

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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ENTERED

Office of Proceedings

February 7, 2013

Part of

Public Record

Finance Docket No. 35517

**CF INDUSTRIES, INC. v. INDIANA & OHIO RAILWAY, POINT COMFORT
AND NORTHERN RAILWAY, AND THE MICHIGAN SHORE RAILROAD—
PETITION FOR DECLARATORY ORDER**

Docket No. 42129

**AMERICAN CHEMISTRY COUNCIL, THE CHLORINE INSTITUTE, INC.,
THE FERTILIZER INSTITUTE, AND PPG INDUSTRIES, INC.**

v.

ALABAMA GULF COAST RAILWAY LLC AND RAILAMERICA, INC.

REPLY TO MOTION TO DISMISS

The American Chemistry Council (“ACC”), the Chlorine Institute, Inc. (“CI”), The Fertilizer Institute (“TFI”) and PPG Industries, Inc. (“PPG”) file this Reply to the Motion filed by the Defendants in the above-captioned proceedings.

The Defendants have filed new tariffs, amending the tariffs that are the subject of the Complaints in these proceedings. The substance of the revised tariffs is to remove the provisions calling for “Priority Train Service” for railcars containing Toxic Inhalation Hazardous materials (“TIH”) and the restriction against moving more than three cars of any TIH material in the same train on rail lines of Defendants including the Alabama Gulf Coast Railway (“AGR”), the Indiana & Ohio Railway Company (“IORY”), the Point Comfort and Northern Railway Company (“PCN”), the Mid-Michigan Railroad,

Inc. (“MMRR”), along with the Huron and Eastern Railway Company, Inc. (“HESR”), the Indiana Southern Railroad, LLC (“ISRR”), the New England Railroad, Inc. (“NECR”) and the Toledo, Peoria and Western Railway Corporation (“TP&W”).

BACKGROUND

Effective March 11, 2011, AGR issued a tariff 0900 applying on all TIH materials shipped on its rail lines. This tariff applied when shipments were from connections at all AGR interchange points on an AAR Accounting Rule 11 basis to all AGR served stations. The AGR tariff provided that (i) all TIH materials would be moved only in dedicated train service; (ii) TIH movements would be moved only by special permit that must have been requested and tendered to AGR no less than five days prior to interchange; (iii) no more than three loaded cars would be transported in the same dedicated train; (iv) a TIH surcharge of \$15,000 per train would be assessed; (v) a TIH dedicated train would be limited to 10 miles per hour; (vi) every car would have to be inspected by a AGR employee before interchange; and (vii) that employees of AGR must accompany all TIH shipments at all times.

On April 15, 2011, the Complainants in Docket 42129 filed a Complaint challenging the requirements of the AGR tariff and the similar practices adopted by its parent company RailAmerica.

On April 29, 2011, AGR and RailAmerica filed a Motion to Dismiss the Complaint. The Motion was based on AGR’s cancellation of tariff 0900 and issuance of a new tariff 0900-1, thus rendering the Complaint moot, and further, on the contention that RailAmerica was not a rail carrier and not subject to the jurisdiction of the Board. Complainants filed a Response to the Motion to Dismiss on May 16, 2011. The claim

that the Complaint was moot was based on changes to the tariff that eliminated the mandatory 10 mph speed restrictions, but recommended that train speed be governed by conditions reasonable for the circumstances of the movement, and eliminated the objectionable portions of the notification requirements.

On May 17, 2011, CF Industries, Inc. (“CFI”) filed a Petition for Declaratory Relief in F.D. No. 35517 requesting that the Board declare the tariff practices of RailAmerica and its subsidiaries IORY, PCN and MMRR to be unreasonable practices. The Board decided to institute the Declaratory Order Proceeding in F.D. 35517 and hold the Complaint in Docket 42129 in abeyance pending the outcome of the Declaratory Order Proceeding.

After discovery and the filing of evidence in F.D. 35517 the Board issued an order on November 28, 2012. The order noted that the 10 mph speed restriction had been removed but cautioned the Defendants not to impose speed restrictions on TIH cars that were any different than those applying to other cars. The order also noted that the objectionable portions of the notification requirements had been removed and the shippers did not object to the remaining requirements. The order also asked for comments from the Federal Railroad Administration (“FRA”), the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) and the Transportation Security Administration (“TSA”) as to their views of the remaining “Priority Train Service” requirements or recommendations.

Prior to the comment date upon which comments from the above-noted agencies were to be filed, Defendants filed the instant Motion. This Motion is bottomed upon the contention that all the previously complained of “Priority Train Service” provisions still

remaining after the previous modifications of the tariffs, and after the Board's order of November 28, 2012, have been eliminated from the new tariffs. Thus, Defendants contend that both F.D. 35517 and Docket No. 42129 are moot and should be dismissed.

RESPONSE OF COMPLAINANTS

Complainants in Docket No. 42129 take no position on the dismissal of F.D. 35517. F.D. 35517 was indeed the proceeding left open when Docket No. 42129 was held in abeyance and therefore was the only vehicle that Complainants had to pursue discovery and evidence in the then functionally consolidated dockets. Thus, Complainants presentation was filed in the joint docket, but was based almost entirely on evidence and discovery dealing with AGR and RailAmerica.

The evidence adduced regarding AGR and RailAmerica makes one thing very clear. AGR performed no additional services whatever in return for the TIH surcharge of as much as \$15,000 per car for movement over a 22 mile line of railroad that had virtually no other traffic. The alleged 10 mph speed restriction was based entirely on the fact that, under FRA regulations, track conditions on the AGR line prohibited any traffic over that line from moving in excess of that speed. The alleged pre-notification of arriving TIH shipments was nothing more than an email from the shipper that allowed the AGR to track the shipment through normal processes. The accompaniment of all TIH shipments by AGR personnel was of course required simply by someone being there to move the train. The inspection requirement at interchange was already mandated under 49 C.F.R. § 174.9; furthermore, the train assembly provisions of the original tariff were changed because they violated 49 C.F.R. § 174.14.

The entire AGR/RailAmerica tariff was a misrepresentation to allow AGR/RailAmerica to impose a very substantial and totally unjustified TIH surcharge without performing any additional services to merit that charge. This is not a question of the reasonableness of rates and charges, it is a question of not allowing rail carriers, even short-line carriers, to impose charges for an additional service, not actually performing any additional services, and then misleading the shippers into believing that some additional service is being done for those charges. If the Complaint in Docket 42129 had not been filed there would have been no way for shippers or the Board to realize the unreasonableness of the AGR/RailAmerica actions; and if Docket 42129 is dismissed there will be no way for the affected shipper to seek reparations for this unreasonable practice.

REQUEST FOR RELIEF

Complainants request that the Board deny the Motion to Dismiss Docket 42129 as moot. In addition, the Complainants urge to Board to return Docket 42129 to active status and allow Complainants to amend their Complaint to reflect the now discovered evidence regarding the unreasonable misrepresentation made by AGR and RailAmerica to impose a TIH surcharge without providing any different service whatsoever to merit such additional charges.

Respectfully submitted,

/s/ Paul M. Donovan

Paul M. Donovan

LaRoe, Winn, Moerman & Donovan

1250 Connecticut Ave, N.W. Suite 200

Washington, DC 20036

(202) 298-8100

Counsel for Complainants

/s/ Jeffery O. Moreno
Jeffery O. Moreno
Thompson Hine LLP
1920 N Street, N.W. Suite 800
Washington, DC 20036
(202) 331-8800
Counsel for The Fertilizer Institute

February 7, 2013

Certificate of Service

The undersigned hereby certifies that I have this 7th day of February 2013, filed a copy of this Reply to Motion to Dismiss on all parties of record in this proceeding by electronic mail.

/s/ Paul M. Donovan