

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36298

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**NAVAL NUCLEAR PROPULSION PROGRAM, UNITED STATES ARMY MILITARY
SURFACE DEPLOYMENT AND DISTRIBUTION COMMAND, AND FLUOR MARINE
PROPULSION, LLC–PETITION FOR DECLARATORY ORDER**

**DELAWARE AND HUDSON RAILWAY COMPANY INC.'S
REPLY TO PETITION FOR DECLARATORY ORDER**

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Contains Color Exhibits

TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	3
A. The History of the Line.	3
B. Negotiations with the Government Parties.	6
C. CP’s Custom and Practice.	12
D. CP’s Commitment to Providing Service.	12
ARGUMENT	13
I. THE LOADING/UNLOADING TRACK IS NOT NOW AND NEVER WAS A LINE OF RAILROAD.	13
A. The Siding Bears the Indicia of Excepted § 10906 Track.....	15
B. The Siding Has Not, Is Not Now, and Cannot in the Future, be Used for Through Traffic.	17
C. The 1980 Abandonment Proceeding Record Confirms the Status of the Siding as Excepted Track.	19
D. Contrary to the Government Parties’ Argument, The Siding Was Never Converted to a Line of Railroad.....	20
II. THE COMMON CARRIER OBLIGATION.	22
A. The Common Carrier Obligation Includes Reasonable Delivery/Spotting On a Private Siding.....	23
B. If the Government Purchases the Siding, CP Would Continue To Have a Common Carrier Obligation to Deliver to the Existing Loading/Unloading Facility.....	26
C. The Board Has Jurisdiction to Enforce CP’s Common Carrier Obligation Even If the Government Purchases the BSIT and Operates it as Private Track.	29
CONCLUSION	32
CERTIFICATE OF SERVICE	33
VERIFIED STATEMENTS	

Verified Statement of James Clements (with Exhibit A – Tariff 1)

Verified Statement of Kristine Williams (with Exhibit A – Google Earth Photographs)

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Pursuant to the 49 C.F.R. § 1104.13, Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific (“CP”) submits this Reply to the Joint Petition for a Declaratory Order (the “Petition”) filed by the Naval Nuclear Propulsion Program, United States Army Military Surface Deployment and Distribution Command, and Fluor Marine Propulsion, LLC (the “Government Parties”) on April 30, 2019.¹

INTRODUCTION

CP owns an infrequently used, half-mile rail spur in Ballston Spa, NY. For decades, the Ballston Spa Spur Industrial Track (“BSIT”), as it is known, has been used by only one customer, the U.S. Government. The Government uses the BSIT to receive and ship by rail empty and loaded nuclear fuel casks. The casks are used in replenishing the nuclear reactors at the Government’s nearby Kenneth A. Kesselring Site (“Kesselring Site”). The Government’s need for rail service at Ballston Spa is extremely sporadic, with a handful of moves followed by a decade or more of inactivity. Although CP is committed to providing continued rail service to the Government at Ballston Spa, CP’s continued ownership of the BSIT makes little sense for

¹ This Reply is supported by the verified statements of James Clements (“Clements V.S.”) and Kristine Williams (“Williams V.S.”).

several reasons, including ownership costs and liability. Accordingly, CP wants to sell the BSIT to the Government and the Government initially agreed to acquire it.

In the course of exploring the sale transaction with the Government, there have been surprises including the discovery that despite its name, and despite having many of the indicia of a “spur” track, the half-mile long BSIT that CP acquired when it purchased the D&H is a regulated line of railroad. As it turns out, the BSIT was once part of a longer line of railroad that, except for the remaining half mile, was abandoned long ago. This discovery led CP to propose a pared-back transaction that would include only the siding used for loading/unloading (the “Siding”) and not the regulated rail line between the Siding and CP’s main line. CP proposed this compromise to break an impasse and because the Siding is excepted from Board entry and exit licensing regulation under 49 U.S.C. § 10906 and therefore would not require an abandonment proceeding prior to sale.

The indicia that the Board relies on in determining whether track is § 10906 track overwhelmingly support the conclusion that the Siding is excepted track. The Siding is just 430 feet in length and stub-ended, terminating at the wall of a freight house. It is used solely for loading and unloading and by only one customer, the Government. However, the Government Parties assert differently. According to the Government Parties, despite all evidence to the contrary, the Siding is a line of railroad used for “through rail service.”

CP is concerned that the sale transaction be consummated before the first loaded nuclear fuel shipment moves this fall. In order to structure the transaction properly, however, the Parties need certainty as to the regulatory status of the Siding. Accordingly, CP agrees that it would be appropriate for the Board to resolve the dispute by issuing a declaratory order, and CP asks that the Board declare that the Siding is excepted § 10906 trackage.

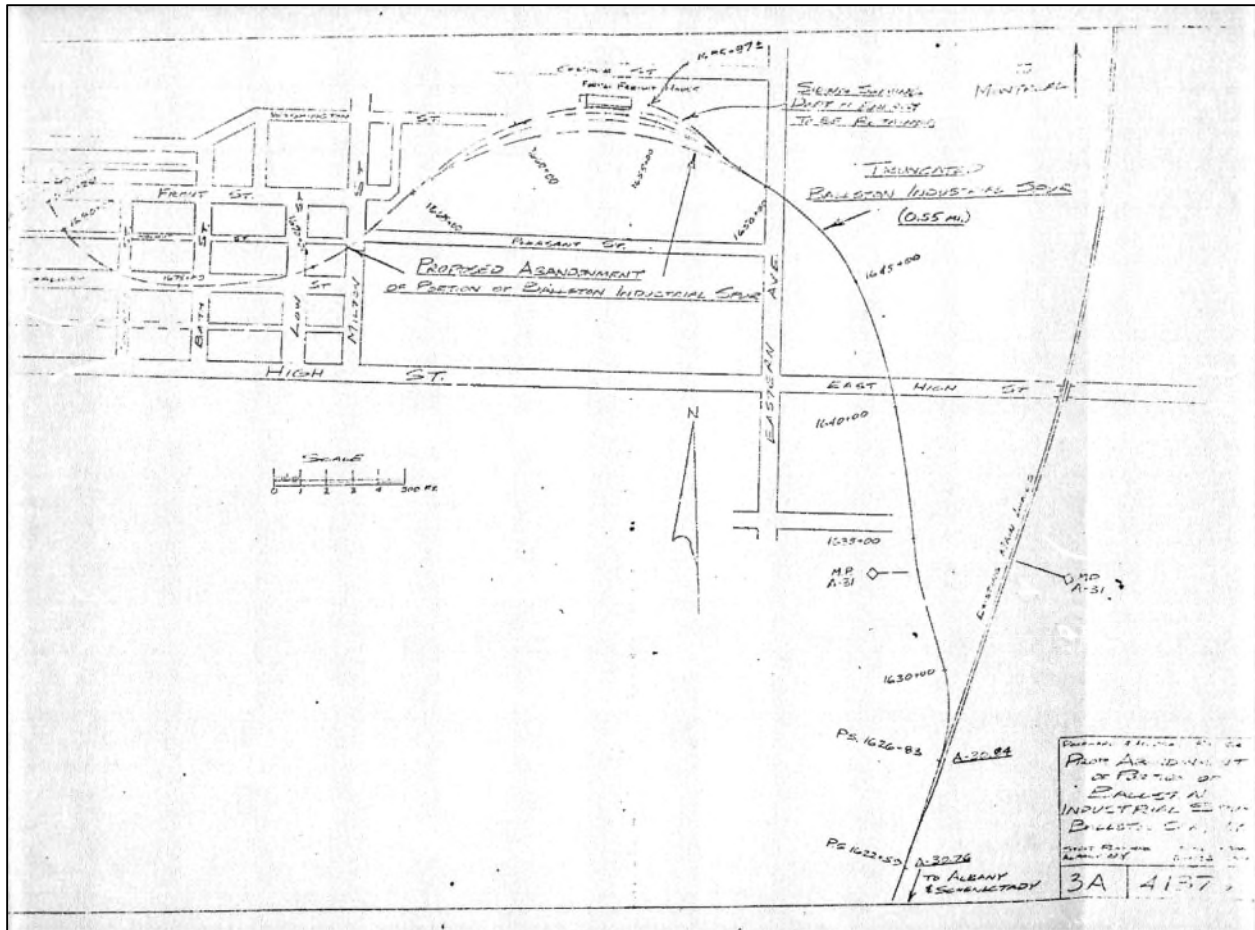
Given the importance of continued rail service, the Government has also expressed concern that the sale transaction might compromise its rights and ability to obtain rail service to the loading/unloading area. CP has repeatedly assured the Government that it understands the scope of its common carrier obligation in these circumstances to require CP to provide rail service to the loading/unloading area regardless of whether the track involved is private or rail-owned. CP has repeatedly committed to honoring that obligation. CP has also sought to provide the Government with additional safeguards to provide the Government more comfort. The Government, however, has not been able to obtain the level of comfort that it apparently needs to proceed with the transaction. Among other things, the Government construes CP's common carrier obligation much more narrowly than CP and continues to have trepidation that it would be compromising its rights by converting the Siding to private track. Given the unusual facts of this dispute, including the Government's representations regarding the vital importance of continued rail service to national security, CP agrees that it would be helpful for the Board to provide guidance as to the scope of the common carrier obligation.

BACKGROUND

A. The History of the Line.

The Ballston Spa Industrial Track was, at one time, part of the D&H mainline. Petition at CE-14. In the 1960s the D&H mainline was relocated as part of a state crossing elimination program. The realignment left behind a stub-ended 1.03 mile rail line that extended from the main line at milepost ("MP") A 31.76 in the Village of Ballston Spa to MP 31.79 in the Town of Milton, known as the BSIT. In the late 1970s, the line experienced a "drastic" decline in volumes, as nearly all of the traffic shifted to truck. Petition at CE-22. One of the only remaining profitable customers was Department of Energy ("DOE") for occasional shipments to the nearby

Knolls Atomic Power Lab (*i.e.*, the Kesselring Site) which used the team delivery tracks near the old freight house to load and unload nuclear fuel casks. Efforts to find an alternative routing or loading/unloading location for the DOE traffic proved unsuccessful. *Id.* at CE-26-27. In 1980, the D&H filed an abandonment application for the entirety of the BSIT but with the “specific purpose” of obtaining ICC assistance in finding a solution to the unprofitability of continued operations on the line. *Id.* at CE-18. That abandonment application led to the August 7, 1980 Rail Service Agreement (the “1980 Agreement”) between D&H and the DOE for continued rail service between the main line switch and the loading/unloading facility located at MP A 31.32 on the BSIT. The parties agreed that D&H would retain the Siding at the loading/unloading facility that was used for the DOE traffic and that D&H would spot and pull cars on the Siding. *Id.* at CE-93. As a condition of the 1980 Agreement, D&H agreed to withdraw its application for abandonment as to the portion of the rail line between the main line switch and MP A 31.32. The parties included the following map as Appendix “A” to the 1980 Agreement which was filed in the abandonment proceeding:



The map clearly shows that D&H was retaining the portion of the BSIT from the mainline up to the switch to the team loading/unloading facility and retaining the Siding for DOE's use. It also clearly shows that the remainder of the BSIT west of the switch to the loading/unloading facility was to be abandoned. Although not specifically marked on the map, using the map's scale and reference marks places MP A 31.32 at the location of the switch to the loading/unloading facility. As CP's Real Estate Director Kristine Williams explains in her verified statement, using valuation maps and the rail industry accepted methodology for determining milepost locations also puts MP A 31.32 at this location. Williams V.S. at 3-6.

CP acquired the BSIT when it acquired the D&H in 1991. As CP's Vice President Strategy Planning and Transportation Services James Clements explains in his verified

statement, rail service on the BSIT has been virtually non-existent except for the very infrequent freight service for the Government Parties that has occurred only every fifteen years or so. Except for that sporadic service, CP has used the BSIT only to store maintenance of way equipment and the occasional bad order car. As a result, the western end of the BSIT was in a state of considerable disrepair when the Government Parties notified CP in 2017 that they had shipments of empty and loaded containers for nuclear materials scheduled in the next two years. Clements V.S. at 2.

For a number of reasons, including the physical nature of the BSIT and the decades-long interludes between freight service, until the Government Parties provided contrary information in May 2018, CP has assumed that the BSIT was unregulated spur track pursuant to 49 U.S.C. § 10906. *Id.*

B. Negotiations with the Government Parties.

For more than two years, CP has been working diligently with the Government Parties to negotiate the conditions governing rail shipment of loaded and empty containers of radioactive material on the BSIT, and continues to do so. These negotiations have been complicated by several factors: the phased nature of discussions and multiple shifts in the structure of the agreement being pursued, the unique considerations associated with rail shipment of radioactive materials, and the inherent difficulties posed by the multiple decision-making departments of the federal government. Clements V.S. at 2-3.

Since April 2017, CP has actively discussed with the contract operators of the Kesselring Site, first Bechtel Marine Propulsion Corporation (“BMPC”) and later Fluor Marine Propulsion, LLC (“Fluor”), the use of the BSIT for receipt of a shipments of empty containers for radioactive materials, shipments which were contemplated to commence as early as the Spring of 2018. CP

and BMPC began by discussing a siding access agreement. Such agreements are standard practice in the rail industry, and are of particular importance when the shipper intends to engage in ultra-hazardous activities on railroad property, as is the case here. Because a portion of the BSIT required significant rehabilitation before it could be used for rail service, the siding access agreement would provide BMPC with access to the BSIT to complete necessary rehabilitation work. Clements V.S. at 3.

Due to BMPC's concerns regarding the timeline of shipments, while discussion of the siding access agreement was ongoing, CP and BMPC negotiated a right of entry agreement to allow BMPC's contractor to investigate the condition of the BSIT and assess the extent of rehabilitation work required. CP and BMPC executed the right of entry agreement in May 2017. BMPC contractors were thereafter able to assess the site conditions and need for rehabilitation work on the BSIT. *Id.*

CP and BMPC continued to negotiate the terms of the siding access agreement through the Summer of 2017. During this time, CP evaluated the potential issues regarding liability and security related to the contemplated shipments of radioactive materials. In September 2017, CP determined that, in light of the infrequent use of the BSIT, the best course of action to address these issues would be to sell the BSIT property to the Government rather than entering into the proposed siding access agreement. Clements V.S. at 3-4.

CP's continued ownership of the BSIT makes little sense. There is only one shipper on the line, the U.S. Government. Moreover, that shipper rarely uses the line and decades can pass without a single car moving over the line. CP determined that its continued ownership of BSIT is not necessary to meet the Government's needs for continued, but infrequent, rail service. Clements V.S. at 4.

Recognizing this was a change of direction that could affect the shipment timelines, CP quickly informed BMPC of its decision and proposed a solution that would allow BMPC to continue to move forward with its rehabilitation efforts while the terms of a sale were negotiated. Specifically, CP and BMPC entered into a letter agreement wherein the parties acknowledged that they would pursue the sale of the BSIT property. Additionally, CP and BMPC entered into a Permission to Enter Premises, Release and Agreement to Insure (the “Rehabilitation ROE”), which provided BMPC the necessary ability to complete the rehabilitation of the BSIT as sale negotiations proceeded. Both agreements were fully executed on October 9, 2017. Clements V.S. at 4.

The Rehabilitation ROE and the right to conduct the rehabilitation work without a definitive sale agreement were outside of CP’s standard practices, as work by outside forces on CP property that was not subject to a lease or access agreement raised potential issues with CP’s collective bargaining agreement with its maintenance of way employees. Nevertheless, CP offered this accommodation to BMPC and the Government Parties as a demonstration of its good faith in recognition of the timing constraints regarding upcoming rail shipments on the BSIT. *Id.*

At the end of October 2017, CP provided BMPC with a draft of a Purchase and Sale Agreement to initiate negotiations regarding the sale of the BSIT. Clements V.S. at 4. At the time, CP understood the BSIT to be a spur track excepted from STB exit licensing requirements, and therefore proposed selling the entire line from the mainline switch to the end of the track. Clements V.S. at 2, 4-5. Consistent with CP’s understanding of its common carrier obligation to deliver rail cars to the location where the customer could accept the shipment, CP would provide service after the sale all the way to the loading/unloading area. Service to BMPC would be pursuant to the terms of an industry-standard private siding agreement, modified only to address

the liability issues associated with the ultra-hazardous nature of both the commodity and the over-sized equipment required for the movement. Clements V.S. at 5.

Although the Government committed to acquiring the property prior to the first loaded movement, progress towards that goal has been glacial. In an effort to hold the Government to its commitment, CP insisted on weekly telephone conferences with the Government Parties. However, the Government Parties frequently cancelled or failed to participate in the scheduled calls or attended without a representative who had decision-making authority. In addition, there was a months-long delay before the Government Parties identified the appropriate counterparty to the proposed sale agreement. *Id.*

Months went by with little or no progress in the negotiations. In February 2018, CP provided maps and deeds for the subject property to BMPC. With shipments scheduled to begin in June, CP reminded BMPC that CP would comply with its common carrier obligations and needed a definitive agreement in place before shipments commenced. *Id.*

In March 2018, some six months into negotiations to sell the BSIT, BMPC informed CP that a sale could not be completed in time to accommodate the shipments scheduled to begin in June 2018. BMPC indicated that the typical timeline for federal government acquisition of real property is on the order of five to seven years due to the number of actions by different government branches involved, but that BMPC would work with the involved government agencies and pursue additional options to compress the timeline to under two years. Although BMPC stated that the Government Parties intended to move forward diligently and in good faith with the purchase of the BSIT, the time constraints of the anticipated rail shipments required that the parties execute an agreement to allow scheduled shipments to proceed before the sale transaction. Clements V.S. at 5-6.

Consequently, in March 2018, the parties again shifted course and began pursuing multiple paths forward in parallel. The parties revisited the terms of the siding access agreement and incorporated milestones related to the purchase and sale of the BSIT. The Government Parties also provided a draft sale agreement for the BSIT, taking the position that the transaction would have to be completed on their form. Finally, in April 2018, the Government Parties provided CP a formal tender request for rates for the movement of empty containers for radioactive material. CP responded to this formal tender request with a proposed transportation contract pursuant to 49 U.S.C. § 10709. Clements V.S. at 6.

The Government Parties, however, informed CP that they were unable to enter into a private contract for rail transportation, and reiterated their request for a public tariff for the proposed shipments. CP provided the Government Parties with common carrier rates and, after some miscommunication between the parties as to the precise format in which the Government insisted CP provide the rates,² CP published a revised tariff for the movement on May 10, 2018. Clements V.S. at 6.

The Government Parties also advised CP, for the first time, that the BSIT was a regulated rail line and not excepted 49 U.S.C. § 10906 spur track as the parties had up until then assumed. The Government Parties provided CP with a copy of the 1980 abandonment file, including the 1980 Agreement. Until then, CP had not been aware of these documents. Clements V.S. at 7.

Additionally, to accommodate BMPC's near-term needs, CP and BMPC entered into an access agreement on May 9, 2018 to allow BMPC to receive service on the BSIT and unload

² The Government Parties' allegation that CP did not timely respond to a request for a common carrier rate is not accurate. CP responded quickly to the Government's request, but due to rate negotiations, unfamiliarity with the Government's rigid requirements, and miscommunication, there was a delay in providing the Government the final rate in the precise format that the Government demanded. CP remains committed to responding to future rate requests consistent with its common carrier obligation. Clements V.S. at 6-7.

empty containers. With regard to longer-term needs, CP proposed to abandon the BSIT to allow purchase by the Government Parties. Expressing concern that abandonment would eliminate CP's common carrier obligation to provide service to the loading/unloading area, in June 2018 BMPC proposed that the sale proceed pursuant to a *State of Maine* transaction. CP advised BMPC that it was not interested in a *State of Maine* transaction, which CP viewed as inconsistent with the Government's commitment to acquire the BSIT. Clements V.S. at 7.

For the next six months, CP and BMPC continued to discuss the options for sale of the BSIT, and CP consistently assured the Government Parties that, consistent with its common carrier obligation, CP would continue to provide service to the loading/unloading area following the BSIT's abandonment. In August 2018, CP proposed that it also provide contractual assurance by specifying in the private siding agreement that CP would serve the loading/unloading area after abandonment. Clements V.S. at 7-8.

As real estate and environmental due diligence progressed, the United States Army Corps of Engineers ("USACE") issued an official letter of interest dated October 18, 2018 to acquire the BSIT property, reiterating its expectation that the acquisition would be a *State of Maine* transaction. Clements V.S. at 8. By letter dated November 27, 2018, CP responded to the USACE letter of interest reiterating that a *State of Maine* approach was not acceptable to CP, was inconsistent with prior commitments to acquire the BSIT, and that abandonment was in the best interest of both parties.³ CP further indicated its intent to provide the Government with a long-term private siding agreement that included CP's contractual commitment to serve the loading/unloading area, in conjunction with seeking abandonment authority. Clements V.S. at 8.

³ A *State of Maine* transaction would open the possibility that other shippers will demand service on the BSIT that could interfere with rail service to the Government. Abandonment would foreclose interference by other shippers.

By letter dated January 27, 2019, the Government Parties responded that they would vigorously oppose any efforts by CP to abandon the BSIT. *Id.*

In March 2019, CP continued its efforts to provide the Government Parties with the assurances they required. CP proposed a renewable ten-year term for the private siding agreement in order to provide long-term security. CP also offered to limit the sale to only the unregulated siding at the end of the BSIT. The Government Parties continued to insist, however, that the Siding, which is used solely for loading/unloading, was a regulated line of railroad. The Government Parties notified CP by letter dated March 25, 2019 that the question of whether the regulated track continued to the end of the siding at the loading/unloading area was central to the structure of the sale transaction, and that the parties should seek an STB declaratory order to resolve the issue. *Clements V.S.* at 8.

C. CP's Custom and Practice.

It is CP's custom and practice to spot and pull cars from a customer's facility as part of the line-haul rate. This practice is reflected in CP's Tariff 1. The first spot is part of the line-haul service. Typically, CP will spot or pull cars from the loading and unloading tracks of its customers unless CP and the customer have mutually agreed to another location or CP is unable to reach the loading and unloading area. CP's service over a customer's private track is subject to reasonableness requirements including the requirement that CP be able to operate safely over the track without unreasonable interference. CP also requires a private siding access agreement. Such agreements are standard in the industry. *Clements V.S.* at 9.

D. CP's Commitment to Providing Service.

Throughout negotiations, CP has repeatedly expressed its commitment to providing the rail service requested by the Government Parties. CP has not shrunk from its common carrier

obligations and has no intention of doing so. CP remains fully committed to fulfilling its common carrier obligation and is especially proud to do so in the service of the country. *Clements V.S.* at 9.

ARGUMENT

I. THE LOADING/UNLOADING TRACK IS NOT NOW AND NEVER WAS A LINE OF RAILROAD.

The first issue raised by the Government Parties is the regulatory status of the Siding—a 430-foot stub-ended track that terminates at the wall of a freight house and is used solely for loading and unloading. According to the Government Parties, this loading and unloading trackage is a regulated line of railroad subject to Board entry and exit licensing authority. The Government Parties are wrong.

Congress excepted “spur, industrial, team, switching, [and] side tracks” from Board entry and exit licensing authority. 49 U.S.C. § 10906. Although Congress did not define what constituted such excepted track, as the U.S. Circuit Court of Appeals for the District of Columbia explained, its intent is obvious:

[I]t is sufficiently plain, from a consideration of not only the obvious purpose prompting the [Interstate Commerce Act] but also of the general nature of the tracks mentioned, that Congress intended *to subject to the requirements of [section 1(18)] so-called main or branch lines of railroad, that is, lines designed and used for continuous transportation service by through, full trains between different points of shipment or travel, and to exclude from the operation of the statute all that mass of “tracks” (as distinguished from “lines”) naturally and necessarily designed and used for loading, unloading, switching, and other purposes connected with, and incidental to, but not actually and directly used for, such transportation service.*

Nicholson v. I.C.C., 711 F.2d 364, 367-68 (D.C. Cir. 1983), *cert. denied* 464 U.S. 1056. *See also Bhd. of Locomotive Eng’rs v. United States*, 101 F.3d 718, 726 (D.C. Cir. 1996). To determine whether track is “excepted track under § 10906, the Board has adopted a case-by-case approach

that analyzes the track's intended use, physical characteristics, and relationship to the rail system." *Oakland Global Rail Enter.—Pet. for Declaratory Order*, FD 36168 (served March 15, 2019) ("OGRE"). See also *Tri-City R.R.—Pet. for Declaratory Order*, FD 36037, slip op. at 4 (STB served June 1, 2017); *Battaglia Distrib. Co., Inc. v. Burlington N. R.R. Co.*, FD 32058, slip op. at 3 (STB served June 27, 1997). The Board has explained the indicia that it weighs in making the determination:

With respect to "intended use," the Board has considered whether the track will be used for certain ancillary operations (e.g., switching, loading, and unloading); whether it serves more than one shipper; whether the shipper is located at the end of the track; whether there are stations on the track; whether there is regularly scheduled service; who owns and maintains the track; and the volume of traffic moving over the track. With respect to physical characteristics the Board has considered the length of the track; whether it is stub-ended; and whether the track was constructed with light-weight rail. With respect to relationship to the rail system the Board typically has considered whether the track was built to penetrate new markets or territory. The Board considers and weighs the various indicia as appropriate in light of the particular evidence and circumstances of each case.

OGRE, slip op. at 8 (internal citations omitted). The Board also considers the history of the track in making its determination. *Id.* n.8.

Battaglia involved the regulatory status of a spur track that bore several important similarities to the Siding at issue here. The track at issue was railroad-owned, 2,600 feet in length, served only one shipper, stub-ended, terminated at a warehouse wall, unlikely to have been constructed to invade another carrier's territory, in need of rehabilitation, used for the sole purpose of switching cars to and from the customer's facility, not the type of track that would be used for through train service, had never been used for branch or mainline operations, and there were no stations on the track and never had been. *Battaglia*, slip op. at 3-4. Based on these facts, the Board concluded that "the overwhelming balance of factors relevant to this analysis support a finding that the disputed track is side track." *Id.* slip op. at 4. Similar to *Battaglia*, the

overwhelming balance of factors support a finding that the siding at issue here is excepted § 10906 track.

A. The Siding Bears the Indicia of Excepted § 10906 Track.

Historically, the Siding has been used as team unloading/loading facility and there is no evidence of any other use. In the 1980 Abandonment Application, D&H described the siding and related tracks as “a team delivery facility where the majority of the traffic [then moving on the line] is received or forwarded.” Petition at CE-21. The Siding has not been used for branch or mainline operations. There are no stations located on the Siding and no regularly scheduled service has been offered over the Siding. As described in the Petition, the Government has used the Siding specifically to transload nuclear fuel casks from rail cars to trucks, and it is the Government’s intention to continue to use the Siding only for that purpose. Recently, the Government rehabilitated the Siding specifically for its specialized loading and unloading needs, and the Government erected a fence around the Siding. CP would not make these modifications, and ordinarily would not have allowed third parties to make specialized modifications on trackage that otherwise are intended to be used to meet its common carrier obligation. The “specialized” configuration serves only the Government’s unique loading/unloading requirements.

It is clear from both the history and the physical characteristics that the Siding was not intended to, and “does not extend into new territory not previously served by the existing line or into territory served by another railroad.” *OGRE*, slip op. at 9. Rather, the Siding was intended to facilitate rail service of shippers located on the adjacent rail line. See *N.Y.C. Econ. Dev. Corp. — Pet. for Declaratory Order*, FD 34429, slip op. at 5-6 (STB served July 15, 2004) (addition of slightly more than a mile to the end of existing track to reach a new transload facility and one

other potential shipper did not penetrate a new market where the additional track facilitated, but was not a prerequisite to serving the area).

The Siding's physical characteristics also make through traffic impossible. As in *Battaglia*, the track is short and stub-ended, terminating at the side of a warehouse. Thus, rail service can only be originated or terminated on the Siding.

The length of the track and its stub-end "are classic indicia of excepted track." *OGRE*, slip op. at 9. Notably, the Siding is significantly shorter in length than track that the Board has ruled as excepted track based, in part, on track length. See *Battaglia*, FD No. 32058, slip op. at 3-4 (2,600 foot track exempt spur); *Tri-City R.R.*, FD 36037, slip op. at 5 (track "less than two miles in length" was indicative of exempt spur); *N.Y.C. Eco. Dev. Corp.*, FD 34429, slip op. at 7 ("The track's length will be moderate (under 1.3 miles), which is comparable to the length of some other tracks that have been found to be spur or switching tracks."); *Park Sierra Corp.—Lease & Operation Exemption—S. Pac. Transp. Co.*, FD 34126, slip op. at 5 (STB served Dec. 26, 2001) (1.7-mile-long spur track); *Chi. South Shore & S. Bend R.R.—Pet. for Declaratory Order—Status of Track at Hammond, Ind.*, FD 33522 (STB served Dec. 17, 1998) (1.8-mile-long spur track).

The volumes moving to and from the Siding are further indicative of its status as exempt trackage. Even before D&H abandoned the mainline track beyond MP A 31.32, there was little or no through traffic on the Ballston Spa Spur. In the 1980 abandonment application, D&H explained that after a portion of the line was relocated in the 1960s, little or no traffic moved beyond MP A 31.32 (the switch to the freight warehouse). Petition at CE-20-21. By the time of the application, D&H was providing no service on the rail line west of MP A 31.32 where the

switch to the Siding is located. *See Id.* at CE-21. Thus, CP abandoned the rail line that was west of MP A 31.32.

Since CP purchased the D&H in 1991, traffic on the BSIT has been virtually non-existent. Clements V.S. at 2. In fact, prior to the latest round of movements to replenish the nuclear fuel at the Kesselring Site, no traffic had moved on the line for several years. In the interim, CP has used the end of the BSIT nearest the CP mainline to store maintenance of way equipment. The trackage between Eastern Avenue and the freight house was not used. Prior to commencing use of the line, the Government rehabilitated the Siding. Today, the Siding serves only one shipper, the Government. Clements V.S. at 2, 4.

B. The Siding Has Not, Is Not Now, and Cannot in the Future, be Used for Through Traffic.

In their Petition, the Government Parties, quoting *Allied Erecting*,⁴ erroneously conclude that the Siding is used for “through service” and is therefore a regulated line of railroad. Petition at 52-53. *Allied Erecting* does not support this conclusion. In *Allied Erecting*, the physical characteristics and use of the track at issue were materially distinguishable from the physical characteristics and use of Siding here. In *Allied Erecting*, the track at issue was “about four miles” in length, “connected to Norfolk Southern Railway on one end and to CSX Transportation, Inc., on the other end, and thus are not stub-ended.” The track was maintained and operated by a short line rail carrier who used it to move cars between the Class I railroads’ interchanges as well as between the Class I railroad interchanges and customers, including customers located on a lead track. *Id.* slip op. at 7-9. Based on these physical characteristics and use, the Board concluded that the tracks were part of the route for moving traffic between points of shipment and delivery.

⁴ *Allied Erecting & Dismantling, Inc. & Allied Indus. Dev. Corp. –Pet. For Declaratory Order – Rail Easements in Mahoning Cty., Ohio*, FD 35316, slip op. at 7 (STB served Sept. 17, 2015).

In contrast to the tracks in *Allied Erecting*, the Siding here is just 430 feet in length, stub-ended, serves just one customer, is currently maintained by the customer, and the track is the point of shipment or delivery—“through traffic” on the Siding would be a physical impossibility.⁵ These facts alone compel the conclusion that the Siding is exempt § 10906 track.

The Government Parties’ rely on *Meyers v. Jay St. Connecting R.R.*, 262 F.2d 676 (2d Cir. 1959) and *Cheney Lime & Cement Co. v. Seaboard Sys. R.R.*, No. 40037, 1987 WL 99911 (ICC served Dec. 7, 1987) for the proposition that terminal trackage can constitute a line of railroad. This reliance is similarly misplaced. In fact, in *Cheney*, the ICC ruled that “a short, stub-ended segment” that was necessary for delivery to the shipper and used for unloading, was excepted track. *Cheney*, at *2. In doing so, the ICC distinguished *Meyers*, based on the “exceptional circumstances” of that case.⁶ *Id.* As the ICC explained, *Meyers* involved a terminal railroad

composed primarily of exempt spur, industrial, team, switching and side tracks. If these exempt portions were abandoned, no traffic could move over the line. Under these exceptional circumstances, the Second Circuit explained that a literal reading of section 10907(b) would frustrate the intent of Congress by depriving us of the power to regulate an entire line abandonment. We found that the circumstances are not comparable here.

*Id.*⁷ The track at issue here is comparable to the excepted track in *Cheney*. Thus, *Cheney* actually supports a determination that the Siding is excepted § 10906 trackage.

⁵ In *Nicholson*, the appellate court described through traffic as the “continuous transportation service by through full trains between different points of shipment.” See *Nicholson*, 711 F.2d at 367 (emphasis in the original).

⁶ *Meyers* also predated the ICC’s adoption of “a multifaceted analysis based on such considerations as use, history, and physical characteristics ... in determining whether a track is statutorily exempt from our abandonment jurisdiction.” *Cheney*, at *2.

⁷ Prior to recodification in 1995, a provision similar to § 10906 was contained in § 10907(b).

C. The 1980 Abandonment Proceeding Record Confirms the Status of the Siding as Excepted Track.

The record in the 1980 abandonment proceeding likewise supports the conclusion that the Siding is excepted § 10906 track. In the proceeding, D&H negotiated an agreement with the Government in which it would retain the rail assets necessary to meet the Government's rail service needs.⁸ Those assets are identified in the proceeding as the Ballston Spur rail line from the mainline to "the team loading/unloading facility located at Milepost A 31.32" and the team loading/unloading facility, or more specifically the stub-ended track identified in Appendix "A" to the 1980 Agreement as "SIDING SERVING DEPT OF ENERGY TO BE RETAINED." Petition at CE-89. Accordingly, with the Government's agreement, D&H abandoned the portion of the Ballston Spa rail line west of MP A 31.32.⁹ It retained the Siding and it retained the portion of the Ballston Spa rail line between MP A 31.32 and the D&H main line so that it could provide rail service at the Siding.

The location of MP A 31.32 is not open for genuine dispute. As Kristine Williams explains, the location of MP A 31.32 is easily determined with railroad valuation maps using the accepted industry method for determining milepost locations. Using this approach puts MP A 31.32 at the switch to the Siding. Williams V.S. at 3. This conclusion is entirely consistent with the agreed-upon map that was included as Appendix "A" to the 1980 Agreement and filed in the abandonment proceeding. Using the scale and reference marks on the Appendix "A" map also show that MP A 31.32 corresponds to the location of the switch to the Siding. Williams V.S.

⁸ The Delaware and Hudson Railway Company–United States Department of Energy Rail Service Continuation Agreement included as Exhibit CE-89 to CE-105 to the Petition.

⁹ As there were no shippers located west of MP A 31.32, there was no reason for D&H to retain the portion of the rail line west of MP A 31.32.

at 4. Further, Appendix “A” clearly identifies the rail line west of the switch to the loading/unloading facility as the portion of the line proposed for abandonment.

D. Contrary to the Government Parties’ Argument, The Siding Was Never Converted to a Line of Railroad.

In their Petition, the Government Parties argue that the abandonment resulted in the conversion of the Siding to main line track. The Government Parties’ theory is based on (1) a discrepancy between the milepost and the engineering survey station that identify the location of the current main line switch between the Ballston Spa Spur and the mainline in the 1980 abandonment proceeding; and (2) the representation that the loading/unloading facility is 0.55 miles from the main line switch. According to the Government Parties, the engineering survey station is the correct location of the main line switch and the milepost reference should be disregarded. Based on the allegation that the distance from the current main line switch to the end of the Siding is 0.55 miles, the Government Parties incorrectly conclude that the Siding is therefore a line of railroad. The Government Parties’ underlying assumptions regarding the location of the switch in 1980 and the correct starting point for the measurements referenced in the abandonment proceeding are simply self-serving speculation.¹⁰ More importantly, their conclusion that the Siding is therefore regulated track is a *non-sequitur*.

Assuming that the Siding is included in the 0.55 miles of track identified in the abandonment proceeding as retained to serve the Government, it does not follow that the Siding is therefore a regulated rail line. At best, it would mean that the 0.55 miles included both (1) the

¹⁰ While the 1993 track charts (Gundermann Ex. BEG-9) show the switch to the main line at the engineering survey station 1626+83, the valuation maps, as well as Google Earth photographs, show that there had been a switch at or in the vicinity of MP 30.76 prior to 1993. Williams V.S. at 5 & Ex. A. It appears that the main line was relocated and the switch at or near MP A 30.76 was also relocated. CP does not have complete records for this rail line and has not been able to determine when the mainline and the switch to the BSIT were relocated. Nor has CP been able to determine the purpose of referencing in the abandonment proceeding both the milepost and a differently located engineering survey station. See Williams V.S. at 2, 5.

regulated line of railroad between the main line and MP A 31.32 and (2) the exempt Siding which extended from the switch at MP A 31.32 to the side of the freight house. This conclusion is consistent with the filings in the abandonment proceeding, which repeatedly distinguish between the rail line and the loading/unloading facility, or Siding, located at MP A 31.32. For example, the 1980 Agreement states the following:

“WHEREAS DOE has been using RAILROAD’S team loading/unloading facility located at Milepost A 31.32 on RAILROAD’S line known as the Ballston Spa Industrial Track.”

...

Section 201. RAILROAD shall continue to provide DOE ... with public rail freight service ... up to the RAILROAD’S team loading/unloading facility located at Milepost A 31.32. Such rail freight service includes carriage of all shipments into and out of said team facility as required by DOE and in accordance with the RAILROAD’S common carrier obligation.

Petition at CE-90, 93. Nothing in the abandonment proceeding indicates that the Siding was intended to become part of the line of railroad.

No changes to the physical characteristics or future use of the Siding were contemplated in the abandonment proceeding or otherwise that would make the Siding a line of railroad. Rather, the Siding remained 430 feet in length and stub-ended, terminating at the side of the freight warehouse. The 1980 Agreement specifically contemplated that the Siding would continue to be used to receive and deliver freight traffic. In fact, the Government agreed to bear the cost of rehabilitating the trackage so that it could be used for those purposes. Thus, since 1980, the Siding has continued to manifest all of the indicia of excepted § 10906 track.

Another fundamental flaw in the Government Parties’ argument is that it focuses on the wrong end of the BSIT. The location of the main line switch has no bearing on the location of the end of the regulated rail line designated in the abandonment proceeding. D&H unambiguously

sought and was granted authority to abandon the portion of the BSIT west of MP A 31.32. The location of MP A 31.32 is unaffected by the location of the main line switch. Whether the main line switch was located at MP A 30.76, engineering survey station 1626+83, or at some other location would not change MP A 31.32's location just west of Eastern Avenue where the Siding connected to the rail line.

Without foundation, the Government Parties speculate that D&H relocated the rail line to the Siding. While the Government Parties are correct that a rail carrier can relocate a rail line without seeking regulatory approval, there is no basis whatsoever to think that is what might or could have happened here. D&H abandoned the rail line beyond MP A 32.31. It did not relocate it and certainly not to a stub-ended siding that is incapable of handling through traffic.

II. THE COMMON CARRIER OBLIGATION.

The dispute between the parties here centers on the scope of CP's common carrier obligation to provide service to the Siding under the following scenarios: (1) the Board finds that the Siding is a regulated line of railroad; (2) the Board finds that the Siding is excepted § 10906 track; and (3) the Government acquires ownership of the Siding. The Government Parties narrowly construe the scope of CP's common carrier obligation as requiring it to spot and pull cars from the loading/unloading area on the Siding only if CP retains ownership of the Siding. If the Siding becomes private track, the Government Parties assert that CP's obligation ends once it has placed the cars on the private siding clear of the main line. Petition at 59. As explained below, under the circumstances here, CP actually views its common carrier obligation as requiring more.

Under each of the three scenarios, CP views the scope of its common carrier obligation to include spotting and pulling the Government Parties' cars from the loading/unloading area on the Siding and to provide the Government Parties access to the loading/unloading facility. These

obligations are, of course, subject to reasonable conditions that are customary practice in the industry. These conditions include the execution of appropriate access agreements and track that is in safe operating condition.¹¹

A. The Common Carrier Obligation Includes Reasonable Delivery/Spotting On a Private Siding.

Under 49 U.S.C. § 11101, railroads have a statutory common carrier obligation to provide transportation for commodities or traffic that have not been exempted from regulation pursuant to 49 U.S.C. § 10502.¹² This obligation creates two interrelated requirements. First, railroads must provide, in writing, common carrier rates to any person requesting them. 49 U.S.C. § 11101(b). Second, they must provide rail service pursuant to those rates upon reasonable request for service. 49 U.S.C. § 11101(a); *see Sherwin Alumina Co. v. Union Pac. R.R.*, NOR 42143, slip op. at 5 (STB served Sept. 29, 2015).

“What constitutes a reasonable request for service is not statutorily defined but depends on all the relevant facts and circumstances.” *Sherwin Alumina*, slip op. at 5 (citing *Chi. & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325 (1981) (“The duty to provide [rail service] is not absolute, and the law exacts only what is reasonable of the railroads under the existing circumstances.”)); *see also, e.g., Mont. v. BNSF Ry.*, NOR 42124, slip op. at 4 (STB served Apr. 26, 2013) (“What constitutes a reasonable request for service is not statutorily defined but depends upon all the relevant facts and circumstances.”). Thus, when operating as a

¹¹ The scope of the common carrier obligation would be the same if CP abandoned the BSIT and sold it to the Government. As the Government acknowledges, this has been CP’s consistent position. *See* Petition at 59 n.22 (“CP has continually argued that if it abandoned the BSIT, CP would still have a mandatory common carrier obligation to provide service over the BSIT (assuming the Government bought it and operated it as a private track) and the STB would retain jurisdiction to enforce this common carrier obligation.”)).

¹² It is uncontroverted that the STB has the statutory authority to apply, interpret, and enforce the common carrier obligation as set forth in the Interstate Commerce Act, as amended. *See, e.g.*, 49 U.S.C. §§ 10102(5), 11101(b); *see also* Petition at 54-55 & n.16.

common carrier, the railroad “is under a duty simply to act reasonably under the prevailing circumstances.” *Valley Feed Co. v. Greater Shenandoah Valley Dev. Co.*, NOR 41068, slip. op. at 14 n.32 (STB served Dec. 11, 1998); *see also Granite State Concrete Co. v. STB*, 417 F.3d 85, 92 (1st Cir. 2005); *Nat’l Grain & Feed Ass’n v. United States*, 5 F.3d 306, 310 (8th Cir. 1993).¹³

This core obligation of reasonable action extends to the location of delivery and bifurcates depending on whether the carrier and consignee agree for delivery to be made upon the carrier’s track or a separate mutually agreeable location (usually a private siding). *E.g.*, *Ex Parte No. 104*, 209 I.C.C. 11, 32 (1935) (“[I]t is well settled that carload freight may be delivered or received by carriers upon a private industrial siding. Under general custom and practice the line-haul rate entitles a consignee to have his shipment delivered at a reasonably convenient place, whether this be within a plant, or upon a track agreed upon by him and the carriers.”); *see also* 13 C.J.S. Carriers § 379 Place of Delivery (2019 update) (“[I]n the case of heavy freight,” the “usual place” of delivery is “team tracks, or some convenient place on the carrier’s grounds, or the consignee’s sidetrack.”); *Republic Carloading & Distrib. Co. v. Mo. Pac. R. Co.*, 302 F.2d 381, 386 (8th Cir. 1962) (the common carrier’s delivery obligation “is normally effected when the car is placed on a team track or spotted.”).

The general rule is that it is the responsibility of the carrier, as part of the transportation service covered by the line-haul rate, to ‘deliver’ the goods by placing them in such a position as to make them accessible to the consignee. . . . In accordance with these principles, the railroad spots the car on the team track in its yards in the destination city, and the consignee is given appropriate free time in which to unload. *In the case of private sidings, the railroad’s job ends when it has placed the car on the consignee’s siding.*

Sec’y of Agric. v. United States, 347 U.S. at 647 (emphasis added).

¹³ “These are not inflexible rules. The law recognizes and reflects the practicalities of transportation by rail and the diversities to which they give rise.” *Sec’y of Agric. v. United States*, 347 U.S. 645, 647 (1954).

A century ago, in *N.Y. Cent. & Hudson River R.R. Co. v. Gen. Elec. Co.* (cited by Petition at 56 n.18), Justice Cardozo, then Chief Judge of the New York Court of Appeals, explained the scope of the common carrier obligation to deliver upon a private siding, if so agreed:

[P]rivate sidings have become common, and freight is carried over them between the railroad and the plant. Such carriage is commonly a part of the work of transportation. In most cases the distances are short and the carrier's burden remains substantially the same whether the cars are left upon the siding close to the main tracks or hauled along the siding until they reach the plant. In such circumstances it may be said with reason that delivery at the plant means delivery at the platform for loading and unloading. The practice of hauling cars to points along the spur convenient to shipper or consignee is known as 'spotting' and is commonly and fairly regarded as part of the work of carriage.

219 N.Y. 227, 235-36 (1916) (Cardozo, J.) (internal citations omitted). Thus, the law has long recognized that a common carrier is obligated to, in its discretion and upon agreement with the consignee, either provide its own unloading facilities for the consignee to use or to deliver the shipment upon the mutually agreed upon private siding. *See United States v. Chesapeake & Oh. Ry. Co.*, 305 I.C.C. 201, 206 (1950) (recognizing that the common carrier "is normally obligated to perform" delivery upon private military tracks "in connection with its line-haul service and rates"); 13 C.J.S. Carriers § 379 Place of Delivery (2019 update) ("The carrier has a duty to deliver the freight at the destination designated in the contract of shipment.").

Over time and consistent with changes in industry practice, the original limited common carrier obligation to solely spot cars on team tracks outside the industry plant evolved into a general rule that "the line-haul obligation of a carrier is to provide a freight car and deliver it to a reasonably convenient place within the industrial plant area where it can be loaded or unloaded." *Mobil Chem. Co. v. Consol. Rail Corp.*, 362 I.C.C. 8, **8-9 (1979). Thus, under both modern industry practice and law, the carrier's obligation, engendered by its line-haul rate to provide a "proper place" for transloading, "entitles a consignor or consignee to have his shipment delivered

at a reasonably convenient place, whether this be within the plant, or upon track agreed upon by him and the carrier.” *Ford Motor Co. v. Erie Lackawanna Ry. Co.*, 353 I.C.C. 411, 418-19 (1977); *Brockway-Smith Co. v. Bos. & Maine Corp.*, 497 F. Supp. 814, 817 (D. Mass. 1980) (“A carrier may effect the delivery of a carload of goods by placing the car on the consignee’s sidetrack if that is the intention and understanding of the parties or the established custom and usage.”); *see also* 13 C.J.S. Carriers § 379 Place of Delivery (2019 update).

CP’s tariffs and its customs and practice are consistent with this view of the common carrier obligation. CP’s Tariff 1, Item 25 includes “Pick-up of released railcar from origin facility” and “Initial placement of railcar at destination facility” as part of the “core transportation services” that is included in the line-haul rate. Tariff 1, Clements V.S. Ex. A. As James Clements explains, CP’s custom and practice as part of the line-haul rate is to spot and pull cars from the loading and unloading area of its customers on their private track unless agreed otherwise and provided that the area can be reached safely and without unreasonable interference, and subject to an appropriate private siding access agreement. Clements V.S. at 9.

B. If the Government Purchases the Siding, CP Would Continue To Have a Common Carrier Obligation to Deliver to the Existing Loading/Unloading Facility.

The Government Parties’ concern that, if the Government acquires the Siding (or the Siding and BSIT), CP could refuse rail service to the loading/unloading area is misplaced for several reasons. First, under court and STB precedent, if CP cannot provide the Government with loading and unloading access on or adjacent to CP’s track, it fulfills its common carrier delivery obligation by delivery to the loading area on the Government’s private siding. *See Freight-Handling Charges at St. Louis Stations*, 201 I.C.C. 543, 546 (1934) (“In instances where shippers or receivers have private sidings the [common carrier delivery] duty extends to placing cars on those sidings.”); *Sec’y of Agric. v. United States*, 347 U.S. at 647; *N.Y. Cent. & Hudson*

River R.R. Co., 219 N.Y. at 235-36. 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)).

Second, CP's obligation to provide service to the loading/unloading area is dictated in part by CP's historical practice of spotting and pulling cars at that location. See *Ex Parte No. 104*, 209 I.C.C. 11, 32 (1935) ("Under general custom and practice the line-haul rate entitles a consignee to have his shipment delivered at a reasonably convenient place, whether this be within a plant, or upon a track agreed upon by him and the carriers."); see also *Brockway-Smith Co.*, 497 F. Supp. At 818 (based on the established "custom and usage," delivery was not complete until rail carrier moved car up the sidetrack to customer's plant).

Third, CP's obligation to continue to provide service to the loading/unloading area will be reinforced by its representations in this proceeding and, likely, by the contract that CP anticipates it would execute as part of a transaction with the Government Parties. Under such a contract, CP would agree to continue to spot and pull cars at the loading/unloading area. Having long served the Government at the loading/unloading area and agreed to do so in the future if the Government acquires the Siding, absent materially changed circumstances, CP would most likely be estopped from taking a position in the future that its line-haul obligation terminates when it spots the car somewhere short of the loading/unloading area.

Fourth, as noted above, service to the loading/unloading area is included in the line-haul rate under CP's tariffs and consistent with its long-standing custom and practice.

Fifth, the distances involved in providing service to the loading/unloading area are relatively short. The distance from the end of the rail line at MP 31.32 to the loading/unloading area is a few hundred feet. The distance from the main line switch to the loading/unloading area is only half a mile. Under these circumstances, even if the Government acquired the BSIT and the Siding, the loading/unloading area would arguably be the only reasonable delivery point for the Government Parties' unique shipments. *See Minn. Transfer Ry. Co. Term. Serv.*, 279 I.C.C. 52 (1950) (carrier obligated under line-haul rate to deliver to Government's loading/unloading areas that are at least 1.2 miles from switch to carrier's mainline).¹⁴

Consequently, under the facts presented, CP construes the scope of its common carrier obligation as requiring CP to spot and pull the Government's cars at the existing loading and unloading facilities on the Siding on reasonable request. The Government's purchase and operation of the Siding, or both the Siding and the BSIT rail line, would not change this fact. And, given the well-established law that CP has a common carrier obligation to deliver upon a private siding to a mutually agreed upon reasonably convenient place for delivery,¹⁵ *supra*, CP will continue to be obligated to deliver to the loading/unloading area on the Siding even after the

¹⁴ *See also United States v. Chesapeake & Oh. Ry. Co.*, 305 I.C.C. at 206 (reasonable to require carrier to deliver cars to loading/unloading zones along approximately 2 miles of Government private trackage); *Brockway-Smith Co.*, 497 F. Supp. at 817-18 (holding that reasonable delivery required "carry[ing] the car the length of the sidetrack to [receiver]'s plant—a distance of approximately one-fourth of a mile"); *N.Y. Cent. & Hudson River R.R. Co.*, 219 N.Y. at 235-36 ("Reasonable delivery [on private siding] may involve trifling departures from the route, as where the carrier's engines, after switching cars upon a siding, move them a short distance to the doors or platforms of a factory.").

¹⁵ Subject, of course, to whether the private siding is safe and reasonable to traverse. *See e.g. United States v. Chesapeake & Oh. Ry. Co.*, 305 I.C.C. at 206 (common carrier's obligatory delivery via military private siding relieved where track was in "an undeterminable or unsatisfactory condition and needs rehabilitation"). And also subject to an appropriate private siding access agreement that is standard and customary in the industry. *See Clements V.S.* at 9.

Government purchases the Siding (or the Siding and BSIT). *See Republic Carloading & Distrib. Co.*, 302 F.2d at 386 (holding that the “railroad’s common carrier liability terminated at [the] point” “when the car was placed upon the [receiver’s] Platform”).¹⁶

Thus, the Government Parties’ concern that CP could fulfill its common carrier obligations merely by “shunting the car upon the switch, clear of the main tracks,” and leave the rail cars short of the loading/unloading area (Petition at 59 & n.21) is misplaced. CP respectfully requests that the Board provide guidance clarifying the scope of CP’s common carrier obligation so that the parties can progress the transaction.

C. The Board Has Jurisdiction to Enforce CP’s Common Carrier Obligation Even If the Government Purchases the BSIT and Operates it as Private Track.

In a footnote, the Government expresses skepticism that the Board would retain jurisdiction to enforce CP’s common carrier obligation to provide service over the BSIT if the Government purchases the track. Petition at 59 n.2. Although the Government argues that the Board has no jurisdiction over abandoned or private track, *id.* (with citations),¹⁷ that legal

¹⁶ *See also Brockway-Smith Co.*, 497 F. Supp. at 817-18 (holding that carrier’s delivery obligation did not end when it placed car on consignee’s sidetrack so that it was clear of main track but, rather, carrier still had to carry car length of sidetrack to consignee’s plant pursuant to consignee’s instructions, a distance of approximately one fourth of a mile, *inter alia*, because consignee had no equipment or means to bring car to plant); *see, e.g., United States v. Chesapeake & Oh. Ry. Co.*, 305 I.C.C. at 206 (common carrier delivery obligation required railroad to transport cars along private military siding in an Army base and deliver at private transload facilities, except to the extent that the private tracks were unsafe); *Intech, Inc. v. Consol. Freightways, Inc.*, 836 F.2d 672, 674-75 (1st Cir. 1987) (“However, spotting a shipment is not *final* delivery if ‘anything remains to be done by the carrier in order to effectuate a delivery.’” (emphasis in original) (quoting *Keystone Motor Freight Lines v. Brannon-Signaigo Cigar Co.*, 115 F.2d 736, 738 (5th Cir. 1940))).

¹⁷ The authorities cited by the Government all refer to the Board not having jurisdiction over “wholly private rail operations.” *Devens Recycling Ctr., LLC–Pet. for Declaratory Order*, FD 34952, slip op. at 2 (STB served Jan. 10, 2007); *Chi. Coating Co. v. United States*, 892 F.3d 1164, 1166 (Fed. Cir. 2018); *Energy Sols., LLC D/B/A Heritage R.R. Corp.–Abandonment Exemption–In Anderson & Roane Cts., Tenn.*, AB 1128X, slip op. at 3 (STB served Oct. 13, 2015). None of the authorities stands for the proposition that the Board loses jurisdiction the

conclusion elides the source of the Board’s jurisdiction in this case: CP’s common carrier obligation to provide service pursuant to its rates and tariffs. 49 U.S.C. § 11101(a) & (b); § 10502.

Pursuant to 49 U.S.C. § 10501(b) the Board has expansive and exclusive jurisdiction over “transportation by rail carriers,” including their rates and services. *See Boston & Maine Corp. & Springfield Term. R.R. Co.—Pet. for Decl. Order (“Winchester I”)*, FD 35749 (STB served July 19, 2013), *reconsideration denied* (STB served Oct. 31, 2013) (“*Winchester II*”). This jurisdiction necessarily includes both the jurisdiction to determine the scope of the common carrier obligation and to enforce that duty including when that duty originates or terminates on private track. *Cf. Winchester I*, FD 35749, slip op. at 4-5 (holding that the Board retains jurisdiction that preempts a town’s attempt to regulate a segment of private track because the railroad’s transit of that track segment did not terminate the railroad’s common carrier duty to its shipper); *Winchester II* (reaffirming the Board’s preemptive jurisdiction over a segment of private track because the carrier transiting that track segment “is a rail carrier conducting freight rail transportation service over these tracks, and [the shipper] has rights provided by federal law to ask for and receive common carrier rail service.”); *see also, e.g., United States v. Chesapeake & Oh. Ry. Co.*, 305 I.C.C. at 206 (I.C.C. exercises jurisdiction over dispute between common carrier and Army regarding the railroad’s obligation to transit several miles of Army’s private siding to deliver at Army transload facility).

moment a common carrier switches a regulated shipment from regulated rail tracks to the receiver’s private siding or track.

Thus, while it may be correct that the Board cannot directly order a carrier to operate over private tracks,¹⁸ once the common carrier and consignee agree that delivery will be made upon private siding pursuant to regulated line-haul rates, the Board has jurisdiction to enforce the resultant common carrier obligation of the carrier to complete delivery as the carrier has agreed.

¹⁸ See *Winnsboro Granite Corp. v. S. Ry. Co.*, 176 I.C.C. 481, 483 (1931) (service over private track beyond the initial placement point “is neither compelled nor prohibited by the interstate commerce act” and “[t]o furnish it or withhold it is within the discretion of the carrier”).

CONCLUSION

For the foregoing reasons, CP respectfully requests that the Board declare that the Siding, a short, stub-ended track used solely for loading and unloading, is excepted 49 USC § 10906 trackage. CP further requests that the Board provide guidance as to the scope of CP's common carrier obligation to provide rail service to the loading/unloading area in the event that the Government Parties acquire the Siding from CP.

Respectfully Submitted,

/s/ David F. Rifkind

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Dated: May 31, 2019

CERTIFICATE OF SERVICE

I hereby certify, that I have this 31st day of May, 2019 caused a copy of the foregoing Delaware and Hudson Railway Company Inc.'s Reply to Petition for Declaratory Order to be served by Federal Express overnight delivery service, and an electronic copy by email (where an email address is indicated below), on the following:

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36298

**NAVAL NUCLEAR PROPULSION PROGRAM, UNITED STATES ARMY MILITARY
SURFACE DEPLOYMENT AND DISTRIBUTION COMMAND, AND FLUOR MARINE
PROPULSION, LLC – PETITION FOR DECLARATORY ORDER**

VERIFIED STATEMENT OF JAMES D. CLEMENTS

My name is James D. Clements. I am employed by Canadian Pacific Railway Company d/b/a Canadian Pacific (“CP”) as Vice President Strategic Planning and Transportation Services. I have been employed by CP since 1994 and have occupied my present position since 2014. During my employment with CP, I have served in a variety of positions in planning, operating, commercial, and administrative roles. Since 2013, my responsibilities have included tactical and strategic asset acquisitions, line rationalization, and other strategic transactions to preserve and improve the efficiency and capacity of CP’s system including its indirectly owned subsidiaries such as the Delaware and Hudson Railway Company, Inc. (D&H) also d/b/a Canadian Pacific. In my prior positions, including as Director, Mines, Metals and Aggregates and as General Manager – Car Management, I participated in the operations of D&H. I am familiar with the rail line known as the Ballston Spa Industrial Track (“BSIT”) that is the subject of this proceeding, and have been directly involved in the discussions with the Government Parties regarding the sale of the BSIT. I provide this statement in support of CP’s Reply to the Joint Petition for a Declaratory Order filed by the Naval Nuclear Propulsion Program, United States Army Military Surface

Deployment and Distribution Command, and Fluor Marine Propulsion, LLC (the “Government Parties”) on April 30, 2019.

The BSIT

The BSIT is a stub-ended, approximately one half mile line of track that connects to CP’s Canadian Main Line near the Village of Ballston Spa in New York. Rail service on the BSIT has been virtually non-existent except for the very infrequent freight service for the Government Parties that has occurred only every fifteen years or so. Except for that sporadic service, CP has used the BSIT only to store maintenance of way equipment and the occasional bad order car. As a result, the western end of the BSIT was in a state of considerable disrepair when the Government Parties notified CP in 2017 that they had shipments of empty and loaded containers for nuclear materials scheduled in the next two years.

For a number of reasons, including physical nature of the BSIT and the decades-long interludes between freight service, until the Government Parties provided contrary information in May 2018, CP had assumed that the BSIT was unregulated spur track pursuant to 49 U.S.C. § 10906. As I explain later, this contributed to the protracted nature of the parties’ negotiations regarding the sale of the BSIT.

History of Negotiations with the Government Parties

For more than two years, CP has been working diligently with the Government Parties to negotiate the conditions governing rail shipment of loaded and empty containers of radioactive material on the BSIT, and continues to do so. These negotiations have been complicated by several factors: the phased nature of discussions and multiple shifts in the structure of the agreement being pursued, the unique considerations associated with rail shipment of radioactive

materials, and the inherent difficulties posed by the multiple decision-making departments of the federal government.

Since April 2017, CP has actively discussed with the contract operators of the Kesselring Site, first Bechtel Marine Propulsion Corporation (“BMPC”) and later Fluor Marine Propulsion, LLC (“Fluor”), the use of the BSIT for receipt of a shipments of empty containers for radioactive materials, shipments which were contemplated to occur as early as the Spring of 2018. CP and BMPC began by discussing a siding access agreement. Such agreements are standard practice in the rail industry, and are of particular importance when the shipper intends to engage in ultra-hazardous activities on railroad property, as is the case here. As noted above, a portion of the BSIT required significant rehabilitation before it could be used for rail service, and the siding access agreement would provide BMPC with access to the BSIT to complete necessary rehabilitation work.

Due to BMPC’s concerns regarding the timeline of shipments, while discussion of the siding access agreement was ongoing, CP and BMPC negotiated a right of entry agreement to allow BMPC’s contractor to investigate the condition of the BSIT and assess the extent of rehabilitation work required. CP and BMPC executed the right of entry agreement in May 2017. BMPC contractors were thereafter able to assess the site conditions and need for rehabilitation work on the BSIT.

CP and BMPC continued to negotiate the terms of the siding access agreement through the Summer of 2017. During this time, CP evaluated the potential issues regarding liability and security related to the contemplated shipments of radioactive materials. In September 2017, CP determined that, in light of the infrequent use of the BSIT, the best course of action to address

these issues would be to sell the BSIT property to the Government rather than entering into the proposed siding access agreement.

CP's continued ownership of the BSIT makes little sense. There is only one shipper on the line, the U.S. Government. Moreover, that shipper rarely uses the line and decades can pass without a single car moving over the line. Consequently, CP determined that its continued ownership of BSIT is not necessary to meet the Government's needs for continued, but infrequent, rail service.

Recognizing this was a change of direction that could affect the shipment timelines, CP quickly informed BMPC of its decision and proposed a solution that would allow BMPC to continue to move forward with its rehabilitation efforts while the terms of a sale was negotiated. Specifically, CP and BMPC entered into a letter agreement wherein the parties acknowledged that they would pursue the sale of the BSIT property. Additionally, CP and BMPC entered into a Permission to Enter Premises, Release and Agreement to Insure (the "Rehabilitation ROE"), which provided BMPC the necessary ability to complete the rehabilitation of the BSIT as sale negotiations proceeded. Both agreements were fully executed on October 9, 2017.

The Rehabilitation ROE and the right to conduct the rehabilitation work without a definitive sale agreement were outside of CP's standard practices, as work by outside forces on CP property that was not subject to a lease or access agreement raised potential issues with CP's collective bargaining agreement with its maintenance of way employees. Nevertheless, CP offered this accommodation to BMPC and the Government Parties as a demonstration of its good faith in recognition of the timing constraints regarding upcoming rail shipments on the BSIT.

At the end of October 2017, CP provided BMPC with a draft Purchase and Sale Agreement to initiate negotiations regarding the sale of the BSIT. At the time, CP understood the

BSIT to be an spur track excepted from STB exit licensing requirements. We proposed selling the entire line from the mainline switch to the end of the track. After the sale, CP would provide service to the loading/unloading area pursuant to the terms of an industry-standard private siding agreement, modified only to address the liability issues associated with the ultra-hazardous nature of both the commodity and the over-sized equipment required for the movement. Providing service over the BSIT all the way to the loading/unloading area is consistent with CP's understanding of its common carrier obligation to deliver rail cars to the location where the customer could accept the shipment.

Although the Government committed to acquiring the property prior to the first loaded movement, progress towards that goal has been glacial. In an effort to hold the Government to its commitment, CP insisted on weekly telephone conferences with the Government Parties. However, the Government Parties frequently cancelled or failed to participate in the scheduled calls or attended without a representative who had decision-making authority. In addition, there was a months-long delay before the Government Parties identified the appropriate counterparty to the proposed sale agreement.

Months went by with little or no progress in the negotiations. BMPC obtained maps and deeds for the subject property from CP in February 2018. With shipments scheduled to begin in June, CP informed BMPC of CP's concern regarding the lack of progress, and that CP needed a definitive agreement in place before shipments commenced. CP emphasized, however, that it would comply with its common carrier obligations.

In March 2018, some six months into negotiations to sell the BSIT, BMPC informed CP that a sale could not be completed in time to accommodate the shipments scheduled to begin in June 2018. BMPC indicated that the typical timeline for federal government acquisition of real

property is on the order of five to seven years due to the number of actions by different government branches involved, but that BMPC would work with the involved government agencies and pursue additional options to compress the timeline to under two years. Although BMPC stated that the Government Parties intended to move forward diligently and in good faith with the purchase of the BSIT, the time constraints of the anticipated rail shipments required that the parties execute an agreement to allow scheduled shipments to proceed before the sale transaction.

Consequently, in March 2018, the parties again shifted course and began pursuing multiple paths forward in parallel. The parties revisited the terms of the siding access agreement and incorporated milestones related to the purchase and sale of the BSIT. The Government Parties also provided a draft sale agreement for the BSIT, taking the position that the transaction would have to be completed on their form. Finally, in April 2018, the Government Parties provided CP a formal tender request for rates for the movement of empty containers for radioactive material. CP responded to this formal tender request with a proposed transportation contract pursuant to 49 U.S.C. § 10709.

The Government Parties informed CP that they were unable to enter into a private contract for rail transportation and reiterated their request for a public tariff for the proposed movements. CP provided the Government Parties with common carrier rates and, after some miscommunication between the parties as to the precise format in which the Government insisted CP provide the rates, CP published a revised tariff for the movement on May 10, 2018.

The Government Parties' allegation that CP did not timely respond to a request for common carrier rate is not accurate. CP had responded to the request for a rate by providing a confidential transportation contract. However, due to rate negotiations, unfamiliarity with the

rigid format demanded by the Government and miscommunication, there was a delay in providing the Government the final rate in the precise format that the Government required. CP remains committed to responding to future rate requests consistent with its common carrier obligation.

The Government Parties also advised CP, for the first time, that the BSIT was a regulated rail line and not excepted 49 U.S.C. § 10906 spur track as the Parties had until then assumed. The Government Parties provided CP with a copy of the 1980 abandonment file, including the August 7, 1980 Rail Service Agreement. Until then, CP had not been aware of these documents.

Additionally, to accommodate BMPC's near-term needs, CP and BMPC entered into an access agreement on May 9, 2018 to allow BMPC to receive service on the BSIT and unload empty containers. With regard to longer-term needs, CP proposed to abandon the BSIT to allow purchase by the Government Parties. In June 2018, BMPC informed CP that the Government Parties could not support abandonment of the BSIT because the Government Parties were concerned that abandonment would eliminate CP's common carrier obligation to provide service to the loading/unloading area. BMPC proposed that the sale proceed pursuant to a *State of Maine* transaction. CP advised BMPC that it was not interested in a *State of Maine* transaction, which CP viewed as inconsistent with the Government's commitment to acquire the BSIT.

For the next six months, CP and BMPC continued to discuss the options for sale of the BSIT, and CP consistently assured the Government Parties that, consistent with its common carrier obligation, CP would continue to provide service to the loading/unloading area following the BSIT's abandonment. In August 2018, CP provided BMPC with a draft private siding agreement containing additional contractual assurance that CP would serve the loading/unloading area after abandonment.

As real estate and environmental due diligence progressed, the United States Army Corps of Engineers (“USACE”) issued an official letter of interest dated October 18, 2018 to acquire the BSIT property, reiterating its expectation that the acquisition would be a *State of Maine* transaction. By letter dated November 27, 2018, I responded to the USACE letter of interest, reiterating that a *State of Maine* approach was not acceptable to CP, was inconsistent with prior commitments to acquire the BSIT, and would open the possibility that other shippers will demand service on the BSIT that could interfere with rail service to the Government. Abandonment would foreclose interference by other shippers and was in the best interest of both parties. I further indicated that CP intended to proceed with seeking abandonment authority, but would provide the government with a long-term private siding agreement that included CP's contractual commitment to serve the loading/unloading area. By letter dated January 27, 2019, the Government Parties responded that they would vigorously oppose any efforts by CP to abandon the BSIT.

In March of this year, CP continued its efforts to provide the Government Parties with the assurances they required. CP proposed a renewable ten-year term for the private siding agreement in order to provide long-term security. CP also offered to limit the sale to only the unregulated siding at the end of the BSIT. The Government Parties, however, took the position that the siding was a regulated line of railroad. Despite CP's efforts, the Government Parties remained unconvinced that the siding was unregulated track. The Government Parties notified CP by letter dated March 25, 2019 that the question of whether the regulated track continued to the end of the siding at the loading/unloading area was central to the structure of the sale transaction, and that the Parties should seek an STB declaratory order to resolve the issue. The Joint Petition followed.

CP's Custom and Practice

It is CP's custom and practice to spot and pull cars from a customer's facility as part of the line-haul rate. This practice is reflected in CP's Tariff 1, attached hereto as Exhibit A. The first spot is part of the line-haul service. Typically, CP will spot or pull cars from the loading and unloading tracks of its customers unless CP and the customer have mutually agreed to another location or CP is unable to reach the loading and unloading area. CP's service over a customer's private track is subject to reasonableness requirements including the requirement that CP be able to operate safely over the track without unreasonable interference. CP also requires a private siding access agreement. Such agreements are standard in the industry.

CP's Commitment to Providing Service

Throughout negotiations, CP has repeatedly expressed its commitment to providing the rail service requested by the Government Parties. CP has not shrunk from its common carrier obligations and has no intention of doing so. CP remains fully committed to fulfilling its common carrier obligation and is especially proud to do so in the service of the country.

VERIFICATION

I, James D. Clements, declare under penalty of perjury under the laws of the United States, that I am authorized to make this verification on behalf of Delaware and Hudson Railway Company, Inc., and that the information included in the foregoing statement is true and correct to the best of my knowledge and belief.



James D. Clements
Vice President Strategic Planning and Transportation Services
Canadian Pacific

Dated: May 31, 2019

EXHIBIT A



CP'S GUIDE TO PRODUCTS AND SERVICES

Tariff 1

www.cpr.ca



Revision 2019.1
Issued November 30, 2018
by Specialist - Tariff Policy
Canadian Pacific
7550 Ogden Dale Road SE
Calgary, AB T2C 4X9

Effective January 1, 2019
Expires December 31, 2019

This document is updated from
time to time. For the most recent
version and to subscribe to
notifications of updates to this
and other tariffs, please visit
www.cpr.ca

Changes can be identified
by these icons

	Wording change
	Price decrease
	Price increase
	New item added

Tariff 1 – CP's Guide to Products and Services

Contents

4 [Introduction to services](#)

About Canadian Pacific
Core transportation service
Supplemental services

5 [Shipping](#)

Customer shipping responsibilities
Wood packing material
Shipping instructions

7 [Invoicing and payment](#)

Credit
Payment
Disputes
Interest Charges

9 [Rules and regulations](#)

Other important tariffs

Note: the former *Appendix to Tariff 1: Intermodal Safety Standards and Restricted Commodities* has been moved into Tariff 3.

[Tariff 2 \[Railcar\]](#)

[Tariff 3 \[Intermodal\]](#)

[Tariff 4 \[Transload\]](#)

[Tariff 5 \[Unit Train\]](#)

[Tariff 6 \[Private Equipment\]](#)

[Tariff 7 \[Between Railways\]](#)

[Tariff 8 \[Hazardous Commodities\]](#)

[Tariff 9 \[Automotive\]](#)

[Tariff 10 \[Miscellaneous\]](#)

[Tariff 9700 \[Mileage-based Fuel\]](#)

[Tariff 9900 \[Percentage-based Fuel\]](#)

[Tariff 9800 \[Environmental Surcharges\]](#)

Introduction to services

About Canadian Pacific *Item 10*

Information about the markets Canadian Pacific (CP) serves, as well as the transportation and logistical services CP offers can be found at www.cpr.ca or by contacting a CP account manager [see <http://www.cpr.ca/en/customer-resources/become-a-customer>]. The suite of tools for doing business with CP is housed in Customer Station [<http://www.cpr.ca/en/customer-resources/customer-station>].

Core transportation service and supplemental services *Item 25*

Pricing in a published freight contract or tariff will include the core transportation services provided by CP. Optional services provided beyond this core transportation service are supplemental. Unless otherwise stated in the applicable freight contract or tariff, Table A summarizes the service elements that are included as core and some examples of optional supplemental services:

Table A: Core transportation services						
Service element	Rail Direct	Door Direct		Terminal Direct		
	Carload	Intermodal	Transload	Intermodal	Transload	Automotive
Pick-up of released railcar from origin facility						
Movement from origin facility to destination facility						
Initial placement of railcar at destination facility						
One switch per scheduled service day* (service days are subject to change)						
Switch request for a specific car ID or specific car type						
Switching of railcars at facility after initial placement						
Additional cars switched to carry out customer's car movement instructions						
Live delivery and pick-up of the shipment / equipment						
Use of standard container and chassis for live (un)load						
Use of standard flatbed or trailer type appropriate to commodity						
Direct shipment transfer from truck / chassis to railcar						
One in-gate or out-gate at the terminal per trailer / chassis						
Direct shipment transfer between trailer / chassis and railcar						
Load and secure vehicles or unload vehicles						

 = Included [Core]  = Optional [Supplemental]

*CP operates 24 hours per day and 7 days per week. Facilities receive service on scheduled service days, the frequency and timing of which depend on local operating factors and are subject to change. CP's core service includes one switch per service day.

The provision of supplemental services, and the fees or charges related to such, is governed by CP's Supplemental Services Tariffs:

[Tariff 2 \[Railcar\]](#) – rules, supplemental services and fees for shipments in railcars

[Tariff 3 \[Intermodal\]](#) – rules, supplemental services and fees for shipments in intermodal or international containers

[Tariff 4 \[Transload\]](#) – rules, supplemental services and fees for shipments into or out of transload facilities

[Tariff 5 \[Unit Train\]](#) – rules, supplemental services and fees for shipments travelling as full trains

[Tariff 6 \[Private Equipment\]](#) – rules governing private equipment on CP's network, including mileage equalization

[Tariff 7 \[Between Railways\]](#) – switching rules and fees in Canada and the United States

[Tariff 8 \[Hazardous Commodities\]](#) – rules and fees for hazardous shipments

[Tariff 9 \[Automotive\]](#) – supplemental services and fees for automotive shipments

[Tariff 10 \[Miscellaneous\]](#) – supplemental services and fees with limited application or infrequent usage

Ordering service from CP indicates acceptance of the terms and conditions published in CP's tariffs in effect at the time of the order.

Shipping

Safety starts with you *Item 114*

Customers are essential to ensure the safety of shipments, equipment, employees and the communities through which the railway runs. Customers are responsible to ensure that equipment is loaded, unloaded and released properly, and are liable for the consequences when this is not done, including but not limited to damage, theft, injury or fatalities. Some customer shipping responsibilities include:

Preparation

- Know and abide by the applicable laws, regulations and requirements for the areas through which the shipment will travel
- Adhere to applicable commodity restrictions in effect (e.g. in Tariff 8 or Tariff 3 Appendix)
- Receive required permits and CP pre-authorization for any shipment exceeding standard equipment dimensions or restrictions
- Inspect equipment before loading to ensure it is suitable and free from material defects
- Ensure tank-type equipment meets IMO, AAR and Transport Canada's *TC Impact Approved* standards
- All Wood Packing Material (WPM) to be used in the shipment must be compliant per Tariff 1 Item 132

Loading

- Always wear personal protective equipment (PPE) when working near railway facilities, tracks or equipment
- Follow applicable AAR / RAC loading guide, CP approved standard operating procedures (SOP) and applicable CP shipping guide
- Distribute the shipment weight evenly and within the equipment load limit
- Temperature-controlled shipments must be loaded to allow proper air flow and product pre-warmed/cooled to the set temperature
- Ensure the shipment is contained entirely within the equipment

Securing

- Secure the shipment to prevent both linear and lateral shifting, using blocking and bracing as necessary
- Close and secure all gates, doors, hatches, etc.
- Apply ISO 17712 seals on all equipment, including containers to be picked up or dropped off at multiple locations
- Clear the exterior of the equipment of debris, product or other accumulation to ensure it is safe to travel

Releasing and Unloading

- A Bill of Lading must be submitted prior to tendering any shipment for transportation (see Tariff 1 Item 120)
- Unload / release equipment in a timely fashion to avoid asset use charges
- Equipment must be available for immediate pick-up when billed or released
- At destination, empty equipment of all product, ensuring any dunnage or debris is removed and doors, gates or hatches are closed
- Intermodal equipment must be cleared of snow and debris, and ready for highway travel before the driver arrives for pick-up

While it is a customer's responsibility to ensure a safe facility and the proper loading, unloading and release of equipment, CP's Damage Prevention Team can assist in planning for the safe movement of shipments. This team has loading guides online [<http://www.cpr.ca/en/customer-resources/damage-prevention-and-claims>] and can be reached by email at dpcs_sop@cpr.ca. Customers must comply with CP's Customer Safety Handbook [<http://www.cpr.ca/en/customer-resources/customer-safety>].

Wood packing material *Item 132*

For all cross-border (loaded or empty) shipments tendered to CP, the customer represents and warrants that any Wood Packaging Material (WPM) [e.g. pallets, crates, boxes, dunnage, etc.] used to support or brace the cargo is either heat treated or fumigated with methyl bromide, and marked with an approved international stamp certifying compliance with the international standard. The Customer further represents and warrant that the interior and exterior of all commodities, packaging and equipment is free of pests, including insects (live or dead), insect larva, insect eggs and weed seed, prior to the shipment being tendered. Shipments will be denied entry/border crossing if the shipment does not conform to the above or related regulatory requirements. Non-compliant shipments are subject to fees in CP's Supplemental Services Tariffs and may be re-routed for export from border locations at the customer's expense. CP reserves the right to request that the customer provide proof of compliance to regulations and standards associated to WPM.



Shipping instructions Item 120

Shipment instructions – by way of a Bill of Lading – authorize CP to move shipments. It is the customer’s responsibility to ensure that shipment instructions are received prior to (but not more than 7 days before) a shipment being tendered to the railway. By submitting a Bill of Lading, customers are agreeing to the rates, terms and conditions of the shipping authority (contract or tariff) that governs the movement of the shipment. CP will not pick-up a shipment without a complete Bill of Lading in place. Shipments without a complete Bill of Lading at the time of service will be left behind, which may result in delays to the shipment and additional tariff charges. Bills of Lading must be accurate and complete and may be submitted electronically through *Customer Station* [<http://www.cpr.ca/en/customer-resources/customer-station>] or via EDI. The components required for a complete Bill of Lading are summarized in Table B below:

Table B: Components required for a complete Bill of Lading		
All shipments	Cross-border shipments	Hazardous commodities
Equipment details (initials, number, size, type, etc.)	Customs broker	Commodity UN Number
Payer of freight (i.e. billable party)	Country of origin	Commodity Class Number
Shipper's legal name and full address	Invoice value and currency	Commodity Packing Group
Consignee's legal name and full address	Full shipper/exporter name and full address	24-hour telephone contact number
Any other parties to the shipment (e.g. care of)	Full consignee/importer name and full address	Emergency response plan # and phone number
Origin, destination and route	ITN, T&E, CCN and any other required customs info	Other required commodity or region-specific info
Equipment load or empty status		
Commodity description and all STCCs in shipment		
All seal numbers affixed to secure equipment		
Net weight and unit of measure (e.g. kg, tons)		
Total # of pieces and package type		
Shipping authority (i.e. contract or tariff #)		
Additional requirements		
Shipment instructions must meet all local, provincial, state and national regulatory requirements to be considered complete		
Temperature-controlled shipments require set-temperature details in the Bill of Lading		
When a 3 rd party terminal loads containers to a railcar, the Bill of Lading must include car and container information, including the position of the containers		
Any special notes or instructions on the Bill of Lading are not binding on CP or other carriers		

Invoicing and payment

Credit Item 111

Every customer must secure credit with CP prior to shipping. Without credit, funds for shipments are required in advance, which could result in shipment delays. Customers can apply for credit online at: <http://www.cpr.ca/en/customer-resources/become-a-customer/credit-application-form>. A CP Credit Analyst is available for assistance at 1-877-404-0433. For companies without publically-available financial information, additional information (e.g. financial statements) may be required to grant or maintain credit. Any changes to company name or ownership must be disclosed to CP immediately using CP's online credit application form (link above). Failure to pay invoices within credit terms, a change in credit-worthiness, or a failure to provide financial information requested by CP to demonstrate credit-worthiness may result in credit suspension or cancellation without notice.

Payment Item 140

Payment must be made no later than the due date on the invoice. Electronic payment is made through the *Manage Invoices* tool on *Customer Station* <http://www.cpr.ca/en/customer-resources/customer-station>. Questions about electronic invoicing and payment options may be directed to CP's e-Business team by email at eB_Support@cpr.ca or by phone at 1-888-333-8111.

Disputes Item 141

In the event that invoiced charges are not correct, they should be disputed promptly. Disputes are submitted electronically through the *Manage Invoices* tool on *Customer Station* <http://www.cpr.ca/en/customer-resources/customer-station> and must be submitted prior to the due date on the invoice. Any undisputed amounts on the invoice must be remitted as described in Item 140. The dispute submission should include a brief description of the reason for the dispute along with documentation to support the dispute as indicated in Table C below. Disputes submitted without the required documentation may be declined. Contact information for the appropriate CP accounts receivable representative is indicated on the top right of each invoice.

Table C: Documentation required to support a disputed invoice												
Dispute type	Rate Authority (CP or Foreign RR)	Amount Expected	Correspondence supporting dispute	Bill of lading or purchase order	Contact person	Correct Bill To party	Duplicate invoice # and/or date	Payment information (check #, amount, date, details or remittance)	Foreign RR contact (email, phone)	Correct reference, PO or branch	Evidence of cars shipped (provide reason if incentive volume not met)	Tax exemption form
Incorrect rate applied												
Fuel surcharge error												
Incorrect Bill To party												
Duplicate invoice												
No physical move												
Already paid												
Movement / service should be free												
Rule 11 vs Through movement												
Incorrect reference # or branch												
Supplemental services fees incorrect												
Incentive rate error												
Tax issue												
Origin / Destination / Route error												
Operations error (e.g. derailment, pulled in error)												
Other dispute not covered above												

Interest Charges

Item 144

NEW
ITEM

Canadian Pacific assesses an interest charge on freight and supplemental service invoice amounts that are beyond specified Credit Terms. The method of interest application is described below, with sample scenarios provided in Table D for additional context:

- Interest is assessed at a rate of 0.0329% per day [12% per annum] for each day the invoice is/was past due.
- Separate monthly statements outline the interest charges for all open invoices that are past due, as well as any closed invoices from the previous month that were paid past specified Credit Terms.
- Credit Terms are outlined in Item 200 of this tariff [*Section 10 - Payment and Credit Terms*] unless otherwise specified within the applicable freight tariffs and contracts that govern shipments on CP.
- Due Date is calculated as Invoice Date plus Credit Terms.
- Days Past Due is calculated as Due Date minus the date funds were received by CP.
- When an invoice is disputed [see Item 141], it is placed into a disputed status, which is not subject to the interest charge. If the disputed invoice is deemed accurate, the disputed status is removed and interest charges reinstated.
- Questions regarding interest charges may be directed to the CP accounts receivable representative indicated on the top right of each invoice, or to the CP Receivables Management team at 1-877-474-5008.

Table D: Sample interest scenarios

Based on an invoice generated Jul 6 for the period of Jun 1 - 30

#	Waybill Date	Invoice Date	Credit Terms [Days]	Due Date	Invoice Amount	Amount Paid	Date Paid	Balance	Days Past Due	Interest Charge [Current Month]	Current Invoice Status	Interest Charge Comments
1	Jun 1	Jun 2	15	Jun 17	\$1,500	\$0.00	-	\$1,500	13	\$6.42	Unpaid	Interest charges assessed as invoice amount is 13 days beyond terms.
2	Jun 20	Jun 21	15	Jul 6	\$1,000	\$0.00	-	\$1,000	0	\$0.00	Unpaid	No interest assessed during this period as invoice amount is still within credit terms.
3	May 1	May 2	15	May 17	\$2,000	\$0.00	-	\$2,000	30	\$19.74	Unpaid	Interest charges assessed for entire interest period [Jun 1-30] as amount is beyond terms. Customer would have also received interest charges for this invoice on the previous interest invoice [covering May 17-30].
4	Jun 1	Jun 2	15	Jun 17	\$1,000	\$1,000	Jun 22	\$0.00	5	\$1.65	Paid	Interest charges assessed as full amount paid was not within credit terms.
5	Jun 1	Jun 2	15	Jun 17	\$1,000	\$0.00	-	\$1,000	13	\$0.00	Dispute	Invoice amount was disputed within credit terms, therefore no interest is charged at this time. After investigation, it an amount is still owing to CP, interest will be reinstated.
6	Jun 9	Jun 10	15	Jun 25	\$2,000	\$1,500	Jun 22	\$500	5	\$0.00	Dispute	Invoice amount was partially paid and therefore automatically placed into dispute status. No interest is charged at this time. After investigation, it an amount is still owing to CP, interest will be reinstated.
7	Jun 1	Jun 2	15	Jun 17	\$1,500	\$0.00	-	\$1,500	13	\$6.42	Dispute over; balance unpaid	Customer disputed amount on Jun 16, however total amount was deemed valid on Jun 24 and has yet to be paid. Therefore, interest charges are assessed.

Rules and regulations *Item 200*

For notifications of updates to this tariff, subscribe at <http://www.cpr.ca/en/subscriptions>

1. Application

In this Tariff 1, and all other applicable CP tariffs (including but not limited to tariffs 2 through 10) and other ancillary tariffs and supplements ("CP Tariffs"), "CP" shall mean, each and together:

- Canadian Pacific Railway Company;
- Dakota, Minnesota & Eastern Railroad Corporation;
- Delaware and Hudson Railway Company, Inc.; and
- SOO Line Railroad Company

respectively, where each is involved in the movement of the shipment.

CP's Tariffs shall be enforced in accordance with the laws of the province or state in which the shipment tendered originates, together with applicable federal legislation and the custom and usage of the railway industry. The Customer acknowledges and agrees that on shipments moving to or from other railways, all applicable tariffs of the other railways apply to that portion of the shipment on the respective other railways, and that the services offered on other railways may differ from CP. For greater clarity, the Customer acknowledges and agrees that such other railways are independent contractors and are not agents, representatives, or subcontractors of CP, nor shall anything be construed as establishing or implying a relationship of agency, subcontractor, joint venture or partnership between CP and any connecting railway.

"Carrier" or "Carriers" shall mean CP and any connecting railway. "Commodities" mean the goods transported. "Hazardous Commodities" are as specified in CP's Tariff 8. "Private Equipment" is as specified in CP's Tariff 6. References to CP cars shall also extend to cars owned or operated similarly by other railways unless stated otherwise. Except as otherwise provided, rates and charges published in CP's Tariffs are competitive rates and only apply from or to points specified. Rates do not apply to intermediate points and cannot be used to construct combination rates.

Shipping Instructions, also referred to as Bill of Lading, are deemed to be duly authorized when submitted and are valid and binding, irrespective of means of transmission, including electronic submission of same, including but not limited to 'EDI 404'. Any Shipping Instruction submitted for shipments originating in Canada shall be deemed to use CP's Standard Bill of Lading, and for shipments originating in the United States of America, the Uniform Straight Bill of Lading, the terms and conditions of which are incorporated by reference. Each Bill of Lading, whether issued under the authority of a rate tariff or a confidential contract, shall constitute a "Contract of Carriage" and such Contract of Carriage shall incorporate CP's Tariffs. In addition to this Tariff 1, Shipper is responsible for ascertaining all other applicable CP Tariffs and complying with all requirements therein.

2. Updates to This Tariff

This document and the associated documents outlining chargeable services and rules will be updated from time to time with 30 days' notice of any price increase or change of rules or conditions. Notice of update will be sent to email addresses subscribed to notifications under the tariff subscription section of www.cpr.ca. To subscribe, please visit <http://www.cpr.ca/en/subscriptions>.

3. Limitation on Common Carrier Offering

Intermodal services are not common carrier offerings, and CP does not hold itself out to be a common carrier for Intermodal services.

4. Customer Representations and Warranties

The Customer represents and warrants to the Carrier(s) that the commodity(ies), the packaging thereof, the loading and unloading thereof, and all other obligations of the Customer under the Contract of Carriage have been and will be performed in accordance with all applicable provincial, federal, state or local laws, regulations, decisions, orders, tariffs, and schedules as well as customer responsibilities as detailed in this tariff and associated tariffs. The Customer represents and warrants to the Carrier(s) that it controls the routing of the commodity(ies) being transported by the Carrier(s) and is the purchaser of these services as described in the Contract of Carriage.

5. Rights to Inspect, Reject, Return, and Determine Final Weight

CP reserves the right to inspect shipments to ensure safety or ascertain the accuracy of the description(s). The description of the commodity(ies), as set forth on all shipping documents, must conform to the Standard Transportation Commodity Code 6001 Series and must show ALL applicable STCC numbers. In the event a description is incorrect, CP shall be permitted to:

- a) adjust the rates being charged to ensure the rates conform with the commodity actually being transported;
- b) refuse to transport the commodity; or
- c) respond in any other legal manner.

CP reserves the right to reject any shipment which does not comply with provisions set-out by CP. Failure of CP to reject a shipment which does not comply shall not make CP responsible for loss, damage or injury resulting from the nonconformity or otherwise alter CP's responsibility or liability. When shipment is directly or indirectly refused or rejected and not unloaded by the consignee or receiver, CP reserves the right to return the shipment to its origin, subject to the same freight price used to ship it to the consignee or receiver that refused or rejected it.

CP reserves the right to make the final determination as to the weight of any shipment where the applicable rate is priced using weight and the actual weight is disputed. In intermodal containers, "Footprint Weight" may not exceed 2,500lbs per linear foot without sub floor protection. Drive axle can carry approximately 75% of fully loaded forklift weight (for example, a 20,000lb forklift [including cargo] that has 7,500lbs on each front drive wheel [5,000lbs more than the 2,500lb per linear foot limit] must utilize sub floor reinforcement in loading and unloading).

6. Use of "Team Tracks" or Public Delivery Tracks

Existing team track service, including loading/unloading platforms and other structures, are available for use by shippers for non-hazardous commodities only on a pro-rata share usage basis, at the sole cost, risk and expense of the Customer(s) using the team track facilities. By using such facilities, the Customer agrees to indemnify, defend and hold harmless CP from all claims, costs, and expenses, and to assume all risk, responsibility and liability for death, personal injury, or property damage, arising from, related to, or in any manner caused by, in whole or in part, the use of such team track facilities.

By using a CP team track, the Customer agrees to CP's Tariffs. Team tracks may be accessed only upon CP permission and signed written agreement. CP may deny access if, in CP's discretion, it is determined that the Customer's use of the facilities is negatively affecting the safety of the team track, other Customers, or other CP operations. Upon completion of loading or unloading, the Customer(s) shall leave

CP's property in a safe and clean condition, removing all materials brought onto CP's property or removed during unloading.

7. Switching performed by other railways

Where switching or "inter-switching" charges are incurred in the transportation of commodities, Shipper shall be responsible for any switching charges incremental to those included in Rates as detailed in tariffs or confidential contract.

8. Customer's Owned or Leased Equipment

If equipment used for any shipments tendered by the Customer is owned or leased and provided by, or on behalf of, the Customer, the Customer represents and warrants to the Carrier(s) that such equipment is in compliance with all terms listed in CP's [Tariff 6 \[Private Equipment\]](#). Should any Private Equipment as defined in CP Tariff 6 be used, the terms and conditions of CP Tariff 6 shall apply.

9. Hazardous Commodities

If any Hazardous Commodities (loaded or residue) are transported, the Customer represents and warrants to the Carrier(s) that such commodities are in compliance with all terms listed in CP's [Tariff 8 \[Hazardous Commodities\]](#). Any application of Hazardous Commodities to CP equipment or shipment not in compliance will be deemed unsafe and unauthorized, and will be subject to applicable fees.

10. Payment & Credit Terms

The Customer shall pay all rates, charges, costs, expenses and taxes in full within fifteen (15) days (inclusive of Saturdays, Sundays and statutory or civic holidays) of the day following the date of issuance of an invoice for the same. If the Customer disputes any portion of the invoice, the Customer shall pay the invoice by the due date shown on the invoice less the disputed amount in accordance with the Customer's records and indicating the reason for the adjustment. The Carrier will accept a whole or partial claim for overcharge, over-collection or duplicate payment only if the claim is:

- made within 180 days of the date of the invoice in which it is alleged to have been made;
- in writing; and
- contains sufficient information for the Carrier to conduct an investigation, including:
 - the name of the claimant (which must be the same as the party who overpaid);
 - the amount of the claim;
 - the applicable quote number;
 - the original bill of lading;
 - the original freight bill;
 - a description of the freight bill payment charges at issue and supporting documentation; and
 - in the case of overcharges: the rate, weight, description of the commodities, and applicable supporting documentation.

Any claim or dispute must include all documentation required in accordance with Item 141 of this Tariff 1. Failure to file all required information and documentation within the times and as stipulated in this Tariff 1 will result in denial of the claim or dispute. If the Customer's Financial Statements (as defined below) are not publicly available on the EDGAR database of the United States Securities and Exchange Commission or the SEDAR database of the Canadian Securities Administrators or a similar public database, the Customer shall, within two (2) Business days of receipt of a request from the Carrier, deliver to the Carrier its consolidated balance sheet for its most recently completed fiscal quarter and year, and the related statement of income and statement of changes in financial position of the Customer for such fiscal quarter and year (collectively the

"Financial Statements"), prepared in accordance with applicable generally accepted accounting principles or international financial reporting standards, all in reasonable detail and in the case of such annual Financial Statements information certified by independent chartered or certified public accountants of recognized standing.

If:

- a) The Carrier determines, in its reasonable discretion, that Customer's credit worthiness has deteriorated;
- b) Customer fails to provide Financial Statements following a request for the same from the Carrier; or
- c) Customer fails to pay an invoice within fifteen (15) days,

the Carrier may do any one or more of the following:

- i. assess interest charges of twelve percent (12%) per annum on all past due amounts;
- ii. cancel credit and either (a) require payment in advance, or (b) require that Customer provide Performance Security in order to ship under credit for any further shipments under the Contract of Carriage or any other contract for the transportation of Commodities between the Carrier and Customer; or
- iii. terminate the Contract of Carriage or any contract for the transportation of Commodities between the Carrier and Customer on five (5) days written notice to Customer.

Where Performance Security is provided it shall be maintained by Customer during the entirety of the duration that Customer is tendering shipments to CP, unless otherwise agreed by the Carrier. In this section "Performance Security" means sufficient security in an amount acceptable to the Carrier and in the form of either an irrevocable standby letter of credit in a form and from a financial institution acceptable to the Carrier, or prepayment. Unless Performance Security is provided, Customer shall pay an additional fee of \$100 for each railcar or container shipped under the Contract of Carriage. This charge will be in addition to all other rates, charges, costs, expenses and taxes for such shipment.

11. Liability

Claims for loss, damage or delay to the Commodity will be governed in accordance with terms and conditions as listed within this tariff unless otherwise specified in a Confidential Contract or any other CP Tariff. The liability of CP for any alleged loss, damage or delay to the commodity shall be as follows:

- a) For transportation of Commodities within Canada, CP's liability for claims and the procedures for processing such claims, shall be the same as that imposed on a Canadian rail common carrier. For greater certainty, the terms and conditions regarding liability shall be those of the Railway Traffic Liability Regulations SOR/91-488, except as otherwise provided herein.
- b) For transportation of Commodities within the United States, CP's liability for claims and the procedures for processing such claims, shall be the same as that specified in 49 U.S.C. Section 11706, except as otherwise provided herein.
- c) In no event shall CP be liable for more than a value of \$2 per pound up to \$50,000, for shipments not under common carrier service.
- d) No claim for loss or damage shall be filed by the claimant or investigated by the Carrier for \$500.00 or less per container/railcar.
- e) With respect to liability claims, the "value" of the Commodity or portions thereof shall be computed on the basis of the value at the time of shipment of the Commodities at the place and time of shipment under the Bill of Lading including the freight and other charges if paid, and the customs duty if paid or payable and not refundable. However, the "value" of the commodity or portions thereof shall be computed on the

basis of the manufactured cost of the Commodities only in the case of replenishment movements (Transfer of Stock). For Transfer of Stock, the Customer shall provide the Carrier with written certification as follows: "We hereby certify that this shipment is a transfer of stock and no actual sale is involved and that the foregoing statement of facts is correct and price(s) used in this claim does/do not exceed the value at the place and time of shipment in the quantity shipped and does/do not include profit not earned or GST, warehousing, distribution, transportation or other expenses not actually incurred."

- f) CP will not be liable for the rejection of Commodities due to off-temperature or variances. CP does not provide or release confidential reefer mechanical operation download reports.
- g) CP will not be liable for Commodities due to expiration of shelf life or delay while in transit.
- h) When transporting Commodities in carload form to or from a siding, station, wharf or landing, the Commodities will only be at the risk of the Carrier from the time the car is picked up until the car is placed at destination.
- i) CP will not be liable for loss of, damage to, or delay in transportation of Commodities of extraordinary value where the Customer, before shipping, does not disclose in writing the value of the Commodities to CP.
- j) CP will not be liable for concealed loss or damage to any container or the contents thereof.
- k) CP will not be liable for loss of, damage to, or delay in the transportation of Commodities arising from consignee's failure to unload the Commodities in a timely manner.
- l) CP will not be liable for loss due to natural shrinkage and/or difference between origin and destination weight except where loss results from defective equipment and such defect is directly attributable to CP (i.e. derailment).
- m) CP will not be liable for damaged packaging of Commodities unless it is the direct result of derailment occurrence.
- n) CP will not be liable for damaged Commodities due to overhead stacking compression onto lower layers.
- o) CP will not be liable for water damage in equipment not solely owned and operated by CP except where the water damage is the direct result of damage that CP caused to the equipment.
- p) CP will not be liable for loss when bottom outlet gates on hopper railcars do not have the outlet gate retainer locks in the locked position and wired in the locked position. A security seal may act as the wire.
- q) There shall be no presumption of CP fault for the loss of, damage to, or delay in the transportation of Commodities. The burden of proof to establish the culpability of CP is upon the claimant. CP is not liable for any loss of, damage to or delay in transportation of Commodities, except where CP's intentional act or omission, gross negligence or simple negligence is the direct and proximate cause of the injury.
- r) The Customer is responsible for proper and lawful packaging, loading, stacking, blocking, bracing and ventilation of the Commodities. Shifting of a load en route is, of itself, not evidence of CP mishandling. If a car without mechanical protection against heat and cold is requested by the Customer, CP is not responsible for the deterioration of the product which may occur because of temperature within the car.
- s) Full Liability Transportation – As an alternative to the preceding Restricted Liability provisions, CP offers Full Liability transportation subject to the terms and conditions of 49 U.S.C. Section 11706 (Carmack Amendment) and at a rate or charge higher than that applicable to transportation under restricted liability terms. If the Customer elects to use the Carmack Amendment or alternative, it must comply with all of the following:
 - i. The Customer must notify the appropriate CP sales representative and damage prevention and claims services (contact_dpfc@cpr.ca) no less than 72 hours before the shipment is released for

the shipment to be subject to 49 U.S.C. Section 11706.

- ii. The Customer must obtain a special CP price authority from the appropriate sales representative that is not less than 250% of the otherwise applicable price authority. The price authority must reference 49 U.S.C. Section 11706.
- iii. The shipping instructions must note that the shipment is moving under 49 U.S.C. Section 11706 liability terms and is subject to the special price authority.
- iv. The shipment must be prepaid. Collect shipments are not accepted.
- v. Carmack Liability coverage is not available for shipments that originate in Mexico.

The Customer's failure to comply strictly with all of the above requirements for transportation subject to 49 U.S.C. Section 11706 shall create a conclusive presumption that the shipment is intended for transport on the Restricted Liability terms of CP's Tariff 1.

Claims for damaged private equipment as defined in Tariff 6 [Private Equipment] will be adjudicated or governed under the same principles and practices of the current copy of the AAR Interchange Rules for repairs to and settlement of rail equipment.

In no event shall CP be liable for any legal fees or special, consequential, reliance, indirect, incidental or punitive damages, loss of revenue or profits, loss of market, vessel or third party demurrage which are based upon, arise out of or are connected with the transportation of Commodities or anything done or maintained hereunder or anything not done or maintained as required hereunder or for any amount in excess of the actual damage to the Commodities transported under this Contract whether arising in negligence, tort, statute, equity, contract, common law, or any other cause of action or legal theory, even if such damages were foreseeable.

12. Seal Requirements

Seal requirements for shipments that move on CP apply as published here: www.cpr.ca/en/customer-resources-site/Documents/seal-sop.pdf. CP does not monitor shipments for seal compliance (i.e. seal existence, seal type, seal identification number, electronic reconciliation of seal identification numbers) on behalf of the shippers, receivers or the Billable Party for the shipment, and CP is not obliged to report the condition of seals during transportation to any party (including but not limited to Shippers, Consignees or the Billable Party for the shipment). CP will not be liable for loss when adherence to ISO/PAS 17712 seal standards are not proven with:

- a) digital photos of seal serial number at time of loading;
- b) affidavit inclusive of seal serial number at time of loading; or
- c) a CP-approved seal management program compliant with CP seal requirements as published here: www.cpr.ca/en/customer-resources-site/Documents/seal-sop.pdf.

13. Claims

For more information on how to report overages, shortages and/or damages, options for salvage handling and how to file a formal freight claim, please refer to the following link: <http://www.cpr.ca/en/customer-resources/damage-prevention-and-claims>.

In case of incident, CP reserves the right to dispose of commodities as it sees fit.

To report an exception: contact_dpfc@cpr.ca

The Carrier shall only be liable for loss or damage resulting from the Carrier's own negligence during the service of rail transportation. Any

damages discovered at final destination shall be reported to the Carrier for verification before claim is honoured. The Customer and/or consignee releases and agrees to indemnify and hold harmless the Carrier from any and all claims for loss, damage, or delay in the event of failure of the Customer and/or consignee to give such notice and provide such opportunity for inspection. No claim for special or consequential damage will be honoured without prior agreement. The Contract of Carriage a shipment moves under contains certain provisions that stipulate the time frames during which a claimant may file a claim. Under a Canadian Bill of Lading, notification of loss/damage must be received by the delivering carrier within four (4) months after delivery. A formal claim must be submitted within the statute of limitations. On shipments moving under a United States Bill of Lading, notification of loss/damage must be received within nine (9) months from date of delivery. The below documents are required to support the Customer's claim:

- a) Bill of Lading and paid freight invoice
- b) Invoice showing ownership and costs
- c) Detailed breakdown of all items damaged/lost and the amount claimed for each
- d) A copy of a survey report (if applicable) and/or an Exception Report or its number
- e) In the case of bulk shipment(s), a copy of the scale documentation both at origin and destination to substantiate the amount of product lost or damaged
- f) A copy of the delivery receipt or proof of delivery (POD)
- g) If a shortage claim, verification of quantity shipped and quantity received, as well as seal record at time of unloading and on receipt from CP
- h) If repairs are required, invoices for parts and labour
- i) If shipment is a transfer of stock, a stock transfer certification
- j) For claims on shipments under perishable protective service related to "off-temperature", a temperature history log for the unit in question

Amounts claimed for loss, damage or delay may not be deducted from any freight bills issued by the Carrier.

To submit a formal Freight Claim: freight_claims@cpr.ca

For product overages, disposition will be handled by CP's Warehouse Agent. Contact CP Account Manager for details.

14. Claims for Damage to Containers

CP liability for any alleged loss or damage to the container or trailer shall be as outlined in the AAR Intermodal Interchange Rules, except as otherwise provided below where CP shall:

- a) not be liable for damage in excess of the lesser of:
 - i. the calculated depreciated value;
 - ii. the cost to repair; or
 - iii. \$20,000/unit of equipment ("Liability Limit");
- b) not be claimed against for damage per container or trailer for amounts of \$1,000.00 or less;
- c) not be liable for damage that does not impair the structural integrity of the trailer or container, nor internal damage to the trailer or container, unless damage is proven to be the result of Carrier mishandling;
- d) not be liable for damage to trailer or container appurtenance or external mountings or fuel tanks which are not compatible or come into contact with the railcar;
- e) not be liable for prior damage to trailer or container, damage as a result of vandalism (e.g. graffiti), or damage to the door or securement mechanisms;
- f) not be liable for any special, consequential, reliance, indirect, incidental or punitive damages or loss resulting from the loss of use of the trailer or container;
- g) not be liable for damage as the result of an Event of Force Majeure.

A claim for equipment damage must be submitted within two (2) months of the incident occurring. The nature of repair must reflect the standards as outlined AAR Intermodal Interchange Rules.

CP shall calculate the Depreciated Value of units based on the following information and method:

- Manufactured Date (month and year)
- Damaged Date (month and year)
- Price is the Original Purchase Price or Reproduction Price with invoice support
- Monthly Depreciation Factor:
 - 180 (months) for "steel welded"
 - 120 (months) for "post and panel" design

Price ÷ Monthly Depreciation Factor = Monthly Depreciation

Monthly Depreciation x Months in Service = Depreciation

Price - Depreciation = Depreciated Value

15. Emergency Routing

In the event the Carrier(s) transport the Commodity(ies) over a route other than that specified in the Contract of Carriage because of traffic congestion, washout, wreck or other similar emergency, or the Carrier(s) error, the rates to be charged shall be the lesser of the rates in the Confidential Rate Quote or the most recent applicable rates for the route published by CP.

16. Force Majeure

The Customer, Consignee, and CP shall be excused from its or their obligations, with the exclusion of obligations related to ensuring safety and any obligation to pay invoices in accordance herewith, under the Contract of Carriage or CP Tariffs, provided that the Customer or CP is prevented or delayed in such performance by any event which is unavoidable or beyond its reasonable control (an "Event of Force Majeure"). These may include, without limitation:

- act of God;
- act of the Queen's or public enemies;
- flood or washout;
- rockslide, landslide, snow-slide or avalanche;
- storm or earthquake;
- expropriation;
- fire or explosion;
- strike, lockout, walkout or other industrial dispute;
- labour shortage
- war, sabotage, riot or insurrection;
- derailment;
- power or fuel shortage; or
- the act or failure to act of any government or regulatory body.

Lack of funds shall not be considered an Event of Force Majeure.

Under an Event of Force Majeure, all time periods provided for in the applicable contracts or tariffs shall be extended for a period equal to the period during which the Event of Force Majeure is continuing. So far as reasonably possible, the party affected will take all reasonable steps to remedy the Event of Force Majeure; provided, however, that nothing contained in this paragraph shall require any party to settle any industrial dispute or to test the constitutionality of any provincial, federal, state or local law or regulation. Upon the occurrence of an Event of Force Majeure, the party affected shall give prompt written notice to the other party describing the event in question in reasonable detail, and such party shall also furnish prompt notice when the Event of Force Majeure has ended. Failure to provide notice shall not preclude a party from relying on the existence of an Event of Force Majeure.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36298

**NAVAL NUCLEAR PROPULSION PROGRAM, UNITED STATES MILITARY
SURFACE DEPLOYMENT AND DISTRIBUTION COMMAND, AND FLUOR MARINE
PROPULSION, LLC – PETITION FOR DECLARATORY ORDER**

VERIFIED STATEMENT OF KRISTINE WILLIAMS

My name is Kristine Williams. I am employed by Canadian Pacific Railway Company ("CPRC") as Director Real Estate. My office is in Calgary, Alberta. From 2011 to 2017, I was employed as Manager Real Estate – US by Soo Line Railroad Company, a CPRC subsidiary. I moved to Canada to take the position of CPRC's Manager Real Estate West in 2017 and received promotion to Director in 2018. I hold a Bachelor of Science degree in Real Estate Finance and a Master of Business Administration with a concentration in Real Estate, both from the University of St. Thomas. I am familiar with the available property records for the rail line in Ballston Spa, New York that is the subject of this proceeding, and have reviewed the 1980 abandonment proceeding filings in Docket No. AB-156 (Sub-No. 8F) and the Verified Statement of Bernhard E. Gundermann filed by the Government Parties on April 30, 2019.

Delaware and Hudson Railway Company, Inc. ("D&H"), an indirect owned subsidiary of CPRC doing business as Canadian Pacific ("CP"), owns the Ballston Spa rail line. In 1990, the Interstate Commerce Commission ("ICC") approved in Finance Docket No. 31700 the

acquisition of substantially all of the assets, properties and business of the bankrupt Delaware & Hudson Railway Company by Canadian Pacific Limited, CPRC's parent.¹

In May 1980, D&H sought approval to abandon the approximately 1.03 mile rail line known as the Ballston Spa Industrial Track ("BSIT"), which was the remaining remnant of D&H's main line between Albany and Rouses Point, NY that had been relocated in the 1960s. The BSIT was seldom used and was too expensive to maintain for the minimal traffic volume. D&H understood the DOE's need for continued service and filed for abandonment with the express intention of negotiating an arrangement that would mitigate its operating losses on the BSIT. In August 1980, in response to opposition by the U.S. Department of Energy ("DOE") and other parties, D&H amended its application to abandon only the segment of the BSIT between milepost A 31.32 and milepost A 31.79.

Concurrently with its amended abandonment application, D&H filed a copy of the August 7, 1980 Rail Service Agreement with the DOE, which set forth the terms for D&H's continued rail freight service to the DOE to the team tracks at the loading/unloading facility. The Rail Service Agreement includes as Appendix "A" a drawing illustrating the portion of the BSIT to be abandoned, the segment that would remain as regulated track (labeled Truncated Ballston Industrial Spur), and the siding that would be used to serve the DOE (labeled Siding Serving Dep't of Energy to be Retained). On September 30, 1980, the ICC approved D&H's abandonment of the line from milepost A 31.32 to milepost A 31.79 and its retention of the line to milepost A 31.32 as regulated track.

¹ For a variety of unknown factors, CPRC received incomplete records regarding the Ballston Spa rail line in the 1991 transaction. Accordingly, until the Government brought it to D&H's attention, D&H was unaware that any part of the Ballston Spa trackage was regulated.

For reasons that I explain later, D&H's description of the track to be abandoned in its 1980 filings has created confusion on the part of the Government Parties concerning where the end of the regulated track is physically located. Mr. Gundermann devotes a considerable portion (§§ 15-28) of his statement describing the basis for their confusion. A careful examination of the valuation maps attached as Exhibits 7 and 10 to his statement, however, reveals that the primary cause for the confusion is the misplaced focus on the beginning rather than the end of the track that D&H withdrew from its abandonment application. This and a series of incorrect assumptions, in turn, result in the Government Parties arriving at the incorrect conclusion that the regulated track extends to the end of the loading/unloading tracks by the side of the freight house.

In 1980, the ICC approved D&H's abandonment of the rail line from milepost A 31.32 west to milepost A 31.79. Accordingly, after abandonment, milepost A 31.32 is the end of the regulated common carrier track. It is relatively simple to determine where milepost A 31.32 is physically located using the valuation maps, which is an accepted methods railroads use to determine milepost locations. Valuation map V-11(15), attached as Gundermann Exhibit 10, indicates that milepost A 31² is associated with valuation station ("V.S") 1633+83.5. Map V-11(15) also indicates that western edge of Eastern Avenue is V.S. 1650+99. The distance from V.S. 1633+83.5 at milepost A 31 to V.S. 1650+99 at Eastern Avenue is 1,715.5 feet or approximately 0.32 miles. Milepost A 31.32 is therefore located at or near the western edge of Eastern Avenue and, not coincidentally, at the approximate location of the switch for the siding that leads to the freight house shown on Appendix "A".

² The mileposts depicted on valuation maps for this section of the D&H indicate the distances from both Albany, NY (denoted by the letter "A") and from Rouses Point, NY (denoted "R.P."). Thus, on map V-11(15), the location marked by milepost A.31/R.P.160 is 31 miles from Albany and 160 miles from Rouses Point.

The location of milepost A 31.32 can also easily be determined using the scale on Appendix "A". Measuring .32 miles from milepost A 31 (or .56 miles from milepost 30.76) north similarly places milepost A 31.32 at the approximate location of the switch for the siding to the freight house.

When D&H relocated its mainline, it conveyed portions of its former right-of-way property to Saratoga County and to private parties, including John Zepko, as depicted on valuation map V-11(14), attached as page 1 of Gundermann Exhibit 7. The former right-of-way shown as The Rensselaer & Saratoga Railroad Company is now the Zim Smith Mid-County Trail.³ The property conveyed to John Zepko, et al., included part of the right-of-way for the former rail line that continued to Ballston Spa and Milton. Although the property sold in the Zepko sale severed the former right-of-way, valuation map V-9A(26) indicates that not all of the right-of-way was sold. Likely in connection with the sale of the property, the rail line to Ballston Spa and the switch to the main line were relocated from approximately milepost A 30.76 to its current location. The old location of the line and switch to the main line is reflected in the Google Earth photograph attached to this statement as Exhibit A.

As Mr. Gundermann notes in ¶ 21 of his statement, D&H incorrectly associated milepost A 30.76 with V.S. 1626+83 its initial abandonment application. Although both valuation maps V-11(14) and V-9A(26) indicate the current point of the switch for the line leading into Ballston Spa is at V.S. 1626+83 (which Mr. Gundermann calculates to correspond to milepost A 30.84), both maps also reference V.S. 1622+59 as the point of the switch for what is now the passing

³ This right-of-way is also depicted on valuation map V-9A(26), attached as page 2 of Gundermann Exhibit 7.

siding.⁴ That location is also where the former right-of-way began its westward curve into Ballston Spa.

It is not known why D&H initially incorrectly associated milepost A 30.76 where (according to the 1993 track chart attached as Gundermann Exhibit 9) the passing siding switch is located with V.S. 1626+83 where the BSIT switch is located.⁵ It may have been due to a desire to cleanup what was thought to be remaining regulated right-of-way after the Zepko sale beginning at milepost A 30.76 or simply an error in identifying the milepost for the switch for the Ballston Spa Industrial Track. In any event, the parties provided clarity when they entered into the Rail Service Agreement in August 1980. The drawing attached as Appendix "A" to the agreement clearly depicts both switches and correctly identifies the locations of the mileposts and valuation stations.

What Appendix "A" also clearly illustrates is the parties' intention that D&H would retain the BSIT as regulated rail line up to the point it connected to the siding leading to the freight house where the DOE would receive service. In 1980, the siding and other team tracks were, as they are now, unregulated spur tracks outside the scope of agency abandonment authority. As Appendix "A" notes, the parties agreed that the siding would be retained for the purpose of providing service to the DOE. It also incontrovertibly notes that the BSIT west of the switch to the siding would be abandoned. Nowhere does Appendix "A" provide support for the Government Parties' incorrect assertion that milepost A 31.32, where all parties agreed the regulated track ended, was located at the end of the freight house siding. Moreover, in my

⁴ The distance between V.S. 1582+33 at milepost A 30 and valuation station 1622+59 is 4,026 feet or 0.76 miles. Valuation station 1622+59 thus corresponds to milepost A 30.76.

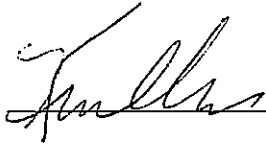
⁵ Other mileposts referenced in the 1980 application are also incorrectly associated with valuation stations – e.g., valuation map V-11(15) indicates that the end of the track is located at V.S. 1681+20, which is 665 feet (or 0.1259 miles) from V.S. 1687+85 at milepost A 32, and therefore, correctly corresponds to milepost A 31.87, not milepost A 31.79 as is repeatedly stated throughout the 1980 abandonment filings.

experience, it is not customary for railroads to designate mileposts on unregulated tracks such as spur, industrial, team, switching, or side tracks.

As DOE had previously received service on the unregulated siding and would continue to receive service there after D&H's abandonment of the BSIT west of the switch at milepost A 31.32, there would have been no reason for D&H and DOE to believe it necessary to convert the siding to regulated track as a necessary condition of the Rail Service Agreement, assuming that such a conversion by agreement was even possible. There is similarly no reason now to misread the record in an effort to convert what has always been an unregulated siding to a regulated line of railroad. As it agreed in 1980, D&H will continue to provide service to the DOE (just as it did in 2004) over the regulated Ballston Spa Industrial Track to milepost A 31.32 and then over the unregulated siding to the loading/unloading area next to the former freight house.

VERIFICATION

I, Kristine Williams, declare under penalty of perjury that I am authorized to make this verification on behalf of Delaware and Hudson Railway Company, Inc., and that the information included in the foregoing statement is true and correct to the best of my knowledge and belief.



Kristine Williams
Director Real Estate
Canadian Pacific Railway Company

Dated: May 15, 2019

EXHIBIT A

