted. *See* Attach. 5. Thus, Finch often was unable to call in railcars to its Facility and was also unable have railcars moved as needed once they were on its property. Attach. 6.

21. The problems with the CP website continued into October of 2013, when again Finch remained unable to release some cars after switches had been completed and was unable to call in other cars for delivery of materials to its plant. Attach. 7. CP promised to look into what was preventing Finch from using the website but the problems continued unabated.

22. In November of 2013, the problem became, if anything, more pronounced. For example, on November 5, 2013, Finch received notification that [

]

Attach. 8. [

.] *Id.*

23. In December of 2013, Finch attempted to order in an ammonia car to a specific spot but was unable to do so through the website. Attach. 9. Finch emphasized that it was imperative that the car arrive as it was needed for its “just in time” operations. *Id.*

24. In early 2014, the problems with being unable to call in cars from the website continued but additional problems also arose. Frequently, the website contained inaccurate information, such as reporting that cars were available to be called in to Finch when they were already at the Finch Facility and in some cases, had been for weeks. Attach. 10.

25. In February of 2014, Finch complained that two cars it had ordered showed a last location at Whitehall but according to CP’s website were unavailable to be called in for needed switches. Attach. 11. [

] *Id.* This created enormous problems for us because when CP incorrectly believed that railcars containing pulp or chemicals necessary for Finch's operations had already been delivered to Finch, Finch would have to arrange for the delivery of such materials or chemicals by trucking on short notice at significant extra expense to Finch.

26. In March of 2014, Finch complained to CP that it was having both switch issues and website issues. The switch issues included: 1) CP failing to bring in ammonia cars pursuant to the standing instructions; 2) CP failing to remove a car from the Finch Property following a switch; and 3) CP bringing in a car that had not been ordered. In addition, the problems with the website included three caustic cars that had been reported as available for Finch to order in the day before but subsequently had disappeared, and a car that according to the website had been en route to Finch since February but now showed no estimated date of arrival.

27. On April 3, 2014, Finch was told that a car it needed had been moved to Fort Edward but the next day it did not show up on any of Finch's reports. Attach. 12. Similarly, a starch car needed by Finch for its operations was inexplicably moved to Albany. *Id.* This was an example of cars going on a "field trip."

28. On April 9, 2014, the CP website showed that an ammonia car was on Finch property when it was not. Attach. 13. Finch needed the ammonia car to be brought in for its "just in time" operations. The next day a pulp car that Finch had been informed was available to be brought in to its plant was missing from CP's website. Attach. 14.

29. On April 10, 2014, the website again was not working and not allowing cars to be brought in for switches. Attach. 15.

30. On April 15, 2014 Finch could not order in from the website. The following day the website inaccurately reported the location of three separate railcars. Attach. 16.

31. On April 17, 2014, Finch complained that it had left several messages regarding a new supplier of caustic that it would be receiving and that it needed a new bill of lading built into the system so cars could be released when they were empty. *See* Attach. 17. Later in the day, CP still had not responded to our numerous messages. *Id.*

32. On May 5, 2014, Finch could not order in cars for switches. Attach. 18.

33. On May 13, 2014, Finch could not order in switches through the website and the website inaccurately reported that a car was at Finch's facility when it was not. Attach. 19.

34. On May 19, 2014, railcars that Finch needed for its operations were not showing up on CP's website or CP's inbound reports. Attach. 20. On the next day, the website locked up and CP crews failed to pull cars from the Finch Facility or to bring in cars as ordered. Attach. 21.

35. On May 22, 2014, the website did not allow Finch to order switches and a crew again failed to bring in an ammonia car for placement. Attach. 22.

36. On July 3, 2014, the switches could not be done through the website and an ammonia car that previously had been reported as being in Whitehall was no longer showing up on the website as available to be ordered in to Finch's property. Attach. 23.

37. On July 28, 2014, Finch was notified that an ammonia car and a caustic car had been constructively placed,² despite the fact that the cars had already been delivered to Finch and were empty. Attach. 24.

38. In September of 2014, cars located in Fort Edward and intended for Finch were shown on the website as instead heading for Saratoga. Attach. 25. The car went on a field trip.

² Constructive placement triggered the demurrage clock to start. Thus, here, CP started the demurrage running on railcars that had already been delivered and emptied.

39. In October of 2014, Finch could not order in switches through the website and four cars that were ordered in were not brought in by the CP crew as requested. Attach. 26.

40. In October of 2014, Finch stopped receiving arrival notifications or constructive placement notifications when cars arrived at Whitehall. Attach. 27. As of October 31, 2014, 15 cars had arrived at Whitehall for which Finch did not receive notices. *Id.* As a result, demurrage would begin accruing without Finch receiving notice. Finch would also not know that cars containing chemicals and materials necessary for Finch's ongoing operations were not available to be bought in to its Facility. Finch informed CP that it needed to receive that information to allow its various departments to know what materials are available to them and for Finch to produce paper. Attach. 28.

41. On November 17, 2014, the CP crew did not bring in any of the cars that were ordered for the Finch F0301 track. Instead CP brought in two cars that were not ordered. Attach. 29.

42. On November 26, 2014, [
] Attach. 30. [
] *Id.*

43. On December 2, 2014, the CP website incorrectly showed that a car was on Finch's property despite the fact that it had never been ordered in. Attach. 31. The next day, the website still had not been updated to provide correct information in this regard. *Id.*

44. On December 3, 2014, four cars were shown on CP's website as being in Whitehall and available for Finch to order in. The next day, the four cars were no longer showing on the website as being available. Attach. 32.

45. On December 9, 2014, a railcar was brought in, emptied, and taken off of Finch property. The next day CP issued an Arrival Notice for the car, which started the demurrage clock. Attach. 33.

46. On January 19, 2015, Finch was unable to cancel re-spots of cars through the website. Attach. 34. [] *Id.*

47. On January 13, 2015, the website showed a car on Finch property that had not been called in and was not on Finch property. Attach. 35.

48. On January 21, 2015, the CP website showed two cars as being at the serving yard despite the fact that they had been on Finch property since the Monday before, January 19th. Attach. 36. As a result, Finch was unable to release the cars on the website as empty so that they could be taken from its property. *Id.*

49. On February 26, 2015, Finch tried 3 separate times to order in cars for its switch the following day, but the orders were repeatedly canceled. Attach. 37.

50. On March 14, 2015, Finch received an arrival notice for a car. When Finch went to call in the car on March 19, 2015, the CP website did not show the car as in Whitehall or available anymore through the website. Attach. 38. When informed of this fact, CP told Finch that [] *Id.*

51. On March 17, 2015, Finch informed CP that its website incorrectly failed to list 2 cars as being on Finch property and thus Finch was unable to release them. Attach. 39. CP explained that the problem was [] *Id.*

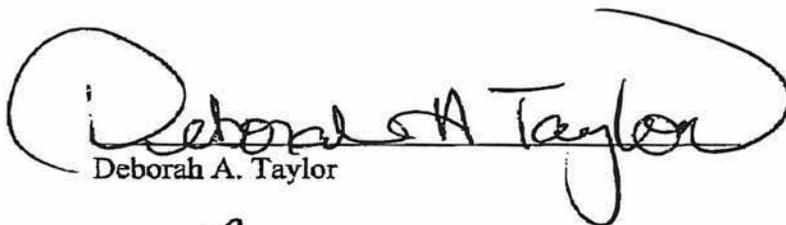
52. On March 18, 2015, the CP website incorrectly showed 8 railcars as being on Finch property. Attach. 40.

53. On May 11, 2015, CP incorrectly invoiced Finch for \$27,000 in charges on ammonia railcars that had been called in by Finch on April 13th but were not actually delivered to Finch by CP until April 22nd. Attach. 41. [

] *Id.* As a result, the ammonia cars were not brought in timely and CP improperly sought \$27,000 in demurrage charges from Finch.

VERIFICATION

I, Deborah A. Taylor, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to sponsor this Verified Statement.

A handwritten signature in black ink that reads "Deborah A. Taylor". The signature is written in a cursive style with a large, looping initial "D" and a long horizontal stroke underlining the name.

Deborah A. Taylor

August 17, 2016

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PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket FD 35981

PETITION FOR DECLARATORY ORDER - FINCH PAPER LLC

Verified Statement

Of

Thomas D. Crowley
President

L.E. Peabody & Associates, Inc.
On Behalf Of

Finch Paper LLC

Due Date: August 24, 2016

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LIST OF EXHIBITS

<u>EXHIBIT NO.</u>	<u>EXHIBIT DESCRIPTION</u>
(1)	(2)
1	Statement of Qualifications of Thomas D. Crowley
2	CPFinch0014670-CPFinch0014673.pdf
3	Average PTC Cost per TIH Carload with Demurrage Markup

I. INTRODUCTION

I am Thomas D. Crowley, economist and President of L. E. Peabody & Associates, Inc., an economic consulting firm that specializes in solving economic, transportation, marketing, financial, accounting and fuel supply problems. I have spent most of my consulting career of over forty (40) years evaluating fuel supply issues and railroad operations, including railroad costs, prices, charges, financing, capacity and equipment planning issues. My assignments in these matters were commissioned by railroads, producers, shippers of different commodities, and government departments and agencies. A copy of my credentials is included as Exhibit No. 1 to this Verified Statement (“VS”).

I have been requested by Counsel for Finch Paper LLC (“Finch”) to review and comment on Canadian Pacific Railway’s (“CP”) demurrage policy and certain demurrage charges CP claims that Finch owes pursuant to invoices issued between the months of October, 2013 and March, 2015 for demurrage charges assessed between September 2013 and February, 2015, respectively. I also have been requested to review and comment on the damages that Finch incurred as a result of CP’s failure to provide rail switching services at Finch’s paper mill from September 24, 2012 to July 2, 2015, which is the period of time over which data was provided to me. Finch’s damages continued to accrue after July 2, 2015, and my analysis would need to be supplemented to account for additional damages incurred subsequent to July 2, 2015.

The results of my review are summarized in the remainder of this VS and accompanying Exhibits. Specifically, my comments are organized under the following topical headings:

II. CP Demurrage Policy/Charges

III. Finch Damages

II. CP DEMURRAGE POLICY/CHARGES

CP filed a complaint in federal court seeking an order requiring Finch to pay \$1,349,050 in demurrage charges calculated by CP and covering September, 2013 through February, 2015. My understanding is that the demurrage for February, 2015 is not at issue in this case, and so the total amount of demurrage at issue in CP's complaint is \$1,323,920. The following sections demonstrate that CP's demurrage charges were unreasonable and should be dismissed in total or, at a minimum, all of the demurrage charges on cars carrying ammonia should be dismissed.

A. CP DEMURRAGE POLICY

Finch railcars in CP's service are governed by CP Tariff 2 – *Railcar Supplemental Services*. Items 10 through 18 of CP Tariff 2 outline CP's demurrage policy and the asset use (demurrage) charge discussed in these items is calculated using a debit and credit system. For railroad owned cars, CP calculates debit days for each day after constructive placement or actual placement, if no constructive placement is done, until the empty car is released back to CP. For private owned rail cars CP calculates debit days for each day after constructive placement until actual placement occurs. CP Tariff 2 gives one credit day per railroad owned car, and no credit days for private railroad cars. CP Tariff 2 also gives credit days when a car is called to order but is not placed at the next available switch. In this instance, CP will include credit days for each day between when the car was requested and not placed and its actual placement. The credit days for each individual car are then subtracted from the debit days for that car to determine the demurrage days for the car.

For railroad-owned, non-hazardous, non-TIH/PIH commodities, which would represent pulp cars being shipped to Finch, CP Tariff 2 charges \$90 to \$200 per car per demurrage day, depending on fleet status. For private-owned, non-hazardous, non-TIH/PIH commodities, which

would represent starch cars being shipped to Finch, CP Tariff 2 charges \$60 per car per demurrage day. For private and railroad-owned, hazardous, non-TIH/PIH commodities, which would represent sulphur and caustic cars being shipped to Finch, CP Tariff 2 charges \$160 per car per demurrage day. For private and railroad-owned, hazardous, TIH/PIH commodities, which would represent ammonia cars being shipped to Finch, CP Tariff 2 charges \$1,500 per car per demurrage day.

**1. CP's Demurrage Charge for TIH
Shipments is a Profit Center for CP**

Demurrage is comprised of three factors: an amount to compensate the carrier for the use of its facilities to store cars, an amount to compensate the carrier for the use of a rail car if the car is owned by the railroad, and a penalty to ensure prompt return of the car to common carrier service. Since the majority of railcars in which Finch incurred demurrage are private, the cost that the carrier incurs for use of its railcars does not need to be accounted for when collecting demurrage. In my opinion, the \$1,500 per day demurrage charge that CP has charged Finch for its ammonia cars over-recovers the cost of storing these ammonia cars on CP's track. If the balance of the charge is to be construed as a penalty, CP's assessment of the full charge to Finch under these circumstances was unreasonable. In either case, CP's TIH demurrage charge is essentially a profitable revenue stream for CP, which was acknowledged by CP employees before CP decided to terminate Finch's lease of its track at Ft. Edward in 2012 and begin charging demurrage on Finch cars.¹ The \$1,500 per day TIH demurrage is over 900% greater than CP's demurrage charge of \$160 per day for cars containing hazardous materials. However,

¹ See: Exhibit No. 2 -- email chain between CP employees (CPFinch0014670 – CPFinch0014673), which determined that CP would have generated over [] million in revenue in 2010 on Finch carloads.

the cost of storing TIH cars on CP track is nowhere near 900% of the cost to store hazardous cars.

The Railroad Safety Improvement Act (“RSIA”) of 2008 required Class I railroads to install PTC on all lines moving TIH and passenger traffic. As a result of the RSIA, the Surface Transportation Board (“STB”) decided to include supplemental schedules to all Class I railroads Annual Report Form R-1 (“R-1”) that capture Positive Train Control (“PTC”) capital and operating expenses beginning in 2013. Line 1 of Table 1 below, demonstrates the total PTC operating expenses that Class I railroads incurred from 2013 through 2015

A railroad is able to recover a majority of its costs of PTC implementation through the base transportation rate it charges its customers. As stated above, a railroad is also able to recover some of the cost it incurs to store TIH cars on its tracks through demurrage, which in theory would also include PTC Costs. For sake of argument, assume all of the PTC operating expenses that all Class I Railroads incurred were allocated to only TIH traffic. Further assume that CP, even though it is a much smaller railroad than other Class I railroads and has demonstrably less PTC operating expenses than other Class I railroads as shown in its R-1, incurred the same PTC operating expenses as all other Class I railroads. Finally, assume that demurrage was the only avenue for CP to recover its PTC operating expenses, i.e. not in its base transportation rates. If all of these broad and over-reaching assumptions were true, CP would still be recovering over 13 to 25 times its cost of PTC operating expenses through its TIH demurrage charge of \$1,500 per day, as shown in Line 5 of Table 1 below. CP’s actual costs of PTC operating expenses would be much less than demonstrated in Table 1 below. However, Table 1 demonstrates just how overstated and unreasonable CP’s TIH demurrage charge of \$1,500 per day is.

Table 1
Average US PTC Cost Per Carload
CP Tariff 2 Demurrage Markup
 (Per Carload Basis)

Item (1)	2013 (2)	2014 (3)	2015 (4)
1. PTC Operating Expense 1/	\$179,606,000	\$268,746,000	\$347,788,000
2. US TIH Carloads 2/	3,108,359	3,184,937	3,162,965
3. PTC Cost Per TIH Carload 3/	\$57.78	\$84.38	\$109.96
4. CP Tariff 2 TIH Demurrage Charge 4/	\$1,500.00	\$1,500.00	\$1,500.00
5. Markup 5/	2596%	1778%	1364%

1/ Total US PTC Operating Expenses compiled in the Supplemental PTC Schedule 410 of the Annual Reports R-1. See Exhibit No. 3.

2/ Total Number of Loaded Cars for STCC subgroups containing TIH from QCS. See Exhibit No. 3 and "PTC Costing Summary.xlsx".

3/ Line 1 ÷ Line 2.

4/ Source: "CP_tariff-2-railcar-supplemental-services-july-2016.pdf".

5/ Line 3 ÷ Line 4.

Since RSIA, CP and all Class I railroads have sought (and continue to seek) to pass PTC related costs on to TIH shippers. Applying demurrage charges is one indirect way for the railroads to accomplish this objective. Here, the demurrage charges assessed on Finch's ammonia cars reflect that CP's demurrage program has become a profit center (or more accurately a PTC cost-offset revenue stream). Demurrage on TIH shipments is high, ostensibly because of the relative risk associated with moving TIH shipments and the railroads' intention to use TIH-related revenues to defray PTC implementation costs.

CP's demurrage actions demonstrate that it has evaluated the risk associated with storing TIH and determined that its demurrage charges for TIH exceed the monetary value of the associated risk. CP is trading relatively small increases in risk for relatively large increases in profits related to demurrage charges. If the demurrage charges on TIH were actually set to

approximate the risk associated with the storage of the materials on CP's system, CP would make a more concerted effort to quickly place the cars on private property and avoid the risk associated with storing them (i.e., elevate them above first-in/first-out dispatching status). The cost to install PTC on CP's system and the risk associated with storing TIH cars on CP tracks does not justify CP's exorbitant demurrage charge for ammonia cars.

**B. RESTATEMENT OF CP
DEMURRAGE CALCULATIONS**

I have reviewed CP's application of its Tariff 2 demurrage provisions to Finch traffic and determined that with a few minor exceptions, CP's application of its charges generally aligns with the reported constructive placement ("PCON"), order for placement ("ORPL"), actual placement ("PACT"), and empty release ("RMTY") event dates included in its data. However, that does not mean that all of the demurrage calculated should be charged to Finch.

**1. Elimination of Ammonia Demurrage
Charges Due to Standing Instruction**

CP's historical handling practices and treatment of demurrage charges on Finch's ammonia shipments established an understanding and agreement of disregarding all demurrage time and charges that accrued between the time ammonia cars were constructively placed and when they were actually placed. This understanding between the parties and related business practices were memorialized in May, 2012. Specifically, on May 20, 2012, CP's Specialist – Service Delivery (James Cotton) sent an email to Finch requesting that Finch begin requesting cars via Standing Instruction Codes (codes for each commodity) instead of by car ID starting on

Tuesday (May 22, 2012), and that any car requested via car ID after that date would be subject to a \$60 charge per car.²

Finch complied and instructed CP to deliver all carloads of ammonia to the Finch mill immediately upon arrival at the serving yard.³ Although CP did not always follow its own directive, presumably either because CP's crews were not "aware of the other tracks" for placement of the cars⁴ or simply because they were not even told of CP's own agreement with Finch, CP complied with the parties' agreement by retroactively clearing demurrage charges that had accrued on Ammonia shipments which sat in Whitehall or Fort Edward before being placed on Finch's property. Numerous examples of this are provided by other Verified Statements submitted with Finch's Opening Evidence.

CP's actions are explicit acknowledgements that because Finch issued standing instructions to deliver all ammonia cars immediately (or as soon as practicable), there can by definition be no elapsed time between constructive placement and Finch's order for actual placement. Although CP's data captures the PCON event and a separate ORPL event, this merely shows that CP's car tracking system and its crews made operating decisions that violated Finch's standing order. Because the accrued demurrage was consistently forgiven after the fact in the normal course of business, Finch allowed it to occur even though it clearly violated Finch's standing order. All demurrage charges for ammonia cars in private equipment are attributed to the time between the PCON and ORPL events.

CP's reduction of service days at Finch's mill coupled with CP's dispatching and operations decisions caused CP to constructively place Finch cars for its own operating

² See: Email from James Cotton to Debbie LaMere, dated May 20, 2012. FINCH00918.

³ See, Stuart Alheim Verified Statement at para 93.

⁴ See: Email from Jeffrey Holley to Stuart Alheim, dated February 25, 2013. CP Finch 000252.

convenience despite Finch's standing instruction to deliver all cars immediately. All demurrage that accrued was at the discretion of CP. Stated differently, it was not caused by action (or inaction) on Finch's part. Because all demurrage charges for ammonia cars in private equipment are attributed to the time between the PCON and ORPL events, and because Finch's standing instruction by definition eliminates all time between PCON and ORPL for ammonia shipments, there can be no valid accrual of demurrage on ammonia shipments destined for Finch's mill.

**2. Impact of CP's Decisions to
Terminate the Track Lease and
Reduce Finch Service from 5 Days to
3 Days**

In my opinion, CP's decisions to first, terminate the track lease in the Fort Edward Yard, and then reduce switching service from 5 days to 3 at the Finch facility caused its demurrage charges to skyrocket, for a couple of reasons. First, because demurrage accrues every day regardless of the days on which a facility has access to service, demurrage charges must increase when the number of service days is reduced if the shipper is ready to accept the car. Specifically, prior to the change in service implemented by CP in October of 2012, a Finch carload arriving at Fort Edward or Whitehall yard on a Tuesday morning could have been placed at the Finch mill on the same day or be placed on the leased tracks. In either case, demurrage would not accrue. However, after the change, placement on either the leased storage tracks or at the mill was no longer an option, so the only action available to CP would be to constructively place the car in either of the yards, notify Finch, and start the demurrage clock.

The verified statements of Finch employees submitted with Finch's Opening Evidence discuss in detail how Finch objected to the change in service levels and to the additional demurrage that began accruing when these changes took place in October, 2012. Finch also sent

several emails to CP in February and March of 2013⁵ contesting the demurrage charges that accrued over the interim time period. In response, CP stated that,

[

] ⁶

CP's statement [], is simply false. In fact, CP never offered [] to Finch, and by April, 2013 when the foregoing email was written, it had reduced service to three days per week. Thus, the above premise for CP seeking demurrage on days it did not provide service, *i.e.* that Finch itself chose not to receive switches on those days, is baseless. On the contrary, demurrage wrongfully accrued on days when CP chose not to perform switching operations, such as when a car arrived on Monday, and Finch was ready to accept it on Tuesday, but CP had chosen not to perform switching operations that day.

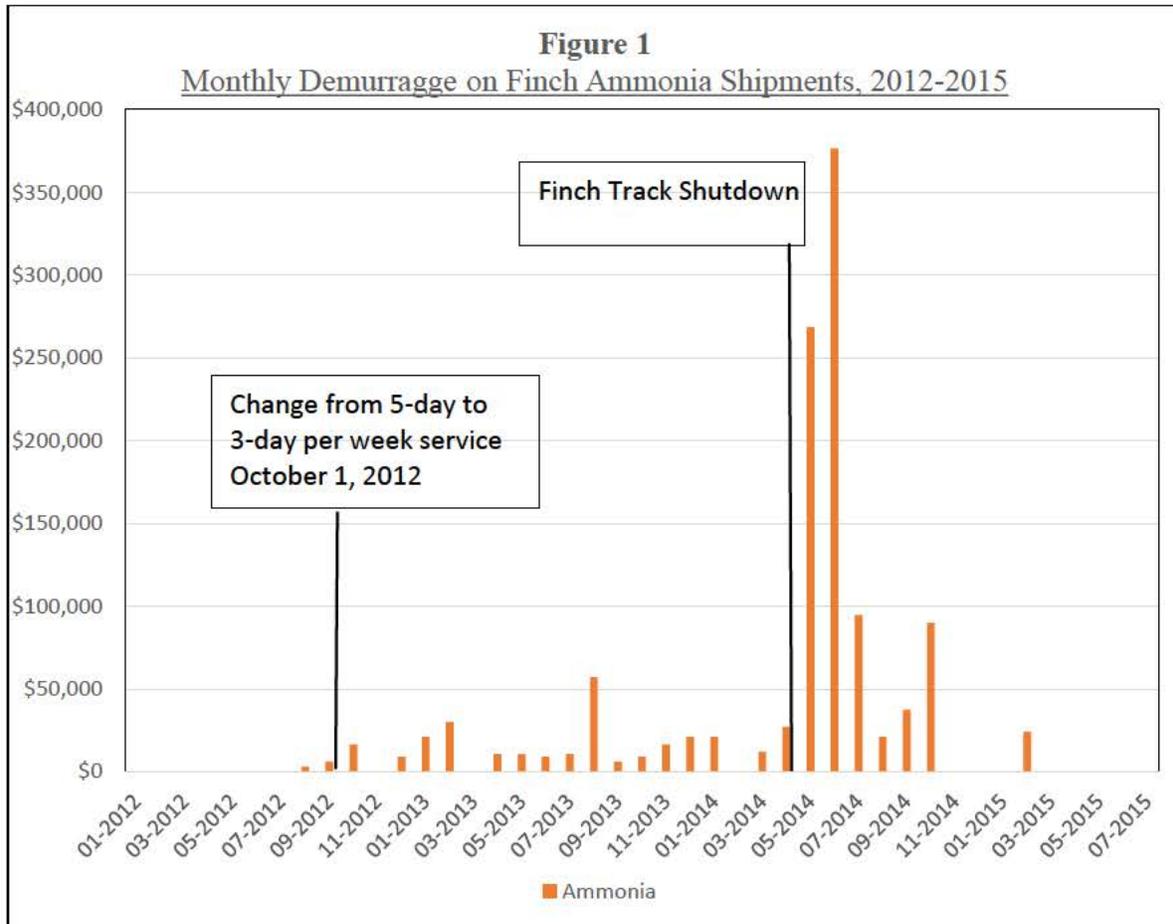
Second, due to the many reasons discussed by Finch current and former employees in their written testimony, CP's notification processes were far from reliable over the time period in question. As reflected in the Verified Statement of Deborah Taylor, CP's notification system was substantially flawed. In some instances, CP sent out constructive placement notifications when railcars were not actually available. Sometimes this was due to the widespread problems with CP's website. Sometimes it was due to the CP crew placing cars on the wrong train, thus making the cars unavailable to Finch for extended periods of time after the constructive

⁵ See: Email from Stuart Alheim (Finch Senior Transportation Planner) to Nancy Bento (CP Accounts Receivable Representative), dated February 12, 2013. FINCH00072. Email from Stuart Alheim to Nancy Bento, dated February 26, 2013. FINCH00065. Email from Stuart Alheim to Jeffrey Holley, dated March 28, 2013. FINCH00064.

⁶ See: Email from Jeffrey Holley to Stuart Alheim, dated April 1, 2013. FINCH00063

placement notification had been issued. In other instances, CP failed to provide constructive placement notifications at all. In October of 2014, CP stopped providing arrival notices and constructive placement notifications when ammonia cars arrived at Whitehall. The failure of CP to inform Finch of the constructive placement of inbound shipments allowed demurrage to accrue without Finch's knowledge. Finch could not reasonably be expected to order a car to be switched into its facility if Finch did not know the car had been constructively placed.

Third, the verified statements of Finch's employees recount how CP failed to even provide the three day per week switching service it promised to deliver. CP routinely failed to provide switching service on Mondays, Wednesdays, and Fridays when Finch requested the service. The net effect of CP's reduction in service and introduction of an inefficient and unreliable notification system was a dramatic uptick in demurrage charges accruing on carloads destined for the Finch mill. This pattern for ammonia railcars can clearly be seen in the historical demurrage accrual data for Finch, as shown in the Figure 1 below,



3. Impact of CP’s Decision to Shut Down Portions of Finch’s Track

As shown in Figure 1 above, there was a drastic spike in demurrage charges in May and June of 2014, immediately after CP shut down service to Finch due to a track closure on site. Assuming for purposes of this analysis that the “standing instruction” for ammonia cars was not in place, it was unreasonable for CP to charge Finch demurrage starting April 24, 2014 when CP’s precipitous action (closing off the tracks) caused the back up of cars that were already in the pipeline with nowhere to go. Stated simply, it is unreasonable for any railroad to rack up hundreds of thousands in demurrage charges, especially the penalty component designed to ensure prompt return of the car to common carrier service, when the customer cannot take the cars and unload them because the railroad unilaterally refused to deliver them.

After closing down Finch's tracks, CP constructively placed four cars carrying ammonia in its rail yards on April 28, 2014 according to its event data. These four cars were later delivered separately to the Finch mill on May 10, May 12, May 15, and May 16.⁷ In addition, CP constructively placed another car carrying ammonia on April 30, 2014, according to its event data. This car was delivered to the Finch mill on May 16.⁸ In the intervening time, a total of \$114,000 in demurrage charges accrued on these shipments.⁹ For four of the five shipments, the demurrage accrual reflects the time between the PCON events on April 28/30 and the ORPL events on May 9/12/16. However, for the fifth carload, there is no ORPL event included in the data, and the demurrage accrual aligns with the time period between the PCON event on April 28 and the PACT event on May 15. CP billed Finch \$25,500 in demurrage for this car alone but shows no record of when it was ordered for placement by Finch.¹⁰

CP closed substantial portions of Finch's tracks, thereby limiting Finch's ability to move cars to all of the storage tracks in its facility, which would explain the delay in Finch ordering cars for placement (i.e., Finch could not order cars for placement until CP allowed it to move cars into Finch's yard.) Although Finch's ammonia cars were not being delivered to its facility, its operations and supply chain continued to function. However, the backlog of en route ammonia shipments from its suppliers created a bottleneck at the Fort Edward and Whitehall yards. It took over two months to clear the bottleneck, and over \$700,000 in demurrage charges

⁷ See: CP Monthly Demurrage Report for May 2014 ammonia cars GATX 202470, TILX 303866, NATX40446, and GATX 200174 respectively. FINCH01468.

⁸ See: CP Monthly Demurrage Report for May 2014 ammonia car GATX 202941. FINCH01468.

⁹ See: Sum of Line 17, Column (12) (\$90,000) and Line 18, Column (12) (\$24,000) in the workpaper "Finch Ammonia Cars PCON Between April 24 and May 14.xlsx" tab "Full Summary," summarized from FINCH01468 and FINCH01460.

¹⁰ See: Line 11, Column (12) in the workpaper "Finch Ammonia Cars PCON Between April 24 and May 14.xlsx" tab "Full Summary," summarized from FINCH01468.

was accrued on 143 carloads.¹¹ In my opinion, under these circumstances it was unreasonable for CP to rack up hundreds of thousands of dollars in demurrage charges when its decision to restrict deliveries to Finch was the reason that ammonia cars could not be switched in.

¹¹ See: CP Monthly Demurrage Reports for May 2014 and June 2014 carloads counted where Demurrage Days were greater than zero. FINCH01459 to FINCH01470. See workpaper “Summary of May and June 2014 Demurrage Carloads.xlsx”.

III. FINCH DAMAGES

I have also been asked to review Finch's calculation of its damages resulting from CP's failure to provide adequate service, including incremental costs Finch incurred to maintain its operations with diminished rail service.

A. SUMMARY OF FINCH DAMAGES

CP's actions since September 2012 have negatively affected Finch's operations in three ways. First, CP's reduction in service from five days per week to three days per week as of October, 2012 caused an immediate, negative impact on Finch's bottom line because it had to begin moving more input commodities to its facility by truck when its rail service was curtailed, and moving products by truck is relatively more costly than moving them by rail. These increased costs took effect when CP implemented the reduction in service frequency and they continue to this day. Finch also saw an immediate spike in demurrage charges, both directly and indirectly, through charges that accrued to Finch's suppliers.

Second, reduced service over the long-term reduced Finch's ability to account for fluctuations in delivery of its products because Finch's physical location and lack of on-site storage require that its business model service is based on just-in-time ("JIT") inventory management.

Third, CP's sudden shut down of Finch's tracks in April, 2014 caused an immediate negative impact on Finch's bottom line because it caused Finch's operations (and production) to slow down due to a shortage of input materials resulting from the sudden stop in rail deliveries.

Below I discuss these impacts on Finch's operations and costs and their manifestation in damages to Finch from September 2012 through the first half of 2015. The quantification of the costs below is based on information and data supplied to me by Finch. To develop total damages

through the present, the data underlying this analysis would need to be supplemented with later time periods.

1. Finch Incremental Truck Costs

When CP reduced the frequency of service to Finch's mill, trucks had to be ordered to maintain production levels. This most notably affected Finch's shipment patterns related to ammonia, which was an input commodity Finch very rarely shipped by truck prior to CP's reduction in service days. In the first nine months of 2012, Finch moved only two truckloads of ammonia to its facility. However, after CP reduced the days it would provide service starting in October 2012, Finch was forced to order dozens of truckloads of ammonia each year to maintain its production levels. According to data provided by Finch, the cost differential for shipping ammonia by truck compared to rail was [] per ton. Multiplying this cost differential by the incremental volume of ammonia Finch shipped by truck after CP's service level reduction results in \$83,068 in damages.

Similarly, Finch's truck shipments of caustic soda more than doubled from [] trucks per day before CP reduced switching operations from five days per week to three, to [] trucks per day afterwards. According to data provided by Finch, the cost differential for shipping caustic soda by truck compared to rail was [] per ton. Multiplying this cost differential by the incremental volume of caustic soda Finch shipped by truck after CP's service level reduction results in \$20,661 in damages.

Likewise, Finch's began moving cationic starch by truck for the first time after CP reduced switching operations from five days per week to three. According to data provided by Finch, the cost differential for shipping cationic starch by truck compared to rail is [] per ton.

Multiplying this cost differential by the incremental volume of cationic starch Finch shipped by truck after CP's service level reduction results in \$1,495 in damages.

Finally, Finch's truck shipments of hardwood kraft also increased from [] trucks per day before CP reduced switching operations from five days per week to three, to [] trucks per day afterwards.¹² According to data provided by Finch, the cost differential for shipping hardwood kraft by truck compared to rail is [] per ton. Multiplying this cost differential by the incremental volume of hardwood kraft Finch shipped by truck after CP's service level reduction results in \$16,926 in damages.

In total, Finch's incremental trucking costs attributable to CP's reduction in service equaled \$122,149 from October 2012 through June 2015.

2. Finch Incremental Supplier Demurrage Costs

In addition to the demurrage charges CP improperly assessed to Finch for ammonia and other shipments discussed in Section II above, Finch also suffered from increased demurrage charges passed through to Finch by its suppliers. Using the January through September 2012 baseline time period consistent with its incremental truck cost analysis, Finch determined that its average cost for supplier demurrage during that base period was [] per month. Next, Finch reviewed its supplier demurrage charges for the fourth quarter of 2012 through the second quarter of 2015 and determined that its monthly cost for supplier demurrage averaged [] in the fourth quarter of 2012, [] in 2013, [] in 2014, and [] in the first half of 2015. By applying the differential between the historical baseline amount [] and the

¹² According to Finch, during its semiannual plant shutdowns, Finch trucks in substantial hardwood kraft volumes. Shipments during these periods were unaffected by CP's service levels and were excluded from the analysis.

actual amount paid in all time periods, Finch calculated \$124,654 in total incremental supplier demurrage charges attributable to the change in rail service levels at the Finch mill.

3. Finch Incremental Grain Processing Truck Costs

As discussed above, not all of the negative operational impacts were felt immediately upon the change in service days at the Finch mill. However, the reduction dramatically affected Finch's ability to absorb shocks to its JIT inventory management system. In March of 2015, the service reduction caused a bottleneck which resulted in bunching of Finch starch rail cars on CP tracks in Fort Edward and at upstream locations. To avoid idling a paper machine, Finch was forced to procure starch from an alternate supplier at a higher overall commodity cost. Specifically, Finch ordered [] pounds ([] tons) of starch in five truckloads at an average cost of [] per pound, which was [] more than Finch's contract price of [] per pound. Applying the price differential by the emergency volume ordered results in \$22,722 in incremental costs attributable to CP service failures brought on by its reduced service levels.

4. Costs Incurred as a Result of 2014 Pulp Mill Slow Down

When CP closed Finch's receiving tracks on April 24, 2014, Finch was unable to procure adequate levels of pulp chemicals to maintain its pulp mill digester rate. During the 14-day slowdown caused by the track closure, Finch's digester rate averaged [] tons per day, 54 tons per day below its normal level of [] tons per day.

Finch supplemented its pulp production by acquiring hardwood kraft (pulp) on the open market. Specifically, Finch brought in [] tons of pulp over the 14-day period immediately following the track shut down at a cost of [] per ton, which is [] per ton more than

Finch’s bleached stock cost of [] per ton. As a result, Finch incurred \$118,790 in incremental costs to maintain its operations.

5. Finch Incremental Off-Site Storage Costs

Throughout 2014, CP’s inability to deliver adequate production inputs to the Finch mill caused Finch to arrange for a Third-party Logistics (“3PL”) provider to arrange storage of the materials off-site. As a result, Finch incurred storage charges for these materials and it incurred the costs associated with trucking the materials to its facility from storage. Finch data shows \$93,273 in storage and transport costs associated with this activity.

6. Total Damages

In total, CP’s action resulted in \$481,588 in damages to Finch through the first half of 2015, as shown in Table 2 below.

Table 2 <u>Evaluation and Statement of Finch Damages</u>	
Description (1)	Value (2)
1. 2012 - 2015 Cost of Trucks Over Rail	\$122,149
2. Supplier Demurrage	\$124,654
3. Q1 2015 Grain Processing Trucks	\$22,722
4. 2014 Pulp Mill Slow Down	\$118,790
5. Pulp Diverted to Off-Site Storage	\$93,273
6. Total	\$481,588

Source: “FINCH01725-FINCH01742 HIGHLY CONFIDENTIAL
Unprotected updated 20160821.xlsx”

7. Damages Accruing after June 11, 2013

Finally, I was asked to quantify the damages to Finch that occurred after June 11, 2013, which is two years prior to the date Finch filed its counterclaim against CP in the federal court case brought by CP to collect assessed demurrage charges. This was requested due to the

possible application of 49 U.S.C. §11705(c) to Finch's claim that CP has violated 49 U.S.C. §11101. The damages accrued after that date and up to July 2, 2015 equal \$394,379. As stated previously, because CP's service to Finch's mill remains inadequate, Finch continues to be damaged on an ongoing basis. The above analyses would need to be updated with data for mid-2015 through the present to determine total damages owed to Finch.

THOMAS D. CROWLEY
STATEMENT OF QUALIFICATIONS

My name is Thomas D. Crowley. I am an economist and President of the economic consulting firm of L. E. Peabody & Associates, Inc. The firm's offices are located at 1501 Duke Street, Suite 200, Alexandria, Virginia 22314, 760 E. Pusch View Lane, Suite 150, Tucson, Arizona 85737, and 7 Horicon Avenue, Glens Falls, New York 12801.

I am a graduate of the University of Maine from which I obtained a Bachelor of Science degree in Economics. I have also taken graduate courses in transportation at George Washington University in Washington, D.C. I spent three years in the United States Army and since February 1971 have been employed by L. E. Peabody & Associates, Inc.

I am a member of the American Economic Association, the Transportation Research Forum, and the American Railway Engineering and Maintenance-of-Way Association.

The firm of L. E. Peabody & Associates, Inc. specializes in analyzing matters related to the rail transportation of all commodities. As a result of my extensive economic consulting practice since 1971 and my participation in maximum-rate, rail merger, service disputes and rule-making proceedings before various government and private governing bodies, I have become thoroughly familiar with the rail carriers and the traffic they move over the major coal routes in the United States. This familiarity extends to subjects of railroad service, costs and profitability, cost of capital, railroad capacity, railroad traffic prioritization and the structure and operation of the various contracts and tariffs that historically have governed the movement of traffic by rail.

As an economic consultant, I have organized and directed economic studies and prepared reports for railroads, freight forwarders and other carriers, for shippers, for associations and for state governments and other public bodies dealing with transportation and related economic

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problems. Examples of studies I have participated in include organizing and directing traffic, operational and cost analyses in connection with single car and multiple car movements, unit train operations for coal and other commodities, freight forwarder facilities, TOFC/COFC rail facilities, divisions of through rail rates, operating commuter passenger service, and other studies dealing with markets and the transportation by different modes of various commodities from both eastern and western origins to various destinations in the United States. The nature of these studies enabled me to become familiar with the operating practices and accounting procedures utilized by railroads in the normal course of business.

Additionally, I have inspected and studied both railroad terminal and line-haul facilities used in handling various commodities. These operational reviews and studies were used as a basis for the determination of the traffic and operating characteristics for specific movements of numerous commodities handled by rail.

I have frequently been called upon to develop and coordinate economic and operational studies relative to the rail transportation of various commodities. My responsibilities in these undertakings included the analyses of rail routes, rail operations and an assessment of the relative efficiency and costs of railroad operations over those routes. I have also analyzed and made recommendations regarding the acquisition of railcars according to the specific needs of various shippers. The results of these analyses have been employed in order to assist shippers in the development and negotiation of rail transportation contracts which optimize operational efficiency and cost effectiveness.

I have developed property and business valuations of privately held freight and passenger railroads for use in regulatory, litigation and commercial settings. These valuation assignments

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required me to develop company and/or industry specific costs of debt, preferred equity and common equity, as well as target and actual capital structures. I am also well acquainted with and have used the commonly accepted models for determining a company's cost of common equity, including the Discounted Cash Flow Model ("DCF"), Capital Asset Pricing Model ("CAPM"), and the Farma-French Three Factor Model.

Moreover, I have developed numerous variable cost calculations utilizing the various formulas employed by the Interstate Commerce Commission ("ICC") and the Surface Transportation Board ("STB") for the development of variable costs for common carriers, with particular emphasis on the basis and use of the Uniform Railroad Costing System ("URCS") and its predecessor, Rail Form A. I have utilized URCS/Rail form A costing principles since the beginning of my career with L. E. Peabody & Associates Inc. in 1971.

I have frequently presented both oral and written testimony before the ICC, STB, Federal Railroad Administration, Federal Energy Regulatory Commission, Railroad Accounting Principles Board, Postal Rate Commission and numerous state regulatory commissions, federal courts and state courts. This testimony was generally related to the development of variable cost of service calculations, rail traffic and operating patterns, fuel supply economics, contract interpretations, economic principles concerning the maximum level of rates, implementation of maximum rate principles, and calculation of reparations or damages, including interest. I presented testimony before the Congress of the United States, Committee on Transportation and Infrastructure on the status of rail competition in the western United States. I have also presented expert testimony in a number of court and arbitration proceedings concerning the level

THOMAS D. CROWLEY
STATEMENT OF QUALIFICATIONS

of rates, rate adjustment procedures, service, capacity, costing, rail operating procedures and other economic components of specific contracts.

Since the implementation of the *Staggers Rail Act of 1980*, which clarified that rail carriers could enter into transportation contracts with shippers, I have been actively involved in negotiating transportation contracts on behalf of shippers. Specifically, I have advised shippers concerning transportation rates based on market conditions and carrier competition, movement specific service commitments, specific cost-based rate adjustment provisions, contract reopeners that recognize changes in productivity and cost-based ancillary charges.

I have developed different economic analyses regarding rail transportation matters for over sixty (60) electric utility companies located in all parts of the United States, and for major associations, including American Chemistry Council, American Paper Institute, American Petroleum Institute, Chemical Manufacturers Association, the Chlorine Institute, Coal Exporters Association, Edison Electric Institute, the Fertilizer Institute, Mail Order Association of America, National Coal Association, National Grain and Feed Association, National Industrial Transportation League, North America Freight Car Association and Western Coal Traffic League. In addition, I have assisted numerous government agencies, major industries and major railroad companies in solving various transportation-related problems.

In the two Western rail mergers that resulted in the creation of the present BNSF Railway Company and Union Pacific Railroad Company and in the acquisition of Conrail by Norfolk Southern Railway Company and CSX Transportation, Inc., I reviewed the railroads' applications including their supporting traffic, cost and operating data and provided detailed evidence supporting requests for conditions designed to maintain the competitive rail environment that

THOMAS D. CROWLEY
STATEMENT OF QUALIFICATIONS

existed before the proposed mergers and acquisition. In these proceedings, I represented shipper interests, including plastic, chemical, coal, paper and steel shippers.

I have participated in various proceedings involved with the division of through rail rates. For example, I participated in ICC Docket No. 35585, *Akron, Canton & Youngstown Railroad Company, et al. v. Aberdeen and Rockfish Railroad Company, et al.* which was a complaint filed by the northern and mid-western rail lines to change the primary north-south divisions. I was personally involved in all traffic, operating and cost aspects of this proceeding on behalf of the northern and mid-western rail lines. I was the lead witness on behalf of the Long Island Rail Road in ICC Docket No. 36874, *Notice of Intent to File Division Complaint by the Long Island Rail Road Company.*

EXHIBIT 2- REDACTED

**CONTAINS HIGHLY CONFIDENTIAL
MATERIAL**

Average PTC Cost per TIH Carload with Demurrage Markup

<u>Item</u> (1)	<u>BNSF</u> (2)	<u>CN</u> (3)	<u>CP</u> (4)	<u>CSXT</u> (5)	<u>KCS</u> (6)	<u>NS</u> (7)	<u>UP</u> (8)	<u>All Class I's</u> (9)
<u>A. 2013</u>								
1 PTC Operating Expense 1/	\$35,131,000	\$3,267,000	\$0	\$44,007,000	\$120,000	\$21,829,000	\$75,252,000	\$179,606,000
2 US TIH Carloads 2/	597,421	337,955	197,064	595,579	104,236	407,172	868,932	3,108,359
3 Cost Per Carload 3/	\$58 80	\$9 67	\$0 00	\$73 89	\$1 15	\$53 61	\$86 60	\$57 78
4 Demurrage Rate 4/	No Published Rate	\$2,000 00	\$1,500 00	\$1,500 00	\$2,500 00	\$1,060 00	\$5,000 00	\$2,260 00
5 Markup 5/	xxx	20,689%	xxx	2,030%	217,158%	1,977%	5,773%	3,911%
<u>B. 2014</u>								
1 PTC Operating Expense 1/	\$71,841,000	\$5,663,000	\$0	\$70,780,000	\$40,000	\$20,393,000	\$100,029,000	\$268,746,000
2 US TIH Carloads 2/	589,100	329,458	187,457	627,153	102,661	426,084	923,024	3,184,937
3 Cost Per Carload 3/	\$121 95	\$17 19	\$0 00	\$112 86	\$0 39	\$47 86	\$108 37	\$84 38
4 Demurrage Rate 4/	No Published Rate	\$2,000 00	\$1,500 00	\$1,500 00	\$2,500 00	\$1,060 00	\$5,000 00	\$2,260 00
5 Markup 5/	xxx	11,635%	xxx	1,329%	641,631%	2,215%	4,614%	2,678%
<u>C. 2015</u>								
1 PTC Operating Expense 1/	\$88,376,000	\$11,619,000	\$65,000	\$94,030,000	\$263,000	\$25,887,000	\$127,548,000	\$347,788,000
2 US TIH Carloads 2/	578,647	322,666	185,383	609,041	106,122	456,521	904,585	3,162,965
3 Cost Per Carload 3/	\$152 73	\$36 01	\$0 35	\$154 39	\$2 48	\$56 70	\$141 00	\$109 96
4 Demurrage Rate 4/	No Published Rate	\$2,000 00	\$1,500 00	\$1,500 00	\$2,500 00	\$1,060 00	\$5,000 00	\$2,260 00
5 Markup 5/	xxx	5,554%	427,807%	972%	100,876%	1,869%	3,546%	2,055%

1/ Total PTC Operating Expenses compiled in the Supplemental PTC Schedule 410 of the annual reports R-1

2/ Total Number of Loaded Cars (STCC subgroups containing TIH) from QCS TIH Carloads identified using 3-digit STCC subgroups identified by public UP TIH STCC tables filed as "up_chemical_tih-stcc-list pdf "

3/ L 1 ÷ L 2

4/ Source: "RR Industry Demurrage Charges Summary.xlsx"

5/ L 3 ÷ L 4

CERTIFICATE OF SERVICE

I do hereby certify that on this 24th day of August, 2016, I have served copies of the Public and Highly Confidential/Confidential versions of the foregoing Opening Statement of Finch Paper LLC by email and by first class mail to:

David F. Rifkind, Esq.
Stinson Leonard Street
1775 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20006
Phone: 202.969.4218
Fax: 202.785.9163
david.rifkind@stinson.com

by first class mail to:

John K. Fiorilla, Esq.
Capehart & Scatchard, P.A.
8000 Midlantic Dr., Ste 300S
P.O. Box 5016
Mt. Laurel, NJ 08054-5016
Phone: 856.914.2054
Fax: 856.235.2786
jfiorilla@capehart.com

and by hand delivery to:

The Honorable H. Peter Young
Office of Administrative Law Judges
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

/s/ Thomas W. Wilcox