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BEFORE THE
SURFACE TRANSPORTATION BOARD

NAVAL NUCLEAR PROPULSION PROGRAM, UNITED STATES ARMY MILITARY SURFACE DEPLOYMENT AND DISTRIBUTION COMMAND, AND FLUOR MARINE PROPULSION, LLC – PETITION FOR DECLARATORY ORDER	)	Docket No. FD 36298

JOINT REBUTTAL STATEMENT OF THE NAVAL NUCLEAR PROPULSION PROGRAM, UNITED STATES ARMY MILITARY SURFACE DEPLOYMENT AND DISTRIBUTION COMMAND, AND FLUOR MARINE PROPULSION, LLC

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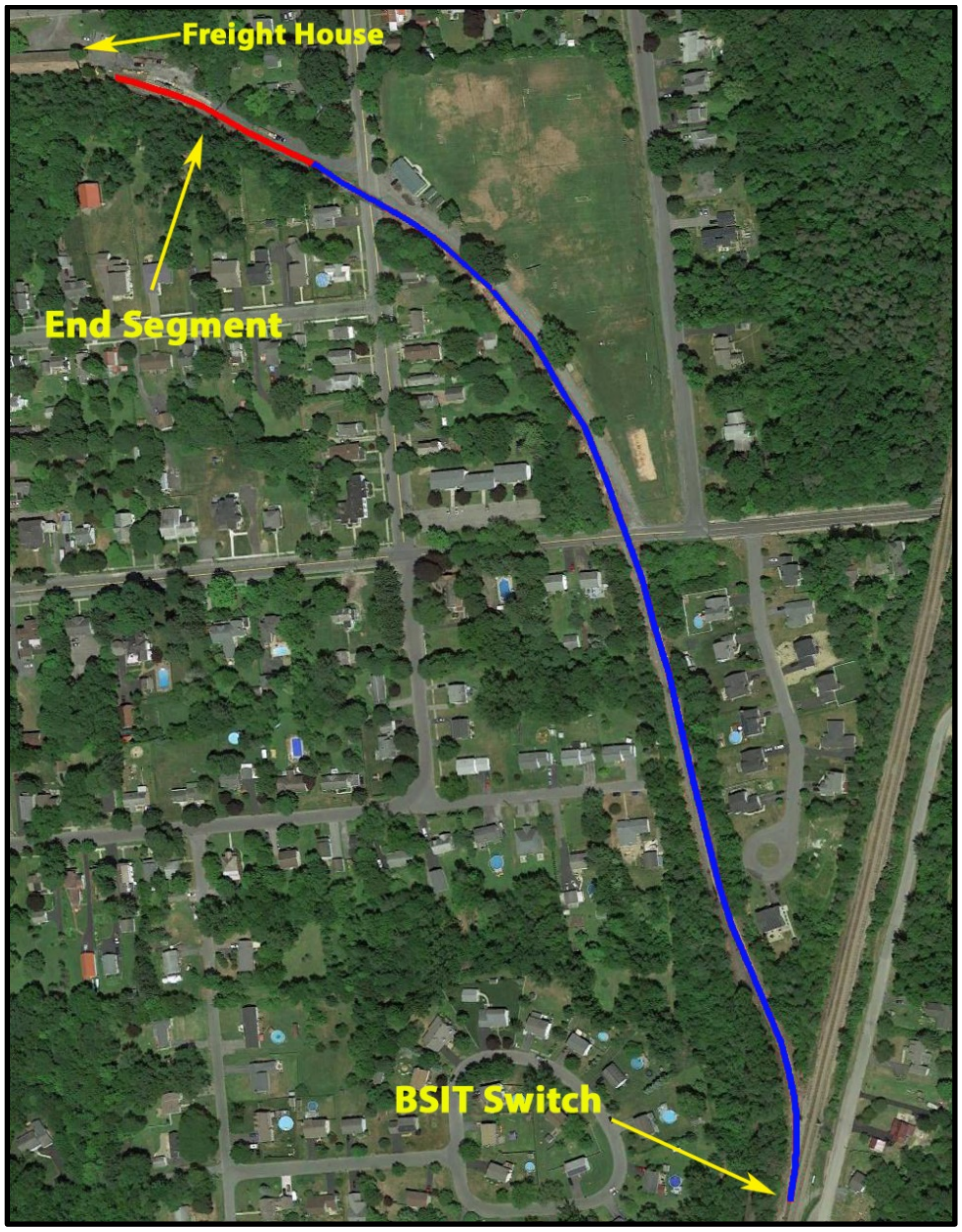
The Naval Nuclear Propulsion Program ("NNPP"), the United States Army Military Surface Deployment and Distribution Command ("SDDC") and Fluor Marine Propulsion, LLC ("FMP") (collectively the "Government") submit this Joint Rebuttal Statement ("Rebuttal"). This Rebuttal is submitted in support of the Government's Joint Petition for Declaratory Order ("Petition") filed on April 30, 2019 and responds to Delaware and Hudson Railway Company Inc. d/b/a Canadian Pacific's ("CP") Reply to Petition for Declaratory Order ("CP Reply" or "Reply") filed on May 31, 2019.

SUMMARY

The Government's Petition asks the Surface Transportation Board ("STB" or "Board") to institute a declaratory order proceeding to address three questions involving the regulatory status of, and CP's obligations to provide service over, the last

430 feet ("End Segment")[1] of the 0.55-mile Ballston Spa Industrial Track ("BSIT"):



Petition at 5.

[1] In its Reply, CP repeatedly claims the End Segment is a "siding," (*i.e.*, track that is on the side of another line), but, as is obvious from the following satellite view map, it is not a "siding," but simply the end segment of a single rail line.

The BSIT is a Strategic Rail Corridor Network ("STRACNET") connector line that forms an irreplaceable link in the transportation supply chain used in the periodic refueling of the nuclear-powered prototype reactors at the Government's Kenneth A. Kesselring Site ("Kesselring Site"), a critically important national defense facility used to train U.S. Navy nuclear officers and enlisted sailors. The Government's Petition was prompted by a series of CP actions, fully described in the Petition, which called into question CP's commitment to adhere to its legal obligations to transport the Government's loaded container shipments and to assist the parties in structuring a potential line sale transaction.

The Government asked the Board to decide its Petition on an expedited basis because the Kesselring Site is currently undergoing a $1.5 billion prototype reactor refueling, with the first loaded container shipments scheduled to occur on the BSIT in late 2019/early 2020.[2] Any delay in transporting these shipments can cost the Government up to $800,000 per day and undermine national security because for every week or partial week of delays, the Navy suffers a loss of approximately twenty nuclear-trained sailors.

- **Question 1.** The first question the Government posed is whether the End Segment is a regulated rail line. The Government asks the Board to find that the answer to this question is "yes." The 1980 Abandonment Case Final Decision[3] requires

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[2] CP agrees that the Board should institute a declaratory order proceeding to address the three questions on an expedited basis. *See* CP Reply at 2-3.

[3] *See Del. & Hudson Ry. Co. – Abandonment – In the Towns of Ballston & Milton,*

CP to continue to provide service over the BSIT from the main line switch (Valuation Station 1626+83) to the old freight house, a distance of approximately 0.56 miles. This 0.56 miles includes the End Segment. *See* Final Decision at 1-2 (CE-107 thru -08).

CP asks that the Board answer Question 1 "no," but offers no credible arguments to support its position. Prior to the institution of these proceedings, CP took the position that, in 1980, the Interstate Commerce Commission ("ICC") approved D&H's retention of 0.55 miles of regulated rail line, starting at the BSIT main line switch. CP maintained, however, that in 1980, the switch was located at Valuation Station 1622+53 – 430 feet south of where it is today. Using that starting point, the 0.55 miles of regulated rail track ended at the beginning of the End Segment.

The Government's Petition contained detailed evidence demonstrating the BSIT main line switch was located at Valuation Station 1626+83 well before 1980. In its Reply, CP acknowledges that the main line switch was located at Valuation Station 1626+83 well before 1980. Thus, using this starting point, the 0.55 miles of regulated rail track from the main line switch (1626+83) *encompasses* the End Segment.

Rather than admitting error, CP abandons its pre-proceeding position and now maintains that the location of the main line switch in 1980 makes no difference. Instead, CP maintains that in the 1980 Final Decision, the ICC stated that the regulated

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NY, ICC Docket No. AB-156 (Sub-No. 9F) ("1980 Abandonment Case") (ICC Decision served Oct. 15, 1980) ("Final Decision") (copy appended to the Government's Petition as Counsel's Exhibit ("CE") at 107-109). For ease of citation, the Government will use the same short form references to record filings in the 1980 Abandonment Case without repeating their long-form captions.

segment ended at milepost ("MP") 31.32, and, according to CP's new theory, in 1980, the parties represented (and the ICC understood) that MP 31.32 was located at the beginning of the End Segment.

CP's new theory is even more attenuated than its first (now discarded) theory. The record in the 1980 Abandonment Case is clear: D&H represented that MP 31.32 was located at the old freight house (which is 0.56 miles from the main line switch), and the ICC relied on this representation when approving D&H's request to retain 0.56 miles of regulated rail track from the main line switch to the old freight house.

- **Question 2.** The Government's second question asks whether CP has a common carrier obligation to provide the Government with common carrier rates, service and access to its freight over the BSIT End Segment if: (a) the Board finds that the BSIT End Segment is a regulated rail line; or (b) the Board finds the BSIT End Segment is not a regulated rail line.

The parties appear to agree that the answer to Question 2(a) is "yes" – CP has an obligation to provide reasonable rates, service and access if the Board finds the End Segment is a regulated common carrier rail line. However, the Government requests that the Board specifically reaffirm that the Board has the authority to set reasonable access terms if the parties do not reach an agreement on these terms.

In response to Question 2(b), CP maintains that it has a "common carrier obligation" to provide rates, service and access if the Board finds that the End Segment is not a regulated rail line, but the cases CP cites in support of its position are tariff compliance cases, not common carrier law cases, and hold that (i) *if* a carrier *elects* to

provide service over an excepted track; *then* (ii) the carrier is legally obligated to adhere to its tariff terms for the service it provides over the excepted track (*while these terms remain in effect*); and (iii) the carrier can ordinarily *stop* providing service (and cancel its rates) on twenty days' notice. Thus, while CP indicates its answer to Question (2)(b) is "yes," it really is "no."

The Government continues to request that the Board answer Question 2(b) as "yes" for the reasons set forth in the Government's Petition. CP's common carrier obligation does not depend on CP's discretion – CP is legally obligated to provide service, rates and access under the unique facts of this case: the BSIT is the only location on the entire CP system where the Government can transload its freight to and from the Kesselring Site. In addition, CP is estopped, based on the commitments D&H made in the 1980 Abandonment Case, from arguing it has no common carrier obligation (properly construed) to provide service over the End Segment.

Alternatively, if the Board sides with CP on Question 2(b), it should have the authority to issue a Board order directing CP to adhere to the representations it has made in this proceeding that it will provide the Government with reasonable rates, service and access to the End Segment, subject to post-proceeding enforcement by the Board if CP does not adhere to its rate, service and access representations.

- **Question 3.** The Government's third question asks: if (i) the End Segment is (or becomes) non-regulated rail track, and (ii) the Government purchases the End Segment for its exclusive private use, does CP have a common carrier obligation to place the Government's cars at the beginning of the End Segment?

In response to Question 3, CP maintains that it has a "common carrier obligation" to provide rates, service and access over the entire End Segment, but the cases CP cites in support of its position are tariff compliance cases, not common carrier law cases, holding (i) *if* a carrier *elects* to provide service over private track (an election where the carrier can first insist that the shipper agree to the carrier's private track agreement terms no matter how onerous), *then* (ii) the carrier is legally obligated to adhere its tariff terms for the service it provides over the private track (*while these terms remain in effect*); and (iii) the carrier can *stop* providing service (and cancel its rates) on twenty days' notice. Thus, while CP indicates its answer to Question 3 is "yes," it really is "no."

The Government continues to request that the Board answer Question 3 as "yes" for the reasons set forth in the Government's Petition. CP's common carrier obligation does not depend on CP's discretion – CP is legally obligated to place the Government's rail cars at the beginning of the End Segment. In addition, the Board should have jurisdiction to issue an order directing CP to adhere to the representations it has made in this proceeding that if the Government purchases and operates the End Segment as a private line, CP will provide the Government with reasonable rates, service and access over the End Segment, with the order subject to enforcement in subsequent STB proceedings if CP does not adhere to its rate, service and access representations.

The Government's filing includes two Rebuttal Verified Statements, one by Mr. Donald Boyle ("Boyle Rebuttal VS") and one by Mr. Bernhard Gundermann ("Gundermann Rebuttal VS"). Mr. Boyle responds to CP's efforts to put a CP-positive

spin on the events preceding the Government's filing of this Petition. Mr. Boyle emphasizes, as he did in his Opening Verified Statement ("Boyle OVS"), that CP's interest in selling all or part of the BSIT has been driven by its misguided liability concerns and that CP has played hardball with the Government over the past two years to advance its sales interests, including threatening to abandon the BSIT, and refusing, to date, to be willing to enter into an agreement that allows FMP's contractors access to the BSIT to transload container cars carrying radioactive materials.

Mr. Gundermann responds to CP's Reply assertions why the BSIT End Segment is not a regulated rail line. Mr. Gundermann emphasizes that CP has jettisoned its pre-Petition position on why the End Segment is not a regulated rail line, and provides detailed supporting evidence demonstrating that CP's new position is without merit. Mr. Gundermann correctly concludes, as he did in his Opening Verified Statement ("Gundermann OVS"), that the End Segment is a regulated rail line because it is part of the 0.56-mile long corridor, starting at the BSIT main line switch and ending at the old freight house, that D&H agreed to retain as regulated track in the 1980 Abandonment Case.

REBUTTAL ARGUMENT

The principal issue the Government raises is whether the End Segment of the BSIT is a regulated rail line. This issue turns on whether this segment of track was included in the 0.56 miles of regulated rail track D&H retained in the 1980 Abandonment Case. The Government asks the Board to answer this question "yes," while CP asks the Board to answer this question "no."

I. THE BSIT END SEGMENT IS A REGULATED RAIL LINE

In the 1980 Abandonment Case, D&H agreed to retain 0.56 miles of regulated BSIT track starting at the main line switch at Valuation Station 1626+83 and ending at the old freight house. *See* Final Decision at 1-3 (CE-107 thru -09). This 0.56-mile right-of-way includes the BSIT End Segment. *See* Petition at 41-58. CP's Reply contentions to the contrary are without merit.[4]

A. CP Concedes Its Pre-Petition Arguments That the End Segment Is Not a Regulated Rail Line Were Wrong

In its 1980 Final Decision, the ICC granted D&H's request to retain, as ICC-regulated track, the track between MP 30.76 (Valuation Station 1626+83) and MP 31.32 – a distance of approximately 0.55/0.56 miles.[5] Prior to the institution of this

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[4] CP devotes most of its Question 1 Reply argument to an irrelevant discussion of whether the BSIT End Segment possesses the characteristics of an excepted spur track. *See, e.g.*, CP Reply at 13-18. However, where, as here, the rail corridor (*i.e.*, the 0.56-mile corridor from the main line switch to the old freight house) was "once unquestionably used for line haul operations," the Board "continue[s] to have jurisdiction over it," even in cases where "the track in question possesses many of the characteristics of a spur." *Chelsea Prop. Owners – Abandonment – Portion of the Consol. Rail Corp.'s W. 30th St. Secondary Track in N.Y.C., NY*, 8 I.C.C.2d 773, 790 (1992), *aff'd sub nom. Consol. Rail Corp. v. ICC*, 29 F.3d 706 (D.C. Cir. 1994)).

[5] D&H's Application (CE-21, -27), its Amended Application (CE-81) and the ICC's Final Decision (CE-107) state or indicate that the distance between the main line switch and the old freight house was 0.56 miles. The text of the 1980 Rail Service Agreement refers to this distance as 0.55 miles (CE-90). The difference (0.01 mile or 52 feet) is not material in the instant proceeding. The Government refers herein to the distance as 0.56 miles – the distance shown or referred to in the Application, the Amended Application, and the Final Decision – unless the 0.55 miles is specifically cited by the parties in the record. The BSIT track, as currently configured, ends 0.55 miles from the main line switch.

proceeding, CP and the Government agreed that the ICC had approved D&H's retention of approximately 0.55 miles of track; where the parties disagreed was the starting point from which to count the 0.55 miles.[6]

CP took the position that, in 1980, the main line switch was located at Valuation Station 1622+53 – the point on the Schematic appended to the 1980 Rail Service Agreement where MP 30.76 is shown (CE-102) – and CP argued the switch was moved, after 1980, to the location shown on the Schematic: Valuation Station 1626+83/MP 30.84.[7] Using Valuation Station 1622+53 as the location of the switch, and measuring 0.55 regulated miles from that point, showed that the 0.55 miles of regulated rail line ended at the start of the End Segment.[8]

The Government took the position that the switch was located at Valuation Station 1626+83 long before 1980, so the proper starting point to count the 0.55 regulated miles from was Valuation Station 1626+83.[9] Using Valuation Station 1626+83 as the location of the switch, and measuring the 0.55 regulated miles from that point, showed the regulated miles included the entire End Segment.

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[6] *See* Petition at 22-23; Gundermann OVS at ¶¶ 15-28; Gundermann Rebuttal VS at ¶¶ 10-11; Boyle OVS at ¶¶ 15-28; Boyle OVS Exhibit No. 11 (DJB-11); Boyle Rebuttal VS at ¶¶ 16-17.

[7] *Id*.

[8] *Id*.

[9] *Id*. The Government acknowledged D&H may have used an incorrect milepost reference in its Application and Amended Application. The Government's analysis indicated that Valuation Station 1626+83 appeared to be located at MP 30.84, not 30.76, in 1980. *See* Petition at 49; Gundermann OVS at ¶ 21; Gundermann Rebuttal VS at ¶ 28.

The dispute between the parties is illustrated in the following satellite view map (with CP's position shown on the blue line and the Government's on the red line):

Gundermann Rebuttal Exhibit No. 1 (BEG-R1).

In its Petition, the Government introduced substantial evidence, including Valuation Maps, historic photos, and other information demonstrating that the BSIT main line switch was installed at its current location at Valuation Station 1626+83 long before 1980.[10] In its Reply filing, CP witness Kristine Williams reviewed the same material and

[10] Gundermann OVS at ¶ 20; Gundermann OVS Exhibit Nos. 7 (BEG-7) & 8 (BEG-8).

reached the same conclusion – the D&H switch was located in its current position, *i.e.*, Valuation Station 1626+83, well before 1980.[11]

Thus, CP now agrees with the Government that the main line switch in 1980 was located at Valuation Station 1626+83. With this concession, CP is forced to acknowledge that its pre-Petition argument was wrong – the main line switch did not move after 1980 – so the 0.55 miles of regulated track, measured from the correct location of the main line switch in 1980 (Valuation Station 1626+83), includes the entire End Segment.[12]

B. CP's Attempts to Resuscitate Its Case Are Meritless

CP's new post-Petition position is that there is no need to focus on where the BSIT starts because the pertinent inquiry is where the BSIT ends. *See* CP Reply at 21-22. Specifically, CP asserts that the ICC's Final Decision says the regulated track ends at MP 31.32 – a point CP's Witness Williams plots, using Valuation Maps and the 1980 Schematic, as located at the beginning of the End Segment.[13]

Referring to the satellite map above, all CP is doing is adding a milepost reference (MP 31.32) to the "CP End Point" shown on the map, *i.e.*, MP 31.32 is the

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[11] *See* CP Reply, Verified Statement of Kristine Williams ("Williams Reply VS") at 4; Gundermann Rebuttal VS at ¶ 13.

[12] CP opines that there might have been a BSIT main line switch 430 feet south of its current location at one time (Williams Reply VS at 4), but no such switch is shown in the Valuation maps, nor would there have been any reason for a switch to have been located there, given the history of the track in the area. *See* Gundermann Rebuttal VS at ¶¶ 14-15.

[13] *See* Williams Reply VS at 3-4; Gundermann Rebuttal VS at ¶¶ 17-21.

same point where CP previously argued the regulated segment ended. CP's new "end point" contention is even more flawed than its failed "the switch moved" contention.[14]

First, CP's "avoid the start point" contention is a transparent effort to end-run the obvious result of its concession. While CP may not like the answer, it is now beyond dispute that D&H retained 0.56 miles of regulated rail line, starting at the BSIT main line switch at Valuation Station 1626+83 and ending at the old freight house. CP cannot avoid this clear result by saying it is not relevant. The location of the main line switch is not only relevant, it is dispositive.

Second, under CP's new theory, D&H only retained 0.48 miles of regulated track from the main line switch – a result that is clearly incorrect.[15] *See* Final Decision at 1-2 (CE-107 thru -08). D&H requested, and the ICC granted, D&H's request to retain 0.56 miles of regulated track starting from the main line switch and ending at the old freight house.

Third, all of the narrative references to the location of MP 31.32 in the 1980 Abandonment Case record, including those in D&H's Abandonment Application, its Amended Application, and the 1980 Rail Service Agreement state that MP 31.32 is located at the old freight house, not 430 feet short of it.[16]

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[14] CP devotes little more than one page of its 33-page Reply Argument to support this new contention. *See* CP Reply at 19-20.

[15] *See* Gundermann Rebuttal VS at ¶¶ 9, 36.

[16] *See* Application at 6 (CE-18), 9 (CE-21), 10 (CE-22), 15 (CE-27); Rail Service Agreement at 1 (CE-90), 2 (C-91), 7 (CE-96); Amended Application at 3 (CE-81), 4 (CE-82).

Fourth, while D&H may have used the wrong milepost reference for the old freight house (at Valuation Station 1656+40) – it appears today that the correct milepost in 1980 was 31.40, not 31.32[17] – D&H never corrected this error in its 1980 filings, and the ICC, in its Final Decision, approved D&H's Amended Application *as pled by D&H*. The ICC permitted D&H to retain the 0.56 miles of regulated track from the main line switch (Valuation Station 1626+83, MP 30.76) to MP 31.32, and authorized CP to abandon the remaining 0.47 miles starting at MP 31.32 and ending at Valuation Station 1681+20, MP 31.79. *See* Final Decision at 1-2 (CE-107 thru -108).

Fifth, CP points to the hand-drawn Schematic appended to the 1980 Rail Service Agreement (CE-102) as "proof" that the parties understood in 1980 that MP 31.32 was located 430 feet short of the old freight house. *See* CP Reply at 5. The Schematic contains no notation of where MP 31.32 is located (*id*.),[18] and the text of the

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[17] *See* Gundermann Rebuttal at ¶ 31. D&H consistently represented that MP 31.32 was located at the old freight house. As Ms. Williams and Mr. Gundermann point out, the mileposts D&H cited in its 1980 filings were consistently misstated by minus 0.08 miles. D&H did not correct these errors in its 1980 filings, but it did not make any practical difference at the time, and does not today, because both sets of mileposts – the set D&H used: 30.76 (switch); 31.32 (freight house); 31.79 (end), and the corrected versions: 30.84 (switch); 31.40 (freight house); 31.87 (end) – produce the same results. *See* Gundermann Rebuttal VS at ¶¶ 35-36; Gundermann Rebuttal Exhibit No. 5 (BEG-R5). Under either set, the regulated track starts at Valuation Station 1626+83, the old freight house is located 0.56 miles east (at Valuation Station 1656+40), and abandoned track starts at the old freight house and ends 0.47 miles from the old freight house at Valuation Station 1681+20. *Id*.

[18] *See also* Gundermann Rebuttal VS at ¶ 21.

Rail Service Agreement repeatedly refers to MP 31.32 as being located at the old freight house.[19]

Sixth, CP claims the ICC, in its Final Decision, relied upon milepost locations that can be derived from the Schematic. The record shows that D&H itself did not cite or rely on any milepost locations shown on the Schematic in its Amended Application, nor did it request the ICC to do so. For example, the Schematic shows that Valuation Station 1626+83 is located at MP 30.84.[20] D&H filed the Rail Service Agreement (with the appended Schematic) with the ICC on the same day that it filed its Amended Application (August 11, 1980).[21] In that Amended Application, D&H referred, as it had in its Application, to the main line switch as located at Valuation Station 1626+83, MP 30.76 (not 30.84)[22] and, in its Amended Application, asked the ICC to approve its retention of 0.56 miles of regulated track between the main line switch at MP 30.76 (not 30.84) and MP 31.32.[23]

Seventh, CP also relied on the Schematic for its initial argument that the BSIT main line switch was located 430 feet south of Valuation Station 1626+83.[24] It should be clear by now that the Schematic – which was a hard-to-read one-page drawing appended as the first of two exhibits to a twelve-page agreement – has no plain meaning.

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[19] *See* record citations, *supra* note 16.

[20] *See* Gundermann OVS Exhibit No. 6 (BEG-6).

[21] *See* CE-78 (Amended Application) & CE-89 (Rail Service Agreement).

[22] Amended Application at 1 (CE-79).

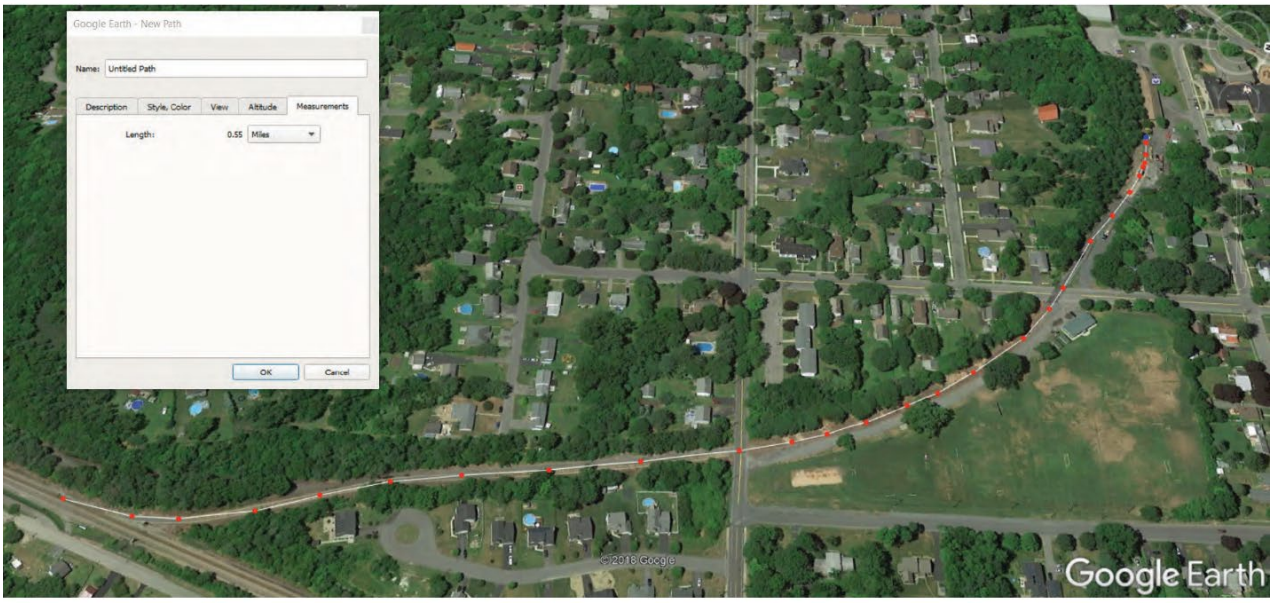
[23] *Id*. at 2-4 (CE-80 thru -82).

[24] *See* Gunderman OVS at ¶ 18.

Moreover, the Schematic is just one page in the 111-page administrative record in the 1980 Abandonment Case, and is a page that D&H did not even reference, much less rely upon, in its Amended Application. It has only now taken on significance because CP has decided to rest its entire case on reading into the Schematic two theories (the first of which it has now abandoned) that simply were not adopted by D&H in 1980, nor relied upon in any way by the ICC in its 1980 Final Decision.

C. The End Segment Is Located Within the 0.56-Mile Regulated Rail Line Corridor

Prior to this proceeding, CP admitted the BSIT End Segment was located within the 0.56-mile regulated rail line corridor, a fact that is obvious from the satellite map CP provided FMP on March 8, 2019, which showed that the 0.55-mile alignment of the BSIT (including the End Segment) ended just before the old freight house:



Gundermann OVS Exhibit No. 5 (BEG-5); Gundermann OVS at ¶¶ 17-18; Boyle OVS at ¶ 30.

It is not clear from the available information whether the End Segment was also the "main line" being used in 1980 from the main line switch to (and beyond) the old freight house, or whether it was a "siding" off the main line.[25] It makes no difference now, however, since D&H retained 0.56 miles of regulated track between the main line switch and the old freight house, and D&H was free to relocate tracks in the End Segment area, so long as it retained 0.56 miles of regulated track. *See* Petition at 51-52.

CP concedes that D&H was free to relocate its tracks to comply with the ICC's order directing it to retain the 0.56 miles of regulated line, but claims "it does not follow that Siding is therefore a regulated line." CP Reply at 20. Of course, it does "follow." D&H needed to obtain ICC authority to abandon any portion of the 0.56-mile track right-of-way between the main line switch and the old freight house.[26] There is no basis to assume today that D&H unlawfully abandoned any portion of the regulated 0.56-mile right-of-way.

CP also speculates that, by 1980, all traffic moving over the BSIT was using the current BSIT track alignment. CP Reply at 16-17. However, pictures taken in the late 1950s show that there was a single track approaching the old freight house that split into two lines shortly before reaching the old freight house – one of the lines appears to include the current End Segment alignment.[27] Valuation Maps show both tracks went

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[25] Petition at 51-53; Gundermann Rebuttal VS at ¶ 14.

[26] *See* 49 U.S.C. § 10903 (requiring a carrier to obtain permission from the ICC, and now from the Board, before abandoning regulated rail lines).

[27] *See* Gundermann Rebuttal VS at ¶¶ 24-26; *id.* Exhibit No. 2 (BEG-R2).

to and past the old freight house, and cars are shown on both tracks at the old freight house.[28]

There is no reason to believe that both tracks did not remain in place (and in use) in 1980 (with one serving as the "main line" track). This result also conforms to D&H's repeated statements in the 1980 Abandonment Case record that multiple shippers had used the BSIT between 1978 and 1980, and that all shippers (including the U.S. Department of Energy ("DOE")) had been using tracks adjacent to the old freight house to load and unload their freight.[29]

II. CP HAS A COMMON CARRIER OBLIGATION TO PROVIDE RATES AND SERVICE OVER THE BSIT END SEGMENT AND TO PROVIDE THE GOVERNMENT REASONABLE ACCESS TO THE END SEGMENT TO TRANSLOAD ITS FREIGHT

A. CP Agrees These Obligations Apply if the BSIT End Segment Is a Regulated Rail Track

CP's common carrier obligation clearly extends to providing rates and service terms to move the Government's shipments (including loaded containers) over regulated track, and to provide the Government reasonable access to the regulated track

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[28] *Id*. *See also* Gundermann Rebuttal Exhibit No. 3 (BEG-R3) (Valuation Map).

[29] *See e.g.*, Application at 7 (CE-19) (referencing shippers' use of the BSIT by the old freight house); *id*. at 13 (CE-25) (identifying seven shippers that had used the BSIT in the two years prior to 1980, including Tufflite Plastics, who was using the old freight house as a warehouse in 1980); Tufflite Plastics Letter (CE-47 thru -48) (referencing its interest in continued use of the BSIT). D&H's Amended Application also references shippers other than DOE using the BSIT (Amended Application at 3 (CE-81)), and the ICC, in its Final Decision, refers to the 0.56-mile segment D&H withdrew from abandonment as "the only segment of the line that DOE, a*s well as other users of the line* are actually concerned about . . . ." (Final Decision at 1 (CE-107) (emphasis added)).

to transload its shipments. *See* Petition at 55-56 (citing governing statutes and cases). Thus, if the Board finds that the BSIT End Segment is a regulated rail line, CP must provide the Government reasonable rates, service and access.

CP appears to agree that if "the Board finds that the [End Segment] is a regulated line of railroad," CP's common carrier obligation requires it to provide rates to apply to the Government's loaded container shipments moving over the End Segment, to transport the loaded containers, and to provide the Government access to the End Segment to transload the containers. CP Reply at 22.

CP adds, "[t]hese obligations are, of course, subject to reasonable conditions that are customary practice in the industry," which "include the execution of appropriate access agreements and track that is in safe operating condition." *Id*. at 23. Question 1 assumes that CP owns the regulated End Segment track. Thus, the responsibility to keep the track in "safe operating condition" rests with CP, not the Government. In addition, while CP and the Government are free to try to negotiate "appropriate access agreements," the Board clearly has the authority to prescribe reasonable terms if the parties cannot agree on contract terms.[30]

The Government raised Question 1 because of the delays it incurred in obtaining common carrier rates for its empty container shipments, and CP's refusal (to

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[30] *See* 49 U.S.C. § 10702 (STB has jurisdiction to find rail practices unreasonable and to prescribe reasonable rail practices); *Trainload Rates on Radioactive Materials, E. R.Rs.*, 362 I.C.C. 756, 773 (1980) (finding rail carrier practices impeding the transportation of radioactive materials unreasonable and prescribing reasonable practices), *as supplemented*, 364 I.C.C. 981 (1981), *aff'd sub nom*. *Consol. Rail Corp. v. ICC*, 646 F.2d 642 (D.C. Cir. 1981).

date) to negotiate contractual terms governing FMP contractor access to the end of the End Segment to transload containers containing radioactive materials. The Government continues to request that the Board answer Question 1 as "yes," and, as part of that answer, reaffirm that it has the legal authority to prescribe reasonable access terms, upon complaint or petition, if the parties do not reach agreement on contract terms.

B. These Obligations Also Apply if the BSIT End Segment Is Not a Regulated Rail Track

If the Board finds that the End Segment is not a regulated rail line, the Board should, nevertheless, find that CP has a common carrier obligation to provide reasonable rates, service and access over the BSIT.

1. CP's Common Carrier Obligation (Correctly Stated)

The Board normally does not have legal authority to enforce the common carrier obligation over track that is not classified as regulated track. *See* 49 U.S.C. § 10906. As the Government pointed out in its Petition, there are exceptions to the usual rule, two of which apply here.

First, the Board has the authority to order a carrier to provide rates and service over track that might otherwise be classified as excepted terminal facilities, and to order a carrier to allow a shipper reasonable access to that track to transload its freight, when those facilities are "the sole terminal facilities held out to the public for access to the main line" (*Meyers v. Jay St. Connecting R.R.*, 262 F.2d 676, 678 (2d Cir. 1959)) or, in cases where "no traffic could move over the line," if the terminal facilities were

abandoned. *Cheney Lime & Cement Co. v. Seaboard Sys. R.R.*, No. 40037, 1987 WL 99911, at *2 (ICC served Dec. 7, 1987).

CP concedes that the End Segment is the "sole terminal facility held out to the public for access" to the BSIT. *See* CP Reply at 27 ("CP does not have, and cannot provide, adequate alternative facilities to load and unload the Government's unique and oversized cargo adjacent to or on CP's track.").[31] Nevertheless, CP appears to argue that *Meyers* is no longer good law, but cites no court or ICC/STB case overturning *Meyers.*

To be sure, the *Meyers* rule is one that applies only in "exceptional circumstances" (*Cheney*, at *2), but this case involves "exceptional circumstances" since, as CP concedes, the End Segment is the only location on the entire CP system where the Government can transload containers needed for critical national defense purposes – the refueling of the Kesselring Site.

Similarly, "no traffic could move over [the BSIT] if the End Segment" was abandoned (or not held open for Government use). CP attempts to argue that *Cheney* is factually distinguishable from the instant case, and CP is correct, but not for the reasons it states. In *Cheney*, the ICC held that the defendant carrier's closing of a spur would not result in "no traffic" moving over the line connected to the spur. *Id*. at *3. Here, the only

[31] CP does have a rail yard in Saratoga Springs, New York that might be an alternative location on its system, but CP has informed the Government that it will not permit the yard to be used for transloading, and the Government does not have permits in place to transport its shipments over local roads from the Saratoga Yard to the Kesselring Site. *See* Gundermann OVS at ¶ 12.

shipper using the BSIT is the Government, and no traffic can or will move over the BSIT if CP abandons (or does not allow the Government to use) the End Segment.

Another case on point here is *Bi-State*.[32] In that case, the ICC held that if a carrier stopped providing a shipper service over an excepted siding, the carrier's common carrier obligation required it to provide "some other reasonable means to accept traffic from, and deliver shipments to, [the shipper]."[33] The ICC went on to hold that if the carrier did not do so, the shipper could file "a formal complaint" at the ICC to enforce the carrier's common carrier obligation:

> The Commission does not regulate the use of side track, and Commission authorization is not necessary to discontinue service over a side track, under 49 U.S.C. 10907 [now 10906]. However, should [the carrier] cease to use the side track, it must provide some other reasonable means to accept traffic from, and deliver shipments to, [the shipper]. As a common carrier [the carrier] has a responsibility to provide adequate service upon reasonable request to all shippers on the [] line. 49 U.S.C. 11101(a). If it should not meet that obligation, [the shipper] would have a remedy by filing a formal complaint under 49 CFR Part 1111.[34]

Bi-State sets forth the general governing standard here – a carrier must provide a shipper with at least one reasonable location on its line where the shipper can load, unload or transload its freight. *Meyers* applies this basic principle in a case where, as here, there is only one such reasonable location (here, the BSIT End Segment) and

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[32] *Bi-State Dev. Agency of Mo.-Ill. Metro. Dist. – Acquisition & Operation Exemption – Norfolk & W. R.R.*, FD 31425 (Sub-No. 1), 1989 WL 239312 (ICC decided Aug. 29, 1989).

[33] *Id*. at *2.

[34] *Id*.

abandoning (or not allowing the Government the use of) that location would preclude any traffic from moving over an entire rail line (here, the BSIT).

Second, CP is estopped from arguing in this proceeding that it does not have a common carrier obligation to provide service over the BSIT End Segment because it represented in the 1980 Abandonment Case that it would continue to provide service over the BSIT End Segment. *See* Petition at 57-58. CP apparently has no answer to this argument, and its statements concerning estoppel as they relate to the representations it is making in this proceeding (addressed below) fully support the conclusion that CP is estopped from claiming it has no common carrier obligation to provide service, rates and access over the End Segment.

2. CP's Tariff Rate Assertions

CP argues that the Government's concerns about CP's failure to provide service, rates and access over the End Segment – if the Board finds that the End Segment is not a regulated rail line – are much ado about nothing. According to CP, it has a common carrier obligation to provide service, rates and access over the BSIT End Segment – even if it is classified as an excepted spur. *See* CP Reply at 22.

The problem the Government has here is that CP's interpretation of its common carrier obligation is erroneous. The law is clear. A common carrier railroad has no *common carrier* obligation to provide service, rates or access over excepted track facilities (subject to the very few limitations discussed above which do apply in this

case), and the Board cannot order a carrier to do so.[35] But, of course, a carrier has the *discretion* to do so.

What the pertinent case law CP cites holds is *if* the carrier does exercise its *discretion* to provide service over excepted track: (i) it must provide, upon a shipper's reasonable request, line-haul common carrier rates to apply to the service; (ii) the line-haul rates must cover the carrier's service up to a point where the shipper's traffic can be reasonably loaded, unloaded or transloaded; and (iii) the Board has the authority to direct a carrier to adhere to the terms of these tariff rates for the excepted service the carrier has elected to provide.[36]

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[35] *See, e.g.*, *Valley Feed Co. v. Greater Shenandoah Valley Dev. Co.*, No. 41068, slip op. at 14 (STB served Dec. 11, 1998) ("*Valley Feed*") ("a cause of action does not lie under [49 U.S.C.] section 11101(a) [which incorporates the common carrier obligation] for a failure to provide service over spur track [excepted under the statutory predecessor to 49 U.S.C. § 10906]"); *Battaglia Distrib. Co. v. Burlington N. R.R.*, FD 32058, slip op. at 5 (STB served Dec. 11, 1998) (same). The Board's rationale here is that "there is no ICC/STB authority to order the resumption of rail service where there is no ICC/STB jurisdiction over its termination." *Valley Feed*, slip op. at 13-14; *Battaglia*, slip op. at 5 (same). The limited exceptions, stated above, apply in the extraordinary circumstances when the STB does have jurisdiction over service termination.

[36] CP lumps together cases involving regulated service, excepted service and private track service in its Reply. Most of the cases CP cites involve carrier service over private tracks (discussed *infra*), which in the excepted service/rate context (under current law) involve analogous principles. CP cites only a few cases involving transportation over excepted spurs, including *Valley Feed* and *Sherwin Alumina Co. v. Union Pac. R.R.*, No. 42143 (STB served Sept. 29, 2015). In *Valley Feed*, the Board held it did not have the regulatory authority to order an unwilling carrier to provide service over excepted track (*see* n.35). In *Sherwin*, the STB held that the defendant carrier was not obligated to provide service pursuant to its voluntarily published rates applicable over, what appears to have been, carrier-owned spur track during a strike at a customer facility. CP also cites an inapposite case involving carrier obligations under line-haul tariffs applicable to regulated track. *See Montana v. BNSF Ry.*, No. 42124 (STB served Apr. 26, 2013).

Thus, the case law CP cites to support its contentions that the common carrier obligation applies over excepted track do not involve the common carrier obligation, but the separate duty of a carrier to adhere to its published line-haul tariff terms for service it elects to provide – terms (and service pursuant to those terms) that a carrier can ordinarily cancel at any time on twenty days' notice.[37]

3. Enforcing CP's Representations

The Government asked the Board to address CP's common carrier obligations in the excepted spur context because it wanted to obtain a Board ruling that CP had a binding common carrier obligation to provide service over the End Segment (even if the End Segment was not deemed a regulated rail line). The Government reiterates that request and asks the Board to answer Question 2(b) as "yes" for the reasons articulated by the Government.

Alternatively, if the Board disagrees with the Government's answer to Question 2(b), CP appears to represent to the Board that it will exercise its discretion to provide reasonable rates and service over the End Segment (owned by CP) and will provide the Government reasonable access to transload its freight on the End Segment. If that is the case, the Board should have the authority to issue a Board-enforceable order directing CP to adhere to these representations.[38]

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[37] *See* 49 U.S.C. § 11101(c). An exception exists if the carrier is charging an STB-prescribed rate. In that case, the carrier must adhere to the terms of the rate prescription while the rate prescription remains in effect. *See Rate Regulation Reforms*, EP 715, slip op. at 12 (STB served July 25, 2012).

[38] The Board has issued "adhere to representations" orders in many rail acquisition

III. IF THE GOVERNMENT PURCHASES THE BSIT END SEGMENT, CP HAS A COMMON CARRIER OBLIGATION TO PLACE THE GOVERNMENT'S CARS ON THE SEGMENT

In its Petition, the Government asked the Board to address the scope of CP's common carrier obligation to provide service over the End Segment if the Government purchased the End Segment and operated it as a private line. The Government, citing governing law, asked the Board to answer Question 3 as "yes" by holding that CP had a common carrier obligation to place the Government's containers at the beginning of the End Segment. Petition at 59.

In its Reply, CP asserts that its common carrier obligation requires "more" than just placing cars at the beginning of the End Segment if the End Segment is operated as a private line (*see* CP Reply at 23-31), but what CP is really arguing is that its "common carrier obligation" gives it discretion to supply service over the BSIT (including, it appears, service in the form of initial placement of the Government's

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proceedings. *See, e.g.*, *CSX Corp. – Control & Operating Leases/Agreements – Conrail Inc.*, FD 33388, slip op. at 7 (STB served May 21, 2001) ("We will continue to be vigilant in doing what we can to ensure that representations made by parties to our proceedings are actually honored."); *Union Pac. Corp. – Control & Merger – S. Pac. Rail Corp.*, FD 32760, slip op. at 5 (STB served Aug. 14, 1997) ("applicants must be held to the representations made by their witnesses in the course of this proceeding"). The Board issued these orders to protect the integrity of the administrative process. While the instant case is not a rail acquisition case, the principles of protecting the integrity of the administrative process should apply with equal force in this proceeding, and the Board's authority to issue such an order also should fall within its broad general powers to administer the Revised Interstate Commerce Act. *See* 49 U.S.C. § 1321. Issuance of an "adhere to representations" order is particularly appropriate because, as CP itself has acknowledged, "CP would most likely be estopped from taking a position in the future" that conflicts with its representations in this proceeding. Reply at 27.

railcars beyond the end of CP's regulated BSIT right-of-way). CP's views of its "common carrier obligations" are not correct.

A. CP's Common Carrier Obligation (Correctly Stated)

The law concerning a carrier's common carrier obligation to provide service over a private track is clear. A carrier, as part of its common carrier service obligation, is required to place cars on the shipper's private track just clear of its rail line, but has no obligation to provide service over the private track.[39]

Of course, a carrier can exercise its discretion to provide service over a private track:

> Service over private tracks or plant-facility tracks by a common carrier subject to our jurisdiction is neither compelled nor prohibited under the interstate commerce act. To furnish it or withhold it is within the discretion of the carrier.

Practices of Carriers Affecting Operating Revenues or Expenses Part II, Terminal Services, 209 I.C.C. 11, 28 (1935) ("Ex Parte No. 104") (quoting *Am. Fuel Co. v. Atchison, Topeka & Santa Fe Ry.*, 123 I.C.C. 101, 112 (1927)).

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[39] *See, e.g.*, *Freight-Handling Charges at St. Louis Stations*, 201 I.C.C. 543, 546 (1934) (common carrier obligation "extends to placing cars on" private track); *Booth-Kelly Lumber Co. v. S. Pac. Co.*, 183 F.2d 902, 913 (9th Cir. 1950) (carrier required to switch cars onto a private siding clear of the railroad's right-of-way); *Indus. Rys. Case, Allowances to Short Lines of R.R. Serving Indus.*, 29 I.C.C. 212, 225-26 (1914) ("Under the common law as construed in the practically unanimous decisions of the courts, a delivery of carload freight to a shipper having a private siding is made by shunting the car upon the switch, clear of the main tracks.").

B. CP's Tariff Rate Assertions

If a carrier exercises its discretion to provide service over private track, it is going beyond what is required under its common carrier service obligation. In Ex Parte No. 104, the ICC held that *if* a carrier exercised its discretion to provide service over private track, then it had to publish common carrier tariff rates to apply to its service over that private track:

> *If a carrier operates over private industrial tracks*, *it is because in its discretion it elects to do so, and its legal obligation in such operations extends no farther than is covered by the compensation it exacts for the services performed*. In other words, the obligation upon the carrier in such circumstances is to be measured by the compensation received and not by any definite duty otherwise placed upon the carrier by the statutes. The payment by the carrier to a shipper for rendering services upon private tracks which are not contemplated by the charges of the carrier would be 'a gift – a rebate – a thing *ipso facto* illegal and prohibited by the statute.' . . . Further, the rendition by the carrier of such services as are not contemplated by the compensation which it receives free and without additional charge is prohibited by section 6 of the act.[40]

The cases CP cites generally stand for the proposition that *if* carriers exercise their discretion to provide service over private track, they have to publish, upon reasonable request, appropriate tariff terms to apply to that service, and the ICC had (and the STB now has) jurisdiction to adjudicate tariff compliance issues.[41] In cases where

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[40] Ex Parte No. 104, 209 I.C.C. at 29 (emphasis added). The reference to "section 6" is to 49 U.S.C. § 6 (repealed). Section 6, among other things, required carriers to file their common carrier tariff rates at the ICC and adhere to the provisions of those filed tariff rates. *See* 49 U.S.C. § 6(7) (repealed).

[41] *See, e.g.*, *United States of America v. Chesapeake & Ohio Ry.*, 305 I.C.C. 201 (1958) (ICC adjudicates dispute over carrier compliance with voluntarily published tariff

carriers did not exercise their discretion to provide service over private tracks, the ICC consistently held (and the STB has consistently held) that the Agency ordinarily has no authority to order carriers to provide service over private tracks.[42]

Thus, the case law CP cites to support its contentions that the common carrier obligation applies over private track do not involve the common carrier obligation, but the separate duty of a carrier to adhere to its published line-haul tariff terms – terms that a carrier can ordinarily cancel at any time on twenty days' notice[43] – or other issues involving voluntary provision of service over private track.

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rates for private track service); *Mobil Chem. Co. – Pet. For Declaratory Order – Applicability of Switching Charges – Privately-Owned Hopper Cars*, 362 I.C.C. 8 (1979) (same); *N.Y. Cen. & Hudson River R.R. v. Gen. Elec. Co.*, 219 N.Y. 227 (1916) (same); *Ford Motor Co. v. Erie Lackawana Ry.*, 353 I.C.C. 411 (1977) (same); *Terminal Servs., Minn. Transfer Ry., New Brighton, Minn.*, 279 I.C.C. 52 (1950) (same). Other cases CP cites are irrelevant here. *See, e.g.*, *Intech, Inc. v. Consol. Freightways, Inc.,* 836 F.2d 672 (1st Cir. 1987) (Carmack Amendment case involving loss and damage claim under voluntarily established bill of lading); *Brockway-Smith Co. v. Bos. & Me. Corp.*, 497 F. Supp. 814 (D. Mass. 1980) (same); *Bos. & Me. Corp. – Pet. For Declaratory Order*, FD 35749 (STB served July 19, 2013) (local ordinance's application over rail track preempted in case where a rail carrier was voluntarily providing service over the track).

[42] *See* Petition at 59-60 n.22 (citing cases). *See also Hanson Nat. Res. Co. – Non-Common Carrier Status – Pet. For Declaratory Order*, FD 32248 slip op. at 23-27 (ICC served Dec. 5, 1994) (ICC does not have jurisdiction over the construction, operation, or abandonment of a rail that is (i) owned by the shipper; (ii) used exclusively for the transportation of the shipper's goods; (iii) the carrier providing service over the line does not hold out to provide common carrier service over the line; and (iv) the carrier providing service does not pay to maintain the line); *N.Y. Cen. R.R. v. S. Ry.*, 226 F. Supp. 463 (N.D. Ill. 1964), *aff'd per curiam*, 338 F.2d 667 (7th Cir. 1964) (same); *Pinelawn Cemetary – Pet. For Declaratory Order*, FD 35468, slip op. at 7 (STB served Apr. 21, 2015) ("[i]n contrast to railroad lines and excepted track, the Board has no jurisdiction over private track").

[43] *See* citations and accompanying text, *supra* note 37.

The Government's shipments to the Kesselring Site are too important to national security interests to turn on CP's "discretion" to provide service to the end of the End Segment, or to force the Government to agree to CP's onerous private line agreement as a *quid pro quo* for service over the BSIT.

C. Private Line Agreements

CP asserts that it ordinarily provides service over private tracks, only if CP and the private track owner first enter into a private track agreement. CP Reply at 8. With this statement, CP is conceding that under its view of the "common carrier obligation," it has no duty to provide service unless the shipper and carrier enter into a private track agreement.

The STB has no jurisdiction to order a carrier to enter into a private track agreement; it has no jurisdiction to adjudicate contract disputes between parties involving a private track agreement; and it has no jurisdiction to enforce a carrier's contractual service obligations under a private track agreement.[44]

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[44] *See, e.g.*, *Nat'l Indus. Traffic League v. Aberdeen & Rockfish R.R.*, 61 I.C.C. 120, 123 (1921) (common carrier has no "duty" to "enter into an agreement to operate privately owned sidetracks" and the Interstate Commerce Act "does not confer upon us the power to pass upon liability clauses . . . or of agreements for the maintenance, use, and operation of such individual sidetracks"); *Ralston Townsite Co. v. Mo. Pac. Ry.*, 22 I.C.C. 354, 355 (1912) (ICC "is without jurisdiction to compel the defendant to specifically perform a [private siding] contract . . . or to award damages for the breach thereof."). The STB also has no authority to enforce tariff terms incorporated by reference in private service contracts. *See* 49 U.S.C. § 10709(c)(1); *H.B. Fuller Co. v. S. Pac. Transp. Co.*, No. 41510, slip op. at 2 (STB served Aug. 22, 1997).

Given the vital importance of its shipments to national security and the lack of available alternative transloading locations, the Government considers it crucial to be able to invoke the STB's regulatory jurisdiction to enforce CP's common carrier obligation, and no such jurisdiction exists under a private track agreement.[45]

D. Enforcing CP's Representations

The Government asked the Board to address CP's common carrier obligations in the private line context because it wanted to obtain a Board ruling that CP had a binding common carrier obligation to place the Government's cars on the beginning of the End Segment.

In its Reply, CP appears to be representing to the Board that it will exercise its discretion to provide reasonable rates and service over the End Segment, and will provide the Government reasonable access to transload its freight on the End Segment. If that is the case, and the Government has no other choice but to purchase and operate the BSIT End Segment as a private track, the Board should have the authority to issue a Board-enforceable order directing CP to adhere to these representations.[46]

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[45] If exploration of a *State of Maine* transaction applicable to the End Segment resulted in a final agreement, it would resolve the Government's concerns about CP's legal obligation to provide service over the End Segment and the STB's jurisdiction to enforce that obligation. *See* Petition at 19.

[46] *See* case citations and accompanying text, *supra* note 38.

CONCLUSION

The Government respectfully requests that the Board grant its Joint Petition on an expedited basis and issue a Declaratory Order responding to the questions presented in the manner set forth above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, that I have this 14th day of June, 2019 caused a copy of the foregoing Joint Rebuttal Statement to be served by email on counsel for CP, as follows:

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BEFORE THE
SURFACE TRANSPORTATION BOARD

NAVAL NUCLEAR PROPULSION PROGRAM, UNITED STATES ARMY MILITARY SURFACE DEPLOYMENT AND DISTRIBUTION COMMAND, AND FLUOR MARINE PROPULSION, LLC – PETITION FOR DECLARATORY ORDER	)	Docket No. FD 36298

REBUTTAL VERIFIED STATEMENT OF BERNHARD E. GUNDERMANN

1. I am Bernhard E. Gundermann. I presented an opening verified statement ("OVS") in this proceeding on April 30, 2019. I remain employed as the Manager, Refueling Overhaul ("ROH") Production Support for the Naval Nuclear Laboratory ("NNL"). NNL is currently managed and operated by Fluor Marine Propulsion, LLC ("FMP"). Between October 1, 2009 and September 30, 2018, NNL was managed and operated by Bechtel Marine Propulsion Corporation ("Bechtel"). My references to FMP include, for time periods prior to December 31, 2018, Bechtel.

2. I addressed three topics in my OVS: (i) overview of the transportation aspects of the current refueling at the Kesselring Site; (ii) the important role the Ballston Spa Industrial Track ("BSIT") plays in refueling at the Kesselring Site; and (iii) the regulatory status of the BSIT.

3. On May 31, 2019, Delaware and Hudson Railway Company, Inc. ("D&H") d/b/a Canadian Pacific ("CP") filed its Reply to Petition for Declaratory Order

("CP Reply" or "Reply") in this proceeding. The CP Reply included Counsel's reply argument and two verified statements, including one by Kristine Williams ("Williams Reply VS").

4. In this Rebuttal VS, I respond to those portions of CP Counsel's reply argument and Ms. Williams' Reply VS that address my OVS.

OVERVIEW/BSIT IMPORTANCE

5. The nuclear reactor prototypes used at the Kesselring Site require refueling periodically. This refueling involves the transportation of very heavy, oversized containers to and from the Kesselring Site. Since the Kesselring Site has no direct rail access, the delivery supply chain requires off-site transloading of the containers between rail and heavy haul vehicle. This transloading occurs at the end of the "End Segment" of the BSIT. (I continue to refer to the last 430 ft. of the BSIT as the "End Segment").

6. I emphasized in my OVS that the BSIT played a critical role in the past and current refuelings at the Kesselring Site because there is no other practical rail location on the entire CP system where loaded and empty containers can be transloaded for heavy haul transportation to and from the Kesselring Site.

7. In its Reply, CP cites my OVS, and agrees that the End Segment is the only practical location for transloading shipments to and from the Kesselring Site:

> As the Government Parties acknowledge, CP does not have, and cannot provide, adequate alternative facilities to load and unload the Government's unique and oversized cargo adjacent to or on CP's track. *See* Petition at 57 ("The only area where the Government can [practically transload its freight] is at the end of

> the End Segment—there are no other places to do so on the entire CP system." (citing Gundermann V.S. at ¶ 12)).

CP Reply at 27.

8. I also emphasized in my OVS that the Kesselring Site and the BSIT are no ordinary facilities. The Kesselring Site is a critically important national defense facility, and the BSIT – which provides the only viable transloading site for rail shipments to and from the Kesselring Site – is a Strategic Rail Corridor Network ("STRACNET") connector line. Nothing in CP's Reply disputes the military importance of the BSIT to maintaining our national defense.

REGULATORY STATUS OF THE BSIT

9. As I discussed in my OVS, the record in the 1980 Abandonment Case is straightforward:

> - On May 1, 1980, D&H filed an application at the Interstate Commerce Commission ("ICC") seeking authority to abandon the BSIT ("Abandonment Application" or "Application"). Counsel's Exhibit ("CE")-12 thru -40. D&H described the BSIT as a 1.03-mile of rail line that started at the BSIT/D&H mainline switch located at milepost ("MP") A 30.76 (Valuation Station 1626+83) and ended at MP A 31.79 (Valuation Station 1681+20). D&H observed in its Application that the only portion of the BSIT shippers were then using was the 0.56-mile segment from the main line switch to the old freight house located on the line at MP A 31.32.
>
> - Following the filing of D&H's Application, the U.S. Department of Energy ("DOE") and other shippers objected to D&H's Application insofar as it sought authority to abandon the portion of the BSIT they were using – the first 0.56-mile segment to the old freight house located at MP A 31.32.
>
> - On August 7, 1980, DOE and D&H entered into a settlement agreement ("Rail Service Agreement"). CE-90 thru -

> 105. In the Agreement, D&H agreed to continue to provide service over the 0.55-mile portion of the BSIT from the main line switch at MP A 30.76 to the old freight house (then being used as a warehouse) at MP A 31.32. The Agreement appended a hand-drawn schematic of the BSIT track area ("Schematic"). CE-102. In return, DOE agreed to pay for specified track improvements "to Freight House." CE-103. The parties also agreed that D&H could petition the ICC to abandon the portion of the BSIT "past the . . . [w]arehouse (Milepost 31.32)." CE-96.
>
> - On August 11, 1980, D&H filed the Rail Service Agreement with the ICC. It also filed on that same day an Amended Application. CE-77 thru -88. In its Amended Application, D&H stated that it had initially sought to abandon the BSIT from the main line switch at MP A 30.76 (Valuation Station 1626+83) to MP A 31.79 (Valuation Station 1681+20), a distance of 1.03 miles, but now was withdrawing the portion of its Application "as relates to . . . the portion of the line which extends from MP 30.76 to MP 31.32." CE-80. D&H observed that the portion of the line between MP A 30.76 and MP A 31.32 was the portion of the BSIT then being used by shippers.
>
> - On October 15, 1980, the ICC issued a decision granting D&H's request to withdraw the portion of its initial Application over the portion of the BSIT shippers were using – from the D&H main line switch at MP A 30.76 (Valuation Station 1626+83) to MP A 31.32 – and granting D&H's request that D&H be authorized to abandon the portion of the BSIT shippers were not using – from MP A 31.32 to MP A 31.79 (Valuation Station 1681+20). CE-107 thru -111.

This record clearly shows that in the 1980 Abandonment Case, D&H retained as regulated rail track the 0.56-mile segment between the mainline switch and the old freight house.

10. As I also discussed in my OVS, Don Boyle, FMP's General Counsel, and I met with CP representatives on March 8, 2019 to discuss the parties' differing views on whether the End Segment of the BSIT was a regulated rail line.

FMP's position was that in its 1980 Final Decision, the ICC approved D&H's request to retain as regulated track the 0.56-mile track between the D&H mainline switch (located at Valuation Station 1626+83) and the old freight house (located at MP A 31.32), and that 0.56 miles encompassed the current 0.55-mile length of the BSIT, including the End Segment.

11. CP took the position that the ICC had approved D&H's retention of a 0.55-mile regulated segment but stated the Government was using the wrong starting point to measure the 0.55-mile long regulated track. According to CP, the main line switch in 1980 was located 430 ft. south of where it is today at Valuation Station 1626+83. If CP's starting point is used, the 0.55-mile regulated segment would stop just short of the beginning of the End Segment. I illustrate the difference in the parties' positions in my Rebuttal Exhibit 1 (BEG-R1).

12. Following our meeting, I undertook a detailed review of all relevant information I could find on the location of the BSIT switch in 1980. As I discussed in my OVS, the pre-1980 Valuation maps and pre-1980 historic photos all show that the BSIT main line switch was located at Valuation Station 1626+83 long before 1980.

13. Ms. Williams agrees with my conclusion – though she tries to obscure that fact. At page 4 of her Reply VS, she references some property sales to a John Zepko, *et al*. shown in the Valuation Map I appended to my OVS as my Exhibit No. 7 (BEG-7) at 1. She goes on to say that "[l]ikely in connection with the sale of the property," the BSIT main line switch was installed at its "current location" at Valuation Station 1626+83. The Valuation Map Ms. Williams cites show that the Zepko, *et al*.

property sales took place in the 1960s – so Ms. Williams acknowledges the obvious fact that the BSIT switch was not located 430 ft. south of its current location in 1980, as CP claimed in our March 8, 2018 meeting.

14. Ms. Williams also speculates that at one time, there may have been a switch between the D&H mainline and the BSIT 430 ft. south of the current switch, but offers no real evidence to support her position. She includes as her Exhibit A, a current satellite view showing, what she calls "the old spur alignment," but there is nothing in the Valuation Maps (or any other source) that clearly shows there was a BSIT mainline switch located 430 ft. south of the current mainline switch, nor would there have been any need for one, as the main line coming from Albany curved into Ballston Spa at this location before it was replaced by the new main line track east of Ballston Spa. What the historic records do show is that there was a switch to a siding east of the CP mainline at Valuation Station 1622+53.[1] Likewise, her suggestion that Valuation Station 1622+53 is where "former right-of-way began its westward curve into Ballston Spa" finds no support in the record. The original Saratoga & Schenectady alignment was located to the west of where MP A 30.76 is now located. Moreover, all of the alignment changes happened before 1966 and were no longer relevant or accurate by the time of the 1980 Abandonment Application.

[1] The Valuation Map is difficult to read, and I believe that is the source of the six-foot distance difference between my identification of Val. Stat. 1622+53 and Ms. Williams' identification of Val. Stat. 1622+59, as the "9" could easily be read as a "3."

15. Moreover, as I explained in my OVS, if D&H had sought authority to abandon track 430 ft. south of Valuation Station 1626+83, it would have been asking for authority to abandon a portion of its active main line track – which it would not have done – and the 1.03-mile abandonment it sought would not have reached the end of the regulated line at Valuation Station 1681+20 – which it would not have sought.

16. Ms. Williams' concession is very significant. As framed by CP at our March 8, 2019 meeting, the dispute between the parties over whether the End Segment of the BSIT is regulated is tied to where the BSIT main line switch was located in 1980. If the main line switch was located where CP claimed (at Valuation Station 1622+53), 0.55 regulated miles ends before the start of the End Segment. If the main line is where FMP claims (at Valuation Station 1626+83), the 0.55 regulated miles includes the End Segment. The answer is now clear – CP acknowledges that the D&H switch was located at Valuation Station 1626+83, so, using that as the switch location, the 0.56 regulated miles includes the End Segment.

17. One might think that CP would now simply acknowledge the End Segment is regulated rail track. Unfortunately, that is not the case. Ms. Williams now claims that my measurement of the 0.56 regulated miles was "misplaced," because the proper analysis, according to Ms. Williams, is to identify where MP A 31.32 – the end of the regulated segment – is located. According to Ms. Williams, the record the ICC relied upon in deciding the 1980 Abandonment Case shows that MP A 31.32 is located at a point where the End Segment begins.

18. Ms. Williams' new theory finds no support in the 1980 Abandonment Case record. In its Abandonment Application, D&H sought to abandon 1.03 miles of track starting at the main line switch (Valuation Station 1626+83, MP A 30.76). D&H repeatedly stated in this Application that 0.56 miles from the mainline switch – *i.e.*, at MP A 31.32 – there was an old freight house where most of the traffic on the line was loaded and unloaded. The old freight house is located just past the end of the End Segment.

19. Similarly, in the 1980 Rail Service Agreement, DOE and D&H acknowledged that DOE had been using a loading/unloading area that "is .55 miles from the connection of said track with RAILROAD's main line." CE-90. In the Agreement, D&H agreed to continue to provide common carrier rail service "over the portion of the Ballston Spa Industrial Track that extends from Milepost A 30.76 to the Tufflite Plastics Company Warehouse at Milepost A 31.32 as identified in the attached Appendix 'A'" (CE-92) and further stated that nothing in the Agreement "affects RAILROAD'S right to petition the ICC for abandonment of its Ballston Spa Spur past the Tufflite Plastics Company Warehouse (Milepost A 31.32)." CE-96.

20. Finally, the ICC's Final Decision states that it was approving CP's Amended Application where D&H withdrew its initial request to abandon the 0.56-mile portion of the BSIT between the mainline switch (located at Valuation Station 1626+83, MP A 30.76) and MP A 31.32. The ICC observed that MP A 31.32 was the location where shippers loaded and unloaded their cargo.

21. Ms. Williams and CP's Counsel maintain that the Appendix "A" Schematic to the Rail Service Agreement conclusively establishes that MP A 31.32 is located well before the location of the Tufflite Plastics Company Warehouse (which was once the old freight house). Appendix A does not contain any marking for the location of MP A 31.32, but does clearly show the location of the warehouse, which the text of the Agreement says is located at MP A 31.32. Ms. Williams attempts to calculate the location of MP A 31.32, but her result – MP A 31.32 ends well short of the warehouse – does not comport with the plain text of both the Rail Service Agreement, the Amended Application, or the ICC's Final Decision. All three of these documents identify MP A 31.32 as located at the old freight house.

22. Ms. Williams and CP's Counsel also contend that the location of MP A 31.32, at the beginning of the End Segment, makes commercial sense because, by 1980, no traffic moved beyond the start of the End Segment to the old freight house. Of course, DOE's traffic moved beyond the start of the End Segment because it used (and the Government continues to use) the unloading area at the end of the End Segment near the old freight house.

23. D&H also stated in its Application that other shippers had been using the BSIT prior to 1980; these other shippers all loaded and unloaded their traffic adjacent to the old freight house; and one of these shippers (Tufflite Plastics) stated on the record that it planned to continue its shipments after 1980.

24. In response to CP's Reply contentions concerning the use of the BSIT past the start of the End Segment, I was able to locate some photographs taken in

the late 1950s of the loading/unloading area by the old freight house. I append these photos in my Rebuttal Exhibit 2 (BEG-R2). These photos show that there were at least two parallel tracks by the old freight house. One of these tracks (the one closest to the freight house) appears to encompass the current BSIT End Segment alignment. As shown in my Rebuttal Exhibit 3 (BEG-R3), the Valuation Maps show that each of these two tracks continued past the old freight house and then merged with the adjacent tracks west of the old freight house.

25. While these pictures were taken well before 1980, they show rail cars situated immediately adjacent to the freight house on both lines. These photos provide additional support for D&H's statements in its 1980 Abandonment Application and Amended Application that DOE and other shippers had traditionally used the track by the old freight house to load and unload their freight.

26. The photos also illustrate that in the late 1950s there were two active rail lines near the old freight house, one of which was the main line. There is nothing in the 1980 Abandonment Case record indicating that D&H had stopped providing service over both of these lines in 1980 or, as CP now claims, all traffic was moving over the current BSIT alignment track.

27. Ms. Williams and CP's Counsel also opine that the Appendix A Schematic contains all correct Valuation Station and mileposts and that the parties and the ICC relied upon these correct milepost designations in its Final Decision. The Schematic shows that the mainline switch (Valuation Station 1626+83) is located at MP A 30.84, not MP A 30.76.

28. As I stated in my OVS, D&H may have used the wrong milepost designation for the location of the main line switch (using MP A 30.76 rather than MP A 30.84), but D&H never attempted to correct this or any other milepost references when it filed its Amended Application. The Amended Application continued to reference the BSIT as starting at the main line switch at MP A 30.76. Similarly, in its Final Decision, the ICC referred to the BSIT as starting at MP A 30.76. Neither the Amended Application nor the ICC's Final Decision make any reference to MP A 30.84.

29. To respond to Ms. Williams' new assertions, I have reviewed the Valuation Maps to identify whether D&H's milepost error designations also extended to the location of the old freight house and the end of the line. It appears to me that D&H may have misidentified the correct mileposts at these other locations as well. I append the details of how I made these calculations in my Rebuttal Exhibit 4 (BEG-R4).

30. In its Application, D&H represented that the regulated line ended at Valuation Station 1681+20/MP A 31.79. The Valuation Maps show that Valuation Station 1681+20 is the correct end, but using the limited milepost data contained in the maps, I calculate the correct milepost at MP A 31.87. I note that Ms. Williams made a similar calculation and reached the same result. Williams Reply VS at 5.

31. Similarly, the Valuation Maps show the location of the old freight house at Valuation Station 1656+40, which, using the milepost data contained in the maps, would be at MP A 31.40, not the MP A 31.32 referenced D&H's filings and the ICC's decisions.

32. While D&H may have used the wrong milepost locations for both the pre-Application end of the regulated line and the old freight house, D&H did not correct these errors in 1980, nor did the ICC rely on any "corrected" mileposts in its Final Decision.

33. In its Application and in its Amended Application (filed after the parties entered into the Rail Service Agreement), D&H referred to the location of the end of 1.03 mile BSIT as located at Valuation Station 1681+20/MP A 31.79. Similarly, the ICC in its Final Decision refers to the location of the end of the 1.03-mile line as Valuation Station 1681+20/MP A 31.79. There is no reference to the "correct" milepost at MP A 31.87 in either the Application, the Amended Application or the Final Decision.

34. In its Application, and its Amended Application, D&H stated that the old freight house was located approximately 0.56 miles from the mainline switch at MP A 31.32. Similarly, the ICC in its Final Decision refers to location of end of the regulated segment as located at MP A 31.32 – 0.56 miles from MP A 30.76. There is no reference to the "correct" milepost at MP A 31.40 in either the Amended Application or the Final Decision.

35. I add that D&H's apparent use of incorrect mileposts in its 1980 filings makes no practical difference here because D&H's errors were internally consistent and tie to the actual locations involved. As filed, D&H stated the location of the mainline switch was at MP A 30.76; the old freight house was located 0.56 miles from MP A 30.76 at MP A 31.32; and the end of the regulated line was located 1.03 miles from the mainline switch at MP A 31.79. Had D&H corrected the record, it would

have used MP A 30.84 as the location of the mainline switch; the old freight house would be located 0.56 miles from MP A 30.84 at MP A 31.40; and the end of the regulated line would be located 1.03 miles from the mainline switch at MP A 31.87. A simple demonstration of this point is in the graphic attached as my Rebuttal Exhibit 5 (BEG-R5).

36. Stated another way, the record in the 1980 Abandonment Case clearly shows that D&H sought, and the ICC approved, D&H's request to retain the 0.56-mile segment between the main line switch and the old freight house, and to abandon the remaining 0.47-mile segment between the old freight house and the end of the line. If D&H had used the correct milepost designations, it would have made the same request (citing the correct mileposts) and the ICC would have granted the same relief (citing the correct mileposts).

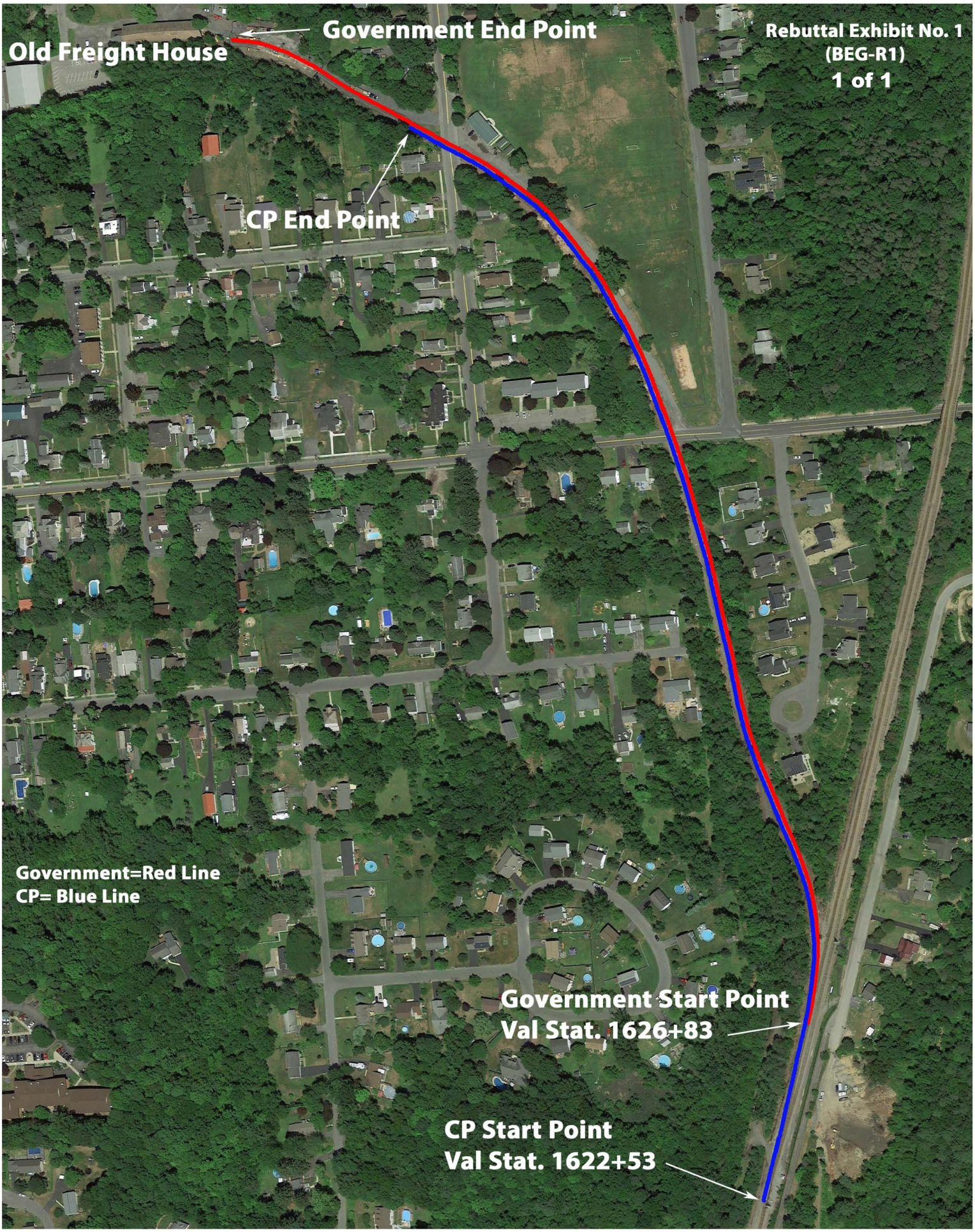
VERIFICATION

I, Bernhard E. Gundermann, verify under penalty of perjury that I have read the foregoing Rebuttal Verified Statement, know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this Rebuttal Verified Statement.

Bernhard E. Gundermann

Executed on June 13, 2019

GUNDERMANN
REBUTTAL EXHIBIT 1
(BEG-R1)


Government End Point
Old Freight House
Rebuttal Exhibit No. 1
(BEG-R1)
1 of 1
CP End Point
Government=Red Line
CP= Blue Line
Government Start Point
Val Stat. 1626+83
CP Start Point
Val Stat. 1622+53

GUNDERMANN
REBUTTAL EXHIBIT 2
(BEG-R2)

12-26-59, KS 22,358, DIG-CRIBBING USED TO SHIELD PV ONTO LOW BOY

UNCLASSIFIED

S. I. S. fuel shipping cask. ready on flat car for journey

MANITOWOC
KS- 102311
UNCLASSIFIED
10

GUNDERMANN
REBUTTAL EXHIBIT 3
(BEG-R3)

No.	Grantor	Grantee	Instrument	Date	Record	Custodian Number	Remarks.
1	Lebanon Coal, etc.	S. & S. R.R. Co.	W. Deed	Oct. 7, 1833	B.B.Y., P.320, June 21, 1834	N.Y. 1789	
1	" " "	" " "	Release	Feb. 16, 1831	" 95, " 86, Feb. 9, 1831	" 1790	See Note #1
2	Hiram Middlebrook, et al.	" " "	W. Deed	Feb. 9, 1833	" W., " 497, July 29, 1833	" 1791	
3	Thos. C. Taylor	" " "	Deed	Nov. 12, 1832	" " " 49, Apr. 24, 1833	" 1792	
4	Stephen Smith, et ux.	" " "	"	Nov. 17, 1832	" " " 302, Dec. 5, 1832	" 1793	
5	James Cornbach, et ux.	" " "	W. Deed	June 11, 1832	" V., " 313, July 3, 1832	" 1794	
6	Harvey Loomis	" " "	Cession	July 15, 1831	" X., " 246, Sept. 12, 1833	" 1795	
7	" "	" " "	"	" " "	" " " " " "	" 1796	
8	Ezra H. Cassedy, et ux.	" " "	"	July 30, 1832	" " " 140, July 5, 1832	" 1796	
9	Harvey Loomis, et ux.	" " "	"	Nov. 22, 1833	" " " 271, Sept. 12, 1833	" 1797	
10	E. R. Wright, et ux.	" " "	W. Deed	June 13, 1832	" U., " 399, June 25, 1832	" 1798	
11	Thos. Palmer, et ux.	" " "	Deed	May 1, 1832	" " " 366, June 1, 1832	" 1799	
12	Harvey Loomis	" " "	Cession	July 15, 1831	" X., " 246, Sept. 12, 1833	" 1797	
13	" "	" " "	"	" " "	" " " " " "	" 1798	
14	" "	" " "	"	" " "	" " " " " "	" 1799	
15	A. Van Steenburgh, et ux.	" " "	Release	Mar. 26, 1849	" 117, " 340, Apr. 12, 1849	" 1801	See Note #2
16	Harvey Loomis, et ux.	" " "	W. Deed	Apr. 22, 1833	" W., " 532, May 3, 1833	" 1800	See Note #3
17	Abel Ekstrom	D. & H. Co	Lease	June 29, 1916		M.D. 3148	See Note #4

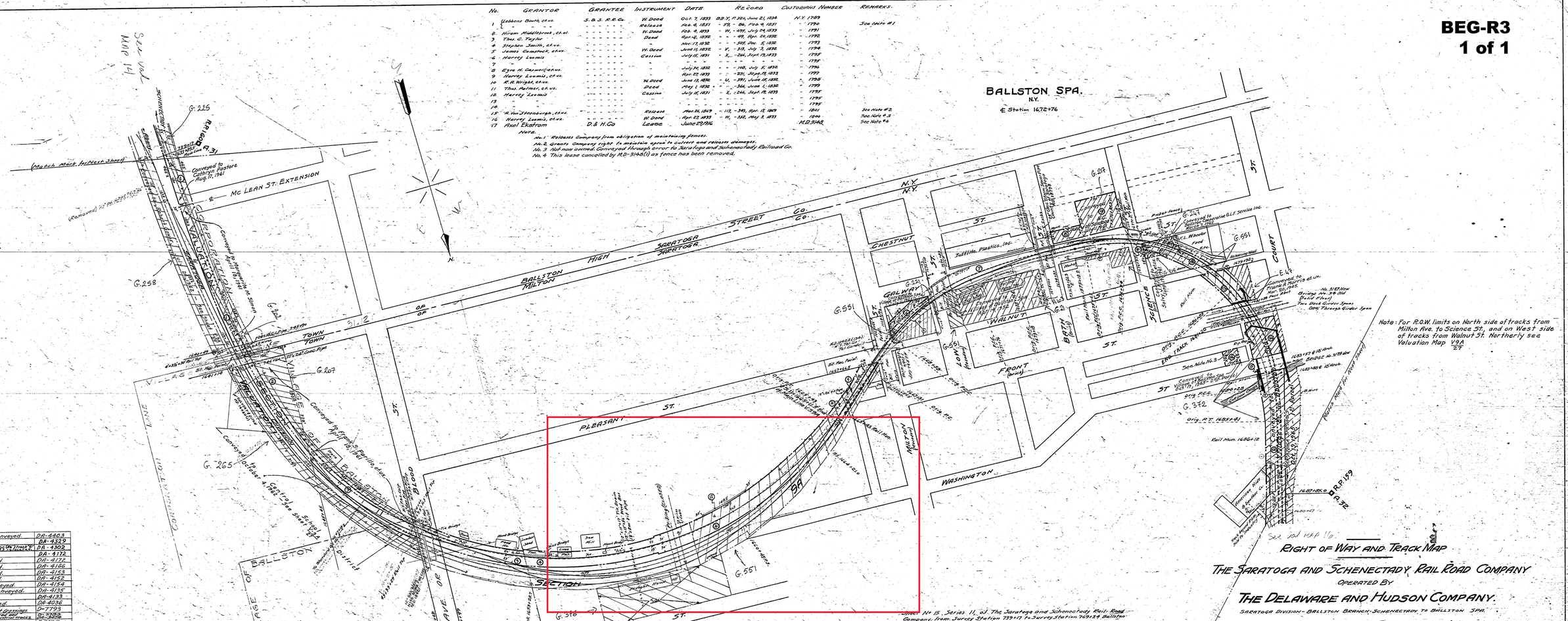
Note.

No. 1 Releases Company from obligation of maintaining fences.

No. 2 Grants Company right to maintain apron to culvert and releases damages.

No. 3 Not now owned. Conveyed through error to Saratoga and Schenectady Railroad Co.

No. 4 This lease cancelled by R.E. 3148(1) as fence has been removed.

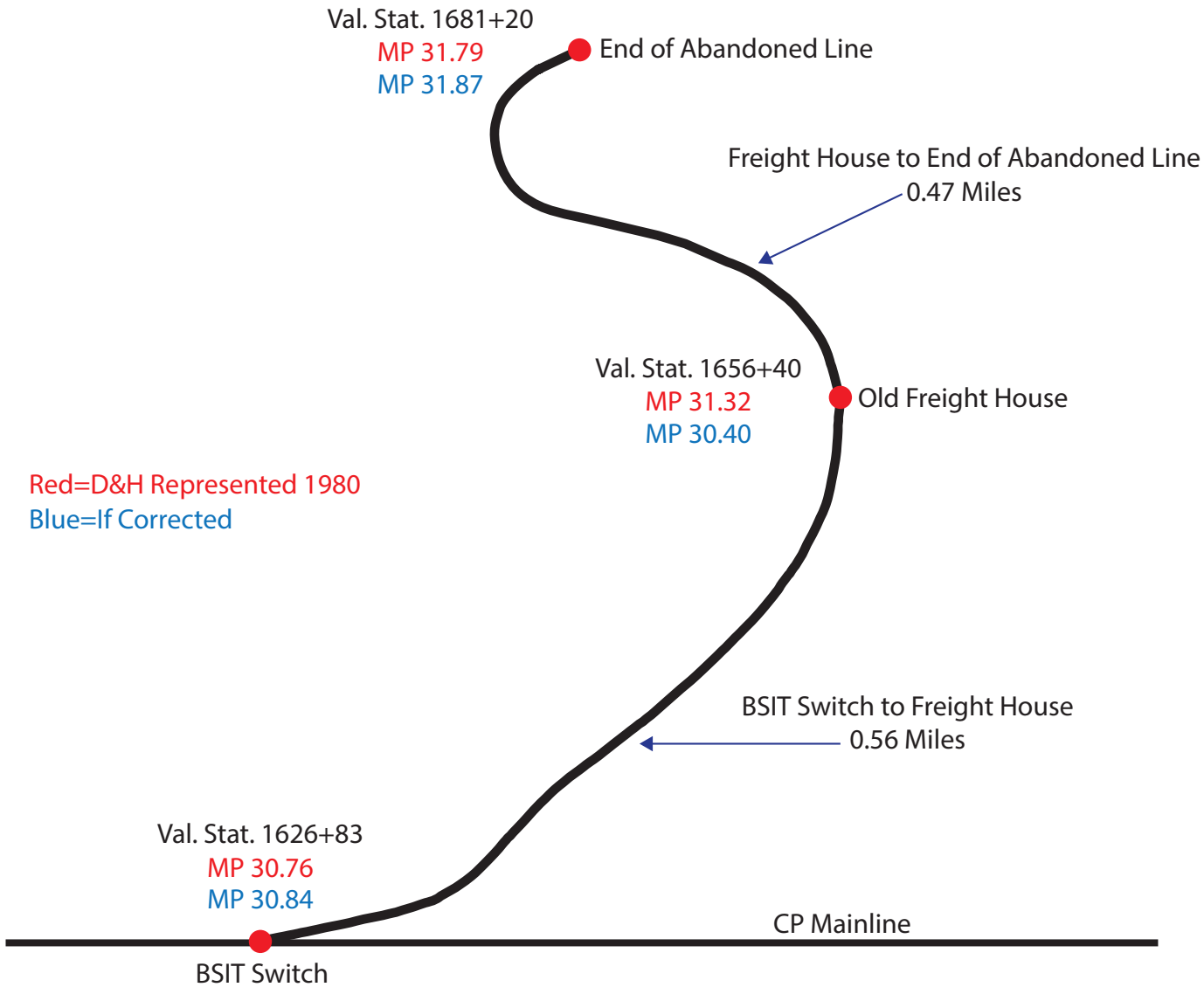

BALLSTON SPA.
N.Y.
℄ Station 1672+76
Mc LEAN ST. EXTENSION
BALLSTON MILTON High STREET
SARATOGA SARATOGA
N.Y. N.Y.
CHESTNUT ST.
WALNUT ST.
FRONT (Rear)
PLEASANT ST.
WASHINGTON ST.
GROVE ST.
BRIDGE ST.
COURT ST.
Juliette Plastics, Inc.
G.551
G.552
G.207
G.265
G.268
G.226
G.372
G.316
R.P. 159
R.P. 32
Note: For R.O.W. limits on North side of tracks from Milton Ave. to Science St., and on West side of tracks from Walnut St. Northerly see Valuation Map V9A 27
See Vol. 14 Map 1
See Vol. 14 Map 1
See Note No. 3
See Note #2
See Note #4
Conveyed to Catherine Pestore Aug. 11, 1941
Conveyed to Frank A. Morris et ux. Feb. 26, 1945
Conveyed to Saratoga Electric Corp. Nov. 30, 1945
Conveyed to Saratoga Electric Corp. Nov. 30, 1945
Conveyed to Saratoga Electric Corp. Nov. 30

GUNDERMANN
REBUTTAL EXHIBIT 4
(BEG-R4)

Location	Valuation Station	Milepost	Action to Calculate
BSIT Switch	1626+83	30.84	+0.55 Miles/2,904 Feet
Freight House	1656+40	31.40	Station Exact/MP Rounded
Abandonment End Point	1681+20	31.87	-665 Feet (1687+85-1681+20) then divide 665/5280=0.13 mile rounded to determine MP
MP 32 on Val. Map	1687+85	32.00	

GUNDERMANN
REBUTTAL EXHIBIT 5
(BEG-R5)

Ballston Spa Industrial Track — Key Locations



BEFORE THE
SURFACE TRANSPORTATION BOARD

NAVAL NUCLEAR PROPULSION PROGRAM, UNITED STATES ARMY MILITARY SURFACE DEPLOYMENT AND DISTRIBUTION COMMAND, AND FLUOR MARINE PROPULSION, LLC – PETITION FOR DECLARATORY ORDER	)	Docket No. FD 36298

REBUTTAL VERIFIED STATEMENT OF DONALD J. BOYLE

1. My name is Donald J. Boyle. I submitted an Opening Verified Statement ("OVS") in this proceeding on April 30, 2019. I continue to serve as General Counsel for the Naval Nuclear Laboratory ("NNL"), which is currently managed and operated by Fluor Marine Propulsion, LLC ("FMP"). My references to FMP include NNL's predecessor manager/operator, Bechtel Marine Propulsion Corporation, also known as BMPC.

2. On May 31, 2019, Delaware and Hudson Railway Company, Inc. ("D&H") d/b/a Canadian Pacific ("CP") submitted a Reply filing in this proceeding. This Reply included Counsel's Argument and two verified statements, one by James D. Clements, CP's Vice President, Strategic Planning and Transportation Services, and one by Kristine Williams, CP's Director of Real Estate. I respond here to assertions made by both Mr. Clements and Ms. Williams in their Reply Verified Statements ("Reply VS").

Response to Mr. Clements' Reply Verified Statement

3. Mr. Clements' Reply VS includes several pages under the heading "History of Negotiations with the Government Parties." Clements Reply VS at 2-8. Many of Mr. Clements' statements are incorrect or mischaracterize this history. I address each one below.

4. Mr. Clements asserts that discussions between CP and FMP concerning the sale of the Ballston Spa Industrial Track ("BSIT") got underway in 2017 because "CP determined that its continued ownership of BSIT [was] not necessary to meet the Government's needs for continued, but infrequent, rail service." Clements Reply VS at 4. This assertion is not accurate. As I discussed in my OVS, CP representatives informed me in 2017 that CP's interest in selling the BSIT was driven by liability concerns. Specifically, CP representatives informed me that following the rail disaster in 2013 at Lac-Mégantic, CP's top management had decided to limit (or eliminate) CP's risks related to the transport of hazardous commodities, such as radioactive material.

5. Mr. Clements asserts that CP offered the October 2017 letter/indemnity agreement (Boyle OVS Exhibit 2 (DJB-2)) as an "accommodation" to FMP. Clements Reply VS at 4. This assertion is not accurate. As I discussed in my OVS, CP demanded that FMP agree to start negotiations of a line sale before it would allow FMP contractors access to the BSIT to make necessary repairs – at FMP's expense. FMP had little choice but to agree, since the first unloaded rail shipment was scheduled to use the BSIT in May 2018, and the repairs had to be done before that date. I emphasize

here that it was CP that was demanding a sale of the BSIT, not FMP demanding a purchase of the BSIT.

6. Mr. Clements asserts that following the parties' execution of the October 2017 letter agreement, "the Government committed to acquiring the property prior to the first loaded movement." Clements Reply VS at 5. This assertion is not accurate. In the letter agreement, FMP agreed only to enter into good faith negotiations that might lead to a Government purchase of the BSIT. DJB-2 at 1. FMP, and the other involved Government entities, did not "commit" to purchasing the BSIT, nor for that matter, did CP "commit" to sell the BSIT. Indeed, as noted throughout my discussions with CP, and as memorialized in the May 9, 2018 Access Agreement between FMP and CP (Boyle OVS Exhibit 4 (DJB-4) at 21), which by its own terms supersedes and cancels all prior agreements and understandings (*id*. at 9), the Government and FMP are subject to certain laws and regulations governing purchases of real property interests and would be in no position legally to commit to a purchase of the BSIT in contravention of such requirements.

7. Mr. Clements asserts that following FMP's and CP's execution of the letter/indemnity agreements, the sales discussions proceeded at a "glacial" pace. Clements Reply VS at 5. In fact, as I explained to CP's counsel in my letter dated March 5, 2018, the Government was handling the negotiations on an expedited basis. Boyle OVS Exhibit 3 (DJB-3) at 2.

8. Mr. Clements states at page 6 of his Reply VS that in April 2018, the Government "provided a draft sale agreement for the BSIT." The document that Mr.

Clements refers to (copy attached as my Rebuttal Exhibit 1 (DJB-R1)) followed up on my March 5, 2018 letter. As can be seen, it is simply a generic blank sales form that the U.S. Army Corps of Engineers uses to purchase real property.

9. Mr. Clements also refers on page 6 of his Reply VS to the Access Agreement that FMP and CP executed on May 9, 2018 (copy attached to my OVS as DJB-4). As I discussed in my OVS, CP insisted that FMP execute this Agreement before it would provide the Government with its common carrier rates for the then in-transit first empty container shipment. Since FMP determined it had no choice but to obtain access rights with a shipment already in transit, FMP executed the Access Agreement.

10. Mr. Clements states that during the Winter and Spring of 2018, CP always emphasized that "it would comply with its common carrier obligations." Clements Reply VS at 5. In fact, one CP executive (not Mr. Clements) told us point-blank in the Winter of 2018 that CP would not transport our shipments unless we first completed a sales agreement. Boyle OVS at ¶ 12; DJB-3 at 2. In addition, CP refused to include in the May 2018 Access Agreement any rights to access or transload container shipments containing radioactive materials. *Id*. at ¶ 17. Finally, the Government issued its tender for Rule 11 rates to apply to our first set of incoming empty containers on April 5, 2018. This tender requested Rule 11 common carrier rate offerings. The originating and bridge carriers provided timely responses, but CP dragged its heels, and would not provide common carrier rates until FMP executed the Access Agreement. *Id*. at ¶¶ 13-18.

11. In April of 2018, the Government learned, after retaining Outside Counsel with Surface Transportation Board ("STB" or "Board") expertise, that the BSIT

was a regulated rail line. The Government immediately informed CP of this new development. As Mr. Clements states at page 7 of his Reply VS, CP's response was to threaten to abandon the BSIT – an illustration of CP's true sentiments with regard to its common carrier obligations.

12. In order to break the impasse, the Government proposed that the parties explore a "*State of Maine*" sales transaction. Mr. Clements asserts that this offer was "inconsistent with the Government's [prior] commitment to acquire the BSIT." Clements Reply VS at 7. This assertion is incorrect. As discussed above, and as CP well knows, the Government has never "committed" to purchase the BSIT. It has committed to enter into good faith negotiations to consider the purchase of the BSIT. The Government and its contractors have proceeded in good faith to retain the U.S. Army Corps of Engineers to conduct any potential real estate acquisition proceeding, and have invested in surveying and sampling work in support of the Government's required real estate acquisition processes, including completing a title review and environmental sampling – the proper execution of which are conditions precedent to any commitment to purchase a real property interest. In addition, the parties had to deal with a new development in the discussions – the fact that the BSIT was a regulated rail line. The Government's response was to propose exploration of a *State of Maine* arrangement wherein the Government would purchase the BSIT and CP would continue to have a common carrier service obligation over the BSIT. CP's initial response was to seek to terminate its common carrier obligation by abandoning the BSIT.

13. Mr. Clements also states that CP was not interested in pursuing a *State of Maine* transaction because CP might have to serve "other shippers." Clements Reply VS at 8. Normally, railroads want to serve "other shippers." In any case, as CP itself acknowledges, there have not been any "other shippers" using the BSIT for decades, and, given its location (in a largely residential area), it appears most unlikely that there will be any "other shippers" in the future. Putting that aside, what is relevant today is that, by CP's own admission, the Government's only option for reasonable access to its shipments supporting the vital national security mission at the Kesselring Site is the BSIT, including the transloading area on the End Segment of the BSIT.

14. Mr. Clements states that if the Government acquires the BSIT, or the End Segment, and operates it as a private line, CP will provide service to the Government under a "private" contract and operate in accordance with its "custom and practice." Clements Reply VS at 9. As discussed in our Rebuttal, the STB does not have any regulatory authority to enforce private contracts of this type and, particularly in light of the national security importance of the BSIT, the long history of railroads trying to limit their obligations to transport hazardous materials, and CP's stated concerns about transporting the Government's radioactive material shipments, the Government cannot rely on vague commercial assurances that CP will adhere to its "customs" and "practices." The Government needs to ensure that CP will provide STB-enforceable common carrier service to meet its shipment needs at the Kesselring Site.

Response to Ms. Williams' Reply Verified Statement

15. Mr. Gundermann has provided a detailed response to Ms. Williams' Reply VS in his Rebuttal VS. I will only add a couple of additional comments here.

16. I have had extensive oral and written communications with CP concerning the regulatory status of the BSIT, and the End Segment of the BSIT (see my OVS at ¶¶ 28-31). I also attended the March 8, 2019 meeting where CP representatives and FMP representatives met to try to narrow our areas of dispute. At that meeting, CP and FMP agreed that in its 1980 decision, the ICC had approved D&H's request to retain as regulated track approximately 0.55 miles of track starting at the D&H mainline switch.

17. The parties' differences centered on the location of that switch. CP's position was that, in 1980, the switch was located 430' south of where it is located today and, after 1980, D&H moved the switch to its current location. If that starting point is used, the 0.55 miles ended at the start of the End Segment. FMP's position was that the switch was in the same location in 1980 as it was today, and using the current switch location as the starting point, the 0.55 miles included the End Segment.

18. As discussed in detail in Mr. Gundermann's Rebuttal VS, Ms. Williams acknowledges in her Reply VS that the BSIT mainline switch was located in 1980 at the same location it is located today. Thus, using this starting point, the 0.55 miles of regulated track encompasses the End Segment. Based upon the discussions I participated in with CP at the March 8, 2019 meeting, there should be no further dispute between CP and the Government whether the End Segment is regulated track – it clearly is regulated track.

19. Ms. Williams' new fallback argument is that the 1980 Abandonment Case record shows that the end of the regulated segment is less than 0.55 miles from the D&H mainline switch. This new argument is unsupported by the record. The ICC's Final Decision in the 1980 Abandonment Case clearly holds that D&H was to continue to provide common carrier service from the mainline switch for 0.56 miles to the old freight house. In addition, all of the 1980 Abandonment Case records state the old freight house was located 0.55/0.56 miles from the mainline switch – an area that encompasses the BSIT End Segment. Mr. Gundermann provides additional reasons why CP's new contentions are flawed in his Rebuttal VS.

VERIFICATION

I, Donald J. Boyle, verify under penalty of perjury that I have read the foregoing Rebuttal Verified Statement, know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this Rebuttal Verified Statement.

Donald J. Boyle

Executed on Jan 13, 2019

BOYLE
REBUTTAL EXHIBIT 1
(DJB-R1)

DEPARTMENT OF THE ARMY

OFFER TO SELL REAL PROPERTY
(ER 405-1-12)

Project

Tract No.

Contract No.

The undersigned, hereinafter called the Vendor, in consideration of the mutual covenants and agreements herein set forth, offers to sell and convey to the United States of America and its assigns, the fee simple title to the following described land, with the buildings and improvements thereon, and all rights, hereditaments, easements, and appurtenances thereunto belonging, located in the County of Arlington, State of Virginia, bounded and described as set forth in Exhibit(s) attached hereto and made a part hereof, subject to existing easements for public roads and highways, public utilities, railroads, and pipelines, and subject to the following exceptions and rights outstanding in third parties:

The Vendor reserves only the following rights and interests in the above described property: [namely:]

The terms and conditions of this offer are as follows:

(1) The vendor agrees that this offer may be accepted by the United States of America through any duly authorized representative, by delivering, mailing, or electronically submitting a notice of acceptance to the Vendor at the address stated below, at any time within three hundred sixty (360) days from the date hereof, whereupon this offer and the acceptance thereof become a binding contract.

(2) The United States of America agrees to pay to the Vendor of the said land the sum of

($), payable on the acceptance of this offer and approval of the Vendor's title; provided the Vendor can execute and deliver a good and sufficient general warranty deed conveying said land with the hereditaments and appurtenances thereunto belonging to the United States of America and its assigns, in fee simple, free and clear from all liens and encumbrances, except those specifically excepted or reserved, above, together with all right, title, and interest which the Vendor may have in the banks, beds, and waters of any streams bordering the said land to be conveyed, and also all interest in alleys, roads, streets, ways, strips, gores, or railroad rights-of-way abutting or adjoining said land and in any means of ingress or egress appurtenant thereto.

(3) It is agreed that the United States of America will defray the expenses incident to the preparation and recordation of the deed to the United States of America and the procurement of the necessary title evidence.

(4) The Vendor agrees that he/she will satisfy of record at or before the transfer of title, all encumbrances and special assessments which are a lien against the land, as the United States of America may require, and that he/she will pay the pro rata portion of all taxes on the property which are allocable to a period prior to and including the date of vesting title in the United States of America, or the effective date of possession of such real property by the United States of America, whichever is the earlier, and, if the Vendor fails to do so, the United States of America may pay any taxes, assessments, and encumbrances which are a lien against the land; that the amount of any such payments by the United States of America shall be deducted from the purchase price of the land; and that the Vendor will, at the request of the United States of America and without prior payment or tender of the purchase price, execute and deliver a general warranty deed to the United States of America and obtain and record such other curative evidence of title as may be required by the United States of America.

(5) The Vendor agrees that loss or damage to the property by fire or acts of God shall be at the risk of the Vendor until the title to the land and deed to the United States of America have been accepted by the United States of America through its duly authorized representative or until the right of occupancy and use of the land, as hereinbelow provided for, has been exercised by the United States of America; and, in the event that such loss or damage occurs, the United States of America may, without liability, refuse to accept conveyance of the title or it may elect to accept conveyance of title to such property, in which case there shall be an equitable adjustment of the purchase price.

(6) The Vendor agrees that the United States of America may, notwithstanding the prior acceptance of this offer, acquire title to said land by condemnation or other judicial proceedings, in which event the Vendor agrees to cooperate with the United States of America in the prosecution of such proceedings; agrees that the consideration hereinabove stated shall be the full amount of just compensation, inclusive of interest, for the taking of said land; agrees that the consideration recited in paragraph 2 hereof constitutes the full amount of the compensation for the land and shall be pro rated among all persons having an interest in this property as their respective interests may appear; and agrees that the said consideration shall be in full satisfaction of any and all claims of the Vendor for payment for the right of occupancy and use hereinafter provided for in paragraph 7.

(7) As additional consideration for the payment of the purchase price hereinabove set forth, the Vendor hereby grants to the United States of America the right of immediate occupancy and use of the land for any purpose whatsoever from and after the acceptance by the United States of America, of this offer until such times as said land is conveyed to the United States of America and, upon demand, the Vendor will immediately vacate the property and deliver possession to the United States of America.

(8) It is agreed that the spouse, if any, of the Vendor, by signing below, agrees to join in any deed to the United States of America and to execute any instrument deemed necessary to convey to the United States of America any separate or community estate or interest in the subject property and to relinquish and release any dower, curtesy, homestead, or other rights or interest of such spouse therein.

(9) The Vendor represents and it is a condition of acceptance of this offer that no Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to or share any part of this agreement, or to any benefits that may arise therefrom; but this provision shall be not construed to extend to any agreement if made with a corporation for its general benefit.

(10) The terms and conditions aforesaid are to apply to and bind the heirs, executors, administrator, successors, and assigns of the Vendor.

(11) All terms and conditions with respect to this offer are expressly contained herein and the Vendor agrees that no representative or agent of the United States of America has made any representation or promise with respect to this offer not expressly contained herein.

SIGNED, SEALED, AND DELIVERED this day of , 2017

WITNESSES:

……. ……..*(SEAL)*

……. ……..*(SEAL)*

……. ……..*(SEAL)*

……. ……..*(SEAL)*

……. ……..*(SEAL)*

……. ……..*(SEAL)*

NOTICE OF ACCEPTANCE OF THIS OFFER IS TO BE SENT TO:

……..
(Name and Address)

ACCEPTANCE OF OFFER TO SELL REAL PROPERTY

Date:

The offer of the Vendor contained herein is hereby accepted for and on behalf of the State of New York.

_____ _____
WITNESS

Approved for sufficiency of funds $_____

_____ _____
Name and Signature ***Date***

***U.S.GPO:1991-0-522-313/20542**