This Agreement is effective as of this \_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_ , 20\_\_\_

**AGREEMENT FOR THE**

**COMMERCIAL RESOLUTION OF DISPUTES**

## BETWEEN

## Canadian Pacific Railway Company (“CP”)

## AND

## \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_(“Customer”)

**WHEREAS** CP and the Customer wish to enter into an agreement that will establish a process to resolve in a commercial fashion the Dispute (as defined herein) that may arise between the parties;

**WHEREAS** CP and the Customer wish to establish a preliminary mandatory mediation process for any Dispute;

**WHEREAS** CP and the Customer agree that, in the event a Dispute is not resolved through the mandatory mediation process, the Customer may elect to submit the Dispute to binding arbitration or seek resolution of the Dispute using recourse available under the *Canada Transportation Act*;

**AND WHEREAS** CP and the Customer have agreed to set out the process for mediation and arbitration for resolution of the Dispute;

**NOW THEREFORE**, the parties agree as follows:

1. **TERM:**

This Agreement is effective on, as of and from the date first above written for a term of twenty-four (24) months.

1. **SCOPE:**
	1. This Agreement applies to a Dispute involving:
		1. the linehaul rates for the movement of goods by rail that could be the subject of a final offer arbitration proceeding pursuant to section 161 of the *Canada Transportation Act*;
		2. whether CP has failed to provide the level of service to the Customer as contemplated by sections 113 to 115 of the *Canada Transportation Act*; and
		3. the interpretation and application of the terms of railway tariffs for the provision of the incidental services set out in Appendix II;

all of which are collectively referred to in this Agreement as the “Dispute”.

* 1. For greater clarity, the parties agree that this Agreement applies to a Dispute identified in paragraph a) but only in respect of traffic that originates and terminates in Canada and for which the parties have not otherwise provided a Dispute resolution mechanism.
1. **COMPONENTS OF THE COMMERCIAL DISPUTE RESOLUTION (“CDR”) PROCESS:**

The CDR process set out in this Agreement is a two-step confidential process with the first step being mandatory mediation in accordance with paragraph 3.1, and the second step being binding commercial arbitration.

**3.1 Mandatory mediation:**

1. Prior to initiating any other recourse in connection with a Dispute the parties agree to enter into mediation with the objective of reaching a consensual, voluntary resolution of their Dispute.
2. The mediation shall be carried out in accordance with and pursuant to the mediation process established by the Canadian Transportation Agency.
3. The timeline for completion of the mediation will be fifteen (15) working days from the date of the appointment of the mediator by the Agency and the mediation session shall not exceed two (2) days unless otherwise agreed by the parties.
4. The mediation shall be held at a location agreed to by the parties or, failing agreement, at a place designated by the Agency.
5. Each party will be responsible for its own costs and both parties will share equally in the costs of, and the services provided by, the mediator.
	1. **Election by Customer:**

In the event that the Dispute is not fully resolved at the end of the mediation process, the Customer may elect to:

* exercise any recourse the Customer may have available to it at law, including recourse pursuant to the *Canada Transportation Act;* or
* submit the matter to binding arbitration in accordance with paragraph 3.3.

**3.3 Binding arbitration:**

1. If a list of potential arbitrators and a process for selecting a person from that list has been agreed upon between CP and the Customer or designate of Customer then the arbitration shall commence by filing a submission for arbitration in accordance with the agreed upon process. The application shall clearly define the Dispute, the parties involved and the relief sought. In such case, the arbitration shall be held in a location agreed to by the parties.
2. If the parties have not agreed upon a list of potential arbitrators and a process for selecting a person from that list then the Customer shall commence arbitration by filing a submission for arbitration with CP and making an application to the superior court of the province to which the Dispute relates or which governs the contractual relationship between the parties for the appointment of an arbitrator. The application shall clearly define the Dispute, the parties involved and the relief sought. Upon application, the court shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator. In such case, the arbitration shall be held at a location to be agreed to by the parties or, failing agreement, at a location designated by the arbitrator.
3. Each party will be responsible for its own costs and both parties will share equally in the costs of, and the services provided by the arbitrator.
4. Unless otherwise agreed by the parties, the award of the arbitrator in respect of a Dispute concerning a matter described in paragraph 2 a)(i) and/or (ii) shall become part of a confidential contract between the parties.
5. The arbitration will be subject to timelines for completion and be carried out in accordance with the Rules attached as Appendix I.
6. **GUIDELINES FOR THE ARBITRATOR:**

**4.1 Linehaul rate dispute resolution:**

The arbitrator may select the rate proposed by CP or by the Customer or choose to establish a rate between the rate proposed by CP and the Customer.

In choosing or establishing the rate, the arbitrator shall consider the reasonableness of the proposed rates in relation to the market conditions. For greater clarity the market conditions do not include the Customer’s manufacturing costs.

The award shall apply for a one-year period from the date of the application unless the Customer has specified in its application that it is requesting the award to be applicable for a two-year period.

**4.2 Level of service matters:**

In determining a complaint regarding level of service, the arbitrator shall consider whether the Customer is requesting a service covered by CP’s common carrier obligation, as provided for in sections 113 to 115 of the *Canada Transportation Act* or a service over and above such obligation. The jurisdiction of the arbitrator shall be limited to level of service disputes that would be covered by sections 113 to 115 of the *Canada Transportation Act*. The arbitrator, in resolving a level of service dispute may determine what is an adequate and suitable level of service and determine whether CP is providing an adequate and suitable level of service.

The award shall apply for a period of one year from the date of the application.

**4.3 Application of tariff for incidental services:**

In determining the correctness of the application of the various incidental service tariff items, the arbitrator shall base the award on the facts presented and be guided by the wording of the tariff items and cannot amend the tariff rates nor the tariff conditions.

The award shall apply for the period under Dispute.

* 1. **General:**

Prior to making a determination in respect of matters set out in paragraph 4.1 (Linehaul rate dispute resolution), the arbitrator shall consider whether the Customer has the choice of another railway, either through direct physical connection or through traffic solicitation rights by agreement between the railways or interswitching. In such event, the arbitrator shall select CP’s proposed rates in respect of a Dispute under paragraph 4.1.

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For Canadian Pacific Railway Company For the Customer

**Customer Contact Information**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Name

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Address

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 Telephone

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 Fax

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 Email Address

**APPENDIX I – Rules Governing Arbitration**

**1. Interpretation**

**1(1) Definitions**

In addition to the definitions contained in the Agreement, the following terms shall have the following meanings:

a) "Arbitrator" shall mean the person or persons appointed to arbitrate the Dispute.

b) "Business Day" shall mean Monday to Friday only (excluding Canadian statutory holidays and any provincial statutory holiday in the province in which the arbitration is held.

c) "Party" means a party to a Dispute.

d) "Representative" means the solicitor or an authorized representative of the party.

**1(2)** These Rules apply whether the Arbitrator is selected by a court of competent jurisdiction or by the parties pursuant to a list of potential arbitrators.

**1(3)** These Rules shall be interpreted liberally and in such a way so as to provide the parties with the most just and equitable outcome.

**1(4)** In these Rules, where there is a reference to a number of days between two events, they shall be counted by excluding the first day and including the last day on which the event takes place.

**2. Agreement of Parties**

**2(1)** These Rules may be varied at any time by agreement between the parties.

**2(2)** In the event that any provision of these Rules is in conflict with any applicable law from which the parties cannot derogate, the provisions of that law shall prevail.

**3. Initiating Arbitration**

**3(1)** The Customer may commence an arbitration under the Agreement and these Rules by filing a written submission to arbitrate under these Rules, signed by the Customer:

1. in accordance with the process agreed upon where the parties have agreed upon a list of potential arbitrators and a process for selecting an arbitrator from that list; or
2. where there is no agreed upon list of potential arbitrators and a process for selecting an arbitrator from that list, with CP.

The written submission shall contain a statement of the nature of the Dispute, the name and address of the Customer, any claim, the amount involved, if any, and the remedy sought.

**3(2)** Where the arbitration is in respect of a Dispute specified in paragraph 2. a)(i) of the Agreement (linehaul rates for the movement of goods), the statement shall specify whether the Customer requests the award to be applicable for a two-year period.

**4. Appointment of Arbitrator**

**4(1)** . In the event that the parties have agreed upon a list of potential arbitrators the parties shall be at liberty, acting unanimously, to select a particular arbitrator or panel of arbitrators from that list. If the parties cannot agree on a specific arbitrator or arbitrators, an arbitrator or arbitrators shall be appointed in accordance with the process agreed upon by the parties.

**4(2)** In the absence of an agreed upon list of potential arbitrators and a process for selecting an arbitrator from that list, the superior court of the province to which the Dispute relates or which governs the contractual relationship between the parties may appoint an arbitrator on a Party’s application.

**5. Pre-Hearing Conference**

**5(1)** Prior to commencing the arbitration, the Arbitrator will convene within five (5) business days from its appointment, a pre-arbitration conference call in order to prepare an arbitration agenda concerning the procedure to be used in the arbitration proceedings and appropriate timetables to be used.

**5(2)** The pre-arbitration conference call agenda shall include:

1. identification of the issues in Dispute (not the arguments to presented),
2. procedure to be followed,
3. fees and costs,
4. timelines and procedural steps, and
5. location of the hearing.

**5(3)** The Arbitrator shall record any agreements or orders made at the pre-arbitration conference and shall send an electronic copy of that document to each of the parties.

**6. Exchange of Statements**

**6(1)** Each Party shall prepare an arbitration statement, as follows :

a) the claimant shall deliver a written statement simultaneously to the respondent and the Arbitrator which statement should include:

 i) a description of all matters and amounts being claimed,

ii) the facts supporting the claim(s) made,

iii) the issues to be determined,

iv) the relief or remedy sought, and

v) a summary of the important legal principles to be applied and the key authorities to be relied upon;

b) on receipt of the claimant's statement, the respondent shall deliver a written statement of defence, containing the information listed above, together with any claim or counterclaim as set off; and

c) on receipt of the respondent's statement of counterclaim, the claimant may deliver a written reply.

**6(2)** Subject to the direction of the Arbitrator, each Party shall deliver the documents upon which it intends to rely with each of the above statements.

**7. Privacy and Confidentiality of Arbitration**

**7(1)** The arbitration is private and confidential. The parties and their Representatives and experts witnesses shall attend the arbitration. All other persons may only attend with the consent of the parties and the Arbitrator.

**7(2)** All hearings, meetings, and communications as well as all documents and exhibits filed shall be private and confidential as between the parties and the Arbitrator.

**7(3)** The Arbitrator shall not be compelled to appear as a witness or expert in any pending or future adversarial or judicial proceeding involving any one or more of the parties or relating in any way to the subject matter of the arbitration.

**8. Powers and Duties of Arbitrator**

**8(1)** Without limiting the generality of any other rule which confers jurisdiction or powers on the Arbitrator, and unless the parties at any time agree otherwise, the Arbitrator may:

1. order an adjournment of the proceedings from time to time;
2. make a partial award;
3. make an interim order or award on any matter with respect to which it may make a final award;
4. order inspection of documents, exhibits or other property, including a view or physical inspection of property;
5. at any time extend or abridge a period of time fixed or determined by it, or any period of time required in these Rules;
6. make interim and other orders, including settling of matters at the pre-hearing meeting, that do not deal with the issues in Dispute; and
7. order that any party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation.

**9. Rights of the Parties**

**9(1)** As well as the specific rights set out in these Rules, the parties have, as between themselves, any right which they would have under the applicable law.

**9(2)** The parties also have the following rights:

1. the right to have a full opportunity to present their case;
2. the right to be treated equally and fairly in an arbitration; and
3. the right to a just, speedy and economic determination of the proceeding on its merits.

**10. Conduct of the Hearing**

**10(1)** The Arbitrator shall, in consultation with the parties, set the dates for the hearings.

**10(2)** Each Party shall have the onus of proving the facts on which it relies.

**10(3)** In deciding issues of relevance and materiality of evidence, the Arbitrator shall be guided by but not be required to apply the rules of evidence.

**10(4)** The Arbitrator may direct the order of proceeding, divide the proceedings into stages, exclude repetitive or irrelevant testimony, limit or refuse to receive the evidence of a witness of fact or opinion, or direct the parties to address specific issues, the determination of which may dispose of some or all of the Dispute.

**10(5)** In order to limit the time spent at the hearing, the parties should ensure that the Arbitrator has up-to-date copies of:

1. the record;
2. the agreed documents;
3. an agreed facts and/or agreed "will say" statements;
4. any demonstrative aid necessary to properly understand the issues; and
5. memoranda of fact and law and authorities books, where necessary.

The material should be delivered as soon as possible in accordance with the directions of the Arbitrator, but no less than five (5) business days before the hearing.

**11. The Award**

**11(1)** The Arbitrator shall deliver an award no later than sixty (60) days after the pre-hearing conference in respect of a Dispute under paragraph 2. a)(i) (linehaul rates for the movement of goods) and 2. a)(ii) (level of service) of the Agreement.

In respect of a Dispute under paragraph 2. a)(iii) (application of incidental charges) of the Agreement, the Arbitrator shall deliver an award within thirty (30) days after the pre-hearing conference.

**11(2)** The award shall be signed and shall set out:

1. the nature of the claim;
2. the decision;
3. the facts;
4. the issues;
5. the law; and
6. the relief awarded.

**12. Costs**

**12(1)** Costs include:

a) the fees of the Arbitrator which shall be separately determined and stated for each member of the arbitral panel (if applicable), together with reasonable travel and other expenses incurred by the Arbitrator; and

 b) the administration fees, and the expenses incurred by the parties for the conduct of the arbitration such as recording of the proceedings, hearing facilities, etc.

**13. Amendments and Corrections to the Award**

**13(1)** On the application of a Party or on the Arbitrator's own initiative, an Arbitrator may amend an award to correct:

a) a clerical or typographical error,

b) an accidental error, slip, omission or similar mistake, or

c) an arithmetical error made in a computation.

**13(2)** An application by a Party under paragraph 13(1) must be made within fifteen (15) days after the Party is notified of the award.

**14. Termination of Arbitration**

**14(1)** Arbitration shall be terminated:

a) by agreement between the parties, or

b) if a settlement is reached between the parties during the arbitration and prior to the award being delivered to the parties.

# APPENDIX II – Incidental Services

**Items subject to commercial process to resolve Disputes:**

The following items contained in CP Tariffs for the provision of optional or incidental services are subject to the CDR process in respect of disagreements on the correctness of application of the tariff items as invoiced by CP. For greater clarity, the Arbitrator may amend neither the amounts nor the conditions set out in the tariffs. The application is limited to incidental services provided within Canada.

1. **Demurrage of railway supplied cars**

The application of demurrage has an overall Canadian network impact. Cars that do not move cause yard congestion, reduce overall fleet velocity and as a result directly reduces overall car supply/fleet carrying capacity across diverse customers, as well as directly impact the level of service being delivered.

1. **CP guaranteed car order program**

The objective of the program is to establish a balance between performance incentives for CP to supply cars on the desired date once guaranteed, with performance incentives for the customer not to cancel orders or release cars without a load.

1. **Manual transaction fees**

CP encourages electronic data interchange (EDI) transactions to avoid errors, delays and service failures. Railways e-business tools are made available without charge to customers.

1. **CP handling fees**

This includes items such as cars ordered but not used, released but not available to pull and incorrect placement.

1. **Car held because essential Bill of Lading information missing**

Accurate and complete Bill of Lading information is required for on-time delivery of service, smooth border crossing of traffic and to conform to safety and legal requirements for hazardous materials. When the customer fails to provide all the necessary information, their car must be held for further instructions instead of being expedited to destination.

1. **Car released not suitable for next loading**

Receivers are responsible to clean cars after unloading to ensure ready for next move. When they choose not to, the railways will perform or arrange for this optional service to allow the car to be loaded by the next shipper.

1. **Car held for Customs**

Car is being held at the request of Canadian or US Customs. Security measures designed to improve safety and security at the border drive these hold requests by customs. This may be because of erroneous Customs documentation provided by the customer or their agent, or because of random Customs check. The customer has in their control, by ensuring that accurate documentation is provided, the capability to avoid the non-random holding of their shipment.

1. **Private Car storage**

Customers have many options independent of CP. They can build their own tracks to store their leased/owned cars, they can store with shortlines – of which many offer this service, they can store with industries or third parties who offer the service, they can right size their fleet at a lower level, they can store on other US railroads at destination, or they can consider the optional services offered by CP.

1. **Intraplant switching at customer site**

Customer has the choice to hire a third party contractor to perform intraplant car switching, or acquire a trackmobile (or the like) to have their own employee move the cars around in plant as required, or use the optional services of the railways to perform these intraplant activities.

1. **Special dedicated train service**

Special dedicated train services are those that are beyond regular scheduled services. Customers’ option is to use regular scheduled services or to use another mode if traffic is urgent.

1. **Loading/Unloading/Securement**

When the customers cannot perform this work themselves, or require assistance to efficiently and safely load and secure or unload their railcar, they have the option to hire a contractor, and in fact are encouraged to do so.

1. **Weighing**

Customers have the option to install a railcar scale inside their facilities, or to install appropriate calibrated flow meters, or pre-scale separately their rolls of paper, bale of pulp, ingots, or any other means of weighing a load. Or the customer can choose the option to ask the railway to do so.

1. **Diversion of cars**

Loaded cars are moving to a specific destination, in accordance with the customer Bill of Lading instructions. Diversion to a new consignee, via a new route or even to a new destination is driven by the customer choice.