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February 27, 2013

Ms. Cynthia T. Brown  
Chief of the Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D. C. 20423

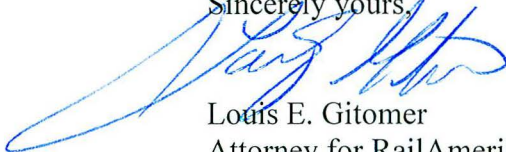
RE: **Docket No. FD 35517, *CF Industries, Inc. v. Indiana & Ohio Railway Company, Point Comfort and Northern Railway Company, and Michigan Shore Railroad, Inc.***  
**Docket No. 42129, *American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, and PPG Industries, Inc. v. Alabama Gulf Coast Railway LLC and RailAmerica, Inc.***

Dear Ms. Brown:

Enclosed for e-filing is a Reply of RailAmerica, Inc., Alabama & Gulf Coast Railway LLC, Indiana & Ohio Railway Company, Point Comfort and Northern Railway Company, and Mid-Michigan Railroad, Inc.

Thank you for your assistance. If you have any questions please call or email me.

Sincerely yours,



Louis E. Gitomer  
Attorney for RailAmerica, Inc., Alabama & Gulf Coast  
Railway LLC, Indiana & Ohio Railway Company,  
Point Comfort and Northern Railway Company, and  
Mid-Michigan Railroad, Inc.

Enclosure

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Finance Docket No. 35517

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CF INDUSTRIES, INC.  
v.  
INDIANA & OHIO RAILWAY COMPANY, POINT COMFORT AND NORTHERN  
RAILWAY COMPANY, AND MICHIGAN SHORE RAILROAD, INC.

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Docket No. 42129

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AMERICAN CHEMISTRY COUNCIL, THE CHLORINE INSTITUTE, INC., THE  
FERTILIZER INSTITUTE, AND PPG INDUSTRIES, INC.  
v.  
ALABAMA GULF COAST RAILWAY LLC AND RAILAMERICA, INC.

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REPLY OF RAILAMERICA, INC., ALABAMA & GULF COAST RAILWAY LLC,  
INDIANA & OHIO RAILWAY COMPANY, POINT COMFORT AND NORTHERN  
RAILWAY COMPANY, AND MICHIGAN SHORE RAILROAD, INC.

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NORTHERN RAILWAY COMPANY,  
AND MICHIGAN SHORE RAILROAD,  
INC.

Dated: February 27, 2013

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Respondents <sup>1</sup>file this reply to the requests for alternative relief filed by CF Industries, Inc. and the American Chemistry Council, the Chlorine Institute, Inc., the Fertilizer Institute, and PPG Industries, Inc. on February 7, 2013. In the alternative, Respondents request leave from the Surface Transportation Board (“Board”) to file a reply to the replies filed on February 7, 2013, in the above proceedings, for the good cause of responding to the new arguments raised in the replies.

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<sup>1</sup> Respondents are RailAmerica, Inc. (“RailAmerica”), Alabama & Gulf Coast Railway LLC (“AGR”), Indiana & Ohio Railway Company (“IORY”), Point Comfort and Northern Railway Company (“PCN”), and Mid-Michigan Railroad, Inc. (“MMRR”). The Michigan Shore Railroad (“MSR”) is an unincorporated division of the MMRR. AGR, IORY, PCN, and MSR are referred to collectively as the “Respondent Railroads.”

## BACKGROUND

In Docket No. NOR 42129, the American Chemical Council (“ACC”), The Chlorine Institute, Inc. (“CII”), The Fertilizer Institute (“FI”), and PPG Industries, Inc. (“PPG”) (collectively “Complainants”) filed a complaint on April 15, 2011 alleging that AGR and RailAmerica were engaging in an unreasonable practice and violating the common carrier obligation (the “Complaint”).<sup>2</sup> On April 19, 2011, Complainants filed a Motion for Injunctive Relief.<sup>3</sup>

In Docket No. FD 35517, CF Industries, Inc. (“CFI”) filed a petition for declaratory order on May 17, 2011, requesting that the Board declare invalid and unenforceable certain tariffs addressing the movement of TIH-PIH materials issued by IORY, PCN, and MMRR (the “Declaratory Order Proceeding”).

The Board determined that there was a case or controversy and instituted the Declaratory Order Proceeding to address the issues raised concerning the movement of Toxic Inhalation Hazards and Poison Inhalation Hazards (“TIH-PIH”) by rail in a single proceeding and to hold the Complaint in abeyance.<sup>4</sup>

After development of a complete record, the Board decided that the challenge to the notification requirement in the then effective tariffs was moot and that the operation of trains at an appropriate speed was reasonable.<sup>5</sup> The Board requested comment by January 28, 2013 from

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<sup>2</sup> Arkema, Inc. filed a Petition for Leave to Intervene on June 13, 2011, which the Board held in abeyance. *American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, and PPG Industries, Inc. v. Alabama Gulf Coast Railway and RailAmerica, Inc.*, Docket No. NOR 42129 (served September 30, 2011) (“September 2011”).

<sup>3</sup> The Board denied the Motion for Injunctive Relief. *American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, and PPG Industries, Inc. v. Alabama Gulf Coast Railway and RailAmerica, Inc.*, Docket No. NOR 42129 (served May 4, 2012).

<sup>4</sup> See, *September 2011*.

<sup>5</sup> *CF Industries, Inc. v. Indiana & Ohio Railway, Point Comfort and Northern Railway, and The Michigan Shore Railroad—Petition for Declaratory Order*, Docket No. FD 35517, slip op. at 3-4 (served November 28, 2012) (“November 2012”).

the Federal Railroad Administration (“FRA”), the Pipeline and Hazardous Materials Safety Administration (“PHMSA”), and the Transportation Security Administration (“TSA”) as to the net benefit and detriment of priority train service and the three-car limit.<sup>6</sup>

On December 28, 2012, Genesee & Wyoming Inc. (“GWI”) acquired control of RailAmerica and its subsidiary railroads, which includes the Respondent Railroads.<sup>7</sup> The handling of TIH-PIH by GWI’s railroad subsidiaries does not require the use of priority trains or limit the number of TIH-PIH cars to three per train. In order to standardize practices among its railroad subsidiaries, GWI directed the subsidiary railroads that it obtained control of as a result of *FD 35654* to replace their tariffs and eliminate the requirements (1) of using priority trains to handle TIH-PIH and (2) of limiting trains with TIH-PIH cars to three cars per train.

On January 18, 2013, Respondents filed a Motion to Dismiss (the “Motion”) the Complaint and Declaratory Order Proceeding as moot because the Respondent Railroads and the Huron and Eastern Railway Company, Inc., Indiana Southern Railroad, LLC, New England Central Railroad, Inc., and the Toledo, Peoria and Western Railway Company (collectively “Railroads”) had replaced their TIH-PIH tariffs to eliminate the requirements that (1) all TIH-PIH commodities be moved in priority train service and (2) no more than 3 load cars containing TIH-PIH commodities will be transported in the same train.<sup>8</sup> See Appendix A to the Motion for the replaced tariffs.

RailAmerica and its subsidiary Railroads are now controlled by GWI. All of the senior management of RailAmerica has left and, thus, the entire senior management has changed since the Complaint and Declaratory Order request were filed. The management of the new owner of

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<sup>6</sup> *Id.* at 4-6.

<sup>7</sup> *Genesee & Wyoming Inc.-Control-RailAmerica, Inc., et al.*, Docket No. FD 35654 (served December 20, 2012) (“FD 35654”).

<sup>8</sup> MMRR’s tariff expired on May 5, 2012, and has not been renewed. Therefore, it is not being replaced.

the Railroads has directed the Railroads to handle TIH-PIH differently than the previous management at RailAmerica. More importantly, the tariffs that gave rise to the Complaint and the Declaratory Order Proceeding have been amended to remove the requirements that concerned the Board, the Complainants, and CF.

## ARGUMENT

In their February 7, 2013 filing at pages 1-2, Complainants concede that 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.

Board precedent is to declare the “issue moot” where the offending requirement of the tariff has been removed.<sup>9</sup> The Railroads urge the Board to follow its recent precedent.

Instead of accepting Board precedent, Complainants have made clear that they intend to use the unreasonable practice proceeding as a rate proceeding without actually filing for rate relief.<sup>10</sup> The Board should dismiss the unreasonable practice complaint filed in Docket No. 42129 and require Complainants to file a complaint that is appropriate to the relief they seek.

The only justification that Complainants put forth for opposing the Motion to Dismiss is that they are being charged an additional **rate** per car but that they are not receiving any additional service for that **rate**. The only issue Complainants seem to have is with the **rate** for movement of TIH-PIH cars, not the rules and practices related to the movement of those TIH-PIH cars. As Complainants state, “[t]he evidence adduced regarding AGR and RailAmerica

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<sup>9</sup> *CF Industries, Inc. v. Indiana & Ohio Railway, Point Comfort and Northern Railway, and the Michigan Shore Railroad—Petition for Declaratory Order*, Docket No. FD 35517 slip op. at 3 (STB served November 28, 2012).

<sup>10</sup> In the Complaint, Complainants referenced 49 CFR §1111, but failed to “indicate whether, in [their] view, the reasonableness of the rate should be examined using constrained market pricing or using the simplified standards adopted pursuant to 49 U.S.C. 10701(d)(3).” 49 CFR §1111.1.

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.” Complainant Reply at 4.<sup>11</sup> Complainants are not claiming an unreasonable practice but instead are asking the Board to address the rate reasonableness of the TIH-PIH charge as an unreasonable practice. The Board cannot, however, address rate reasonableness issues as unreasonable practices. When “the so-called ‘practice’ is manifested exclusively in the level of rates that customers are charged”, as is the case here, the Board must examine it under a rate reasonableness lens. *Union Pac. R.R. v. I.C.C.*, 867 F.2d 646, 649-50 (D.C. Cir. 1989).

The pretext of Complainants’ arguments is clear from how their arguments have changed. Complainants originally argued that using priority trains to handle TIH-PIH and limiting trains with TIH-PIH cars to three cars per train was burdensome and therefore an unreasonable practice (Complaint paragraphs 18, 20, 21, and 23). Now that AGR has removed those practices from its tariff, Complainants add a new argument that the TIH-PIH charge is a surcharge and therefore an unreasonable practice because the carrier is not providing any different service that would justify the additional charge. Essentially, Complainants now argue that because AGR has stopped providing the previous “burdensome” practice (opposed by Complainants), that it is an unreasonable practice for AGR to surcharge TIH-PIH traffic because it is not providing the “burdensome” service. Complainants are wrong because AGR Tariff-0900-8 does not surcharge TIH-PIH traffic, it provides the only charge for handling TIH-PIH traffic by AGR as a Rule 11

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<sup>11</sup> In making this statement, Complainants completely ignore their ongoing opposition to operational and safety protocols that were implemented by the Railroads under the former tariffs. Such additional activities were obviously conducted at additional expense, which is supported by the record. See, e.g., Deposition of Harry Shugart, pages 13-16, Attachment B to the Opening Evidence and Argument on Behalf of Complainants.

proportional charge. Complainants are also wrong because the rate for TIH-PIH is not now claimed to be based on the prior tariff requirements.

Complainants would like to equate the TIH-PIH charge with *Rail Fuel Surcharges*, STB Ex Parte No. 661 (STB served January 26, 2007) (“*Fuel Surcharges*”) by arguing that AGR and RailAmerica imposed TIH-PIH charges based on the misrepresentation that additional services would be included in those charges. In *Fuel Surcharges* the Board found that it was an unreasonable practice for the railroads to call something a fuel surcharge when that charge was designed to recover more than the incremental cost of fuel attributable to the movement involved. The Board explained, if there is no correlation between the fuel surcharge and the increase in fuel costs then the term is misleading and an unreasonable practice. But, AGR did not publish a TIH-PIH surcharge. AGR properly published a new rate for the handling of TIH-PIH. At the time the new rates were adopted, AGR commenced handling TIH-PIH in priority trains which required additional crews and locomotive costs. Unlike *Fuel Surcharges*, AGR directly linked the additional cost of handling TIH-PIH cars to the new TIH-PIH rate.

Under new ownership, the Railroads have changed their respective tariffs to remove the use of priority trains with a three car limit. In the new tariffs the Railroads have included the rate for moving TIH-PIH cars. This charge is not a surcharge or an unreasonable practice, but rather, the published rate for Railroads to transport TIH-PIH cars on their lines. If the Complainants have an issue with this rate, they must bring a rate reasonableness complaint. They cannot challenge the rate within an unreasonable practice claim and seek monetary remedies.

Railroads in general may impose a rate of their choice for the services provided. TIH-PIH by its nature is dangerous. It is not unreasonable for the Railroads to set a car specific rate for the movement of TIH-PIH. Railroads have the freedom to publish any rate and combination

of charges they choose on traffic where the railroad is not market dominant, while captive shippers have the right to challenge that rate under the rate reasonableness standards. The rate published on January 18, 2013 in AGR Tariff-0900-8 is for handling TIH-PIH, but not in priority trains or with car limits within those trains. Complainants' case has solely become about the rate per car and not about any practice.

The Declaratory Order Proceeding should also be dismissed as moot. The Board opened the Declaratory Order Proceeding to resolve a case or controversy. There is no longer a case or controversy to resolve. CF argues that the Board has not ruled on the "standard operating procedure" ("SOP"), priority trains, or train car limits and that it must do so. However, as discussed in previous filings, the SOP was a negotiating tool, not an across the board policy. Neither the Complainants nor CF have proffered any actual evidence to support a contrary conclusion. Both have simply stated and restated arguments and conclusions without any evidence to support them. Moreover, the SOP of RailAmerica's prior management is not the SOP of GWI, as evidenced by the new TIH-PIH tariffs published by the Railroads, a fact that was recognized by the Complainants. Priority trains and train car limits were the only issues remaining from the *September 11* decision. Those issues were resolved when the TIH-PIH tariffs were replaced. Hence there is no longer a case or controversy for the Board to resolve in the Declaratory Order Proceeding.

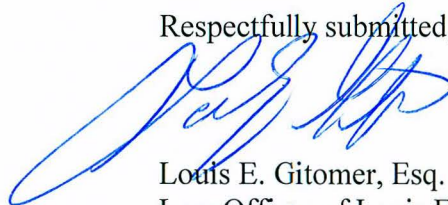
More concerning is CF's request that the Board turn back the clock to the failed regulatory model predating the Staggers Act of 1980, Pub, L. No. 96-448, 94 Stat. 1895 (1980) ("Staggers Act"). CF wants the Board to severely constraint the Railroads' ability to modify their TIH-PIH tariffs going forward. Specifically, CF is asking the Board to impose a prior approval requirement before the Railroads alter their handling of TIH-PIH cars. Under this prior

approval requirement, the Railroads would need to obtain prior Board approval and written support for such changes from FRA, PHMSA, and TSA. This request runs contrary to the Staggers Act. The Staggers Act provided railroads with rate freedom, which includes practices. In essence CF is asking that the Railroads file their tariffs with the Board for approval before those tariffs become effective. In order to approve the TIH-PIH tariffs, the Board would have to conduct an investigation. However, "the Board may begin an investigation under this part only on complaint." 49 U.S.C. §11701(a). CF also ignores the fact that Congress repealed the requirement that railroads file tariffs in ICCTA.<sup>12</sup> In essence, CF is asking the Board to impose a condition contrary to the intent of the Staggers Act and squarely contrary to the ICCTA.

### CONCLUSION

Respondents respectfully request that the Board deny the relief sought by Complainants and CF and grant the Motion to Dismiss the Complaint and the Declaratory Order Proceeding.

Respectfully submitted,



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INC.

Dated: February 27, 2013

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<sup>12</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803).

## **CERTIFICATE OF SERVICE**

I hereby certify that on this date a copy of the foregoing document was served electronically on

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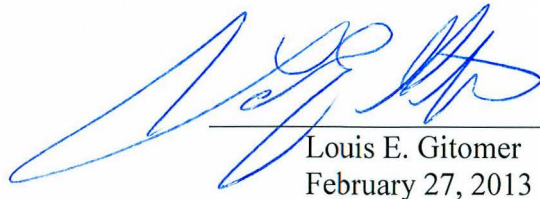
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