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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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STB Docket FD 35981

FINCH PAPER LLC – PETITION FOR DECLARATORY ORDER

**REPLY STATEMENT OF
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d/b/a CANADIAN PACIFIC**

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EXHIBITS A-JJ

EXHIBIT LIST

Exhibit	Document Description
EXHIBIT A	Deposition Transcript excerpts of Derek Basile (Vol. I), July 15, 2016
EXHIBIT B	Deposition Transcript excerpts of Derek Basile (Vol. II), July 28, 2016
EXHIBIT C	Deposition Transcript excerpts of Stuart Alheim, July 15, 2016
EXHIBIT D	Deposition Transcript excerpts of Richard Petro, July 14, 2016
EXHIBIT E	Deposition Transcript excerpts of Deborah Taylor, July 14, 2016
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EXHIBIT H	March 2011 email correspondence
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EXHIBIT L	February 19, 2013 Finch Paper Conference Call
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EXHIBIT N	February 10, 2015 Albany Business Review Article
EXHIBIT O	Service Exception Chart
EXHIBIT P	April 24, 2014 CP Customer Safety Audit Form
EXHIBIT Q	August 13, 2014 email correspondence from Newell to Petro <i>et al.</i>
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EXHIBIT X	May 2014 invoice and statements - Finch mark-up
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EXHIBIT DD	August 2014 invoice and statements
EXHIBIT EE	September 2014 invoice and statements
EXHIBIT FF	November 18, 2014 email correspondence from Nichols to Alheim
EXHIBIT GG	December 31, 2014 email correspondence from Alheim to Falvo
EXHIBIT HH	October 17, 2012 email correspondence from Cotton to Lawrance <i>et al.</i>
EXHIBIT II	October 11, 2012 email correspondence from CP to Finch
EXHIBIT JJ	2014 Finch daily car records

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REPLY STATEMENT

Delaware and Hudson Railway Company d/b/a Canadian Pacific (“CP”) hereby submits its Reply Statement to the Opening Statement of Finch Paper LLC (“Finch”).

**I.
INTRODUCTION**

This proceeding is about one thing: whether a rail customer should be held to account for the consequences of failing to maintain its track, including track used to carry Toxic Inhalation chemicals (TIH) and other hazardous materials, in a safe condition.

This dispute arose because, in April 2014, CP inspected Finch’s tracks and discovered serious safety defects. CP refused to provide service on the defective tracks until they were repaired, which did not happen until mid-August. During the intervening time, when Finch lacked sufficient track capacity, Finch opted to use CP’s rail yard as its own personal storage yard. Finch knowingly amassed nearly \$1,000,000 in demurrage in just three months which together with approximately \$330,000 in subsequent charges, Finch has refused to pay. Finch has refused to even pay the \$417,000 in demurrage charges that Finch concedes are “valid.”

After CP filed suit in federal court in New York to collect the unpaid demurrage, Finch filed counterclaims alleging violation of the common carrier obligation and unreasonable

practices with respect to CP's demurrage rules and practices, and sought referral to the STB of the issues raised in its claims. But, those claims have never been more than artifices to afford Finch leverage to negotiate a steep discount off its demurrage bill, the same reason that Finch refuses to pay the "valid" \$417,000 in demurrage charges.

Finch has the burden on each of the questions referred for guidance by the court. Finch does not, and in some instances does not even try to, carry its burden. For example, although Finch alleges that three days a week service is inadequate, it presents no evidence that additional common carrier service is necessary. In fact, CP's service frequency is plainly adequate to deliver all of Finch's weekly volumes. Finch argues instead for a rebuttable presumption that less than five-day service is unreasonable.

Finch also argues that three-day-week service violates the common carrier obligation because of the supposed increased risk to Finch if there should be a rail service disruption. A request for more frequent service that is inefficient and uneconomical in order to provide a cushion against potential service disruption is not a reasonable request for service. Moreover, while Finch demands more frequent service, it wants it only when it is convenient and most economical for Finch. CP offered Finch seven day a week service and offered to add a switch on Saturday, both of which Finch refused because of the extra labor costs to Finch.

Likewise, Finch is unwilling to make investments that would reduce the supposed risk to Finch. Its desire for more service is due to Finch's limited track capacity and its need for intra-plant switching. CP has encouraged Finch to take a variety of steps that would provide the cushion that Finch asks CP to provide. For example, CP has offered to sell Finch track that CP owns within its facility, as well as adjacent land to build storage tracks. CP has encouraged Finch to increase storage capacity. And, CP has encouraged Finch to obtain its own switching

equipment to perform intra-plant switching. Finch has refused, perhaps because Finch has the ability to use trucks to supplement rail transportation and therefore its risk from rail disruption is low. In fact, in the four years since CP reduced service to Finch, Finch identified just one instance in which it slowed production due to supply issues – a brief period of time when its tracks were out of service due to safety defects.

Finch's allegation that CP has failed to provide even three-day-a-week service is demonstrably false. The reality is that CP has provided highly consistent, highly reliable service at least three days a week, with less than a handful of exceptions. In those limited instances when CP has not provided service on a scheduled service day, CP has almost always provided service the very next day. Moreover, in most instances when service did not occur on a service day, it was due to severe weather, derailments, or equipment issues.

Finch's claims regarding demurrage are equally specious. Finch's principal argument against demurrage is that during the track outage there was a standing instruction in effect for CP to bring in TIH cars automatically which, if followed, would have resulted in no TIH demurrage. Finch is wrong on both counts. Because Finch had reduced capacity, Finch dropped the standing instruction during the track outage. For the same reason, had CP brought in the TIH ammonia cars to Finch automatically they could not have been placed on Finch's track and, therefore, Finch would have incurred demurrage as well as supplemental charges for failure to place.

Notably, Finch accrued the charges over several months. During this time, although Finch admits that it was using its best efforts to order the TIH cars in quickly to avoid demurrage, Finch nevertheless left the TIH cars in CP's serving yard for days and weeks. Finch [] and even advised CP that large portions of the TIH demurrage charges were "valid" and would be paid. Only after Finch reduced the TIH in its rail pipeline and

stopped accruing TIH demurrage charges, did Finch cry “gotcha,” asserting that CP should have been bringing in the cars all along and demanding that CP waive all of the TIH charges.

Finch also asks the Board to at least waive the penalty portion of the demurrage charge based on the fiction that Finch exercised due diligence and is somehow not at fault for the condition of its track and for the demurrage that ensued. However, Board precedent sets a high bar for a petitioner seeking such relief, including as a threshold matter, a showing that the petitioner was not the proximate cause of the car detention. Finch was responsible for maintaining its track and cannot make this threshold showing. Nor can Finch show that it exercised due diligence in repairing its tracks or in seeking to otherwise avoid demurrage.

Demurrage primarily serves as a penalty to encourage efficient utilization of rail assets. Encouraging shippers to maintain their tracks in safe, usable condition so that they can be used to meet business needs is entirely consistent with the purpose of demurrage. At the end of the day, Finch is essentially asking the Board to relieve it of any consequence of its failure to maintain its tracks in safe and usable condition, and of its choice to use CP’s serving yard as a storage yard for TIH and other commodities. To relieve Finch of those consequences would undermine the deterrent value of demurrage and set a dangerous precedent.

II. FACTUAL BACKGROUND

A. The Finch Plant

Finch operates a paper mill on the banks of the Hudson River in Glens Falls, New York. Finch obtains raw materials used in paper production via rail and truck. The raw materials include wood pulp, caustic soda, cationic starch, sulfur, and anhydrous ammonia, which is a TIH. Finch relies entirely on truck transportation for outbound product.

Both Finch and CP own track inside Finch's gate. CP's Coolidge Branch Line enters Finch from the east and terminates inside Finch's gates near the west end of the Finch plant. Verified Statement of George Newell ("Newell V.S."), attached to CP's Reply Statement, at ¶ 4. Finch-owned sidetracks branch off from CP's line. *Id.* Pursuant to an Industry Track Agreement (ITA) among the parties, CP is responsible for maintaining the CP track and certain switches. *See* Ex. G (ITA) at § 2. Finch, however, is responsible for maintaining all other tracks and switches. *Id.* Per the ITA, Finch must maintain and renew the sidetrack "to the satisfaction of the Chief Engineer of the Railway." *Id.* Also, Finch is responsible for "remov[ing] ice and snow from all tracks" on its property. *Id.* Normally, Finch can accommodate approximately 21 rail cars on its sidetracks, depending on the size of the rail cars. Newell V.S. at ¶ 4; Verified Statement of Richard Petro, attached to Finch's Opening Statement, ("Petro V.S.") at ¶ 11. Some of the spots are used for unloading while others are used for storage. *Id.* Finch, which does not have its own switching equipment, relies on CP to perform intra-plant switching, *e.g.*, pulling empty cars and replacing them with loaded cars from storage. Newell V.S. at ¶ 6.

B. CP Terminates the Track Lease

CP previously leased track to Finch at its Fort Edward Yard, which Finch used for storage of loaded rail cars. Verified Statement of James Clements ("Clements V.S."), attached to CP's Reply Statement, at p. 8-9; Finch Opening Statement at p. 7. In 2010, as part of a system-wide risk reduction effort, CP prohibited storage of TIH on the leased tracks. Clements V.S. at p. 9. In 2012, as part of a system-wide effort both to reduce risk and free up CP's tracks for rail service, CP canceled storage track leases on a system-wide basis. *Id.* Accordingly, in May 2012, CP notified Finch that it was exercising its right to terminate the track lease with Finch. *Id.*

C. Finch Rejects CP Efforts to Sell Finch Additional Track and Land

In 2009, CP offered to sell to Finch CP's tracks that are located within Finch's gate as well as two acres immediately outside its gate that could be used for storage tracks. Ex. H (CPFinch0014670). Finch rejected the offer and indicated that it was not interested in purchasing the track or land. *Id.* Finch has rebuffed subsequent CP entreaties to sell property to Finch. *See* Finch Opening Statement at p. 6 ("CP . . . 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."); Transcript of July 15, 2016 Deposition of Derek Basile ("Basile Tr. Vol. I"), excerpts attached as Ex. A, at 20:14–21:20. Even though acquiring the property would provide Finch additional track capacity, Finch does not want to be responsible for maintaining the track.¹ Basile Tr. Vol. I at 21:21–22:6.

D. Three-Day-a-Week Rail Service is Adequate to Meet Finch's Needs

Prior to October 2012, CP provided five-day-a-week service to Finch. Finch Opening Statement at p. 9. In May 2012, CP approached Finch regarding moving to a seven-day-a-week service as part of a new CP initiative known as the Local Service Reliability Program (LSRP). *Id.* However, Finch did not want the increased service as it would have required Finch to accept cars on Saturdays and Sundays. Verified Statement of Stuart Alheim, attached to Finch's Opening Statement, ("Alheim V.S.") at ¶ 7 ("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."); Transcript of July 15, 2016 Deposition of Stuart Alheim ("Alheim Tr."), excerpts attached as Ex. C, at 34:20-36:21.

¹ [

]

CP continued to provide Finch five-day-a-week service until October 2012 when CP implemented a restructuring of its service in the Northeast. Verified Statement of Jason LaValla, attached to CP's Reply Statement, ("LaValla V.S.") at ¶ 5. CP's 2012 restructuring of its Northeast US rail service sought to better align resource allocation with car volumes. *Id.* Prior to the restructuring, CP operated two switch jobs out of its yard at Fort Edward. *Id.* One job served customers in the Fort Edward area, including Finch, while another served customers to north of Whitehall. *Id.* However, due to a reduction in volumes over time, CP determined that it was no longer economical, efficient or necessary to maintain two switch jobs. *Id.* Two-day a week service was sufficient to meet the needs of its customers north of Whitehall and three-day a week service was sufficient to meet the needs of customers in the Fort Edward area, including Finch. *Id.* Accordingly, in October 2012, CP eliminated one of the Fort Edward switch jobs and moved the remaining job to Whitehall, serving its customers to the north of Whitehall on Tuesdays and Thursdays and its customers south of Whitehall, including Finch, on Mondays, Wednesdays, and Fridays. *Id.* Customers retained the option of requesting a special switch if an additional switch was needed. *Id.* at ¶ 6; Newell V.S. at ¶ 5.

Although Finch protested CP's decision and demanded a return to five-day service, Finch concluded internally that [] See Ex. I (Finch00365). In response to Finch's protests regarding the frequency, CP again reviewed Finch's volumes and needs. See Ex. J (CPFinch0012689-91); Ex. K (CPFinch0012739). That review found: "Volumes do not justify more than 3 DOW service. Volume for this customer is avg [

² [] either way 3 switches per week is sufficient to handle Finch's volumes.

] Ex. K (CPFinch0012739). Also, Finch had the option of trucking in raw materials if there was a rail service disruption. *See* Ex. J (CPFinch0012690). Finally, Finch had the option of requesting an unscheduled switch. *Newell V.S.* at ¶ 5. Accordingly, CP came to the [] conclusion []—that three-day-a-week service was adequate to meet Finch’s needs.

Notwithstanding its internal conclusion that [], Finch continued to seek a return to five-day service. In February 2013, on a conference call with Finch, CP again indicated its willingness to put Finch on the seven-day service model but []

Ex. L (FINCH00299). Finch confirmed that it did not want seven day-a-week service. Ex. C, *Alheim Tr.* at 47:5-47:15. In discussing Finch’s desire for five day service, CP made clear that it was “not willing to provide service if the only service ordered is intra-plant switches.” Ex. L (FINCH00299). However, CP offered to add a fourth scheduled Saturday switch which Finch rejected []

[] *Id.*; Ex. C, *Alheim Tr.* at 47:5-15, 48:12-14 (

] CP agreed to do its best to add a fourth scheduled switch on Thursdays, commencing February 21, 2013. Ex. L (FINCH00299). While, contrary to Finch’s claims, CP frequently provided the scheduled Thursday switch, it proved challenging. In some instances, providing the switch would have required an additional crew which was not justified by the volumes. *LaValla V.S.* at ¶ 5. In August 2013, CP initiated a conversation with Finch regarding a return to scheduled three-day-a-week service. Ex. M (FINCH00459-61). Finch again []

] *Id.*

The adequacy of CP's service has been borne out by experience. Despite the decrease in switching frequency, rail car tonnage actually increased in 2013 and its use of truck transportation for inbound raw materials decreased. Verified Statement of Charles H. Banks and John D. Ireland ("Banks/Ireland V.S."), attached to CP's Reply Statement; LaValla V.S. at ¶ 10.

Moreover, Finch admits that [

] Transcript of July 28,

2016 Deposition of Derek Basile ("Basile Tr. Vol. II"), excerpts attached as Ex. B, at 142:1-143:12, 145:18-22. Further, Finch touts significant improvements in its financial performance during this same time period which have allowed Finch to make substantial reinvestments in its plant. *Id.*; Ex. N (Albany Business Review, Feb. 10, 2015).

E. CP Provides Finch with Highly Consistent and Highly Reliable Rail Service

Throughout the time period at issue, CP has provided highly consistent and highly reliable rail service to Finch. As detailed in the Verified Statement of Jason LaValla and the accompanying appendices, CP service records show that, from October 2012 through December 2015, CP served Finch at least three times nearly every single week. LaValla V.S. at ¶ 8 and Appendix A thereto. Moreover, the data shows that the vast majority of the switches occurred on the scheduled service day. On those rare occasions on which CP was unable to perform the switch on the scheduled service day, with the exception of the incidents discussed above, CP provided service the next day. *Id.* at 9. Most service issues occurred in February 2014 and January through March of 2015 and were caused by severe winter weather which disrupted rail operations locally and throughout the northeast United States and into Canada. *Id.* at ¶ 11 and Appendix B thereto; Newell V.S. at ¶ 10. Even Finch recognizes that severe winter weather caused issues with its vendors. *See* Ex. C, Alheim Tr. at 64:22-65:1 (

). While severe weather was the primary factor disrupting service during the winter of 2015, the unexpected departure of several crewmembers (several were hired away by another railroad) was also a factor. Newell V.S. at ¶ 9. CP quickly hired and trained a new class of crew members and, in the meantime, brought in crews from elsewhere to fill in. *Id.*

On occasion, CP crews would reach their hours of service limits before completing switching activities at Finch. In some cases, crews expired because Finch had failed to clear its switches of snow or other obstacles or had failed to properly ready a car to be pulled. Newell V.S. at ¶ 8; Ex. O (CPFinch006956). When a crew expired before completing switching at Finch, a recovery crew was sent to complete the switch, in most cases by the next day. LaValla V.S. at ¶ 9; Newell V.S. at ¶ 8.

Finch's claims of "missed switches" are rife with inaccuracies and frequently misleading. For example, Finch repeatedly alleges that CP did not serve Finch on days that contemporaneous service records show that Finch received service. Mr. LaValla's Verified Statement includes as Appendix B a response to specific service issues alleged in Mr. Alheim's Verified Statement.

Finch also complains that there were instances in which CP provided the switch but failed to bring in specific cars that Finch had ordered in. *See generally* Alheim V.S. However, many of those cars were not yet available for delivery at the time that Finch ordered them. LaValla V.S. at Appendix B thereto. In other instances, Finch was mistaken. CP's Trainmaster on occasion would make a special trip out to Finch to show them that the car was actually on their property. Newell V.S. at ¶ 11. Several of the alleged "missed switches" in 2013 concern the fourth switch that CP attempted to add in an effort to placate Finch's desire for more service. LaValla V.S. at Appendix B.

F. Finch Transportation and Mitigation Options

There were several actions that Finch could take to address any concerns it had arising from CP's decision to reduce service frequency. For example, Finch could have purchased the CP owned tracks and/or adjacent land that was offered to Finch, explored off-site storage options, or obtained a track mobile for intra-plant switching. *See Newell V.S.* at ¶¶ 6-7. But Finch repeatedly avoided taking responsibility for its own issues, choosing instead to blame CP. As explained below, when asked at depositions whether these reasonable options were explored, Finch's representatives [

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One reasonable option would have been for Finch to purchase from CP the track and/or land that CP has repeatedly offered to Finch. Finch, however, as noted above, has repeatedly rebuffed CP's offers for sale. When asked at his deposition why Finch did not agree to buy this available track, Finch's CFO responded that Finch is "not entertaining purchasing any additional track," because of the accompanying maintenance responsibilities and that acquiring more space is "isn't part of our core competencies." *Ex. A, Basile Tr. Vol. I* at 21:21–22:6. Thus, while Finch complains that it lacks physical space to expand track storage at its facility, it makes no effort to address that issue. Finch chose the location and layout out of its facility and, thus, it is Finch's obligation to address alternatives for materials and rail car storage. Yet Finch refuses to take reasonable measures to alleviate a problem of its own making.

Similarly, Finch could have purchased a track mobile for intra-plant switching, which would allow Finch to move rail cars within its own facility, particularly on the days in between CP service days. *See Newell V.S.* at ¶ 6. Indeed, a primary reason that Finch demands more frequent rail service is in order to have CP perform Finch's intra-plant switching. *Id.* Finch itself

even suggested that [

] Ex. I (FINCH00366). But Finch did not purchase a track mobile or similar device. Newell V.S. at ¶ 6. And when asked, none of Finch’s witnesses could explain why.³ Although Finch’s designated a corporate witness to testify on these topics, the witnesses were unprepared and could shed no light on Finch’s decision making. It is CP’s understanding, however, that Finch did not purchase a track mobile due to liability concerns. Newell V.S. at ¶ 6.

Finch has the ability to truck in its raw materials. In fact, even when CP provided five-day service, Finch utilized trucks for a portion of its raw material needs. Banks/Ireland V.S. at p. 3-4. Finch apparently has concluded that trucking is a sufficient and preferable option to meet its business needs than any of the other options.

G. The April to August Track Outage

On April 24, 2014, CP conducted its biannual customer safety audit of Finch, which included an inspection of Finch’s track. The inspection of Finch’s track was conducted by Jason Blanchfield, a Roadmaster with CP and an experienced FRA qualified track inspector. Verified Statement of Jason Blanchfield, attached to CP’s Reply Statement, (“Blanchfield V.S.”) at ¶¶ 2-11. Mr. Blanchfield was accompanied by CP’s local trainmaster, George Newell, and Finch’s

³ Ex. D, Petro Tr. at 83:17-21 ([
Ex. A, Basile Tr. Vol. I at 22:13 –23:11:
[

]

plant manager, Richard Petro. *Id.* at ¶ 7; Newell V.S. at ¶ 12; *see* Transcript of July 14, 2016 Deposition of Richard Petro (“Petro Tr.”), excerpts attached as Ex. D, at 51:8-13. In the course of the inspection, Mr. Blanchfield identified several major defects “including gauge width issues (*i.e.*, too wide or too narrow), bad ties and bad tie conditions, including ties which were not properly anchored in stable ground, and an inoperable switch.” Blanchfield V.S. at ¶ 8, Attachment 1 thereto (listing 5 separate “Item[s]” under “Brief Description”). Mr. Blanchfield concluded that the defects made the track unsafe for continued operation and that “repairs were necessary before CP would be able to safely provide rail service to Finch, particularly since these tracks were used to carry and store rail cars carrying TIH and other hazardous materials.” Blanchfield V.S. at ¶ 10. Although Mr. Petro now claims that he disagreed with the decision “to immediately shut down portions of Finch’s track,” notably, he did not disagree with any of Mr. Blanchfield’s findings regarding the unsafe condition of the track. Petro V.S. at ¶ 10; Ex. D, Petro Tr. at 55:21-58:14, 58:1-8 (“

).

During his deposition, Mr. Basile, Finch’s CFO, testified that it was Finch’s position that the tracks could not have been unsafe and that CP acted unreasonably. First, according to Mr. Basile, the previous inspection had not found any defects and there had been no intervening “discrete event,” such as a tornado. Ex. A, Basile Tr. Vol. I at 31:6-19. However, Mr. Basile admitted to having no qualifications, training or experience for his opinion. *Id.* at 31:20-32:3 (“Q. Do you have any experience in the rail industry? A. I do not. Q. Do you have any training in the rail industry? A. I do not. Q. Have you read anything about rail maintenance? A. I have not.”). Nor could Mr. Basile identify when the track was last inspected. *Id.* at 29:17-30:1. Next,

Mr. Basile claimed that Finch's maintenance supervisor, Mr. Petro told him that he disagreed with CP's findings. However, as noted above, Mr. Petro testified that he did not disagree with any of CP's findings, and only now asserts cryptically that he "disagreed with CP's decision" to "shut down portions of Finch track." Petro V.S. at ¶ 9-10. Lastly, Mr. Basile testified that in July 2014, he walked the tracks with the maintenance supervisor and observed that Finch's tracks appeared to be in better condition than CP's track. *Id.* at 35:10-22. However, unlike CP's Roadmaster, Messrs. Basile and Mr. Petro are not FRA qualified track inspectors and their observations are not evidence that Finch's track was not unsafe.

As a result of its unsafe track conditions, Finch had reduced track capacity at its plant. Typically, Finch can hold approximately 21 cars on its tracks depending on car size (ammonia tank cars are approximately twice the size of sulfur tank cars). Newell V.S. at ¶ 4. Initially, the track outage reduced the number of available spots to approximately 8. Finch made repairs that allowed 3 spots to be placed back in service the week of May 5, 2014, bringing the track capacity up to approximately 11 spots. Petro V.S. at ¶¶ 11-13. Repairs to the paper dock on the "hill" were completed on July 28, 2014. Ex. P, (CPFinch0009024). But it was not until August 13, 2014 that all the repairs had been completed. Ex. Q (CPFinch0009112) [

]; Newell V.S. at ¶ 12; Blanchfield V.S. at ¶ 11.

Finch has given inconsistent testimony on why it took more than three months to repair the other portions of its tracks. [

] Ex. R (FINCH01553). In discovery, Finch blamed the subsequent delay in completing repairs on [] Petro Tr. at 73:10-15, 75:3-76:4. However, in its opening evidence, Finch attributed the delay to the unavailability of a

qualified contractor. Verified Statement of Derek Basile, attached to Finch’s Opening Statement, (“Basile V.S.”) at ¶ 10. Finch has not demonstrated that it made an effort to locate other sources of materials or other contractors in order to expedite the repair. *See* Petro Tr. at 75:3-76:4. Notably, Finch did not seek CP’s assistance in locating either materials or a contractor. Blanchfield V.S. at ¶ 11.

Finch claims that the closure of its tracks 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.” Finch Opening Statement at p. 14. However, the evidence shows that Finch had a haphazard track inspection regime. Contrary to Finch’s claim, Finch had “no set schedule for inspections” and would call in its maintenance contractor only when CP requested that Finch do so because of a specific concern. Ex. D, Petro Tr. at 68:2-75:1. As to FRA inspections, according to Finch, those inspections occurred annually, but Finch had no record of when such inspections actually occurred or what was found. *Id.* In fact, Finch could not identify when the track was last inspected prior to the 2014 track outage. *Id.* at 66:6-67:15; Basile Tr. Vol. I at 29:17-31:5. Importantly, CP does not conduct a monthly “track inspection” of Finch’s owned tracks as asserted by Finch, *see* Petro V.S. at ¶ 3; rather, CP regularly conducts a visual inspection of Finch’s facility for safety hazards to its crews but these inspections are not “track inspections,” and are no substitute for such inspections. Blanchfield V.S. at ¶ 6.

Moreover, and contrary to Finch’s claims, [

] In July 2013, Finch’s maintenance contractor wrote to Finch that on a section of track used to carry hazardous materials including TIH, the [

] Ex. S (FINCH01205) (emphasis added);

Petro Tr. at 61:17-62:5. [

] [

] ⁴ Nor was it was the first time that CP had shutdown Finch's tracks. Just prior to the contractor's letter, CP had identified a defective derail and took the affected Finch tracks out of service until repaired. Ex. T (CPFinch0002943).

H. The "Standing Instruction" is a Red Herring

The "standing instruction" that Finch primarily relies on to justify not paying demurrage dates back to 2012. According to Finch, CP insisted that Finch have standing instructions that all ammonia cars be brought in on the next available switch. Finch Opening Statement at p. 15. At the time the instruction was established, CP instructed Finch to include the standing instruction in its switch requests as it would not otherwise be included in the instructions issued to the crew. Alheim V.S., Attach. 46. Accordingly, between 2012 and April 24, 2014, Finch included on the switch request forms that Finch prepared and submitted to CP a request that CP bring in "any/all ammonia cars" to Finch's storage track. *See* Transcript of July 14, 2016 Deposition of Deborah Taylor ("Taylor Tr."), excerpts attached as Ex. E, at 25:15-26:6.⁵ Notwithstanding the standing

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⁵ Ex. E, Taylor Tr. at 25:15-26:6:
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instruction, after a dispute between the parties over the standing instruction in late 2013, Finch ordered in nearly all of its ammonia cars by car number. Ex. U (CPFinch9969-78).

A fundamental premise of the standing instruction was that there was space available on Finch's storage track to accommodate any ammonia car brought in pursuant to the instruction. Cars that could not be spotted, would be returned to CP's serving yard, subject to a supplemental charge for failure to place and demurrage would have continued to accrue. Newell V.S. at ¶ 13. In addition to supplemental charges, the movement of cars back and forth from CP's serving yard would have exposed CP, Finch and the surrounding population unnecessarily to the risk associated with transporting TIH.

Finch understood that the standing instruction would not excuse demurrage if the car could not be placed at Finch's plant. On occasion, Finch would ask CP to waive demurrage on ammonia cars based on CP's alleged failure to follow the standing instruction. Ex. V (FINCH00932). In seeking that waiver, however, Finch relied on being able to show that there was space available to spot the cars on Finch's track. *Id.* However, in disputing the invoices at issue here, Finch provided no evidence of track availability to support its waiver request.

Following CP's April 24, 2014 inspection, which revealed the unsafe conditions of Finch's tracks, Finch's track capacity was reduced from approximately 21 spots to 11 spots. Petro V.S. at ¶¶ 11-13. As a result, Finch lacked sufficient spots to accommodate all of the cars in its pipeline as they arrived, including anhydrous ammonia cars. Finch immediately canceled

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its switch request for April 24, 2014, and rescinded the “standing instruction,” removing it from the switch requests submitted to CP. *See* Ex. E, Taylor Tr. at 28:17-21, 31:10-32:14;⁶ Ex. R (FINCH01554); Ex. W (CPFinch003215, FINCH01724, CPFinch0003276, CPFinch0003311).

Due to the reduced track capacity, Finch dramatically changed its car ordering practices. Prior to the track outage, Finch consistently ordered its ammonia cars for placement at the plant within days of constructive placement. Ex. C, Alheim Tr. at 78:4-16. In fact, between January 1 and April 24, 2014, Finch ordered in nearly all ammonia cars before, on or within a day of constructive placement. *Id.* During much of the track outage, however, Finch ordered ammonia cars in several days and even weeks after constructive placement. Ex. C, Alheim Tr. at 78:4-85:20. For example, in May 2014, 11 of the 13 ammonia cars on which Finch incurred demurrage dwelled in CP’s yard for 14 days or more. Ex. X (FINCH01375). Increased dwell

⁶ Ex. E, Taylor Tr. at 31:10-32:14:

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times for some of the non-TIH materials were even more dramatic. For example, in that same month of May 2014, 8 of the starch cars on which Finch incurred demurrage dwelled in CP's yard for 30 days or more. Ex. X (FINCH01374). The sudden increase in ammonia car dwell times occurred despite the fact that Finch tried "to order in the cars that were in CP yard as quickly as possible" to avoid demurrage. Ex. B, Basile Tr. Vol. II at 149:11-19. *See also* Ex. F, Finch's Answer to CP's Interrogatory No. 21 ("Finch Paper states that it arranged the best it could under the circumstances to call in ammonia rail cars to the Facility during (the April 24, 2014 to August 13, 2014) time period.").

Prior to the track outage, Finch promptly notified CP if it believed that CP had failed to bring in an ammonia car pursuant to the standing instruction. For example, on April 22, 2014, just two days before the track outage, Ms. Taylor e-mailed CP inquiring why CP did not bring four ammonia cars in on the previous day's switch. Alheim V.S. at ¶ 104, Attachment 54. During the track outage, Finch did not contact CP once to ask why its ammonia cars were not being brought in under the standing instruction, although it was aware that ammonia cars were dwelling in CP's serving yards for many days at a time. Ex. C, Alheim Tr. at 88:12-89:2. Instead Finch began [

] *Id.* at 59:13-60:14.

One thing that did not change during this time period was Finch's close monitoring of the status of each of its cars in the CP pipeline. Each weekday, Finch [

] ⁷ Ex. C, Alheim Tr. at 23:17-24:3, 89:8-90:21 ([

⁷ Finch tracks its cars daily through PCON notices, inbound reports and CP's website and enters information regarding the status of each car into a spreadsheet.

]); Ex. E, Taylor Tr. at 58:17-60:7. But despite knowing full well of the accruing demurrage, Finch did not take remedial action to limit it. Ex. C, Alheim Tr. at 89:22-90:2 ([
]).

I. Finch Opts to Incur Demurrage

Notably, Finch could have sought to minimize demurrage by reducing the number of cars in its rail pipeline to better align with its ability to receive ammonia cars as they arrived in CP's serving yard and avoid demurrage. While Finch immediately diverted some pulp to temporary storage, its [
] Ex. C, Alheim Tr. at 148:9-19. Instead of reducing its pipeline to align with its reduced track capacity, Finch opted to use CP's yard to stage its cars into its facility. As Finch explained in an interrogatory response, "[Finch] is in the business of manufacturing paper and paper products, not seeking to manage demurrage charges that CP *may seek to impose*. Thus Finch Paper purchases raw materials as needed and schedules that delivery in an efficient fashion as necessary for the continuous operation of its Facility." Ex. F, Finch's Answer to CP's Interrogatory No. 12 (emphasis added). Further, Finch concluded that [
]

] Ex. B, Basile Tr. Vol. II at 149:11-19. Finch's terse interrogatory response notwithstanding, Finch admits that, during the track outage, in order to minimize demurrage, "it arranged the best that it could under the circumstances to call in ammonia rail cars to the Facility" and to do so "as quickly as possible." Ex. F, Finch's Answer to CP's Interrogatory No. 21; Ex. B, Basile Tr. Vol. II at 149:11-19. As a result of Finch's choices, Finch incurred substantial demurrage charges, particularly in May, June and July.

J. After Incurring Demurrage, Finch Tries to Avoid Paying it.

On May 21, 2014, Finch disputed \$57,240 of the April charges on the grounds that CP cannot charge “demurrage for days in which [Finch] cannot receive a switch.” Ex. Y (FINCH00171). In other words, Finch claimed that CP could charge demurrage only on Mondays, Wednesdays and Fridays, regardless of how long Finch chose to leave its cars in CP’s yard after constructive placement. Notably, Finch did not challenge the April ammonia charges based on the standing instruction. Rather, Finch recalculated the ammonia demurrage to exclude non-service days. *Id.* Based on this recalculation Finch claimed that the “Demurrage days for the AMMON *should be* 4 days @ \$1,500/day = \$6,000.” *Id.* (emphasis added). Finch calculated that it owed \$19,340, including the \$6,000 for ammonia cars, and promptly paid the undisputed amount. *Id.* On June 11, 2014, CP advised Finch that the disputed charges were valid, explained CP’s demurrage program, and demanded payment of the outstanding invoiced amount. Ex. Y (FINCH00170).

On June 30, 2014, Finch disputed a portion of the May demurrage bill on the same already-rejected basis that it disputed the April bill -- that Finch should not be charged demurrage for days on which CP does not provide scheduled service to Finch. Finch agreed that demurrage charges totaling \$122,940, including \$102,000 for ammonia cars, were “valid” and would be placed in line for payment. *See* Ex. Z (FINCH00162) (email from Mr. Alheim stating: “I have attached a copy of the invoice correcting the demurrage days with the valid days and amounts, which I will forward for approval.”). Notably, as with the April invoice, Finch did not assert that the standing instruction excused the May ammonia demurrage charges. *Id.* Unlike with the April invoice, however, Finch did not pay the amounts that it deemed valid. Again, CP rejected Finch’s basis for disputing the invoice. *See* Ex. Z (FINCH00161).

After CP twice rejected the non-service day argument, Finch changed tact. On July 24, 2014, Finch re-disputed the May invoice but this time Finch asserted that CP should waive *all* of the ammonia demurrage charges on the grounds that “we have had in place a standing instruction with CP Rail to have ammonia cars brought in when available for placement. This standing instruction has not been rescinded.” *See* Ex. AA (FINCH01368). Notably, Finch acknowledged that \$47,030 in non-ammonia demurrage charges were not in dispute. *Id.* However, Finch again failed to pay the undisputed amount.

Likewise, on August 13, 2014, Finch disputed the June ammonia demurrage charges based on the alleged “standing instruction”:

We are placing in dispute the charges on the ammonia which we have continued to hold our standing instruction with CP Rail to bring in any and all ammonia upon arrival Had this instruction been followed, there would be no ammonia demurrage for May or June as we have sufficient room on our tracks to hold these cars and we have shown sufficient evidence to support this claim.

Ex. V (FINCH00932). Finch, however, stated that it was not disputing \$53,210 of the May invoice or \$64,200 of the June invoice. *Id.* Nevertheless, Finch failed to pay these amounts.

In June, before CP issued the May demurrage invoice to Finch, CP’s demurrage department investigated the cause of the unusually high demurrage charges.⁸ LeaAnn Russ, a Senior Supplemental Service Representative, spoke to the local Trainmaster, George Newell, who advised that “CP went in and inspected Finch’s tracks and as a result have taken several of their storage tracks out of service. He said the cars are being brought down to Fort Edward and stored until Finch has enough room to order them in.” Ex. BB (CPFinch0012055); Ex. V

⁸ Finch’s contentions that CP did not know the cause of the high demurrage at the time and only investigated the cause in “late September of 2014” are clearly false. *See* Finch Opening Statement at p. 42.

(FINCH00931). Accordingly, when Finch subsequently disputed the invoices based on the “standing instruction,” CP rejected the dispute. *Id.*

K. Finch Admits it Has No Legitimate Reason for Not Paying Undisputed Amounts

Finch has repeatedly conceded that \$417,000 of the more than \$1.3 million at issue in this proceeding are valid and payable demurrage charges. *E.g.*, Ex. CC (FINCH01445-70); Ex. DD (FINCH1383-90); Ex. EE (FINCH1437-44); Ex. FF (CPFinch010100-01) (November 18, 2014 email from Mr. Alheim to CP stating: “I would like the [invoices] placed in dispute with the summary as follows:

Month	CP Invoiced	Disputed	Chargeable/Payable
May Demurrage	\$330,710	\$202,360	\$128,350
June Demurrage	\$440,700	\$262,500	\$178,200
July Demurrage	\$165,290	\$108,140	\$57,150
August Demurrage	\$54,020	\$35,850	\$18,170
September Demurrage	\$90,220	\$54,950	\$35,270
Total	\$1,080,940	\$663,800	\$417,140

I have forwarded the invoices to be approved in the amounts shown as “Chargeable/Payable”).

Finch has also acknowledged that it has no legitimate basis for not paying these undisputed amounts. Nevertheless, Finch has failed to pay based solely on its counsel’s instructions:

Q. I’m asking if there is a reason, other than counselor told me not to, that you didn’t pay this amount that you represented to CP was chargeable and payable.

MR. COLLINS: Is it based on instruction from counsel?

THE WITNESS: It’s based on instruction from counsel.

MR. COLLINS: Okay. Don’t answer.

A. How many times does he need to say that.

Ex. B, Basile Tr. Vol. II at 161:14-22. Indeed, Mr. Basile, Finch’s CFO, could not state any legitimate reason for disputing the \$417,140:

Q. Are you aware of a legitimate basis on which you dispute the \$417,140?

A. The reason why we haven’t paid --

Q. Are you aware of . . . a legitimate reason to dispute the \$417,140?

A. Not that I can recall right now.

Id. at 162:1-6.

L. Website Issues

In order to better serve its customers, CP developed and maintains “Customer Station,” a website that allows Customers to track and trace shipments, submit electronic shipping instructions, and order railcars for placement and release, among other things. LaValla V.S. at ¶ 12. CP encourages customers to use Customer Station. *Id.* In CP’s experience, the website has been a success. *Id.* Customer Station has vastly improved the customer experience by streamlining the ordering process, reducing the opportunity for error, and providing CP customer with greater visibility into shipment status. *Id.*

That is not to say that Customer Station works perfectly one hundred percent of the time or that the information in Customer Station is one hundred percent accurate and up to date. As with any complex information technology system, occasionally issues arise including software, hardware, and data entry issues. *Id.* at ¶¶ 12-13. Data entry issues are the most prevalent and are typically due to user error, *e.g.*, the customer ordering the wrong car number or the crew misreporting the car number. *Id.* at ¶ 13. In CP’s experience, these issues have been the exception. *Id.* at ¶ 12.

Finch’s challenges in adapting to Customer Station have been unusual. *Id.* at ¶ 14. Most of CP’s customers transitioned to, and use Customer Station without difficulty. *Id.* at ¶ 12. CP’s customer service worked with Finch to try to overcome the issues that Finch was reporting, and, in the meantime, allowed Finch to submit its switch requests in writing, without fee. *Id.* at ¶ 14. Much of Finch’s website difficulties concerned ordering intra-plant switching. Ex. E, Taylor Tr. at 19:21-20:2.

Several allegations concern cars that Finch alleges it was unable to order in from the website, were misreported in the website, or were brought in in error. However, Finch identifies only a handful of specific instances in which this occurred over several years during which CP handled thousands of cars for Finch. In some instances, the error was with Finch. LaValla V.S. at ¶ 13. In instances in which an issue arose, CP worked with Finch promptly to find a remedy. *Id.*

Finch's claim that CP replaced its customer service department with Customer Station is baseless and wrong. *Id.* at ¶ 15. Throughout this time, CP maintained its Customer Service department and even expanded its service offerings. *Id.* For example, the Customer Service Department now offers customers, including Finch, an opportunity to review demurrage charges before they are invoiced. *Id.*; Ex. GG (FINCH00027).

III. ARGUMENT

A. Finch Failed to Show that CP Violated its Common Carrier Obligation

The District Court referred to the Board for guidance the following questions regarding the common carrier obligation:

1. Whether CP Rail's violated its statutory common carrier obligations to Finch Paper under 49 U.S.C § 11101 by reducing the frequency of CP Rail's switching services to the Facility; and

2. Whether CP Rail also violated its common carrier obligations under 49 U.S.C. § 11101 by failing to provide switching services even in accordance with its reduced switching schedule

1. Legal Standard

As the petitioner, Finch has the burden of proof. 5 U.S.C. § 556(d) ("Except as provided by statute, the proponent of a rule or order has the burden of proof"). *Cf. Michael H. Meyer, Tr. in Bankr. for California W. R.R., Inc.*, STB Docket FD 34337, 2007 WL 268796, at *3 (served Jan. 31, 2007) ("A complainant has the burden of showing that it is entitled to relief. The trustee

has not met that burden here. To prove a violation of the common carrier obligation at 49 U.S.C. 11101(a), the trustee must show that the carrier failed to provide service upon reasonable request.”); *The TJJ Cos., Inc.-Petition for Declaratory Order-Certain Rates & Practices of Sweeney Transp., Inc., & Knickerbocker E.-W., Inc.*, STB Docket 41192, 2002 WL 31097636, at *5 (served Sept. 20, 2002) (“TJJ seeks declaratory relief here and therefore has the burden of demonstrating that it is entitled to it.”). With respect the first question, Finch must show that its request for daily weekday service constitutes a reasonable request for service under the circumstances. Finch does not even attempt to carry this burden nor can it since it has repeatedly [] So instead, Finch asks the Board to create a rebuttable presumption that less than 3-day-a-week service is unreasonable. Such a presumption is unwarranted and contrary to Board precedent. With respect to the second question, Finch presents misleading evidence that is contradicted by the contemporaneous records, including those kept by Finch that show that CP provided highly reliable and highly consistent rail service to Finch.

The statutory common carrier obligation requires that a “rail carrier providing transportation or service subject to the jurisdiction of the Board ... provide the transportation or service on reasonable request.” 49 U.S.C. § 11101(a). That obligation, however, is not absolute. *GS Roofing Products Co. v. STB*, 143 F.3d 387, 391-92 (8th Cir. 1998) (valid embargo excuses the service obligation); *Savannah Port Terminal R.R., Inc. – Petition for Declaratory Order – Certain Rates and Practices as Applied to Capital Cargo, Inc.*, STB Docket FD 34920, 2008 WL 2224904, at *6 (served May 30, 2008) (“*Savannah*”) (“common carriers serve the public generally, and the common carrier obligation does not require a carrier to maintain service levels for one shipper that will degrade service overall”). There are significant limitations to the

common carrier duties. See *MidAmerican Energy Co. v. STB*, 169 F.3d 1099, 1106 (8th Cir. 1999). It is usually at the discretion of the carrier how it wishes to satisfy its duty to provide rates and service. *Id.* Further, the common carrier obligation does not require a carrier to maintain the same level of service it has provided in the past, as that “could discourage railroads from providing additional service to customers, lest they be required to continue such service levels even when they are not reasonably able to do so.” *Savannah*, 2008 WL 2224904, at *6.

Importantly, whether a carrier is providing adequate service is not based solely on shipper’s desire for a higher level of service. As the Board explained in *Expedited Relief for Service Inadequacies*, STB Ex Parte No. 628, “while transportation needs are crucial, individual service desires are not necessarily the proper determinant of the adequacy or inadequacy of rail service, as some shippers have suggested.” 3 S.T.B. 968, 1998 WL 887188, at *4 (1998). Rather, in determining whether a railroad has violated its duty under 49 U.S.C. § 11101 to provide adequate service, the Board applies a balancing test similar to the test applied in abandonment proceedings. See *Illinois Central Gulf RR Co.*, 363 I.C.C. 690, 695, 1980 WL 14106 (1980). The Board weighs the need for service at the level sought against the burden on the carrier and on interstate commerce of providing service at that level. See *id.* at 695. See also *Savannah*, 2008 WL 2224904, at *6. Thus, the Board recognized in *Savannah*, “[t]here is no set rule establishing the number of switches a rail carrier is required to provide. Rather, the Board looks to what is reasonable under the circumstances.” *Id.*

In determining whether a carrier is providing adequate service, the Board considers such factors as the traffic volumes, the availability of alternative transportation, the extent to which a shipper’s desire for more frequent service stems from problems that are internal to the shipper and the feasibility of addressing such problems through means other than increased service

frequency. See *Roseburg Forest Products Co., Timber Products Co., L.P., Suburban Propane, L.P., Cowley D&L, Inc., Sousa Ag Service, and Yreka Western R.R. Co.—Alternative Rail Service Central Oregon & Pacific RR, Inc.*, STB FD No. 35175, 2009 WL 536893 (served March 4, 2009) (“*Roseburg*”).

Roseburg is particularly instructive. The movements at issue included shipments of lumber and wood products to two mills. 2009 WL 536893, at *1-4. The shippers, who sought an order for interim alternative rail service, alleged inadequate rail service based on the incumbent carrier’s reduction of service from five to two days-a-week, and on the alleged failure to adhere even to the reduced service schedule. *Id.* The shippers further alleged that five day-a-week service was necessary to supply raw materials to the mills and that the reduced service schedule was disrupting mill output. *Id.* at *6. The Board ruled that the shippers had not carried their burden of establishing that rail service was inadequate. In considering the adequacy of 2-day-a-week service, the Board looked first to the weekly volumes. *Id.* at *5-6. The Board found that the two trains were generally sufficient to handle the average volumes shippers tendered, and the carrier ran extra trains as needed. *Id.* Based on this, the Board concluded that the “2-day-a-week schedule was adequate to handle [shippers’] weekly traffic.” *Id.* at n.6. As to the allegations that the carrier failed to provide even 2-day-a-week service, the Board noted that the missed service days were due to severe winter weather and that the carrier ran extra trains to clear the resulting backlog and did not establish that shippers were receiving inadequate service. *Id.* at *2-6. As to the claims that the mills needed 5-day-a-week service, the Board took note that the mills’ problems were due in part to “internal difficulties” including constrained capacity to place cars. *Id.* at *6. The Board sought more evidence on “the feasibility of addressing these problems

through means other than a return to a 5-day-a-week service schedule (i.e., building more track at the mills for loading and unloading cargo or storing raw materials at the mills).” *Id.*

2. Three Days-A-Week Rail Service is Indisputably Adequate

Like the shippers in *Roseburg*, Finch claims that less than 5 days-a-week rail service is inadequate and seeks a return to 5 day-a-week service. However, as in *Roseburg*, the frequency of CP’s rail service to Finch is clearly sufficient to handle Finch’s weekly traffic volumes. Finch averages less than 20 cars a week and can feasibly receive up to 12 to 15 cars per switch, which is more cars that Finch typically orders in a switch. *Newell V.S.* at ¶ 5. Thus, CP’s current weekly service levels are more than adequate to serve Finch’s needs. Further, CP can, and has, provided extra train service when needed. Ex. HH (CPFinch009250); *LaValla V.S.* at Appendix B.

Significantly, Finch does not contend that more than 3 day-a-week rail service is necessary in order to provide a sufficient supply of raw materials to meet its plant production needs. In fact, as noted above, [

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3. CP is Not Required to Provide More Frequent Rail Service to Mitigate Risk of A Rail Service Disruption.

Finch contends that CP’s reduction of rail service to 3 days-a-week violates the common carrier obligation because CP knew that it would increase the risk to Finch in the event of a disruption in rail service. Finch Opening Statement at p. 28 (“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.”). There are several flaws in this argument.

Finch cites no legal authority for its novel argument that an increased risk to a customer from a service disruption is a basis for finding a violation of the common carrier obligation.

Railroads are not required to provide inefficient and unnecessary scheduled service in order to provide customers with a cushion against potential service disruption. *Cf. Roseburg*, at 6-7. Nor are railroads required to provide a higher level of service frequency in order to ameliorate conditions that are a result of issues that are internal to the customer, such as limited track capacity. *Id.*; *Savannah*, 2008 WL 2224904, at *6 (“Here, the obvious source of Capital’s problem was not inadequate service by the railroad, but rather the inadequacy of Capital’s track to meet the volumes that Capital’s business generated”).

Finch’s desire for more frequent rail service stems from internal limitations at the Finch facility and choices that Finch has made. Importantly, there are several actions that Finch could take to increase capacity at Finch and reduce risk from disruption. For example, Finch could expand track capacity by purchasing the CP owned track that is located on its property. Finch rejected this option, however, because it does not want to be responsible for track maintenance. Finch could have accepted the 7 day-a-week service option that CP offered or accepted a fourth scheduled switch on the weekend. Again Finch rejected those options because it did not want to incur the extra weekend labor costs. Finch could obtain equipment to perform its own intra-plant switching service or hire a third party to perform the switching. Finch rejected these options too, although it was unable to explain the basis for its decision. Although Finch claims to lack room to expand track or storage capacity, there is no evidence that it has seriously explored those options. Moreover, Finch has the demonstrated ability to supplement its rail service with truck transportation in the event of a disruption.

Assuming that Finch faces an increased risk to its operations, that increased risk appears to be due primarily to Finch’s need for intra-plant switching. Finch’s plant is powered by ammonia direct from the rail car. Finch has a limited number of spots that it has equipped to

feed the ammonia cars from the rail car to the plant. It relies on CP to pull empty ammonia cars from the unloading pads and replace with loaded ammonia cars from Finch's storage tracks. Such intra-plant switching has long been considered an "industrial service" that is outside the common carrier obligation. *Cf., e.g., Detroit Harbor Terminals, Incorporated, Terminal Allowance - Practices of Carriers Affecting Operating Revenues or Expenses*, 332 I.C.C. 635, 636-37, 640 (1968) (holding that common carrier obligation requires carrier to place car on interchange track or customer spur; performance of additional plant switching "constitutes an industrial service which it is not the duty of respondent to provide"); *U.S. Cast Iron Piper & Foundry, Co. v. Director Gen. and Penn RR Co.*, 57 I.C.C. 677, 684 (1920) (same). Since three switches a week is sufficient for the traffic volumes, Finch's requests for additional switching service appears to be largely based on its need for intra-plant switching. In fact, in February 2013, in response to Finch's request for a return to five-day service, CP told Finch that "CP is not willing to provide service if the only service ordered is intra plant switches." Ex. L (FINCH00299). Accordingly, to the extent Finch's request for additional service was for intra-plant switching, such requests are not subject to the common carrier obligation.

Perhaps most telling is the fact that in the four years that CP has operated on the reduced frequency schedule, Finch has thrived.⁹ It alleges that its operations were impacted just once in recent times. At least since mid-2014, Finch has operated at full production capacity. Moreover, Finch has identified only four instances where it specifically alleges that it called in trucks due to rail service delays.¹⁰ *See* Alheim V.S. at ¶¶ 24-25, 46, 52-54, 83.

⁹ *See* Ex. N (Feb. 10, 2015 Albany Business Review Article).

¹⁰ According to Mr. Alheim, Finch ordered trucks in due to poor rail service on May 17, 2013, December 20, 2013, February 11, 2014 and March 6, 2015. As explained in Appendix B to Mr. LaValla's verified statement, the May 17, 2013 service issues resulted from an engine failure; December 20, 2013 was due to cars delayed in Canada due to severe winter weather; February

The data show that CP has provided highly reliable and highly consistent service throughout the time period at issue. When disruptions have occurred with few exceptions, CP has recovered within 24 hours. In those few instances where CP was unable to do so, Finch has not shown that it would have been any better off had Finch been on a five day-a-week schedule.

A) Finch Puts Cart Before the Horse

Finch also argues that CP violated the common carrier obligation because it made fulfilling its statutory “obligations to Finch ‘contingent upon whether [it thought] it [was] ‘worth it’ to do so...” Finch Opening Statement at p. 28. Finch’s argument must be rejected because Finch simply assumes that CP has a statutory obligation to serve Finch 5 days-a-week without establishing that CP has such an obligation. As discussed above, Finch has not carried its burden on showing that Finch’s request for higher service frequency is reasonable and ample evidence establishes that three-day service is adequate. Further, Finch’s argument is based on an erroneous statement of the law and allegations of fact.

Finch’s contention that a carrier is prohibited from considering economics in service decisions is based on Board precedent that is inapplicable here. Finch relies on two cases that involved refusal to provide any rail service whatsoever. *Pejepscot Industrial Park, Inc., d/b/a Grimmel Industries – Petition for Declaratory Order*, STB No. FD 33989, 2003 WL 21108198, at *4-6 (served May 15, 2003) (“Pejepscot”) (carrier refuses to quote a common carrier rate in response to shipper request); *Sherwin Alumina Co., LLC v. Union Pacific Railroad Co.*, STB Docket No. NOR 42143, 2015 WL 5711004 (served September 29, 2015) (carrier refuses service during labor strike). Here, Finch is receiving regular scheduled rail common carrier service, but

11, 2014 was due to severe winter storms as well as cars that had not yet been received from the connecting carrier; and, finally, on March 6, 2015, CP provided service to Finch but some of Finch’s cars were not yet available to be brought in.

wants more frequent service. Thus, Finch's challenge goes to how CP meets its common carrier duty and not if CP is required to provide any common carrier service. How CP satisfies its obligation, however, is generally at CP's discretion. *See MidAmerican*, 169 F.3d at 1106.

As a matter of sound economics, railroads must consider profitability in virtually every decision, including decisions regarding rail service levels. Factoring in economics in such decisions is critical to the long term health of the carrier and the industry as a whole. Likewise, the STB is required under the National Rail Policy "to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues" and "to foster sound economic conditions in transportation." 49 U.S.C. § 10101(3), (5). A *per se* rule that any economically motivated change in service levels or refusal to increase service levels violates the common carrier obligation would be unworkable, nonsensical, and contrary to the National Rail Policy. Such a rule would require railroads to provide more rail service than is necessary to provide adequate service and, would result in inefficient allocation of limited resources and inefficient rail operations. Providing uneconomic, inefficient and unnecessary service would negatively impact rates and service levels to all customers by diverting resources and track capacity to providing unnecessary service.

Finch also gets the facts wrong. Finch alleges "the *only* reason CP provided to Finch [for the service reduction] was that CP had determined the service was not sufficiently profitable." But in the very next sentence, Finch acknowledges that "CP told Finch that its days of service were based on *volumes of traffic* and profitability." Finch Opening Statement at p. 27 (emphasis added). In fact, CP has consistently advised Finch that the reduction in service is based on volumes. For example, on October 11, 2012, CP advised Finch that the changes to service levels "were made to better reflect volumes and asset utilization in your area." Ex. II

(CPFinch0012758). Likewise, in February 2013, CP's road superintendent explained that Finch's volumes did not justify additional frequency. Ex. L (FINCH00299). Under Board precedent, traffic volume and costs are both factors to be considered in determining the reasonableness of a request for more service. *See Savannah*, at *8. Here, the volumes of traffic both locally and specific to Finch did not justify the costs of providing daily weekday service.

B) The Board Should Not Relieve Finch of its Burden

Because Finch cannot satisfy its burden to show that CP violated a reasonable request for service, Finch asks the Board to shift the evidentiary burden to CP. Essentially, Finch asks the Board to establish a rebuttable presumption that anything less than 5 day-a-week service is unreasonable. However, Finch's request is based on a misreading of Board precedent and would be bad public policy.

Finch incorrectly claims that "the Board has recognized the industry standard of switch service for the 'vast majority of shippers' by the major railroads is one switch every weekday to each facility of rail shipper." *See Finch Opening Statement at p. 27 (quoting Capitol Materials at *7)*. However, Finch is relying on the Board's description of the carrier's argument in *Capitol Materials* which is different than the Board's findings in that declaratory proceeding. In holding that the shipper failed to meet its burden of showing that it was unreasonable for the carrier to refuse to provide more than one switch per weekday, the Board recognized only that "[m]any railroads provide shippers of Capitol's size with just one switch per weekday." *Capitol Materials at *8*. This is a far cry from recognizing a national industry standard of general applicability. Notably, in *Savannah*, the Board relies largely on *Capitol Materials* for the proposition that "for

the most part, carriers do not generally provide more than one switch per day.”¹¹ *Savannah*, at *6. There is simply no legal or evidentiary basis for the Board to draw any conclusions about the standard service levels today for shippers like Finch.

In *Roseburg*, the burden was squarely on the shipper to show that providing service fewer than five days a week constituted inadequate service. *Roseburg*, 2009 WL 536893, at *4-6. There is no rational reason to relieve Finch of that burden here.

C) CP has Provided Highly Consistent and Reliable Service at Least 3-Days a Week

Finch’s claim that CP has failed to provide even 3-day service is unfounded and based on clearly erroneous allegations. Since October 2012, CP has provided at least 3-day-a-week service on a highly consistent and highly reliable basis. *LaValla V.S.* at ¶ 8. As shown in Table 1 below, since it reduced service frequency in October 2012, CP provided switching service to Finch at least three days a week nearly every week that it was scheduled to receive three day service, *e.g.*, excluding weeks that Finch was scheduled to received two switches due to holidays.

¹¹ The Board also cites to *Detroit Harbor Terminals*. However, in that case the issue was whether the common carrier obligation requires the carrier to switch a car more than once. The ICC held that once the carrier had placed the car on interchange or industry tracks, it had fulfilled its common carrier duty. 332 I.C.C. 635, 636-37, 640.

Table 1

Year	No. of Weeks Finch scheduled to receive 3 DOW service	No. of weeks that CP provided at least 3 DOW service
2012	13	13
2013	51	49
2014	51	50*
2015	50	48**

* Finch received less than 3 switches the week of February 17, 2014 due to a winter storm and storm-related derailments.

** In 2015, one of the two weeks in which Finch received less than 3 scheduled switches involved a missed Friday switch that CP made up on the following Sunday.

LaValla V.S. at ¶ 8.

The vast majority of these switches commenced on the scheduled service day. In those relatively few instances that CP did not switch Finch on the scheduled Monday, Wednesday or Friday service day, CP nearly always serviced Finch the following day. In 2014, three of the six missed switches occurred in February and were attributable to severe winter weather, one of which caused a derailment which further exacerbated the disruption. Likewise, in 2015, six of the ten missed switches occurred in January, February or March and were due to severe winter weather. A series of successive storms pounded the Northeast burying it under several feet of snow and disrupting rail operations.¹² Newell V.S. at ¶ 10.

¹² Even Finch conceded that delays due to severe weather would not constitute inadequate service. Ex. A, Basile Tr. Vol I. at 93:22-94:15 ([

]). And yet Finch now includes such delayed switches in its litany of complaints. *See generally* Alheim V.S.

Table 2

Year	Missed scheduled M,W, F switches *	Missed scheduled M,W, F switches made up the next day
2012	0	0
2013	9	7
2014	11	7
2015	17	13

* Excludes switches canceled by Finch and days when Finch was not scheduled to receive a switch due to holidays.

LaValla V.S. at ¶ 9.

Finch’s allegations of poor service do not withstand scrutiny. Many of the alleged missed switches were not missed at all. Finch includes several switches that were delayed but occurred on the service day. However, CP does not guarantee any particular service time. As the Board recognized in *Capitol*, “given the many variables outside a railroad’s control that may affect delivery ... a railroad cannot reasonably be expected always to be able to meet an ideal delivery timetable.” *Capitol*, at *6. Indeed, many of the delays that Finch cites were due to severe weather. LaValla V.S. at ¶¶ 8, 11. In a few instances, the delays were due to derailments, equipment or track issues, and in at least one instance, CP was delayed by Amtrak service on CP’s mainline. Delays are often due to customers, including Finch, failing to prepare properly to receive rail service. On several instances, CP crews arrived at Finch to find its tracks and switches covered by snow and ice, cars that had not been unhooked, and/or locked gates, delaying service at Finch as well as to other customers. *Newell V.S.* at ¶ 8.

Several of Finch’s allegations concern crews that reached their federal hours of service limit before performing or completing service at Finch. Finch suggests that this somehow shows

that CP did not have sufficient crews. It does not. In most instances cited by Finch, crews expired due to delays caused by severe weather. In some instances, Finch itself was to blame by not properly preparing to receive service. In most instances when a crew expired, within hours CP sent a fresh recovery crew to complete service at Finch.

Several of the alleged “missed switches” in 2013 involved CP’s attempt to provide a fourth switch on Thursdays in order to placate Finch. In each instance that CP canceled a Thursday switch, CP serviced Finch on the immediately preceding and following day, and Finch received at least three switches in that week. LaValla V.S. at Appendix B.

Finch alleges that there were instances where cars that it had ordered were not brought in as ordered, or went on “field trips.” In most instances, in which Finch did not receive a car that it had requested, the car had not arrived at the serving yard in time for the switch and was brought in on the next available switch. LaValla V.S. at ¶ 9. In some instances, Finch received cars that it reported missing and the trainmaster had to make his own field trip to Finch to show Finch that the cars were in fact at its facility. Newell V.S. at ¶ 11.

It is also important to put Finch’s allegations in to perspective. The allegations of car mishandling span more than a three-year time period (October 2012 to December 2015) in which CP switched more than 3,000 cars into and out of Finch’s facility. Of these, Finch alleges that CP mishandled a small fraction of the total cars that CP placed at Finch. LaValla V.S. at ¶ 8.

Accordingly, there is no basis on which to find that CP has violated its common carrier obligation.

D) Finch’s Allegations Regarding CP’s Website Are Beyond the Scope of this Proceeding, Misleading and Irrelevant

Recognizing that the evidence does not support its service inadequacy claims, Finch turns its focus to alleged problems with CP’s website. According to Finch, difficulties in ordering cars

from the website breached CP's common carrier obligation. There are two problems with Finch's argument. First, these allegations are beyond the scope of the issues referred to the Board by the Court, which focuses only on the frequency of service. In fact, Finch neither alleged the website issues as a basis for its claim in the counterclaim or in response to interrogatories seeking the basis for its claim that CP had violated the common carrier obligation. Ex. F, Finch's Answer to CP's Interrogatory No. 4.

Second, even if true, Finch's misleading and unfounded website allegations are irrelevant to whether CP violated the common carrier obligation. The common carrier obligation requires a carrier to provide transportation on reasonable request, which CP did here notwithstanding Finch's allegations of a poor website experience. As Finch acknowledges, issues with the website did not prevent Finch from requesting common carrier service or receiving that service. CP allowed Finch to order cars in by e-mail and, although Finch implies otherwise, CP waived the supplemental fee for doing so. *LaValla V.S.* at ¶ 14. Moreover, much of Finch's website difficulties involved Finch's efforts to request intra-plant switching, and not requests for common carrier service. *See* Ex. E, Taylor Tr. at 19:18-20:11.

4. Finch's Claim for Damages are Beyond the Scope of this Declaratory Order Proceeding and its Calculations are Deeply Flawed

Finch includes a calculation of damages in its opening evidence. By definition and by statute, however, monetary relief is not available in a declaratory order proceeding. 49 U.S.C. § 11705(c) ("A person must file a *complaint* with the Board to recover damages under section 11704(b) of this title within 2 years after the claim accrues.") (emphasis added). Further, a damages determination is beyond the scope of the U.S. District Court's referral. Any damages

determination must be made in the appropriate forum subject to the appropriate evidentiary and procedural rules.¹³

Moreover, as Charles Banks and John Ireland explain in their Verified Statement, attached to CP's Reply Statement, Finch's damages calculations are built on several erroneous and unfounded assumptions and methodologies.

Notably, Finch's damages calculation assumes that Finch's truck usage increased after CP reduced service frequency beginning in October 2012, and such increase was due to CP's alleged violation of the common carrier obligation. But as Messrs. Banks and Ireland explain, neither assumption is supported by the data. Finch's data show an *increased* reliance on rail transportation in the years following the change in service frequency. To the extent that there have been, at times, shifts toward [

For example, trucking of [

] To the extent that there might be a correlation between truck usage and a particular rail service issue, Finch makes no effort to distinguish between rail

¹³ Under the Board's complaint procedures or the federal court discovery rules, Finch would have been required to present its expert report on damages in discovery and CP would have had the opportunity to conduct further discovery on those calculations. Under the declaratory order procedures, CP is not afforded that opportunity. Here Finch provided a damages calculation in discovery that is different from the one now sponsored by Mr. Crowley. CP deposed Finch's designated corporate witness who despite being designated was neither prepared to nor able to answer questions regarding those calculations. *E.g.*, Ex. B, Basile Tr. Vol. II at 106:3-11 ("[

118:19-119:5 ("[

]);

service issues due to CP's fault and service issues due to causes beyond CP's control, e.g., extreme weather, delays on connecting carriers, delays due to Finch's own failures to keep its tracks cleared of snow and ice, or disruption caused by Finch's failure to maintain its tracks in safe condition.

Finch also includes other alleged damages that it incurred due to the track outage such as costs incurred in diverting pulp cars to temporary storage. CP cannot be held liable for the consequences of Finch's failure to maintain its tracks in safe condition.¹⁴

B. Finch Failed to Show that CP's Demurrage Charges, Rules or Practices are Unreasonable

The Court referred four questions to the Board for guidance regarding CP's demurrage practices and rules. Two questions focus on whether it was reasonable for CP to charge Finch the demurrage at issue. The other two questions focus on the reasonableness of CP demurrage rules as set out in its tariff.

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

4. Whether CP Rail's calculation and assessment of demurrage charges against Finch Paper after "constructively placing" its railcars was improper, because the delays preventing the "actual placement" of those railcars were the fault CP Rail, making the

¹⁴ To the extent Finch contends that it is entitled to damages as of October 2012, such a claim is time barred. A statute of limitations starts to run when a claim accrues. See 49 U.S.C. §11705(c). Under 49 U.S.C. § 11705(g), "accrual" of a claim generally is the result of an affirmative act: "delivery or tender of delivery by the rail carrier." Although a claim can accrue on a continuous basis, "the Board counts back 2 years from the date of the complaint to set a cutoff point for relief" when determining timeliness for statute of limitations purposes. *Brampton Enterprises, LLC v. Norfolk S. Ry Co.*, STB Docket No. NOR 421181, 2011 WL 903870, at *3 (served Mar. 16, 2011) ("If a shipper files a complaint about a particular rate level charged over a period of time, it generally may recover only as to shipments that moved within 2 years of the filing of the complaint." (citing *Aluminum Co. of Am. v. United States*, 867 F.2d 1448, 1452 (D.C. Cir. 1989))).

assessment of the demurrage charges an unreasonable practice in violation of 49 U.S.C. §10702;

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

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

1. Legal Standard

Since the beginning of the railroad industry, railroads have charged demurrage. *See e.g., Chrysler Corp. v. N. Y. Cent. R.R. Co.*, 234 I.C.C. 755, 759 (1939) (*Chrysler*) (discussing history of demurrage charges and regulation). Demurrage serves two purposes: It “both compensates railroads for the expenses incurred when rail cars are detained by shippers and serves as a penalty for undue car detention to encourage the efficient use of rail cars in the rail network.” *Railroad Salvage and Restoration Inc.—Petition for Declaratory Order—Reasonableness of Demurrage Charges*, STB Docket NOR 42102, 2010 WL 2836850 at *3 (served July 20, 2010) (*Railroad Salvage*). But it serves “primarily as a penalty.” *Albert Lea Packing Co. v. Chicago, Milwaukee & St. Paul Ry Co.*, 152 I.C.C. 665, 666 (1929). Under 49 U.S.C. § 10746, railroads are required to “compute demurrage charges, and establish rules related to those charges, in a way that will facilitate freight car use and distribution and promote an adequate car supply.” *Railroad Salvage* at *3.

The Board has explained demurrage as follows:

The principle underlying demurrage is simple. When a shipper uses a railroad-owned rail car, it is depriving the railroad of an asset—the use of that rail car. Likewise, when a shipper's privately owned rail cars are idled on the railroad's tracks, it is depriving the railroad of the use of that track. A railroad has a right to set a reasonable time-free time-for a shipper to finish using rail assets and return them to the railroad. If a shipper keeps an asset for too long (beyond the allocated free time), it should compensate the railroad

for the extended use of its asset (rail cars or track)-in other words, for demurrage. However, 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.

Id.

As with Finch's common carrier obligation challenge, as the party challenging demurrage charges, Finch "has the burden of establishing by competent evidence that collection of the assailed charges is unlawful." *Savannah*, 2008 WL 2224904, at *6 n.20 (citing *North Am. Freight Car Ass'n. v. BNSF Railway Co.*, STB Docket No. 42060 (Sub-No. 1) (STB served Jan. 26, 2007), at 5 (NAFCA) and *Ametek, Inc. - Petition for Declaratory Order - Panther Valley R.R. Corp., et al.*, ICC Docket No. 40663, *et al.* (ICC served Mar. 26, 1992)) (in demurrage cases, unless otherwise specified in the statute, the burden of proof generally rests with the complainant)). Moreover, Finch has the burden of proof even though this declaratory order was instituted following a referral from the U.S. District Court for the Northern District of New York. *See id.* ("The fact that SPTR, pursuant to a court order, has instituted this declaratory order proceeding does not relieve Capital of meeting its burden of proof as to the merits of its claim."). Finch has not and cannot carry its burden with respect to any of the demurrage charges.

2. Nearly All of The Disputed Demurrage was Incurred Because Finch Failed to Maintain its Tracks, Including Tracks Used for TIH, in Safe Condition

The vast majority of the demurrage that is in dispute accrued between April 24 and August 13, 2014, while some of Finch's tracks were out of service because the condition of the track made service on those tracks unsafe for rail service. It is undisputed that during this track outage, Finch had reduced track capacity. It is indisputable that due to this track outage Finch lacked sufficient track capacity to accept rail cars as they arrived at CP's serving yard and that Finch waited several days, and sometimes even weeks, after constructive placement before ordering cars in from the serving yard. It is also undisputed that Finch was responsible for

maintaining its tracks in safe operating condition. Accordingly, it was reasonable for CP to charge demurrage that accrued as a result of Finch's failure to maintain the track in safe condition. *See Portland & Western RR, Inc.—Petition for Declaratory Order—RK Storage & Warehousing, Inc.*, STB FD No. 35406, 2011 WL 3157556 at *5-6 (served July 27, 2011) (holding that customer “was responsible for the condition of its unloading track, and therefore it was reasonable for the railroad to charge demurrage that accrued as a result of these 3 days of missed switches” due to track outage).

Nevertheless Finch argues that the penalty portion of the demurrage should be waived because, according to Finch, CP gave it virtually no notice of the shut down and Finch “exercised due diligence” in trying to alleviate the cause of the demurrage. Finch misconstrues the STB’s due diligence standard which is inapplicable here.

Under Board precedent, a shipper seeking waiver of the penalty portion of demurrage has a difficult burden. *The Prince Mfg. Co. v. Norfolk and Western Ry. Co.*, 356 I.C.C. 702, 707 (1978).¹⁵ As a threshold matter, the shipper must “first establish that it was not the proximate cause of the detention.” *Id.* at 706 n.9. Failure to make this showing ends the analysis. *Id.* Finch cannot make this threshold showing. Finch alone was responsible for maintaining the condition of its tracks and its failure to do so was the proximate cause of the demurrage.

¹⁵ In *Prince Mfg. Co.*, the ICC considered a challenge to demurrage that had been levied on twelve cars that arrived at the plant frozen due to abnormally cold weather and an ice storm, and could not be unloaded. 356 I.C.C. at 703. The shipper demonstrated that it had exercised due diligence in trying to unload the cars but was unable to until warmer weather thawed their contents. *Id.* The ICC’s initial decision upholding the demurrage charges was reversed on the grounds that the ICC departed from its precedent by requiring a “very high degree” of diligence and found that Prince had carried its burden of establishing a prima facie case of due diligence. *Id.* at 704. On remand, the ICC concluded that because Prince was not the proximate cause of the detention, had shown that it had taken “all measures that could reasonably be required of it, including special efforts” and there was no showing of a car shortage emergency during the detention period, the penalty portion of the demurrage charge was unjust and unreasonable. *Id.* at 708.

Moreover, according to Finch, the major track defects that CP identified were not the product of some unforeseen or unexpected event. Ex. A, Basile Tr. Vol. I at 31:6-19. Rather, these conditions developed over time and were fully predictable. In fact, CP previously advised Finch that the longer cars that CP was placing on Finch’s track eventually would cause gauge issues. Blanchfield V.S. at ¶ 9. And, one year prior, Finch’s maintenance contractor advised Finch that a section of its tracks [

] – an opinion that was not disclosed to CP at the time. See footnote 4, *supra*. Although Finch’s tracks were used to carry hazardous materials including TIH and Finch largely depends on rail service to meet its business needs, Finch failed to take basic prophylactic measures including adopting a regular track inspection regime. Although, Mr. Petro now claims that Finch, through its maintenance contractor, conducts regular inspections, in his deposition Mr. Petro stated clearly that Finch did not regularly inspect its tracks. Ex. D, Petro Tr. at 68:2-75:1 [

] Rather, Finch waited until CP expressed a concern before it would call in its maintenance contractor to conduct a track inspection. *Id.*¹⁶ Remarkably, despite the fact that this approach has repeatedly been shown to be inadequate, Finch still has not adopted a regular inspection regime.

Finch tries to shift blame for the demurrage to CP arguing that it was the fact that CP took its tracks out of service on “virtually no notice” that caused the demurrage. See Finch Opening Statement at 45. But even Finch concedes that if the tracks were unsafe, CP was

¹⁶ [

] Finch also states that CP “visually inspect[s]” the tracks from a truck monthly. Petro V.S. at ¶ 3. CP does make regular visual observations to ensure safe working conditions for its crews but such observations are not a substitute for track inspections nor in any way relieve Finch of its obligations to have a regular track inspection regime. Blanchfield V.S. at ¶ 6.

“justified in taking them out of service.” Ex. B, Basile Tr. Vol. II at 179:19–180:5. Finch’s contention that CP should have continued to provide service on tracks that were not safe is patently absurd and suggests a worrisomely cavalier attitude towards safety.

If Finch were able to make the threshold showing that it was not responsible for the track conditions – which it cannot – in order to obtain relief, it would then be required to show that,

it has taken all measures that may reasonably be required to avoid and/or relive detention, including the exercise of prudent foresight in the particular circumstances. Normally, prudent foresight in this context would involve taking action to avoid situations where demurrage is likely to accrue; for example, an ongoing strike. Such action might include diversion or cancellation of orders to ship.

In addition, complainant should be required to show that it has made *special efforts* to avoid demurrage where detention was reasonably foreseeable or special efforts to abate detention if it was not foreseeable.

Prince Mfg. Co., 356 I.C.C. at 706. Finch did not take all measures nor did it make *special efforts* to avoid demurrage or abate detention.

In addition to failing to properly maintain its tracks, Finch has not shown that it exercised due diligence in repairing the tracks so they could be returned to service. Although the defects were identified in April 24, 2014, more than a month passed before Finch arrived at a [] for repairing the track. It was not until August 13, 2014 that Finch finally advised CP that the repairs had been completed. Finch has provided inconsistent explanations for the delay, initially blaming the delay on the availability of materials, and now blaming contractor availability. However, Finch has produced no evidence to support either explanation. Nor has Finch identified any steps it took to try to overcome these supposed obstacles.

Nor has Finch shown that it exercised due diligence in trying to avoid or abate demurrage by diverting cars or by reducing the cars in its pipeline or cancelling orders. Although Finch initially diverted pulp cars to temporary storage, it maintained most of the cars in its pipeline, particularly ammonia, [] and used CP's serving yard as temporary storage facility for those cars. Finch provided no evidence that it adjusted its ordering or sought out other options for minimizing demurrage. In fact, Finch rejected the notion that it should have taken any action to manage or avoid demurrage. Ex. F, Finch's Answer to CP's Interrogatory No. 12; Ex. C, Alheim Tr. at 90:11-92:4. Thus, Finch has failed to show that it exercised even a minimal amount of diligence in avoiding or abating demurrage that was not just reasonably foreseeable, but fully expected by Finch.

Under these circumstances, charging demurrage is entirely consistent with the purposes of demurrage. During the track outage caused by Finch's failure to maintain its tracks in safe condition, Finch used CP's serving yard to store raw materials including TIH. Finch let cars, including cars loaded with TIH and other hazardous materials, languish in CP's yard for weeks resulting in poor utilization of rail cars and CP's yard tracks, additional costs to CP associated with securing and inspecting TIH cars in its yard, and increased liability exposure. Demurrage compensates CP for these costs and it penalizes Finch for poor utilization of railroad-owned assets, as well as of private rail cars. *Cf. Savannah*, 2008 WL 2224904, at *8 (holding that the reduction in switch frequency "advanced the first purpose of demurrage by penalizing Capital for poor utilization and encouraging Capitol to move to a facility with sufficient track capacity to meet its business needs). Most importantly, imposition of demurrage encourages Finch to maintain its track in safe operating condition in order to ensure sufficient track capacity to meet its business needs. *See id.*

Failing to hold Finch accountable and forcing CP to bear the consequence for discovering that Finch's tracks were unsafe and refusing to serve them, would in effect, penalize CP for taking safety critical actions. Such an outcome could discourage railroads from taking similar safety critical actions in the future.

3. The Standing Instruction is a Red Herring as Finch Lacked Capacity to Receive the Ammonia Cars

Finch argues that CP's imposition of demurrage charges for ammonia cars during the track outage was precluded by an express agreement that CP would bring in ammonia cars to Finch on arrival, the so called "standing instruction." According to Finch, CP did not advise it that it was rescinding the standing instruction and, had CP followed the standing instruction, there would be no demurrage charges on the ammonia cars. Finch's standing instruction argument is a red herring as, during the track outage, Finch lacked sufficient capacity for CP to have carried out the standing instruction. In any event, the evidence clearly shows that Finch rescinded the standing instruction, had no expectation that CP would automatically bring in ammonia cars during the track outage, and understood that ammonia cars dwelling in CP's service yard were subject to demurrage.

Implicit in the standing instruction is that Finch has adequate space on the storage track for CP to spot any ammonia car that is brought in under the instruction. Finch is responsible for managing its pipeline and tracks to ensure that CP can place the cars on Finch's track. If CP brings in an ammonia car that cannot be placed on Finch track, CP must return the car to the serving yard, subject to demurrage and a supplemental charge for failure to place. Thus, had CP brought in ammonia cars as Finch now claims it should have, Finch would owe more than just demurrage. And, of course, the shuttling of a loaded TIH car would have created additional and

unnecessary risk. Continued application of the standing instruction was not practical, and decidedly not in the interest of Finch, CP or the public.

Finch's revisionist claim that CP acted unilaterally and without notice to Finch when it stopped automatically bringing in ammonia cars to Finch is belied by Finch's actions at the time. Most notably, during the track outage, Finch rescinded the standing instruction. Since 2012, Finch included the standing instruction in its switch requests, including switch requests submitted up to the eve of the track outage. But after April 24, 2014, Finch omitted the standing instruction from its switch requests submitted to CP. Also during the track outage, Finch stopped complaining to CP when it failed to bring ammonia cars in automatically. Only two days prior to the outage, Finch complained that CP had not brought in ammonia cars under the standing instruction. Although Finch acknowledges that it was monitoring car dwell time daily, after April 24, 2014, Finch remained silent as its ammonia cars sat for days and even weeks. During this time, Finch tracked the [] Ex. C, Alheim Tr. at 59:13-60:14; Ex. JJ (FINCH1604).

Even after Finch received invoices for April and May that included large amounts of ammonia demurrage charges, Finch did not query CP why it was not following the "standing instruction" it now claims was in effect, ask CP to bring in all the ammonia cars, or even dispute the validity of the charges based on the standing instruction at that time. In fact, Finch agreed that sizeable portions of the ammonia demurrage charges were "valid", and even paid some of the April charges. Finch's silence as to the standing instruction is all the more telling, as just days before it contested the April invoice, CP waived the March ammonia demurrage charges

based on, according to Finch, the standing instruction.¹⁷ Thus, Finch clearly understood that its ammonia cars were accruing demurrage during this time period.

It was not until the end of July, near the end of the outage and after CP rejected Finch's initial basis for disputing portions of the May and June invoice, that Finch asserted that CP should have been bringing in the ammonia cars automatically all along. This time, Finch disputed all of the May and June ammonia charges, including charges that it had previously told CP were valid. Conveniently, Finch waited to raise the "standing instruction" issue until after Finch had finally reduced its ammonia pipeline to align with its reduced track capacity and after most of the disputed ammonia demurrage had been incurred.

Finch presents no evidence that it had adequate spots available to accommodate the ammonia cars that it now says CP should have been brought in immediately. Although it claims to have had sufficient spots "available," Finch also claims that it made its best efforts to order the ammonia cars in as quickly as possible during the track outage. Both statements cannot simultaneously be true.¹⁸ If, as Finch states, it was ordering in ammonia as quickly as possible, then the only explanation for Finch not ordering in an ammonia car is that Finch had no available spots for CP to place it at the plant.

¹⁷ Finch alleges that CP's waiver in May 2014 of the ammonia demurrage charges incurred in March 2014 proves that the standing instruction was in effect in May. At most, CP's waiver of the March ammonia charges is evidence that there was a standing instruction in effect in March when the charges were incurred. It has no bearing on whether there was a standing instruction in effect at a later date.

¹⁸ It is unclear on what basis Finch is claiming that it had sufficient track capacity to accommodate all of the ammonia cars. Finch may be playing a semantic game here as it did in discovery by referring to the tracks that CP identified as unsafe and refused to serve until repaired as "available." Ex. D, Petro Tr. at 104:5-10 ("[

]). Obviously, the unsafe tracks were not "available."

4. Finch Has Not Shown that CP's Demurrage Tariff Specific to TIH is Unreasonable

Finch challenges the reasonableness of the demurrage rate that CP charges for TIH cars. Finch failed to provide any evidence in response to discovery requests on the issue. Nor could it identify a single basis for its contention that the rate is unreasonable. Indeed, in response to an interrogatory seeking the basis for Finch's assertions that CP's demurrage practices were unreasonable, Finch simply retorted: "CP further engaged in unreasonable practice by adopting and implementing demurrage rates and practices that were unreasonable." Ex. F, Finch's Answer to CP's Interrogatory No. 3. With its Opening Statement, Finch now presents the verified statement of Thomas Crowley, who has no specialized knowledge or expertise on demurrage issues, and no credible basis for rendering his opinions on the reasonableness of CP's TIH rate. Mr. Crowley's assumptions and speculation are baseless and wrong.

In considering reasonableness of demurrage rate levels, the Board considers the rate levels charged by other railroads. *See Capitol Materials*, 2004 WL 771676, at *3. Here, Finch acknowledges that CP's \$1,500 rate is consistent with the rates of other Class Is for TIH. In fact, CP's rate compares favorably to the other Class I railroads. For example, it is substantially lower than UP's and KCS's TIH demurrage rates which are \$5,000 and \$2,500 respectively. *Clements V.S.* at p. 8.

Nonetheless, Finch contends that the rate level is unreasonable because the rate over recovers the PTC associated costs that Finch claims it was designed to fund. However, this conclusion itself is specious and based on unsupported speculation that CP and other railroads charge high demurrage on TIH in order to recoup PTC costs. As Mr. Clements explains, CP's demurrage rates are not designed to generate revenue, are not tied to PTC funding, and its TIH demurrage revenues amount to a small fraction of CP's PTC costs. *Id.* at 8.

The primary goal of CP's demurrage program is to influence customer behavior to encourage efficient asset utilization, *i.e.*, to act as a penalty. *Id.* at 2. Thus, CP's TIH rates are established at a level that in CP's experience will be sufficient to incent customers to accept TIH cars quickly and to minimize the risk to CP and the public. *Id.* at 7. Whenever CP moves TIH it faces potentially catastrophic liability. Even a minor incident can cause significant injury and be enormously disruptive to rail operations and to local populations and businesses. That risk is not just academic. In 2000, a defective leaky valve on a Finch car in CP's Fort Edward Yard prompted evacuation of 800 people and disrupted rail operations for several days, and reportedly resulted in some 60 hospitalizations. *Id.* at 3. Because of this risk, CP seeks to ensure that shippers carefully plan how they order TIH to ensure that they are able to receive loaded TIH cars as quickly as possible. CP's principal tool for properly incenting shippers is a high demurrage rate. *See id.* at 7.

Mr. Crowley's threadbare analysis focuses on cost recovery and disregards the more important penalty component of CP's demurrage charge. Finch has presented no evidence on which the Board could find that \$1,500 is unreasonable as a penalty. In fact, Finch's failure to maintain its track in safe condition and to take reasonable actions to avoid demurrage on its TIH cars during the track outage suggests that \$1,500 may be set too low.

5. CP's Application of Demurrage to Include Non-Service Days after Constructive Placement is Reasonable and Consistent with the Goals of Demurrage

According to Finch, it should not be charged demurrage on days on which CP does not provide service. What Finch means by this, however, is uncertain and Finch's argument in the brief is different from the verified statement on which it is based. In its brief, Finch appears to be challenging the timing of constructive placement. Finch Opening Statement at p. 44.

Specifically, it challenges CP's alleged constructive placement of cars which arrived on a service day too late to be brought in to the mill and would begin calculating demurrage until the next service day. *Id.* Finch alleges that Mr. Alheim calculated that this improper constructive placement comprise \$234,760 of the disputed demurrage charges. However, in Mr. Alheim's verified statement he appears to be making the same argument that he made in May 2014 when he challenged the April invoice. Namely, that CP should not be able to charge Finch demurrage on cars sitting in CP's serving yard on *any* day that CP does not provide scheduled service to Finch, period. *See* Alheim V.S. at ¶¶ 111-12. In other words, regardless of how long after constructive placement Finch lets a car languish in CP's serving yard before ordering it in, CP can charge demurrage only for the intervening Mondays, Wednesdays and Fridays on which CP provides scheduled service. According to Mr. Alheim, the \$234,760 actually represents "demurrage accruing on days [CP] refused to provide service to Finch." *Id.* at ¶ 116. Notably, Finch does not disclose the underlying calculations for the \$234,760 or identify the specific demurrage charges it claims are improper. Such evidence presumably would have clarified the nature of its argument. Nonetheless, neither argument is supported by authority or evidence, nor is either correct.

Finch's argument that CP constructively placed Finch cars prematurely which resulted in improper demurrage charges is made entirely in the hypothetical. Finch has not identified a single example of CP engaging in the alleged conduct. Moreover, the hypothetical that Finch provides lacks sufficient detail regarding the circumstances in which the car was constructively placed or even when Finch ordered the car in. Without more, it is not possible to make any determination about whether constructive placement or demurrage charges would be proper. In any event, Finch misconstrues CP's demurrage program.

As Mr. Clements explains, under CP's demurrage program, for closed gate customers (*i.e.*, customers that CP does not have access to place cars 24/7) such as Finch, cars are constructively placed "when, upon arrival at a CP serving yard, cars are not ordered for placement at the applicable loading/unloading facility." Clements V.S. at p. 4. Cars are not constructively placed when CP is not prepared to immediately deliver the car. Accordingly, for closed gate customers that receive less than seven day a week scheduled service, cars are constructively placed on service days only.¹⁹ Cars that have been constructively placed begin to accrue demurrage at 00:01 AM the next day. The customer can pause or, in the case of private cars, stop the demurrage clock by ordering the car in for placement (ORPL). An ORPL notifies CP that the customer is ready to receive the car immediately. No demurrage accrues between ORPL and active placement regardless of when the next service day is scheduled, provided the customer is able to receive the car when CP brings it in. Thus, the customer can avoid demurrage altogether by submitting its ORPL before the demurrage clock starts to run, assuming that the customer is in fact able to accept the car. "Customers can also request that a car be brought in on a specific date in the future in which case the ORPL occurs on the date that the customer wants the car to be brought in on, and not the date that the request is made." *Id.* at 5.

In Finch's threadbare scenario, if on Monday the car is constructively placed and Finch orders the car in for placement, no demurrage would accrue. If Finch waited until Tuesday to order the car in for placement, the demurrage clock would pause/stop on Tuesday, and Finch would be charged one demurrage day. Under either of these scenarios, CP could bring in the car at its discretion, including before the next scheduled service if it so chooses. If CP brought the

¹⁹ Under Finch's hypothetical, there are insufficient facts to determine whether constructive placement on Monday was proper. Typically, however, a car that arrives on a service day would constructively place on the following service day. Clements V.S. at pp. 4-5.

car in on Tuesday and Finch was not ready to receive it, Finch would incur demurrage and an additional charge for failure to place. If on either Monday or Tuesday, Finch requested that CP bring in the car specifically on Wednesday, the ORPL would occur on Wednesday-- the day Finch told CP it is prepared to accept the car – and Finch would be charged two demurrage days (Tuesday and Wednesday). Thus, whether Finch incurs demurrage is within its control and Finch is not charged demurrage because of CP's inability to place the car or frequency of scheduled service. Charging demurrage in such circumstances is reasonable. *Id.* at 6.

The argument that Mr. Alheim references in his verified statement, *i.e.*, that CP cannot charge demurrage on intervening non-service days between constructive placement and when Finch orders the car in, is so farfetched that Finch itself disagrees with it. Finch's corporate witness, Mr. Basile, agreed that unless there was a standing instruction to bring the cars in automatically, "we should be responsible for demurrage in the time that it's available to the time that we ordered it in." Ex. B, Basile Tr. Vol. II at 164:9-167:18. Finch only raised this argument for the first time in May 2014 and soon abandoned it, apparently recognizing its flaws.

As Mr. Clements explains, Mr. Alheim's position is inconsistent with the terms of CP's Tariff 2 and its longstanding practice, as well as with other railroads' demurrage programs. Moreover, it would undermine the efficacy of demurrage programs by substantially reducing the consequence for a shipper of letting a car dwell on railroad track. Also, because railroads would not be compensated for use of their assets on non-service days, it would penalize railroads which provide less than five day a week service regardless of whether more service is requested or required.

IV. CONCLUSION

For the reasons set forth above, on each of the issues referred by the U.S. District Court, Finch has not carried its burden in this declaratory order proceeding. Accordingly, the Board should find that Finch has not shown that CP violated its common carrier obligations under 49 U.S.C. §11101. Further, the Board should find that Finch has failed to show that CP's demurrage charges are unreasonable or not consistent with 49 U.S.C. §10702 and §10746, or that CP's assessment of demurrage against Finch was an unreasonable practice under 49 U.S.C. §10702. Finally, the Board should deny Finch's improper, unsupported and unwarranted request for damages.

Dated: September 23, 2016

Respectfully submitted,

/s/ David F. Rifkind

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CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of September 2016, copies of the Public Version and the Highly Confidential/Confidential Version of the foregoing Reply Statement were served by hand-delivery to:

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket FD 35981

PETITION FOR DECLARATORY ORDER – FINCH PAPER LLC

VERIFIED STATEMENT OF JAMES D. CLEMENTS

My name is James D. Clements. I am submitting this verified statement in support of CP's Reply to the Opening Statement of Finch Paper LLC ("Finch"), filed in the above-captioned proceeding pending before the Surface Transportation Board (the "Board").

I am the Vice President Strategic Planning and Transportation Services for Canadian Pacific ("CP"). My office is in Calgary, Alberta. I have been employed by CP since 1994 and have occupied my present position since 2014. During my employment with CP, I have served in a variety of planning, operating, commercial, and administrative roles, including Financial Analyst, Director – US Grain Marketing and Sales, and General Manager – Car Management. Since January 2009, I have been in charge of the Yield department at CP. In this capacity, I oversee the analysis, development, and implementation of CP's commercial policies and tariffs that apply to Toxic by Inhalation Hazard ("TIH") commodities and, more generally, to CP's demurrage program. In my prior positions including as Director – Mines, Metals and Aggregates, as well as General Manager – Car Management, I participated in the operations of CP's indirectly owned subsidiaries such as the Delaware and Hudson Railway Company

("D&H"). As a result, I am familiar with D&H operations in the Northeast United States and with CP's demurrage programs and policies.

The purpose of my statement is to describe and explain the goals and mechanics of CP's demurrage program, as well as to provide context for CP's decision to terminate a storage track lease with Finch in 2012.

CP's Demurrage Program

CP's demurrage program serves several purposes including facilitating freight car use and distribution, promoting an adequate car supply, reducing congestion and facilitating efficient rail operations, compensating CP for asset use, and minimizing CP's liability exposure and risk to the public. The primary purpose and goal of CP's demurrage program, however, is to influence third party behavior in order to ensure fluid and efficient rail operations. The goal of CP's demurrage program is not to generate revenue but to influence behavior. In fact, CP would prefer that customer's avoid demurrage altogether.

In recent years, CP has been highly focused on velocity, *i.e.*, moving each car from origin to destination as quickly as possible. Increasing velocity reduces the amount of crew and equipment needed to provide the same or higher level of service. Thus, by improving velocity, particularly since 2012, CP has been able to dramatically improve its operating, financial and service metrics. CP has accomplished these improvements while maintaining its position as an industry leader on safety.

Improving yard fluidity has been critical to CP's efforts to improve velocity. Cars dwelling in yards consume track space which can make it more difficult for crews to operate within the yard. What should be straightforward switching operations can become complicated and time consuming in congested yards. This, in turn, can lead to delayed train departures and

crews running out of time before they are able to complete assignments. Congested yards can also force CP to stage trains outside yards on sidings until yard space becomes available. This results in additional crew and equipment costs and reduces mainline capacity. By the same token, reducing dwell time results in faster turns of assets. Faster turns of assets reduce the amount of equipment needed to move a given amount of volume in a given time, which in turn frees up rail capacity. Faster asset turns also lowers customer costs, and gives CP the ability to provide more consistent and more timely service to our customers.

To ensure that CP's yards remain fluid and do not become congested and to turn assets more quickly, CP seeks to encourage its customers to manage their rail supply pipeline so as to allow them to accept cars as soon as they become available for placement, thereby minimizing car dwell time in CP yards. CP's demurrage program is the principal tool in this effort.

Additionally, CP's demurrage program is an important tool in minimizing risk associated with the rail transportation of Toxic Inhalation Hazard (TIH), and other hazardous materials. TIH, including anhydrous ammonia, are amongst the most dangerous commodities that, under Board precedent, rail carriers are required to move. A release of TIH can be lethal and have catastrophic consequences. Even a minor incident can cause significant injury and be enormously disruptive to rail operations and to local population and businesses. The risk is not merely theoretical. For example, in 2000, a Finch bound car in CP's Fort Edward Yard was found to be leaking anhydrous ammonia due to a defective valve. The leak prompted an evacuation of the surrounding areas, displacing 800 Fort Edward residents from their homes, closing downtown, and disrupting rail operations for several days. Some 60 people were reported hospitalized. *See Attachment 1.*

In addition to the increased risk associated with rail transportation of TIH, CP incurs additional costs to secure and inspect TIH cars that dwell in its yards. CP's TIH demurrage rate is primarily intended to encourage customers to take steps to minimize the amount of time that TIH cars are on CP, but also to compensate CP for the increased costs and risks associated with TIH dwelling on CP.

Mechanics of CP's Demurrage Program

Tariff 2 contains the terms and conditions of CP's demurrage program. At a high level, the program establishes the amount of time that a shipper has to accept a car for placement at its facility, and in the case of a railroad owned car, the amount of time a shipper has to load or unload a car and release it back to the railroad. If the shipper exceeds the allotted times, CP imposes a demurrage charge. The amount of allotted time and the charge varies by commodity and by car ownership. While the system works on a debit and credit day system, it is easier to explain the system in terms of a clock.

The demurrage clock starts following "constructive placement." Constructive Placement (PCON) will occur when, upon arrival at a CP serving yard, cars are not ordered for placement at the applicable loading/unloading facility. A Constructive Placement notice is issued advising that the demurrage clock will begin to run at 00:01 on the day following notification. It is important to note that CP will not initiate a Constructive Placement when it is not prepared to immediately deliver the railcar which is evidenced by the fact that, for customers with less than seven day per week of scheduled service, the Constructive Placement initiates consistent with their actual days of service. For example, for a customer like Finch who receives scheduled service on Mondays, Wednesdays and Fridays, if a car arrives on a Tuesday the car will constructively place on Wednesday and the demurrage clock will commence on Thursday at

00:01 AM. If the car arrives on Wednesday, the car will constructively place on Friday and the demurrage clock will commence on Saturday at 00:01 AM.

Closed gate customers, such as Finch, order in the car by submitting an Order for Placement, or ORPL. An ORPL indicates that the customer is able to receive the car immediately. Once the customer submits an ORPL, the demurrage clock stops in the case of privately owned cars, or pauses in the case of railroad owned cars. The time between ORPL and actual placement, or PACT, is not counted in calculating demurrage provided that the customer is able to receive the car on the next service, whether that service is scheduled or unscheduled. Customers can also request that a car be brought in on a specific date in the future in which case the ORPL occurs on the date that the customer wants the car to be brought in on, and not the date that the request is made. For example, a customer that is closed on the weekend might request on Friday that a car be brought in on Monday, in order to avoid the possibility that CP would bring in the car over the weekend when the customer is not ready to accept it. The ORPL would occur on Monday because that is when the customer has told CP that the customer will be ready to receive the car. Once a railroad-owned car is placed at the customer's plant, the demurrage clock resumes and does not stop until the customer releases the car to CP.

CP notifies customers when cars arrive at a notification station, typically the main yard. In addition, customers can monitor the status of cars on CP system using web tools provided by CP. Closed gate customers, such as Finch, have the option of ordering cars in before they even reach the serving yard, i.e., while they are still in transit, sometimes referred to as ordering from the pipeline. If a customer orders a car from the pipeline or at any time before 00:01 AM on the day after constructive placement, the customer will incur no demurrage on shipper-owned cars. On rail-owned cars, the demurrage clock would not resume until actual placement.

The Demurrage Clock Continues to Run on Non-Service Days

I understand that Finch asserts that CP should not be allowed to charge demurrage on days on which CP does not provide scheduled service. Under Finch's theory, regardless of how many days Finch chooses to let the car sit in CP's yard before ordering the car in for placement, CP can charge demurrage only for Mondays, Wednesdays, and Fridays, the days that CP provides scheduled rail service to Finch. So, if a car was constructively placed on a Monday and Finch waited until the following Monday to order the car in, under Finch's theory, CP could charge demurrage for just two days (the intervening Wednesday and Friday) although Finch chose to let the car sit in CP's yard for a full week.

Finch's theory is contrary to CP's Tariff 2 and its long standing application of Tariff 2, including to Finch. Under Tariff 2, the demurrage clock does not pause or stop until the customer orders the car for placement. No credit is given for intervening days on which CP does not serve a customer. Thus, CP charges for each day between Constructive Placement and an Order for Placement, regardless of whether CP serves a customer on the intervening day(s).

This practice is reasonable as the shipper incurs demurrage only for days in which the car is not actually placed due to the shipper's inability to accept the car, and not due to the railroad's inability to bring the car in. The demurrage clock starts only after a service day, i.e., after the customer has been provided an opportunity to order the car in. The shipper does not need to wait until a service day to stop or pause the clock, but can do so by submitting its Order for Placement, regardless of whether CP provides service on the day the order is submitted.

Further, Finch's theory would undermine the effectiveness of the demurrage programs of CP, and other railroads. It would fail to compensate adequately the railroads for the use of their assets and significantly reduce the incentive on the customers to order in and release cars.

I am familiar with other railroad demurrage programs. CP's Tariff 2 and its implementation of the Tariff, including charging demurrage on non-service days is consistent with the rest of the rail industry. Conversely, Finch's theory of demurrage is inconsistent with other railroads' demurrage programs and the statutory requirement that railroads charge demurrage.

CP's Demurrage Rate for TIH is Reasonable

I understand that Finch is challenging the \$1,500 demurrage rate for TIH cars as unreasonable based on Finch's assertion that the actual per day car cost to CP is substantially less. Finch, however, fails to take into account three important factors. First, CP incurs additional costs when a TIH car is held on its tracks. Unlike non-TIH cars, as discussed above TIH cars must be secured and inspected which results in additional costs that Finch ignores.

Second, Finch ignores the increased risk associated with TIH. As discussed above, that risk is not merely academic as demonstrated by a leaking Finch-bound anhydrous ammonia car that was sitting in Fort Edward Yard. The leak reportedly hospitalized dozens, prompted evacuation of hundreds of local residents and disrupted rail operations for several days, all at significant cost to CP and the surrounding community. Finch fails to consider the costs associated with this risk.

Third, Finch fails to consider this risk in terms of its impact on customer behavior. Given the substantial risks associated with TIH, all other things being equal, a customer has an incentive to leave the risk with CP as long as possible. Accordingly, to be effective, the demurrage rate on TIH must be set at a rate that is sufficient to create an incentive for the customer to assume the risks as soon as possible. If the demurrage rate is set too low, the shipper may opt to pay the charge and have CP bear the risks of storing the car until the car is needed.

Further, CP's TIH demurrage rate compares favorably with those of other Class I railroads. For example, UP imposes on loaded TIH cars, "a charge of **\$5,000** per railcar per 24 hour period, or fraction thereof, from the time that the railcar is first available for delivery until the railcar is placed at the billed destination facility." UP 6004, General Rule Item 130. KCS charges \$2,500 while CN charges \$2,000 per day. KCS 6000-F, Item 75, CN 9000-Y, Item 9250. BNSF charges a "daily fee of \$1,500 for the first chargeable day and \$2,500 per subsequent chargeable days." This fee is in addition to demurrage charges, and commences the first hour after notification of constructive placement. BNSF Demurrage Book 6004-C, Section 3. CSX charges \$1,500 per day applicable to all loaded hazmat cars, not just TIH. CSX 8100 Section 2. NS charges \$1,000 per day demurrage on loaded TIH cars. NS 6004-D, Item 1012.

CP Does Not Consider PTC Funding Needs in Establishing Demurrage Rates

I also understand that Finch asserts that CP set its TIH demurrage rate in order to provide revenue to fund Positive Train Control ("PTC") implementation. This assertion is both baseless and wrong. CP's PTC budget is in no way tied to demurrage revenue. Likewise, CP's TIH demurrage rates are not set based on PTC costs.

Indeed, charging high demurrage rates would be a poor way of funding PTC. High rates should incent customers to avoid incurring demurrage, resulting in decreasing demurrage revenue. It should also be noted that CP's PTC costs far exceed by several orders of magnitude revenues derived from CP's TIH demurrage program.

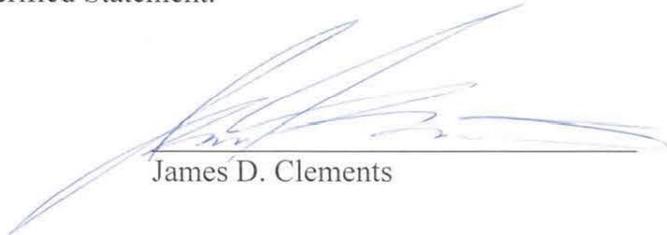
Termination of the Finch Lease Track

As discussed above, in recent years CP has focused on velocity by, in part, by improving yard and system fluidity. Prior to 2012, CP had entered into several agreements with customers for the lease of yard and other track to store cars, including with Finch for the lease of CP yard

tracks in Fort Edwards. As a result of such lease agreements, these tracks were generally not available for rail operations and negatively impacted fluidity and capacity. In 2010, as part of a system-wide effort to reduce liability, CP prohibited Finch's use of the lease tracks to hold TIH. Then, in 2012, as part of an effort to free-up CP's tracks for rail operations, CP decided to cancel storage track leases system-wide. Accordingly, in May 2012, CP notified Finch that it was exercising its right to terminate the storage track lease.

VERIFICATION

I, James D. Clements, verify under penalty of perjury under the laws of the United States that the foregoing Verified Statement is true and correct. Further, I certify that I am qualified and authorized to sponsor this Verified Statement.



James D. Clements

September 22, 2016

ATTACHMENT 1

The New York Times

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September 1, 2000

Ammonia Leak Keeps Upstate Residents From Their Homes

FORT EDWARD, N.Y., Aug. 31— For the third night in a row, more than 800 residents of this small factory town on the Hudson River were unable to go home today, evacuated because a tanker train car in a nearby rail yard was leaking ammonia gas.

The rail car, bound for a paper mill, began leaking anhydrous ammonia vapor through a faulty gasket Tuesday night. Though emergency crews have transferred most of the gas to another car, the evacuees -- more than a quarter of Fort Edward's 3,000 residents -- were told today that it was still not safe to return, Firefighter Mark Brockaway said.

And the downtown of Fort Edward, about 43 miles north of Albany, remained off limits to the public except for through traffic.

"Basically, I'm trying to get my family back in the house," said Arvid O'Connell, who was also rousted from his home in a low-lying part of town, where the gas accumulated. He was staying with in-laws in a neighborhood on higher ground.

"We were more or less at the mercy of the wind," said Mr. O'Connell, standing near Fort Edward High School, command center for dozens of police officers, firefighters and other emergency workers, reporters, and local, state and federal officials. "First they moved us to the firehouse and then up here."

At 11:06 p.m. Tuesday, two men saw and smelled the ammonia leaking from the top of a tanker car just east of downtown, said Max Fruchter, a spokesman for the Fort Edward Fire Department. The leak was in a gasket in a bell-shaped compartment that serves as an emergency valve, akin to that on a pressure cooker.

Firefighters arrived five minutes later, followed by Washington County emergency workers, 9 other fire companies, 17 ambulances and more than 100 volunteers to help evacuate people.

About 60 people were treated at hospitals, mostly children whose asthma was worsened by stress or older people with medical conditions. Mr. Fruchter said one elderly person was injured by inhaling the ammonia vapor and was likely to be released soon.

A section of the Champlain Barge Canal was still closed today, and Amtrak trains to Montreal, which run through here, were being stopped in Albany, where passengers switched to buses.

Most evacuees moved in with relatives and friends, and 150 stayed at the high school overnight before finding other quarters.

By today, about 25 remained in another shelter at the Hudson Falls High School.

At 10 this morning, a team from the Findlay, Ohio, offices of the International Technologies Corporation, hired by the federal Environmental Protection Agency, hooked a hose to the rail car and began transferring the gas to another tanker.

The original tanker had a capacity of 30,000 gallons, roughly equivalent to that of three tractor-trailers, Mr. Fruchter said.

The tanker car from Canadian Terra International had been in the rail yard, operated by a division of Canadian Pacific Railway, since Aug. 17, said Michel Spenard, a spokesman for the railway. The ammonia was being taken to the Finch, Pruyn & Company paper mill in Glens Falls, N.Y.

The mill uses anhydrous ammonia to break down wood fiber during its conversion to paper pulp.

The ammonia can be smelled at 2 parts per million, tolerated without protection at up to 25 parts per million and is an immediate danger to humans at 300 parts per million, said Jeff Bechtel, a hazardous materials coordinator for the E.P.A. On Wednesday night, he said, readings ranged from 105 parts per million at the tanker to 35 in the rail yard, to 5 to 10 at the high school.

The hurried evacuation caused some unexpected problems. Many had to leave their pets behind. The Society for the Prevention of Cruelty to Animals of Upstate New York helped retrieve 100 pets.

Others forgot their pills. Donald Bentley, 72, was given help in fetching his 19 medications. He and his wife, Roberta, 57, stayed Tuesday night with her mother in Rutland, Vt., 50 miles away, and then at a motel.

"I'm supposed to go to work tomorrow, but what am I going to do about these clothes, which I've been wearing for three days?" Mrs. Bentley asked, clutching her toy Pekingese, Mayli.

Map of New York shows the location of Fort Edward: Residents left Fort Edward after a rail car began leaking ammonia.

PUBLIC VERSION
BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket FD 35981

PETITION FOR DECLARATORY ORDER – FINCH PAPER LLC

VERIFIED STATEMENT OF GEORGE NEWELL

1. My name is George Newell. I am submitting this Verified Statement in support of CP's Reply to the Opening Statement of Finch Paper LLC ("Finch"), filed in the above-captioned proceeding pending before the Surface Transportation Board (the "Board" or "STB").

2. I am employed by the Delaware and Hudson Railway Company d/b/a Canadian Pacific ("CP") as a Trainmaster with responsibility for the area that includes Glens Falls, New York. My office is in Saratoga Springs, NY. I joined CP in 2011 as a yardmaster in Binghamton, NY. I have been in my current position since October 2013. In my position as Trainmaster, I supervise the crews that switch railcars in and out of the Finch property in Glens Falls. I have visited the Finch property and have personal knowledge of the layout of the tracks located on the Finch property.

3. The purpose of my statement is to provide the Board with an overview of CP's rail service to Finch, and the factors that have affected that service in the last few years, including the track outage that began in April 2014 and lasted through mid-August 2014, and the severe weather in early 2015.

4. The Finch property is located on the end of CP's Coolidge Branch line ("CP Line"). The CP Line terminates inside the gate of the Finch property. It enters from the east and terminates near the west end of the Finch property. Finch owns several side tracks that branch off of the CP Line. There are approximately 21 railcar positions (depending on the size of the railcars) located on the Finch property that Finch can use for the unloading or storage of railcars. Of these 21 positions, 6 can only be used for storage.

5. Based on my experience, if all railcar positions on the Finch property are in good order, it is feasible for Finch to receive up to 12 to 15 cars per switch, which is more than the number of cars that Finch typically orders in a switch. I understand that Finch's regular weekly volume during the relevant time period has averaged less than [] cars. CP is typically able to handle all of Finch's weekly volumes in three switches. CP provides additional service as needed or on special request.

6. Finch does not currently have the ability to switch cars itself within its plant. It relies on CP to move cars from its storage track to its unloading track. It is my understanding that a primary reason that Finch wants CP to provide more frequent rail service is in order to perform this intra-plant switching. Based on conversations with Finch employees, it is my understanding that Finch considered obtaining equipment to conduct switching at its plant, but decided against it because Finch did not want to assume any resulting liability.

7. I am aware of CP efforts to sell Finch the portion of the CP Line inside its gate as well as property outside its gate on which side track could be placed. Either of these options would expand Finch's rail car capacity. Finch has refused to purchase the property.

8. I understand that Finch claims that the facts that CP's crews sometimes ran out of time before they either serviced Finch or before completing switching at Finch shows that CP did

not have sufficient crews. This is not correct. There are many variables that can affect how long it takes a crew to perform assignments. Severe weather, yard and mainline congestion, track and equipment issues, and derailments are all examples of issues that affect a crew's ability to complete its assignment within the federal hours of service limitation. Often crews are delayed because the customer is not prepared for rail service. For example, there have been several instances in which CP crews arrived at Finch to find that the tracks and switches were covered in ice, snow or other debris, that Finch had failed to ready a car to be pulled, and/or that the gate was locked. With very few exceptions, whenever a crew expired before completing its assignment at Finch, CP sent a recovery crew within hours to complete the job.

9. CP has sufficient crew and equipment to provide consistent and reliable rail service to Finch. There was a brief period of time beginning in early 2015 when the crew pool used to service Finch was below its normal complement. This was due to unexpected departures of several crew members, some of whom were hired away by other railroads, including Amtrak. CP promptly hired and trained a new class of crew members. In the meantime, CP brought in a switch job that operated out of Plattsburgh, NY to fill in as needed. During this time, however, the primary issue affecting service to Finch was the harsh weather.

10. During the winter and spring of 2015, the Northeast was hit with particularly harsh winter weather. Successive heavy snow storms caused significant problems beginning in January and lasting late into the spring. Waist deep snows in CP's yards and at customer facilities, ice, snow and debris on track, and frozen switches, delayed service and caused derailments and equipment failures.

11. I understand that Finch alleges that there were instances in which CP did not deliver cars that it ordered. In my experience, Finch often misreported that it had not received

cars that CP had delivered. Several times, I personally drove out to the Finch facility and confirmed that the cars which Finch claimed to be missing were actually on Finch's property.

12. On April 24, 2014, I participated in an inspection of the spur tracks located on the Finch property with the CP Roadmaster, Jason Blanchfield. Finch is responsible for the condition of these tracks, and a representative of Finch, Richard Petro, accompanied us on this inspection. CP determined that a number of the Finch tracks were out of compliance with safety standards and posed a major risk to persons and property. The non-compliant tracks were taken out of service immediately. As a consequence, there were 13 fewer positions available on the Finch property for the unloading or storage of railcars. Most of the positions remained out of service until August 13, 2014 when Finch completed the necessary repairs. During this time, Finch did not seek my assistance in locating material or a qualified contractor.

13. During the track outage, Finch ordered in all of the cars carrying anhydrous ammonia, which is a Toxic Inhalation Hazard (TIH), by car number to specific spots. Finch did not have spots available for CP to place anhydrous ammonia cars, other than the cars that Finch specifically ordered in. Had CP brought cars out to Finch that could not be placed, CP would have returned the cars back to its yard and charged Finch a supplemental charge for failure to place.

14. Also, during the track outage, Finch let several cars, including TIH cars, sit in CP's Fort Edward yard for weeks and even months before ordering them in. These cars consumed track space and made it more difficult to perform switching operations in the yard. CP was required to take extra precautions to inspect, secure and monitor the TIH cars while they sat in the yard. These activities consume crew time that is normally used for rail operations.

Because of the dangers associated with TIH, as well as the impact on rail operations, it is in CP's interest to deliver TIH cars to the customer as quickly as possible.

VERIFICATION

I, George Newell, verify 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.


George Newell

September 20, 2016

PUBLIC VERSION
BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket FD 35981

PETITION FOR DECLARATORY ORDER – FINCH PAPER LLC

VERIFIED STATEMENT OF JASON BLANCHFIELD

1. My name is Jason Blanchfield. I am submitting this Verified Statement in support of CP's Reply to the Opening Statement of Finch Paper LLC ("Finch"), filed in the above-captioned proceeding pending before the Surface Transportation Board (the "Board" or "STB").

2. I am employed by the Delaware and Hudson Railway Company d/b/a Canadian Pacific ("CP") as a Roadmaster. My territory includes Glens Falls, New York. I have been in the position of Roadmaster since 2012 and I have been with CP for more than 10 years. Prior to being a Roadmaster, my prior positions with CP have included Track Supervisor, Track Foreman, and Track Welder.

3. I am a FRA qualified track inspector. I have also attended regular training, including derailment school, Continuous Welded Rail (CWR) training, fault protection training, and other internal CP training classes.

4. As a CP Roadmaster, I am responsible for track maintenance in my subdivision, including the rail tracks, rail ties, spikes, and switches. My responsibilities include overseeing inspections of CP owned rail track. This includes the twice-weekly inspections of the main line track, the weekly inspections of tracks on the Coolidge Branch line (which terminates inside

Finch's gate), and the monthly inspections of tracks in CP's Fort Edward rail yard. If repairs are needed, I typically coordinate those repairs and follow up to see that the repairs have been made.

5. As the CP Roadmaster with responsibility for the area that includes Glens Falls, New York, I am familiar with the Finch facility and have personal knowledge of the layout of the rail tracks on the Finch property, including the tracks owned by Finch. Among other hazardous materials, anhydrous ammonia, which is a Toxic Inhalation Hazard (TIH), is carried in rail cars on the tracks at the Finch property.

6. It is Finch's responsibility to inspect and maintain the rail tracks it owns. CP has a policy to inspect its customers' tracks twice yearly. CP crews and its trainmaster also observe its customer facilities to ensure that tracks are clear of debris, tripping and other obvious safety hazards, but those observations are not a substitute for a track inspection. Moreover, neither the visual observations made by CP nor the semi-annual track inspections conducted by CP relieve Finch of its obligation to conduct its own regular track inspections.

7. Consistent with CP's policy, I conducted a Spring inspection of the tracks at the Finch property on April 24, 2014. George Newell, the local trainmaster from CP, was also present for the April 24, 2014 inspection. During the inspection, we were accompanied by Richard Petro, the maintenance manager for the pulp mill at Finch's Facility. That inspection included measuring track gauge, inspecting ties, and looking for loose bolts, braces, angle bars, and tracks. I also checked switches to make sure that they functioned properly. It is the same type of inspection that I have made on tracks owned by CP.

8. The April 24, 2014 inspection revealed several major defects including track gauge width issues (*i.e.*, either too wide or too narrow), bad ties and bad tie conditions, including ties which were not properly anchored in stable ground, and an inoperable switch. A copy of the

Customer Audit Safety Form for the April 24, 2014 inspection is attached as Attachment 1, which lists 5 distinct items: “chlorine track wide gauge”; “pulp dock and #6 switch wide gauge”; “paper dock on hill (run around track north end), bad tie condition”; “3A narrow gauge”; “paper dock south end switch, can’t throw”.

9. That the Spring inspection, which followed an abnormally snowy and cold winter, revealed several issues should not have surprised Finch. Extreme temperature changes cause track to expand and contract which can wreak havoc on track integrity. Similarly, ice can be particularly destructive and create bad tie and gauge issues. Additionally, previously I had cautioned Finch that storing longer rail cars on Finch’s track, including a curved section of track, would subject the rail to greater forces. The increased forces would, over time, cause the track gauge, including the “chlorine track,” to widen beyond the acceptable limits.

10. As a result of the April 24, 2014 inspection, I concluded that the defects made Finch’s track unsafe for continued operation. This conclusion was based on my training and experience as a FRA qualified inspector, and my experience in the rail industry. Indeed, common causes of a derailment include issues with non-compliant track gauge width and bad rail tie conditions. Thus, repairs were necessary before CP would be able to provide safely rail service to Finch, particularly since these tracks were used to carry and store rail cars carrying TIH and other hazardous materials.

11. Although Finch repaired the “pulp dock and #6 switch wide gauge” by early May 2014, the remaining issues were not repaired for several weeks and in some cases not until August 2014. I do not recall Finch seeking my assistance in locating either materials or a contractor during that time in an attempt to complete those necessary repairs in a timelier manner.

12. Lastly, I understand that in July 2013, Finch's contractor advised Finch that a section of its track was [] but I do not recall Finch notifying me at that time of Finch's contractor's findings.

VERIFICATION

I, Jason Blanchfield, verify 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.



Jason Blanchfield

September 22, 2016

ATTACHMENT 1

CANADIAN
PACIFIC

CUSTOMER SAFETY AUDIT FORM

Date of Current Audit: 4-24-14
 Inspected By: jason blanchfield / george newell
 Date of Last Audit:
 Location: finch prynn paper
 Customer Name: coolidge branch
 Customer Contact Name and Phone Number: Rick Hogan 361-1835/ Dick Petro 361-6316

Green Status Yellow Status Red Status

Green Status - Indicate all CP practices/standards met. No further action required.

Yellow Status - Indicate partial compliance with CP practice/standards.

- Risk Level B or C exist (see table below).

- The CP Manager will be contacting your facility to follow up on required actions

Red Status - Indicates non compliance with CP practice/standards.

- Risk Level A exists.

- CP Customer Service Operations (CSO) Center will be notified and service maybe suspended immediately.

- CP Customer Service Representative will be contacting your general office.

- CP Manager will contacting your facility to follow up on required actions.

Item (YY-MM-###)	Brief Description	Risk Level	Who	Action to be Taken / Update	Due Date	Completion Date
14-04-24	chlorine track wide gauge	A		oos		
14-04-24	pulp dock and #6 switch wide gauge	A		oos. put back inservice. temp. repairs have been made.		week of may 5th. inspected by stev brooks. put inservice+
14-04-24	paper dock on hill (run around track north end), bad tie condition	A		oos. put back inservice. All ties have been replaced		14-28-07
14-04-24	3A narrow gauge	A		oos		
14-04-24	paper dock south end switch, can't throw	A		oos. new sw. to be installed		

Risk Level

A Major: a condition or practice likely to cause permanent disability, loss of life or body part and/or extensive loss of structure, equipment or material.

B Serious: a condition or practice likely to cause serious injury or illness resulting in temporary disability or property damage that is disruptive but not extensive.

C Minor: a condition or practice likely to cause non-disabling injury or illness or non-disruptive property damage.



Track Conditions

Switches: # chloline Comments wide gauge
 & Derails # pulp dock Comments wide gauge
 # run around, part Comments bad tie condition
 # 3a Comments narrow gauge
 # paper dock sort Comments can't throw sw.

Walkways: _____ Comments _____
 _____ Comments _____

Clearance Issues: _____ Restricted Clearance Signs Visible
 Other Conditions: _____ Derail Signs Visible

Weed Control: Good Fair Poor Comments _____
 Spillage on Tracks: Yes No Comments _____

Track # _____	Tie Condition: <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor Comments _____ Cross Level & Alignment: <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor Comments _____ Rail Condition: <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor Comments _____	Track # _____	Tie Condition: <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor Comments _____ Cross Level & Alignment: <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor Comments _____ Rail Condition: <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor Comments _____
Track # _____	Tie Condition: <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor Comments _____ Cross Level & Alignment: <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor Comments _____ Rail Condition: <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor Comments _____	Track # _____	Tie Condition: <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor Comments _____ Cross Level & Alignment: <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor Comments _____ Rail Condition: <input type="checkbox"/> Good <input type="checkbox"/> Fair <input type="checkbox"/> Poor Comments _____

Customer track inspection completed monthly Track Protection procedures used appropriately Blue Flag or equivalent is visible from occupied track Blue Flag or equivalent is in good condition (i.e. not rusty, muddy, or covered in grease, etc.)

Equipment Securement

Track _____: # Cars _____ # Car/HB _____ Required # Car/HB _____ Secured Low End: <input type="checkbox"/> Yes <input type="checkbox"/> No Properly Coupled: <input type="checkbox"/> Yes <input type="checkbox"/> No Near Derail: <input type="checkbox"/> Yes <input type="checkbox"/> No
Track _____: # Cars _____ # Car/HB _____ Required # Car/HB _____ Secured Low End: <input type="checkbox"/> Yes <input type="checkbox"/> No Properly Coupled: <input type="checkbox"/> Yes <input type="checkbox"/> No Near Derail: <input type="checkbox"/> Yes <input type="checkbox"/> No
Track _____: # Cars _____ # Car/HB _____ Required # Car/HB _____ Secured Low End: <input type="checkbox"/> Yes <input type="checkbox"/> No Properly Coupled: <input type="checkbox"/> Yes <input type="checkbox"/> No Near Derail: <input type="checkbox"/> Yes <input type="checkbox"/> No
Track _____: # Cars _____ # Car/HB _____ Required # Car/HB _____ Secured Low End: <input type="checkbox"/> Yes <input type="checkbox"/> No Properly Coupled: <input type="checkbox"/> Yes <input type="checkbox"/> No Near Derail: <input type="checkbox"/> Yes <input type="checkbox"/> No

Approved Equipment Handling Process: Yes No Type _____

Comments: _____

Snow & Ice Conditions

Walkways/Crossings/Flangeways

Switches # _____ Clean & Operable: <input type="checkbox"/> Yes <input type="checkbox"/> No # _____ Clean & Operable: <input type="checkbox"/> Yes <input type="checkbox"/> No # _____ Clean & Operable: <input type="checkbox"/> Yes <input type="checkbox"/> No # _____ Clean & Operable: <input type="checkbox"/> Yes <input type="checkbox"/> No # _____ Clean & Operable: <input type="checkbox"/> Yes <input type="checkbox"/> No # _____ Clean & Operable: <input type="checkbox"/> Yes <input type="checkbox"/> No # _____ Clean & Operable: <input type="checkbox"/> Yes <input type="checkbox"/> No # _____ Clean & Operable: <input type="checkbox"/> Yes <input type="checkbox"/> No # _____ Clean & Operable: <input type="checkbox"/> Yes <input type="checkbox"/> No	Derails # _____ Clean & Operable: <input type="checkbox"/> Yes <input type="checkbox"/> No # _____ Clean & Operable: <input type="checkbox"/> Yes <input type="checkbox"/> No # _____ Clean & Operable: <input type="checkbox"/> Yes <input type="checkbox"/> No # _____ Clean & Operable: <input type="checkbox"/> Yes <input type="checkbox"/> No # _____ Clean & Operable: <input type="checkbox"/> Yes <input type="checkbox"/> No # _____ Clean & Operable: <input type="checkbox"/> Yes <input type="checkbox"/> No # _____ Clean & Operable: <input type="checkbox"/> Yes <input type="checkbox"/> No # _____ Clean & Operable: <input type="checkbox"/> Yes <input type="checkbox"/> No # _____ Clean & Operable: <input type="checkbox"/> Yes <input type="checkbox"/> No	_____ Cleared of Ice & Snow <input type="checkbox"/> Yes <input type="checkbox"/> No _____ Salt/Sand Dispensed <input type="checkbox"/> Yes <input type="checkbox"/> No _____ Cleared of Ice & Snow <input type="checkbox"/> Yes <input type="checkbox"/> No _____ Salt/Sand Dispensed <input type="checkbox"/> Yes <input type="checkbox"/> No _____ Cleared of Ice & Snow <input type="checkbox"/> Yes <input type="checkbox"/> No _____ Salt/Sand Dispensed <input type="checkbox"/> Yes <input type="checkbox"/> No _____ Cleared of Ice & Snow <input type="checkbox"/> Yes <input type="checkbox"/> No _____ Salt/Sand Dispensed <input type="checkbox"/> Yes <input type="checkbox"/> No Other: _____ Comments: _____
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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 CHARLES H. BANKS AND JOHN D. IRELAND

We are Charles H. Banks and John D. Ireland, the President and an associate at R.L. Banks & Associates (RLBA), a consulting firm entirely focused on rail related subjects, based in Arlington, VA. Founded in 1956, RLBA is a multidisciplinary firm providing economic, engineering and operational counsel to freight railroads, passenger railroads and governmental organizations. RLBA features more than 60 years of experience providing expert economic, analytical, valuation and litigation support services to a nationwide group of clients representing every principal segment of the economy, including shippers, railroads, governmental entities and financial institutions. Since RLBA's inception, the firm has submitted statements in a variety of proceedings before the Surface Transportation Board.

Charles H. Banks. Charles H. Banks, RLBA President, oversees and directs the firm's litigation and all other analytical efforts. Since joining RLBA in 1985, Mr. Banks has focused on railroad negotiations, strategic planning and evaluating the economics of financing the acquisition, expansion and rehabilitation of numerous short line and regional railroads, often assessing their potential viability as part of due diligence studies performed by the firm. Mr. Banks enjoys significant experience regarding railroad litigation in a variety of judicial venues, including the US Supreme Court. He earned a BA in Economics from Haverford College and an

MBA from the University of Pennsylvania, Wharton School of Business. In this assignment, Mr. Banks oversaw the analysis of Finch and CP-provided data, as well as addressed issues regarding damages. A more extensive treatment of the applicable qualifications of Mr. Banks is included in the Statement at Appendix 1.

John D. Ireland. Since joining RLBA in 2014 as a Project Manager, Mr. Ireland has been involved in numerous freight and passenger railroad operations and economics assignments on behalf of a variety of shipper and railroad clients. He has provided expert railroad operations analysis on behalf of numerous clients engaged in proceedings before the Board, ranging from major rail shippers to Class I railroads. He is a graduate of Carnegie Mellon University in Pittsburgh, PA. In this assignment, Mr. Ireland managed RLBA's analytics team. A more extensive treatment of the applicable qualifications of Mr. Ireland is included in the Statement at Appendix 2.

Introduction

RLBA was engaged by Stinson Leonard Street LLP, counsel to Delaware & Hudson Railway Company, d/b/a Canadian Pacific (CP), to comment on several claims advanced by Finch Paper LLC (Finch) pertaining to service provided by CP to Finch's Glen Falls, New York facility. Specifically, it is RLBA's understanding that Finch claims that: 1) CP's decision to reduce service from five to three days-a-week in October of 2012 put Finch's Glen Falls facility 'at risk' and 2) perceived issues with CP's service reliability under the adopted three day-a-week service plan resulted in a significant and involuntary increase in Finch Paper's reliance on trucks to move all inbound commodities. To determine the validity of those claims, RLBA was charged with analyzing and comparing trends in the amount of freight traffic received by Finch at the company's Glen Falls location. RLBA was instructed to focus our analysis on the period

extending between January 2012 and December 2014. To that end, RLBA reviewed information provided to it which was produced by both Finch and CP, as well as the various Verified Statements included in Finch's filing before the Board.

Additionally, RLBA was asked to review Thomas D. Crowley's Verified Statement, particularly with respect to his and Finch's calculations of its alleged damages resulting from changes in CP service. Mr. Crowley and Finch contend that CP service was inadequate throughout the period 2012-2014 and that the reduction in service level from five to three days-a-week that commenced October 2012 contributed to that inadequacy.

Comparison of Finch's Use and Costs of Rail and Trucking

RLBA reviewed the historical receipt data produced by Finch in connection with the ten commodities reportedly received at the Finch facility; Ammonia, Cationic Starch, Caustic Soda, Starch Bulk, Sulfur, Aspen Kraft, Hardwood Kraft, Purchased Recycled Pulp, Softwood Kraft and Wet Lap Kraft. Those commodities are delivered to Finch by one of two transportation modes; rail and/or truck. A railcar generally holds significantly more freight than a truck, thus RLBA determined that comparing total tonnage instead of individual delivery vehicle counts would support more robust and accurate comparisons of movements via the two modes of transportation. According to Finch's receipt data, Finch received a total of {

}

Given this understanding of Finch's inbound supply chain, RLBA first attempted to determine what, if any changes, Finch experienced in the volumes of freight received via each

mode of transportation. Given that the total volume of freight received by Finch was relatively unchanged year-to-year between 2012 and 2014, RLBA determined the ratio of freight tonnage received by rail to that by truck to determine if there were any notable trends towards shifting reliance away from one mode to another. As displayed in Table 1 and Table 2, RLBA determined that the amount of freight received by rail generally *increased* over the period of time between 2012 and 2014, a surprising outcome given the dispute between the parties to this case. Specifically, in 2012, {

¹ {

Comparison of Finch's Use of Rail and Trucking When Finch's Track Was Out-Of-Service

RLBA received additional instruction to pay particular attention to freight transportation trends during the period of time between April 24, 2014 and August 13, 2014, during which a portion of Finch's track was deemed by CP to be unfit to support CP rail service. It is one of Finch's main contentions in this proceeding that during this period, Finch was forced to increase reliance on trucks, particularly in the case of Ammonia, due to a lack of storage space at which to spot railcars at its facility. To determine the validity of that claim, RLBA analyzed the percentage of freight tonnage moved by rail during each month Finch's track was out-of-service against the three-year average of said months. As demonstrated in Table 6, while overall total freight tonnage in those months {

² Please see RLBA Appendix 3 for volume and tonnage by month of each commodity.

³ Please see footnote 2.

⁴ See footnote 2.

}

Criticisms of the Crowley Damages Calculations

At the request of Stinson Leonard Street LLP, RLBA reviewed the methodology employed in the Verified Statement of Thomas Crowley. RLBA found several serious inconsistencies with the underlying logic and assumptions in said statement. The most serious of these errors concerns Mr. Crowley's assignment of responsibility regarding his Damages calculations. Among the most important aspects of determining what, if any, damages are appropriate for a given situation is the clear determination of whom is responsible for each individual issue for which damages are being claimed. This determination is particularly important in cases involving a supply chain, in which a number of entities must work in close coordination for the process to work properly. Prolonged shortcomings, or successes for that matter, in the shipper/railroad relationship are rarely, if ever, solely the result of the actions of one party and one party only.

This real world, interconnected relationship is all but completely ignored in Mr. Crowley's and Finch's damages. Both calculations suffer from the fatal flaw of assuming that every truck load of material received above and beyond an arbitrary baseline (defined as the first nine months of 2012) is a result solely of the actions of CP and CP alone. Neither Finch nor Crowley appear to make an attempt to determine the reasoning behind the individual truckloads being claimed as damages, they simply assign responsibility to CP.

By doing so, both Mr. Crowley and Finch are unfairly assigning responsibility to CP for a number of instances outside the control of CP, such as extreme winter weather⁵, a derailment elsewhere on the system⁶, or failures of other railroads to deliver cars bound to Finch to interchange with CP in a timely fashion⁷. What's more, Mr. Crowley's and Finch's methodology ignores instances in which cars were delayed due, at least in part, to the actions of Finch. Successful rail service is only achieved through cooperation between the shipper and the railroad. CP data suggest that Finch did not always meet its contributions to that cooperative effort; CP's records list multiple instances of Finch's switches being frozen over⁸, Finch not releasing cars in a timely manner⁹ or Finch's track being unfit to receive cars over prolonged periods of time¹⁰.

⁵ CP provides numerous examples of weather-related service interruptions, particularly in the Winters of 2014 and 2015.

⁶ As one example, CP reported that the April 7, 2014 crew was not able to perform the Finch switch due to a derailment.

⁷ As one example, CP reported that in February, the delivery of several ammonia cars was delayed before interchange by CN.

⁸ As one example, CP reported that on February 12 and February 14, 2014, Finch's switches were frozen over and could not be operated. Maintenance of said switches are the responsibility of Finch.

⁹ As one example, CP reported that on July 23, 2014, Finch released two cars however the cars were still loaded and could not be pulled.

¹⁰ As previously discussed, some of Finch's tracks were deemed unfit for service by CP between April 24 and August 13, 2014.

What's more, in several of instances in which Mr. Crowley assigns responsibility to CP, Finch has, to this point, not provided any evidence that alternate transportation was arranged as a result of the actions of CP. As example, while several of the Finch's Verified Statements detail the situation and circumstances surrounding the decision to order {

,} yet Mr. Crowley nor Finch appear to have made any attempt to determine the circumstances which resulted in the decision to order such volumes by truck. Mr. Crowley's and Finch's effort to assign responsibility appears so incomplete, that in light of the trends discovered in RLBA analysis of the traffic (discussed above), we question if it is even appropriate for Finch to suggest that it is entitled to damages at all.

The inability of Mr. Crowley and Finch to acknowledge other external factors beyond CP manifests itself throughout Mr. Crowley's and Finch's calculations. As previously discussed, Mr. Crowley's flawed attempts at establishing damages are largely centered around the development and application of a baseline, defined by Mr. Crowley as the first nine months of 2012 (the final nine months of five day-a-week service to Finch)¹¹. This baseline was then paired with selected other figures and averages in an effort to determine damages amounts

¹¹ {

associated with the various issues which Mr. Crowley and Finch erroneously assigned entirely to CP. Not only is the concept of using a baseline in this manner to establish damages flawed but RLBA finds that the methodology used to define said baseline is itself based on flawed logic. Just as Mr. Crowley and Finch failed to realize that other factors besides CP might have influenced Finch's decision to move certain commodities by truck at certain times, they also have failed to acknowledge or account for real world factors other than CP in the establishment of their baseline.

Case in point; in his determination of supposed damages associated with supplier demurrage costs, Mr. Crowley determined the baseline to be the average monthly demurrage paid by Finch to suppliers in connection with trucked-in deliveries over the first nine months of 2012. Mr. Crowley and Finch both accepted this average "as is" however as shown in Table 8, a closer review of the monthly demurrage suggests that there are several serious outliers.

Table 8

{

} These figures appear to directly contradict Mr. Crowley's and Finch's assertions that truck supplier demurrage charges are directly correlated to perceived deficiency in CP rail freight service.

Mr. Crowley and Finch ignored additional abnormalities in their demurrage calculations. Specifically, {

} Neither Mr. Crowley nor Finch provides any explanation of this significant change. The fact that CP provided five day-a-week service during both 2011 and the first nine months of 2012 suggests that changes in supplier demurrage do not necessarily correlate at all to frequency of rail service but are influenced by other, undisclosed factors. Further, Crowley's and Finch's use of the 2012 period suggests cherry picking of the base period.

Conclusion

In summary, after reviewing the raw data produced by Finch, the summary data produced by CP and the Verified Statement of Thomas Crowley, RLBA reached the following conclusions regarding Finch's inbound freight transportation of commodities and CP's service to Finch:

- 1) Finch received a larger percentage of freight by rail after the implementation of three day-a-week service by CP than before, indicating satisfaction with rail service, this and other complaints notwithstanding;
- 2) The two commodities which saw a significant shift away from rail enjoyed a lower reported price per ton when shipped via truck than rail;
- 3) The percentage of freight received by rail at Finch's Glen Falls facility was relatively unaffected by the prolonged track outage in 2014 and
- 4) Mr. Crowley's methodology of establishing a baseline trucking cost amount, followed by assigning all trucking cost above said baseline to CP without considering the individual circumstances of each instance, is fatally flawed and should be rejected in its entirety.

VERIFICATION

We, Charles H. Banks and John D. Ireland, verify under penalty of perjury that the foregoing is true and correct. Further, we certify that we are qualified and authorized to sponsor this Verified Statement.


Charles H. Banks

September 22, 2016


John D. Ireland

September 22, 2016

Verified Statement of Charles H. Banks & John D. Ireland

Appendix 1

Charles H. Banks

President

Education

MBA, University of Pennsylvania, Wharton School of Business, 1977

BA Economics, Haverford College, 1974

Professional Affiliations

Transportation Research Forum

Transportation Research Board Committee on Commuter Rail Transportation, AP070

American Society of Civil Engineers

ENO Center for Transportation, Board of Advisors, 2011

Years of Transportation Experience

40

Qualifications

Since joining RLBA in 1985, Mr. Banks has focused on railroad negotiations strategic planning and evaluating the economics of financing the acquisition, expansion and rehabilitation of numerous short line and regional railroads, often assessing their potential viability as part of due diligence studies performed by the firm. He has examined the competitive economics of continued or proposed unit coal train movements to utilities and industrial customers on many rail lines. When evaluating intermodal and intramodal transport competition and other modal choices, Mr. Banks has interviewed hundreds of the largest existing and prospective rail customers on the I&M Rail Link, Wisconsin Central Ltd., Iowa Interstate Railroad, Dakota, Minnesota & Eastern Railroad and more than a dozen other enterprises as well as many large industrial customers served by Class I railroads.

Relevant Project Experience

- ***The Oregon International Port of Coos Bay*** Interviewed representatives of all major shippers on the rail line between the Port and Eugene to ascertain: 1) historical rail traffic volumes and shipper requirements so as to develop future railroad freight traffic projections; 2) determine how much more it was costing shippers to ship by a combination of a truck and rail than an all-rail haul and 3) how volume might change in the future as part of a Feeder Line Application to the Surface Transportation Board to acquire the line owned and operated by a Rail America subsidiary, Central Oregon and Pacific Railroad Inc. Prepared a Verified Statement concerning going concern value, a Joint Verified Statement concerning rail service implementation, initial service, rehabilitation, infrastructure maintenance renewal and operational structure and a Supplemental Verified Statement pertaining to service startup and mobilizing the rail operator.
- ***PYCO Industries*** Directed RLBA's participation through development and submission of testimony in support of an STB feeder line application to acquire certain South Plains Switching, Ltd. Co. (SAW) rail lines serving multiple customers in Lubbock, Texas by PYCO Industries, the largest cottonseed cooperative in the southeastern United States. Developed going concern values of three, alternative rail asset transfer scenarios as well as analyzing historical, existing and future traffic volumes. Provided four Verified Statements illustrating financial analyses of current and future rail operation viability and going concern values, considering potential rehabilitation costs to cure years of deferred maintenance. Written testimony included rebuttal statements to differing opinions offered by witnesses on behalf of SAW and a competing feeder line applicant.

Charles H. Banks

- **Riverside County Transportation Commission (RCTC)** Testified on behalf of RCTC in connection with a dispute between the Commission and BNSF concerning the parties' alternative interpretations of signed agreements governing RCTC's right to run additional commuter trains in exchange for making capital improvements. Specifically, estimated the damages to RCTC resulting from not being allowed to operate its desired number of trains in terms of: 1) denied access to commuter trains actually operated beyond the limits of the disputed segment; 2) capital improvements funded by RCTC to permit operation of the disputed trains and 3) parking lot expansion costs incurred at the Riverside Station resulting from rail passengers from the San Bernardino area driving to Riverside Station because of the constrained service to the San Bernardino Station.
- **Inspiration Consolidated Copper Company** Rebutted Southern Pacific Transportation Company's application to abandon its Globe Branch, which economic justification rested on poor prospects for continued movement of copper concentrate in unit trains across the branch. Since train service on the branch did not extend beyond the main line junction, the financial analysis was tantamount to a short line viability determination. The ICC rejected the railroad's abandonment initiative.
- **Virginia Railway Express (VRE)** Managed RLBA's provision of on-call Economic and Operations Consulting Services. Led several railroad right-of-way Alternative Access Arrangement Seminars examining the economics of acquiring the Norfolk Southern rail line over which some VRE trains operate and analyzed the economics of various types of coaches deployed in U.S. commuter rail services, which analysis supported the exercising of an option to acquire VRE's first bi-level coaches. Sponsored Verified and Rebuttal Verified Statements to inform the STB as to the adverse impacts on VRE service of granting the absorption of Conrail by CSXT and NS.
- **CSX Transportation** Analyzed CSX Maintenance-of-Way (MOW) costs incurred along two, separate corridors in Florida, specifically, both proposed commuter rail service on the Central Florida Commuter Rail Transit (CFCRT) corridor between Deland and Kissimmee surrounding Orlando and existing Tri-Rail commuter rail service between West Palm Beach and Miami, over the South Florida Rail Corridor. Those costs were used in part to analyze allocated costs per-mile among CSX, Amtrak and the State of Florida. CSX was is in negotiations with the State of Florida's Department of Transportation (FDOT) to determine an equitable, allocated cost per mile to maintain the subject corridors in a steady state of repair (level of utility) as necessary to support a specified level of service, in this case, FRA Class 4 track. Reviewed actual, historical cost information provided by CSX and critiqued a copy of that consultant's report based on CSX furnished data and industry experience.

Prior to joining RLBA, Mr. Banks was Manager of Capital and Rehabilitation Expenditure Analysis at the United States Railway Association (USRA), a public entity which restructured several Northeast railroads into Conrail. There, he was responsible for the analysis of all operations, capital and maintenance expenditures in the terminal area encompassing more than today's North Jersey Shored Assets Area. In Conrail's Strategic Planning Department, Charlie worked on the Strategic Investment Study commissioned by the company's Board to investigate Conrail's return on capital invested in physical plant, particularly the benefits flowing from such improvements. As part of that study, in individual day-long meetings with senior executives of six larger railroads, Mr. Banks discussed exactly how those carriers analyzed and approved track investment projects. While a member of Conrail's Finance Department, Mr. Banks analyzed dozens of rail freight investment initiatives, recommending or rejecting their progress toward Board review. Prior to Conrail, at the Bureau of Transportation Research at Southern Pacific, he completed numerous capital budgeting assignments, prepared abandonment studies and testified before California's and Oregon's Public Utilities Commissions. He also worked in the Operating and Market Research Departments of railroads subsequently acquired by Norfolk Southern, CSX Transportation and Union Pacific.

Verified Statement of Charles H. Banks & John D. Ireland

Appendix 2

John D. Ireland

Project Manager

Education

B.A., Carnegie Mellon University, Pittsburgh, PA, 2009

Years of Transportation Experience

2

Qualifications

Since joining RLBA in 2014 as a Project Manager, Mr. Ireland has been involved in numerous freight and passenger railroad operations and economics assignments on behalf of a variety of shipper and railroad clients. He has provided expert railroad operations analysis on behalf of numerous clients engaged in proceedings before the Board, ranging from major rail shippers to Class I railroads. His freight rail assignment experience covers a wide range of topics including, rail economic analysis, transaction due diligence, right-of-way valuation, hazardous material operations, railroad safety, capacity simulation and joint facility/shared used operations.

Relevant Project Experience

- **Kansas City Southern** RLBA was engaged through Baker & Miller, PLLC to consider the operational impacts to Kansas City Southern (KCS) as a result of the potential introduction of BNSF direct service into a jointly-owned (KCS and UP) segment of railroad, known as the Rosebluff Lead, in the greater Lake Charles, LA area, particularly as it concerned the movement of crude-by-rail into the CITGO Lake Charles Manufacturing Complex. In support of this task, Mr. Ireland conducted a four-day, on-site, inspection of the KCS and UP facilities in the Lake Charles area. While on site, he observed operations on KCS, UP and BNSF, as well as conducted interviews with local KCS and UP Operating Department managers. Upon completion of the inspection, he coauthored a Joint Verified Statement to be submitted before the Surface Transportation Board describing the significant negative impacts on the safety and fluidity of existing operations that would flow from granting BNSF's request to obtain Terminal Trackage Rights.
- **New England Central Railway** Project Manager of a Infrastructure Maintenance Cost Estimation Study, as well as a Value In Place Valuation of real estate and rail assets, regarding 74 miles of the New England Central Railway, a Genesee & Wyoming, Inc. subsidiary, primarily in Vermont. As Project Manager, he was responsible for the day-to-day project management, interacting with the client and subcontractors as well as final composition of the deliverables. Upon completion of the valuation, he coauthored a Joint Verified Statement which was submitted before the Surface Transportation Board, explaining the methodologies and conclusions reached in the study and valuation.
- **A&K Railroad Materials, Inc.** Coauthored a Joint Verified Statement submitted before the Surface Transportation Board discussing the Net Liquidation Value of V&S Railway's Towner Line in response to a Feeder Line Application to acquire said rail line from V&S. As part of the Feeder Line Application process, the applicants submitted an NLV advancing a significantly lower value for the Towner Line than that developed by RLBA as part of an earlier engagement. In response to the applicant's NLV, RLBA: 1) produced a new, independent NLV of the Tower Line; 2) used the results from this new NLV to confirm the validity of two earlier produced Towner Line NLVs and 3) conducted an in-depth review of the secondary railroad materials market, the results of which were used to opine on the faulty methodologies and assumptions which resulted in the applicant's NLV significantly understating the value of the railroad.

John D. Ireland

- **Consumers Energy** RLBA was engaged to simulate a 150 mile plus railroad network mirroring various CSX Transportation lines linking a connection with BNSF Railway in Chicago, IL to Consumer Energy's J.H. Campbell Generating Complex in West Olive, MI. Using Berkley Simulation Software's Rail Traffic Controller*, RLBA assessed the capacity of a hypothesized railroad network to handle current and future additional business volumes in support of a stand-alone railroad rate case dispute. Mr. Ireland tested inputs and design of the model, participated in developing track configuration and operating plan and provided analysis of the model's output.
- **Consumers Energy** As part of a larger Stand Alone Rate Case before the Surface Transportation Board, assisted in the development of a maintenance-of-way (MOW) plan for a hypothetical railroad network. The MOW work addressed both routine and program maintenance. Routine maintenance covers the largely labor-intensive, day-to-day maintenance task necessary to ensure that the track and bridge structure is available to safely host train. Program maintenance comprehends the periodic, project and/or emergency replacement of track and bridge components.
- **Total Petrochemical Inc.** Provided expert litigation assistance as a subcontractor to Total Petrochemical Inc. supporting the company's standalone rate case against CSX Transportation. Assisted in the evaluation and construction of methodologies rebutting CSX's reply evidence pertaining to yard dwell times. Drafted text presented to the Surface Transportation Board discussing various assumptions made by CSX to artificially increase dwell times and thus, associated cost, on a hypothetical standalone Total Petrochemical Railway.
- **Foulston Siefkin LLP** Conducted a three-day, on-site, inspection of the Wichita Terminal Association's (WTA) facilities and operations to determine the feasibility of constructing a permanent grade crossing to allow the commercial development of the client's 'landlocked' property. After inspection, drafted a Verified Statement submitted before the Surface Transportation Board commenting on the impact of the grade crossing to WTA's interchange operations with BNSF Railway. Drawing upon observations during the inspection and a review of WTA's records, determined that with minor alterations, operations could continue with minimal negative effect to operations or safety.
- **Confidential Client** A short line railroad engaged RLBA to assist in the preparation of a bid package to lease and assume operations of a large portion of railroad from another carrier. Mr. Ireland assisted in the initial review of the short line's existing draft, making numerous recommendations as to how to improve the package. Recommendations included adjusting proposed operations on the line to better suite interchange, adjusting unit cost to better reflect real world cost and developing realistic rates for specific commodities to ensure a fair, yet enticing revenue split between the short line and it's Class One interchange partner. The short line largely accepted all of RLBA's recommendations, eventually including a letter of recommendation from RLBA in the introduction of the final bid package.

Prior to joining RLBA, Mr. Ireland was a Surface Warfare Officer in the United States Navy, serving in various operational and engineering management and supervisory positions. He successfully led three shipboard divisions on two separate deployments to the Middle East and Southeast Asia. In addition to a lifelong interest in the railroad industry, Mr. Ireland brings expertise in management, operational planning, critical analysis and railroad operations.

Verified Statement of Charles H. Banks & John D. Ireland

Appendix 3

REDACTED

PUBLIC VERSION

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Docket FD 35981

PETITION FOR DECLARATORY ORDER – FINCH PAPER LLC

VERIFIED STATEMENT OF JASON LAVALLA

1. My name is Jason LaValla. I am submitting this verified statement in support of CP's Reply to the Opening Statement of Finch Paper LLC ("Finch"), filed in the above-captioned proceeding pending before the Surface Transportation Board.

2. I am employed by the Soo Line Railroad Company d/b/a Canadian Pacific ("CP") as Manager of Operations US. My office is in Minneapolis, Minnesota. I have been with CP since October 6, 2003, starting out as a Transportation Service Representative in Customer Service Operations. I transitioned to our Accounting Service Center in December 2007 where I worked in various roles from applying cash to collections, eventually taking the lead in supplemental collections in July of 2010. In April of 2011, I moved back to Operations (now called Network Services) as a Manager of Production and was promoted that same year to lead CP's US Problem Resolution Team. That team handled resolution of systemic Operational and Service issues. In December 2012, I became the Manager of Carload Services US East, in charge of all operations inventory reporting processes along with escalated customer service issues for CP's US East Division. I was promoted to my current position of Manager Operations US in June 2014 where I have co-responsibility/oversight of CP's Network Service Center in

Minneapolis. In these roles, I have supported CP's US operating subsidiaries including Delaware and Hudson Railway Company d/b/a CP.

3. I first started working with Finch in 2010 on supplemental collections issues. I continued to work with Finch as the Manager of Carload Services US East. In that capacity, service issues were escalated to me, as well as issues with proper ordering processes, supplemental charges, and inventory reporting. In dealings with Finch, I primarily communicated with Stuart Alheim and Deborah Taylor. Although my direct involvement with Finch is now minimal, I do still hear from Mr. Alheim if he feels the need to escalate an issue.

4. The purpose of my statement is to address Finch's erroneous claims regarding the frequency and quality of CP's service to Finch. As I explain below, the service records show that three day-a-week service is sufficient to deliver all of Finch's weekly volume, and that since reducing service frequency, CP has provided Finch highly consistent and highly reliable service. In addition, I also address below Finch's erroneous claims regarding its website functionality and the termination of the standing instruction.

5. In October 2012, CP implemented a restructuring of its service in the Northeast to better align resource allocation with car volumes. Prior to the restructuring, CP operated two switch jobs out of its yard at Fort Edward. One job served customers in the Fort Edward area, including Finch, while another served customers to north of Whitehall. However, due to a reduction in volumes over time, CP determined that it was no longer economical, efficient or necessary to maintain two switch jobs. Two-day a week service was sufficient to meet the needs of its customers north of Whitehall and three-day a week service was sufficient to meet the needs of customers in the Fort Edward area, including Finch. Accordingly, in October 2012, CP eliminated one of the Fort Edward switch jobs and moved the remaining job to Whitehall,

serving its customers to the north of Whitehall on Tuesdays and Thursdays and its customers south of Whitehall, including Finch, on Mondays, Wednesdays, and Fridays.

6. As noted above, in 2012, CP reviewed the volumes of Finch and other customers in the area. Based on my review of CP's service records, at the time, Finch averaged approximately [] cars per week. As George Newell explains in his Verified Statement, if Finch maintains its tracks in good repair, it is feasible for Finch to receive up to 12 to 15 cars per switch. Thus, CP can easily handle Finch's volumes with three-day service. In the event that Finch needs more service, Finch has the ability to request a special switch.

7. When a crew places a car at a customer's facility, the crew reports the placement, often via a handheld computer known as an AIR tablet. If for some reason the activity cannot be reported via the tablet, the crew reports via phone or fax. The reported activity includes car number, date, time and action, *i.e.*, whether a car was placed, pulled or moved. The data is reported to CP's car inventory reporting system in Minneapolis. Using this data, I identified each instance that CP serviced Finch in 2011 through 2015. Appendix A shows, by month, each day that Finch received service and the number of cars that CP placed at Finch during that service.

8. The data show that CP provided highly consistent, highly reliable service to Finch. As Table 1 below shows, following the reduction in service frequency beginning in October 2012, CP has serviced Finch at least three times a week nearly every week in which Finch was scheduled to receive three switches, *i.e.*, excluding weeks when Finch was scheduled to receive only two switches due to a holiday or Finch canceled its switch.

Table 1

Year	No. of Weeks Finch scheduled to receive 3 DOW service	No. of weeks that CP provided at least 3 DOW service
2012	13	13
2013	51	49
2014	51	50 ¹
2015	50	48 ²

9. As Table 2 shows, in most instances when CP was unable to provide service on a scheduled service day, CP provided service the following day.

Table 2

Year	Missed scheduled M,W, F switches³	Missed scheduled M,W, F switches made up the next day
2012	0	0
2013	9	7
2014	11	7
2015	17	13

¹ Finch received less than 3 switches the week of February 17, 2014 due to a winter storm and storm-related derailments.

² In 2015, one of the two weeks in which Finch received less than 3 scheduled switches involved a missed Friday switch that CP made up on the following Sunday.

³ Excludes switches canceled by Finch and days when Finch was not scheduled to receive a switch due to holidays.

10. [

]

11. I investigated the allegations of service issues contained in Mr. Alheim's verified statement, and found several significant discrepancies between Mr. Alheim's allegations and the contemporaneous rail service records. These include several instances in which Mr. Alheim incorrectly claims that CP did not provide service on a particular day. I also found that several of the alleged service disruptions were due to severe winter weather. In Appendix B, I have addressed Mr. Alheim's service allegations on a paragraph-by-paragraph basis.

12. In 2013, CP introduced Customer Station. Customer Station is a website that customers can use to track the status of shipments, and order and release cars, among other things. It has streamlined the order and release process and reduced errors. It has also given customers greater visibility as to the status of their shipments. While there have been the

occasional hardware and software issue, those issues have generally been few and manageable. Overall, Customer Station has been a success.

13. CP endeavors to ensure that the website is accurate at all times. However, occasionally discrepancies occur. These are usually due to user error, *e.g.*, a shipper enters erroneous shipping instructions, or a crew member enters erroneous car data. If that happens, we work to correct the information as quickly as possible. A customer can always communicate directly with their customer service representative to obtain accurate data. While I understand that Finch claims that the website was frequently inaccurate, this is not true. Some of the discrepancies Finch alleged were for cars that were not yet on CP's system. In other instances, Finch claimed that cars that CP had in fact delivered had not been delivered. Further, it is important to put Finch's claims in context. Amongst the thousands of cars that CP has moved for Finch since implementing the website, Finch has identified only a few cars that it claims were incorrectly reported on the website.

14. Often when Finch had an issue with the website, I was the point of contact for Finch. Finch had an unusually difficult time adapting to ordering through the website. In light of Finch's apparent difficulties, CP allowed Finch to submit its switch requests via e-mail and waived the administrative fee that CP normally charges. I reviewed CP records and found no record of such a fee ever being paid by Finch.

15. I understand that Finch claims that in late 2012, CP "drastically cut" the customer service department and replaced us with a website. Finch's claims are untrue. In fact, the introduction of Customer Station allowed the customer service department to be more responsive to customers' needs and concerns and to expand our service offerings. For example, the

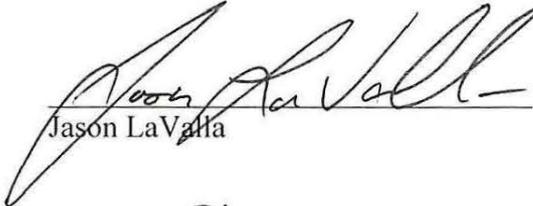
customer service department now offers customers, including Finch, the opportunity to review demurrage charges prior to invoicing. This service offering has helped reduce disputes.

16. I understand that Finch claims that there was a standing instruction for CP to automatically bring in anhydrous ammonia cars as they arrived and that instruction was in effect until December 2015 when, according to Finch, the parties “mutually agreed” to terminate it. This is not accurate. After April 24, 2014, Finch lacked sufficient space for CP to have brought in anhydrous ammonia cars automatically. During this time, Finch ordered in all anhydrous ammonia cars by car number. After the tracks were returned to service, CP insisted that Finch continue to order in all anhydrous ammonia cars by car number.

VERIFICATION

I, Jason LaValla, verify 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.



Jason LaValla

September 21, 2016

APPENDIX A
CONFIDENTIAL

APPENDIX B
CONFIDENTIAL

EXHIBIT A

REDACTED

EXHIBIT B

REDACTED

EXHIBIT C

REDACTED

EXHIBIT D

REDACTED

EXHIBIT E

REDACTED

EXHIBIT F

REDACTED

EXHIBIT G

REDACTED

EXHIBIT H

REDACTED

EXHIBIT I

REDACTED

EXHIBIT J

REDACTED

EXHIBIT K

REDACTED

EXHIBIT L

REDACTED

EXHIBIT M

REDACTED

EXHIBIT N

REDACTED

EXHIBIT O

REDACTED

EXHIBIT P

REDACTED

EXHIBIT Q

REDACTED

EXHIBIT R

REDACTED

EXHIBIT S

REDACTED

EXHIBIT T
REDACTED

EXHIBIT U

REDACTED

EXHIBIT V

REDACTED

EXHIBIT W

REDACTED

EXHIBIT X

REDACTED

EXHIBIT Y
REDACTED

EXHIBIT Z

REDACTED

EXHIBIT AA

REDACTED

EXHIBIT BB

REDACTED

EXHIBIT CC

REDACTED

EXHIBIT DD

REDACTED

EXHIBIT EE

REDACTED

EXHIBIT FF

REDACTED

EXHIBIT GG

REDACTED

EXHIBIT HH

REDACTED

EXHIBIT II

REDACTED

EXHIBIT JJ

REDACTED