

In the Matter of an Investigation pursuant to subsection 116 (1.11)
of the *Canada Transportation Act*, S.C. 1996, c. 10, as amended,

As Directed by Letter Decision LET-R-29-2019

Canadian Pacific Railway Company
RESPONSE SUBMITTED MARCH 26, 2019

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Introduction

Canadian Pacific Railway Company (CP) respectfully submits that, throughout the period of October, 2018 to January 2019, CP has fulfilled its service obligations in the Vancouver area. It has provided the highest level of service in respect of its obligations under sections 113 to 115 of the Canada Transportation Act, S.C., 1996, c. 10, as amended, (CTA) that it could reasonably provide in the circumstances, having regards to the considerations in subsection 116(2) of the CTA.

The information and data collected by the Canadian Transportation Agency (Agency) and reported in the Agency's initial Inquiry Report dated January 24, 2019 and the Second Inquiry Report dated March 6, 2019 do not support any claim of a service failure on the part of CP. Rather, the Second Inquiry Report specifically points to the evidence submitted by Alliance Grain Terminals which reported 100% delivery fulfillment, and for another South Shore terminal, where the average transit times declined by 25%. As such, there is nothing to warrant any further investigation of CP.

Nonetheless, as directed by the Agency, CP submits that:

1. the placement of embargoes on certain traffic, specifically embargoes CPRS002318, CPRS002418 and CPRS002518, was exceptional, rather than routine in nature, and was proportionate, targeted and non-discriminatory; and
2. CP has reasonably initiated, either on its own or with the support of others, improvements to railway infrastructure in the Vancouver area, and elsewhere that would assist the flow of traffic to and from the Vancouver area, to reduce potential congestion issues.

In summary, CP's use of embargo was necessary and reasonable under the circumstances and CP's improvements to its railway infrastructure was suitable and adequate to discharge its level of service obligations.

Procedural Considerations – Lack of Evidence to Warrant continued Investigation of CP

This response (Response) is being submitted as directed by the Agency in its Letter Decision LET-R-29-2019, which confirms that the record before the Agency comprises documents and data submitted by participants, the transcript of the oral hearing, and the 2 reports from the Inquiry Officers. The record remains devoid of any evidence, or even allegation, of service failure by CP. As stated by CP at the outset, starting with CP's submission dated January 17, 2019, given the lack of any evidence of actual or possible service failure by CP, the investigation against CP was, and still remains, without foundation.

Letter Decision LET-R-29-2019 does not contain any specific finding or allegation of actual or possible service failure against CP. At paragraph 6 of the Letter Decision LET-R-29-2019, the Agency sets out the key points that emerged from the record, specifically that "shortfalls or

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delays in the transportation of traffic primarily affected terminals on the North Shore of Vancouver.” It further cites the experiences of Cargill Ltd., Richardson International Limited, and Chemtrade Logistics Inc. as having only respectively received 83%, 80%, and 75% of their planned scheduled deliveries or empty car orders. The North Shore and these customers located on the North Shore are not served by CP.

Further, paragraphs 7 and 8 specifically identify that the shortfalls and delays were related in part to congestion and increase car dwelling at CN’s Thornton Yard, again, not served by CP. In fact, not only did CP not cause or contribute to the congestion and increase car dwelling at CN’s Thornton Yard, CP assisted CN to reduce congestion by blocking traffic on behalf of CN to reducing switching demands.

The Agency’s discussion regarding the use of embargoes in paragraph 9 also lacks any evidence of improper use of embargoes by CP, or any support for a finding that CP caused or contributed to any shortfalls or delays in the movement of traffic to the terminals in issue. As described below, because of CP’s proactive management of the network through the appropriate and responsible use of embargoes in the circumstances which were created outside of CP’s control, service to CP’s customers and terminals on the South Shore of Vancouver met or exceeded service level expectations.

Lastly, the Agency now directs CP (and CN) to address infrastructure investments that would help reduce congestion issues. It should be noted that the request of information issued at the commencement of the investigation did not require any information regarding infrastructure investments. This issue was first raised in passing in the initial Inquiry Report, which cites, without support, merely a suggestion by some shipper associations that infrastructure bottlenecks in the Vancouver area have contributed to what they see as possible challenges to the efficiency of the transportation supply chain. Since then, there has been no additional information tendered to suggest that infrastructure investment is at issue. Certainly, there was no discussion of same in either the Second Inquiry Report or Letter Decision LET-R-29-2019. CP submits that this issue is not properly before the Agency, as it was not within the scope of the investigation and has not been the subject of specific allegations or evidence. Moreover, by posing the question to CP now in the manner that it has, the Agency has effectively reversed the onus onto CP. This is patently unfair.

Level of Service – A Reasonable Balance of Commercial Interest of Shipper and Carrier

In assessing whether CP has met its level of service obligations under ss. 113-115 and 116(1.2), the Agency must apply the governing principle that level of service obligations must be commercially fair and reasonable as between the effected parties taking into account the circumstances. The Supreme Court of Canada has stated that, in applying this principle, a railway company is not bound to furnish cars at all times sufficient to meet all demands of its customers, and that economic ramifications for the railway company are always an essential consideration when determining the extent of its level of service obligations.

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The leading decision on the determination of the adequacy of service provided by a railway company is the Supreme Court of Canada's decision in *Patchett & Sons Ltd. v Pacific Great Eastern Railway Co.*, (1959) S.C.R. 271. Following that decision, the Agency and our courts have repeatedly reaffirmed that reasonableness permeates any assessment of level of service obligations and that level of service obligations are to be commercially fair and reasonable to both the railway company and its customers in all the particular circumstances.¹

This same principle is reflected in section 112 of the CTA which states that any condition of service established by the Agency under Division IV of Part III of the *Canada Transportation Act* must be commercially fair and reasonable to all parties:

112. A rate or condition of service established by the Agency under this Division must be commercially fair and reasonable to all parties.

In *Patchett*, Justice Rand stated that the governing principle of commercial reasonableness entailed that the economics of the railway company were always to be an essential consideration when determining level of service, and that a railway company was not bound to furnish cars at all times sufficient to meet all demands of its shippers but rather only to provide "a reasonable service" (*Patchett* pp. 274-5):

Apart from statute, undertaking a public carrier service as an economic enterprise by a private agency is done on the assumption that, with no fault on the agency's part, normal means will be available to the performance of its duty. That duty is permeated with reasonableness in all aspects of what is undertaken except the special responsibility, of historical origin, as an insurer of goods; and it is that duty which furnishes the background for the general language of the statute. The qualification of reasonableness is exhibited in one aspect of the matter of the present complaint, the furnishing of facilities: a railway, for example, is not bound to furnish cars at all times sufficient to meet all demands; its financial necessities are of the first order of concern and play an essential part in its operation, bound up, as they are, with its obligation to give transportation for reasonable charges. Individuals have placed their capital at risk of the operations; they cannot be compelled to bankrupt themselves by doing more than what they have embraced within their public profession, a reasonable service. Saving any express or special statutory obligation, that characteristic extends to the carrier's entire activity. Under that scope of duty a carrier subject to the Act is placed. (emphasis added)

Based on *Patchett*, embargoes cannot be said to be in and of themselves a breach of the level of service obligation. There is no absolute obligation to furnish cars at all times sufficient to meet all demands.

¹ See for example *Canadian National Railway Company v. Dreyfus*, 2016 FCA 232 at para. 20 (Dreyfus); *Canadian National Railway Company v. Canadian Transportation Agency*, 2013 FCA 270 at para. 21; *Emerson Milling* at para 71; *Canadian National Railway Company v. Northgate Terminals Ltd.*, 2010 FCA 147 at paras. 35-36 (Northgate); *Canadian Pacific Railway Company v. Univar Canada Ltd.*, 2019 FCA 24, at paras. 24-26.

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There is simply no evidentiary basis to suggest that CP's 3 issued embargoes in December 2018 reflect any breach of its level of service obligations. In the circumstances, these embargoes were an appropriate traffic control mechanism -- to avoid temporary operational impairment and protect network fluidity -- in response to congestion problems at the north shore interchange. As explained below, they were exceptional, proportionate, targeted and non-discriminatory.

Various parties gave evidence (or made conjectures) about the cause of this north shore congestion. These included: materially increased demand compared year over year; weather; slides; irregular vessel arrivals due to winter conditions; terminal closures; terminal capacity; car shortages; massive increase in container demand, and certain shippers' failure to obtain advance terminal authorization.

No party provided any evidence, however, that the congestion and resultant embargoes were caused by CP's failure to provide reasonable service in all the circumstances. The only evidence is to the contrary: as indicated in CP's February 8, 2018 Reply and Answer to Undertakings, CP's Dwell performance in Vancouver for Q4 2018 was 6% better than its 4 year weekly average, at the same time that CP was moving record volumes through the Port.

In addition, there is no evidentiary basis by which the Agency could assess whether a particular remedy to be ordered against CP was commercially fair and reasonable to CP in all the circumstances. To make that assessment, the Agency would need specific evidence regarding the cost of the particular remedy to CP, as well as detailed and precise evidence regarding the anticipated benefit of the remedy to shippers in the context of the complex, integrated, multi-party supply chain system in the Vancouver area.

Without that evidence, the Agency cannot determine whether a particular remedy is commercially fair and reasonable to CP in all the circumstances, which would make the remedy unlawful. It would contravene both s. 112 and the reasonableness principle which governs the determination of the extent of a railway's level of service obligations.

Embargoes – Exceptional, Proportionate, Targeted, and Non-Discriminatory

Industry Practice Permits the Use of Embargo as a Method of Controlling Traffic

As stated in CP's presentation, CP uses embargoes and permits as a tool of last resort to control traffic movements when there is actual or threatened operational impairment that is temporary in nature. Within the last several years, CP has only implemented three embargoes in the Vancouver area. These were all in December of 2018.

The Association of American Railroads (AAR) Embargo/OPSL Notes and Permit System (Embargo System), is a long-standing, well-developed, and generally accepted tool to manage traffic. As described by Railinc in its overview, attached as Appendix A.

By automating a time-consuming manual approval process, the Embargo and Permit System allows railroads to implement embargoes more quickly and cost-effectively. This

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allows railroads to stop shipments before they move to locations where they can't be handled properly, reducing transportation costs associated with extra car handling and unnecessary car movement.

An added benefit of the Embargo System is that it provides for fast and effective notification to shippers and other stakeholders in the supply chain of operational or physical impairment of railway networks so that they can make the appropriate decisions to reroute or direct their traffic elsewhere as is best to suit their needs.

Using embargoes to control traffic movements when there is “congestion/accumulation” that impairs, or threatens to impair, operations is a permitted and contemplated cause. The Embargo System is configured to specifically identify “congestion/accumulation” as a legitimate cause for the issuance of an embargo. It is a condition included in the drop-down menu of recognized causes when entering data into the Embargo System, as can be seen at page 12 of the AAR Embargo/OPSL Notes and Permit System User Guide, attached as Appendix B.

CP’s Imposition of Embargo due to Congestion are trending down in a time of increases by other roads

In terms of total embargoes imposed over the last five years system wide, CP is trending down, this is contrary to unsupported comments made in the hearing that CP is issuing embargoes “more often than normal”. That may be the case for other railways but is not so for CP. As summarized in the table below, the use of embargoes by CP has decreased significantly, the outlier being in 2018 when most of CP’s embargoes are due to work stoppage/strike action(s).

CP Embargoes Network Wide Canada & US:

Year	Total Embargoes	Work Stoppage/Strike Action	Embargoes related to congestion	Percentage
2018	27*	19*	5	18.5%
2017	4	0	1	25%
2016	5	1**	2	40%
2015	42	18	21	50%
2014	31	0	27	87.09%

*These figure includes embargoes issued due to 2 work stoppages at CP resulting from strike action taken by the same collective bargaining unit, and thus in an inflated number.

**Customer Work stoppage

All Railway Embargoes Canada & US:

Year	Total Number of Embargoes Created	Total Number of Congestion Embargoes Created	Percentage
2018	2303	1600	69.47%
2017	1173	481	41%
2016	812	291	35.79%

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2015	945	479	50.68%
2014	1020	456	44.70%

Source: Railinc Data

CP has not received any formal service complaints resulting from any of the embargoes issued by CP that are the subject to this investigation. As discussed in the hearing, CP takes these measures very seriously and are only used as tool of last resort which the tables above support.

Columbia Containers Embargo CPRS002518

CP's Imposition of Embargo CPRS002518 is a prime example of an effective and measured effort to control traffic for the benefit of the entire supply chain. It bears repeating once again that CP's issuance of Embargo CPRS002518 was to proactively manage the build-up of traffic after having specifically identified and isolated the affected traffic to those destined to Columbia Containers Ltd. (Columbia).

Again, CP considered the following factors in determining whether it was necessary and thus, reasonable, to issue an embargo with permits on Columbia:

- **Receiver spot capacity** - Columbia car spot capacity is 35 cars but they take an average of 25 cars per spot due to product mix and unload capabilities.
- **Inventory on-hand** - It would be reasonable to have 2-2.5 days of traffic on hand in the Vancouver terminal area. Once this level is exceeded, if CP allows a single facility to back up to 3x-5x its normal inventory, the backlogged cars in queue are consuming other customers' capacity/track space.
- **Communication** - CP worked closely with Columbia, who was being impacted by large blocks of CN traffic. As evidenced in the chart below, those efforts failed to reduce the inbound pipeline. In addition, the receiver communicated with us that they needed our help to control this pipeline.

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Columbia Containers

Weekly Average # of CP / CN cars in Vancouver Week & Total Cars Spotted
2017-18 vs 2018-19



The chart above described the months leading up to our Embargo Notice on Dec 21st:

- The straight lines charted below describe the average daily cars requested and spotted by Columbia year over year for this time frame – of note service was much more consistent in 2018/19 vs 2017/18 in spite of increased volume.
- The stacked bars charted represent CP and CN average daily cars on hand for the week during this time period. This is overlaid with the dotted lines that chart average daily cars on hand in the yard for each month year over year. Note the significant uptick in CN originated volume.
- The bright Yellow line indicates the day Embargo Notice was provided, December 21st, effective December 23rd.

The data clearly shows that the number of railcars accumulated in the serving yard dramatically increased from 2017-2018 as compared to 2018-2019 over the period between October and January, and well above the average number of railcars requested, and at certain times, above 5x Columbia's unload capacity.

Additionally, as indicated by CP, CP was in constant communication with Columbia throughout this period to ensure alignment in so far as practicable. In fact, Columbia itself recognized the stress caused by uncontrolled amount of inbound traffic destined to their terminal. More importantly, notwithstanding the embargo placed on Columbia, and arguably because of the

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strategic and measured control of traffic, railcars delivered by CP to Columbia met and in most cases, exceeded the requested railcars.

Attached as Appendix C are the monthly daily unloads statistics reported by Columbia, which are summarized in the table below.

Month	Total Number of Railcars Requested	Total Number of Railcars Spotted
October, 2018		
November, 2018		
December, 2018		
As at January 17, 2019		

In commenting about CP’s level of service, Mr. Elvin Toews, Rail Planner for Columbia, wrote in an email dated January 18th, 2019, a copy of which is attached as Appendix D:

At the level I deal with CP Rail, I am very happy with the work you and your staff do on a daily basis. I find your staff pleasant to deal with, punctual, and willing to try to accommodate any of our service requests.

Granted, there was a couple days when our spot time was later than ideal, but I never doubted your staff’s desire to do right by us and give us the best possible service they could provide given the circumstances.

Overall, I only have positive things to say about the service your team provides on the Waterfront.

This is clear and convincing evidence of CP meeting its level of service obligations to Columbia in the particular circumstances, and providing adequate and suitable accommodation for the delivery of traffic for unloading.

Additionally, this high level of performance is consistent with service provided by CP to other terminals similarly situated. Both Alliance Grain Terminal Ltd. and Cascadia Port Management Corporation record achievements confirmed that, as a result of the level of service provided by CP, they have each enjoyed record achievements in 2018, including specifically over the period between October, 2018 and January, 2019. Attached as Appendix E are copies of their respective correspondence.

[North Shore Embargo CPRS002318 and CPRS002418](#)

For CP customers with traffic destined to CN Northshore, CP monitored the dwell time associated with Interchange to CN. CP started seeing a pattern of CN rejecting Interchange traffic at the end of November. CP and other roads use a process called Transfer of liability

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(TOL) when the interchange is not physically possible due to constraints on the other road. This process exists to transfer the car-hire liability.

As demonstrated in the chart below, the customers that CP embargoed under CPRS002318 and CPRS002418 were due to CP’s inability to interchange traffic over to the Northshore.

Description of chart:

TOL shipments – the total amount of shipments that CP tried to interchange to CN in December; a TOL was requested by CP as CN could not physically interchange the cars.

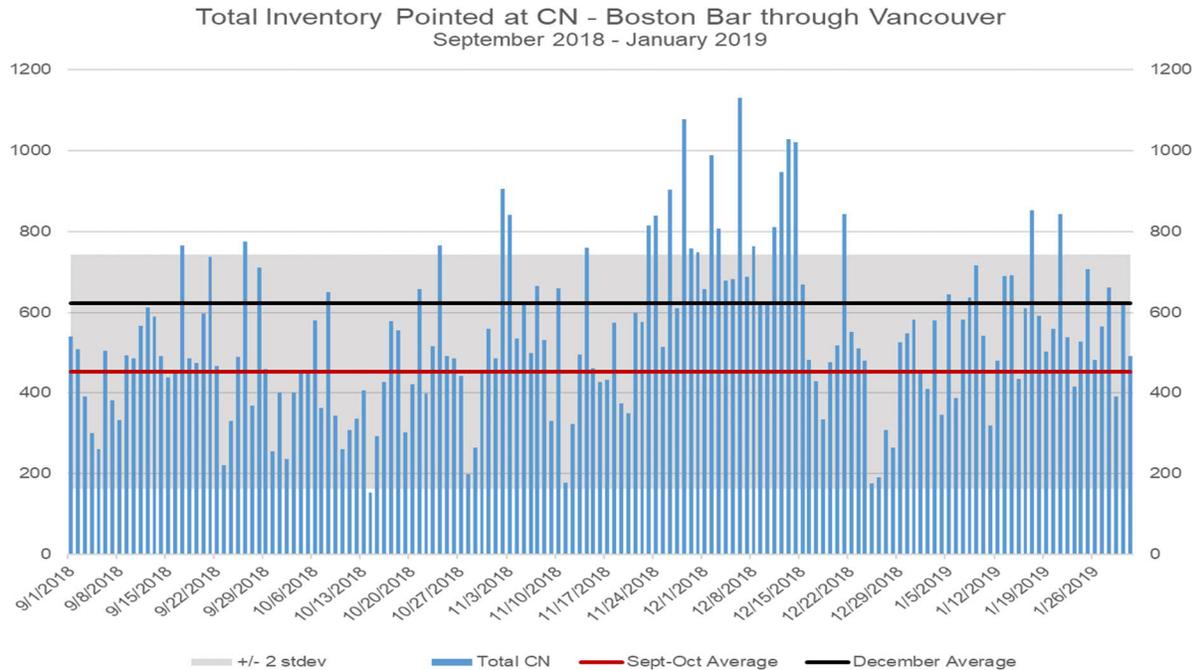
Min/Avg/Max TOL dwell – this is the amount of dwell across these shipments from the time the TOL was offered until the interchange was physically accepted.

	TOL Shipments	Min TOL Dwell	Avg TOL Dwell	Max TOL Dwell
FOREST PRODUCTS	548	0.23	2.77	15.71
COAST 2000 TERMINALS LTD				
EURO ASIA TRANSLOAD INC				
LYNN TERMINALS EASTGATE				
OLYMPIA TRANSPORTATION LTD				
GRAIN	831	0.23	5.54	20.71
FIBRECO EXPORT INC				
GLOBAL AGRICULTURE TRANS-LOADING INC				
KM CANADA MARINE TERMINAL LP				
RAY-MONT LOGISTICS VANCOUVER INC				
Total associated with embargoed customers	1,379	0.23	4.68	20.71
Total Loaded TOLS	1,616	0.23	4.18	20.71

Of the total cars that CN declined at the interchange, these customers represented approximately 85% of the volume (1,379/1,616) and accounted for approx. 5 days of dwell from when the cars were available for interchange to when the cars were physically interchanged.

Further, the chart below shows total inventory on CP (for interchange to CN). The inventory pointed at CN in the Vancouver area did increase significantly in late November through mid-December – with 14 of 22 days between November 23rd and December 14th exceeding the September average by more than 2 standard deviations, with overall average inventory pointed at CN 170 cars higher than in September / October. This indicates that 63% of the days the volume of inventory directed at CN was significantly above normal.

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CP had to ensure that the North Shore did not create a throughput bottleneck inside CP's yards. CN's inability to accept CP's cars directly affected CP's serving yard and reduced its capability to service all customers.

Permits

CP reiterates that 100% of permits requested by shippers under the various embargoes were issued by CP. That is, all 993 permits requested were accepted by CP, resulting in all shipments being delivered as requested. Thus, there was no shortfall or delays resulting from CP's embargoes.

CP once again clarifies that embargo CPRS002318 was the only embargo issued without permits. Recall that embargo CPRS002318 was necessary because of CN's embargo, which was replicated by CP. In this particular case, CN was applying permits, accepting all shipments and then not allowing CP to interchange the railcars (as noted in TOL data supplied above). As such, CP had to take additional action to not allow permits in order to manage the buildup of railcars on CP's network, which was affecting CP's ability to serve all customers. CP promptly cancelled the embargo 6 days later when the dwell associated with the CN interchange returned to acceptable levels.

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Pulp & Paper Cars Dwelling in Interchange in Vancouver	
	Total # Cars Dwelling in Yard
1-Dec-18	35
2-Dec-18	94
3-Dec-18	125
4-Dec-18	127
5-Dec-18	132
6-Dec-18	183
7-Dec-18	66
8-Dec-18	97
9-Dec-18	121
10-Dec-18	143
11-Dec-18	87
12-Dec-18	118
13-Dec-18	95
14-Dec-18	84
15-Dec-18	52
16-Dec-18	46
17-Dec-18	14
18-Dec-18	14
19-Dec-18	10
20-Dec-18	0
21-Dec-18	0
22-Dec-18	0
23-Dec-18	0
24-Dec-18	18
25-Dec-18	18
26-Dec-18	16
27-Dec-18	0
28-Dec-18	0
29-Dec-18	0
30-Dec-18	0
31-Dec-18	0
Embargo period	

In summary, the embargoes, with or without permits, were required to preserve network fluidity for all customers. There were no targeted or discriminatory actions taken against specific customers and CP continues to use embargoes, and where appropriate permits, as a tool of last resort.

CP's Capital Investments

As stated in the Procedural Considerations section of this Response, CP submits that the question put to CP in respect to improvements to railway infrastructure in the Vancouver area that would help reduce congestion is patently unfair. There is no evidence to suggest that CP has failed to meet its service obligations, and in particular no evidence to suggest that it has done so as a result of inadequate capital investment. On the contrary, the evidence clearly demonstrates that CP has met, and in most cases exceeded, service demands. CP should therefore not be required to provide evidence regarding its capital improvements.

Notwithstanding these objections, CP confirms that it has undertaken improvements to its railway infrastructure where it has the ability, either on its own, or in collaboration with other stakeholders, to do so, as can reasonably be expected in the circumstances.

Capital is deployed in all areas, starting with railway infrastructure, to railway equipment, technology, processes, and many other facets of CP's business. Additionally, CP works with other stakeholders in the supply chain, including shippers and terminals receivers, to increase capacity. This all best summarized in CP's Investor Day presentation delivered on October 4th, 2018, a copy of which is attached as Appendix F. Additional information regarding capital expenditure incurred in 2018 can be found in CP's 2018 Annual Report, which can be found on CP's website, under the Investor tab, with URL: <https://investor.cpr.ca/overview/default.aspx>.

CP's capital investment decisions are always focused on increasing CP's network capacity to improve service to its customers. CP's network is vast and the allocation of limited and valuable capital is decided with careful consideration of many different factors, many of which are not within the purview of the Agency. Railway infrastructure is capital intensive, are long-lasting assets, and thus should not be used to resolve isolated or temporary issues. After careful consideration and planning, CP had developed a capital plan for 2018 and 2019 which are described Appendix G. CP submits that CP's capital plan is a reasonable one.

Below, CP will more fully describe some of the railway infrastructure projects initiated of planned by CP. Additionally, CP also adopts all submissions that are already on Record on this topic.

Lower Mainland Infrastructure Projects

Lower Mainland expansion capability is limited due to real estate availability. Despite this challenge, CP continues to look for opportunities to invest in railway infrastructure improvements to help reduce congestion issues. In prior years, CP financially supported several grade separations to eliminate the majority of road rail interfaces. Minor track realignments in late 2016 between CN and CP impacting, Pacific terminals, Vanterm and West Coast Reductions created individual access leads to enable more than one assignment to service at the same time.



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[Redacted]

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[REDACTED]

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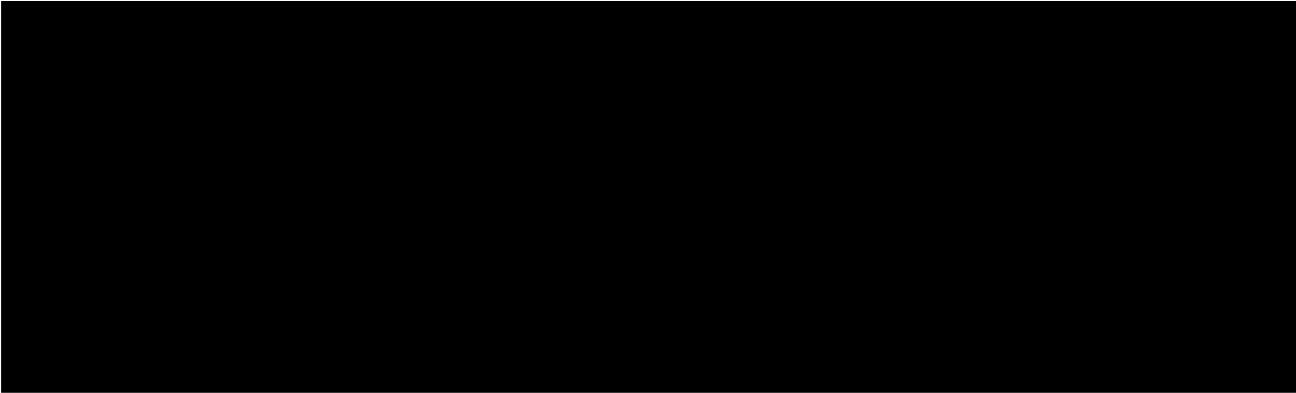
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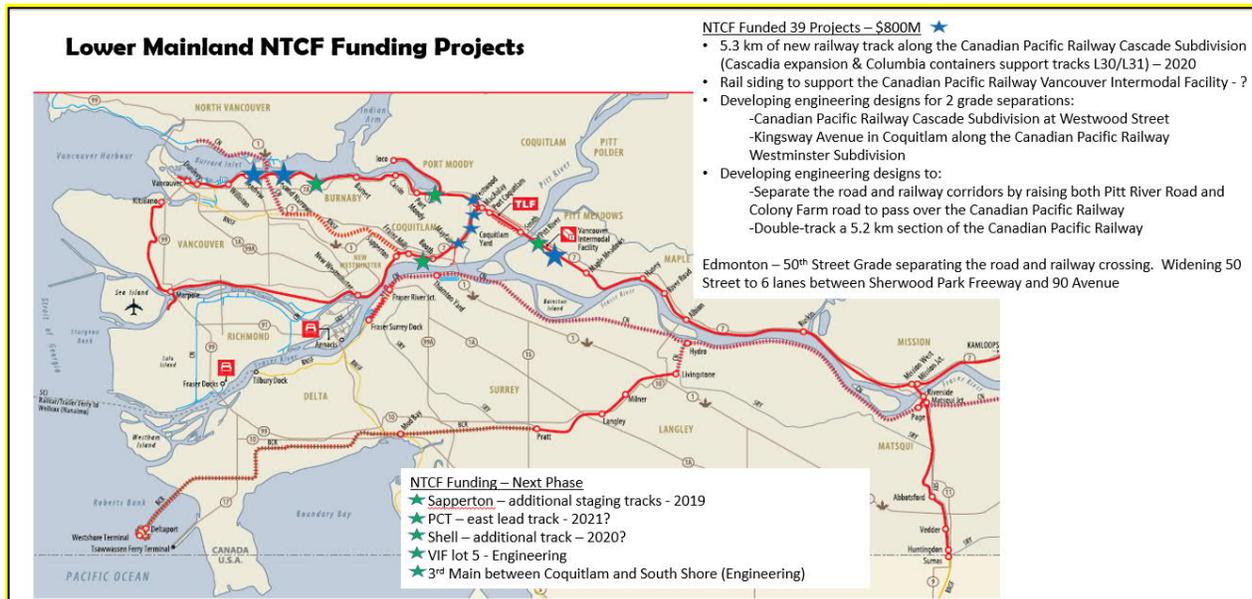
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National Trade Corridor Funding will be a significant enabler to further increase capacity in the Vancouver area and elsewhere where additional infrastructure is required to support the effective and efficient transportation system. As identified above, CP, and other stakeholders in the supply chain have been working together to identify opportunities, and will continue to do so in order to ensure that shippers continue to enjoy a cost-effective and efficient transportation system, one that will continue to yield the benefit of maintaining an average freight rate that is among the lowest in the world and recognized as one of the best.²



² Emerson Report: Pathways: Connecting Canada’s Transportation System to the World, p. 118

Concluding Remarks

Neither of the 2 Inquiry Officer's Reports disclose any evidentiary foundation to continue an investigation against CP for breach of its level of service. There has been no evidence adduced in this entire investigation, despite many invitations and opportunities for any affected party to come forward, and despite the Agency having proactively sought additional information from certain interested parties, to suggest that CP has caused or contributed to any alleged service failure in the Vancouver area.

To the contrary, there is clear and convincing evidence that CP has met its service level obligations, providing the highest level of service in respect of those obligations that CP can reasonably provide, in the circumstances. CP has provided adequate and suitable accommodation for traffic, including the interchange of traffic from connecting carriers. In answer to the specific questions posed to CP, the evidence shows that

- The imposition of embargoes by CP was exceptional, proportionate, targeted, and non-discriminatory; and
- CP is optimizing its existing infrastructure and has made and will continue to make responsible and sustainable investments to accommodate projected growth in demand.

Given the lack of any evidence to suggest a breach of CP's level of service obligations, there is no legitimate basis to order any remedy against CP under s. 116(4), whether in the nature of improvements to infrastructure or otherwise.

CP thus respectfully requests that this investigation be terminated as against CP as it is unwarranted.